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Construction Law

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I. INTRODUCTION

Although the period of July 1, 1993 through July 1, 1994 was not as eventful as the prior year in Florida construction law, there were several decisions worthy of discussion which affect construction practitioners.

II. MINORITY AND DISADVANTAGED BUSINESS ENTERPRISES

In Advanced Barricades & Signing, Inc. v. State, Department of Transportation, the First District Court of Appeal held that the State Department of Transportation (“DOT”) has no obligation under statute or rule to ensure that contractors do not wrongfully terminate their subcontractors. Approval by DOT of a substituted subcontractor is merely a ministerial act. As long as the subcontractor is a certified disadvantaged business enterprise (“DBE”) or, alternatively, that the contractor has made a good faith effort to subcontract with another DBE, the DOT must approve the substitution. Only where the subcontractor sought to prove that the DOT acted fraudulently, arbitrarily, illegally, or dishonestly, might the subcontractor have standing to seek administrative relief.

In Charles E. Burkett & Associates, Inc. v. State, Department of Transportation, the court upheld the validity of the DOT rules requiring a minority or a woman business owner to have “technical capability, knowledge, training, education, or experience required to make decisions in the critical areas of operation[s]” in addition to being an owner, before a business may be certified as a DBE. Given the social purpose of the

2. Id. at 706.
3. Id. at 705.
4. Id.
5. Id.
6. 637 So. 2d 47 (Fla. 5th Dist. Ct. App. 1994).
7. Id. at 48.
program, it would seem that the minority business owner is placed at the disadvantage of being required to have the expertise, rather than being able to simply hire others with expertise. However, the rules were determined to be neither arbitrary nor capricious.\(^8\)

### III. PERMITS: DUE PROCESS—PROPERTY RIGHT

In *Reserve, Ltd. v. Town of Longboat Key*, the Eleventh Circuit Court of Appeals held that it was not a violation of procedural due process for the town to revoke a building permit which was issued subject to a provision of the Longboat Key Code which stated that a permit would be revoked if no "substantial work" was accomplished in any thirty day period after construction commenced.\(^9\) The court concluded that the substantial work standard was not unconstitutionally vague.\(^10\) The court further stated that there is a constitutionally protected interest in a building permit where funds had been expended in reliance upon the permit.\(^11\)

### IV. CONSTRUCTION CONTRACT PROVISIONS

#### A. Indemnity (Hold Harmless) Clauses

In *Winn Dixie Stores, Inc. v. D & J Construction Co.*, the Fourth District Court of Appeal upheld an indemnity agreement where the language of the agreement clearly covered the claim made.\(^12\) In this case, a construction company employee was injured while working on Winn Dixie's premises. The construction worker slipped and fell in a puddle caused by a leaking roof. The roof was not part of the construction company's work, and the company was not at fault for the leak. However, the construction company did have an indemnity agreement with Winn Dixie which covered:

\[
\text{[A]ny claim or loss arising in any manner out of the presence or activity of [D & J] or any of our servants, agents, or employees or representatives or out of the presence of such equipment when such persons or equipment are on your premises for the purposes of}
\]

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8. Id.
9. 17 F.3d 1374 (11th Cir. 1994).
10. Id. at 1378.
11. Id.
12. Id. at 1380.
14. Id. at 65.
performing services . . . notwithstanding such accident or damage may have been caused in whole or in part [by] negligence of you [Winn Dixie] or any of your servants, agents or employees.\textsuperscript{15}

Based on this agreement, the court held that Winn Dixie was entitled to indemnification from the contractor for the loss.\textsuperscript{16}

B. Conditions Precedent

In \textit{HRS v. E.D.S. Federal Corp.},\textsuperscript{17} the First District Court of Appeal held that where there is express agreement that the parties will pursue disputes through administrative remedy, a suit for breach of contract before pursuing the administrative remedy is subject to dismissal.\textsuperscript{18} The contract required claims to be submitted to the contracting officer for resolution. Absent a showing of bias on the part of the contracting officer, suit before submission to the contracting officer for decision was premature.\textsuperscript{19}

