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NOTES AND COMMENTS

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ARTICLES AND SURVEYS

NOTES AND COMMENTS

JOINT NEGLIGENCE THEORY OF CONTRACTUAL INDEMNITY: SHIELDING INDEMNITEES FOR CONCERTED ACTIONS

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I. INTRODUCTION

The concept of transferring liability from one party to another exists in many different forms in Florida law.[1] Common law indemnity and vicarious liability impute liability from one party to another as a matter of law for equitable purposes.[2] Exculpatory clauses in contracts release one party from liability altogether, and contractual indemnity is an agreement by one party (the "indemnitor") to protect another party (the "indemnitee") from liability for actions arising under the contract.[3] Of these liability-transferring concepts, contractual indemnity depends on the contracting parties' negligence.[4] Florida courts analyzing contractual indemnity provisions have issued a line of cases holding that a party may be indemnified even when its negligence is combined with the negligence of the other contracting party, resulting in their joint negligence.[5]

Understanding the consequences of the different varieties of contractual indemnity provisions can help drafters make informed decisions as to which provision best suits their clients' needs.[6] A thorough review of the caselaw in Florida, regarding indemnity for joint negligence can help drafters include the necessary language, interpreted by Florida courts, to ensure the indemnity provisions are interpreted to their clients' advantage.[7]

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1. *See e.g.*, Goss v. Hum. Servs. Assoc., Inc., 79 So. 3d 127, 131 (Fla. 5th Dist. Ct. App. 2012); Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 (Fla. 1979).

2. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 467–68 (Fla. 2005) (per curium); K-Mart Corp. v. Chairs, Inc., 506 So. 2d 7, 9 (Fla. 5th Dist. Ct. App. 1987).

3. Raveson v. Walt Disney World Co., 793 So. 2d 1171, 1173 (Fla. 5th Dist. Ct. App. 2001); Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999); Claire's Boutiques, Inc. v. Locastro, 85 So. 3d 1192, 1198 (Fla. 4th Dist. Ct. App. 2012).

4. *See* Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

5. *See e.g.*, Leonard L. Farber Co., Inc. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976); Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); United Parcel Serv., Inc. v. Enf't Sec. Corp., 525 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 1987).

6. *See e.g.*, Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973); Gencor Indus., Inc. v. Fireman's Fund Ins., 988 So. 2d 1206, 1207 (Fla. 5th Dist. Ct. App. 2008); Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992); Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip., Co., 374 So. 2d 487, 489 (Fla. 1979); Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *4, *5 (M.D. Fla. Mar. 7, 2013).

7. *See e.g.*, *Univ. Plaza Shopping Ctr., Inc.*, 272 So. 2d at 511; *Gencor Indus., Inc.*, 988 So. 2d at 1208; *Cox Cable Corp.*, 591 So. 2d at 629; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Acosta*, 2013 WL 869520, at *4, *5.

II. CONTRACTUAL INDEMNITY

Contractual indemnity is a contractual agreement whereby one party (the "indemnitor") agrees to protect another party (the "indemnitee") from a loss or liability.[8] Contractual indemnity is its own cause of action in Florida.[9] The terms of the contract and the indemnity provision govern the scope of the indemnitor's obligation to indemnify the indemnitee.[10]

Florida courts have identified three varieties of contractual indemnity provisions: (1) provisions in which the indemnitee seeks indemnity from the indemnitor *for the indemnitor's negligence* or the negligence of some third party; (2) provisions in which the indemnitee seeks indemnity from the indemnitor *for the indemnitee's own negligence*; and (3) provisions in which the indemnitee seeks indemnity from the indemnitor *for the joint negligence of the indemnitee and the indemnitor*.[11]

A. *Distinguished from Common Law Indemnity*

Common law indemnity is a separate cause of action from contractual indemnity under Florida law.[12] Common law indemnity is a cause of action in equity arising from a special relationship between two parties by which one party, the indemnitee, is brought into a lawsuit based solely on its relationship with another party, the indemnitor.[13] Contractual indemnity is not an equitable cause of action and arises from the specific terms of an underlying contract, not involving special relationships.[14]

The Supreme Court of Florida, in *Houdaille Industries, Inc. v. Edwards*,[15] made clear that joint negligence has no place under common law indemnity and is, in fact, fatal to a claim for common law indemnity.[16] On the other hand, joint negligence is not fatal to a cause of action for contractual

8. *Dade Cnty. Sch. Bd.*, 731 So. 3d at 643.
9. *Id.* at 643–44.
10. *See Jaksch*, 335 So. 2d at 848; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).
11. Hillstone Rest. Grp., Inc. v. P.F. Chang's China Bistro, Inc., 144 So. 3d 679, 682 (Fla. 3d Dist. Ct. App. 2014); *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077; *Jaksch*, 335 So. 2d at 848–49.
12. *See* Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 n.2 (Fla. 1979).
13. *Id.* at 492–93.
14. *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077.
15. 374 So. 2d 490 (Fla. 1979).
16. *Id.* at 493.

indemnity.[17] A cause of action for contractual indemnity may exist, depending on the terms of the contract, where the contracting parties are jointly negligent, or where either party is solely negligent.[18] Because contractual indemnity is a distinct cause of action from common law indemnity, and the two are subject to different legal rules under Florida law, this Article only discusses the contractual indemnity cause of action.[19]

B. *Distinguished from Exculpatory Clauses*

Although both are contractual in nature, contractual indemnity and exculpatory clauses have clear differences and are subject to different rules developed through caselaw in Florida.[20] Exculpatory clauses remove a party's right to bring a lawsuit against another party.[21] On the other hand, contractual indemnity clauses grant a party the right to seek reimbursement from another where that party is facing liability.[22] The two contractual clauses are distinct under Florida law, although they may result in the same ultimate conclusion.[23]

Sanislo v. Give Kids the World, Inc.[24] held that exculpatory clauses seeking to excuse a party for its misconduct are held to a different legal standard than contractual indemnity clauses seeking to indemnify a party for its misconduct.[25] The standards applicable to various indemnity agreements are discussed later in this Article.[26] Following the holding in *Sanislo*, exculpatory clauses that seek to exculpate a party for its misconduct are held to a less strict standard of interpretation than are contractual indemnity clauses that seek to indemnify a party for its own misconduct or for joint misconduct with another.[27]

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17. *See* Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 962 (Fla. 4th Dist. Ct. App. 2002); Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973).

18. Leonard L. Farber Co., Inc. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

19. *See Houdaille Indus., Inc.*, 374 So. 2d at 492–93; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1077; discussion *infra* Sections II.B–D, Parts III–VII.

20. Sanislo v. Give Kids the World, Inc., 157 So. 3d 256, 264, 266, 271 (Fla. 2015) (per curiam).

21. *Id.* at 265.

22. *Id.* at 264; First Baptist Church of Cape Coral, Inc. v. Compass Constr., Inc., 115 So. 3d 978, 986 (Fla. 2013).

23. *Sanislo*, 157 So. 3d at 265; O'Connell v. Walt Disney World Co., 413 So. 2d 444, 446 (Fla. 5th Dist. Ct. App. 1982).

24. 157 So. 3d 256 (Fla. 2015) (per curiam).

25. *Id.* at 261–62, 271.

26. *See* discussion *infra* Part III.

27. *Sanislo*,157 So. 3d at 271.

C. *Vicarious Liability vs. Affirmative Misconduct*

Vicarious liability is also a separate legal concept from contractual indemnity.[28] Vicarious liability arises where the liability of one party is imputed to another party based on some relationship between the two parties.[29] Vicarious liability is based on the policy of shifting loss to a party in a better position to bear the financial burden of the loss.[30] Contractual indemnity, on the other hand, is not based on the relationship of the parties—aside from their contractual relationship—and the contract governs the scope of each party's liability, whereas the scope of a vicariously liable party is complete (the vicariously liable party is exposed to the same extent of liability as the active tortfeasor).[31]

D. *The Joint Negligence Theory of Contractual Indemnity*

The joint negligence indemnity provision was first recognized in Florida in *Leonard L. Farber Co., Inc. v. Jaksch*.[32] In *Jaksch*, a property owner leased its property to a commercial lessee for the purpose of operating a shopping mall.[33] A patron of the mall slipped and fell on a piece of sausage in one of the mall's common areas and brought suit against the property owner and the lessee for negligence.[34] The count against the property owner alleged that the owner failed to maintain the property in a reasonably safe condition.[35] The count against the lessee alleged that the lessee was negligent in its method of dispensing sausage samples.[36] The property owner brought a crossclaim for contractual indemnity against the lessee based on an indemnity provision in their lease agreement.[37] The agreement provided, in part, that the lessee shall indemnify the property owner for acts "occasioned wholly or in part by any act or omission of Lessee."[38] After both parties had settled with the original

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28. *See* Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 874–75 (Fla. 2d Dist. Ct. App. 2010).
29. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 467–68 (Fla. 2005) (per curiam).
30. *Id.*
31. *Id.*; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).
32. 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).
33. *Id.* at 847.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Jaksch*, 335 So. 2d at 847.
38. *Id.* at 847–48.

plaintiff, the trial court was left to adjudicate the crossclaim.[39] The trial court entered a judgment against the property owner, and the property owner appealed.[40] On appeal, the appellate court held that, based on the above-cited language in the indemnity provision, the provision did not provide that the lessee indemnify the owner solely for the owner's negligence, but it clearly did require the lessee indemnify the owner for lawsuits involving the lessee's joint negligence.[41] The appellate court reversed the trial court on these grounds and ordered that judgment be entered for the property owner based on the indemnity provision.[42]

In *Mitchell Maintenance Systems v. State Department of Transportation*,[43] the Florida Department of Transportation sought contractual indemnity from Mitchell Maintenance Systems, a company hired to maintain light poles throughout Florida's highways.[44] Mitchell was required to ensure the base of each light pole was securely underground in order to prevent a motorist from striking the base, which would be more harmful to the motorist than if the motorist were to strike the pole.[45] Soil erosion exposed the base of one such light pole, and a motorist drove into the base of the pole, dying as a result of the accident.[46] The estate of the deceased motorist brought a lawsuit against the Florida Department of Transportation ("Florida DOT") and Mitchell, both of which settled.[47] The Florida DOT then sought contractual indemnity from Mitchell based on a provision in its work order contract which provided, in part, that Mitchell would indemnify the Florida DOT against any claims "whether direct or indirect, and whether to any person or property to which DEPARTMENT or said parties may be subject."[48] The appellate court held that the provision did not provide for indemnity where the Florida DOT was solely at fault but did provide for indemnity in cases in which Mitchell and the Florida DOT were sued for their joint negligence in producing the harm.[49] The court went on to state: "[a]pplying this interpretation, indemnity is appropriate if there is any evidence from which the judge could conclude that Mitchell was negligent."[50] Because an employee of Mitchell had given

39. *Id.*
40. *Id.* at 847.
41. *Id.* at 848–49.
42. *Jaksch*, 335 So. 2d at 849.
43. 442 So. 2d 276 (Fla. 4th Dist. Ct. App. 1983).
44. *Id.* at 277.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Mitchell Maint. Sys.*, 442 So. 2d at 277.
49. *Id.* at 278.
50. *Id.*

testimony that they were required to notify the Florida DOT of soil erosion near light poles and because the Florida DOT introduced evidence they had not received any such notification, the appellate court held there was evidence of Mitchell's negligence, satisfying the joint negligence indemnity provision, and requiring a judgment in favor of the Florida DOT.[51]

The joint negligence theory of contractual indemnity has been applied by Florida courts in other cases, including *United Parcel Service, Inc. v. Enforcement Security Corp.*,[52] *Gulfstream Park Racing Ass'n, Inc. v. Gold Spur Stable, Inc.*,[53] and *Marino v. Weiner*.[54]

III. WHICH STANDARD APPLIES?

Depending on the scope of an indemnity agreement, the party seeking to enforce the agreement must meet a specific burden of proof regarding the contracting parties' intentions.[55] If the party seeking to enforce the agreement merely seeks to prove that the agreement provides indemnity for the indemnitor's negligence, the burden of proof is relatively low.[56] On the other hand, if the party seeking to enforce the agreement wants to prove the agreement provides indemnity even for the indemnitee's negligence or for the joint negligence between the indemnitee and the indemnitor, the burden of proof placed on the enforcing party is much higher.[57] Florida courts have imposed these varying standards as a matter of public policy.[58] Indemnity agreements that seek to provide indemnity even for the indemnitee's negligence are viewed with disfavor by Florida courts.[59]

A. *Reasonable Intent of the Parties Standard*

The least strict standard applicable to interpreting an indemnity agreement applies to provisions that obligate the indemnitor to indemnify the

51. *Id.*
52. 525 So. 2d 424, 425 (Fla. 1st Dist. Ct. App. 1987).
53. 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002).
54. 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982).
55. *See* Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992).
56. *Id.* at 661.
57. *Id.*
58. ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 100–01 (Fla. 1st Dist. Ct. App. 2016).
59. *Id.* at 99.

indemnitee for the indemnitor's negligence.[60] While Florida courts have yet to specify what this lesser standard entails, courts default to this standard when they determine that the stricter standard has yet to be met.[61] Indemnity agreements are governed by the same rules as contract law, so this lesser standard may be said to be the reasonable intent of the parties standard.[62] Thus, if the reasonable intent of the parties is to provide for indemnity of the indemnitee for the indemnitor's negligence, this lesser standard will be met, and the court will require indemnity under these circumstances.[63]

B. *Clear and Unequivocal Standard*

The strictest standard that applies to interpreting an indemnity agreement is the clear and unequivocal standard.[64] The clear and unequivocal standard states that an indemnitor will only be required to indemnify an indemnitee if the contract expresses this intention in clear and unequivocal terms.[65] The clear and unequivocal standard was first held to apply to indemnity contracts that purport to require indemnity for the indemnitee's negligence in *University Plaza Shopping Center, Inc. v. Stewart*.[66]

The *University Plaza* case arose between University Plaza (the landlord of a shopping center) and Stewart (a commercial tenant within that shopping center) when a gas line beneath Stewart's shop exploded, resulting in Stewart's death.[67] Stewart's estate sued University Plaza for his death, and University Plaza brought a claim against Stewart for contractual indemnity.[68] The indemnity clause between the parties, found in their lease agreement, provided

> Tenant shall indemnify and save harmless the Landlord from and against any and all claims for damages to goods, wares, merchandise and property in and about the demised premises and from and against any and all claims for any personal injury or loss of life in

60. *See Transp. Intern. Pool, Inc.*, 609 So. 2d at 660 (holding that the stricter "clear and unequivocal" standard does not apply to indemnity agreements purporting to indemnify the indemnitee for the indemnitor's negligence).

61. *Id.*

62. *See generally id.* at 660–61.

63. *See generally id.*

64. *See* Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509 (Fla. 1973).

65. *Id.*; *see also* Endurance Am. Specialty Ins. v. Liberty Mut. Ins., 34 F.4th 978, 987 (11th Cir. 2022).

66. 272 So. 2d 507, 509 (Fla. 1973).

67. *Id.* at 508.

68. *Id.*

> and about the demised premises.[69]

University Plaza admitted that the gas line at issue was not part of the leased premises, and the trial court entered summary judgment in favor of Stewart, holding the indemnity provision, as written, did not require Stewart to indemnify University Plaza for University Plaza's sole negligence.[70] University Plaza was responsible for maintaining the gas line, and the only issue before the Supreme Court of Florida was whether the trial court was correct in ruling that the indemnity language in the lease agreement was insufficient as a matter of law to require Stewart to indemnify University Plaza for its own negligence.[71] After reviewing how federal circuit courts and Florida state appellate courts dealt with this issue, the Court ultimately ruled that the clear and unequivocal standard must always be met to require indemnity for the indemnitee's negligent conduct.[72] Following the Supreme Court of Florida's ruling in *University Plaza*, an indemnitor will only be required to indemnify an indemnitee for the indemnitee's negligence if that intention is stated clearly and unequivocally in their agreement.[73]

The Supreme Court of Florida extended the clear and unequivocal standard to indemnity agreements for the joint negligence of the indemnitee and the indemnitor in *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co*.[74] *Charles Poe* involved a plaintiff who had fallen from a scaffold while working at a construction site.[75] The plaintiff sued the scaffold manufacturer, Spring Lock Scaffolding Rental Equipment Company, for his injuries.[76] While Spring Lock had indeed manufactured the scaffold, it had leased the scaffold to Charles Poe Masonry, Inc. for use in the construction project at which the plaintiff had been injured.[77] Spring Lock filed a third-party complaint against Charles Poe for, among other causes of action, contractual indemnity based on an indemnity provision between the two in the lease agreement for the scaffold.[78] The indemnity provision provided

> [Spring Lock] shall have no responsibility, direction or control over the manner of erection, maintenance, use or operation of said equipment by [Charles Poe]. [Charles Poe] assumes all

69. *Id.* at 508–09.
70. *Id.* at 509.
71. *Univ. Plaza Shopping Ctr., Inc.*, 272 So. 2d at 509.
72. *Id.* at 509–11.
73. *See id.* at 511.
74. 374 So. 2d 487, 489–90 (Fla. 1979).
75. *Id.* at 488.
76. *Id.*
77. *Id.*
78. *Id.*

> responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold [Spring Lock] harmless from all such claims.[79]

The Court ultimately held that this language did not meet the clear and unequivocal standard.[80]

The underlying conclusion from these cases is that an agreement for indemnity that protects an indemnitee against *its own* negligence or for the *joint negligence* of both the indemnitee and the indemnitor will only be upheld if the contract expresses, in clear and unequivocal terms, an intent to indemnify against the indemnitee's wrongful conduct.[81] A general indemnity provision indemnifying a party against "any and all claims" on its own is insufficient to meet the clear and unequivocal standard required to indemnify a party for the conduct of others.[82]

IV. LOOKING TO PRECEDENT TO CHOOSE AN INDEMNITY AGREEMENT WITH FORESIGHT

From the indemnitee's perspective, a provision that merely indemnifies an indemnitee for the negligence of the indemnitor is the weakest variety of indemnity because it requires the indemnitee to prove that it is being sued by the original plaintiff *exclusively* for the negligent actions of the indemnitor.[83] Indemnity provisions that indemnify an indemnitee even for its own negligence or for the joint negligence between the indemnitee and the indemnitor, are much stronger than the first variety because these provisions

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79. *Charles Poe Masonry, Inc.*, 374 So. 2d at 489.

80. *See id.*

81. *See, e.g.*, Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973); Gencor Indus., Inc. v. Fireman's Fund Ins., 988 So. 2d 1206, 1208–09 (Fla. 5th Dist. Ct. App. 2008); Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992); *Charles Poe Masonry Inc.*, 374 So. 2d at 489–90; Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *4–5 (M.D. Fla. Mar. 7, 2013).

82. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

83. *Compare* Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992) (holding that the indemnity provision that indemnified the indemnitee for the negligence of the indemnitor was valid because there was no evidence of the indemnitee's negligence), *and* Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 278 (Fla. 4th Dist. Ct. App. 1983) (holding that the indemnitee was entitled to indemnification because there was evidence that the indemnitor was negligent), *with* Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848–49 (Fla. 4th Dist. Ct. App. 1976) (holding that the language of the indemnification agreement was "sufficiently 'clear and unequivocal'" to find that the indemnitor must indemnify the indemnitee for their joint liability).

allow the indemnitee to receive indemnity even if the plaintiff is suing them for the plaintiff's negligent conduct.[84] Because these provisions could require an indemnitor to pay in situations in which the indemnitor bears no fault at all, Florida courts have strictly required very specific language for these provisions to be upheld.[85] This is the reasoning behind the clear and unequivocal standard.[86]

Because indemnity agreements have the potential of shifting partly or entirely the liability of one party to a separate party, the interpretation of the agreements is hotly contested in Florida courts.[87] The best practice to avoid an adverse interpretation of an indemnity agreement by a court is to review the Florida caselaw interpreting past indemnity agreements in drafting one's indemnity agreement to incorporate language which has either required or prohibited indemnity for joint negligence.[88]

A. *Joint Indemnity Language Favored by Florida Courts*

As a basic rule of contract law, courts must interpret a contract provision in accordance with the intent of the parties to that provision.[89] This rule applies to indemnity provisions.[90] When interpreting an indemnity provision, the court must determine whether the parties intended to require indemnity for only the indemnitor's negligence, for the indemnitee's

84. *Compare Jaksch*, 335 So. 2d at 848–49 (holding that the language of the indemnification agreement was "sufficiently 'clear and unequivocal'" to find that the indemnitor must indemnify the indemnitee for their joint liability), *with Transp. Intern. Pool, Inc.*, 609 So. 2d at 660 (holding that the indemnity provision that indemnified the indemnitee for the negligence of the indemnitor was valid because there was no evidence of the indemnitee's negligence), *and Mitchell Maint. Sys.*, 442 So. 2d at 278 (holding that the indemnitee was entitled to indemnification because there was evidence that the indemnitor was negligent).

85. *See* ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 100–01 (Fla. 1st Dist. Ct. App. 2016); *Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90.

86. *See ATC Logistics Corp.*, 188 So. 3d at 100–01; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90.

87. *See generally, e.g.*, *Jaksch*, 335 So. 2d at 847–48; Marino v. Weiner, 415 So. 2d 149, 150 (Fla. 4th Dist. Ct. App. 1982); *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Mitchell Maint. Sys.*, 442 So. 2d at 277; *Transp. Intern. Pool, Inc.*, 609 So. 2d at 660–61; *ATC Logistics Corp.*, 188 So. 3d at 98.

88. *See generally, e.g.*, *Jaksch*, 335 So. 2d at 847–48; *Marino*, 415 So. 2d at 150; *Charles Poe Masonry, Inc.*, 374 So. 2d at 489; *Mitchell Maint. Sys.*, 442 So. 2d at 277; *Transp. Intern. Pool, Inc.*, 609 So. 2d at 660–61.

89. *See ATC Logistics Corp.*, 188 So. 3d at 102 (citing Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 511 (Fla. 1973)).

90. *Id.*

negligence, or for the joint negligence of the indemnitor and the indemnitee.[91] To determine the parties' intentions regarding an indemnity provision, Florida courts have ruled that certain key terms in the provision reveal an intent to require indemnity for joint negligence.[92]

1. Key Term: "Wholly or in Part"

In *Jaksch*, the language "wholly or in part" in the indemnity provision was crucial to the court's determination that the provision required indemnity for joint negligence.[93] The facts of *Jaksch* were discussed in a previous section.[94] The pertinent language in the *Jaksch* contract stated that the lessee shall indemnify the property owner for acts "occasioned wholly or in part by any act or omission of Lessee."[95] In the court's words,

> The question then is whether the language, ' . . . occasioned wholly in part by any act or omission of Lessee, . . .' is sufficiently 'clear and unequivocal' to make the Lessee liable to indemnify Lessor for their joint liability . . . . We believe that it is.[96]

The *Jaksch* case was the first case holding that the "wholly or in part" language indicates an intent to provide for indemnity in cases involving joint negligence.[97] Most, if not all, courts after *Jaksch* have cited the case in support of holding that the "wholly or in part" language provides indemnity for joint negligence.[98]

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91. *Id.* at 100–01 (citing *Charles Poe Masonry, Inc.*, 374 So. 2d at 489).

92. *See e.g.*, *Jaksch*, 335 So. 2d at 848–49; *Marino*, 415 So. 2d at 151.

93. *Jaksch*, 335 So. 2d at 848–49; *see also* Gibbs v. Air Can., 810 F.2d 1529, 1536–37 (11th Cir. 1987). In *Gibbs*, the federal Eleventh Circuit, applying Florida law, read similar "in whole or in part" language in a provision that limited the applicable indemnity provision such that it would not provide indemnity for joint negligence. *Gibbs*, 810 F.2d at 1536–37. The Eleventh Circuit was thus interpreting the "in whole or in part" language in the same manner as courts, such as *Jaksch*, interpreted the language, but the Eleventh Circuit was dealing with this language in a limitation of liability clause—not in an indemnity clause—so the impact of the language was different. *Id.*

94. *See supra* Section II.D.

95. *Jaksch*, 335 So. 2d at 848.

96. *Id.* at 848.

97. *See id.* at 848–49.

98. *See, e.g.*, Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 278 (Fla. 4th Dist. Ct. App. 1983).

Following the ruling in *Jaksch*, the next case to address the "wholly or in part" language was *Marino v. Weiner*.[99] This case involved a slip and fall caused by a puddle of water at a discotheque, allegedly due to a leaking air conditioning unit installed on the roof of the building.[100] The plaintiff sued the lessor of the building for negligence, and the lessor then brought a third-party claim against the lessee of the building for contractual indemnity.[101] The indemnity provision stated, in pertinent part: "Lessee shall indemnify Lessor and save harmless from suits . . . arising from or out of any occurrence in, upon, at or from the Demised Premises . . . or *occasioned wholly or in part by any act or omission of Lessee . . . .*"[102] Relying on the decision in *Jaksch*, the court held that the "wholly or in part" language of the indemnity provision provided for indemnity where the parties were jointly negligent, but not where the indemnitee was solely negligent.[103] The appellate court sent the case back to the trial court for a jury to determine whether the slip and fall was caused by the joint negligence of the parties (in which case the lessor would be entitled to indemnity) or if the slip and fall was caused by the sole negligence of the lessor (in which case the lessor would not be entitled to indemnity).[104]

The court in *Gulfstream Park Racing Ass'n, Inc. v. Gold Spur Stable, Inc.*[105] ruled consistently with *Jaksch*, *Marino*, and *Mitchell* that the language "wholly or in part" in an indemnity agreement expressed a clear and unequivocal intent to provide indemnity for the joint negligence of the contracting parties.[106] Specifically, the indemnity provision in *Gulfstream Park* provided

> [t]rainer hereby agrees to indemnify, hold harmless and defen[d] Gulfstream and its officers, directors, agents, representatives, employees, successors and assigns from any claims, losses, liabilities or demands whatsoever, including claims for medical and hospital bills, resulting from or arising directly or indirectly from the acts or omissions of Trainer and its agents, servants, employees, owners or invitees, in whole or in part, from or . . . in connection with Trainer's activities at Gulfstream Park.[107]

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99. 415 So. 2d 149, 150 (Fla. 4th Dist. Ct. App. 1982).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 151 (citing Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 489 (Fla. 1979)).
104. *Marino*, 415 So. 2d at 151.
105. 820 So. 2d 957 (Fla. 4th Dist. Ct. App. 2002).
106. *Id.* at 963.
107. *Id.* at 961–62. Of note, the court also analyzed this provision in conjunction with two other contract provisions: a provision limiting the indemnity provision and a provision

This provision serves as an adequate model of an indemnity provision covering joint negligence.[108]

2. Key Term: "Regardless"

Another key term that can be added to an indemnity provision to support an obligation in a joint negligence scenario is "regardless."[109] Language taken from a disputed provision in *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*[110] stated: "[indemnitor] shall indemnify and hold harmless [indemnitee] . . . from and against any and all claims, damages, losses, and expenses . . . regardless of whether or not it is caused in whole or in part by a party indemnified hereunder."[111] Interpreting this provision, the Florida Fifth District Court of Appeal concluded "this provision clearly expresses the parties' intent that [indemnitee] may be indemnified by [indemnitor] even if [indemnitee] is sued for its wrongful conduct."[112] The court here went beyond joint negligence and ruled that this provision required indemnity even for the indemnitee's sole negligence.[113] It is clear, however, that the court was also interpreting this provision as requiring indemnity for the joint negligence of the indemnitee based on the fact that, in support of its ruling, the court exclusively cited cases in which indemnity was found under a joint negligence theory.[114]

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regarding the general responsibilities of the parties. *Id.* The court held that these provisions supported its ruling that the indemnity provision covered the joint negligence of the parties. *Id.* at 962.

108. *See Gulfstream Park*, 820 So. 2d at 961–62.

109. *See* Camp, Dresser & McKee, Inc. v. Paul N. Howard, Co., 853 So. 2d 1072, 1077 (Fla. 5th Dist. Ct. App. 2003).

110. 853 So. 2d 1072, 1076 (Fla. 5th Dist. Ct. App. 2003).

111. *Id.* at 1076.

112. *Id.* at 1078.

113. *See id.*

114. *See id.*; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 963 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

3. Key Term: "Except Due to the Sole Negligence" of the Indemnitee

Other courts have held that the words "joint negligence" need not necessarily be included in an indemnity provision to find indemnity for joint negligence.[115]

The Third District Court of Appeal held as such in *R.C.A. Corp. v. Pennwalt Corp.*[116] In *R.C.A.*, the indemnity provision at issue read: "*except to the extent that any such injury or damage is due solely and directly to RCA's negligence*, [Pennwalt] shall indemnify RCA against any loss, claim, damages, liability, expense . . . and cause of action, whatsoever, arising out of any act or omission."[117] The court held that the exception at the beginning of the provision—excepting indemnity where the indemnitee was solely negligent—implied the contractors intended indemnity to be required where the parties were jointly negligent.[118] The *R.C.A.* court thus held that an indemnity provision that states indemnity is required "*except to the extent that* . . . [the] *damage is due solely* . . . *to* [the indemnitee's] *negligence*" is sufficient to require indemnity for joint negligence.[119]

In *United Parcel Service of America, Inc. v. Enforcement Security Corp.*,[120] the Florida First District Court of Appeal also approved similar language supporting indemnity for joint negligence.[121] On appeal from an adverse summary judgment ruling, the third-party plaintiff (indemnitee) argued that its contract with the third-party defendant (indemnitor) required indemnity even for the third-party defendant's negligence.[122] The indemnity provision stated that the indemnitor was to indemnify the indemnitee, "except from and against all losses, damages, expense, etc., as set forth hereinabove, arising out of the sole negligence of [indemnitee]."[123] Citing *Mitchell* in support of its reasoning, the court held this language was sufficient to require indemnity for joint negligence, overturning the ruling by the trial court on the indemnitor's motion for summary judgment.[124]

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115. R.C.A. Corp. v. Pennwalt Corp., 577 So. 2d 620, 622 (Fla. 3d Dist. Ct. App. 1991).
116. 577 So. 2d 620 (Fla. 3d Dist. Ct. App. 1991).
117. *Id.* at 621.
118. *Id.* at 621, 622.
119. *Id.* at 621, 622.
120. 525 So. 2d 424 (Fla. 1st Dist. Ct. App. 1987).
121. *Id.* at 425–26.
122. *Id.* at 425.
123. *Id.*
124. *Id.* at 425–26.

The First District Court of Appeal ruled along the same lines in *State Department of Transportation v. V.E. Whitehurst & Sons, Inc.*[125] Procedurally, the third-party plaintiff's third-party complaint, alleging contractual indemnity against the third-party defendant, was dismissed by the trial court on the argument that the indemnity language at issue failed to clearly and unequivocally display an intent to provide for indemnity to the third-party plaintiff even for its negligent acts.[126] On appeal, the appellate court reversed the dismissal, holding that the presence of the language "[indemnitor] will [not] be liable under this section for damages directly caused or resulting from the sole negligence of the [indemnitee]," expressed a clear and unequivocal intent to provide for indemnity of the third-party plaintiff where the parties were jointly negligent.[127]

4. Key Term: "Joint Negligence"

The Middle District of Florida has reasoned that the absence of any language in an indemnity provision specifically dealing with the joint negligence of the contracting parties means that the parties did not intend to provide indemnity for actions in which the indemnitee and the indemnitor, or a third party are jointly liable.[128] The pertinent language in the indemnity clause at issue in *Acosta v. United Rentals (North America), Inc.*,[129] was the limitation on the full indemnity clause, which read: "HOWEVER, CUSTOMER SHALL NOT BE OBLIGATED TO INDEMNIFY UNITED FOR THAT PART OF ANY LOSS, DAMAGE OR LIABILITY CAUSED SOLELY BY THE INTENTIONAL MISCONDUCT OR SOLE NEGLIGENCE OF UNITED."[130] United Rentals, the indemnitee, argued that Acosta was required to indemnify them for negligent acts to which they contributed but for which they were not the sole cause.[131] United Rentals based this argument on the fact that the limitation provision only limited Acosta's indemnity requirements in situations where United Rentals was the "sole" cause and, absent this situation, Acosta was required to indemnify

125. 636 So. 2d 101, 104–05 (Fla. 1st Dist. Ct. App. 1994).

126. *Id.* at 103–04.

127. *Id.* at 103–04, 105.

128. Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013).

129. 2013 WL 869520 (M.D. Fla. Mar. 7, 2013).

130. *Id.* at *5. The initial portion of the indemnity clause required Acosta to indemnify United Rentals for "ANY AND ALL LIABILITY, CLAIMS, LOSS, DAMAGE OR COSTS . . . ." *Id.* at *1.

131. *Id.* at *3, *5.

United Rentals for any and all other claims.[132] The Middle District explained that because this provision did not "speak to joint negligence between Acosta and United," the provision did not meet the clear and unequivocal standard, and the court could not interpret the provision as providing indemnity under a joint negligence theory.[133]

The *Acosta* case is notable because it signals to drafters that courts may be reluctant to infer an obligation to indemnify based on joint negligence without some direct language regarding joint negligence.[134] Provisions that Florida courts have interpreted as requiring indemnity for joint negligence include terms such as "in part" or "joint," both of which were absent from the provision in *Acosta*.[135] While it is unclear whether these terms would have been sufficient for the Middle District to interpret this contract to require joint negligence indemnity, the terms would have moved this provision closer to the provisions in cases such as *Jaksch* and *Gulfstream Park*, giving the Middle District precedent to interpret joint negligence indemnity into this contract and increasing the likelihood of such a ruling.[136] Greater specificity on joint negligence language in contracts is the primary takeaway from the *Acosta* case.[137]

One year after the *Acosta* case, the Middle District of Florida was again faced with indemnitee language similar to "except due to the sole

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132. *See id.* at *5.

133. *Acosta*, 2013 WL 869520, at *5 (citing Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992)).

134. *See id.* at *1, *5.

135. *See id.* at *5; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 847–48 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla, Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).

136. *Compare Acosta*, 2013 WL 869520, at *1 (considering a contractual provision which did not include the terms "in part" or "joint"), *with Gulfstream Park*, 820 So. 2d at 961–62 (considering a contractual provision that included the term "in part"), *and Jaksch*, 335 So. 2d at 847–48 (considering a contractual provision that included the term "in part"), *and Church & Tower*, 936 So. 2d at 41 (considering a contractual provision that included the term "joint").

137. *See Acosta*, 2013 WL 869520, at *5; *but see* Fla. Farm Bureau Cas. Co. v. Batton, 444 So. 2d 1128, 1129, 1130 (Fla. 4th Dist. Ct. App. 1984). In *Batton*, the Fourth District Court of Appeal analyzed an indemnity provision similar to the provision in *Acosta*, as the provision pertained to the contribution claim before the court. *Id.* at 1129. The provision in *Batton* stated in part: "[t]he contractor agrees to indemnify and save harmless, the purchaser . . . from and against all loss or expense . . . except only such injury or damage as shall have been occasioned by the sole negligence of the purchaser." *Id.* Although the indemnity provision was not the focus of the court, it did note that this provision would provide for indemnity for joint negligence, while at the same time noting that "the enforcement of the indemnity agreement is a separate issue to be litigated," beyond the scope of the court's opinion. *Id.* at 1130.

negligence."[138] *White Springs Agricultural Chemicals, Inc. v. Gaffin Industrial Services, Inc.*,[139] decided in 2014, was a wrongful death action in which one named defendant, the indemnitee, brought a claim against another named defendant, the indemnitor, seeking contractual indemnity.[140] The indemnity provision between the two defendants stated, in relevant part: "[indemnitor] shall indemnify and hold harmless [indemnitee], its affiliates, employees and agents against all claims . . . unless it results from the sole negligence or willful misconduct of [indemnitee]."[141] The Middle District Court made clear that the language "unless it results from the sole negligence" of the indemnitee, required the indemnitor to provide indemnity for the indemnitee where the two were jointly negligent.[142] The Middle District did not mention *Acosta* in its holding on the indemnity language, but instead cited to *United Parcel* from the Florida First District Court of Appeal in support of its holding that the "unless it results from the sole negligence" of the indemnitee language mandates indemnity for joint negligence.[143]

Mitchell Maintenance Systems is a Florida Fourth District Court of Appeal indemnity case.[144] The facts of *Mitchell* were discussed earlier in this Article.[145] Of importance in this case is the language in the indemnity agreement, which stated,

> Contractor covenants and agrees that it will indemnify and hold harmless Department . . . from any claim . . . arising out of any act, action, neglect or omission by Contractor during the performance of the contract, whether direct or indirect . . . except that neither Contractor nor any of its sub-contractors will be liable under this section for damages arising out of injury or damage to persons or property directly caused or resulting from the sole negligence of Department . . . .[146]

Relying on the language "except" and "sole negligence," the court ruled that this provision expressed the clear and unequivocal intent of the parties that the

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138. White Springs Agric. Chem., Inc. v. Gaffin Indus. Servs., Inc., No. 11-cv-998, 2014 WL 905577, *6 (M.D. Fla. 2014).

139. No. 11-cv-998, 2014 WL 905577 (M.D. Fla. 2014).

140. *Id.* at *1, *2.

141. *Id.* at *3.

142. *Id.* at *7 (citing United Parcel Serv., Inc. v. Enf't Sec. Corp., 525 So. 2d 424, 426 (Fla. 1st Dist. Ct. App. 1987)).

143. *Id.*

144. Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 277 (Fla. 4th Dist. Ct. App. 1983).

145. *See supra* Section II.D.

146. *Mitchell Maint. Sys.*, 442 So. 2d at 277.

contractor indemnify the Department where the parties were jointly negligent, despite the absence of any language regarding joint negligence.[147] The court reasoned that the exception in the provision stating that indemnity would not apply to the sole negligence of the indemnitee, implied that the provision would apply under circumstances where the indemnitor was negligent or where the parties were jointly negligent.[148]

The conflicting opinions by *Acosta* and *Mitchell* on the possibility that indemnity for joint negligence may be implied in the absence of any express language of "joint negligence," makes predicting how the Florida courts would rule on such indemnity provisions difficult.[149] Thus, drafters should not leave room for judges to choose between the authority of *Acosta* and the authority of *Mitchell*, but should instead insert express language into their indemnity provisions regarding indemnity for joint negligence.[150]

B. *Joint Negligence Indemnity Based on Specific Conduct*

City of Jacksonville v. Franco[151] involved a collision between a motor vehicle and a train operating in the City of Jacksonville ("City").[152] The estate of the motor vehicle driver sued the train owner/operator, Seaboard, as well as the City.[153] The City was responsible, pursuant to a contract with Seaboard, for operating a traffic signal preceding the train tracks that gave motorists enough time to stop for an oncoming train or to proceed across the tracks.[154] Seaboard maintained its responsibility to operate its railroad warning signals, pursuant to the same contract.[155] Further, the contract allowed the City to install an interconnection system, syncing the operation of the railroad signal with the traffic signal, but it was revealed that a City engineer had removed this interconnection system prior to the collision at issue in the case.[156]

147. *See id.* at 278.
148. *See id.*
149. *Compare id.* (holding that the intent to indemnify for joint negligence may be inferred in the absence of language that clearly states that intent), *with* Acosta v. United Rentals (N. Am.), Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013) (holding that the intent to indemnify for joint negligence may not be inferred in the absence of language that clearly states that intent).
150. *See generally Mitchell Maint. Sys.*, 442 So. 2d at 278; *Acosta*, 2013 WL 869520, at *5.
151. 361 So. 2d 209 (Fla. 1st Dist. Ct. App. 1978).
152. *Id.* at 210.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Franco*, 361 So. 2d at 210–11.