C. Arbitration

In \textit{Medident Construction, Inc. v. Chappell},\textsuperscript{20} the question arose as to whether the validity of a contract which contained an arbitration clause was an arbitrable issue. The Third District Court of Appeal held that it was.\textsuperscript{21} A contractor and a homeowner entered into a contract which contained an arbitration clause providing that all disputes between the parties would be submitted to arbitration before the American Arbitration Association. The homeowner filed a complaint against the construction company seeking a declaration of the parties' rights under the contract, compensatory and punitive damages, and fees. The contractor's motion to compel arbitration, under the contract clause, was denied by the trial court, and the contractor appealed.\textsuperscript{22} The appellate court held that because an arbitration clause is considered separate from the rest of the contract, it must be specifically and

\textsuperscript{15} Id. at 66.
\textsuperscript{16} Id.
\textsuperscript{17} 631 So. 2d 353 (Fla. 1st Dist. Ct. App. 1994).
\textsuperscript{18} Id. at 357.
\textsuperscript{19} See id. at 356-57 (explaining that HRS was not biased); see also HRS v. Maximus, Inc., 633 So. 2d 490 (Fla. 1st Dist. Ct. App. 1994) (granting a motion to dismiss for breach of contract because the contract's dispute resolution clause was the same as in \textit{E.D.S.}).
\textsuperscript{20} 632 So. 2d 194 (Fla. 3d Dist. Ct. App. 1994).
\textsuperscript{21} Id. at 195.
\textsuperscript{22} Id.
exclusively attacked in order for the court to try the issue. In this case, the appellee/homeowner challenged the contract as a whole, not specifically the arbitration clause. Therefore, the relief sought fell within the scope of the arbitration clause and was determined to be arbitrable. Other cases have held that the issue of the validity of the agreement containing the arbitration clause was to be determined by the court prior to compelling arbitration. One such case is Dean Witter Reynolds, Inc. v. Clarke, where the court held that a limitation of actions defense must be arbitrable. Where the arbitration award said that it was in full settlement of all claims and counterclaims submitted, and the award did not include prejudgment interest, the court in Nitram, Inc. v. Industrial Risk Insurers would not award prejudgment interest on the arbitration award from the time of the award to the time of entry of judgment upon confirming the award.

D. Scheduling/No Damage for Delay

In a rather definitive opinion, the Eleventh Circuit Court of Appeals has determined that language in a contract allowing the contractee to modify the progress schedule at its discretion makes delay and lost efficiency claims extremely difficult for the contractor to establish. In Marriott v. Dasta Construction Co., the owner had “complete discretion to adjust the schedule as well as to demand that Dasta comply with such adjustments without additionally compensating Dasta.” In the face of such clauses as: 1) the right to adjust the schedule; 2) time is of the essence; and 3) no damage for

23. Id.
24. Id.
25. See Bardinella Designs, Inc. v. Spirit Constr., Inc., 524 So. 2d 703, 704 (Fla. 4th Dist. Ct. App. 1988) (holding that arbitration should not be compelled where a party is seeking declaratory judgment and the validity of a contract has not been determined); see also Caltagirone v School Bd. of Hernando County, 355 So. 2d 873, 875 (Fla. 2d Dist. Ct. App. 1978) (affirming a restraining order halting arbitration until the court determined the contract was valid).
27. Id. at 402; see also Wylie v. Investment Management & Research, Inc., 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993) (holding that a statute of limitations defense should be determined by the arbitrators, not the courts).
29. Id. at D258.
31. Id. at 1066.
delay, the court doomed the contractor’s claims as being without merit under the language of the contract.\textsuperscript{32}

In discussing the contractor’s attempt to avoid the no damage for delay clause on the basis of active interference, the court determined that the contractor’s failure to request time extensions, a right to which it was entitled under the contract, precluded the contractor’s claims for delay, impact, and lost efficiency. The court suggested that if the contractor had requested extensions which were the result of the owner’s fraud, active interference, or concealment, the contractor would have had an arguable position. Not having requested the time extensions was fatal to the contractor’s claims.\textsuperscript{33}