Seaboard filed a third-party claim against the City for contractual indemnity.[157] The indemnity language at issue stated

> Railroad shall have *no responsibility or liability* for any loss of life or injury to person, or loss of or damage to property, growing out of or arising from the irregular operation of the traffic signals of County and/or the railroad train approach warning signals *resulting from or in any manner attributable to the interconnection of County's traffic signals* with the said railroad train approach warning signals, and County insofar as it lawfully may, agrees to indemnify and save Railroad harmless from *all such loss*, injury or damage; PROVIDED, HOWEVER, AND IT IS DISTINCTLY UNDERSTOOD AND AGREED that the provisions of this article shall have no application to any loss, injury or damage growing out of or resulting from the failure or improper operation of the railroad train approach warning signals when such failure or improper operation is not attributable to the presence or existence of County's interconnection with the warning signals of the Railroad; *it being the intention of the parties* that Railroad shall have and assume the same responsibilities and obligations with respect to the railroad train approach warning signals and the operation thereof that it had prior to the installation of the interconnection of County's traffic signals with said railroad train approach warning signals and no others, and that County shall have and assume sole responsibility for its interconnection with the said railroad train approach warning signal and the operation or functioning *thereof*.[158]

On the plaintiff's main claim against Seaboard and the City, a jury ultimately entered a verdict in favor of the plaintiff, charging the City with ninety percent of the negligence for the collision, charging Seaboard with eight percent of the negligence, and charging the plaintiff with two percent of the negligence.[159] The only question remaining was whether Seaboard was entitled to indemnity from the City.[160]

In regard to Seaboard's third-party claim for indemnity against the City, the jury held that Seaboard was not entitled to full indemnity from the City, but was entitled to be indemnified to the extent that the City was itself negligent—the jury essentially treated the indemnity provision as a provision that only provides indemnity for the City's negligence.[161] On appeal, the First

157. *Id.* at 210, 211.
158. *Id.* at 211 (emphasis added).
159. *Id.*
160. *Id.*
161. *Franco*, 361 So. 2d at 211.

District Court of Appeal held that, while the indemnity provision did not require the City to indemnify the railroad for the railroad's sole negligence, the provision did require the City to indemnify the railroad for damages arising from the operation of the traffic signals, but not from the operation of the railroad signals.[162] While at first glance it may appear as though the court interpreted the provision as though it only required the City to indemnify Seaboard for the City's negligence, the court's discussion of the jury's decision to charge Seaboard with eight percent of the negligence for the collision reveals the court actually interpreted this provision as a joint indemnity provision.[163] Specifically, the court reasoned

> Thus, it is that if the jury concluded that Seaboard was, in the degree of negligence assigned to it, derelict in not taking some action to require the City to conform to its contract and to keep the City's warning interconnect system in operational order, or because of some other kindred type logic, we note that such nonaction related to, and was directly attributable to, the failure of the City to maintain the interconnect warning system in accordance with its contract. This tragedy was a direct outgrowth of the action of the city engineer in disconnecting from the City's traffic control box the interconnect warning system and the failure of the City over a period of years to cause the same to be reconnected.[164]

The First District judge reasoned that, because the record is clear that the cause of this collision was the removal of the interconnect warning system by the City engineer, and because the jury still assigned eight percent of the fault for this collision to Seaboard, the jury must have come to the conclusion that Seaboard was somehow negligent in connection with the interconnect warning system.[165] Responsibility for the interconnect warning system was placed on the City pursuant to the contract, so the question which the court was left to

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162. *Id.* at 211–12.
163. *Id.* at 212.
164. *Id.*
165. *Id.* at 210–11. In discussing the alleged cause of this collision, the court stated

> The record reveals . . . [s]ome years before this tragic accident, a city engineer decided to disconnect this interconnect system located within the traffic control box owned by the City and such system was not thereafter reconnected. This action was known by other responsible traffic engineers of the City and County. When this accident occurred, the railroad crossing was protected by flashing lights, warning bells and gates, all in conformity with maximum safety regulations. All such safety warning signals were operating in proper fashion. The record further reflects that the train had its headlights on and its whistle was blowing. The speed of the train was within the range set for that area.

Franco, 361 So. 2d at 210–11.

grapple with was whether Seaboard was entitled to indemnity from the City even if its own negligence contributed to the failure/removal of the interconnect warning system.[166] Looking to the language of the contract provision, the court reasoned that the provision would not require indemnity for Seaboard's "sole" negligence, but it would provide indemnity for Seaboard's "contributing negligence, if any there be."[167] On this basis, the First District Court of Appeal reversed the decision of the trial court and ordered the City to indemnify Seaboard for the entire amount of the verdict.[168]

There are notable differences between the joint indemnity language used in the contract in *Franco* and the joint indemnity language used in other cases.[169] First, in the provision in *Franco*, the drafters of the provision chose to apportion liability for specific actions that would be undertaken by the parties, pursuant to the contract.[170] This differs from the more all-encompassing scope of the joint indemnity provisions seen in other cases.[171] Second, the provision in *Franco* lacks the "in part" language, which has been a cornerstone in other cases in which courts have found joint indemnity to exist.[172] The First District Court of Appeal did apply the "clear and unequivocal language" standard to the clause in *Franco*, as has been held to apply to joint indemnity clauses in other cases.[173] Notably, the court here was faced with a unique situation that does not feature in the other joint indemnity cases: this court was faced with a jury verdict assigning fault to the indemnitee, while at the same time being faced with a court record establishing that the cause of the collision was the responsibility of the indemnitor pursuant to the contract between the indemnitee and the indemnitor.[174] It is unclear exactly why the court did not conclude that this provision would indemnify Seaboard even for its own negligence, solely in regard to the interconnection warning system, but perhaps the court found the contract language insufficiently direct for such a holding and opted instead to remedy the unique

166. *Id.* at 211, 212.

167. *Id.* at 212.

168. *Id.*

169. *See Franco*, 361 So. 2d at 211; Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002); Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 847–48 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla., Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).

170. *Franco*, 361 So. 2d at 211.

171. *Gulfstream Park Racing Ass'n*, 820 So. 2d at 961–62; *Jaksch*, 335 So. 2d at 847–48; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

172. *Franco*, 361 So. 2d at 211; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 963; *Jaksch*, 335 So. 2d at 847; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

173. *Franco*, 361 So. 2d at 211–12; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 962; *Jaksch*, 335 So. 2d at 848; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

174. *Franco*, 361 So. 2d at 210–11, 211–12.

situation in this case by holding that the clause provided for indemnity where the parties were jointly negligent in regard to the interconnection warning system.[175] While the clause in *Franco* did ultimately provide joint indemnity and provides support for a joint indemnity provision that assigns fault to parties more specifically by action under the contract, utilizing the "in part" language of other joint indemnity cases would likely increase the likelihood of success regarding joint indemnity contracts.[176]

C. *Joint Negligence Indemnity Language Disfavored by Florida Courts*

1. General Language Always Disfavored

The indemnity language at issue in *Charles Poe Masonry, Inc.* demonstrates the common mistake made by drafters, when attempting to preclude any possible claim, by using broad language in their indemnity provisions, such as "any and all claims," or simply "all claims."[177] As mentioned previously, the language at issue in *Charles Poe Masonry, Inc.*, was as follows: "[Charles Poe] assumes all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment, and agrees to hold [Spring Lock] harmless from all such claims."[178] The Supreme Court of Florida rejected the "general terms" of this provision, declining to hold that this clause could provide indemnity for the joint negligence of the parties.[179] The Court instead held that the proper interpretation of clauses which use general language, is that these clauses merely require the indemnitor to indemnify the indemnitee when the indemnitee is exposed to any claim based on vicarious liability, but indemnity is not required when the indemnitee is exposed to claims based on its own affirmative misconduct.[180]

Over a decade later, the Supreme Court of Florida would reinforce the ruling in *Charles Poe Masonry* along the same reasoning.[181] The overly general "any and all claims" language was at play yet again in *Cox Cable*

175. *Id.* at 211–12.

176. *Id.*; *Gulfstream Park Racing Ass'n*, 820 So. 2d at 961–62; *Jaksch*, 335 So. 2d at 847–48; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

177. Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 489 (Fla. 1979); *see also* Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 508, 511 (Fla. 1973); On Target, Inc. v. Allstate Floridian Ins., 23 So. 3d 180, 184–85 (Fla. 2d Dist. Ct. App. 2009).

178. *Charles Poe Masonry, Inc.*, 374 So. 2d at 489.

179. *Id.*

180. *Id.*

181. Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992).

Corp. v. Gulf Power Co.[182] The case was appealed to an appellate court, which granted summary judgment, holding the general "any and all" language was sufficient to impose indemnity for joint acts of negligence.[183] The Supreme Court of Florida rejected this argument and reversed the appellate court; citing to *Charles Poe Masonry* and *University Plaza Shopping Center v. Stewart*, the Court reaffirmed the rule that the clear and unequivocal standard applied to impose a requirement of indemnity for joint negligence.[184]

The United States District Court for the Middle District of Florida in *Bankers Insurance v. American Team Managers, Inc.*,[185] quickly dismissed any notion that the indemnity clause at issue could provide indemnity for joint acts of negligence.[186] The clause read: "The General Agent [ATM] agrees to indemnify and hold the Company [Bankers] . . . harmless against and in respect to any and all claim . . . demands, actions, proceedings, liability, losses, damages, judgments, costs and expenses, including . . . which arise, directly or indirectly out of any act or omission of the General Agent . . . ."[187] The Middle District distinguished the clause in this case from the clauses in *Jaksch* and *Gulfstream Park*, and held that this language was not sufficiently clear to provide indemnity for the negligence of both parties jointly.[188]

Florida state courts have also rejected the overly broad "any and all" language in indemnity agreements seeking to cover the joint negligence of the parties in *Florida Power & Light Co. v. Elmore*,[189] *H & H Painting & Waterproofing Co. v. Mechanic Masters, Inc.*,[190] and *Church & Tower of Florida, Inc. v. Bellsouth Telecommunications, Inc.*[191] This language is employed often but should be avoided by drafters attempting to provide for indemnity for joint negligence due to the long line of precedent rejecting the overly-broad language.[192]

182. *Id.*
183. *Id.* at 628.
184. *Id.* at 629.
185. No. 10-cv-2650, 2012 WL 2179117 (M.D. Fla. June 13, 2012).
186. *Id.* at 4.
187. *Id.*
188. *Id.*
189. 189 So. 2d 522, 523 (Fla. 3d Dist. Ct. App. 1966).
190. 923 So. 2d 1227, 1229 (Fla. 4th Dist. Ct. App. 2006).
191. 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006).
192. *See e.g., Elmore*, 189 So. 2d at 522; *H & H Painting*, 923 So. 2d at 1227; *Church & Tower of Fla., Inc.*, 936 So. 2d at 41.

2. Language Providing for Indemnity for the Negligence of the Indemnitor

Language in an indemnity agreement stating that the indemnitor will provide indemnity for the indemnitor's own negligence, would not support an interpretation that the agreement provides indemnity for the joint negligence of the parties.[193] This was the situation in *Royal Palm Hotel Property, LLC v. Deutsche Lufthansa Aktiengesellschaft, Inc.*[194] Factually, this case arose when an airline employee, staying at a hotel, attempted to open a hotel window, resulting in the window falling out of its frame and striking another patron.[195] The patron sued the airline and the hotel alleging negligence.[196] The airline filed a crossclaim against the hotel, asserting a claim for contractual indemnity pursuant to an agreement between the two.[197] The agreement stated: "[t]he Hotel agrees to indemnify and hold [airline] harmless from all liabilities, including damage to property or injury or death of persons, including [airline] property and [airline] personnel that may result from the negligence or wilful [sic] misconduct of the Hotel."[198] Reviewing this language, the Third District Court of Appeal concluded that the agreement failed to meet the clear and unequivocal standard to support an interpretation that the hotel indemnify the airline for any of the airline's negligence.[199] The court specifically noted that the language "that may result from the negligence . . . of the Hotel" was particularly fatal to an interpretation that the airline should be indemnified for its own negligence, given that the provision only specified that it applied to the negligence of the hotel.[200]

Royal Palm Hotel Property, LLC further supports the notion that parties intending to provide for a specific type of indemnity should expressly state the type of indemnity they desire.[201] A provision stating one type of indemnity (i.e., indemnity for the negligence of the indemnitor) will not be read to imply that other types of indemnity subject to a strict interpretation standard (indemnity for joint negligence or indemnity for the indemnitee's

193. Royal Palm Hotel Prop., LLC v. Deutsche Lufthansa Aktiengesellschaft, Inc., 133 So. 3d 1108, 1111 (Fla. 3d Dist. Ct. App. 2014).
194. 133 So. 3d 1108 (Fla. 3d Dist. Ct. App. 2014).
195. *Id.* 1109.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Royal Palm Hotel Prop., LLC*, at 1111.
200. *Id.*
201. *Id.*

sole negligence, both of which are subject to the clear and unequivocal standard) may also have been intended by the contracting parties.[202]

D. *Location of the Indemnity Language*

While the "wholly or in part" language first encountered in *Jaksch* has been generally accepted by Florida courts as establishing a right to indemnity for the joint negligence of the parties, the language must be properly placed in the contract as a whole.[203] In *ATC Logistics Corp. v. Southeast Toyota Distributors, LLC*,[204] the First District Court of Appeal acknowledged it was faced with a similar, but different indemnity provision as that faced by the Fourth District Court of Appeal in *Jaksch*.[205] The provision at issue in this case read

> INDEMNIFICATION BY CARRIER
>
> (a) ATC shall indemnify and hold harmless SET from and against any and all losses, liabilities, damages, costs, fines, expenses, deficiencies, taxes and reasonable fees and expenses of counsel and agents, including any costs incurred in enforcing this Agreement, that SET may sustain, suffer or incur arising from (i) Carrier's failure or alleged failure to comply, *in whole or in part*, with any of its obligations hereunder . . . (iv) any claims by any third person with respect to death, injury or property damage caused by the maintenance or operation of any Car Carrier or the loading, transportation or unloading of Vehicles on or from a Car Carrier . . . .[206]

The issue in this case was whether the indemnity agreement required ATC to indemnify SET even for SET's own negligence or for the joint negligence of SET and another.[207] Factually, this case involved a security guard who was injured on the premises, thus implicating subsection (iv) of the indemnity agreement.[208] Subsection (i) of the agreement, pertaining to the

202. *Id.*
203. ATC Logistics Corp. v. Se. Toyota Distribs., LLC, 188 So. 3d 96, 102 (Fla. 1st Dist. Ct. App. 2016).
204. 188 So. 3d 96 (Fla. 1st Dist. Ct. App. 2016).
205. *Id.* at 101.
206. *Id.* at 98.
207. *Id.*
208. *Id.* at 97–98, 102.

Carrier's failure to abide by its obligations under the contract, did not apply under the factual scenario presented in the case.[209]

The First District began its analysis by concluding that the "any and all" language under section (a) of the provision was insufficient, on its own, to require ATC to indemnify SET for SET's own negligence, pursuant to the Supreme Court of Florida's holding in *University Plaza Shopping Center, Inc.* discussed above.[210] The court then moved on to the possibility that the provision may require indemnity in circumstances of joint negligence.[211] Noticing the familiar "in whole or in part" language in the provision at issue, the court questioned whether it should follow the holding of the Fourth District in *Jaksch* and interpret the provision as requiring indemnity in circumstances of joint negligence.[212] While the court, as well as the parties, were in agreement that subsection (i) would provide indemnity for SET's joint negligence based on the holding in *Jaksch*, ATC argued, and the court ultimately agreed, that the "in whole or in part" language of subsection (i) could not be interpreted as also applying to subsection (iv), the provision at issue in the case.[213] Under this reasoning, the court both affirmed the validity of the "in whole or in part" language addressed by the holding of *Jaksch*, while also denying indemnity based on the joint negligence theory of indemnity because the necessary language was not placed in the correct provision.[214] As the court in *ATC* briefly mentioned however, separate provisions in a contract may be read in conjunction to support an interpretation that indemnity for joint negligence was intended by the parties to the contract.[215] This was the situation in *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*[216]

E. *Interpreting Multiple Clauses in Conjunction*

Counsel advocating both for or against an obligation to indemnify will often argue that the applicable indemnity provision does not exist in a vacuum, but instead must be read in conjunction with other, related clauses in the

209. *ATC Logistics Corp.*, 188 So. 3d at 97–98, 102.

210. *Id.* at 99, 100; Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509, 511 (Fla. 1973).

211. *ATC Logistics Corp.*, 188 So. 3d at 100. The court cites to the *Charles Poe Masonry* case, acknowledging the holding that the same "clear and unequivocal" standard that applies to provisions indemnifying a party for its own negligence, has been held to apply to provisions indemnifying a party for joint negligence. *Id.* at 100–101.

212. *Id.* at 101.

213. *Id.* at 102.

214. *Id.* at 102–103.

215. *ATC Logistics Corp.*, 188 So. 3d at 102.

216. 853 So. 2d 1072, 1076 (Fla. 5th Dist. Ct. App. 2003).

contract.[217] The related provisions of a contract that tend to be argued as related to the indemnity provisions are the Limitation of Liability and the Rights and Responsibilities provisions.[218]

Camp, Dresser & McKee, Inc. was an indemnity case before the Fifth District Court of Appeal involving two contract provisions pertaining to indemnity:

> 6.30. To the fullest extent permitted by law, CONTRACTOR [Howard] shall indemnify and hold harmless OWNER [Orange County] and ENGINEER [CDM] and their agents and employees from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death . . . and (b) is caused in whole or part by any negligent act or omission of CONTRACTOR [Howard], any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.
>
> . . .
>
> 6.32. The obligations of CONTRACTOR [Howard] under paragraph 6.30 shall not extend to the liability of ENGINEER [CDM], his agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications.[219]

The *Camp, Dresser & McKee, Inc.* case centered around a construction project in which CDM was hired to provide engineering work on the project and Howard was hired as the contractor on the project.[220] A subcontractor of Howard received an electric shock when a crane being used

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217. Gibbs v. Air Can., 810 F.2d 1529, 1536 (11th Cir. 1987); Container Corp. of Am. v. Seaboard Coast Line R.R., 401 So. 2d 936, 937 (Fla. 1st Dist. Ct. App. 1981).

218. *See Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076, 1078 (reading limitation of liability provision in conjunction with indemnity provision); *Gibbs*, 810 F.2d at 1536 (reading limitation of liability provision in conjunction with indemnity provision); Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 961–62 (Fla. 4th Dist. Ct. App. 2002) (reading limitation of liability provision and rights and responsibilities provisions in conjunction with indemnity provision); *Container Corp. of Am.*, 401 So. 2d at 937 (reading rights and responsibilities provision in conjunction with indemnity provision).

219. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076.

220. *Id.* at 1075.

came into contact with a power line, arcing electricity from the line to the crane and then into the subcontractor.[221] The subcontractor sued CDM and that suit eventually settled.[222] CDM filed a separate claim for contractual indemnity against Howard.[223] On an appeal from the trial court's order granting Howard's summary judgment motion, CDM argued it was entitled to contractual indemnity from Howard even for its own negligence.[224]

The Fifth District Court of Appeal first held that the indemnity provision at issue (provision 6.30) clearly expressed the intention of the parties to obligate Howard to indemnify CDM even for its own negligence.[225] The court found persuasive the language "any such claim . . . regardless of whether or not it is caused in part by a party indemnified hereunder."[226] The court went on to note that provision 6.32, when read in tandem with provision 6.30, provides additional clarity that provision 6.30 was intended to require indemnity even if CDM was solely or partially at fault.[227] Provision 6.32 limited the scope of Howard's indemnity obligation under 6.30 by providing that Howard was not required to indemnify CDM specifically for its approval/preparation of designs, drawings, etc.[228] The court reasoned that if Howard were not obligated to indemnify CDM for its own negligence under 6.30 in the first place, 6.32 would have no reason to exist since 6.32 is limiting Howard's indemnity obligations regarding CDM's negligence specifically.[229]

While *Camp, Dresser & McKee, Inc.* dealt with an indemnity provision being interpreted in conjunction with a limitation/clarification provision, the court in *Container Corp. of America v. Seaboard Coast Line Railroad Co.*[230] interpreted the indemnity provision in its case in conjunction with the general rights and responsibilities provisions of the contract.[231] The factual background of *Container Corp. of America* was as follows: Seaboard operated trains, which served Container Corp.[232] An employee of Seaboard was injured when he tripped and fell over a piece of rail sticking out of a side track used by Seaboard's trains.[233] The employee sued Seaboard for

221. *Id.*
222. *Id.*
223. *Id.*
224. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1076–77.
225. *Id.* at 1077, 1078.
226. *Id.* at 1076, 1077, 1078.
227. *Id.* at 1078.
228. *Id.* at 1076, 1078.
229. *Camp, Dresser & McKee Inc.*, 853 So. 2d at 1078.
230. 401 So. 2d 936 (Fla. 1st Dist. Ct. App. 1981).
231. *Id.* at 937.
232. *Id.*
233. *Id.*

negligence and Seaboard sued Container Corp. for indemnity pursuant to its contract with Container Corp.[234]

The indemnity clause in Container Corp.'s contract provided,

> [Container] will indemnify and hold [Seaboard] harmless for loss, damage or injury from any act or omission of [Container], his employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on our about the track, and *if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally*.[235]

Relying on the language "and *if any claim or liability . . . shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally*," Container Corp. argued that it should only be liable for its proportional share of liability to the employee since its negligence, as well as the negligence of Seaboard, jointly caused the employee's damages.[236] The First District Court of Appeal rejected this argument, beginning its rationale by examining the rights and responsibilities sections of the contract.[237] The contract first provided that Container Corp. had assumed "the duty of maintaining said trackage in safe condition . . . the duty of keeping the right of way adjacent . . . clean and free of all . . . objects which may be hazardous or dangerous to those engaged in the operation of" the trains operated by Seaboard.[238] The court explained that Container Corp. agreed to undertake responsibility for the track—the exact area where the harm had occurred—and agreed to indemnify Seaboard if any third party was harmed on the track.[239] The court then dismissed Container Corp.'s argument regarding the joint negligence limitation, reasoning that the only allegation in the employee's complaint pertained to the debris on the track—an allegation that fell directly within Container Corp.'s responsibilities under the contract—and, therefore, there was no allegation in the complaint by which Seaboard could have been jointly negligent (such as a separate allegation regarding Seaboard's operation of its trains).[240] The court thus held that Container Corp. was required to indemnify Seaboard for the full amount of any damages recovered by the

234. *Id.*
235. *Container Corp. of Am.*, 401 So. 2d at 937 (brackets in original).
236. *Id.*
237. *Id.*
238. *Id.* (internal quotation marks omitted).
239. *Id.*
240. *Container Corp. of Am.*, 401 So. 2d at 937.

employee since the contract provided for indemnity and the indemnity provision would not be limited under these circumstances because the employee's allegations pertained exclusively to Container Corp.'s responsibilities under the contract.[241]

Camp, Dresser & McKee, Inc. and *Container Corp. of America* provide contract drafters an additional tool to increase or decrease the likelihood that a court will interpret an indemnity provision to require indemnity for the joint negligence of the indemnitee.[242] Using a separate provision in a contract to either limit, or possibly even expand an existing indemnity provision can be used to specify the obligations of the parties and should be interpreted by the court in connection with any other indemnity provisions.[243]

Of brief mention, language found in addendum to the primary contract at issue may provide relevant language to the indemnity provision in the primary contract.[244] Addendums can be used by drafters to clarify, limit, or expand on an indemnity agreement, which may support or negate an intent to provide for indemnity for joint negligence.[245] For example, an addendum may qualify an indemnity provision by stating that the indemnity provision will not apply where the act or omission resulting in harm was solely caused from the negligence of the indemnitee.[246] This addendum language would likely support a holding in favor of joint negligence, assuming the indemnity provision itself contained sufficient language to indicate an intent to indemnify the indemnitee where the indemnitee was jointly negligent with the indemnitor or some third party in producing the harm.[247]

V. PROCEDURE

Whether joint negligence exists—that is, whether each contracting party had committed negligence—is generally a question of fact for the jury to determine.[248] On the other hand, the interpretation of a contract is generally

241. *Id.*

242. *Id.*; *Camp, Dresser & McKee*, 853 So. 2d at 1078.

243. *Camp Dresser & McKee*, 853 So. 2d at 1078; *Container Corp.*, 401 So. 3d at 937.

244. Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848 (Fla. 4th Dist. Ct. App. 1976).

245. *Id.*

246. *Id.*

247. *Id.* at 848–849.

248. Gulfstream Park Racing Ass'n v. Gold Spur Stable, Inc., 820 So. 2d 957, 962 (Fla. 4th Dist. Ct. App. 2002); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982). It is possible for the parties to stipulate that each was jointly negligent in producing the harm at issue. *Jaksch*, 335 So. 2d at 848. This would leave the court to determine whether

a question of law for the judge to determine.[249] This generally results in the need for a jury trial when reaching an ultimate determination as to whether joint or sole negligence existed, but the question of whether an indemnity contract provides for indemnity in the case of joint negligence to begin with, is often ruled on by the judge prior to trial.[250] An indemnity provision is to be interpreted in favor of the indemnitor where the contract as a whole does not have indemnity as its primary purpose.[251]

Claims for contractual indemnity are normally brought by a defendant in the main action (the indemnitee) and either another defendant already named in the main action or against a third party who has not been brought into the case (the indemnitor).[252] Where the indemnitor is already a defendant in the main action, the indemnitee will state his/her contractual indemnity claim through a crossclaim.[253] Where the indemnitor is not a defendant in the main action, the indemnitee will state his/her contractual indemnitee claim through a third party complaint.[254] A complaint for contractual indemnity may, but is not required to be, filed after a judgment in the main action against the indemnitee.[255]

An important defense that is commonly raised to contractual indemnity claims where both the indemnitee and the indemnitor are named defendants in the main action, is that the indemnity provision does not apply because the plaintiff has sued the indemnitee for his/her own negligence, not for the negligence of the indemnitor or for the joint negligence of the indemnitor.[256] This defense could only be attempted where the indemnity provision in the contract does not provide indemnity for the indemnitee's sole negligence—the provision only provides indemnity for the negligence of the indemnitor or for the joint negligence of the indemnitee and the indemnitor.[257] Essentially, the indemnitor is arguing that, because the indemnity provision

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the contract at issue would provide for indemnity for the stipulated joint negligence of the parties, forgoing the need for a jury. *Id.* at 848–849.

249. Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013).

250. *See Marino*, 415 So. 2d at 151.

251. Barton-Malow Co. v. Grunau Co., 835 So. 2d 1164, 1166 (Fla. 2d Dist. Ct. App. 2002).

252. *See e.g., Jaksch*, 335 So. 2d at 847; Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co., 374 So. 2d 487, 488 (Fla. 1979).

253. *See e.g., Jaksch*, 335 So. 2d at 847.

254. *See Charles Poe Masonry, Inc.*, 374 So. 2d at 488.

255. BP Prods. N. Am., Inc. v. Giant Oil, Inc., 545 F. Supp. 2d 1257, 1260–61 (M.D. Fla. 2008).

256. White Springs Agric. Chems., Inc. v. Gaffin Indus. Servs., Inc., No. 11-cv-998, 2014 WL 905577, at *6 (M.D. Fla. Mar. 7, 2014); *see also* Guerrero v. City of Coral Gables, No. 21-cv-21122, 2021 WL 6062724, *2–4 (S.D. Fla. 2021).

257. *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *3, 6.

only imposes a duty to indemnify on the indemnitor where the indemnitee is not solely negligent and because the plaintiff's complaint in the main action alleges misconduct exclusively against the indemnitee (in the counts alleged against the indemnitee), the indemnity provision in the contract does not apply because of the plaintiff's characterization of the indemnitee's wrongdoing.[258] This defense has been rejected by Florida courts.[259] Courts have held that it is not the characterization by the plaintiff of the indemnitee's misconduct, but instead the courts will look at the facts of the case, including discovery conducted in the case, to determine if an indemnity provision may apply to the circumstances.[260] Despite the adverse caselaw on this defense, it may still be argued by counsel for the indemnitor, but the precedent cited should result in courts looking to the facts of the underlying case to determine if an indemnity provision applies, instead of looking to the plaintiff's characterizations in his/her complaint.[261]

VI. SAMPLE CONTRACTUAL INDEMNITY LANGUAGE FOR THE JOINT NEGLIGENCE OF THE INDEMNITEE

Caselaw in Florida provides numerous examples of indemnity contract language that has been held to require indemnity for joint negligence.[262] These examples are useful to draft indemnity provisions using language that has been approved by Florida courts.[263] The following examples are indemnity provisions from four cases in which each court held that

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258. *Id.* at *6.

259. CSX Transp., Inc. v. Becker Sand & Gravel Co., 576 So. 2d 902, 904 (Fla. 1st Dist. Ct. App. 1991); Am. Home Assurance Co. v. City of Opa Locka, 368 So. 2d 416, 419 (Fla. 3d Dist. Ct. App. 1979); *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *7; *see also* Metro. Dade County v. Fla. Aviation Fueling, Inc., 578 So. 2d 296, 299 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

260. *CSX Transp., Inc.*, 576 So. 2d at 904; *Am. Home Assurance Co.*, 368 So. 2d at 419; *White Springs Agric. Chems., Inc.*, 2014 WL 905577, at *7; *see also Metro. Dade County.*, 578 So. 2d at 299.

261. *CSX Transp., Inc.*, 576 So. 2d at 904; *Am. Home Assurance Co.*, 368 So. 2d at 419; *White Springs Agric. Chem., Inc.*, 2014 WL 905577, at *7; *see also Metro. Dade County.*, 578 So. 2d at 299.

262. *See e.g.*, Leonard L. Farber Co. v. Jaksch, 335 So. 2d 847, 848–49 (Fla. 4th Dist. Ct. App. 1976); Church & Tower of Fla., Inc. v. Bellsouth Telecomms., Inc., 936 So. 2d 40, 41 (Fla. 3d Dist. Ct. App. 2006); Marino v. Weiner, 415 So. 2d 149, 151 (Fla. 4th Dist. Ct. App. 1982); Mitchell Maint. Sys. v. State Dep't of Transp., 442 So. 2d 276, 277 (Fla. 4th Dist. Ct. App. 1983).

263. *See Jaksch*, 335 So. 2d at 848–49; Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1078 (Fla. 5th Dist. Ct. App. 2003); R.C.A. Corp. v. Pennwalt Corp., 577 So. 2d 620, 621 (Fla. 3d Dist. Ct. App. 1991); City of Jacksonville v. Franco, 361 So. 2d 209, 211–12 (Fla. 1st Dist. Ct. App. 1978).

indemnity for joint negligence was required.[264] Each provision features different key language essential in each judge's ruling that joint negligence indemnity was required.[265]

The *Jaksch* case demonstrates the importance of the "wholly or in part" language in indemnity provisions.[266] This was the first case to approve the "wholly or in part" language and this key language has been approved more frequently in subsequent cases than any other key language, making it particularly useful for drafters.[267] The indemnity provision reads,

> [Indemnitor] shall indemnify [indemnitee] and save it harmless from suits, actions damages, liability and expense in connection with loss of life, bodily or personal injury or property damage arising from or out of any occurrence [arising under this contract], or occasioned wholly or in part by any act or omission of [indemnitor]; its agents, contractors, employees, servants, invitees, licensees . . . . [Notwithstanding the indemnity provision above] [indemnitee] shall not be relieved of any liability resulting solely from the negligence of [indemnitee] or of its agents or employees.[268]

The *Camp, Dresser & McKee, Inc.* case, in addition to the "in whole or in part" language, also features the "regardless of whether or not [the negligence] is caused by [the indemnitee]" language.[269] *Camp, Dresser & McKee, Inc.* is the only appellate-level case in which this language has been tested, but the Fifth District Court of Appeal made clear that this language does clearly and unequivocally reveal an intent to provide indemnity for joint negligence.[270] The indemnity provision in *Camp, Dresser & McKee, Inc.* stated

> To the fullest extent permitted by law, [indemnitor] shall indemnify and hold harmless [indemnitee] and their agents and employees from and against all claims, damages, losses, and expenses including but not limited to attorneys' fees arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness,

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264. *See Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So. 2d at 621; *Franco*, 361 So. 2d at 211–12.

265. *See Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So. 2d at 621; *Franco*, 361 So. 2d at 211–12.

266. *Jaksch*, 335 So. 2d at 847–49.

267. *See e.g.*, *Church & Tower of Fla., Inc.*, 936 So. 2d at 41; *Marino*, 415 So. 2d at 151; *Mitchell Maint. Sys.*, 442 So. 2d at 277.

268. *Jaksch*, 335 So. 2d at 847–48.

269. *Camp Dresser & McKee, Inc.*, 853 So. 2d at 1076, 1077.

270. *Id.* at 1078.

> disease or death . . . and (b) is caused in whole or part by any negligent act or omission of [indemnitor] anyone directly or indirectly employed by any of them or anyone for whose acts [they] may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.[271]

The *R.C.A. Corp.* case featured the "except due to the sole negligence of the indemnitee" language approved by the Third District Court of Appeal as requiring indemnity for joint negligence.[272] This language implies joint negligence is covered within its scope by exclusively limiting its scope to situations where the indemnitee is solely negligent.[273] Despite merely implying coverage for joint negligence, this language has also been approved by the First and Fourth District Courts of Appeal, as well as the federal Middle District of Florida.[274] The indemnity contract in the *R.C.A. Corp.* case provided

> [Indemnitor] shall take all necessary precautions to prevent the occurrence of any injury (including death) *to any person*, or any damage to any property, arising out of any acts or omissions of such agents, employees, or subcontractors, *and except to the extent that any such injury or damage is due solely and directly to [indemnitee's] negligence*, shall indemnify [indemnitee] against any loss, claim, damages, liability, expense (including reasonable attorneys' fees) and cause of action, whatsoever, arising out of any act or omission of the [indemnitor], its agents, employees or subcontractors . . . .[275]

When drafters intend to provide for indemnity for the parties' joint negligence regarding certain actions under the contract, but not for other actions under the contract, the *Franco* case provides a good model.[276] The First District Court of Appeal approved the indemnity provision as covering the joint negligence of the parties.[277] The provision in *Franco* read

> Railroad shall have *no responsibility or liability* for any loss of life or injury to person, or loss of or damage to property, growing out of or arising from the irregular operation of the traffic signals of

271. *Id.* at 1078.
272. *R.C.A. Corp.*, 577 So. 2d at 621, 622.
273. *Id.* at 622.
274. Acosta v. United Rentals (N. Am.) Inc., No. 8:12-CV-01530, 2013 WL 869520, at *5 (M.D. Fla. Mar. 7, 2013).
275. *R.C.A. Corp.*, 577 So. 2d at 621.
276. *Franco*, 361 So. 2d at 211–212.
277. *Id.* at 212.

> County and/or the railroad train approach warning signals *resulting from or in any manner attributable to the interconnection of County's traffic signals* with the said railroad train approach warning signals, and County insofar as it lawfully may, agrees to indemnify and save Railroad harmless from *all such loss*, injury or damage; PROVIDED, HOWEVER, AND IT IS DISTINCTLY UNDERSTOOD AND AGREED that the provisions of this article shall have no application to any loss, injury or damage growing out of or resulting from the failure or improper operation of the railroad train approach warning signals when such failure or improper operation is not attributable to the presence or existence of County's interconnection with the warning signals of the Railroad; *it being the intention of the parties* that Railroad shall have and assume the same responsibilities and obligations with respect to the railroad train approach warning signals and the operation thereof that it had prior to the installation of the interconnection of County's traffic signals with said railroad train approach warning signals and no others, and that County shall have and assume sole responsibility for its interconnection with the said railroad train approach warning signal and the operation or functioning thereof.[278]

This sample can be useful to customize a contract such that a certain degree of indemnity applies to one action under the contract, whereas a separate degree of indemnity applies to another action, as the parties see fit.[279]

VII. CONCLUSION

A client's litigation outlook can differ dramatically depending on whether a contractual provision requires indemnity only for the indemnitor's negligence, for the joint negligence of the parties, or even the negligence of the indemnitee.[280] Indemnity for the parties' joint negligence is the most recent variety of contractual indemnity recognized by Florida courts and, although it is held to the same interpretation standard as indemnity provisions covering the indemnitee's sole negligence, the contract language approved for these types of indemnity differs.[281] By understanding the rules applicable to and the language approved for contractual indemnity for joint negligence,

278. *Id.* at 211.

279. *Id.* at 211–12.

280. *Compare Charles Poe Masonry, Inc.*, 374 So. 2d at 489–90, *with R.C.A. Corp.*, 577 So. 2d at 622.

281. *See e.g.*, *Jaksch*, 335 So. 2d at 848–49; *Camp, Dresser & McKee, Inc.*, 853 So. 2d at 1078; *R.C.A. Corp.*, 577 So .2d at 621; *Franco*, 361 So. 2d at 211–12.

drafters can employ or avoid this language in their own contracts to better serve their clients' intentions.[282]

282. *See e.g.*, Transp. Intern. Pool, Inc. v. Pat Salmon & Sons of Fla., Inc., 609 So. 2d 658, 660 (Fla. 4th Dist. Ct. App. 1992).

EFFECTIVE ENFORCEMENT OF NUISANCE ABATEMENT LAWS

MICHAEL FLYNN*
ELEANOR OHAYON**

I. INTRODUCTION

Janie lives in a peaceful, quiet neighborhood . . . or so she thought! Although she knows most of her neighbors, there is one neighbor she does not know and, frankly, does not want to know. Over a period of months, Janie noticed unusual comings and goings at all hours of the day and night at this neighbor's house. She saw a steady stream of cars parading up and down the street with people going inside the neighbor's house for just a few minutes and often leaving with packages. Others drove up in the driveway of the neighbor's house and, accompanied by four to six young women, went inside the house. A few moments later, the driver of the car would come out of the

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house alone and leave. This was followed by a parade of cars parking along the street near the neighbor's house, with only men getting out of these cars and going inside the house, not leaving until hours later. The young women who went inside the house would later come outside, scantily clothed, for a brief time during the day, and then return back inside. On other occasions, a van would pull up to the neighbor's house and unload several other young women who went inside the house, followed by several young women leaving the house in the van, some seated in the cargo area of the van. The whole scenario made Janie suspicious, especially when loud discussions and arguments would erupt at any time, particularly late at night. The main problem was that this neighbor was disrupting Janie's and the neighborhood's peace and quiet. Janie spoke with the other neighbors she knew and asked what they thought of all of this. All of them agreed that this neighbor was disruptive but cautioned Janie to not confront this neighbor. Janie eventually called the police and asked them if there was anything that could be done. Janie just wanted this to stop!

The foregoing scenario could play out in any neighborhood, urban, suburban, or rural, and in any part of the United States. The above example is a compilation of a number of circumstances that have occurred in Broward County, Florida.[1] This backdrop is the impetus for the enactment of nuisance abatement state laws and local ordinances which offer a civil remedy to abate public nuisances, complimenting a criminal or private remedy.[2] Nuisance abatement state statutes and local government ordinances provide, in most jurisdictions, for a legal action to protect the health and welfare of affected neighborhood residents and to return a neighborhood to its proper quiet and peaceful environment.[3] These statutes and ordinances specifically target

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1. *See e.g.*, Andrea Torres, *Police: Woman Living in Fort Lauderdale Caught Running Prostitution Fronts in 2 Counties*, WPLG LOC. 10 NEWS, http://www.local10.com/news/local/2023/09/12/police-woman-living-in-fort-lauderdale-ran-prostitution-operations-in-2-counties/ (Sept. 12, 2023 5:11 PM); Alex Finnie & Andrea Torres, *Fugitive Sought After 2 Weeks Over Prostitution Network in Broward*, WPLG LOC. 10 NEWS, http://www.local10.com/news/local/2023/07/13/fugitive-sought-after-2-arrests-over-prostitution-operation-at-massage-parlors-in-broward/ (July 13, 2023 6:14 PM); *Police Crack Down on Fort Lauderdale Prostitution*, THE L. OFFS. OF LEIFERT & LEIFERT, http://www.leifertlaw.com/blog/police-crack-down-on-fort-lauderdale-prostitution/ (last visited Dec. 22, 2023).

2. *See* COMM. ON COMPREHENSIVE PLAN., NUISANCE ABATEMENT, FLA. S. INTERIM PROJECT REP. 2004-122, 35th Sess. at 1 (Fla. 2003).

3. *See* FLA. STAT. § 893.138(1), (2)(g), (3) (2023) (prohibiting activities related to the unlawful sale, delivery, manufacture, or cultivation of controlled substances, criminal gang activity, dealing in stolen property, murder, attempted felony murder, aggravated battery with a deadly weapon, aggravated assault with a deadly weapon without intent to kill); NEW YORK CITY, N.Y., ADMIN. CODE § 7-701 (2023); COLO. REV. STAT. § 31-15-401(1)(a)–(d)(I)

prostitution, drug distribution, and other similar activities operating out of a neighborhood house or dwelling, declaring any premises used for prostitution, drug distribution, and other similar activities a public nuisance to be dealt with by the appropriate city, county, or municipality.[4]

Broward County recently proposed to amend its Nuisance Abatement Ordinance.[5] One of the significant amendments proposed is the language in the amendment that would change the burden of proof on the government entity to prove a public nuisance in a nuisance abatement quasi-judicial hearing.[6] Broward County's current standard of proof for nuisance abatement proceedings is "preponderance of the evidence."[7] However, the proposed standard of proof for nuisance abatement proceedings is "clear and convincing," which is a higher standard of proof.[8]

This article details why the proper burden of proof for nuisance abatement hearings in Broward County is preponderance of the evidence.[9] First, this article explains what a public nuisance is and what public nuisance abatement laws are designed to accomplish.[10] This article also outlines Florida law on nuisance abatement proceedings, and specifically addresses the burden of proof requirements and the proposed amendment to the Broward County Nuisance Abatement Ordinance.[11] Next, this article examines other states' case law concerning the applicable standard for the burden of proof in a nuisance abatement proceeding.[12] Finally, this article concludes that the appropriate burden of proof in a nuisance abatement proceeding is the preponderance of the evidence standard.[13]

(2023); MONT. CODE ANN. § 45-8-112(1) (2023); ARK. CODE ANN. § 5-74-109(c)(1) (2023); IOWA CODE § 331.384(1) (2023).

4. FLA. STAT. § 893.138(2)–(3); COLO. REV. STAT. § 31-15-401(1)(f)–(h); NEW YORK CITY, N.Y., ADMIN. CODE § 7-701.

5. BROWARD COUNTY, FLA., ORDINANCES ch. 20, art. VII, div. 7 (Consumer Prot. Bd., Proposed Draft 2023); Meeting Minutes, Consumer Prot. Bd., Broward Cnty. 2 (Mar. 15, 2023), http://www.broward.org/Consumer/Forms/Documents/Consumer_Protection_Board_Minutes_03.15.2023.pdf.

6. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Consumer Prot. Bd., Proposed Draft 2023).

7. BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (2023).

8. BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft).

9. *See* discussion *infra* Part VIII.

10. *See* discussion *infra* Parts II–III.

11. *See* discussion *infra* Parts IV–VII.

12. *See* discussion *infra* Part VIII.

13. *See* discussion *infra* Part VIII.

II. WHAT IS A NUISANCE?

The Florida Supreme Court in *Knowles v. Central Allapattae Properties, Inc.*,[14] stated that "[a]nything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restrained."[15] A nuisance is an injury to the possessor of property.[16] A property owner or occupant may put their property to any reasonable and lawful use, but they must not use the property in such a way that will deprive adjoining landowners or other property owners and occupiers within the same community of any right to the enjoyment of their property.[17] The reasonableness of a property owner's use of their land is determined on a case-by-case basis.[18] Even an activity conducted on property that is in full compliance with the law may constitute a nuisance depending on the specific circumstances in that location.[19] There are two types of nuisances: private and public.[20] The law of private nuisance stems from the fundamental principle that "every person should . . . use his own property . . . [without] injur[ing] that of another."[21] A public nuisance is a violation of public rights, impairs public order, morals, or decency, or results in inconvenience or damage to the general public.[22]

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14. 198 So. 819 (Fla. 1940).

15. *Id.* at 822 (citing Henderson v. Sullivan, 159 F. 46, 49 (6th Cir. 1908)).

16. McClosky v. Martin, 56 So. 2d 916, 918 (Fla. 1951).

17. *Id.*; *Knowles*, 198 So. 2d at 822.

18. *McClosky*, 56 So. 2d at 918.

19. Lake Hamilton Lakeshore Owners Ass'n v. Neidlinger, 182 So. 3d 738, 741 (Fla. 2d Dist. Ct. App. 2015).

20. *See* Philbrick v. City of Miami Beach, 3 So. 2d 144, 146 (Fla. 1941) (Brown, J., concurring) (per curiam); *Nuisance*, LAWSHELF, http://lawshelf.com/coursewarecontentview/nuisance (last visited Dec. 22, 2023).

21. Jones v. Trawick, 75 So. 2d 785, 787 (Fla. 1954) (en banc) (holding that a cemetery constituted a private nuisance because of constantly recurring funeral services and the reminder of depression and death that would disrupt the plaintiff's normal pastimes and peaceful pursuits); *see* Beckman v. Marshall, 85 So. 2d 552, 555 (Fla. 1956) (finding whether a particular use constitutes a private nuisance depends on "whether the use . . . is . . . reasonable . . . under the circumstances, and whether there is 'an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure" or an injury resulting in "trifling annoyance, inconvenience, or discomfort'"); Bartlett v. Moats, 162 So. 477, 480 (Fla. 1935) (holding that a creation of loud and disturbing noises in residential areas during the nighttime is a nuisance).

22. Orlando Sports Stadium, Inc. v. State *ex rel.* Powell, 262 So. 2d 881, 884 (Fla. 1972).

> Any store, shop, warehouse, dwelling house, building, vehicle, ship, boat, vessel, aircraft, or any place whatever, which is visited by narcotic or other drug users for the purpose of unlawfully

III. WHAT IS NUISANCE ABATEMENT?

Each state has the power to abate nuisances that affect the public, generally or otherwise.[23] Florida law outlines specific criteria that a property must meet before it may be declared a nuisance.[24] The legislature authorized various counties and municipalities to create administrative boards to hear and take action on certain nuisance complaints.[25] Once a property is declared a nuisance, "a board may order the property owner to take necessary [action] to eliminate the nuisance."[26] These nuisance abatement boards, "like all quasi-judicial boards . . . must provide proper notice and an opportunity to be heard prior to . . . taking actions which affect the interests of the parties before it."[27]

IV. FLORIDA LAW

Under section 893.138 of the Florida Statutes, counties and municipalities have the authority to create and assign governmental administrative boards to abate public nuisances.[28] The purpose behind this

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> using hallucinogenic drugs, barbiturates, central nervous stimulants, amphetamines, narcotic drugs, habit-forming drugs or any other drugs as described in chapter 398, 404 and 500, Florida Statutes, or which is used for the illegal keeping, selling, or delivering of the same, shall be deemed a public nuisance.

FLA. STAT. § 823.10 (2023). For example, one court found that frequent loud and disturbing noises, vulgar language, traffic jams, and obscene conduct constituted a public nuisance. Wade v. Fuller, 365 P.2d 802, 804 (Utah 1961). Another court found that the habitual assembly of lewd women and men drinking and dancing constituted a public nuisance. Beard v. State, 17 A. 1044, 1046 (Md. 1889).

23. *See id.* at 884; *e.g.*, FLA. STAT. § 893.138 (2022); NEW YORK CITY, N.Y., ADMIN. CODE § 7-703(a) (2023); COLO. REV. STAT. § 31-15-401(1)(c) (2023); MONT. CODE ANN. § 45-8-112(1) (2023); ARK. CODE ANN. § 5-74-109(c)(1) (2023); IOWA. CODE § 331.384(1)(a) (2023).

24. *See* COMM. ON COMPREHENSIVE PLAN., NUISANCE ABATEMENT, FLA. S. INTERIM PROJECT REP. 2004-122, 35th Sess. at 2 (Fla. 2003).

25. Mesa v. City of Miami Nuisance Abatement Bd., 673 So. 2d 500, 501 (Fla. 3d Dist. Ct. App. 1996). In Broward County, Florida, the governmental Board designated to adjudicate nuisance abatement complaints is the Consumer Protection Board. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(a) (2023).

26. FLA. S. INTERIM PROJECT REP., 2004-122, at 1.

27. *Mesa*, 673 So. 2d at 502.

28. FLA. STAT. § 893.138(1) (2023); *see* BROWARD COUNTY, FLA., ORDINANCES § 20-176.121 (2023).

> [T]he Board of County Commissioners of Broward County hereby transfers the roles and responsibilities of the Broward County Drug, Prostitution, and Youth and Street Gang-Related Nuisance Abatement Board to the Consumer Protection Board. The Consumer Protection Board shall meet as the Broward County Drug, Prostitution,

statute is to "promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state."[29] The state has allowed this to be done at the local level "in order to provide an equitable, expeditious, effective, and inexpensive method of enforcing ordinances in counties and municipalities under circumstances when a pending or repeated violation continues to exist."[30] A governmental board is allowed "to hear complaints regarding nuisances" and can declare a property to be a public nuisance.[31] In declaring a property to be a public nuisance, the governmental board can enter an order requiring the owner of the property to adopt an appropriate procedure to remedy the nuisance.[32]

In order to do this, the Florida legislature gave counties and municipalities the authority to hold hearings in which they can consider any evidence, including the general reputation of the property, and any evidence the property owner chooses to present.[33] Since counties and municipalities have this power, it is up to the counties and municipalities to draft their own ordinances.[34] Thus, counties and municipalities determine what constitutes a public nuisance within their jurisdictions and what the burden of proof is at a quasi-judicial hearing.[35]

V. BURDEN OF PROOF IN NUISANCE ABATEMENT PROCEEDINGS

Nuisance abatement ordinances establish the burden of proof to be used in public nuisance abatement hearings.[36] In Florida, the burden of proof standard is stated in different terms throughout different jurisdictions.[37] The

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> and Criminal Street Gang-Related Public Nuisance Abatement Board when hearing public nuisance abatement matters . . . .

BROWARD COUNTY, FLA., ORDINANCES § 20-176.121. "The Consumer Protection Board shall have jurisdiction in the unincorporated areas and municipalities which have entered into a public nuisance abatement interlocal agreement with the County." BROWARD COUNTY, FLA., ORDINANCES § 20-176.125 (2023).

29. FLA. STAT. § 893.138(1).
30. *Id.*
31. *Id.* § 893.138(4).
32. *Id.* § 893.138(5).
33. *See id.* § 893.138(4).
34. *See* FLA. STAT. § 893.138(1), (4), (11).
35. *See id.* § 893.138(4); *see e.g.*, BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (2023); MIAMI-DADE COUNTY, FLA., ORDINANCES § 2-98.7(e)(1) (2023); PALM SPRINGS, FLA., ORDINANCES § 46-13(f) (2023).
36. *See e.g.*, BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g); MIAMI-DADE COUNTY, FLA., ORDINANCES § 2-98.7(e)(1); PALM SPRINGS, FLA., ORDINANCES § 46-13(f).
37. *See* Pompano Horse Club v. State *ex rel.* Bryan, 111 So. 801, 807 (Fla. 1927) (en banc); Rollins v. Rollins, 336 So. 3d 1241, 1243 (Fla. 5th Dist. Ct. App. 2022).

burden of proof at a nuisance abatement hearing is usually either "preponderance of the evidence," "clear and convincing," "clear and satisfactory evidence," or "competent, substantial evidence."[38]

A. *What is the Preponderance of the Evidence Standard?*

Preponderance of the evidence is the typical burden of proof used in civil cases.[39] A nuisance abatement proceeding is a civil case because it includes the discretion to impose a civil penalty and the remedies sought, such as injunctive relief, are equitable.[40] "[P]reponderance of the evidence is defined as 'the greater weight of the evidence. . . ,' or evidence that 'more likely than not' tends to prove a certain proposition."[41] The preponderance of evidence standard ensures that the trier of fact will have found it more likely than not that the factual and legal issues have been given due examination.[42]

One advantage of the preponderance of the evidence standard is that it equally allocates the risk of error between litigants.[43] Black's Law Dictionary defines the preponderance of the evidence as "superior evidentiary weight" that, while not sufficient enough to completely free the mind from all reasonable doubt, it is sufficient enough to induce "a fair and impartial mind to one side of the issue rather than the other."[44]

B. *What is the Clear and Convincing Evidence Standard?*

Clear and convincing evidence is an intermediate burden of proof standard that requires the evidence presented to be found credible, the facts that the witnesses testify about to be distinctly remembered, and the testimony to be explicit and precise without the witnesses having any confusion as to the facts at issue.[45] Furthermore, the evidence must weigh enough to produce "in

38. *See Pompano Horse Club*, 111 So. at 807; *Rollins*, 336 So. 3d at 1243.

39. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 875 (Fla. 2014); *Rollins*, 336 So. 3d at 1243.

40. *See Pompano Horse Club*, 111 So. at 809.

41. *See* Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) (per curiam) (citing Am. Tobacco Co. v. State, 679 So. 2d 1249, 1254 (Fla. 4th Dist. Ct. App. 1997)); *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

42. Bourjaily v. United States, 483 U.S. 171, 175 (1987) [hereinafter *Bourjaily II*].

43. *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 872 (citing Grogan v. Garner, 498 U.S. 279, 286 (1991)).

44. *Preponderance of the Evidence*, *supra* note 41.

45. *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 872 (citing *In re* Davey, 645 So. 2d 398, 404 (Fla. 1994) (per curiam)).

the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[46]

The clear and convincing evidence standard is used in numerous cases, such as civil cases involving fraud, involuntary civil commitment proceedings, deportation cases, and forfeitures.[47]

VI. NEW PROVISION IN BROWARD COUNTY'S NUISANCE ABATEMENT ORDINANCE

Broward County's proposed amendment includes a number of changes to the current Nuisance Abatement Ordinance, including enhancing the definition of the term "nuisance."[48] A significant proposed change, however, is an increase in the burden of proof needed at a hearing in order to abate a nuisance on a property.[49] The current burden of proof required at a nuisance abatement hearing is preponderance of the evidence.[50] However, Broward County is considering increasing this burden of proof to clear and convincing evidence.[51] The reason for this change and the increase in the burden of proof is that the proposed ordinance no longer requires a criminal conviction to prove a public nuisance.[52] The removal of the criminal conviction requirement allows for a more effective, timely and efficient

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46. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th Dist. Ct. App 1983). The clear and convincing burden of proof additionally contrasts with beyond a reasonable doubt burden of proof in criminal prosecutions. *Id.* at 799. A nuisance abatement proceeding is not a criminal proceeding although criminal prosecutions may in fact be based on the conduct that also supports a nuisance abatement claim. Pompano Horse Club, Inc. v. State *ex rel.* Bryan, 111 So. 801, 809 (Fla. 1927) (en banc). Unlike in the application of the clear and convincing burden of proof standard, the trier of fact in a criminal prosecution must find that the evidence presented to support a conviction must be of such weight that it leaves no reasonable doubt. *See Slomowitz*, 429 So. 2d at 799.

47. *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 873.

48. *Compare* BROWARD COUNTY, FLA., ORDINANCES § 20-176.122–29 (Consumer Prot. Bd., Proposed Draft 2023), *and* BROWARD COUNTY, FLA., ORDINANCES § 20-176.123(6) (Consumer Prot. Bd., Proposed Draft 2023), *with* BROWARD COUNTY, FLA., ORDINANCES § 20-176.122–29 (2023), *and* BROWARD COUNTY, FLA., ORDINANCES § 20-176.123(1)–(5) (2023) (showing the proposed changes throughout the ordinance).

49. *Compare* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Consumer Prot. Bd., Proposed Draft 2023), *with* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (2023). *See* Meeting Minutes, *supra* note 5, at 2.

50. BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g).

51. Meeting Minutes, *supra* note 5, at 2; BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft).

52. *See* Meeting Minutes, *supra* note 5, at 2 (explaining that a change is being proposed by the Office of the County Attorney to the County Commissioners); BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft).

enforcement of the nuisance abatement ordinance without being so dependent on the vagaries of the criminal justice system with its time delays, plea bargains, and other procedural nuances.[53] When dealing with a public nuisance, it is unacceptable for any neighborhood impacted by nuisance activities to have to wait for the criminal justice system to mete out punishment.[54]

The current version of the Broward County Nuisance Abatement Ordinance stated that the findings of the governmental body in a quasi-judicial hearing should be based on a preponderance of the evidence when the activity that constitutes a public nuisance is supported by a criminal conviction.[55] The burden of proof required in a criminal case is beyond a reasonable doubt.[56] Under the proposed ordinance, Broward County is now considering getting rid of the criminal conviction requirement and making the required burden of proof clear and convincing evidence.[57]

The idea behind this proposal is to make up for the fact that a criminal conviction is no longer required to prove nuisance in violation of the ordinance.[58] The apparent notion is that the alleged violator of the Nuisance Abatement Ordinance is somehow deserving of an increased burden of proof.[59]

This rationale assumes that using the preponderance of the evidence burden of proof undermines the substantive and procedural due process rights of the ordinance violator.[60] If this is so, then the preponderance of evidence burden of proof should not be used in any civil case.[61] This rationale is directly at odds with established precedent in civil cases where the jury is instructed as to the preponderance of the evidence burden of proof, and to the vast array of quasi-judicial governmental entities that make administrative decisions daily.[62] The key to any judicial or quasi-judicial proceeding that is civil in nature is the existence of procedural and substantive due process to ensure that

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53. BROWARD COUNTY, FLA., ORDINANCES ch. 20, art. VII, div. 7 (Consumer Prot. Bd., Proposed Draft 2023).

54. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.122(a) (2023).

55. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g).

56. California *ex rel*. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam).

57. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft).

58. *See id.*

59. *See* Meeting Minutes, *supra* note 5, at 2.

60. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft); City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d Dist. Ct. App. 2008).

61. *See Wellman*, 976 So. 2d at 27.

62. *See* Gross v. Lyons, 763 So. 2d 276, 280 (Fla. 2000) (per curiam); Fitzpatrick v. City of Miami Beach, 328 So. 2d 578, 579 (Fla. 3d Dist. Ct. App. 1976).

a defendant has the opportunity to contest any alleged wrongdoing and is treated fairly.[63] It is necessary to ensure substantive and procedural due process regardless of the burden of proof in a civil case; there is nothing special about the violation of a nuisance abatement ordinance or any other civil ordinance violation that warrants substitution of a higher burden of proof.[64] The Broward County Nuisance Abatement Ordinance—whether the current version or the proposed version—fully protects an alleged violator's procedural and substantive rights by setting up a quasi-judicial process that includes required notice of the proceedings and the ability to present evidence to counter the alleged violation.[65] Further, the remedies available for a Nuisance Abatement Ordinance violation in a quasi-judicial proceeding do not include forfeiting property ownership, revoking a license, or similar kinds of remedies.[66] Rather, the remedies afforded in such a hearing are primarily an injunction against continuing to use the property in a prohibited manner and a civil penalty.[67] Though a governmental board acting in its quasi-judicial capacity may recommend additional enforcement, such as forfeiture of property rights, the remedies available under the ordinance are not a depravation of property rights, but rather a simple mandate of conduct in conformity with the ordinance, which protects neighborhoods and the public health and welfare.[68] This is all Janie wanted in the first place.

VII. FLORIDA CASE LAW

The Florida Supreme Court has previously held that when a court is asked to impose civil fines against a party, the moving party does not need to prove the alleged violations by clear and convincing evidence.[69] In *South*

63. *See* Jennings v. Dade County, 589 So. 2d 1337, 1339, 1340 (Fla. 3d Dist. Ct. App. 1991).

64. *See* Pompano Horse Club v. State *ex rel.* Bryan, 111 So. 801, 809 (Fla. 1927) (en banc); *see, e.g.*, California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93–94 (1981) (per curiam) (holding that the Fourteenth Amendment does not require proof beyond a reasonable doubt in an obscenity case, the decision is left to the states).

65. *Compare* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(c)–(e) (2023), *with* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127 (Proposed Draft) (making no changes to sections (c)–(e)).

66. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127 (j)(2); *Pompano Horse Club*, 111 So. at 807 (quoting Mugler v. Kansas, 123 U.S. 623, 668, 669 (1887)).

67. *See Pompano Horse Club*, 111 So. at 809, 810; BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(h)(3).

68. BROWARD COUNTY, FLA., ORDINANCES § 20-176.128 (2023); *see* City of Hollywood v. Mulligan, 934 So. 2d 1238, 1247 (Fla. 2006).

69. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 875 (Fla. 2014).

Florida Water Management District v. RLI Live Oak LLC,[70] the Court held that the clear and convincing standard—applicable to the imposition of administrative fines in a fraud case—does not extend to the circuit court's award of civil penalties.[71] Furthermore, the Court held that "[w]hen the Legislature statutorily authorizes a state governmental agency to recover a civil penalty in a court of competent jurisdiction but does not specify the agency's burden of proof, the agency is required" to use the preponderance of the evidence standard rather than clear and convincing evidence.[72]

In *City of Miami v. Wellman*,[73] the Court held that preponderance of the evidence was too low of a standard for the City's ordinances regarding motor vehicle impoundment cases and was therefore unconstitutional.[74] In *Wellman*, the Court considered ordinances that the City had enacted, which "empower[ed] the police to seize and impound any motor vehicle that the police had probable cause to believe had been used to facilitate crimes that were a threat to the health, safety, and welfare of the City."[75] Under this ordinance, an officer must first provide written notice of the seizure and impoundment to the owner of the vehicle along with anybody who was "found to be in control of the vehicle at the time of the seizure and impoundment."[76] The motor vehicle owner may then request a preliminary hearing and, at the preliminary hearing, may request a final hearing.[77] At the final hearing, the City must prove the vehicle was being used for illegal purposes by a preponderance of the evidence for the impoundment to stand; otherwise, the vehicle must be returned to the owner.[78]

The Court held that the standard used by the ordinance in motor vehicle impoundment hearings should be "no less than clear and convincing evidence."[79] The Court referred to the Florida Supreme Court's previous assertion that the Forfeiture Act forbids the government from taking an individual's property in forfeiture proceedings unless it proves that the property was being used to commit illegal activity by no less than clear and

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70. 139 So. 3d 869 (Fla. 2014).
71. *Id.* at 874.
72. *Id.* at 875 (internal quotation marks omitted).
73. 976 So. 2d 22 (Fla. 3d. Dist. Ct. App. 2008).
74. *See id.* at 27.
75. *Id.* at 24.
76. MIAMI-DADE COUNTY, FLA., ORDINANCES § 42-121(b)(2) (2008); *Wellman*, 976 So. 2d at 24.
77. MIAMI-DADE COUNTY, FLA., ORDINANCES § 42-121(b)(2)(a)–(c); *Wellman*, 976 So. 2d at 24.
78. MIAMI-DADE COUNTY, FLA., ORDINANCES § 42-122(a)(2) (2008); *Wellman*, 976 So. 2d at 24.
79. *Wellman*, 976 So. 2d at 27.

convincing evidence.[80] Ultimately, the Third District Court of Appeal ruled that while an impoundment is not a forfeiture, it still is considered a deprivation of property and is therefore analogous to a forfeiture, so ordering an impoundment of a motor vehicle along with the imposition of a fine, should call for a stricter standard.[81]

However, section 127(h)(7) of the proposed Broward County Nuisance Abatement Ordinance states that the governmental board sitting as a quasi-judicial entity may only recommend foreclosure, not order it, in a nuisance abatement proceeding.[82] Further, Miami-Dade County, where *Wellman* was heard, utilizes the preponderance of the evidence standard in its nuisance abatement proceedings.[83] As such, the holding in *Wellman* does not apply.[84] If the governmental board could order foreclosure, then the Supreme Court's interpretation of the Forfeiture Act would apply.[85] However, since the governmental board in a nuisance abatement proceeding can only recommend a forfeiture action to the county attorney, the clear and convincing burden of proof would not apply to the governmental board enforcing the nuisance abatement ordinance.[86] Only if the county attorney chooses to go forward with a forfeiture action—an action that is altogether different from a nuisance abatement proceeding—would the burden of proof for the county be clear and convincing evidence.[87] Therefore, in a nuisance abatement proceeding where forfeiture is not a remedy, the preponderance of the evidence burden is proper and should apply.[88]

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80. *Id.* (quoting Dep't of Law Enforcement v. Real Property, 588 So. 2d 957, 968 (Fla. 1991).

81. *Id.*

82. BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(h)(7) (Consumer Prot. Bd., Proposed Draft 2023).

83. MIAMI-DADE COUNTY, FLA., ORDINANCES §2-98.7(e)(1) (2023).

84. *See Wellman*, 976 So. 2d at 27. The Court held that the impoundment of a vehicle is analogous to a forfeiture of property under the Forfeiture Act. *See id.* The Act forbids the government from taking an individual's property in forfeiture proceedings unless it is proven that the property was being used to commit illegal activity by no less than clear and convincing evidence. *See id. Wellman* is a Miami-Dade County case. *See id.* at 22. Miami-Dade County utilizes the preponderance of the evidence standard in its nuisance abatement proceedings. MIAMI-DADE COUNTY, FLA., ORDINANCES § 2-98.7(e)(1). Broward County may only recommend but not order foreclosure of property as a remedy to a public nuisance and as such an available remedy is not forfeiture of the property. *See* BROWARD COUNTY., FLA., ORDINANCES § 20-176.127(j)(3).

85. *See Wellman*, 976 So. 2d at 27; MIAMI-DADE COUNTY, FLA. ORDINANCES § 2-98.7(e)(1); BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(j)(3).

86. *See Wellman*, 976 So. 2d at 27; BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(j)(3).

87. *See Wellman*, 976 So. 2d at 27.

88. *See id.*

Wellman cites *City of Hollywood v. Mulligan*,[89] in which the Florida Supreme Court held that a vehicle impoundment was not considered a forfeiture.[90] In that case, the City enacted an ordinance allowing the seizure or impoundment of vehicles in which police had probable cause to believe the vehicle was being used in the commission of prostitution.[91] The Court held that the City's ordinance did not conflict with the Contraband Forfeiture Act.[92] As a result, the ordinance, which utilized a preponderance of the evidence standard, was not invalid because only municipal ordinances that conflicted with any controlling provisions of a statute would be invalidated.[93]

The Court's reasoning behind this holding was that the seizure and impoundment of the vehicle were only ever temporary; the vehicle owner would only need to pay a fee in exchange for the vehicle.[94] If that fee was not paid, the vehicle would be disposed of as lost or abandoned property.[95]

As a result, the Court held that this temporary deprivation did not amount to a forfeiture.[96] The Supreme Court's holding in *Mulligan* seems to hinge on the length of time the owner is deprived of property.[97] If we consider the Broward County Nuisance Abatement ordinance in light of this holding, the burden of proof should be preponderance of evidence because the governmental body conducting the quasi-judicial hearing cannot order any deprivation of property.[98]

In *Seminole Entertainment, Inc. v. City of Casselberry*,[99] the facts involved an adult entertainment establishment that was served "with a notice of intent to revoke its license [by the city due to] the sale and use of controlled substances, prostitution, and other [illegal] sexual activities [occurring] on its premises."[100] In that case, the city's administrative board chose to use the clear and convincing burden of proof as opposed to preponderance of the evidence.[101] However, this was a license-revocation proceeding.[102] The Court

89. 934 So. 2d 1238 (Fla. 2006).
90. *Wellman*, 976 So. 2d at 27 (citing *Mulligan*, 934 So. 2d at 1247).
91. *See Mulligan*, 934 So. 2d at 1242.
92. *See id.* at 1240, 1248.
93. *See id.* at 1242, 1246 (quoting Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993)).
94. *Id.* at 1248.
95. *Id.*
96. *Mulligan*, 934 So. 2d at 1248.
97. *See id.*
98. *See id.*; BROWARD COUNTY, FLA., ORDINANCES §§ 20-176.127(g), 20-176.127(h)(2)–(3) (2023).
99. 811 So. 2d 693 (Fla. 5th Dist. Ct. App. 2001).
100. *Id.* at 695.
101. *Id.* at 695 n.3.
102. *Id.* at 694.

held that using a quasi-judicial governmental board hearing process was proper as long as the procedures preserved substantive and procedural due process.[103] The Court further stated that "[a] licensee has a property right in [the] renewal of a business license of which he cannot be deprived absent the requisites of due process."[104] Unfortunately, the case does not provide any reason for using the clear and convincing evidence as the standard of proof as opposed to preponderance of the evidence.[105] Nevertheless, the holding in the case is consistent with other court holdings that the clear and convincing burden of proof applies when the remedy is the forfeiture or deprivation of property rights.[106]

While *Seminole Entertainment, Inc.* provides no reasoning for using the clear and convincing evidence burden of proof for a license revocation hearing,[107] the Supreme Court does provide such reasoning in *Ferris v. Turlington*.[108] In that case, the Court held that "the revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence," and thus, the appropriate burden of proof is clear and convincing evidence.[109] The Court ruled that the revocation of a professional license amounts to a forfeiture and a loss of livelihood, so a stricter burden of proof is essential to "protect the rights and interests of the accused."[110]

Under the Broward County Nuisance Abatement Ordinance, the governmental body entrusted with presiding in a nuisance abatement proceeding has no power to order a deprivation of any property right; thus, there is neither a legal requirement nor a necessity for Broward County to require the clear and convincing burden of proof in quasi-judicial nuisance abatement proceedings.[111]

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103. *See id.* at 696.

104. *Seminole Ent., Inc.*, 811 So. 2d at 696 n.4.

105. *Id.* at 695 n.3.

106. *See id.* at 695 n.3, 696 n.4; City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d Dist. Ct. App. 2008).

107. *See Seminole Ent., Inc.*, 811 So. 2d at 695 n.3.

108. *See* 510 So. 2d 292, 294 (Fla. 1987).

109. *Id.*

110. *Id.* at 295.

111. *See* BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(d) (2023); S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 875 (Fla. 2014); City of Hollywood v. Mulligan, 934 So. 2d 1238, 1242 (Fla. 2006).

VIII. THE BURDEN OF PROOF FOR NUISANCE ABATEMENT HEARINGS SHOULD BE PREPONDERANCE OF THE EVIDENCE.

Many courts across the country utilize the preponderance of the evidence standard in nuisance abatement cases.[112] In fact, some state supreme courts have held that the standard required in nuisance abatement hearings is preponderance of the evidence.[113]

The Supreme Court of the United States even stated that "the 'clear and convincing' standard [is] reserved to protect particularly important interests in a limited number of civil cases."[114] The Supreme Court cited a California case in which the court held that the proper burden of proof in a nuisance abatement action was the preponderance of the evidence standard under section 25604 of the California Business and Professional Code.[115] The Court was careful to specify in which instances "clear and convincing" was the appropriate burden of proof, noting that only in particular civil cases—not including nuisance abatement proceedings—was "clear and convincing" required.[116]

In *South Florida Water Management District*, the Supreme Court of Florida stated that preponderance of the evidence is the traditional applicable standard of proof in civil cases.[117] The Court cited specific instances in which the clear and convincing evidence standard was appropriate: allegations of fraud, deportation cases, denaturalization cases, involuntary civil commitment proceedings, revocation of professional licenses, forfeitures, penalties for

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112. *See e.g.*, People v. Frangadakis, 7 Cal. Rptr. 776, 782 (Dist. Ct. App. 1960); Cnty. Comm'n v. Nat'l Grid NE Holdings 2 LLC, No. 2:21-cv-00307, slip op. at 3 (S.D. W. Va. Sept. 21, 2022); United States v. 1923 Rhode Island Ave., 522 F. Supp. 2d 204, 205, 208 (D.D.C. 2007); People v. Lot 23, 735 P.2d 184, 188 (Colo. 1987) (en banc); State *ex rel.* Lamey v. Young, 234 P. 248, 248, 249 (Mont. 1925); Gregg v. People, 176 P. 483, 484, 485 (Colo. 1918); Durfey v. Thalheimer, 109 S.W. 519, 523 (Ark. 1908); Dunlop v. Daigle, 444 A.2d 519, 520 (N.H. 1982) (per curiam); State *ex rel.* Dist. Att'y v. White, 173 So. 456, 457 (Miss. 1937); State *ex rel.* Hanrahan v. Miller, 98 N.W.2d 859, 860 (Iowa 1959).

113. *Lot 23*, 735 P.2d at 188; *Young*, 234 P. at 249; *Gregg*, 176 P. at 485; *Durfey*, 109 S.W. at 523; *Dunlop*, 444 A.2d at 520; *White*, 173 So. at 457; *Miller*, 98 N.W.2d at 860; Rachlin v. Drath, 132 N.W.2d 581, 582 (Wis. 1965); Vandergriff v. State *ex rel.* Jernigan, 396 S.W.2d 818, 819, 821 (Ark. 1965); Rental Prop. Owners Ass'n v. City of Grand Rapids, 566 N.W.2d 514, 516 (Mich. 1997).

114. California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981) (per curiam).

115. *Id.* at 96 n.3.

116. *Id.* at 93.

117. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

public officers, and campaign finance violations.[118] Furthermore, the Court cited its opinion in *Department of Banking & Finance v. Osborne Stern & Co.*,[119] in which the Court held that clear and convincing evidence was not the requisite burden of proof in an administrative proceeding in which an administrative fine could be assessed for securities violations under Chapter 517, Florida Statutes.[120] Ultimately, the Court held that,

> When the Legislature statutorily authorizes a state governmental agency to recover a civil penalty in a court of competent jurisdiction but does not specify the agency's burden of proof, the agency is not required . . . to prove the alleged violation by clear and convincing evidence, but rather by a preponderance of the evidence.[121]

In addition to this applicable case law, other nuisance abatement ordinances across Florida utilize a preponderance of the evidence as the standard of proof in nuisance abatement proceedings.[122]

IX. CONCLUSION

Timely and effective enforcement of nuisance abatement state statutes and local government ordinances serves at least two purposes.[123] First, the timely and effective enforcement of the ordinance will protect the health and welfare of the affected communities.[124] This is the proper role of government.[125] Second, the timely and effective enforcement of a nuisance abatement law returns the quiet enjoyment of their property to the property owners.[126] This is what Janie, her neighbors, and all neighborhoods want and

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118. *Id.* at 873.

119. 670 So. 2d 932 (Fla. 1996) (per curiam).

120. *Id.* at 935; *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 871, 873.

121. *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 875 (internal quotation marks omitted).

122. PALM SPRINGS, FLA., ORDINANCES § 46-13(f) (2023); LAKE WORTH BEACH, FLA., ORDINANCES § 2-74(f) (2023); LEON COUNTY, FLA., ORDINANCES § 14-51(c)(3) (2023); PALM BAY, FLA., ORDINANCES § 93.26(D)(2) (2023); POMPANO BEACH, FLA., ORDINANCES § 33.130(D)(3)(b) (2023); MIAMI-DADE COUNTY, FLA., ORDINANCES § 2-98.7(e)(1) (2023).

123. *See e.g.*, BROWARD COUNTY, FLA., ORDINANCES § 20-176.122(a) (2023); PALM SPRINGS FLA., ORDINANCES § 46-10(a) (2023); LAKE WORTH BEACH, FLA., ORDINANCES § 2-71(a) (2023).

124. BROWARD COUNTY, FLA., ORDINANCES § 20-176.122(a) (Consumer Prot. Bd., Proposed Draft 2023).

125. *See* FLA. STAT. § 893.138(1) (2023).

126. *See id.*; Knowles v. Cent. Allapattae Props., Inc., 198 So. 819, 822 (Fla. 1940) (citing Henderson v. Sullivan, 159 F. 46, 49 (6th Cir. 1908)); POMPANO BEACH, FLA. ORDINANCES § 33.130(D)(1).

rightfully expect from government enforcement. To accomplish these purposes, such nuisance abatement ordinances need to be crafted so that the ordinance complies with applicable legal doctrine and precedent and does not erect artificial barriers to enforcement.[127] The use of the clear and convincing burden of proof in the quasi-judicial process to enforce the proposed Broward County Nuisance Abatement Ordinance would differ from established legal doctrine and precedent and would create an unnecessary impediment to returning neighborhoods to the peace and quiet they deserve.[128] The use of the preponderance of the evidence burden of proof in the proposed Broward County Nuisance Abatement Ordinance enforcement actions is not only in compliance with legal doctrine and precedent, but also fairly restores the quiet enjoyment of the affected property.[129]

127. *See* California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92–93 (1981) (per curiam); S. Fla. Water. Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 874 (Fla. 2014).

128. *See S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 871, 873, 874 (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) (per curiam)); *Knowles*, 198 So. at 822; BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Consumer Prot. Bd., Proposed Draft 2023).

129. *See Cooper*, 454 U.S. at 93; *S. Fla. Water Mgmt. Dist.*, 139 So. 3d at 872; *Knowles*, 198 So. at 822; FLA. STAT. § 893.138(1); BROWARD COUNTY, FLA., ORDINANCES § 20-176.127(g) (Proposed Draft).

FLORIDA DERIVATIVE LITIGATION IN THE CONTEXT OF CONDOMINIUM ASSOCIATIONS, AND THE COURT'S DEFERENCE TO THE BEST INTERESTS OF THE CORPORATION

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I. INTRODUCTION

As succinctly stated by the Florida Supreme Court,

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of *the majority* of the unit owners since they are living in such close proximity and using facilities in common, *each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property*. Condominium unit owners comprise a little *democratic sub society* of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.[1]

In Florida, Chapter 617, Florida Statutes, governs not-for-profit corporations, which include condominium associations.[2] Unit owners within condominium associations are members and shareholders of their not-for-profit corporation by virtue of their ownership of a unit within the condominium association, and can therefore bring derivative lawsuits in the right of the condominium association.[3] The interplay of community associations, when coupled with the intricate landscape of shareholder derivative actions and corporate governance, often gives rise to complex disputes, as exemplified by the case of *Ezer v. Holdack*.[4] In this case, a condominium association member and shareholder tested the boundaries of Florida's corporate statutes, creating a profound impact on the deference given to internal investigative committees appointed by independent board members of a condominium association pursuant to section 617.07401 of the Florida Statutes.[5] This Comment discusses the multifaceted proceedings of *Ezer*, offering an in-depth analysis of the pivotal role of independent investigation committees appointed by independent board

1. White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 350 (Fla. 1979) (emphasis added).

2. FLA. STAT. § 617.01401 (2023). Chapter 617 Condominiums are also governed by Chapter 718, Florida Statutes. FLA. STAT. § 718.102 (2023). Chapter 617 likewise governs Florida homeowners' associations, which are also governed by Chapter 720, Florida Statutes. FLA. STAT. § 617.01401(13); FLA. STAT. § 720.302(1) (2023). To that end, for the purposes of this Comment, all law and analysis applicable to Chapter 617 Condominiums, is likewise applicable to Chapter 720 Homeowners' Associations. FLA. STAT. § 617.01401(13); FLA. STAT. § 720.302(1).

3. *See* FLA. STAT. § 617.07401(1) (2023).

4. *See* 358 So. 3d 429, 430 (Fla. 4th Dist. Ct. App. 2023).

5. *See id.*; FLA. STAT. § 617.07401(3)(b).

members of corporations pursuant to Chapter 617, and their impact on non-profit corporate governance in the State of Florida.[6] Specifically, this Comment seeks to shed light on the evolving legal landscape surrounding shareholder derivative actions in the context of condominium associations, the ramifications on corporate decision-making, and overall democracy within the democratic subsociety of condominiums, by focusing on what is required by the plain language of Chapter 617, while viewing same in conjunction with Delaware law.[7]

II. FACTS OF CASE

On or about October 12, 2020, pursuant to Chapters 617 and 718 of the Florida Statutes, Tara Ezer ("Ezer"), a member and shareholder of the Hollywood Station Condominium Association, Inc. by virtue of her ownership of a unit within the condominium, initiated a shareholder derivative action in the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County on behalf of Hollywood Station Condominium Association, Inc. (the "Association"), initially naming three former and three current members of the Association's board of directors (i.e., six individual directors in total) ("Board Member Defendants"), and the Association, as defendants.[8] Two days later, on October 14, 2020, Ezer filed a Verified Amended Complaint.[9] The Association, a Florida not-for-profit corporation, operates as a Florida condominium association within the meaning of section 718.103(3) of the Florida Statutes.[10] The lawsuit stemmed

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6. *See* discussion *infra* Part V.

7. *See* discussion *infra* Part V.

8. *See* Complaint at 1–2, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Oct. 12, 2020) [hereinafter *Ezer* Complaint]. "This is a shareholder derivative action brought by TARA EZER, as a member of the Association." *Id.* at 2. "This action is brought pursuant to Fla. Stat. § 617.0740 . . . ." *Id.* "This action is further brought pursuant to Fla. Stat. § 718.303 . . . ." *Id.* Section 617.07401(2) provides:

> A complaint in a proceeding brought in the right of a domestic or foreign corporation must be verified and alleged with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for at least 90 days after the date of the first demand unless, before the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

FLA. STAT. § 617.07401(2) (2023). However, Ezer claimed that the Association would suffer irreparable injury without action within 90 days. *See Ezer* Complaint, *supra* note 8, at 2.

9. Verified Amended Complaint at 1, Ezer v. Holdack, No. CACE-20-016861, 2020 WL 13730022, at *1 (Fla. 17th Cir. Ct. Oct. 14, 2020) [hereinafter *Ezer* Amended Complaint].

10. FLA. STAT. § 718.103(3) (2023); *Hollywood Station Condominium Association, Inc.*, SUNBIZ.ORG,

from a disagreement between Ezer and the Association based on purported violations of the Association's Declaration of Condominium; namely, allegations relating to "certain material alterations, modifications, and improvements to the Common Elements at the Condominium Property . . . ."[11] Specifically, Ezer alleged that,

> a. Defendants may have failed to obtain the approval of the majority of *all* unit owners to make material alterations and substantial additions to the Common Elements, and fraudulently induced Unit Owners to vote for same;
> b. Defendants . . . failed to obtain the approval of the majority of all unit owners at [a] meeting to spend in excess of $100,000.000 in the aggregate in any calendar for additions, alterations and improvements to the Common Elements, and entered into a construction contract with a contractor in the amount of $434,098.26;
> c. Defendants . . . procured a $800,000.00 loan from a bank for the modifications and improvements without obtaining unit owner approval of the loan.[12]

Ezer requested equitable relief by way of a declaratory judgment, an injunction and appointment of a receiver (Counts I–III).[13] In response to Ezer bringing the derivative action on behalf of the Association, the independent board members of the Association, who were not named as defendants in the *Ezer* lawsuit, decided to pursue a reasonable investigation of the allegations in Ezer's complaint, as authorized pursuant to section 617.07401(3)(b) of the Florida Statutes, to determine whether maintenance of the derivative suit was in the best interests of the corporation, i.e., the Association.[14]

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http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=HOLLYWOODSTATIONCONDOMINIUMASS%20N040000059530&aggregateId=domnp-n04000005953-6bfaff4e-0e6f-4d9d-aff7-7cccffb3dddf&searchTerm=hollywood%20station%20condominium&listNameOrder=HOLLYWOODSTATIONCONDOMINIUMASS%20N040000059530 (last visited Nov. 18, 2023); *see* Defendants, Jacqueline Holdack, Dan Tubridy, Victor Rocha, Patricia Gutierrez, Maria Paula Diaz and Frank Colon's Motion to Dismiss Plaintiff's Second Amended Complaint with Incorporated Memorandum of Law at Ex. D, Ezer v. Holdack, No. CACE-20-016861, 2021 WL 11108795 (Fla. 17th Cir. Ct. May 3, 2021) [*Ezer* Board Members' Motion to Dismiss].

11. *Ezer* Amended Complaint, *supra* note 9 at 2.

12. *Id.* at 2–3. Notably, Plaintiff excluded two individual board member defendants from her allegations regarding approval to spend in excess of $100,000.00 and procuring an $800,000.00 loan. *Id.* at 3.

13. *Id.* at 8–13.

14. Meeting Minutes, Bd. of Dirs., Hollywood Station Condo. Ass'n (Dec. 7, 2020) (on file with author) [hereinafter Dec. 7, 2020 Mins.]; FLA. STAT. § 617.07401(3)(b) (2023).

To that end, on December 5, 2020, in accordance with Chapter 718, Florida Statutes, notice was given that a meeting of the board of directors of the Association would be held on Monday, December 7, 2020:

> [F]or the purpose of selecting and appointing a Committee consisting of two or more independent Directors to make a reasonable investigation as to whether the maintenance of a derivative suit filed by a Unit Owner of the Association [namely, Ezer] on October 12, 2020, is in the best interest of the Association, all in accordance with Florida Statute 617.07401 (3)(b).[15]

On December 7, 2020, pursuant to section 617.07401(3)(b) of the Florida Statutes, a majority of independent directors, *who were not named as defendants in the Ezer lawsuit*, voted to appoint a committee consisting of two independent directors to: (1) "make a reasonable investigation of the allegations in the derivative lawsuit;" (2) "to make a good faith determination whether said lawsuit is in the best interest of the . . . Association;" and (3) "prepare a detailed report for submission to the Court concerning the Committee's findings related to its investigation and its determination as to whether said lawsuit is in the best interest of the . . . Association."[16] Two board members, *who were not named defendants in the Ezer lawsuit*, were appointed to the independent investigation committee.[17]

Pursuant to section 617.07401(2) of the Florida Statutes, "[i]f the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed."[18] Consistent therewith, on December 14, 2020, the Association and Board Member Defendants filed a Motion to Stay Derivative Proceedings, requesting the action be stayed for all purposes for sixty days pending the committee's investigation of Ezer's claims.[19] On January 6, 2021, Ezer opposed the Motion to Stay, arguing, *inter alia*, that Defendants delayed in appointing a committee, and that the committee could not be considered independent because

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15. Memorandum from Victor Matos, Prop. Manager, Hollywood Station Condo. Ass'n Inc. on Notice of a Meeting of the Board of Directors (Dec. 5, 2020) (on file with author); FLA. STAT. § 617.07401(3)(b).

16. Dec. 7, 2020 Mins., *supra* note 14; *see* FLA. STAT. § 617.07401(3)(b); *see also* Defendant, Hollywood Station Condominium Association, Inc.'s Motion to Stay Derivative Proceedings at 3, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Dec. 14, 2020) [hereinafter *Ezer* Defendant's Motion to Stay].

17. *See* Dec. 7, 2020 Mins., *supra* note 14; FLA. STAT. § 617.07401(3)(b); *Ezer* Defendant's Motion to Stay, *supra* note 16 at 3.

18. FLA. STAT. § 617.07401(2).

19. *Ezer* Defendant's Motion to Stay, *supra* note 16, at 4.

it consisted of directors that have liability due to their participation in the actions giving rise to Ezer's claims.[20] Notably, however, along with filing the Response in Opposition to the Motion to Stay, Ezer filed a Motion for Leave to Amend Complaint.[21] Specifically, pending the investigation by the appointed committee, which consisted of two board members who, again, *were not named defendants* in Ezer's derivative lawsuit and were appointed pursuant to section 617.07401(3) of the Florida Statutes, Ezer moved for leave to amend her Complaint to include, *inter alia*, the two committee members as defendants to the lawsuit, and an additional claim of breach of fiduciary duties; a litigation tactic which Defendants would later argue was nothing but an ill-founded attempt to try to destroy the independence of the committee.[22]

One week after Plaintiff filed her Motion for Leave to Amend, on January 13, 2021, the Association filed a Notice of Filing in Further Support of Motion to Stay Derivative Proceedings.[23] Attached to the Association's filing was the notice of the December 7, 2020 meeting, along with verified declarations of the independent committee members conducting the investigation into Ezer's claims, attesting to their independence.[24] In response, on January 29, 2021, Ezer filed an Amended Motion for Leave to Amend, again attempting to add, *inter alia*, the committee members as defendants in the action, and setting forth a claim for breach of fiduciary duties.[25] This time, Ezer also proposed setting forth claims for civil conspiracy and aiding and abetting.[26]

Since Ezer's action was a shareholder derivative action and the amount in controversy exceeded $150,000.00, the Association and Board Member

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20. *See* Plaintiff's Response in Opposition to Defendants' Motion to Stay at 6, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 6, 2021).

21. *Id.*; Motion for Leave to Amend Complaint at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 6, 2021) [hereinafter *Ezer* Motion to Amend Complaint].

22. *See Ezer* Motion to Amend Complaint, *supra* note 21, at 2, 10; Defendant, Hollywood Station Condominium Association, Inc.'s Motion to Dismiss Verified Second Amended Complaint Pursuant to Section 617.07401, Florida Statutes at 6, Ezer v. Holdack, No. CACE-20-016861, 2021 WL 11108793, at *3–4 (Fla. 17th Cir. Ct. May 3, 2021) [hereinafter *Ezer* Association's Motion to Dismiss Second Amended Complaint].

23. Defendant, Hollywood Station Condominium Association, Inc.'s Notice of Filing in Further Support of Motion to Stay Derivative Proceeding at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 13, 2021).

24. *Id.* at Notice to All Association Members of a Meeting of the Board of Directors, Verified Declaration of George Partain, Verified Declaration of Scott Granger.

25. Amended Motion for Leave to Amend Complaint, at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Jan. 29, 2021); Verified Second Amended Complaint at 15, Ezer v. Holdack, No. CACE-20-016861, (Fla. 17th Cir. Ct. Mar. 17, 2021) [hereinafter *Ezer* Second Amended Complaint].

26. *Ezer* Second Amended Complaint, *supra* note 25, at 16, 17.

Defendants filed and succeeded in a motion seeking transfer to the complex litigation division—a division presided over by Chief Judge Jack Tuter.[27]

On January 26, 2021, in accordance with section 718.112 of the Florida Statutes, all of the members of the Association were provided notice of a special meeting, informing that a telephonic meeting would be held on February 11, 2021.[28] The notice of the special meeting also specified that "[t]he purpose of the Special Meeting is for the Members to consider and vote on the issue of whether continuation of the derivative lawsuit brought by Tara Ezer [is] in [the] best interest of the Association."[29] Enclosed with the notice was a letter to the unit owners, and the factual findings of the Committee.[30] The letter informed the unit owners that the detailed findings of the Committee (i.e., consisting of directors who were appointed as independent directors to determine whether a derivative lawsuit brought by Ezer was in the best interests of the Association) were enclosed with the notice, and requested that all unit owners review the committee's findings carefully and to notify the Committee of any relevant facts that were not indicated in the Committee's findings by Friday, February 5, 2021.[31] The letter further provided an email address for unit owners to provide any information by email to the independent committee prior to the meeting.[32] Google Drive links to both the Plaintiff's Operative Verified Amended Complaint and Proposed Verified Second Amended Complaint were included within the letter to the Association membership to review.[33] Notably, the Verified Second Amended Complaint that was circulated to the Association membership included the independent Committee members as named defendants to the lawsuit.[34] Reminder emails regarding the February 2021 special meeting were provided to the Association's members on February 4, 2021, February 5, 2021, and February 9, 2021.[35]

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27. Motion Requesting Transfer of Business Case or Tort Case from General Civil Division to a Complex Litigation Division at 1, 2, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Feb. 12, 2021); Order Transferring Case to Division 07 at 1, Ezer v. Holdack No. CACE20-016861 (Fla. 17th Cir. Ct. Feb. 25, 2021).

28. Letter from Victor Matos, Prop. Manager, Hollywood Station Condo. Ass'n, to Unit Owners (Jan. 26, 2021) (on file with author).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Letter from Victor Matos to Unit Owners, *supra* note 28.

34. *Id.*; *Ezer* Second Amended Complaint, *supra* note 25, at 1.

35. *Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8.

At the February 11, 2021 meeting, 101 members were present by electronic vote or by written proxy.[36] The 101 members present exceeded the one-third requirement of the Association's 224 unit owners under the Association's governing documents to constitute a quorum; thereby establishing a quorum for the meeting.[37] At the meeting, a vote was taken on whether the continuation of the instant derivative lawsuit was in the best interests of the Association.[38] Out of the 101 members present at the meeting, ninety-three members voted that the continuation of Ezer's derivative lawsuit was *not* in the best interests of the Association.[39] In other words, by an overwhelming majority (about ninety-two percent of the members present), the Association's membership determined that Ezer's derivative lawsuit *was not* in the best interests of the Association.[40] Thereafter, the Committee prepared a detailed report outlining Plaintiff's claims, detailing their investigation the facts surrounding those claims, and ultimately concluding that the Board of Directors acted in good faith and in the best interests of the Association's unit owners while carrying out their duties with respect to Ezer's allegations.[41]

On March 17, 2021, over the Association's objection, the trial court granted Ezer's Motion for Leave to Amend, deeming the Amended Complaint as filed on March 17, 2021.[42] After consideration of the parties' respective filings and after hearing argument of counsel, however, the Court abated service of process on the defendants Ezer sought to add to the lawsuit (i.e., the committee members) until resolution of any challenges to the newly amended Complaint.[43] Thereafter, Ezer filed a Motion to Bifurcate and Motion for Partial Summary Judgment; the Defendant Board Members filed their own Motion to Dismiss; and the Association filed a Motion to Dismiss Verified Second Amended Complaint Pursuant to section 617.07401 of the Florida Statutes.[44] The Association's

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36. Meeting Minutes, Bd. of Dirs., Hollywood Station Condo. Ass'n (Feb. 11, 2021) (on file with author) [hereinafter Feb. 11, 2021 Mins.]). "[I]n order for a Special Meeting to take place, presence in person, or by limited proxy, of persons entitled to cast 33 1/3% of votes is necessary to establish a quorum in order for business to be conducted." *Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8.

37. Feb. 11, 2021 Mins. *supra* note 36*; Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8.

38. Feb. 11, 2021 Mins. *supra* note 36.

39. *Id.*

40. *See id.*

41. Independent Directors Committee's Fla. Stat. 617.07401(3)(b) Report, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Feb. 12, 2021).

42. Order Granting Motion to Amend Complaint at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Mar. 17, 2021) (No. 20-16861).

43. *Id.*

44. Plaintiff's Motion to Bifurcate Plaintiff's Declaratory Judgment Claim For Resolution Prior to the Remaining Claims at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th

Motion to Dismiss the Second Amended Complaint, pursuant to section 617.07401 of the Florida Statues, is the focus of this Comment.[45]

In its Motion, the Association moved to dismiss the action, in it is entirety, on the basis that, pursuant to section 617.07401(3) of the Florida Statutes, an independent Committee "made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of . . . [the] derivative [suit]. . . is not in the best interests of the Association."[46] In support of its position, the Association argued that the Committee always was, and remained, independent, and made a good faith determination after conducting a reasonable investigation that the maintenance of Ezer's derivative suit was not in the best interests of the corporation.[47] The Association incorporated the final written report of the Committee within its Motion to Dismiss.[48]

Ezer opposed the Association's position and continued to question the Committee's independence, good faith, and reasonableness.[49] The Association filed a reply to Ezer's response, arguing, *inter alia*, that the Committee's investigation was reasonable, conducted in good faith, and that the Committee members were independent.[50] The Association further relied on the business judgment rule, and moreover, argued that Ezer's position was motivated by self-interest and did not adequately represent the interests of the majority, let alone all, of the members of the Association.[51]

Cir. Ct. Mar. 29, 2021); Plaintiff's Motion for Partial Summary Judgment on Count I of Plaintiff's Second Amended Complaint For Declaratory Judgment at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Mar. 29, 2021); *Ezer* Board Members' Motion to Dismiss, *supra* note 10, at 1; *Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 1. The board of directors and the Association separately moved to dismiss Ezer's Second Amended Complaint. *Id.*

45. *See* discussion *infra* Parts IV–VI.

46. *Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 1; *see also* FLA. STAT. § 617.07401(3)(b) (2023).

47. *Ezer* Association's Motion to Dismiss Second Amended Complaint, *supra* note 22, at 8, 9.

48. *Id.* at Ex. "G".

49. Plaintiff's Verified Response in Opposition to Defendants' Motion to Dismiss Second Amended Complaint at 17, Ezer v. Holdback, No. CACE-20-016861 (Fla. 17th Cir. Ct. May 14, 2021) [hereinafter *Ezer* Plaintiff's Response in Opposition to Motion to Dismiss].

50. Nominal Defendant, Hollywood Station Condominium Association, Inc.'s Reply to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint, with Incorporated Memorandum of Law at 8, Ezer v. Holdback , No. CACE-20-016861 (Fla. 17th Cir. Ct. Aug. 11, 2021) [hereinafter *Ezer* Association's Reply to Plaintiff's Response].

51. *Id.* at 25, 28.

On August 12, 2021, a special set hearing was held on the Association's Motion to Dismiss, during which the court heard argument of counsel.[52] During the hearing on the Association's Motion to Dismiss, the trial court acknowledged that there were three things the court needed to determine; namely, whether the members of the Committee were: 1) independent; 2) acting in good faith; and 3) had a reasonable and objective basis for the Committee's report.[53] At the conclusion of the hearing, the court requested both parties submit proposed orders on the Association's Motion to Dismiss and requested that counsel for the Association provide the court a copy of the transcript.[54]

III. TRIAL COURT'S DECISION

Ultimately, the trial court entered a detailed twelve page order granting the Association's Motion to Dismiss, and dismissing Ezer's derivative lawsuit pursuant to section 617.07401(3) of the Florida Statutes.[55] Within the Order, the court discussed section 617.07401(3) in detail.[56] First, the court found that while Ezer argued that the Association's motion was "devoid of any evidence that refutes that the Defendants committed material violations of the Declaration, . . . this *is not* to be considered under Chapter 617."[57] Next, noting that

> [t]he corporation [i.e., the Association in this case] has the burden of proving the independence and good faith of the group making the determination and reasonableness of the investigation, *not* the burden of 'refuting' [Ezer's] allegations. . . . Accordingly, this Court finds that [Ezer's] arguments regarding the merits of this case such as violations of the declaration are of no consequence in determining the dismissal of this action under section 617.07401, Florida Statutes.[58]

The court further stated that "[t]he investigative Committee was appropriately appointed pursuant to section 617.07401(3)(b)" and found that, in compliance with the statute,

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52. *See* Transcript of Motion to Dismiss Hearing at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Aug. 13, 2021) [hereinafter *Ezer* Transcript of Motion to Dismiss].

53. *Id.* at 3.

54. *Id.* at 49.

55. Final Order Dismissing Plaintiff's Derivative Lawsuit Pursuant to Section 617.070401(3), Florida Statutes, at 12, Ezer v. Holdack, No. CACE-20-016861 (07), 2021 WL 11486153, at *6 (Fla. 17th Cir. Ct. Nov. 24, 2021) [hereinafter *Ezer* Final Order Dismissing Derivative Suit].

56. *Id.* at 2–3.

57. *Id.* at 6 (emphasis added).

58. *Id.* at 6–7.

> a majority of independent Directors, who *were not* named Defendants in this case voted to appoint a committee consisting of two independent directors to: (1) conduct a reasonable investigation of the allegations in this derivative lawsuit; (2) make a good faith determination whether maintenance of this derivative lawsuit is in the best interest of Hollywood Station Condominium Association, Inc.; and (3) prepare a detailed report [for submission to the court] concerning the committee's findings [related to its investigation].[59]

The court noted that "despite Plaintiff's argument to the contrary that appointing two of the Association's own Board Members is really to 'short-circuit challenges to business judgment,' [the] appointment of the investigative Committee complied with the statutory authority."[60] The trial court further found that the Committee prepared a final report and, upon a cursory review of the report, the reasonableness and independence of the Committee's investigation was evident, as the Committee recognized Ezer's claims, investigated the facts surrounding those claims, applied the facts to the claims, and formed good faith and reasonable conclusions.[61]

The trial court discussed the case of *Atkins v. Topp Communications Inc.*,[62] i.e., a case both parties referenced, and a written opinion issued by the Fourth District Court of Appeal of Florida.[63] In *Atkins*, the appellate court importantly recognized that "trial courts in this state *are not* required to evaluate the reasonableness of an independent investigator's final recommendation . . . ."[64] To that end, the trial court in *Ezer* further relied on *Atkins*, stating that, "[i]nstead, the trial court must determine whether the investigative committee was independent, acted in good faith, and conducted a reasonable investigation."[65] As a result, the trial court in *Ezer* found,

> [S]ection 617.07401 is devoid of any indication that a corporation moving to dismiss a derivative lawsuit under this Section must refute the plaintiff's allegations. To that end, while Plaintiff argues that Defendant's Motion is completely devoid of any evidence that refutes

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59. *Id.* at 2, 7 (citing FLA. STAT. § 617.07401(3)(b) (2021)).

60. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 7 (FLA. STAT. § 617.07401(3)(b)).

61. *See id.* at 10–12.

62. 874 So. 2d 626 (Fla. 4th Dist. Ct. App. 2004).

63. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 6; *Ezer* Plaintiff's Response in Opposition to Motion to Dismiss, *supra* note 49, at 9; *Ezer* Association's Reply to Plaintiff's Response, *supra* note 50, at 10.

64. *Atkins*, 874 So. 2d at 627 (emphasis added); *see Ezer* Transcript of Motion to Dismiss, *supra* note 52, at 6–7.

65. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 6 (citing *Atkins*, 874 So. 2d at 628).

> that the Defendants committed material violations of the Declaration, this Court finds this is not to be considered under Chapter 617.[66]

Although Ezer argued that the Association failed to provide any evidence refuting an alleged violation of its declaration, the trial court deemed these arguments to be inconsequential in its decision to dismiss the lawsuit.[67] As to the Committee, the trial court further found that the Committee was appropriately appointed pursuant to the Chapter 617.[68]

Moreover, the trial court found the "Committee was and remains independent."[69] Notably, the trial court distinguished *Ezer* from *De Moya v. Fernandez*.[70] Specifically, the committee members in *Ezer* were not appointed by the court "*in lieu* of a special litigation committee," the committee members in *Ezer* had "*not* been served with this lawsuit," and moreover, the committee members in *Ezer* provided sworn testimony as to their good faith and independence.[71] Additionally, the trial court found the Committee's independence was further evidenced "by its lack of any financial interest and personal liability in this litigation."[72] After careful review, the trial court determined that,

> [Ezer's] allegations that the members of the special Committee lacked independence and impartiality fail as a matter of law. The allegations asserted by [Ezer] do *not* support that the members of the special Committee could not independently consider the Investigation. Contrary to [Ezer's] assertion that the members of the special Committee were not disinterested, because of participation in violations of the Declarations, a review of the Committee report and Committee Declarations reveals strong evidence to the contrary.[73]

The trial court found that the Association met its burden in establishing the independence of the Committee.[74] Notably, the trial court also ruled that the detailed report and exhibits demonstrated a "timeline of facts that are specific and narrowly tailored to the allegations set forth by [Ezer] and derive[d] from

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66. *Id.*
67. *Id.* at 7.
68. *Id.*
69. *Id.*
70. 559 So. 2d 644 (Fla. 4th Dist. Ct. App. 1990); *see Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 8.
71. *See Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 8.
72. *Id.*
73. *Id.* at 9–10 (emphasis added).
74. *Id.*

document analysis."[75] "The Committee use[d] dates, quotations, and references to Association meetings, votes, budgets and other specific information displaying the facts set forth after the investigation into [Ezer's] claims."[76] Ultimately, the trial court found that the Committee's investigation was conducted in good faith, and dismissed Ezer's entire action pursuant to section 617.07401(3) of the Florida Statutes, because an independent investigation determined that pursuit of Ezer's derivative claims was not in the Association's best interests.[77]

Ezer quickly appealed the trial court's final dismissal with prejudice, challenging the independence of the Committee appointed, pursuant to section 617.07401(3) of the Florida Statutes.[78] Specifically, Ezer claimed that the trial court erred in determining that the investigation was reasonable and made in good faith and maintained that the trial court was required to address the accuracy of the report's substantive findings.[79] The Fourth District Court of Appeal, however, affirmed the trial court's dismissal of Ezer's lawsuit by way of a six page opinion, agreeing "that the committee was appropriately appointed [by the Association], [was] independent, and conducted a good faith investigation."[80] The Fourth District Court of Appeal rejected Ezer's argument that the trial court was required to independently assess the validity of the report's conclusions.[81] In applying *Kaplan v. Wyatt*,[82] the Fourth District Court of Appeal held that "the trial court's determination that the committee was composed of independent board members is supported by competent substantial evidence," noting that "two members were not on the board when the transactions in question in the original complaint were approved" and the "filed affidavits attest to their lack of involvement in the transactions and their independence."[83] Further, the Fourth District Court of Appeal held that Ezer's Amended Complaint merely alleged limited involvement from the committee, with the role of the two members being at most one of approval, and as stated by the court in *Kaplan*, "even a director's approval of a transaction may not necessarily show a lack of independence."[84]

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75. *Id.* at 10.
76. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 10.
77. *Id.* at 11; *see also* FLA. STAT. § 617.07401(3) (2023).
78. Initial Brief of Appellant at 16, Ezer v. Holdack, 358 So. 3d 429 (Fla. 4th Dist. Ct. App. 2022) (No. 21-3528), 2022 WL 1252616 at *8 [hereinafter *Ezer* Appellant Initial Brief].
79. *Id.* at 17–18.
80. Ezer v. Holdack, 358 So. 3d 429, 430 (Fla. 4th Dist. Ct. App. 2023).
81. *Id.* at 433.
82. 499 A.2d 1184 (Del. 1985).
83. *Ezer,* 358 So. 3d at 433.
84. *Id.* (citing to *Kaplan*, 499 A.2d at 1189).

IV. ROADMAP

This Comment establishes that the Fourth District Court of Appeal, most correctly, affirmed the trial court's dismissal of the Ezer lawsuit which has, and will, have an unprecedented impact on community association and corporate law in Florida moving forward.[85] First, this Comment reviews information essential to understanding the *Ezer* ruling, specifically Chapter 617 and specific sections within relating to members' derivative suits, i.e., section 617.07401 of the Florida Statutes.[86] Second, this Comment explains how the decision in *Ezer* has, and will, significantly impact community association law and non-for-profit corporation law moving forward.[87] Third, this Comment explains why the Fourth District Court of Appeal, most correctly, affirmed the trial court's decision to dismiss Ezer's case, with prejudice, based on the Committee's reasonable investigation that ultimately concluded the maintenance of the derivative suit was *not* in the best interests of the corporation, i.e., was *not* in the best interest of the Association membership as a whole.[88]

V. ANALYSIS

The Fourth District Court of Appeal's analysis in *Ezer* focused on section 617.07401(3) of the Florida Statutes and Delaware law in order to determine a committee's independence, good faith, and reasonableness.[89] In Florida, condominium associations, such as the Defendant in the *Ezer* case (i.e., Hollywood Station Condominium Association, Inc.), are organized under Chapter 617, Florida Statutes, which governs nonprofit corporations.[90] To that end, unit owners within condominium associations, such as Ezer, are members of the corporation by virtue of their ownership of a unit within the condominium association and, therefore, have the right to bring derivative proceedings on behalf of the condominium association.[91] Section 617.07401 of the Florida Statutes prescribes the requirements for a member of a corporation to maintain a derivate suit.[92] Specifically, and at a minimum, the purported derivate plaintiff must: (1) be "a member of the corporation when the transaction complained of

85. *See* discussion *infra* Section V.A.
86. *See* discussion *infra* Part V.
87. *See* discussion *infra* Section V.B.
88. *See* discussion *infra* Part V.
89. *Ezer*, 358 So. 3d at 432.
90. Collado v. Baroukh, 226 So. 3d 924, 927 (Fla. 4th Dist. Ct. App. 2017); FLA. STAT. ch. 617 (2023); *Hollywood Station Condominium Association, Inc.*, *supra* note 10.
91. FLA. STAT. § 617.07401(1) (2023); *Ezer* Amended Complaint, *supra* note 9, at 2.
92. FLA. STAT. § 617.07401(1)–(2).

occurred . . . unless the person became a member through transfer by operation of law from one who was a member at that time;" (2) verify their complaint; and (3) "allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored by the board of directors for at least [ninety] days after the date of the first demand" (unless the demand is rejected in writing before the expiration of the demand or waiting the ninety day expiration period would result in irreparable injury to the corporation).[93]

Section 617.07401 also provides a trial court with guidelines for dismissing derivative suits commenced under the pertinent section.[94] First, pursuant to section 617.07041(2) of the Florida Statutes, to the extent the "corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding" pending the outcome of the investigation.[95] Next, and most importantly,

> [t]he court may *dismiss* a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in paragraphs (a)-(c) has made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation has the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:
>
> (a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;
>
> (b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or
>
> (c) A panel of one or more independent persons appointed by the court upon motion by the corporation.[96]

In deciding *Ezer*, both the trial court and the Fourth District Court of Appeal discussed section 617.07401(3), and the investigation's independence,

93. *Id.*
94. *Id.* § 617.07401(3).
95. *Id.* § 617.07401(2).
96. *Id.* § 617.07401(3) (emphasis added).

good faith, and reasonableness.[97] Florida law is clear that it is the corporation's burden to prove that the committee is independent, acted in good faith, and had a reasonable objective basis for the report.[98] Chapter 617 (and Florida caselaw, for that matter) does not define "independence," "good faith," or "reasonableness."[99] As a result, "[w]here Florida law has not spoken as to a *corporate* term or statute, courts often look to Delaware law."[100] Courts "rely with confidence upon Delaware law to construe Florida corporate law. The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines."[101] With no Florida law available, the courts handling Ezer's claims most correctly looked to Delaware and New York law when determining the "independence" and "good faith" of the committee appointed, and the "reasonableness" of its investigation.[102]

To that end, in determining the independence of an investigative committee, which recommended the dismissal of a shareholder derivative suit, the Delaware Supreme Court stated,

> [a director's] presence on the Board does not establish a lack of independence on the part of the Committee. The mere fact that a director was on the Board at the time of the acts alleged in the complaint does not make that director interested or dependent so as to infringe on his ability to exercise his independent business judgment of whether to proceed with the litigation. Even a director's approval of the transaction in question does not establish a lack of independence.[103]

The Fourth District Court of Appeal, applying *Kaplan*, determined that "the trial court's determination that the committee was composed of independent board members is supported by competent substantial evidence."[104] The court

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97. *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 2; Ezer v. Holdack, 358 So. 3d 429, 433 (Fla. 4th Dist. Ct. App. 2023).

98. FLA. STAT. § 617.07401(3).

99. FLA. STAT. ch. 617 (2023); *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 5–6; *Ezer*, 358 So. 3d at 432.

100. *Ezer*, 358 So. 3d at 432. "To date, no Florida court has had occasion to interpret the governing provisions of section 607.1202 in its 2003 form. As is often true, however, Delaware case law provides guidance to our construction of the statute." *Id.* (quoting Williams v. Stanford, 977 So. 2d 722, 727 (Fla. 1st Dist. Ct. App. 2008)).

101. Int'l Ins. v. Johns, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989).

102. *See Ezer*, 358 So. 3d at 432; *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 5–6; Atkins v. Topp Comm, Inc., 874 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 2004).

103. Kaplan v. Wyatt, 499 A.2d 1184, 1189 (Del. 1985) (citations omitted).

104. *Ezer*, 358 So. 3d at 433 (citing *Kaplan*, 499 A.2d at 1189).

reasoned that: (1) "[t]he two members were not on the board when the transactions in question in the original complaint were approved;" (2) the committee's affidavits attested to their "lack of involvement in the transactions and their independence;" and (3) Ezer's "amended complaint only allege[d] their limited involvement."[105] The trial court recognized the limited involvement, including that "[o]ne of the two members signed off on the unapproved contract as the board's treasurer, and both members were on the board when it approved material alterations to the common elements and . . . draws from the [alleged] improper line of credit."[106] The trial court, however, concluded that said actions by the two committee members "was at most approval, and as in *Kaplan*, even a director's approval of a transaction may not necessarily show a lack of independence."[107] The Fourth District Court of Appeal noted that the record was devoid of anything to show any relationship between the members of the appointed committee and the named board member defendants that would suggest control over the committee.[108] Looking at Ezer's attempt to amend her complaint and add the Committee members, the trial court did not recognize it as impacting their independence.[109]

A. *The Court Is Not Required to Apply Its Own Business Judgment*

While the Fourth District Court of Appeal did not directly discuss *Zapata Corp. v. Maldonado*[110] in the *Ezer* opinion, it is worth discussion in this Comment and is certainly pertinent to subsequent rulings by Florida courts, including both the trial court's dismissal of the *Ezer* lawsuit and the Fourth District Court of Appeal affirming said dismissal.[111] In 1981, the Supreme Court of Delaware decided *Zapata Corp. v. Maldonado*.[112] In *Zapata*, a stockholder initiated a derivate suit on behalf of the corporation, thereby triggering the corporation to create an investigative committee to determine whether the lawsuit should continue.[113] The *Zapata* committee, following its investigation, concluded that the lawsuit was not in the best interests of the corporation, and thus, the corporation moved for dismissal or summary judgment.[114] The trial court denied the motions because Delaware law did not sanction such motions, and the

105. *Id.* at 433.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Ezer*, 358 So. 3d at 433.
110 430 A.2d 779 (Del. 1981).
111. *See Ezer*, 358 So. 3d at 432.
112. *Zapata Corp.*, 430 A.2d at 779.
113. *Id.* at 780, 781.
114. *Id.* at 781.

business judgment rule did not grant the authority to dismiss derivative actions.[115] On appeal, the Supreme Court of Delaware reversed the trial court's order, and the matter was remanded.[116] The Supreme Court of Delaware focused on the corporation's power to speak for itself as to whether a derivative lawsuit—a lawsuit brought on behalf of the corporation—should be continued or terminated, specifically focusing on the following inquiry: "[w]hen, if at all, should an authorized board committee be permitted to cause litigation, properly initiated by a derivative stockholder in his own right, to be dismissed?"[117] In doing so, the Supreme Court of Delaware turned to the Delaware Statutes, which allow boards to delegate all of the board's authority to a committee, which, in turn, means that the committee has the power to seek the termination of a derivative suit.[118] The Supreme Court of Delaware found that the committee, so long as its power was properly delegated, could act for the corporation to move to dismiss derivative litigation that is believed to be detrimental to the corporation's best interest.[119] In submitting to the trial court that a derivative suit is not in the best interest of the corporation, a committee would then file such pre-trial motions based on the committee's findings after conducting an investigation, setting forth the committee's written record of the investigations, as well as findings and recommendations.[120] The Delaware Supreme Court then found that the trial court deciding such a motion filed by the committee should then apply a two-step analysis.[121] First, the trial court would "inquire into the independence and good faith of the committee and the bases supporting [the committee's] conclusions."[122] If the trial court is satisfied, then, in its discretion, the court would proceed to apply its own business judgment in determining whether the evidence supported the committee's recommendation.[123] If the court is then satisfied, it may proceed to dismiss the derivative suit.[124] The *Zapata* approach, however, was ultimately *rejected* in *Atkins v. Topp Comm, Inc.*, and does not apply in Florida.[125]

In deciding *Ezer v. Holdack*, the Fourth District Court of Appeal, consistent with its prior rulings, correctly recognized that the corporation has the

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115. *Id.*
116. *Id.* at 789.
117. *Zapata Corp.*, 430 A.2d at 785.
118. *Id.*
119. *Id.* at 786.
120. *Id.* at 788.
121. *Id.*
122. *Zapata Corp.*, 430 A.2d at 788.
123. *Id.* at 789.
124. *Id.*
125. 874 So. 2d 626, 628 (Fla. 4th Dist. Ct. App. 2004); *Zapata Corp.*, 430 A.2d at 788–89.

burden of proving that the committee is independent, acted in good faith, and has a reasonable and objective basis for its report, citing to section 617.07401(3) and *De Moya v. Fernandez*.[126] In *De Moya v. Fernandez*, decided prior to the enactment of section 617.07401 (as well as its predecessor, i.e., Section 607.07401), the Fourth District Court of Appeal reasoned that "a trial court must make a determination that the committee recommending the dismissal is independent, acting in good faith and has a reasonable and objective basis for its report."[127] The *De Moya* case involved an appeal of an order dismissing a corporate derivate lawsuit after the trial court accepted a report prepared by a trial court-appointed receiver.[128] The Fourth District Court of Appeal reversed the trial court's order "because the record reflect[ed] insufficient evidence upon which to evaluate the thoroughness of the report or the independence of the [appointed] receiver" as well as "inadequate sworn testimony."[129] In *De Moya*, though the court relied on *Zapata* in discussing the trial court's burden, it *did not* determine whether the *Zapata* two-step analysis was required.[130]

A few years later, the United States District Court for the Southern District of Florida, applying Florida law, acknowledged that the trial court must apply its judgment based on the record created by the investigation, relying on the plain language of section 607.07401 and declining to rule on *Zapata*.[131] The following year, however, the Fourth District Court of Appeal took a stance on the application of *Zapata* to section 607.07401, in *Atkins v. Topp Comm, Inc.*[132] In its written opinion in the *Ezer* case, the Fourth District Court of Appeal cites *Atkins v. Topp Comm, Inc.* to support that "[s]ection 617.07401(3)(b)'s plain language *does not* require courts to question a special committee's recommendation as long as the court found that the committee was independent and conducted its investigation reasonably and in good faith."[133]

In *Atkins*, the Fourth District Court of Appeal affirmed the dismissal of a shareholder derivative lawsuit based on the findings of an investigator appointed pursuant to section 607.07401(3) of the Florida Statutes, which

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126. Ezer v. Holdack, 358 So. 3d 429, 432 (Fla. 4th Dist. Ct. App. 2023) (citing FLA. STAT. § 617.07401(3) (2023); De Moya v. Fernandez, 559 So. 2d 644, 645 (Fla. 4th Dist. Ct. App. 1990)).

127. *De Moya*, 559 So. 2d at 645; *see* FLA. STAT. § 617.07401; FLA. STAT. 607.07401 (2003), *repealed by* FLA. STAT. § 607.07401 (2019).

128. *De Moya*, 559 So. 2d at 644.

129. *Id.* at 645.

130. *Id.*

131. *See* Klein v. FPL Group, Inc., No. 02-20170-CIV, 2004 WL 302292, at *15, n.40 (S.D. Fla. Feb. 5, 2004).

132. Atkins v. Topp Comm, Inc., 874 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 2004).

133. Ezer v. Holdack, 358 So. 3d 429, 433 (Fla. 4th Dist. Ct. App. 2023); *Atkins*, 874 So. 2d at 627.

parallels the language of section 617.07401(3).[134] In *Atkins*, the corporation (with all the parties in agreement) appointed a retired circuit court judge as the investigator, who, after conducting witness interviews, reviewing documents, seeking input from both sides and presenting a lengthy report to the trial court, concluded that the lawsuit was not in the best interest of the corporation.[135] The trial court concluded that the independent investigators acted reasonably and in good faith in conducting their investigation and dismissed the lawsuit.[136] One of the issues on appeal was whether the trial court was required to engage in the *Zapata* two-step analysis.[137] The Fourth District Court of Appeal rejected *Zapata* and took a different approach based on the plain language of section 607.07401(3).[138] In doing so, the court determined that the trial court was "not required to evaluate the reasonableness of [the] independent investigator's final recommendation."[139] Indeed, the court in *Atkins* emphasized that had the legislature intended to mandate such a two-step analysis, it would have likely specified so in the body of the statute.[140]

In *Cornfeld v. Plaza of the Americas Club, Inc.*,[141] a shareholder brought a derivative lawsuit against a condominium club and its directors.[142] The plaintiff owned one of the condominium units in the not-for-profit corporation and brought a shareholder derivative action pursuant to section 617.0740 of the Florida Satutes.[143] The plaintiff alleged that "the Club breached its fiduciary duty to the unit owners and [sought] injunctive relief."[144] The Club then filed a motion to dismiss in which it argued that Cornfeld did not have standing to bring a derivative lawsuit because he did not serve a pre-suit demand pursuant to section 617.07401, the business judgment rule barred Cornfeld's claims, that Cornfeld had failed to join RK Centers, LLC as an indispensable party; and that Cornfeld did not state a cause of action for injunctive relief.[145]

Following "the hearing on the motion to dismiss, the trial court deferred ruling [on the motion], and asked the parties how they wanted to proceed, tracking section 617.07401 . . . to determine whether the maintenance of the

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134. *See Atkins*, 874 So. 2d at 627. *Compare* FLA. STAT. § 607.07401(3) (2003), *with* FLA. STAT. § 617.07401(3) (2023).
135. *Atkins*, 874 So. 2d at 627.
136. *Id.* at 628.
137. *Id.* at 627.
138. *Id.* at 628.
139. *Id.* at 627.
140. *Atkins*, 874 So. 2d at 628.
141. 273 So. 3d 1096, 1097 (Fla. 3d Dist. Ct. App. 2019).
142. *Id.* at 1097.
143. *Id.*
144. *Id.*
145. *Id.*

derivate action is in the best interest of the corporation."[146] The Club chose to proceed with the trial court appointing (by unopposed order) an independent investigator to conduct an investigation under the statute.[147] Notably, the independent investigator was an attorney.[148]

After the five-month investigation concluded, the independent investigator filed a forty-four-page report with the trial court.[149] The investigator concluded,

> [T]hat maintaining the derivative action is not in the best interest of the Club. [And further, the investigator] recommended the trial court dismiss the action because: (1) Cornfeld does not adequately represent the interests of the Club's unit owners because of his personal motivation for filing the suit, which is contrary to the interests of the Club membership generally; (2) the Board members' decisions were reasonable, were guided by legal advice throughout, and are protected by the business judgment rule, and the board members are thus immune from the lawsuit; and (3) the litigation is barred because Cornfeld failed to serve a statutorily required pre-suit demand on the Board.[150]

In response, Cornfeld filed objections to the report asserting, *inter alia*, that it "was biased . . . conducted in bad faith, . . . [and] improperly focused on Cornfeld's personal business motivations for filing the derivative suit."[151] Following a one-hour specially set hearing, the trial court determined that the investigation was conducted independently, reasonably, and in good faith.[152] The court adopted the investigator's findings and legal conclusions and dismissed the matter.[153] The trial court "dismissed the amended derivate complaint with prejudice as to Cornfeld."[154]

Cornfeld appealed the decision of the trial court to the Third District Court of Appeal:

> Cornfeld [did] not challenge the independence of the investigator; rather, he argue[d] that there [were] material issues of disputed fact regarding the reasonableness and good faith of the investigation. He assert[ed] that his personal interest . . . [was] irrelevant to the

146. *Cornfeld*, 273 So. 3d at 1097–98.
147. *Id.* at 1098.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Cornfeld*, 273 So. 3d at 1098.
152. *Id.*
153. *Id.*
154. *Id.*

> interests of the Club's unit owners. However, [the Third District Court of Appeal's] review of the record evidence[d] self-interest.
>
> . . .
>
> On the issue of the Club's immunity from liability by virtue of the business judgment rule, [the Court found] no error in the trial court's acceptance of the facts and legal conclusions contained in [the investigator's] independent report . . . . [T]he independent investigator in this case, as did the investigator in *Atkins*, examined the merits of the proposed claims and concluded that the derivative suit was not in the corporation's best interest. The record . . . reflect[ed] that [the investigator] conducted numerous witness interviews, reviewed relevant documents, sought input from the attorneys for both sides, kept both sides advised as to the investigation progressed, and presented a lengthy report to the court."[155]

In conclusion, the Third District Court of Appeal held that "[t]he trial court did not abuse its discretion by adopting . . . [the investigator's] factual findings and legal conclusions, and [found] that the report was reasonable and conducted in good faith."[156] The dismissal, with prejudice, was affirmed.[157]

In *Ezer*, discussing the trial court's efforts relating to the evaluation of the reasonableness of an independence committee, the Fourth District Court of Appeal correctly held that "[t]he court *is not* required to apply its own business judgment to assess the merits of the committee's conclusions."[158]

B. *Following the Ezer Decision*

On July 5, 2023, the very same trial court that decided *Ezer* once again entered an order dismissing a shareholder's derivative lawsuit brought by multiple unit owners within a community association on behalf of the

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155. *Id.* at 1097, 1098, 1099–100 (citing Atkins v. Topp Comm, Inc., 874 So. 2d 626, 627) (Fla. 4th Dist. Ct. App. 2004) (affirming dismissal of the derivative suit, finding that the dismissal was based on the trial court's conclusion that the independent investigator acted reasonably and with good faith in conducting his investigation).

156. *Cornfeld*, 273 So. 3d at 1100.

157. *Id.*

158. Ezer v. Holdack, 358 So. 3d 429, 434 (Fla. 4th Dist. Ct. App. 2023) (emphasis added).

association.[159] In *Sherman v. Condo. Ass'n of Parker Plaza Estates, Inc.*,[160] like in *Ezer*, the derivative plaintiffs initiated a lawsuit in 2021 against a community association and several individual board members alleging mismanagement of a condominium or its assets.[161] Much like in *Ezer*, the association in *Sherman* "appointed an independent committee [pursuant to section 617.07401 of the Florida Statutes] to conduct a reasonable investigation into plaintiffs' allegations" and the association filed a motion to dismiss based on the committee's report.[162] "Two days before the hearing on the motion to dismiss, [the derivative] plaintiffs sought leave to amend the complaint to include additional allegations and name three more directors as defendants;" of these three, two were members of the first committee, much like in *Ezer*.[163] The trial court once again abated service on the three new defendants and allowed the derivative plaintiffs to file their Verified Second Amended Derivative Complaint against the prior individual defendants as well as the association.[164]

In response, the association, once again, appointed a second committee and, after conducting a good-faith investigation into the allegations of the derivative plaintiffs, found that the plaintiffs' allegations were unfounded.[165] "[T]he Second Committee determined that the maintenance of the lawsuit was not in the best interests of the Association. Thus, Defendants [once again] move[d] to dismiss the complaint pursuant to section 617.07401, Florida Statutes."[166] Ultimately, the trial court granted the association's motion to dismiss and entered an order citing *Ezer*, finding that the maintenance of the derivative suit in *Sherman*, much like in *Ezer*, was not in association's the best interest.[167]

C. *The Florida Supreme Court Denies Review*

Undeterred by the Fourth District Court of Appeal's opinion affirming the trial court's dismissal of her case, Ezer petitioned the Florida Supreme Court

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159. *See* Final Order on Defendants' Motion to Dismiss at 1, 5, Sherman v. Fagan, No. CACE-21-020261 (Fla. 17th Cir. Ct. July 5, 2023) [hereinafter *Sherman* Final Order on Defendants' MTD].

160. Verified Derivative Complaint at 1, Sherman v. Condo. Ass'n of Parker Plaza Ests., Inc., No. CACE-21-020261, 2021 WL 5273160 (Fla. 17th Cir. Ct. Nov. 9, 2021).

161. *Id.* at *2.

162. *Sherman* Final Order on Defendants' MTD, *supra* note 159, at 1.

163. *Id.*

164. *Id.*; Agreed Order Granting Plaintiffs' Ore Tenous Motion for Leave to File Second Amended Complaint at 1, 2, Sherman v. Fagan, No. CACE-21-020261 (Fla. 17th Cir. Nov. 23, 2022).

165. *Sherman* Final Order on Defendants' MTD, *supra* note 159, at 2.

166. *Id.*

167. *Id.* at 4–5.

to review the dismissal of her case as a matter of great public importance.[168] The Florida Supreme Court, however, denied Ezer's petition, and the Association and the volunteer board member defendants are currently seeking entitlement to their attorneys' fees and costs against Ezer.[169]

VI. CONCLUSION

As explained above, the dismissal of *Ezer v. Hollywood Station Condominium Association, Inc*. at the trial court level, and the Fourth District Court of Appeal's written opinion affirming said dismissal, and the Supreme Court's denial of Ezer's petition, all serve as a significant milestone in the realm of shareholder derivative actions and corporate democracy in the state of Florida.[170] Indeed, a unit owner should be very hesitant to file any claim against their association that may not be in the best interest of their association *as a whole*, and the holdings in *Ezer* further underscore the critical importance of adhering to statutory requirements and trusting the sound judgment of independent committees.[171] The decision to dismiss the *Ezer* lawsuit based on the findings of the independent committee raised questions about the court's role in evaluating the investigations, and it is clear that the court need not exercise its own business judgment in evaluating same.[172]

In analyzing the *Ezer* case, the intricate interplay between statutory provisions, judicial discretion, and the protection of shareholder interests, have come to the forefront.[173] *Ezer* highlights the delicate balance between shareholder rights and the authority vested in independent committees appointed by independent directors of a corporation.[174] As corporate law in Florida continues to evolve, legal practitioners, scholars, and shareholders must consider the implications of *Ezer* as a precedent-setting case—not only for immediate parties, but for the broader future of corporate governance.[175] *Ezer* serves as a reminder of the complexities inherent in shareholder derivative actions and the

168. Petitioner's Brief on Jurisdiction at 1, Ezer v. Holdack, No. SC2023-0676, 2023 WL 3843518, *1 (Fla. May 22, 2023).

169. Defendants' Motion for Entitlement to Attorneys' Fees and Costs with Incorporated Memorandum of Law at 1, Ezer v. Holdack, No. CACE-20-016861 (Fla. 17th Cir. Ct. Dec. 16, 2021); *Ezer* Final Order Dismissing Derivative Suit, *supra* note 55, at 1.

170. *See* discussion *supra* Part V.

171. *See* discussion *supra* Part V.

172. *See* discussion *supra* Parts III, V.

173. *See* discussion *supra* Parts III, V.

174. *See* discussion *supra* Parts III, V.

175. *See* discussion *supra* Section V.B.

ongoing need to defer to the sound decisions of independent committees, guiding future disputes in the ever-evolving world of corporate law.[176]

Indeed, the purpose of the multiple conditions precedent and safeguards set forth in Chapter 617 governing derivative actions clearly was to ensure that any actions pursued on behalf of a corporation/association are in the best interests of the corporation, and Chapter 617's statutory requirements of a pre-suit demand and verification, coupled with the option of committee investigations, should serve to keep community association matters out of court. For example, where a single unit owner, or even a group of unit owners, are unsatisfied within the way in which a community association is being operated, Chapter 617 and this *Ezer* precedent establishes that despite their dissatisfaction, if a committee finds that their clams are not in the best interests of the community as a whole . . . too bad, too sad; the majority rules. Simply stated, such claims should never be litigated in the first place, and by virtue of living within a community association, unit owners agreed to a democracy, and the majority will, and should, always carry the day.

176. *See* discussion *supra* Parts II, III, V.

AVATAR V. GUNDEL: IMPACTING DEVELOPERS AND HOMEOWNER ASSOCIATION LAW ACROSS THE STATE OF FLORIDA

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I. INTRODUCTION

Avatar Properties Inc. ("Avatar") is a for-profit company that was founded in 1986.[1] It is headquartered in Davenport, Florida and its line of

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The authors wish to thank Luis Duran for all his hard work in the preparation of this Case Comment.

business includes developing residential communities that contain single-family lots.[2] As part of its business operations, Avatar developed a retirement community designed exclusively for individuals aged fifty-five and older.[3] This community is named Solivita, and is located in Polk County.[4] Solivita includes both individual residential parcels and commercial parcels.[5] In Solivita, Avatar constructed recreational facilities including a spa, fitness center, dining venues, indoor and outdoor pools, parks, tennis courts, bocce courts, and pickleball courts.[6] These recreational facilities were constructed on land that Avatar owned and not on land designated as common areas of the Solivita Community.[7] These recreational facilities were known as "the Club."[8]

In order to purchase a home within Solivita, the buyer must become a permanent member of the Club.[9] Each permanent member of the Club is required to pay membership fees, which represents the expenses of the Club.[10] In addition, each permanent member of the Club must pay a perpetual membership fee, which was profit for Avatar.[11] The perpetual membership fee was determined by Avatar.[12] Neither the individual homeowners nor the Solivita Community Association (the "HOA") "had any input over the Club" operations.[13]

Further, every deed to a residential lot in Solivita included a membership in the Club.[14] In other words, every purchaser of a residential

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1. *Avatar Properties Inc*, BLOOMBERG, http://www.bloomberg.com/profile/company/0065039D:US#xj4y7vzkg (last visited Dec. 22, 2023) [hereinafter *Avatar Properties Bloomberg*]; Initial Brief of Appellant Avatar Properties, Inc. at 1, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 28235, at *1 (Fla. 2d Dist. Ct. App. June 7, 2022).

2. *Avatar Properties Inc*, APOLLO, http://www.apollo.io/companies/Avatar-Properties-Inc/55f22299f3e5bb0b2d001efa (last visited Dec. 22, 2023) [hereinafter *Avatar Properties Apollo*]; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

3. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 1 (Fla. 6th Dist. Ct. App. June 22, 2023); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

4. *Avatar Props., Inc.*, slip op. at 1; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

5. *Avatar Props., Inc.*, slip op. at 1; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

6. *Avatar Props., Inc.*, slip op. at 1–2.

7. *Id.* at 1.

8. *Id.*

9. *Id.* at 2.

10. *Id.*

11. *Avatar Props., Inc.*, slip op. at 2.

12. *Id.*

13. *Id.* at 2.

14. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.

home in Solivita was required to regularly pay the Club Membership Fee.[15] Such fees were extensively disclosed to prospective purchasers.[16] Before selling homes in Solivita, Avatar recorded the Master Declaration and the Club Plan; the Master Declaration established the Solivita Community Association, Inc. as the operating entity for the community and required each homeowner to be a member of the HOA.[17]

The Club Membership Fee included a profit for the Club.[18] The Club Membership Fee was set by Avatar and increased by one dollar per month until a cap set by Avatar was reached.[19] Further,

> The assessment imposed by Avatar for Club membership had two components, and a separate invoice was generated for each. One component was the amount required for Club expenses, which was to be shared proportionally by each resident. The second component was for a membership fee, which represented an annual profit charged to each landowner and payable to Avatar.[20]

The Club Facilities are commercial properties and are not common areas owned by the HOA.[21] While the HOA operated the community property, Avatar operated the Club Facilities as commercial property.[22] A third-party company, Evergreen Lifestyles Management, sent to each homeowner "monthly assessments on behalf of the Association and Avatar."[23] Between May 2013 and February 2021, Avatar collected $34,786,034.48 in Club Membership Fees.[24] These fees were used to cover the costs of operating the

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15. *Id.*; *see Avatar Props., Inc.*, slip op. at 2.
16. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1.
17. *Avatar Props., Inc.*, slip op. at 23.

> (1) Assessments.–For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof.
>
> (a) Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.

FLA. STAT. § 720.308(1)(a) (2023).

18. *Avatar Props., Inc.*, slip op. at 4.
19. *Id.* at 4 n.3.
20. *Id.* at 4.
21. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.
22. *Avatar Props., Inc.*, slip op. at 36.
23. *Id.* at 4 n.2.
24. Final Judgment at 3, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *2 (Fla. 10th Cir. Ct. Nov. 2, 2021).

Club Facilities and to generate some profit to Avatar for offering the private facilities.[25]

A class action lawsuit was filed against Avatar, alleging that through the Club Membership Fees, Avatar was collecting a profit in violation of section 720.308 of the Florida Statutes.[26]

This Case Comment argues that Avatar's collection of Club Membership Fees does not violate the aforementioned statute, and advises that clubs that operate private facilities should be kept separate from homeowners' associations.[27] Part I of this Comment provides a background of the relevant facts of the case.[28] Part II of this Comment is a brief discussion of Chapter 720.[29] Next, this Comment will review the trial court's decision in the class action lawsuit.[30] This Comment will also discuss the Sixth District Court of Appeal's de novo review of the case.[31] In Part IV, this Comment will then argue that the Sixth District Court of Appeal erred in deciding that Avatar collected fees in violation of section 720.308 of the Florida Statutes.[32] This Comment will argue that Chapter 720.308 does not apply to commercial property and that the Club for which Avatar collected fees was commercial property.[33] Further, this Comment will argue that even if the statute did apply to the Club Membership Fees collected by Avatar, the limitation on expenses does not apply to the profit and expenses of a for-profit club owner.[34] This Comment will also discuss some of the implications of the Sixth District Court of Appeal's decision.[35] Finally, in light of these implications, this Comment will conclude that fees due to clubs such as the one operated by Avatar, should *always* be billed and kept separate from assessment's due to homeowners' associations.[36]

25. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 44–45.
26. *Avatar Props., Inc.*, slip op. at 5, 24.
27. *See* discussion *infra* Parts I–V.
28. *See* discussion *infra* Part I.
29. *See* discussion *infra* Part II.
30. *See* discussion *infra* Section III.A.
31. *See* discussion *infra* Section III.B.
32. *See* discussion *infra* Part IV.
33. *See* discussion *infra* Section IV.A.
34. *See* discussion *infra* Section IV.B.
35. *See* discussion *infra* Section IV.C.
36. *See* discussion *infra* Part V.

II. LEGISLATIVE HISTORY

Florida's Homeowners' Association Act established the rights and obligations of purchasers and developers of fee simple homes.[37] The Homeowners' Association Act is codified in Chapter 720, Florida Statutes.[38] The prevailing purpose behind the Florida's Homeowners' Association Act is to "protect the rights of association members without unduly impairing the ability of such associations to perform their functions."[39] Further, "[t]he Florida Homeowners' Association Act is another effort by the legislature to place some reasonable restrictions on free-market transactions."[40] Specifically, Chapter 720 gives statutory recognition to corporations that operate residential communities in Florida and provides procedures for operating a homeowners' association.[41]

The Homeowner's Association Act, section 720.301 of the Florida Statutes, governs the formation, management, powers, and operation of homeowners' associations in Florida and applies to not-for-profit organizations that operate homeowners' associations.[42] Along with Florida's Homeowner's Association Act, there are other state laws that impact Florida's HOA's that will be discussed throughout this Comment.[43]

The statutes found in Chapter 720 do not apply to a community that is intended for commercial, industrial, or nonresidential use.[44] Additionally, they also do not apply to commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use.[45] Section 720.302(1) states the following: "[t]he purposes of this chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state . . . ."[46] Further, section

37. *See* 8B FLA. JUR. 2D *Business Relationships* § 463 (2023); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 2; Act effective July 1, 2007, ch. 2007–183, § 1, 2007 Fla. Laws 1 (codified at FLA. STAT. § 720.3085).

38. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 2.

39. FLA. STAT. § 720.302(1) (2023).

40. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 14 (Fla. 6th Dist. Ct. App. June 22, 2023).

41. 8B FLA. JUR. 2D, *supra* note 37, § 463.

42. *Florida HOA Laws and Resources*, HOMEOWNERS PROT. BUREAU, http://www.hopb.co/florida (last visited Dec. 22, 2023); *see* FLA. STAT. § 720.301 (2023).

43. *Florida HOA Laws and Resources*, *supra* note 42; *see, e.g.*, FLA. STAT. §§ 718.102, 718.111(1)(a), 719.101 (2023).

44. FLA. STAT. § 720.302(3)(a).

45. *Id.* § 720.302(3)(b).

46. *Id.* § 720.302(1).

720.302(5) states that corporations that govern homeowners' associations are also governed by Chapters 607 and 617 of the Florida Statutes.[47]

III. CASE HISTORY

As stated earlier in this Comment, in April of 2017, plaintiffs brought a class action lawsuit against Avatar.[48] The plaintiffs sought to declare the assessments for Avatar's Club profit illegal under section 720.308 of the Florida Statutes, and sought to have the payments of those assessments to be returned.[49] The plaintiffs argued that section 720.308 only permits assessments for expenses.[50]

Plaintiffs then filed a Second Amended Class Action Complaint which contained twelve counts.[51] In 2018, the trial court granted the class certification for four of the twelve counts.[52] The class was composed of "all persons who currently or previously owned a home in Solivita and who have paid a Club Membership Fee under the Club Plan on or after April 26, 2013."[53]

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47. *Id.* § 720.302(5).

48. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 5, 24 (Fla. 6th Dist. Ct. App. June 22, 2023).

49. *Id.* at 5.

50. *Id.*

51. *Id.* at 24.

52. *Id.* at 25 (White, J., dissenting). The class was certified as to Counts II, V, partially VI, and VIII. *Avatar Props., Inc.*, slip op. at 25 (White, J., dissenting). Count I was for titled Declaratory Relief—Applicability of HOA Act. Second Amended Class Complaint and Demand for Jury Trial at 16, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2017 WL 11817060, at *10 (Fla. 10th Cir. Ct. Sept. 15, 2017). Count II was titled Declaratory Relief—Voting Rights. *Id.* at 17. Count III was titled Declaratory Relief—Club Property. *Id.* at 18. Count IV was titled Declaratory Relief—Fiduciary Duty. *Id.* at 19. Count V was titled Declaratory Relief—Invalidity of Perpetual Covenant. *Id.* at 21. Count VI was titled Injunctive Relief—Prohibiting Future Profit from Club Membership Fee. Second Amended Class Complaint and Demand for Jury Trial, *supra* note 52, at 22. Count VII was titled Injunctive Relief—Violation of FDUTPA. *Id.* at 23. Count VIII was titled Violation of § 720.308, Fla. Stat. *Id.* at 31. Count IX was titled Breach of Fiduciary Duty. *Id.* at 33. Count X was titled Violation of FDUTPA. *Id.* at 35. Count XI was titled Unjust Enrichment. Second Amended Class Complaint and Demand for Jury Trial, *supra* note 52, at 37.

> It certified a class for Counts II, V, partially VI (as to alleged direct violation of section 720.308), and VIII. The trial court found that its January 2018 order resolved Counts I and III. The trial court found that its January 2018 order had resolved Counts I and III. It also concluded that Counts IV, VI (except as partially certified), VII, IX, X, XI and XII were not amenable to class certification.

Avatar Props., Inc., slip op. at 25 (White, J., dissenting).

53. Final Judgment at 1, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *1 (Fla. 10th Cir. Ct. Nov. 2, 2021).

The Second District Court of Appeal affirmed the class certification.[54] Norman Gundel, William Mann, and Brenda N. Taylor were the class representatives.[55]

A. *Trial Court*

At the trial court, the plaintiffs argued that section 720.308 of the Florida Statutes only permits an assessment for expenses, and not for profit.[56] On the other hand, Avatar pointed to section 720.302(3)(b), which states that Chapter 720 does not apply to "[t]he commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use."[57] Avatar argued that since the Club Facilities are commercial properties, Chapter 720 did not apply.[58] Avatar further argued that even if Chapter 720 did apply, the Club Membership Fee did not violate the "proportional share of expenses" limitation in section 720.308.[59] Ultimately, the entire case rested upon the interpretation of statutory terms.[60]

In January 2018, an order was entered that granted, in part, a motion for summary judgment in Avatar's favor.[61] The trial court ruled in the plaintiffs' favor, finding that section 720.308 did not permit an assessment for profit.[62] Further, the court held that section 720.308(3) prohibited assessing a

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54. *Avatar Props., Inc.*, slip op. at 25 (White, J., dissenting). The class certification was affirmed in its entirety, "except to the extent that it excluded former homeowners from the class with respect to Count VIII." *Id.*

55. Final Judgment, *supra* note 24, at 1.

56. *Avatar Props., Inc.*, slip op. at 5.

57. Initial Brief of Appellant Avatar Properties, Inc. at 34, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 28235, at *34 (Fla. 2d Dist. Ct. App. June 7, 2022); FLA. STAT. § 720.302(3)(b) (2023).

58. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

59. *Id.* at 44, 46–47.

60. *Avatar Props., Inc.*, slip op. at 26 (White, J., dissenting).

61. *Id.* at 24. The trial court entered various orders. *Id.* Some of these additional orders are outside the scope of this Case Comment. *See* discussion *supra* Part I. On October 12, 2021, the court entered the aforementioned order granting the partial summary judgment on Avatar's Third Affirmative Defense based on section 720.302(3)(b) and the order granting Plaintiff's motion for partial summary judgment as to liability for violation of section 720.308. Final Judgment at 2, Gundel v. Avatar Props., Inc., No. 2017-CA-001446, 2021 WL 11678795, at *2 (Fla. 10th Cir. Ct. Nov. 2, 2021). Further, the court denied Avatar's Renewed Motion for Final Summary Judgment and Incorporated Memorandum of Law. *Id.* The trial court also denied the Defendant's Motion for Reconsideration of the Court's Oral Ruling on Section 720.3086. *Id.* The court struck Avatar's seventh, eighth, and ninth affirmative defenses. *Id.* These defenses were waiver, ratification, and estoppel. *Id.* The court granted Plaintiff's Motion for Reconsideration and/or Clarification Regarding Ruling on Affirmative Defenses 7, 8, and 9. Final Judgment, *supra* note 24, at 2.

62. *Id.*

membership fee on Solivita's homeowners.[63] The trial court concluded that: "the Club Plan is not a 'declaration' under section 720.301(4); the Club Plan is a 'governing document' under section 720.301(8)(a); the Club Property, including the Club Facilities, is not a 'common area' under section 720.301(2); and the Club Property, including the Club Facilities, is commercial property under section 720.302(3)(b)."[64]

B. *Appellate Court(s)*

On January 1, 2023, this case was transferred from the Second District Court of Appeal to the Sixth District Court of Appeal and the court reviewed the trial court's decision de novo.[65] Relying on section 720.302(3)(b), Avatar argued that the statute did not apply because the Florida Homeowner's Act does not apply to commercial enterprises.[66]

"The trial court held that section 720.308(3) prohibits the homeowners of Solivita from being assessed a membership fee (the profit component of the Club's operation)," and the Sixth District Court of Appeal affirmed.[67] The Sixth District Court of Appeal pointed to the legislation that set forth the statutory framework for its decision.[68]

The appellate court affirmed the trial court's order.[69] The court was mindful of the probability that its ruling could have far-reaching effects on homeowners associations throughout the state, and therefore it certified the following question to the Florida Supreme Court as one of great public importance: "Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?"[70]

In the concurring opinion, Justice Stargel explained that the trial court decision was affirmed because "the Club Plan implemented by Avatar [fell] outside of the legislative framework set forth in chapter 720."[71] However,

63. *Avatar Props., Inc*., slip op. at 11.
64. *Id.* at 24 (White, J., dissenting).
65. *Id.* at 1 n.1, 5.
66. *Id.* at 7. Avatar relied on section 720.302(3)(b) of the Florida Statutes which states that the Florida Homeowners' Association Act does not apply to the "commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use." *Id.*
67. *Avatar Props., Inc.*, slip op. at 11.
68. *Id.*
69. *Id.* at 17.
70. *Id.* at 17–18.
71. *Id.* at 18 (Stargel, J., concurring).

Justice Stargel further explained that the dissent correctly delineated the court's obligation to determine the plain meaning of a statute based on the text.[72]

In his dissent, Justice White emphasized the need to focus on the plain text of the statute.[73] After a lengthy analysis of the statutory text, Justice White concluded that section 720.308(1)(a) only applied to special assessments or annual budget assessments by the association.[74] Since the Club Membership Fee fell into neither of these categories, Justice White concluded that the majority erred in finding that the fee violated the statute.[75] In addition, Justice White found that even if the statute did apply, the commercial property exemption is broad enough to exclude the Club from the HOA's community.[76] Ultimately, the dissent concluded with Gundel's scathing viewpoint: "[i]n sum, Appellees invite us to adopt arguments clothed in swatches of the statute stitched together, and ignore the rest of the contextual, structural, and textual fabric of chapter 720. The majority accepts that invitation. I must decline."[77]

Nevertheless, the Sixth District Court of Appeal posed a certified question to the Florida Supreme Court.[78] The Supreme Court has discretion to review any decision of a district court of appeal that presents a "question certified by it to be of great public importance."[79]

IV. ARGUMENT

The Sixth District Court of Appeal erred in granting summary judgment to the plaintiffs.[80] The court erred for two reasons: (1) Chapter 720 does not apply to the portion of Solivita owned by Avatar because it is commercial property,[81] and (2) even if the statute applies, the limitation on expenses does not apply to the profit and expenses of a for-profit developer concerning commercial properties that the developer owns.[82] Further, the court's decision can have far-reaching and catastrophic consequences for Florida and its numerous homeowner association communities.[83]

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72. *Avatar Props., Inc.*, slip op. at 18.
73. *Id.* at 26 (White, J., dissenting).
74. *Id.* at 33.
75. *Id.*
76. *Id.* at 36.
77. *Avatar Props., Inc.*, slip op. at 37.
78. *See id.* at 17–18.
79. FLA. CONST. art. V, § 3(b)(4).
80. *Avatar Props., Inc.*, slip op. at 37 (White, J., dissenting).
81. *Id.* at 36.
82. *See id.*
83. *Id.* at 17.

A. *Commercial Property*

As discussed above, Chapter 720 of the Florida Statutes does not apply to a community composed of property primarily intended for commercial, industrial, or other nonresidential use.[84] In fact, "[C]hapter 720 does not apply to the 'commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial . . . use.'"[85] Section 720.302(1) of the Florida Statutes states that "[t]he purposes of [the] chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state."[86] Thus, the Club Facilities are commercial properties and are exempt from Chapter 720 of the Florida Statutes.[87]

The Club Plan disclosures and acknowledgments unambiguously revealed the mandatory fees for the Club Facilities, which showed that the Club Facilities would not be operating at cost but would generate a profit.[88] The Club Facilities are not common areas, and the Court of Appeals' ruling would limit privately-owned facilities, such as the Club Facilities, to operating on an at-cost basis like non-profit homeowners' associations must do with common areas.[89] "The very concept of a commercial property encompasses the anticipation of making a profit and not being limited to operating on an at-cost basis."[90] Thus, section 720.308 only limits expenses about annual budgets of homeowners' associations for association expenses, not to profit and expenses of for-profit developers.[91]

Treating commercial Club Facilities as common areas owned by a non-profit homeowners' association would limit developers like Avatar to operating its private, commercial Club Facilities on an at-cost basis.[92] Looking back to the purpose of the Homeowners' Association Act: "[t]he purposes of this chapter are to give statutory recognition to corporations not for profit that operate residential communities in this state, to provide procedures for

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84. *See id.* at 7; discussion *supra* Section III.A, Part IV; Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

85. *Avatar Props., Inc.*, slip op. at 7.

86. FLA. STAT. § 720.302(1) (2023).

87. *See id.*; *Avatar Props., Inc.*, slip op. at 36 (White, J., dissenting); Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 27.

88. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 30.

89. *Id.* at 27–28.

90. *Id.*

91. *Id.* at 28; *see* FLA. STAT. § 720.308(1)(a) (2023).

92. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 33; *see* Valencia Rsrv. Homeowners Ass'n v. Boynton Beach Assocs., XIX, LLLP, 278 So. 3d 714, 719 (Fla. 4th Dist. Ct. App. 2019).

operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions."[93] In other words, "Chapter 720 [of the Florida Statutes] does not even purport to regulate commercial properties or their operations."[94]

B. *Expenses*

According to section 720.308(1)(a) of the Florida Statutes,

> [a]ssessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors.[95]

Section 720.308(1)(b) of the Florida Statutes states:

> While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association.[96]

Further, section 720.308(4)(b) explains that "[e]xpenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor."[97] The limitation on expenses found in section 720.308 does not apply to the profit and expenses of a for-profit developer concerning commercial properties the for-profit developer owns (e.g., Club Facilities).[98]

Avatar is a for-profit developer of Solivita, a community that includes residential and commercial parcels.[99] Avatar built recreational facilities such

93. FLA. STAT. § 720.302(1) (2023).
94. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 37.
95. FLA. STAT. § 720.308(1)(a).
96. *Id.* § 720.308(1)(b).
97. *Id.* § 720.308(4)(b).
98. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 28.
99. *Id.* at 1.

as "a spa and fitness center, dining venues, indoor and outdoor pools, parks, tennis courts, bocce courts, and pickleball courts" on the land Avatar owns and not on the land designated as common areas.[100] As mentioned above, each homeowner had to become a permanent member of the Club and thus pay a membership fee, representing the expenses of the for-profit Club.[101] In addition to the membership fee, every homeowner was required to pay a perpetual membership fee, which was a profit for Avatar.[102] The limitation on expenses found in section 720.308 does not apply to Avatar concerning the commercial property it owns and operates in Solivita.[103]

In summary, even if section 720.308 did apply to Avatar's private commercial property, the limitation on expenses does not apply to Avatar's profit and expenses concerning the commercial properties it owns in Solivita.[104]

C. *Far-reaching Consequences*

As of 2017, 9,753,000 people lived in 48,000 community associations across Florida.[105] In 2022, there were about 48,500 homeowners' associations in Florida.[106] Further, almost 9.7 million Florida residents live within these communities, where homeowners' associations operate.[107] This constitutes approximately half of all Florida residents.[108]

As of 2022, Florida's population was increasing faster than any other state in the country.[109] Between 2021 and 2022, "Florida's population increased by 1.9% to 22,244,823," making it the fastest-growing state.[110] As

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100. *Id.* at 1, 3; *Avatar Props., Inc.*, slip op. at 1–2.

101. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 1, 6; *Avatar Props., Inc.*, slip op. at 2.

102. Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 6–7; *Avatar Props., Inc.*, slip op. at 2.

103. *See* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 28.

104. *See id.*

105. CMTY. ASSOCS. INST., 2017 NATIONAL AND STATE STATISTICAL REVIEW FOR COMMUNITY ASSOCIATION DATA (2018).

106. *HOA Statistics*, IPROPERTYMANAGEMENT, http://ipropertymanagement.com/research/hoa-statistics#florida (Oct. 9, 2022).

107. *Id.*

108. *Compare QuickFacts: Florida*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/FL (last visited Dec. 22, 2023), *with HOA Statistics*, *supra* note 106.

109. Marc Perry et al., *Florida Fastest Growing State for First Time Since 1957: New Florida Estimates Show Nation's Third-Largest State Reaching Historic Milestone*, U.S. CENSUS BUREAU (Dec. 22, 2022), http://www.census.gov/library/stories/2022/12/florida-fastest-growing-state.html.

110. *Id.*

of 2023, Florida's population has grown by 706,597 people since the Census in 2020.[111] Currently, the inventory of homes available for sale in Florida is lower than before the pandemic.[112] As the population of Florida continues to grow, more communities and homeowners' associations will be needed.[113] In fact, in 2021, builders in Florida received the top five highest number of single-family permits in the country.[114] By September 2023, sales of single-family homes in Florida had increased by 6.1% from 2022.[115]

Many of these new homes will have homeowners' associations that may offer services like those offered by Avatar at Solivita.[116] In fact, this approach is common.[117] The Florida Bar describes it as a typical approach.[118]

> Another approach for ownership and use of shared areas is the mandatory membership club. Under this approach, the club owner is often the master developer or an entity affiliated with it. This approach is typically used when the master developer intends to build extensive recreational facilities and offer them for use not only by the homeowners in the community, but also by other nonowner members. The terms of club membership and use of the club facilities are spelled out in a club plan and the declaration of covenants and restrictions requiring the owners and tenants of dwelling units in the community to become members of the club and pay club dues. The financial obligations of the resident club

111. Mark Lane, *Mo People, Mo Problems and We're No. 1!*, DAYTONA BEACH NEWS-J. (Jan. 1, 2023, 5:00 AM), http://www.news-journalonline.com/story/opinion/columns/2023/01/01/florida-fastest-growing-state-problem-mark-lane/69766600007/.

112. Mihaela Lica Butler, *Florida Housing Market Update: Single-Family Sales Rise by 6.1%*, REALTY BIZ NEWS (Oct. 31, 2023), http://realtybiznews.com/florida-housing-market-update-single-family-sales-rise-by-6-1/98780079/.

113. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant at 6, Avatar Props., Inc. v. Gundel, No. 2D21-3823, 2022 WL 2823582, at *6 (Fla. 2d Dist. Ct. App. June 24, 2022).

114. Danushka Nanayakkara-Skillington, *Texas and Florida Issued the Most Single-Family Permits in 2021*, NAT'L ASS'N HOME BUILDERS (May 12, 2022), http://www.nahb.org/blog/2022/05/building-permits. Builders in Florida received 148,735 single-family permits. *Id.* Idaho was the state in which builders received the highest single-family permits. *Id.* The total number of permits issued in 2021 was approximately 1.1 million. *Id.*

115. Butler, *supra* note 112. The number of single-family homes sales reached 21,335 by September 2023. *Id.*

116. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 6.

117. *Id.*

118. Charles D. Brecker & Margaret A. Rolando, *Planning and Structuring of Real Estate Developments Using Condominium and Community Associations*, *in* FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW 3-26–3-27 (4th ed., 2018).

> members are secured by a lien on the members' dwelling. The mandatory membership club structure allows the club owner to open the facilities to others and to improve, modify, reduce, or expand the facilities unilaterally, without the consent of the members. Typically, the club plan does not grant any ownership rights in the club to any community association or any owner. Rather, the club members receive a nonexclusive license to use portions of the club facilities available to members. Some club plans are designed to give the club owner an exit strategy by giving the association either an option to purchase the club facilities or a right of first refusal.[119]

If developers are unable to operate these private facilities for a profit, they will be discouraged from developing residential communities with commercial parcels with extensive facilities often sought after by those seeking a home.[120] This, in turn, will negatively impact property values.[121] In addition, it may hinder Florida's ability to meet the rapidly growing demand for housing.[122] The Court's ruling that Avatar cannot operate its private facilities for a profit creates a ruling that will have daunting implications for Florida and its growing population.[123]

For developers who operate club facilities at a cost, to avoid a finding that their conduct violates Chapter 720, they should keep their affairs separate from a homeowners' association.[124] In *Avatar*, the management company sent each member an invoice, including both HOA assessments and Club dues.[125] The management company called the Club dues "assessments," and the court relied on this label to find the profit that Avatar was generating to be illegal.[126] Thus, in the future, developers looking to own and operate Club facilities in residential communities should ensure that they keep the Club facilities and the invoicing for Club facilities separate, in every way, from the homeowners' associations.[127] Clubs should bill their fees separately and independently of HOA assessments. And, in place of membership fees, which are profit to the

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119. *Id.*
120. *See* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 33.
121. *See HOA Statistics*, *supra* note 106.
122. *See generally* Initial Brief of Appellant Avatar Properties, Inc., *supra* note 1, at 22.
123. *See id.*; Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 3.
124. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 11 (Fla. 6th Dist. Ct. App. June 22, 2023).
125. *Id.* at 4.
126. *Id.* at 11.
127. *Id.* at 29.

club owners, club owners should have the club documents provide that it is entitled to a management fee for their labor overseeing club operations.

V. SUPREME COURT DENIES REVIEW

"This case is one of first impression, and its outcome will be of statewide importance."[128] In fact, the parties agreed that this was a first-of-its-kind challenge under Chapter 720.[129] On November 2, 2023, the Supreme Court of Florida denied reviewing the certified question presented by *Avatar Properties, Inc. v. Gundel*.[130] The issues presented in this case impact developers and builders involved in developing residential communities containing commercial parcels across Florida.[131] Because the appellate court upheld the trial court's decision and the Supreme Court of Florida denied hearing the case, developers across Florida will be deprived of the opportunity to recover their costs in developing communities enriched with amenities at the developers' upfront expense.[132] Additionally, this will significantly raise the initial costs of buying a home in community developments in Florida containing club facilities.[133] The Court's decision will increase the upfront costs of developing planned residential communities across Florida and deter commercial ownership and maintenance of recreational amenities enriching neighborhoods.[134] This will lead to a decrease in home values and homeowners' satisfaction.[135]

Before the appellate court's decision, the Florida Home Builders Association ("FHBA") feared that the judgment would negatively impact the large number of communities wherein commercial entities have required mandatory membership fees by interfering with existing relationships and punishing current owners of commercial facilities for engaging in acts that have never been prohibited before.[136] Notably,

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128. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 2.

129. *Id.*

130. Avatar Props., Inc. v. Gundel, No. SC2023-0946, 2023 Fla. LEXIS 1674 at *1 (Fla. 2023).

131. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 1.

132. *Id.*

133. *Id.*

134. *Id.* at 3.

135. *Id.*

136. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 7.

> [t]he [Florida Homeowners' Association] Act does not prohibit a developer from collecting and keeping revenue generated by the assessment that exceeds the actual costs of maintenance and operations of the recreational amenities. To find otherwise would eliminate any incentive for a developer to construct and operate any recreational amenities in their developments.[137]

Without the Supreme Court's review, developers remain unincentivized to develop and operate commercial properties in residential developments.[138] Further, the entire state of Florida remains uncertain as to "[w]hether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities."[139]

VI. IMPLICATIONS

The Sixth District Court of Appeal presented the Supreme Court of Florida with a certified question.[140] The court asked: "Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?"[141] Though the Supreme Court of Florida had discretionary jurisdiction over this case, they denied certiorari.[142] The Court's decision not to hear the case on appeal means that the certified question of great importance remains unanswered.[143]

Nevertheless, this Case Comment suggests that the Sixth District Court of Appeal erred for three reasons: (1) Chapter 720 does not apply to the portion of Solivita owned by Avatar because it is commercial property,[144] (2) even if the statute applies, the limitation on expenses does not apply to the profit and expenses of a for-profit developer concerning commercial

137. *Id.* at 12–13.
138. *See id.*
139. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 18 (Fla. 6th Dist. Ct. App. June 22, 2023).
140. *Id.*
141. *Id.*
142. Avatar Props., Inc. v. Gundel, No. SC2023-0946, 2023 Fla. LEXIS 1674 at *1 (Fla. 2023).
143. *Id.*; *Avatar Props., Inc.*, slip op. at 18.
144. *See* discussion *supra* Section IV.A.

properties that the developer owns,[145] and (3) the decision will have far-reaching and harmful implications for Florida and its well-being.[146]

Avatar developed Solivita, and it owns and operates recreational facilities within Solivita.[147] These facilities were built on land that Avatar owns and not on land designated as common areas.[148] To purchase a home within Solivita, the buyer must become a permanent member of the Club and pay a membership fee.[149] Further, the Club facilities are commercial properties and are not common areas.[150] While the HOA operated the community property, Avatar operated the Club Facilities as commercial property.[151] The fees charged to the homeowners were used to cover the costs of operating the Club Facilities and to generate some profit for offering private facilities.[152]

Chapter 720 does not apply to Avatar as the Club Owner because Chapter 720 does not apply to commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use.[153] Because the Club facilities are commercial properties, they are exempt from Chapter 720 of the Florida Statutes.[154] Likewise, the limitation on expenses does not apply to the profit and expenses of a for-profit developer.[155] The court's holding limits a developer's ability to operate a commercial enterprise for profit, which is made available to homeowners within a community governed by Chapter 720.[156]

Further, Florida's population is growing fast, and Florida needs a greater inventory of homes to accommodate its growing population.[157] The Sixth District Court of Appeal's decision disincentivizes developers from helping Florida meet the growing demand for housing.[158]

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145. *See* discussion *supra* Section IV.B.
146. *See* discussion *supra* Section IV.C.
147. *Avatar Props., Inc.*, slip op. at 1.
148. *Id.* at 1–2.
149. *Id.* at 2.
150. *Id.* at 1–2.
151. *Id.* at 1, 3.
152. *Avatar Props., Inc.*, slip op. at 2.
153. *Id.* at 7.
154. *Id.* at 7–8.
155. *Id.* at 7.
156. *See* Valencia Rsrv. Homeowners Ass'n v. Boynton Beach Assocs., XIX, LLLP, 278 So. 3d 714, 719 (Fla. 4th Dist. Ct. App. 2019).
157. Brief of Amicus Curiae Florida Home Builders Ass'n in Support of Appellant, *supra* note 113, at 6.
158. *Id.* at 3.

In rendering its decision, the court relied on the word "assessment" to declare the profit in violation of Chapter 720.[159] This presents a daunting lesson to all developers of residential communities in Florida.[160] Clubs that are owned and operated by developers should be kept entirely separate from homeowners' associations to help ensure that dues are not labeled as "assessments."[161] Rather than charging members a fee that is profitable to a club owner, the members should be charged a Club owner management fee for overseeing the club operations. This would allow developers to operate club facilities for a charge—as they always have—without fear of having their conduct deemed illegal.

159. Avatar Props., Inc. v. Gundel, No. 6D23-170, slip op. at 6–7, 7 n.6 (Fla. 6th Dist. Ct. App. June 22, 2023).

160. *See generally id.*

161. *See generally id.*

JUDICIAL DISCRETION WITHIN THE FLORIDA PROBATE FIELD: GUIDING JUDGES TO FIND THE PROPER BALANCE BETWEEN UPHOLDING ATTORNEYS' FEES AND MAINTAINING THE INTERESTS OF THE CLIENT

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* Natalie Mae Owchariw earned a Bachelor of Arts degree in Criminal Justice and a Master of Science degree in Criminology at Florida Atlantic University, graduating *summa cum laude*. Natalie is currently a Juris Doctor candidate for May 2025 at Nova Southeastern University, Shepard Broad College of Law. Natalie would first like to express that she would not have been able to write this Comment without her faith in God. Her faith is one of the main influences that has encouraged her to pursue a legal career. Second, she would like to thank her parents, Nancy Garcia and Theodor Owchariw II, for their sacrifice, faith, unwavering support, unconditional love, and for teaching her to dream big. Lastly, Natalie extends her gratitude to the executive and editorial board members and her colleagues of *Nova Law Review*, Volume 48, for their hard work and dedication in perfecting this Comment. Natalie was inspired to write this Comment while interning for two probate judges after her first year of law school.

I. INTRODUCTION

The proper function of our legal system relies on the essential role of attorneys' fees.[1] Failure to manage these fees appropriately can undermine the entire legal system.[2] In the realm of probate law, attorneys' fees are unique because probate courts are courts of equity.[3] This grants probate judges the authority to uphold or reduce attorneys' fees when necessary to safeguard client interests.[4] However, because probate judges possess this broad discretion over fees, preventing abuse of this discretion is crucial.[5] In Florida, when probate trial judges are alleged to have abused their discretion, the appellate court steps in to determine whether their decisions were "arbitrary, fanciful, or unreasonable."[6] To further understand attorneys' fees and judicial discretion within the probate field, Part II of this Comment will provide a background on probate law.[7] This Comment will focus specifically on the administration of estates and guardianship, which will be discussed in Parts II, IV, and V of this Comment.[8] Parts III and IV will analyze the cost of estates, the duration of the probate process, and the type of demographics of probate clients.[9] Next, attorneys' fees in Florida will be discussed in Part IV.[10] Part IV will then center on the origin and nature of the Model Rules of Professional Conduct, the Florida Probate Code, and Florida Statutes.[11] For a better understanding of judicial discretion, Part V will explore Florida appellate case law, providing an analysis on the current approach employed by probate judges when reducing attorneys' fees.[12] Part VI will delve into future

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1. *See* Fla. Bar v. Richardson, 574 So. 2d 60, 62 (Fla. 1990) (per curiam).
2. *See id.*; John R. Bradwell, *Excessive Fees in Probate Matters*, 12 J. LEGAL PRO. 161, 161 (1987) (explaining that the legal field cannot properly function in society if attorneys' fees are not reasonable and if clients are unable to pay attorneys' fees).
3. *See* Townsend v. Mansfield, 329 So. 3d 174, 175 (Fla. 1st Dist. Ct. App. 2021) (per curiam); Jeffrey Skatoff, *Power to Award Appellate Attorney's Fees for Services Rendered to an Estate Belongs Exclusively to Florida Probate Court*, PROB. STARS, http://probatestars.com/power-to-award-appellate-attorneys-fees-for-services-rendered-to-an-estate-belongs-exclusively-to-florida-probate-court/ (last visited Dec. 20, 2023).
4. Bradwell, *supra* note 2, at 161.
5. *See* Jack R. Reiter, *Judging Your Appeal: A Practitioner's Perspective*, FLA. BAR J., May 2010, at 34, 35; Skatoff, *supra* note 3 (explaining that the probate court has exclusive jurisdiction to use its discretion to award and reduce attorneys' fees); *Townsend*, 329 So. 3d at 175; Cournand v. Lucor Corp., 114 So. 2d 733, 736 (Fla. 2d Dist. Ct. App. 1959).
6. Reiter, *supra* note 5, at 34.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Parts II, IV, V.
9. *See* discussion *infra* Parts III, IV.
10. *See* discussion *infra* Part IV.
11. *See* discussion *infra* Part IV.
12. *See* discussion *infra* Part V.

implications, suggesting the implementation of a two-step balancing test at the trial and appellate court level to effectively safeguard attorneys' fees and prioritize the interests of the client.[13] Part VII will conclude with a summary of the issues and implications explored in this Comment.[14]

II. BACKGROUND ON PROBATE LAW

Probate is said to come in "two flavors": living probate and death probate.[15] Living probate deals with the legal process when an individual is alive but disabled or mentally incapacitated.[16] Death probate, on the other hand, deals with the legal process when the person is deceased.[17] Death probate involves gathering and distributing a decedent's assets to beneficiaries, as outlined in a valid will.[18] The probate process can also involve paying off the decedent's debts.[19] In the absence of a valid will, the probate process becomes more complex because courts will need to apply relevant Florida Statutes.[20] A will is a document that provides the "last testament" of the decedent.[21]

This Comment specifically delves into two pivotal branches within probate law: the administration of estates and guardianship.[22] Administration of estates hinges on whether there is a will.[23] If a will exists, a personal representative or executor oversees the handling of the decedent's assets in accordance with the will.[24] In the absence of a will, an administrator will

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13. *See* discussion *infra* Part VI.

14. *See* discussion *infra* Part VII.

15. *What Every Senior Should Know About Probate*, ANDERSON DORN & RADER, LTD., http://wealth-counselors.com/reports/what-every-senior-should-know-about-probate/ (last visited Dec. 20, 2023).

16. *Id.*

17. *Id.*

18. *Consumer Pamphlet: Probate in Florida*, THE FLA. BAR, http://www.floridabar.org/public/consumer/pamphlet026/ (Jan. 2021).

19. *Id.*

20. *See id.*

21. *See Using a Will to Pass on Your Estate*, GETLEGAL, http://www.getlegal.com/legal-info-center/wills-trusts-estates/wills-law/ (last visited Dec. 20, 2023).

22. *See Consumer Pamphlet: Probate in Florida*, *supra* note 18; discussion *infra* Part II.

23. *See Consumer Pamphlet: Probate in Florida*, *supra* note 18.

24. *See id.* (explaining that "[i]n a Will, the decedent can name the beneficiaries whom the decedent wants to receive the decedent's probate assets" and "designate a personal representative (Florida's term for an executor) to administer the probate estate") (defining a personal representative as an individual, bank, or trust company); *Executor*, BLACK'S LAW

handle the decedent's assets.[25] Guardianship, on the other hand, deals with the court's appointment of a guardian over a living person.[26] Typically, guardians are appointed for children or mentally incapacitated individuals.[27] Guardians may take on responsibilities that span education, medical care, safety, food, and even financial matters on behalf of the individual.[28]

III. UNIQUENESS OF PROBATE LAW

Probate stands out as a unique field for several reasons: the substantial financial stakes involved, the often lengthy process, and a predominantly elder client base.[29] Nationally, approximately two billion dollars a year are spent on probate.[30] The probate process can potentially be a "costly trap for consumers."[31] The probate process can also be a very lengthy process.[32] The process typically lasts for more than a year.[33] Third, probate clients are typically older people.[34] Ninety percent of probate cases involve property disposition for people aged sixty or older.[35] This demographic is likely due to the nature of the probate process, which administers the assets of either deceased or mentally incapacitated individuals, as the likelihood of death or mental incapacity increasing with age.[36]

Those three factors—expenses, duration, and populace—have an impact on attorneys' fees.[37] Attorneys can "build lucrative practices [based] solely on probate."[38] In probate, attorneys' fees can "consume as much as [twenty percent] of small estates, and as much as [ten percent] of even

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DICTIONARY (11th ed. 2019) (defining an executor as "[a] person named by a testator to carry out the provisions in the testator's will.").

25. *Administrator*, BLACK'S LAW DICTIONARY (11th ed. 2019).

26. Mitch Mitchell, *How Does Guardianship Work?*, TR. & WILL, http://trustandwill.com/learn/probate-guardianship (last visited Dec. 20, 2023); *Administrator*, *supra* note 25.

27. Mitchell, *supra* note 26.

28. *See id.*

29. *What Every Senior Should Know About Probate*, *supra* note 15.

30. *Id.*

31. *See id.*; Eric Millhorn, *Is the Florida Probate Process Expensive?*, MILLHORN ELDER L. PLAN. GRP. (Aug. 9, 2022), http://www.millhorn.com/is-the-florida-probate-process-expensive/.

32. *See What Every Senior Should Know About Probate*, *supra* note 15; Millhorn, *supra* note 32.

33. *What Every Senior Should Know About Probate*, *supra* note 15.

34. *Id.*

35. *Id.*

36. *See id.*

37. *See id.*

38. *What Every Senior Should Know About Probate*, *supra* note 15.

uncomplicated estates."[39] The duration of the probate process significantly influences attorneys' fees, as prolonged proceedings result in higher costs.[40] Considering that the senior population, typically involved in probate matters, often possesses more wealth than their younger counterparts, attorneys can command a greater percentage in fees.[41]

Despite the lucrative nature of the probate field, it is important that attorneys avoid excessively charging their clients.[42] Attorneys must strike a balance between their own interests and the interests of their clients.[43] In situations where finding this balance proves difficult, Florida courts should intervene to "assure the efficient performance of judicial functions."[44] The inherent powers of the Florida courts dictate that judicial functions must be maintained with "dignity and integrity."[45] This empowers the courts to construe and limit attorneys' fees as necessary.[46]

IV. HOW PROBATE ATTORNEYS' FEES ARE ASSESSED IN FLORIDA

Florida courts must uphold attorneys' fees while safeguarding the client's interests.[47] Currently, judges lack a clear standard to determine reasonable attorneys' fees.[48] Some courts have turned to the Model Rules of Professional Conduct as a benchmark for assessing the reasonableness of attorneys' fees.[49] The Model Rules of Professional Conduct were created by the American Bar Association in 1983.[50] These rules serve as a set of guidelines and standards in this regard.[51] However, the Model Rules of

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39. *Id.*
40. *See id.*
41. *See id.*; Millhorn, *supra* note 31.
42. *See* Bradwell, *supra* note 2, at 161, 167.
43. *Id.* at 161 (demonstrating that attorneys should receive reasonable compensation for their services while also maintaining the integrity of the client).
44. *See* Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIA. L. REV. 257, 286 (1985).
45. *Id.*
46. *See id.* at 268.
47. *See id.* at 263, 265, 286, 288–289 (indicating that Florida courts have the inherent power to protect parties' interests and assess attorneys' fees in certain circumstances and the exercise of those inherent powers must be reasonable); Glantz & Glantz, P.A. v. Chinchilla, 17 So. 3d 711, 713 (Fla. 4th Dist. Ct. App. 2009).
48. Bradwell, *supra* note 2, at 161.
49. *Id.*
50. *Model Rules of Professional Conduct*, CORNELL L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/model_rules_of_professional_conduct (last visited Dec. 20, 2023).
51. *Id.*

Professional Conduct are not binding.[52] Thus, courts have the discretion to adopt the Model Rules of Professional Conduct.[53] It is unclear whether Florida courts have fully adopted the Model Rules of Professional Conduct when it comes to determining reasonable attorneys' fees because the Florida Probate Code is similar—but not identical—to the Model Rules of Professional Conduct.[54] Nevertheless, when discussing attorneys' fees, it is imperative to understand the similarities between the Model Rules of Professional Conduct and the Florida Probate Code.[55]

A. *Rule 1.5 of the Model Rules of Professional Conduct*

Under Rule 1.5 of the Model Rules of Professional Conduct, attorneys may only charge and collect a fee that is reasonable.[56] Rule 1.5 outlines various factors to consider when determining reasonableness of attorneys' fees.[57] These factors encompass the time and effort invested by the attorney and the complexity of the issue.[58] Further, the preclusion of other employment by the attorney can also be considered.[59] The third factor is the average rate of the fee in the jurisdiction.[60] The fourth factor examines "the amount [of money] involved and the results obtained" from the case.[61] The fifth factor considers the circumstances of the case and the potential time limitations the client may have put on the attorney.[62] The sixth factor is the relationship between the attorney and the client.[63] The seventh factor considers the ability of the attorney to properly handle the client's case based on both experience and reputation, and the last factor considers "whether the fee is fixed or contingent."[64]

These factors are a non-exhaustive list of considerations.[65] In fact, it is suggested that probate courts broaden their considerations to include

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52. *Id.*
53. *See* Bradwell, *supra* note 2, at 161.
54. *See* Mary Sue Donohue, *Probate and Trust Law: 1993 Survey of Florida Law*, 18 NOVA L. REV. 355, 356 (1993).
55. *See id.*
56. MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2023); Bradwell, *supra* note 2, at 161–62.
57. *See* MODEL RULES OF PRO. CONDUCT r. 5.080.
58. *Id.* r. 1.5(a)(1).
59. *Id.* r. 1.5(a)(2).
60. *Id.* r. 1.5(a)(3).
61. *Id.* r. 1.5(a)(4).
62. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(5).
63. *Id.* r. 1.5(a)(6).
64. *Id.* r. 1.5(a)(7)–(8).
65. *See* Bradwell, *supra* note 2, at 162.

additional factors.[66] For instance, factors such as good faith, diligence, and reasonable prudence are sometimes taken into account by probate courts.[67]

B. *Florida Probate Code*

It is also important to understand how the Florida Probate Code guides courts to evaluate attorneys' fees.[68] The Florida Probate Code was developed in 1933 and later revised in 1945.[69] It outlines rules 5.010–5.530, which govern probate proceedings in Florida.[70] Further, in Florida, Chapters 731–735 encompass the statutes related to probate.[71]

This section will analyze the Florida Probate Code statutes and rules pertinent to understanding how courts are directed to assess attorneys' fees within the administration of estates and guardianship.[72] Under Florida Probate Rule 5.080, courts have "broad discretion" to assess attorneys' fees.[73] This discretion is underscored by Chapter 733, Florida Statutes which further demonstrates the extensive discretion courts have when evaluating attorneys' fees.[74]

1. Florida Statute § 733.106

Section 733.106 of the Florida Statutes falls under the "Administration of Estates" chapter of the Florida Probate Code and discusses costs and attorneys' fees.[75] Under section 733.106, attorneys who perform services for an estate can receive "reasonable compensation from the estate."[76] Florida courts, however, have the power to decide what is reasonable based on

66. *See id.* at 162–63.
67. *See id.*
68. *See* Donohue, *supra* note 54, at 356.
69. *See How Probate in Florida Differs from Other States*, 1800 PROB., http://www.1800probate.com/differences-in-florida/ (last visited Dec. 20, 2023).
70. *See Consumer Pamphlet: Probate in Florida*, *supra* note 18.
71. *See id.*; FLA. STAT. § 731–735 (2023).
72. *See* discussion *infra* Sections IV.1.a–d.
73. FLA. PROB. R. 5.080(b).
74. FLA. STAT. § 733.106(4) (2023).
75. *See id.* § 733.106.
76. *Id.* § 733.106(3).

the estate in the case.[77] This gives Florida courts "sound discretion" when it comes to attorneys' fees.[78]

2. Florida Statute § 733.6171

In addition, section 733.6171 of the Florida Statutes falls under the Administration of Estates chapter of the Florida Probate Code, specifically addressing the compensation of attorneys representing personal representatives.[79] According to this statute, attorneys for personal representatives may receive reasonable compensation.[80] The section also lists the compensation that attorneys can receive for conducting ordinary services.[81] Presumably, the listed compensation is reasonable.[82] This section also requires that attorneys for personal representatives receive reasonable compensation for extraordinary services.[83] The statute goes on to enumerate the factors that categorize attorney services as extraordinary.[84] For example, representation may be considered extraordinary depending on the "size and complexity of the estate."[85]

3. Florida Statute § 733.6175

Section 733.6175 of the Florida Statutes also falls under the Administration of Estates chapter of the Florida Probate Code.[86] This pertains to the "compensation of personal representatives and employees of [an] estate."[87] According to this section, attorneys' fees must be reasonable.[88] Further, the Florida probate court has the discretion to decide when attorneys' fees are reasonable.[89]

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77. *Id.* § 733.106(4).
78. *Probate Attorney's Fees Petitions*, ADRIAN PHILIP THOMAS, P.A. (Oct. 9, 2008), http://www.florida-probate-lawyer.com/blog/2008/october/probate-attorney-s-fee-petitions/.
79. FLA. STAT. § 733.6171 (2023).
80. *Id.* § 733.6171(1).
81. *Id.* § 733.6171(3).
82. *Id.*
83. *Id.* § 733.6171(4).
84. FLA. STAT. § 733.6171(4).
85. *Id.*
86. FLA. STAT. § 733.6175 (2023).
87. *Id.*
88. *See id.* § 733.6175(1)–(4).
89. *Id.* § 733.6175(1).

4. Florida Statute § 744.108

Section 744.108 falls within the Guardianship chapter of the Florida Statutes.[90] This section addresses attorneys' fees and guardians.[91] Under this statute, attorneys providing legal services to the guardian are permitted to receive reasonable fees.[92] The court, as provided in the statute, has the discretion to determine whether attorneys' fees are reasonable based on several factors.[93] The first factor considers the time and labor invested by the attorney.[94] The second factor considers the novelty and skill involved in the case.[95] The third factor considers the preclusion of other employment by the attorney.[96] The fourth factor considers the typical fee rates in that jurisdiction.[97] The fifth factor takes into account the nature and value of the client's estate, the responsibilities of the attorney, and the "amount of income earned by the estate."[98] The sixth factor considers the results of the case.[99] The seventh factor considers time constraints.[100] The eighth factor considers the relationship between the attorney and the client.[101] The last factor takes into account the attorney's ability to perform the required services, their experience, and reputation.[102]

There are striking similarities between the nine factors under section 744.108 and the eight factors under Rule 1.5 of the Model Rules of Professional Conduct.[103] For instance, under Rule 1.5, the time and work put into a case as well as the complexity of the case is considered,[104] and the same applies under the first factor of section 744.108.[105] Additionally, under Rule 1.5, the second factor considers the preclusion of other employment by the attorney,[106] and section 744.108 also considers the preclusion of other

90. FLA. STAT. § 744.108 (2023).
91. *Id.*
92. *Id.* § 744.108(1).
93. *See id.* § 744.108(2).
94. *Id.* § 744.108(2)(a).
95. FLA. STAT. § 744.108(2)(b).
96. *Id.* § 744.108(2)(c).
97. *Id.* § 744.108(2)(d).
98. *Id.* § 744.108(2)(e).
99. *Id.* § 744.108(2)(f).
100. FLA. STAT. § 744.108(2)(g).
101. *Id.* § 744.108(2)(h).
102. *Id.* § 744.108(2)(i).
103. *Compare id.* § 744.108, *with* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2023).
104. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(1).
105. FLA. STAT. § 744.108(2)(a).
106. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(2).

employment by the attorney under the third factor.[107] Under Rule 1.5, the seventh factor considers the ability of the attorney to properly handle the client's case, their experience, and their reputation,[108] with section 744.108 taking into account the ability of the attorney to perform the required services, their experience, and reputation.[109] Due to the parallels between Rule 1.5 and Florida Statute section 744.108, it is evident that there is a close alignment between the Florida Probate Code and the principles outlined in the Model Rules of Professional Conduct.[110]

V. UNDERSTANDING JUDICIAL DISCRETION IN FLORIDA

Although Rule 1.5 of the Model Rules of Professional Conduct, Florida Probate Rule 5.080, and sections 733.106, 733.6175, and 744.108 of the Florida Probate Code dictate that judges have the discretion to discern reasonable attorneys' fees, these rules do not define "reasonable."[111] Case law demonstrates that Florida courts have the inherent power to assess attorneys' fees.[112] Unlike statutory law, case law is often considered to offer more efficient and predictable principles and rules of law[113] because case law evolves through the rulings of different appellate judges.[114]

A. *Florida Appellate Case Law: Administration of Estates and Guardianship*

This section analyzes case law to provide insight into judicial discretion when assessing reasonable attorneys' fees in the probate field.[115] More specifically, this section will delve into appellate cases that analyze Florida Probate Rule 5.080, along with multiple statutes from the Administration of Estates chapter of the Florida Probate Code and the Guardianship chapter of the Florida Statutes.[116] This analysis is crucial for a

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107. FLA. STAT. § 744.108(2)(c).

108. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(7).

109. *See* FLA. STAT. § 744.108(2)(i).

110. *See id.* § 744.108; MODEL RULES OF PRO. CONDUCT r. 1.5; Donohue, *supra* note 54, at 356.

111. *See* FLA. PROB. R. 5.080; FLA. STAT. § 733.106(4) (2023); FLA. STAT. § 733.6171(5) (2023); FLA. STAT. § 733.6175(2) (2023); FLA. STAT. § 744.108(8); Bradwell, *supra* note 2, at 161; MODEL RULES OF PRO. CONDUCT r. 1.5(a).

112. *See* Silver, *supra* note 44, at 265.

113. Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 379 (2008).

114. *See id.*

115. *See* discussion *infra* Section V.A.

116. *See* discussion *infra* Section V.A.

comprehensive understanding of judicial discretion, as appellate courts review trial and circuit court decisions and determine whether judges abused their discretion.[117]

In *Bishop v. Estate of Rossi*,[118] the appellant appealed a trial court's decision.[119] The Fifth District Court of Appeal of Florida reversed and remanded the case for the trial court to determine a reasonable amount of attorneys' fees pursuant to Florida Probate Rule 5.080.[120] The Court reasoned that attorneys' fees must be substantiated by evidence.[121] Further, for attorneys' fees to be supported by evidence, there must be a reasonable number of hours worked and a reasonable hourly rate.[122] Both the hours worked and the hourly rate charged should be based on the nature of the probate litigation.[123]

In *In re Estate of Udell*,[124] the appellant appealed a trial court decision.[125] The Florida Fourth District Court of Appeal affirmed in part and reversed in part the trial court's decision, prompting the trial court to reassess attorneys' fees for the services provided.[126] The appellate Court reasoned that the trial court has sole province to exercise its discretion in determining attorneys' fees.[127]

In *Glantz & Glantz, P.A. v. Chinchilla*,[128] the appellant sought review of a trial court decision.[129] The Florida Fourth District Court of Appeal reversed the trial court's ruling to reduce attorneys' fees by fifty-one percent.[130] The Court reasoned that attorneys are required to receive reasonable compensation.[131] The Court also reasoned that the attorneys' fees

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117. *See* Reiter, *supra* note 5, at 34; *About the U.S. Courts of Appeals*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (last visited Dec. 20, 2023); *District Courts of Appeal*, FLA. CTS., http://www.flcourts.gov/Florida-Courts/District-Courts-of-Appeal (Oct. 10, 2023).

118. 114 So. 3d 235 (Fla. 5th Dist. Ct. App. 2013).

119. *Id.* at 236.

120. *See id.* Attorneys' fees should be reasonable and adequate. *In re* Cobb's Estate, 26 So. 2d 442, 443 (Fla. 1946) (per curiam).

121. *Bishop*, 114 So. 3d at 237 (quoting Simhoni v. Chambliss, 842 So. 2d 1036, 1037 (Fla. 4th Dist. Ct. App. 2003) (per curiam)).

122. *See id.*

123. *See id.*

124. 501 So. 2d 1286 (Fla. 4th Dist. Ct. App. 1986).

125. *See id.* at 1287.

126. *See id.* at 1287–88.

127. *See id.* at 1288–89.

128. 17 So. 3d 711 (Fla. 4th Dist. Ct. App. 2009).

129. *Id.* at 712.

130. *See id.* at 713.

131. *Id.*

in this case were reasonable, emphasizing that the trial court abused its discretion in making such a determination.[132]

In *Sheffield v. Dallas*,[133] the appellant appealed a trial court ruling.[134] The Florida Fifth District Court of Appeal affirmed the trial court's decision to reduce attorneys' fees.[135] The Court reasoned that the trial court properly used its discretion to discern excessive attorneys' fees from reasonable attorneys' fees.[136] Further, the Court explained that a trial court's decision to reduce excessive attorneys' fees would not be disturbed by an appellate court unless there is a "manifest weight of the evidence," suggesting that the trial court erred in discerning reasonable attorneys' fees.[137]

In *Faulkner v. Woodruff*,[138] the appellant appealed an order imposed by the trial court.[139] The Florida Second District Court of Appeal reversed the trial court's order, dismissing the petitioners request to have his attorneys' fees reviewed by the court.[140] The Court reasoned that the appellant had a right to have his attorney's fees assessed by the probate court.[141] The Court further reasoned that the "[a]ppellees have the burden of proof to [prove] that their fees are reasonable."[142]

In *Mitchell v. Mitchell*,[143] the appellant appealed an order reducing attorneys' fees in a guardianship proceeding.[144] In response, the Florida Fourth District Court of Appeal reversed the trial court's order reducing attorney's fees.[145] At the trial court level, their reasoning was based on the fact that the case required the work of multiple lawyers, finding the work completed to be duplicative.[146] At the appellate level, the Court reasoned that just because a partner and associate appear at the same proceeding together does not mean their work is duplicative.[147]

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132. *See id.*
133. 417 So. 2d 796 (Fla. 5th Dist. Ct. App. 1982).
134. *See id.* at 796.
135. *See id.* at 798.
136. *See id.* at 798.
137. *See id.*
138. 159 So. 3d 319 (Fla. 2d Dist. Ct. App. 2015).
139. *See id.* at 320.
140. *See id.* at 323.
141. *See id.*
142. *Id.*
143. 94 So. 3d 706 (Fla. 4th Dist. Ct. App. 2012).
144. *Id.* at 707.
145. *See id.* at 708
146. *See id.*
147. *Id.*

Attorneys' fees can become questionable when attorneys do "duplicative, routine, or administrative" work.[148] If attorneys' fees are based on "duplicative, routine, or administrative" work, the court may deem the fees unreasonable.[149] Work becomes duplicative when one attorney completes the same work as another attorney on the same case.[150] Generally, clients cannot be billed for duplicative work.[151] When the attorney charges the client based on duplicative efforts the court will either order a refund for the client or reduce the attorney fees.[152]

Routine work is defined as work that does not require an attorney's expertise.[153] This is the type of work that is too simple for an experienced probate attorney.[154] In some cases, attorneys will excessively charge a client for simple work.[155] In probate, certain cases require attorneys to complete routine or simple tasks and the court may allow attorneys to bill for this work.[156] However, if an attorney charges excessively for cases that are routine for an experienced probate attorney, the court will reduce fees.[157]

Further, administrative work is considered the "leg work" of an executor of an estate.[158] As discussed previously, the executor is the one who has the legal power to convey the estate of a decedent in the manner which they have described in their will.[159] Thus, if attorneys are carrying out tasks that are actually the executor's responsibility, the court will deem their fees unreasonable.[160] Attorneys who act as an executor must also be careful not to bill the work they perform while acting as the executor.[161] In either of the two above listed incidents, the court will reduce the attorneys' fees.[162]

Finally, in *Schacter v. Guardianship of Schacter*,[163] an attorney appealed an order by the trial court to reduce their fees.[164] The Florida Fourth District Court of Appeal reversed and remanded the trial court's order and

148. Bradwell, *supra* note 2, at 163.
149. *See id.*
150. *See id.* at 164.
151. *Id.*
152. *Id.* at 164, 166.
153. *See* Bradwell, *supra* note 2, at 165.
154. *See id.*
155. *See id.* at 164–65.
156. *Id.* at 165.
157. *See id.* at 164–65.
158. Bradwell, *supra* note 2, at 163.
159. *Executor*, *supra* note 24.
160. Bradwell, *supra* note 2, at 163.
161. *Id.*
162. *See id.*
163. 765 So. 2d 1075 (Fla. 4th Dist. Ct. App. 2000).
164. *See id.* at 1076.

reduced the attorney's fees pursuant to section 744.108 of the Florida Statutes.[165] The Court reasoned that there must be enough evidence for the trial court to reduce attorney fees.[166] Absent such evidence, the trial court abused its discretion.[167]

B. *Connection: The Reasonableness and Abuse of Judicial Discretion*

As demonstrated by the case law discussed above, probate courts have broad discretion to set reasonable attorney fees.[168] The case law presented here demonstrates the legal concept of reasonableness;[169] a term that has been mentioned several times in this Comment, but has not yet been truly explained.[170] Reasonableness largely depends on the court's interpretation.[171] While cases would ideally be assessed by the court objectively, assessing reasonableness requires the court to use its own discretion.[172] This means that each court uses its own perspective to decipher reasonableness.[173]

Variances in judicial perception of reasonableness can be seen in the cases previously discussed.[174] For example, while one case affirms a trial court's ruling, another reverses and remands.[175] These differing appellate court rulings show how different judges may produce different outcomes.[176]

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165. *See id*; FLA. STAT. § 744.108 (2023).

166. *Schacter*, 756 So. 2d at 1076.

167. *Id.*

168. *See* Sheffield v. Dallas, 417 So. 2d 796, 798 (Fla. 5th Dist. Ct. App. 1982); McDaniel v. County. of Schenectady, 595 F.3d 411, 414 (2d Cir. 2010) (demonstrating that the probate court has "sound discretion" to discern reasonable attorney fees); *see also* discussion *supra* Section V.A.

169. *See The Last Word*, AM. BAR ASS'N, http://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/november_december_2017/the-last-word-reasonable-elastic-word-that-can-make-deal/ (last visited Dec. 20, 2023) (demonstrating that reasonableness "depends on the perception of . . . the court"); *see also* discussion *supra* Section V.A.

170. *See* discussion *supra* Parts I, IV–V.

171. *The Last Word*, *supra* note 169.

172. *See id.*

173. *See id.*

174. *See* discussion *supra* Section V.A.

175. *See* discussion *supra* Section V.A; *see e.g.*, Sheffield v. Dallas, 417 So. 2d 796, 798 (Fla. 5th Dist. Ct. App. 1982); Bishop v. Estate of Rossi, 114 So. 3d 235, 236 (Fla. 5th Dist. Ct. App. 2013).

176. *See Judicial Interpretation*, BALLOTPEDIA, http://ballotpedia.org/Judicial_interpretation (last visited Dec. 20, 2023).

The previous cases also help show how judicial discretion comes into play in probate court.[177] For example, many of the rulings in the previous cases remanded the cases back to the trial court so that probate courts could use their discretion and assess attorneys' fees.[178] These previous cases also demonstrate how broad judicial deference can sometimes lead to abuse of discretion.[179] For example, in *Glantz & Glantz, P.A. v. Chinchilla*, the appellate Court found that the trial court abused its discretion by reducing attorneys' fees by fifty-one percent.[180] This reduction of fees is common in attorneys' fees cases.[181] It is, however, rare for a trial court judge to be reversed by an appellate court on these matters.[182] In the aforementioned cases, there were only a few examples where the appellate court reversed and found that the trial court abused its discretion.[183] The cases where the appellate court found that the trial court abused its discretion were those where the trial court either reduced or upheld attorney fees.[184] Despite the existence of statutes meant to guide judges when assessing the reasonableness of attorney fees, judicial discretion can lead to inconsistent holdings.[185] Further, these cases show how trial court judges must use discretion to reduce or uphold attorneys' fees.[186] Although judicial discretion exists to increase fairness and

177. *See* Faulkner v. Woodruff, 159 So. 3d 319, 323 (Fla. 2d Dist. Ct. App. 2015); Glantz & Glantz, P.A. v. Chinchilla, 17 So. 3d 711, 713 (Fla. 4th Dist. Ct. App. 2009); Bradwell, *supra* note 2, at 162–63.

178. *See Faulkner*, 159 So. 3d at 323; *Glantz & Glantz*, 17 So. 3d at 713.

179. Joseph T. Sneed, *Trial-Court Discretion: Its Exercise by Trial Courts and Its Review by Appellate Courts*, 13 J. APP. PRAC. & PROCESS 201, 207 (2012); *see* Bradwell, *supra* note 2, at 164; *Glantz & Glantz, P.A.*, 17 So. 3d at 713.

180. *Glantz & Glantz, P.A.*, 17 So. 3d at 712.

181. *See* Gilbert M. Román, *Avoid These Five Mistakes to "Keep the Crown on" and Avoid Abuse of Discretion Reversals*, THE NAT'L JUD. COLL. (Jan. 18, 2018), http://www.judges.org/news-and-info/abuse-discretion-mistakes-often-lead-reversal/.

182. *See* Christopher Holinger, *Abuse of Discretion: The Toughest Standard of Review to Overcome*, GOLIGHTLY MULLIGAN & MORGAN (Feb. 3, 2022), http://golightlylaw.com/abuse-of-discretion/.

183. Bishop v. Estate of Rossi, 114 So. 3d 235, 237 (Fla. 5th Dist. Ct. App. 2013); Mitchell v. Mitchell, 94 So. 3d 706, 708 (Fla. 4th Dist. Ct. App. 2012); *Glantz & Glantz, P.A.*, 17 So. 3d at 713.

184. *See Mitchell*, 94 So. 3d at 708; *Glantz & Glantz*, 17 So. 3d at 712.

185. FLA. STAT. §§ 744.108(2), 733.6175(1)–(4), 733.6171(3)–(5), 733.106(4) (2023); *see* John C. McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE. L. REV. 487, 490 (1991); *see e.g.*, Sheffield v. Dallas, 417 So. 2d 796, 798 (Fla. 5th Dist. Ct. App. 1982); *Bishop*, 114 So. 3d at 236.

186. *See Sheffield*, 417 So. 2d at 798; Bradwell, *supra* note 2, at 163; *see also* discussion *supra* Section V.A.

promote an equitable legal process, abuse of judicial discretion can lead to gross injustice.[187]

VI. FUTURE IMPLICATIONS

The *In re Hutton*[188] Court declared that there must be judicial balancing when judges uphold attorneys' fees.[189] Under the doctrine of balance, it is imperative that "instruction provide due consideration of varying views of any subject matter."[190] Further, the doctrine of balance demonstrates that when practitioners of a given field are divided on proper approaches, all the approaches should be considered and analyzed.[191] Thus, this section will explore the implications of imposing a two-step balancing test as a form of guidance for probate judges using their judicial discretion to uphold attorney fees and maintain the client's interests.[192]

A. *Balancing Test: Upholding Attorneys' Fees v. Interests of the Client*

When applying a balancing test to judicial discretion, judges must provide due consideration to upholding attorneys' fees while also maintaining the client's interests.[193] This type of due consideration requires judges to balance the work attorneys complete for their clients with the interest of the client to not get overcharged by their attorneys.[194]

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187. Thomas A. Zonay, *Judicial Discretion: 10 Guidelines for Its Use*, THE NAT'L JUD. COLL. (May 21, 2015), http://www.judges.org/news-and-info/judicial-news-judicial-discretion-guidelines/; *see* D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 85 (2007) ("[F]ailure to balance discretion with guidance results in disparity . . . .").

188. 463 B.R. 819 (Bankr. W.D. Tex. 2011).

189. *Id.* at 829 (citing Thielenhaus v. Thielenhaus, 890 P.2d 925, 935 (Okla. 1995)).

190. Kenneth L. Marcus, *The Doctrine of Balance*, 9 FIU L. REV. 59, 59 (2013).

191. *Id.*; *see Balancing Test*, BLACK'S LAW DICTIONARY (11th ed. 2019).

192. *See* Bradwell, *supra* note 2, at 161; discussion *supra* Section V.A.

193. *See* Marcus, *supra* note 190, at 59; Bradwell, *supra* note 2, at 161 (demonstrating that attorneys must balance their interests with the interests of their own client when determining reasonable attorneys' fees).

194. *See* McDaniel v. County of Schenectady, 595 F.3d 411, 414 (2d Cir. 2010) (explaining that reasonable clients want to spend the least amount of money on attorneys' fees, while attorneys want to maintain their reputation while charging reasonable attorneys' fees); Bradwell, *supra* note 2, at 161.

1. "Balance" at the Trial Court Level

This section suggests a balance at the trial court level in efforts to uphold the interests of the attorney and those of the client.[195] At the front lines of assessing attorney fees is the trial court.[196] For probate judges to balance the interests of the attorney and the client at the trial court level, this section suggests that trial court judges use all the factors set forth in the Model Rules of Professional Conduct.[197]

As mentioned previously, under Rule 1.5, trial court judges must consider the time and work put in and the complexity of the issue.[198] Second, trial court judges must consider the preclusion of other employment by the attorney.[199] Third, trial court judges must factor in the typical rate of the fee in that jurisdiction.[200] Fourth, trial court judges must examine the amount of money involved and the results obtained from the case.[201] Fifth, trial court judges must consider the circumstances of the case and the potential time limitations the client may have put on the attorney.[202] Sixth, trial court judges must weigh the relationship between the attorney and the client.[203] Seventh, trial court judges must consider the ability of the attorney to properly handle the client's case based on both experience and reputation.[204] Lastly, trial court judges must consider "whether the fee is fixed or contingent."[205]

Part IV of this Comment discusses the Florida Statutes on attorneys' fees in probate.[206] The only statute discussed in Part IV that incorporated the Model Rules of Professional Conduct was section 744.108 of the Florida

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195. *See* discussion *infra* Section VI.A.1.

196. *See* Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985); GINA BEOVIDES & JAMES NUTT, 2023 FLA. JUD. COLL. CIR. CIV. FUNDAMENTALS, MANAGING THE CONTESTED ATTORNEYS' FEE HEARING IN FLORIDA 3 (2023), http://www.flcourts.gov/content/download/862345/file/Attorney.pdf.

197. *See* MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2023); Bradwell, *supra* note 2, at 161; discussion *infra* Section VI.A.1.

198. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(1).

199. *Id.* r. 1.5(a)(2).

200. *Id.* r. 1.5(a)(3).

201. *Id.* r. 1.5(a)(4).

202. *Id.* r. 1.5(a)(5).

203. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(6).

204. *Id.* r. 1.5(a)(7).

205. *Id.* r. 1.5(a)(8); *see also Fees and Expenses*, AM. BAR ASS'N (Dec. 3, 2020), http://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses/ (explaining that a fixed fee is a flat fee that is usually used in cases that are "straightforward" and "routine," whereas a contingent fee is a fixed percentage based on the success of the case).

206. *See* FLA. STAT. § 744.108 (2023); FLA. STAT. § 733.106 (2023); discussion *supra* Part IV.

Statutes.[207] Because of this, in Part V of this Comment, each case deals with a different statute and has different rulings when assessing attorneys' fees.[208] This shows a lack of consistency, making clear the nessitity to provide trial and appellate court judges with clear guidelines when assessing attorneys' fees.[209]

2. "Balance" at the Appellate Court Level

The trial court is one of many stages where there should be a proper balance between the interests of the attorney and the client.[210] As discussed in Part V of this Comment, in order to truly understand judicial discretion, it is important to analyze case law at the appellate level because appellate courts review the decisions made in trial courts, circuit courts, and even district courts of appeals to determine whether judges abuse their discretion.[211] Further, it is imperative to have a balance at the appellate court level because appellate courts can award appellate attorney's fees.[212]

For probate judges to reasonably balance both the interests of the attorneys and the clients at the appellate court level, this section suggests that appellate court judges require lower courts to adopt the Lodestar Method.[213] The Lodestar Method is a method used in the legal field to compute reasonable attorneys' fees.[214] This method requires trial court judges to multiply the hours reasonably spent on a case by a reasonable hourly rate.[215] The fee obtained from this calculation can then be adjusted based on varying factors, such as the quality of the work, time, and labor.[216]

In *Florida Patient's Compensation Fund v. Rowe*,[217] the Florida Supreme Court adopted the Lodestar Method as a guideline for trial courts to

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207. *See* FLA. STAT. § 744.108; discussion *supra* Part IV.

208. *See* Glantz & Glantz, P.A. v. Chinchilla, 17 So. 3d 711, 713 (Fla. 4th Dist. Ct. App. 2009); Sheffield v. Dallas, 417 So. 2d 796, 798 (Fla. 5th Dist. Ct. App. 1982) (showing that on appeal, the appellate courts differed in interpretation of attorney fees); discussion *supra* Part V.

209. *See* Bradwell, *supra* note 2, at 161–63.

210. *See id.* at 161; *About the U.S. Courts of Appeals*, *supra* note 117.

211. *See* discussion *supra* Part V; Reiter, *supra* note 5, at 34; *About the U.S. Court of Appeals*, *supra* note 117; *District Courts of Appeal*, *supra* note 117.

212. *See* Fisher, *supra* note 187, at 96; Bretton C. Albrecht, *Fee Simple: A Procedural Primer on Appellate Attorneys' Fees and Costs*, FLA. BAR J., Feb. 2013, at 24, 24.

213. *See* discussion *supra* Section VI.A.2; Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1146 (Fla. 1985).

214. *See Lodestar*, BLACK'S LAW DICTIONARY (11th ed. 2019).

215. *Id.*

216. *See id.*

217. 472 So. 2d 1145 (Fla. 1985).

assess and compute reasonable attorneys' fees.[218] Although this case deals with medical malpractice, the Florida Supreme Court set the stage for the Lodestar Method to be applied to all types of cases.[219] Further, in *Standard Guaranty Insurance v. Quanstrom*,[220] the Florida Supreme Court continued to use the Lodestar Method.[221] Thus, with the Florida Supreme Court's use of the Lodestar Method, probate courts should follow suit.[222]

In probate, the Lodestar Method has been utilized in the past.[223] In *In re Estate of Platt*,[224] the Lodestar Method was applied to real property, probate, and trust law cases.[225] However, *In re Estate of Platt* is an older case that has now been superseded by statute.[226] The statute that superseded *In re Estate of Platt* was section 736.0708 of the Florida Statutes.[227] Section 736.0708 can be found in the Florida Trust Code chapter of the Florida Probate Code.[228] This Comment, however, analyzes only two chapters from the Florida Probate Code: Administration of Estates and Guardianship.[229] Thus, this section suggests that probate judges adopt and apply the Lodestar Method only to the administration of estates and guardianship cases.[230]

The Lodestar Method requires trial court judges to multiply the hours reasonably spent on a case by a reasonable hourly rate, requiring appellate court judges to allow for judicial discretion at the trial court level.[231] Although this can be argued to make the Lodestar Method less credible, judicial

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218. *Id.* at 1150.

219. *See id.* at 1146.

220. 555 So. 2d 828 (Fla. 1990).

221. *See id.* at 829; Donohue, *supra* note 54, at 356.

222. *See* Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1146 (Fla. 1985); Donohue, *supra* note 54, at 355–5

223. *See In re* Estate of Platt, 586 So. 2d 328, 333 (Fla. 1991), *superseded by statute*, Fla. Stat. § 736.0708 (2007).

224. 586 So. 2d 328 (Fla. 1991), *superseded by statute*, Fla. Stat. § 736.0708 (2007).

225. *See id.* at 333.

226. *See* Robert Rauschenberg Found. v. Grutman, 198 So. 3d 685, 687 (Fla. 2d Dist. Ct. App. 2016).

227. *See id.*; FLA. STAT. § 736.0708(1).

228. *See* FLA. STAT. § 736.0708.

229. *See* discussion *supra* Parts II–V.

230. *See* discussion *supra* Section V.A.

231. *See* Neil Pedersen, *Attorney Fee Awards in FEHA Claims: The Lodestar Analysis*, PEDERSEN L. (Feb. 27, 2018), http://pedersenlaw.com/lodgestar-analysis/ (explaining that when it comes to the Lodestar Method, appellate opinions have held that experienced trial judges are best suited to judge the work performed by attorneys in their designated field of law); *Lodestar*, *supra* note 214; Sneed, *supra* note 179, at 208 ("Trial courts must recognize that their discretion has limits and appellate courts must recognize that trial-court discretion serves useful purposes and should be respected.").

discretion in some degree is practically inevitable at the trial court level.[232] There is a clear difference between allowing trial court judges to have discretion versus allowing judges to have broad discretion; the latter can more easily lead to abuse.[233] Thus, the goal of this Comment is to provide guidance to both trial court and appellate court judges when it comes to assessing attorneys' fees.[234] This section suggests that appellate court judges adopt the Lodestar Method to provide balance at the appellate level.[235]

B. *Importance of Improving Judicial Discretion*

It is imperative that judicial discretion be standardized to reduce human error on part of the judges.[236] Currently, "there is a lot of intuitive decision making going on in the judicial system."[237] When it comes to judges making decisions intuitively, they must not abuse their discretion.[238]

Judges serve a vital role in our society because they help analyze the law and apply it freely and fairly.[239] However, it is essential that judges are prevented from abusing their power.[240] When judges abuse their power, they hinder the proper functioning of the legal system that is guaranteed in the Constitution.[241] This Comment thus emphasizes the importance of providing probate judges with a clear guide to determine the reasonableness of attorneys' fees.[242]

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232. *See* Pauline T. Kim, *Lower Court Decision*, 82 N.Y.U. L. REV., 383, 388 (2007) (explaining that judicial discretion is unavoidable).

233. *See id.* at 412 (explaining that discretion is when judges "anticipat[e] future scenarios in which a rule of decision might be required"); Sneed, *supra* note 179, at 207 (explaining that broad discretion leads to an abuse of discretion when judges' actions are arbitrary, fanciful, or unreasonable).

234. *See* discussion *supra* Part VI.

235. *See* discussion *supra* Section VI.A.2.

236. *See* Jackie Swift, *Investigating Judicial Decision Making*, MEDIUM: CORNELL RSCH. & INNOVATION (Nov. 27, 2017), http://cornellresearch.medium.com/investigating-judicial-decision-making-cb6c494f93fc.

237. *Id.*

238. *See id.*; Sneed, *supra* note 179, at 208 (demonstrating that an abuse of discretion is when judges misuse their power and thus make mistakes in their rulings).

239. *See Judicial Independence*, JUD. LEARNING CTR., http://judiciallearningcenter.org/judicial-independence/ (last visited Dec. 20, 2023).

240. *See id.*

241. *See id.*; Fla. Bar v. Richardson, 574 So. 2d 60, 62 (Fla. 1990) (per curiam).

242. *See* discussion *supra* Part VI.

VII. CONCLUSION

Attorneys' fees are crucial for the proper functioning of our legal system.[243] Attorneys' fees are especially unique to the probate field because the probate court is an equity court given great discretion in deciding whether to uphold attorneys' fees.[244] Attorneys' fees are also unique to the probate field because of three factors:[245] probate is a very expensive field, the process is very time-consuming, and the client base consists mostly of individuals over the age of sixty.[246] These three factors impact attorneys' fees in the probate field.[247] And as previously discussed, these factors contribute to the lucrative nature of the probate field.[248]

Due to its lucrative nature, it is essential that attorneys refrain from overcharging their clients.[249] Thus, Florida probate courts must assess attorneys' fees reasonably.[250] A clear rule for probate courts to follow in discerning reasonable attorneys' fees would help achieve this.[251] To truly understand what reasonable attorneys' fees should consist of, Rule 1.5 of the Model Rules of Professional Conduct, statutory law, and case law were analyzed within this Comment.[252] Despite the numerous resources available, determinations of reasonable attorneys' fees in probate courts are often guided by broad judicial discretion.[253] This broad judicial discretion leaves open the possibility that judges will abuse their discretion.[254] As a result, it is important to provide probate judges with clearer standards to assess attorneys' fees.[255]

Courts should adopt the balance doctrine and require probate judges to "provide due consideration of varying views [on the] subject matter."[256] More specifically, this means that judges must provide due consideration to

243. *See Richardson*, 574 So. 2d at 62; discussion *supra* Part I.
244. *See* Skatoff, *supra* note 3; discussion *supra* Part I.
245. *See What Every Senior Should Know About Probate*, *supra* note 15.
246. *Id.*
247. *See id.*
248. *See What Every Senior Should Know About Probate*, *supra* note 15.
249. *See* Bradwell, *supra* note 2, at 161.
250. *See* Silver, *supra* note 44, at 263.
251. *See* Bradwell, *supra* note 2, at 161.
252. *See* MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2023); FLA. PROB. R. 5.080(b); Sheffield v. Dallas, 417 So. 2d 796, 798. (Fla. 5th Dist. Ct. App. 1982).
253. *See* MODEL RULES OF PRO. CONDUCT r. 1.5; FLA. PROB. R. 5.080(b); *Sheffield*, 417 So. 2d at 798.
254. *See* Sneed, *supra* note 179, at 207.
255. *See* Zonay, *supra* note 187.
256. *See* Marcus, *supra* note 190, at 59.

upholding attorneys' fees and maintaining the interests of the client.[257] To do this, a two-step approach must be adopted at both the trial and appellate court level.[258] At the trial court level, this would require utilizing all the factors set forth in the Model Rules of Professional Conduct.[259] At the appellate court level, the district courts of appeal should require the lower courts to implement the Lodestar Method.[260] Although implementing the Lodestar Method would require the use of judicial discretion, judicial discretion is ultimately inevitable at the trial court level.[261] Regardless, it is imperative that judicial discretion be improved because judges serve a vital role in applying the law freely and fairly in our society.[262] Thus, this Comment calls for implementing a balancing test to provide probate judges with a clearer guide when it comes to upholding attorneys' fees and maintaining the interests of the client to prevent the abuse of judicial discretion.[263]

257. *See* McDaniel v. County of Schenectady, 595 F.3d 411, 415 (2d Cir. 2010); Hutton v. Ferguson (*In re* Hutton), 463 B.R. 819, 830 (Bankr. W.D. Tex. 2011); Bradwell, *supra* note 2, at 161.

258. *See* Bradwell, *supra* note 2, at 161, 165; Pedersen, *supra* note 231.

259. *See* MODEL RULES OF PRO. CONDUCT r.1.5 (AM. BAR ASS'N 2023); Bradwell, *supra* note 2, at 161.

260. *See* Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1146 (1985).

261. *Id.*

262. *See Judicial Independence*, *supra* note 239; discussion *supra* Section VI.B.

263. *See* discussion *supra* Section VI.B.

THE DEMISE OF AGENCY DEFERENCE IN FLORIDA HAS PRODUCED MIXED RESULTS REGARDING SEPARATION OF POWERS AND DUE PROCESS

FEDERICO M. POHLS*

I. INTRODUCTION

In 2018, Florida citizens voted to constitutionally abolish the judicial rule of deference to an administrative agency's interpretation of an ambiguous statute, rule, or regulation—a principle hereinafter referred to as "agency deference" at the state level and "*Chevron* deference" at the federal level.[1] Due to the similarities between agency deference in Florida and *Chevron*

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1. Frank Shepherd et al., *The Demise of Agency Deference: Florida Takes the Lead*, FLA. B.J., Jan.–Feb. 2020, at 18, 18.

deference federally, Part II analyzes *Chevron* deference and its related issues as a means to preface similar problems surrounding Florida's now-abolished rule of agency deference,[2] which is detailed in Part III.[3] Part IV describes the current landscape of Florida jurisprudence following the abolition of agency deference—where inconsistent application, disagreement over basic norms of statutory interpretation, and the impact of binding precedent promoting a deferential standard, mirror the same separation of powers and due process problems that critics found inherent in the agency deference doctrine.[4]

II. *CHEVRON*: AGENCY DEFERENCE AT THE FEDERAL LEVEL

The United States Supreme Court articulated the principle of agency deference at the federal level in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;[5] namely, that the judiciary will defer to an agency's interpretation of an ambiguous statute so long as that interpretation is reasonable.[6] *Chevron* is among the most cited cases in modern federal administrative law.[7] The principle of "*Chevron* deference" rests on the notion that a statutory ambiguity is the deliberate design of Congress to afford administrative agencies discretion over their execution of statutes they are charged with enforcing.[8] *Chevron* deference essentially forbids judges from interpolating their own readings of laws when a permissible agency interpretation is available.[9] Since *Chevron*, the Court has both expanded and retracted its scope in decisions such as *Auer v. Robbins*,[10] *United States v. Mead Corp.*,[11] and more recently, *West Virginia v. EPA*.[12]

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2. *See* discussion *infra* Part II.
3. *See* discussion *infra* Part III.
4. *See* discussion *infra* Part IV.
5. 467 U.S. 837 (1984).
6. *Id.* at 843, 844, 845; Josh Gerstein & Alex Guillén, *Supreme Court Move Could Spell Doom for Power of Federal Regulators*, POLITICO, http://www.politico.com/news/2023/05/01/supreme-court-chevron-doctrine-climate-change-00094670 (May 1, 2023, 3:14 PM).
7. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1404 (2017).
8. *See Chevron*, 467 U.S. at 843–44.
9. *See id.* at 844; Gerstein & Guillén, *supra* note 6.
10. 519 U.S. 452, 457–58 (1997) (extending *Chevron* to administrative agencies' interpretations of their *own* rules and regulations).
11. 533 U.S. 218, 226–27 (2001) (extending *Chevron* to situations where it "appears" that Congress has delegated authority to an agency to make rules carrying the force of law).
12. 142 S. Ct. 2587, 2633–34, 2635 (2022) (introducing the major questions doctrine as a limitation on *Chevron* deference).

At the time of writing, there were two major challenges to *Chevron*, the first being *Cargill v. Garland*,[13] where the Fifth Circuit abrogated *Chevron* deference in favor of lenity.[14] The second was *Loper Bright Enterprises v. Raimondo,*[15] where the District of Columbia Circuit Court upheld the application of *Chevron* to the National Marine Fisheries Service's promulgation of a rule in accordance with its authorizing statute, requiring that commercial herring fishing companies bear costs of at-sea monitoring.[16]

Raimondo represents a fundamental disagreement within the judiciary over how to apply *Chevron* deference: the majority interpreted *Chevron* to require deference "if the statute is silent *or* ambiguous with respect to the specific issue."[17] The dissenting judge interpreted *Chevron* to require deference if both of the following conditions are met: the statute is ambiguous, and Congress delegated authority to the administrative agency to redress such ambiguity—either expressly or impliedly.[18] The majority's interpretation reflects the literal, plain text of *Chevron*,[19] whereas the dissenting opinion digs a bit deeper at the "ambiguity" prong.[20] The dissenting opinion fashions a definition of statutory ambiguity based on the very next paragraph in *Chevron* that elucidates the legislative intent behind Congress leaving "a gap for the agency to fill."[21] Nonetheless, leaving the gap open, as it were, follows the Supreme Court's rationale in fashioning *Chevron* deference to begin with, as a conflict in the meaning of the statute may elucidate "conflicting policies that were committed to the agency's care by the statute."[22] In this light, *Chevron*, therefore, reflects a form of judicial restraint whereby the judiciary respects the competence of non-judicial institutions, especially "policymaking branch[es] of government."[23] On the other hand, Justice Scalia penned a lengthy dissent in *United States v. Mead Corp.* about the dangers of broadening *Chevron*, where he argued that "[when] *Chevron* applies, statutory ambiguities *remain* ambiguities subject to the agency's ongoing clarification,"

13. 57 F.4th 447 (5th Cir. 2023).
14. *Id.* at 469.
15. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).
16. *Id.* at 363.
17. *Id.* at 369 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
18. *Id.* at 374 (Walker, J., dissenting).
19 *See id.* at 369.
20. *Raimondo*, 45 F.4th at 374 (Walker, J., dissenting).
21. *Id.*; *Chevron* 467 U.S. at 843–44.
22. *Chevron*, 467 U.S. at 845.
23. *See* Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 SMU L. REV. 235, 256 (2019).

where the executive branch is left with the matter in perpetuity, potentially in violation of the nondelegation doctrine.[24]

Seizing on the apparent confusion among judges on how best to apply *Chevron*, the petitioners in *Raimondo* have sought certiorari with the federal Supreme Court, calling for *Chevron* to be overruled or significantly weakened.[25] In their brief, the petitioners argue that *Chevron* deference contravenes separation of powers and due process principles.[26] By requiring Article III courts to defer to the constructions of a statute offered by an executive agency under Article I, *Chevron* deference abrogates the ability of the court to "say what the law is."[27] Additionally, *Chevron* requires courts to make a precommitment to favor the government's judgments about the law.[28]

In addition to *Raimondo*, the United States Supreme Court has now granted a petition for certiorari to hear *Relentless, Inc. v. Department of Commerce*,[29] a companion case asking the court to abolish *Chevron* deference.[30] The Court agreed to hear the first question presented in the petition, to wit: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[31] The Court will hear oral arguments in both *Raimondo* and *Relentless* in January of 2024.[32]

Underlying the principle of agency deference is the rationale that courts lack the expertise required to interpret technical and complex regulatory schemes, and therefore *must* defer the proper interpretation of an authorizing

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24. *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis added); *Nondelegation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle (based on the separation of powers concept) limiting Congress's ability to transfer its legislative power to another governmental branch, esp. the executive branch.").

25. Brief for Petitioners at 2, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-451).

26. *See id.* at 15.

27. *See id.* at 15, 24 (citing Marbury v. Madison, 5 U.S. 137 (1803)).

28. *Id.* at 27.

29. 62 F.4th 621 (1st Cir. 2023), *cert. granted*, No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023).

30. *Relentless, Inc. v. Department of Commerce*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/relentless-inc-v-department-of-commerce (last visited Dec. 22, 2023).

31. *Id.*; Petition for a Writ of Certiorari at i, Relentless, Inc. v. U.S. Dep't of Com., No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023).

32. Amy Howe, *Justices Grant Four New Cases, Including Chevron Companion Case*, SCOTUSBLOG (Oct. 13, 2023, 3:16 PM), http://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case.

statute to the agency charged with enforcing such statute.[33] The United States Supreme Court articulated the special expertise rationale in *Chevron*, as well as a potential separation of powers issue attendant to interfering with the political processes of distinctly political branches of government, i.e., the legislature and executive:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. *While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices*—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[34]

Prior to *Chevron*, the Court had previously endorsed deferential standards in light of agencies being "at the frontiers of science."[35] *Chevron* cites *Skidmore v. Swift & Co.*[36] to support its special-expertise rationale for agency deference.[37] The reasoning and ruling in *Skidmore*, however, was much narrower: the Court announced that statutory interpretations of administrative agencies, although never binding on the courts, comprise a persuasive body of "experience and informed judgment to which courts . . . may properly resort for guidance" because such body of knowledge arises from "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[38] By comparison, the Court famously left open the question in its *Chevron* decision of what properly

33. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

34. *Id.* (emphasis added).

35. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

36. 323 U.S. 134 (1944).

37. *See Chevron*, 467 U.S. at 865 n.40.

38. *Skidmore*, 323 U.S. at 139–40.

constitutes the relevant "expertise" that justifies deference.[39] Nonetheless, the deference to policymaking institutions, as articulated in *Skidmore*, gives *stare decisis*-like weight to the wisdom of those agencies "whose substantive knowledge in a particular area may be greater than the judge deciding the instant case."[40]

Florida appellate courts, meanwhile, have expressed a suspicion toward the special expertise of agencies since decisions like *Chevron* and *Skidmore*.[41] In fact, Florida courts need not defer to an agency's interpretation and execution of a statute if "special agency expertise is not required."[42] The special-expertise prong allowed Florida courts to effectively sidestep deference if the courts concluded sua sponte that the subject matter in question did not require special expertise.[43] Florida appellate courts have refused to review agency matters with deference when such matters involve contractual obligations and public nuisances.[44]

III. THE RISE OF AGENCY DEFERENCE IN FLORIDA

The Florida Supreme Court first fully endorsed its own *Chevron*-style deference in *Gay v. Canada Dry Bottling Co. of Florida*.[45] Florida courts were thereafter required to greatly defer to the interpretation of a statute by the

39. *Cf. id.*; *see Chevron*, 467 U.S. at 865–66; Sidney Shapiro & Elizabeth Fisher, Chevron *and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 465 (2013).

40. *See Skidmore*, 323 U.S. at 140; Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 661 (1992).

41. *See, e.g.*, City of Safety Harbor v. Commc'ns Workers of Am., 715 So. 2d 265, 267 (Fla. 1st Dist. Ct. App. 1998); Bd. of Trs. of Nw. Fla. Cmty. Hosp. v. Dep't of Mgmt. Servs., 651 So. 2d 170, 173 (Fla. 1st Dist. Ct. App. 1995); Schoettle v. Dep't of Admin., 513 So. 2d 1299, 1301 (Fla. 1st Dist. Ct. App. 1987).

42. Doyle v. Dep't of Bus. Regul., 794 So. 2d 686, 690 (Fla. 1st Dist. Ct. App. 2001).

43. *See, e.g., id.*; Miami-Dade Cnty. v. Gov't Supervisors Ass'n of Fla., 907 So. 2d 591, 594 (Fla. 3d Dist. Ct. App. 2005) ("We find the issue raised to be one of simple contract interpretation requiring no agency expertise. Thus, we decline to give PERC's interpretation of the CBA deference in this case."); State Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So. 2d 878, 886 (Fla. 1st Dist. Ct. App. 1988).

44. *See* And Just. For All, Inc. v. Fla. Dep't of Ins., 799 So. 2d 1076, 1078 (Fla. 1st Dist. Ct. App. 2001) ("Determination of whether there is a contractual obligation to provide a specific service does not require expertise in the field of insurance."); *see also* State *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45, 48 (Fla. 2d Dist. Ct. App. 1974); Shepherd et al., *supra* note 1, at 21.

45. 59 So. 2d 788, 790 (Fla. 1952); Shepherd et al., *supra* note 1, at 18.

agency charged with enforcing it.[46] Courts would not defer to an administrative agency's interpretation of a statute "if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute."[47] The underlying rationale was that "[a]dministrative agencies are in the best position to interpret the statutes they implement and enforce."[48] The majority in *Housing Opportunities Project v. SPV Realty, LC*[49] noted that an agency's construction of a statute may be motivated by an agenda or a case of legislation by the executive branch.[50] *Gay* established the "clearly erroneous" standard of review for judicial overrides of agency-originated statutory interpretation.[51] This heightened standard reduces the ability for parties who were unsuccessful at the administrative hearing level to prevail upon judicial review.[52] Agency deference and its heightened standard of review pose significant due process concerns, with Senior Judge Shepherd noting in *Pedraza v. Reemployment Assistance Appeals Commission*[53] that "[i]t ordinarily would be dangerous for a judge in a case to defer to the views of one of the parties . . . [n]onetheless, this is what the judges have done."[54] Problems of due process and separation of powers are inherently attendant on the practice of judicial abdication to one party's particular view in a case, especially when an executive agency's reading of a statute is automatically afforded more weight than the judiciary's reading.[55]

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46. Fla. Hosp. v. Agency for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st Dist. Ct. App. 2002).

47. *Id.* at 848; Hous. Opportunities. Project v. SPV Realty, LC, 212 So. 3d 419, 425–26 n.9 (Fla. 3d Dist. Ct. App. 2016).

48. Chiles v. Dep't of State, 711 So. 2d 151, 155 (Fla. 1st Dist. Ct. App. 1998).

49. 212 So. 3d 419 (Fla. 3d Dist. Ct. App. 2016).

50. *Id.* at 425–26 n.9.

51. Gay v. Canada Dry Bottling Co. of Fla., 59 So. 2d 788, 790 (Fla. 1952).

52. Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 361 n.117, 365 n.140 (2009); *see*, *e.g.*, Muratti-Stuart v. Dep't of Bus. & Pro. Regul., 174 So. 3d 538, 541 (Fla. 4th Dist. Ct. App. 2015) (finding that, despite due process concerns, an administrative agency's decision to deny appellant a license to perform work was not in error); Summer Jai Alai Partners v. Dep't of Bus. & Pro. Regul, 125 So. 3d 304, 305 (Fla. 3d Dist. Ct. App. 2013) (affirming the decision of an administrative agency in denying a permit conversion); Goodwin v. Fla. Dep't of Child. & Fams., 194 So. 3d 1042, 1044, 1048 (Fla. 1st Dist. Ct. App. 2016) (affirming an agency's decision to deny a skilled nursing facilitator the ability to deduct unpaid nursing home bills).

53. 208 So. 3d 1253 (Fla. 3d Dist. Ct. App. 2017).

54. *Id.* at 1257 (Shepherd, J., concurring).

55. *See* Whynes v. Am. Sec. Ins., 240 So. 3d 867, 871 (Fla. 4th Dist. Ct. App. 2018) (Levine, J., concurring).

Legislative choices and judicial norms produced the principle of court deference to administrative agencies at the federal level.[56] The United States Code broadly lays out the procedural requirements of informal rulemaking.[57] In contrast, rulemaking authority in Florida is relatively more constrained.[58] No administrative agency enjoys the broad discretion that the legislature does.[59] Executive agencies lack inherent rulemaking authority, unless vested by the Florida Legislature.[60] The judicial rule of agency deference, as established in *Gay*, allowed courts to be indifferent to "whether an agency interpretation claiming deference was promulgated in accordance with the agency's rulemaking authority," which seems at odds with clear legislative intent and the Florida Constitution.[61]

Some Florida appellate courts recognized the need to sidestep agency deference, as in the Florida Third District Court of Appeal in *Housing Opportunities Project v. SPV Realty, LC*.[62] The majority declined to apply deference to the Florida Commission of Human Rights' interpretation of the Florida Fair Housing Act.[63] Counsellors for the Commission and petitioners argued that because the Florida Fair Housing Act tracks its federal counterpart, the judicial analysis must be the same.[64] However, the Third District identified two potentially competing legislative intents that it felt ill-equipped to resolve and thus, resorted to several well established principles of statutory interpretation to resolve textual ambiguity.[65] Meanwhile, the dissenting judge used the sample tools, in concert with agency deference, to arrive at an opposite conclusion.[66]

Agency deference was not necessarily a "blind mantra" as the majority in *Housing Opportunities Project* put it, considering that nothing required the courts to defer to an interpretation outside the spectrum of possible, reasonable

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56. Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 301 (2022).

57. *See* 5 U.S.C. § 553 (2022).

58. *See* FLA. STAT. § 120.54(1)(a) (2023).

59. *See* FLA. CONST. art. III, § 1; FLA. STAT. § 120.54(1)(a).

60. FLA. STAT. § 120.54(1)(e).

61. *See* Shepherd et al., *supra* note 1, at 20.

62. Hous. Opportunities Project v. SPV Realty, LC, 212 So. 3d 419, 422 (Fla. 3d Dist. Ct. App. 2016); *see also* Chiles v. Dep't of State, 711 So. 2d 151, 155 (Fla. 1st Dist. Ct. App. 1998) (creating and subsequently applying its own ad hoc exception to agency deference where the judiciary may not defer to an administrative agency's reading of a statute if "unrelated to the functions of the agency" to then invalidate an administrative agency's reading).

63. *Hous. Opportunities Project*, 212 So. 3d at 425–26.

64. *Id.* at 425.

65. *See id.* at 420–21.

66. *See id.* at 428.

interpretations.[67] Furthermore, Florida courts refused to adhere to an agency's view of a statute when plainly contrary to the statute's ordinary meaning.[68] The burden on litigants challenging agency decisions based on that agency's interpretation of a statute was still high: "An agency's statutory construction is entitled to great weight and is not to be overturned on appeal, unless clearly erroneous."[69] Nonetheless, Florida appellate courts have inconsistently applied their own *Chevron*-style deference rule.[70] Most notably in *McKenzie Check Advance of Florida, LLC. v. Betts*[71] the Supreme Court of Florida completely disregarded the Department of Banking and Finance's interpretation of its authorizing statute, bypassing any deferential standard and looking solely to the plain language of the text.[72] Such disregard for the deference standard was elucidated solely by Justice Cantero's partial dissent, who argued that the Department's interpretation was entitled to deference because the authorizing statute was ambiguous and such interpretation was reasonable.[73] Even this dissent, however, frames deference as non-threatening to separation of powers principles on the basis that agency deference is implemented out of respect to "institutional competence," but that ultimately, "the courts always remain the final authority on the interpretation of statutes . . . ."[74] As opposed to the majority's position, the dissent's argument is bolstered by precedent affirming deference.[75]

Further, when applying agency deference—as in *International Academy of Design, Inc. v. Department of Revenue*[76]—courts can bypass ordinary rules of statutory interpretation and overlook reasonable alternatives, thereby aligning with an agency's position.[77] Courts often decipher the meaning of a statute by consulting a dictionary.[78] The Florida Supreme Court has stated that dictionaries may be used "to ascertain the plain and ordinary

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67. *See* Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 396, 397 (Fla. 1st Dist. Ct. App. 2003).

68. *See* Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1997).

69. Braman Cadillac, Inc., v. Dep't of Highway Safety & Motor Vehicles, 584 So. 2d 1047, 1050 (Fla. 1st Dist. Ct. App 1991).

70. *See id.*; *Werner*, 689 So. 2d at 1214; Int'l Acad. of Design, Inc. v. Dep't of Revenue, 265 So. 3d 651, 654–55 (Fla. 1st Dist. Ct. App. 2018).

71. 928 So. 2d 1204 (Fla. 2006).

72. *See id.* at 1208.

73. *See id.* at 1211–12 (Cantero, J., concurring in part and dissenting in part).

74. *See id.* at 1215 (Cantero, J., concurring in part and dissenting in part).

75. *Id.* at 1216 (Cantero, J., concurring in part and dissenting in part).

76. 265 So. 3d 651 (Fla. 1st Dist. Ct. App. 2018).

77. *See id.* at 654-55.

78. *See* Lawrence Sloan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993).

meaning" of statutes.[79] The Florida First District Court of Appeal, however, interpreted this commandment to mean consulting dictionaries that were several decades old.[80] The Court emerged with two definitions for the word describe: list and define.[81] The Court found both to be reasonable interpretations of the statute, which would ordinarily require consulting rules of statutory interpretation.[82] The rule of agency deference short-circuited this analysis, allowing the Court to automatically favor an agency's interpretation of the statute.[83] Notwithstanding agency deference, the Court ultimately uses the strict construction against taxpayers to resolve the ambiguity.[84]

IV. THE FALL OF AGENCY DEFERENCE IN FLORIDA

In 2018, Florida voters took to the polls and abolished Florida's version of *Chevron* deference, known simply as agency deference.[85] Article V, section 21 of the Florida Constitution now states that "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, *and must instead interpret such statute or rule de novo*."[86] Therefore, appellate courts in Florida no longer defer to an agency's interpretation of a statutory term.[87]

Florida is among six states that have abolished judicial deference to administrative agencies, alongside Arizona, Mississippi, North Carolina, Ohio, and Wisconsin.[88] The underlying rationale for judicial deference among these jurisdictions was a shared understanding that administrative agencies, as

79. L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) (per curiam).

80. *See Int'l Acad. of Design*, 265 So. 3d at 654.

81. *Id.*

82. *See id.*

83. *See id.* at 654–55.

84. *See id.* at 655.

85. *See* Shepherd et al., *supra* note 1, at 18. Additionally, *Chevron* deference was expanded by the federal Supreme Court in *Auer v. Robbins* by finding that agencies have a high level of deference in interpreting their own regulations. Auer v. Robbins, 519 U.S. 452, 462–63 (1997). Article V, section 21, of the Florida Constitution also abolishes the principle of *Auer* deference, thereby allowing courts to construe agency's interpretations of their *own* rules *de novo*. FLA. CONST. art. V, § 21.

86. FLA. CONST. art. V, § 21 (emphasis added).

87. S. Baptist Hosp. of Fla. v. Agency for Health Care Admin., 270 So. 3d 488, 502 (Fla. 1st Dist. Ct. App. 2019).

88. *See* ARIZ. REV. STAT. ANN. § 12-910(F) (2023); WIS. STAT. § 227.57(5) (2023); King v. Miss. Mil. Dep't, 245 So. 3d 404, 408 (Miss. 2018); N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs, 821 S.E.2d 376, 379 (N.C. 2018); TWISM Enters., LLC v. State Bd. of Registration for Pro. Eng'rs & Surveyors, No. 2021-1440, slip op. at ¶ 42 (Ohio Dec. 29, 2022).

part of the executive branch, are equipped with the requisite special expertise to address "particular subject area[s] . . . to which the [legislature] has delegated the responsibility of implementing the legislative command."[89]

A. *The Florida Supreme Court Embraces Plain Meaning*

The Florida Supreme Court has only invoked Article V, section 21 on two occasions.[90] In the first, *Furst v. DeFrances*,[91] the section is mentioned solely in a footnote.[92] The second, *Citizens v. Brown*,[93] presents an extended discussion of statutory interpretation in light of the de novo standard.[94] The Florida Office of Public Counsel, in appealing an administrative decision to allow a public utility to recover environmental compliance costs from ratepayers, argued that the phrase "protect the environment" does not include measures to "mitigate[], remediate[], or otherwise clean[] up existing harm."[95] The rule of agency deference would have required the court to abide by this definition if the court were to conclude that reasonable minds could differ on the definition of "protect the environment."[96] However, the abolition of agency deference allowed the court to resurrect the rule of plain meaning "when the language of the statute is clear and unambiguous."[97] The Court acknowledged that "protect" means to keep safe from injury, i.e., that the term refers to present efforts to prevent some kind of future harm.[98] In the context of the environment, however, protection requires remedying "existing conditions caused by past actions, provided the harm . . . continues to adversely impact the environment."[99]

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89. OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy, 671 N.E.2d 1087, 1094 (Ohio Ct. App. 1996); Dioguardi v. Superior Ct., 909 P.2d 481, 484 (Ariz. Ct. App. 1995); ARIZ. REV. STAT. ANN. § 12-910(F); WIS. STAT. § 227.57(5); *King*, 245 So. 3d at 408; *N.C. Acupuncture Licensing Bd.*, 821 S.E.2d at 379; *TWISM Enters.*, slip op. at ¶ 42.

90. *See* Furst v. DeFrances, 332 So. 3d 951, 957 n.5 (Fla. 2021); Citizens v. Brown, 296 So. 3d 498, 504 (Fla. 2019).

91. 332 So. 3d 951 (Fla. 2021).

92. *Id.* at 957 n.5.

93. 269 So. 3d 498 (Fla. 2019).

94. *Id.* at 504.

95. *Id.*

96. *See id.*

97. *See id.* (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

98. *Brown*, 269 So. 3d at 504; *Protect*, DICTIONARY.COM, http://www.dictionary.com/browse/protect (last visited Dec. 22, 2023).

99. *Brown*, 269 So. 3d at 504.

B. *Plain Meaning and Due Process Are Restored*

1. Plain Meaning "Protects" the Environment

In *Sierra Club v. Department of Environmental Protection*,[100] the Florida First District Court of Appeal reversed the decision of the Department of Environmental Protection ("DEP") in approving Basin Management Action Plans ("BMAPs") as a result of de novo review of the DEP's authorizing statute.[101] Section 403.067(7) of the Florida Statutes authorizes the DEP to develop these BMAPs to restore Florida springs from pollution.[102] The Sierra Club commenced a four-year legal battle, alleging the DEP produced ineffective BMAPs for several Florida springs.[103] The DEP contended that its reading of the statute precluded it from conducting a "detailed allocation" among specific point sources of pollution and specific categories of nonpoint pollution sources.[104] The First District disagreed, reviewing the DEP's reading de novo pursuant to Article V, section 21, of the Florida Constitution, and applying the rule of surplusage to conclude that a "detailed allocation" must be made if "only an initial allocation among point and nonpoint sources is made."[105] The *Sierra Club* hailed the ruling as a victory for preserving Florida's springs and manatees.[106]

100. 357 So. 3d 737 (Fla. 1st Dist. Ct. App. 2023).

101. *Id.* at 738, 742; *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, SIERRA CLUB: FLA. CHAPTER (Feb. 19, 2023), http://www.sierraclub.org/florida/blog/2023/02/victory-fdep-must-rewrite-outstanding-florida-springs-basin-management-action.

102. FLA. STAT. § 403.067(7) (2023); *Sierra Club*, 357 So. 3d at 738; *see VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101.

103. *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101; *see Sierra Club*, 357 So. 3d at 738, 744.

104. *Sierra Club*, 357 So. 3d at 739, 742.

105. *Id.* at 742 (internal quotation marks omitted); *see* Chris Micheli, *Canon of Statutory Construction — Rule Against Surplusage*, CAL. GLOBE (Oct. 24, 2022, 6:55 AM), http://californiaglobe.com/articles/canon-of-statutory-construction-rule-against-surplusage/.

106. *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101; *see Sierra Club*, 357 So. 3d at 738, 744.

2. Notice, Hearing, and Lenity Are Restored

a. *Notice and an Opportunity to Be Heard*

Due process requires notice and an opportunity to be heard.[107] The abolition of agency deference allowed the Third District, for example, to adhere to due process principles by conducting a plain reading of the Florida Administrative Code to reverse the denial of a Medicaid fair hearing for a disabled thirteen-year-old child.[108] The Code mandated hearing officers to render final orders with "findings of fact," language which the Third District noted was based on due process concerns.[109] Applying Article V, section 21's de novo review to an agency's conclusion of fact, coupled with a de novo standard of review for an agency's conclusion of law, enabled the court to effectively treat the Florida Agency of Health Care Administration Office of Fair Hearings as a court of law, subjecting the agency's findings to judicial review.[110] As the First District demonstrated, de novo review allows the courts to prevent administrative agencies from developing "a potentially limitless fount of regulatory power."[111]

The abolition of agency deference allowed the Third District, in a separate matter, to preserve the due process rights of a student accused of plagiarism.[112] Florida International University (the "University") sought to preserve a hearing officer's exclusion of testimony that would have borne relevance to the bias and motive behind the charges against the student.[113] Freed from deferring to the University's strained interpretation of its own Student Code of Conduct, the Third District instead relied on the canons of ordinary meaning and whole text; this granted the student the right to cross-examine a witness when the student claimed that the charges were fabricated

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107. *See* U.S. CONST. amend. XIV § 1; Pena v. Rodriguez, 273 So. 3d 237, 240 (Fla. 3d Dist. Ct. App. 2019).

108. *See* A.C. v. Agency for Health Care Admin., 322 So. 3d 1182, 1184, 1187 (Fla. 4th Dist. Ct. App. 2019).

109. *Id.* at 1188 (citing Borges v. Dep't of Health, 143 So. 3d 1185, 1187 (Fla. 3d Dist. Ct. App. 2014)).

110. FLA. STAT. § 120.68(1)(a) (2023) (entitling a party who is adversely affected by final agency action to judicial review); *see* FLA. CONST. art. V, § 21; *A.C.*, 322 So. 3d at 1187 n.6.

111. Citizens v. Fla. Pub. Serv. Comm'n, 294 So. 3d 961, 967 (Fla. 1st Dist. Ct. App. 2019).

112. Fla. Int'l Univ. v. Ramos, 335 So. 3d 1221, 1223, 1224 (Fla. 3d Dist. Ct. App. 2021).

113. *See id.* at 1225.

against her.[114] While the University argued that the Code allowed the hearing officer to place limits on testimony, the Court explained that this was technically accurate but an incomplete reading of the Code: the University was required to allow the student to present testimony and cross-examine witnesses.[115] The Court concluded that the University's failure to do so "undermined basic tenets of due process."[116]

The Third District again balanced the due process concerns of individuals versus administrative bodies in *Rodriguez v. Department of Business & Professional Regulation*.[117] The Court concluded that the Florida Department of Business and Professional Regulation exhausted nearly every method, short of actual notice, that complied with both federal and state constitutions by adhering to the plain meaning of the Florida Administrative Code.[118]

b. *The Return of Lenity*

In the absence of agency deference, the First District, in *Loebig v. Florida Commission on Ethics*,[119] applied a version of the rule of lenity to resolve the ambiguity of a statute in favor of a public employee "[b]ecause the Florida Code of Ethics is penal in nature."[120] The Fifth Circuit observed that "the [United States] Supreme Court has never held that the Government's reading of a criminal statute is entitled to any deference," let alone *Chevron* deference.[121] The Court further explained that the application of *Chevron* deference undermines a central purpose of the rule of lenity: "to promote fair notice to those subject to criminal laws."[122] The Florida Supreme Court has

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114. *See id.* at 1224, 1225; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 69, 167 (1st ed. 2011).

115. *Ramos*, 335 So. 3d at 1225.

116. *Id.*

117. 326 So. 3d 796 (Fla. 3d Dist. Ct. App. 2021).

118. *See id.* at 798, 799.

119. 355 So. 3d 527 (Fla. 1st Dist. Ct. App. 2023) (per curiam).

120. *Id.* at 530, 533 (citing Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting)).

121. *See id.* at 467 (quoting United States v. Apel, 571 U.S. 359 (2014)). This assertion by the Fifth Circuit ignores the holding of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, where the United States Supreme Court rejected the argument that the rule of lenity should *always* foreclose deference to an agency's interpretation of a statute solely because the statute includes criminal penalties. *See id.*; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995).

122. *Cargill*, 57 F.4th at 468 (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)).

similarly held that the purpose of the rule of lenity is to provide clear notice of what conduct is proscribed by statute.[123]

Lenity returned in the case of *Galvan v. Dep't of Health*,[124] where an ex-registered nurse appealed the permanent revocation of her license to practice nursing in Florida.[125] The Court interpreted the agency's interpretation of its *own* rule de novo, determining that revocation of a nursing license is a penalty and must be strictly construed in favor of the license holder.[126] Essential to the Florida Department of Health's rule that authorizes the revocation of nursing licenses are two elements: "[f]irst, the person must [be] convicted [of], found guilty of, or have taken a plea . . . [and] [s]econd, [the] crime must be directly related to the practice of nursing or to the ability to practice nursing."[127] The Third District found no nexus between the nurse's "plea to the crime of taking a kickback and the requirement that the pled-to offense be directly related to the practice of nursing."[128] If agency deference had not been abolished, the Department's interpretation of its own rule authorizing the revocation of the appellant's nursing license would have likely been upheld.[129]

C. *"Zombie* Chevron*" Problem in Florida Jurisprudence*

1. The *Raik* Decision and the Problem of Statutory Interpretation

In *Raik v. Dep't of Legal Affairs*,[130] the First District reversed a decision of the Florida Department of Legal Affairs, Bureau of Victim Compensation ("Bureau"), when it denied the wife of a homicide victim compensation under the Florida Crimes Compensation Act ("the Act").[131] Because the Bureau was an administrative agency, the First District used the de novo the standard of review.[132] The Court looked to legislative intent, plain meaning, and the absurdity doctrine, and used a myriad of canons of statutory construction to afford the appellant compensation that the Legislature declared

123. City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993) (citing State v. Llopis, 257 So. 2d 17, 18 (Fla. 1971)).
124. 285 So. 3d 975 (Fla. 3d Dist. Ct. App. 2019).
125. *Id.* at 976.
126. *Id.* at 979.
127. *Id.* (internal quotation marks omitted).
128. *Id.* at 980 (internal quotation marks omitted).
129. *See Galvan*, 285 So. 3d at 980.
130. 344 So. 3d 540 (Fla. 1st Dist. Ct. App. 2022).
131. *Id.* at 541.
132. FLA. CONST. art. V, § 21; *Raik*, 344 So. 3d at 542.

was within her right.[133] The Bureau construed the FCCA requirements for victim compensation too tightly, arbitrarily limiting the number of crime victims who can receive relief under the Act.[134] The court conducted a historical analysis of the FCCA and its various amendments to establish that the Legislature clearly intended to include more crime victims within the scope of the Act.[135] Next, the court declared the Bureau's construction of section 960.03(3)(c) of the Florida Statutes absurd, which would deny compensation to victims of less-culpable forms of vehicular homicide.[136] The majority in *Raik* cited heavily from its previous decisions.[137] The court explained the hazard that canons of construction, like the absurdity doctrine, can pose to the separation of powers; namely, "[c]ourts must be careful in applying the absurdity doctrine so as to not 'substitute their judgment of how legislation *should* read, rather than how it *does* read, in violation of the separation of powers.'"[138]

The dissent in *Raik*, written by Judge Makar, reaches the opposite conclusion and votes to the petitioner's relief because vehicular homicide, while a crime under Florida law, failed to fall within the Act's narrower definition of "crime" to entitle the petitioner to compensation.[139] Rather than primarily rely on legislative history as the majority did, Judge Makar first looked to the plain language of section 960.03(3)(b) of the Florida Statutes.[140] This section enumerates only the *first*-degree violation of vehicular homicide,

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133. *See Raik*, 344 So. 3d at 544, 549; SCALIA & GARNER, *supra* note 114, at 234 (defining the absurdity doctrine, whereby "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").

134. *See Raik*, 344 So. 3d at 544.

135. *Id.* at 544–45.

136. *See id.* at 546–47. Discussing these potential denials of compensation:

> For example, the Bureau's interpretation would exclude the offense which resulted in the death of a child in *State v. Ellison* 561 So. 2d 576 (Fla. 1990). Ellison was convicted of second-degree murder, later reduced to manslaughter, after losing control of a vehicle in a high-speed police chase and hitting another vehicle, killing a sixteen-month-old victim. Under the Bureau's interpretation, the child's parents would not be eligible for compensation, because the perpetrator in *Ellison* did not intentionally use the vehicle: 'Ellison's act of losing control of the car was not committed from ill-will or spite.' Thus, under the Bureau's literal reading of subsection (3)(c) in isolation, the state would fail in its 'moral responsibility' to aid those victims in violation of the stated purpose of the Act.

Id. at 547 (discussing *State v. Ellison*, 561 So.2d 576 (Fla. 1990)).

137. *See id.* at 549–50.

138. Owens v. State, 303 So. 3d 993, 998 (Fla. 1st Dist. Ct. App. 2020) (quoting Nassau Cnty. v. Willis, 41 So. 3d 270, 279 (Fla.1st Dist. Ct. App. 2010)).

139. *Raik*, 344 So. 3d at 550 (Makar, J., dissenting).

140. *Id.* at 552.

which was not the specific charge in the petitioner's case.[141] Then, the dissenting judge looked to subsection 960.03(3)(c), which explicitly excluded operations of motor vehicles resulting in death that were *non*-intentional.[142] Judge Makar then wields two other modes of statutory interpretation: the general-specific provision rule and the rule against surplusage.[143] The general-specific rule states that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails."[144] Judge Makar reasoned that sections 960.03(3)(b) and 960.03(3)(c) act as a "qualification" or limitation of section 960.03(3)(a), which imposes the general definition of "crime" throughout the chapter.[145] Judge Makar bolsters this interpretation using the rule against surplusage, interpreting sections 960.03(3)(a), 960.03(3)(b), and 960.03(3)(c) harmoniously instead of in conflict.[146]

Raik, with its conflicting opinions, demonstrates a fundamental challenge in judicial evaluation of an agency's interpretations of statutes and rules after the constitutional abolition of agency—the confusion over what constitutes a statute's plain meaning.[147] The dissent in *Raik* noted that "[t]he Department's view, to which no deference is due, is nonetheless the *most faithful* to principles of textual analysis."[148] If agency deference had not been abolished, perhaps the view of the Department would have been given significantly more weight, preempting a lengthy discussion by the majority in *Raik* about the legislative intent behind the Florida Crimes Compensation Act.[149] Despite the serious disagreement over what constitutes the "plain meaning" of the Act, neither the dissent nor majority in *Raik* cite *Holly v. Auld*[150] or any other guidance in case law on properly deciphering a statute's plainness or ambiguity in meaning.[151] Thus, the *Raik* decision runs the risk of

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141. *Id.*; *see* FLA. STAT. § 960.03(3)(b) (2023).

142. *Raik*, 344 So. 3d at 552 (Makar, J., dissenting); FLA. STAT. § 960.03(3)(c).

143. *Raik*, 344 So. 3d at 553 (Makar, J., dissenting) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (1st ed. 2011)); *see e.g.*, Mcdonald v. State, 957 So. 2d 605, 610 (Fla. 2007); Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003); Mendenhall v. State, 48 So. 3d 740, 749 (Fla. 2010) (per curiam).

144. SCALIA & GARNER, *supra* note 114, at 183; *Raik*, 344 So. 3d at 553.

145. *Raik*, 344 So. 3d at 553.

146. *See id.* at 553–54.

147. *See* Conage v. United States, 346 So. 3d 594, 598 (Fla. 2022) (reasoning that following a plain meaning rule, with nothing else, "leaves the interpreter in the dark about how to determine whether a particular word or phrase has a clear meaning").

148. *Raik*, 344 So. 3d at 553 (Makar, J., dissenting) (emphasis added).

149. *See id.* at 542, 544; Arza v. Fla. Elections Comm'n, 907 So. 2d 604, 606 (Fla. 3d Dist. Ct. App. 2005).

150. 450 So. 2d 217 (Fla. 1984). It is helpful to note that *Raik* was decided prior to the abrogation of *Holly* in *Conage*. *Conage*, 346 So. 3d at 598.

151. *See Raik*, 344 So. 2d at 548.

being entirely arbitrary, threatening due process principles.[152] The problem is compounded by *Holly*'s abrogation in *Conage v. United States*,[153] where the Florida Supreme Court abrogated the plain, ordinary meaning rule in favor of requiring judges to rely on "traditional canons of statutory interpretation" without specifying which ones, in what context, and for what purpose.[154] *Chevron* is criticized for "reallocating power away from the courts and Congress and concentrating it in the executive."[155] However, the problems posed by Florida's abolition of agency deference gifts power to a judiciary beholden solely to whatever *amuse-bouche* of traditional canons of statutory interpretation.[156]

Conage's command that "judges must exhaust all the textual and structural clues that bear on the meaning of a disputed text,"[157] the abolition of agency deference, and the fact that the rule of lenity is a statutory command, not a mere "canon of construction,"[158] may fast-track judicial deference to defendants and the application of lenity to construe ambiguous criminal or otherwise penal statutes.[159] Such a result was directly envisioned by the dissenting judge in *Cargill*, who noted that "under the majority's rule, the defendant wins by default whenever the government fails to prove that a statute unambiguously criminalizes the defendant's conduct."[160] This is, in

152. *See* United States v. Carmack, 329 U.S. 230, 247 (1946) (defining an 'arbitrary' decision as one made "without adequate determining principle"); 16C C.J.S. *Constitutional Law* § 1864 (2023) ("The purpose of . . . due process is to prevent governmental encroachment against, or arbitrary invasion of, the life, liberty, or property of individuals, through executive, legislative, judicial, or administrative authority.").

153. 346 So. 3d 594 (Fla. 2022).

154. *Conage*, 346 So. 3d at 598.

155. Brief for Petitioners, *supra* note 25, at 32.

156. *See* Macey & Miller, *supra* note 40, at 649 (discussing the highly variable use and *non*-use of canons of statutory construction in judicial decision-making).

157. *See Conage*, 346 So. 3d at 598 (citing Alachua County v. Watson, 333 So. 3d 162, 169 (Fla. 2022)) (internal quotation marks omitted).

158. *Id.* at 602 (citing FLA. STAT. § 775.021(1) (2023)).

159. *See id.* at 598; *see also* FLA. STAT. § 775.021 (2023). There is evidence that this has already taken place. *See* Loebig v. Fla. Comm'n on Ethics, 355 So. 3d 527, 528 (Fla. 1st Dist. Ct. App. 2023) (per curiam). There, a taxpayer rights advocate, although a position created within the Department of Revenue, was deemed by the First District to be "employed" by the Chief Inspector General within the Executive Office of the Governor of Florida after the court examined "all textual and structural clues" in line with *Conage*'s command. *See id.* at 531–32. Without explicitly commenting on the challenged statute's plainness or ambiguity, the court concluded by noting that even if the definition of "employed" were ambiguous, the ambiguity must be resolved in favor of lenity. *Id.* at 533.

160. Cargill v. Garland, 57 F.4th 447, 480 (5th Cir. 2023) (Higginson, J., dissenting).

fact, the point of lenity as a principle that "ensures fair warning" in compliance with due process principles.[161]

2. Ignoring the Will of the Legislature

The case of *Florida Department of Health v. Louis Del Favero Orchids, Inc.*[162] demonstrates how an administrative agency, without deference in interpretating statutes, can maintain an erroneous interpretation of a statute and avoid attorney's fees and costs through the deferential substantial justification standard.[163] The Florida Legislature granted the Florida Department of Health the rulemaking authority to issue and renew licenses for Medical Marijuana Treatment Centers.[164] Under the terms of section 381.986(8)(a) applicants are given preference when he/she can demonstrate that "they own one or more *facilities*" previously used for citrus-processing.[165] The Department proposed an administrative rule that substituted the word "facilit[ies]" for "propert[ies]," a construction that an administrative law judge found to be an invalid exercise of legislative authority that allowed "citrus preferences to be awarded to a broader group of applicants" than contemplated by the statute.[166] The respondent was awarded attorney's fees and costs against the Department, a decision which the Department timely appealed.[167] The First District reversed, reasoning that the Department's construction of its authorizing statute was "substantially justified" under the terms of section 120.595(2) of the Florida Statutes.[168] The majority, in effect, deferred to the Department's construction of the statute as extending citrus preference to property owners.[169] Despite not expressly mentioning agency deference, the First District nonetheless gives the game away by appealing to the special-expertise rationale:

> The executive director of the Department of Citrus testified at the merits hearing that her department advised the Department on its interpretation of the citrus preference statute and what type of "facilities" might be contemplated by its "otherwise processing of citrus fruit" language. *It makes sense that the Department of Health*

161. United States v. Lanier, 520 U.S. 259, 266 (1997).
162. 313 So. 3d 876 (Fla. 1st Dist. Ct. App. 2021).
163. *See id.* at 881–82; *see* FLA. STAT. § 120.595(2) (2023).
164. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 877.
165. *See* FLA. STAT. § 381.986(8)(a)(3) (2023) (emphasis added).
166. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 878.
167. *Id.*
168. *Id.* at 878–79.
169. *Id.* at 880.

> *would reach out to citrus-industry experts for advice about this statutory language instead of going at it alone.* Because the ALJ's decision to discount the Department's advice-seeking efforts stemmed from its incorrect view that the proposed rule's "property" language defied the statute, we cannot accept its evaluation that the Department unreasonably relied on bad advice that was "facially contrary to the Citrus Code." Rather, *the Department's legwork in seeking out industry-specific advice tended to show that it responded reasonably to its constitutional and statutory rulemaking responsibilities here*, even though it lost on the merits in the rule challenge litigation.[170]

Pursuant to Article V, section 21, the dissent found the Department's construction impermissibly broad.[171] In construing the statute to give preference to properties, the Department essentially allowed unimproved pieces of land to receive preference for registration over facilities previously designed for processing citrus fruit.[172] The dissent concluded that, although a deferential standard of review applied to the Department's findings of fact, deference was constitutionally abolished and therefore inapplicable to the Department's construction of its authorizing statute.[173] In its substitution of the word property for facility, the Department substituted its will for that of the Legislature.[174]

Meanwhile, the Second District's decision to reverse the denial of a childcare center's license renewal was predicated on a rather stilted reading of the statute.[175] The Florida Department of Children and Families ("DCF") refused to renew the Laura Center's childcare license on the basis that the facility's owner lacked "good moral character" under the meaning of section 402.305(2) of the Florida Statutes.[176] Once again, pursuant to Article V, section 21, the Second District reviewed the statute's meaning de novo and gave no deference to DCF's reading of section 402.305(2).[177] The Second District concluded that nothing in the statute provided that a verified finding of child abuse amounts to an absence of "good moral character."[178] The child abuse and neglect registry was "one of many" databases that the DCF was

170. *Id.* at 881–82 (emphasis added).
171. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 884 (Makar, J., dissenting).
172. *See id.* at 883 (Makar, J., dissenting).
173. *See id.* at 884 (Makar, J., dissenting).
174. *See id.* (Makar, J., dissenting).
175. *See* Laura's Learning & Enrichment Ctr. v. Dep't of Child. & Fams., 351 So. 3d 1253, 1254, 1256 (Fla. 2d Dist. Ct. App. 2022).
176. *Id.*
177. *Id.* at 1255.
178. *Id.* at 1256.

required to assess before determining a childcare license applicant had failed the screening set forth by section 402.305(2).[179] Therefore, under the Second District's reading of section 402.305(2) an applicant for a childcare license could be granted his or her license even if DCF finds a history of child abuse in the provider's background.[180] This reading arguably contravenes the legislative intent of Chapter 402, Florida Statutes.[181] Section (1)(b) provides, in relevant part, that the Legislature intends that continued "monitoring and investigation shall safeguard the *health, safety, and welfare of consumers* of services provided by [certain] state agencies."[182]

In *R.C. v. Department of Agriculture & Consumer Services*,[183] the First District reversed the decision of the Florida Department of Agriculture and Consumer Services ("FDACS") to deny a convicted felon's application for a concealed-carry license.[184] Pursuant to Article V, section 21, the Court used de novo review to evaluate the FDACS's interpretation of section 790.06(2)(n) of the Florida Statutes.[185] The Court concluded that the FDACS relied on an erroneous interpretation of both Florida *and* federal statutory law in denying the petitioner's request for a license.[186] If an applicant's civil rights have been restored, they are not prohibited from possessing a firearm.[187] In other words, the FDACS failed to apply the plain text and legislative intent behind both the federal and state statutory provisions that guarantee that a convicted felon, whose civil rights and firearm authority have been restored, should not be precluded from owning a firearm.[188] Compare this result to the decision of the United States Court of Appeals for the Eleventh Circuit in *Decker v. Gibson Products Co. of Albany*.[189] There, the Eleventh Circuit concluded that, under the federal firearms statute, "[r]estoration of civil rights . . . does not change a felon's status for purposes of the act unless expressly provided . . . by the state."[190] This decision flies in the face of the plain legislative intent of the firearms chapter of the United States Code, which states, in relevant part, "[a]ny conviction . . . for which a person . . . has had

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179. *Id.*

180. *See Laura's Learning & Enrichment Ctr.*, 351 So. 3d at 1256.; *see also* FLA. STAT. § 402.305(2)(a) (2023).

181. *See* FLA. STAT. § 402.164(1)(b) (2023).

182. *Id.* (emphasis added).

183. 323 So. 3d 275 (Fla. 1st Dist. Ct. App. 2021).

184. *Id.* at 276.

185. *Id.* at 278; *see* FLA. CONST. art. V, § 21; FLA. STAT. § 790.06(2)(n) (2020).

186. *See R.C.*, 323 So. 3d at 276, 279.

187. *Id.* at 279 (citing 18 U.S.C. § 921(a)(20)); FLA. STAT. § 790.23(2)(a) (2023)).

188. *See R.C.*, 323 So. 3d at 279.

189. 679 F.2d 212, 216 (11th Cir. 1982).

190. *Id.* at 214.

civil rights restored *shall not* be considered a conviction for purposes of this chapter."[191]

Not all on the bench, however, were enamored by the majority's reading of the Florida firearms statute: Judge Kelsey's dissent alleges that the majority in *R.C.* violated the negative-implication canon, whereby "[t]he expression of one thing implies the exclusion of others."[192] Judge Kelsey uses this principle to determine that "the Legislature *expressly limited* [the Department's] authority" set forth in section 790.06 of the Florida Statutes.[193] Judge Kelsey further writes that this statutory restriction is consistent with the notion that administrative agencies that exercise powers beyond those expressly designated by the Florida Legislature violate the separation of powers.[194] Judge Kelsey explains that the judiciary's responsibility is not to make law but to say what the law is, adding that courts "lack the power to interpret a statute in a way that would inject requirements the Legislature had not previously adopted."[195] The majority's reading of the firearms statute granted the Department the power to circumvent the proper statutory channel of relying *solely* on criminal justice information reports from the Florida Department of Law Enforcement, which Judge Kelsey notes is a reading that lacks basis in statute.[196] While the principle of agency deference implicated major issues of separation of powers,[197] it seems that even in the wake of its abolition, outstanding separation of powers issues still exist, as is the case with *R.C.*[198]

191. *See* 18 U.S.C. § 921(a)(20)(B) (emphasis added).

192. *See R.C.*, 323 So. 3d at 295 (Kelsey, J., dissenting); *see also* SCALIA & GARNER, *supra* note 114, at 107.

193. *R.C.*, 323 So. 3d at 295 (Kelsey, J., dissenting) (emphasis in original). Florida's firearms statute states in relevant part that "[t]he Legislature does not delegate to the Department of Agriculture and Consumer Services the authority to regulate or restrict the issuing of licenses provided for in this section, *beyond those provisions contained in this section*." FLA. STAT. § 790.06(16) (2020) (emphasis added).

194. *See R.C.*, 323 So. 3d at 297 (Kelsey, J., dissenting).

195. *Id.* at 296 (Kelsey, J., dissenting); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

196. *See R.C.*, 323 So. 3d at 299 (Kelsey, J., dissenting).

197. Pedraza v. Reemployment Assistance Appeals Comm'n, 208 So. 3d 1253, 1257 (Fla. 3d Dist. Ct. App. 2017) (Shepherd, J., concurring).

198. *See R.C.*, 323 So. 3d at 297 (Kelsey, J., dissenting).

3. Deference Lives on Through Precedent

In *Evans Rowing Club, LLC v. City of Jacksonville*,[199] the First District—without a written opinion—denied review of the decision of the City of Jacksonville to rescind petitioner's land-use permit to operate a rowing club.[200] Three First District judges concurred with the denial per curiam.[201] Judge Wolf's concurrence sharply criticized the reasoning of his colleagues and expressly declared that "[l]ocal land use regulations are not state statutes or rules."[202] Article V, section 21—in Judge Wolf's view—does not affect an appellate court's deferential judicial review of local government land-use decisions.[203] The plain text of the amendment excludes local zoning decisions from its scope, as well as decisions and regulations *not* pursuant to general law.[204] Judge Wolf argues that failure to apply a deferential standard of review would cede control on land-use decisions "from local people who are familiar with local conditions to state appellate judges."[205]

Both Judge Wolf and Judge Thomas acknowledge that despite Article V, section 21, a deferential standard of review applies for local land-use decisions based on the principle that local land-use agencies know better than the courts because they are equipped with the expertise the judiciary lacks over zoning decisions.[206] Nonetheless, Judge Thomas argues that these local land-use cases should not grant greater deference than state administrative agencies once afforded.[207] He argues that the current standard of review, which requires the Court to give deference to the City of Jacksonville's denial of the petitioner's permit, should be replaced with the same de novo standard the Court is now obligated to use in all other instances.[208] Judge Thomas determined from Florida Supreme Court precedent that local zoning decisions are inherently administrative and thus, are still entitled to deference.[209] Therefore, the standard of review for second-tier certiorari cases is deferential to the decisions of local zoning agencies in contravention of the clear purpose

199. 300 So. 3d 1249 (Fla. 1st Dist. Ct. App. 2020) (per curiam).
200. *Id.* at 1254 (Thomas, J., concurring).
201. *See id.* at 1249 (Wolf, J., concurring), 1250 (Thomas, J., concurring), 1254 (Makar, J., concurring).
202. *See id.* at 1249 (Wolf, J., concurring).
203. *See id.*
204. *Evans*, 300 So. 3d at 1249.
205. *Id.*
206. *See id.* at 1250.
207. *Id.* at 1252.
208. *See id.*
209. *See Evans*, 300 So. 3d at 1250.

behind the popularly enacted Article V, section 21.[210] This deferential standard of review presents the paradox of *local* government decisions receiving deference while *state* government decisions receive none.[211]

A sort of "zombie *Chevron*" problem also exists in Second District jurisprudence, whereby previous case law decided on agency deference principles may continue to govern future decisions.[212] In *Department of Highway Safety and Motor Vehicles v. Chakrin*,[213] the Second District quashed an order by the Circuit Court to reverse the Department of Highway Safety and Motor Vehicles ("DHSMV") decision to deny reinstatement of a motorist's driver's license.[214] The Circuit Court's decision was based on its interpretation of section 322.271(4)(a) of the Florida Statutes drug-free requirement as excluding alcohol.[215] To get his license reinstated, the petitioner, Mr. Chakrin, had to prove that he was drug-free under the meaning of the statute.[216] Mr. Chakrin had consumed alcohol one week before his reinstatement hearing, and thereafter, the hearing officer denied Mr. Chakrin's request for reinstatement based on DHSMV's reading of section 322.271(4)(a) that contemplated alcohol as a drug requiring "complete abstinence."[217] The Circuit Court agreed with Mr. Chakrin, arguing that the statutory requirement "that Mr. Chakrin prove he had remained drug-free could not be interpreted by DHSMV as including alcohol."[218] The Second District quashed the Circuit Court order, noting that the order failed to abide by controlling case law that directly spoke to the issue of the definition of "drug-free."[219] The Circuit Court interpreted the abolition of agency deference to preclude the future application of past cases decided *on* agency deference to ignore case law that included alcohol in the definition of drug-free.[220] The Second District disagreed, ultimately relying on the principle that the trial-level courts must first apply the rules of decision promulgated by the Florida Supreme Court, and then—if there is no conflict between districts—the law of *all* higher courts of appeal throughout the state, of which the First and Second Districts, in this case,

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210. *See id.* at 1252.
211. *See id.*
212. *See* Dep't of Highway Safety & Motor Vehicles v. Chakrin, 304 So. 3d 822, 831 (Fla. 2d Dist. Ct. App. 2020); Cass R. Sunstein, *Zombie* Chevron: *A Celebration*, 82 OHIO ST. L.J. 565, 570 (2021).
213. 304 So. 3d 822 (Fla. 2d Dist. Ct. App. 2020).
214. *Id.* at 825.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Chakrin*, 304 So. 3d at 825.
219. *See id.* at 825, 834; Dep't of Highway Safety & Motor Vehicles v. Abbey, 745 So. 2d 1024, 1024 (Fla. 2d Dist. Ct. App. 1999) (per curiam).
220. *See Chakrin*, 304 So. 3d at 829; FLA. CONST. art. V, § 21.

agreed.[221] Therefore, past decisions relying on agency deference, where no intervening Supreme Court or multidistrict rule exists to expressly disavow those previous decisions, must control.[222]

That *Chakrin* represents a "zombie *Chevron*" problem may be a touch of hyperbole, considering the Second District made a careful reading of *Department of Highway Safety & Motor Vehicles v. Abbey*[223] to conclude that agency deference was not the sole legal standard that informed the Second District's ruling in that case.[224] *Abbey* supported the Department's determination that alcohol is included within the definition of a drug through an admixture of precedent and the intent of the Legislature in other statutory provisions to define "drug-free" as including abstinence from alcohol.[225] There was no conflict with the lenity rule either, as the statute in question was nonpenal in nature, and the statute was relatively unambiguous.[226] However, after considering related statutes and legislative intent, *Abbey* held that the Department's inclusion of alcohol was not just *a* reasonable interpretation but, rather, the *only* reasonable interpretation.[227]

Curiously, a footnote in *Chakrin* states that "it is important for the purposes of this opinion only to note that the [Department's] order relied on the statute without indication that its interpretation was based on an official agency expression interpreting that statute or any other administrative rule."[228] There are, however, plenty of Florida appellate court decisions where there was no clear indication of "official agency expression" interpreting statutes or rules, yet the de novo standard of review inherent in Article V, section 21, of the Florida Constitution was nonetheless invoked, so it is unclear where the Second District fashioned this criterion for agency decision review.[229] The *Chakrin* footnote's "official agency expression" criterion appears remarkably similar to Justice Scalia's requirement that "ambiguit[ies in statutes whereby] . . . Congress intended agency discretion" and, thus, should be resolved in favor of administrative agencies *if* the interpretation by the administering

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221. *See Chakrin*, 304 So. 3d at 829–30.

222. *See id.* at 830.

223. 745 So. 2d 1024 (Fla. 2d Dist. Ct. App. 1999) (per curiam); Sunstein, *supra* note 212, at 570; *Chakrin*, 304 So. 3d at 822.

224. *Chakrin*, 304 So. 3d at 828 n.5, 831.

225. *See Abbey*, 745 So. 2d at 1025.

226. *See id.* at 1025–26 ("The statute is not a criminal statute that must be narrowly interpreted for the benefit of a defendant.").

227. *See id.* at 1025; *cf.* Cargill v. Garland, 57 F.4th 447, 451 (5th Cir. 2023).

228. *Chakrin*, 304 So. 2d at 828 n.5.

229. *See, e.g.*, D.B. v. Agency for Pers. with Disabilities, 357 So. 3d 727, 729 (Fla. 5th Dist. Ct. App. 2022) (per curiam); O.H. v. Agency for Pers. with Disabilities, 332 So. 3d 27, 29 (Fla. 3d Dist. Ct. App. 2021); G.R. v. Agency for Pers. with Disabilities, 315 So. 3d 107, 108 (Fla. 3d Dist. Ct. App. 2020).

agency represents the "official position of the agency."[230] The majority in *Mead* directly addresses Justice Scalia's novel criterion, writing that the late Justice wanted to "limit what is 'authoritative' or 'official' to a pronouncement that expresses the 'judgment of central agency management, approved at the highest levels,' as distinct from the pronouncements of 'underlings.'"[231]

V. CONCLUSION

Overcoming the confusion stemming from the abolition of agency deference in Florida requires more than just temporary wins in restoring the plain meaning rule; a greater emphasis on due process is crucial to uphold due process rights and the separation of powers.[232] The Florida Supreme Court has twice applied the de novo standard set forth in Article V, section 21, and neither application discusses the abolition of agency deference in any meaningful detail.[233] *Evans* and *Chakrin* each present unique variations of the same fundamental constitutional problem whereby precedent built off of deference to agency interpretations can still affect court decisions even after the abolition of agency deference, i.e., the "zombie *Chevron*" problem.[234] The *Raik* decision reveals fundamental issues with Florida's jurisprudence on the rules of statutory interpretation now that deference is off the table.[235] The same vices that plagued *Chevron's* deference at the federal level and agency deference at the state level appear to adversely affect Florida's judicial decision-making, albeit in slightly different ways.[236]

230. *See Chakrin*, 304 So. 2d at 828 n.5; United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting); *cf. Abbey*, 745 So. 2d at 1025.

231. *Mead Corp.*, 533 U.S. at 238 n.19.

232. *See* discussion *supra* Part IV; Pedraza v. Reemployment Assistance Appeals Comm'n, 208 So. 3d 1253, 1257 (Fla. 3d Dist. Ct. App. 2017).

233. *See* Furst v. DeFrances, 332 So. 3d 951, 957 n.5 (Fla. 2021); Citizens v. Brown, 269 So. 3d 498, 504 (Fla. 2019).

234. *See* Evans Rowing Club, LLC v. City of Jacksonville, 300 So. 3d 1249, 1250 (Fla. 1st Dist. Ct. App. 2020) (per curiam); Dep't of Highway Safety Motor Vehicles v. Chakrin, 304 So. 3d 822, 829 (Fla. 2d Dist. Ct. App. 2020); Sunstein, *supra* note 212, at 570.

235. *See* Raik v. Dep't of Legal Affs., 344 So. 3d 540, 553 (Fla. 1st Dist. Ct. App. 2022).

236. *See* Sunstein, *supra* note 212, at 583; *Raik*, 344 So. 3d at 553; *Evans*, 300 So. 3d at 1250; *Chakrin*, 304 So. 3d at 829.


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