\textbf{V. CONSTRUCTION CLAIMS}

\textbf{A. Licensing}

In \textit{Alfred Karram III, Inc. v. Cantor},\textsuperscript{34} the Fourth District Court of Appeal held that an architect who was not licensed was not entitled to a construction lien, but could maintain an action for breach of contract due to the nature of the work performed.\textsuperscript{35} In this case, the architectural firm performed architectural and related services in designing a single-family home, although the firm did not hold a certificate of authorization required by section 481.219 of the \textit{Florida Statutes}.\textsuperscript{36} None of the principals of the firm were registered architects. The architectural firm filed a claim of lien for the amount of its fees. When the firm tried to enforce its lien and maintain a breach of contract action, the prospective home owner argued that because the firm was unlicensed it had no right to a lien nor to enforce a contract for architectural services.\textsuperscript{37}

The appellate court held that the architectural firm could maintain the breach of contract action, although it was unlicensed, because there is an exemption to the licensing requirement for the type of work performed under section 481.229(1) of the \textit{Florida Statutes}.\textsuperscript{38} No person is required to qualify as an architect in order to make plans and specifications for single

\textsuperscript{32} \textit{id.} at 1065.

\textsuperscript{33} \textit{id.} at 1069.

\textsuperscript{34} 634 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).

\textsuperscript{35} \textit{id.} at 211-12.

\textsuperscript{36} \textit{id.} at 211; \textit{see} FLA. STAT. § 481.219 (1993).

\textsuperscript{37} \textit{Cantor}, 634 So. 2d at 211.

\textsuperscript{38} \textit{id.} at 212; \textit{see} FLA. STAT. § 481.229(1) (1993).
family residences. However, with respect to the construction lien claim, the court held that section 713.03 of the Florida Statutes specifically limits the right to claim a lien to "architects" authorized under chapter 481, or general contractors who provide architectural services under design-build contracts authorized by section 481.229(3). This does not include those who perform architectural services where no professional license is required. Thus, the unlicensed architectural firm had no lien rights under the law.

In Best Pool & Spa Service Co. v. Romanik, the court held that the Fifth Amendment right against self-incrimination applies not only to criminal matters but also to administrative proceedings such as licensing. In Best Pool, a contractor was permitted to invoke the Fifth Amendment and not respond to questions about his certifying to the county that there was liability insurance. It is a crime to make false public records or certificates.

B. Measure of Damages

In Mall v. Pawelski, the buyers of a seventeen-year old house discovered, shortly after moving into the house, that the roof was leaking. They replaced the entire roof and brought an action to recover their expenses. The trial court awarded the buyers full cost of the new roof, even though the roof which was replaced was as old as the house. The sellers of the house appealed and the case came before the Fourth District Court of Appeal.

The appellate court agreed that the buyers were entitled to damages for replacing the leaky roof, but the court disagreed as to the amount of those damages. It reasoned that the buyers did not bargain for a new roof when they bought a seventeen year old house. Allowing full recovery for a new roof would unjustly enrich them. The proper measure of damages, therefore, should be the replacement cost of the roof prorated to account for

39. Cantor, 634 So. 2d at 212; see Fla. Stat. § 481.229(3) (1993).
40. Cantor, 634 So. 2d at 212.
41. 622 So. 2d 65 (Fla. 4th Dist. Ct. App. 1993).
42. Id. at 66; see also State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973) (extending the right to remain silent to administrative proceedings which "tend to degrade the individual's professional standing, professional reputation, or livelihood").
43. Best Pool, 622 So. 2d at 66.
45. 626 So. 2d 291 (Fla. 4th Dist. Ct. App. 1993).
46. Id. at 291-92.
the increased life expectancy of the new roof. Although this principle was applied between a home buyer and seller, it would be equally applicable in a construction defect case where a failed component was replaced after an extended period of use.

It is incredible that there are multiple cases over several years dealing with the measure of damages for recovery of a partially completed contract. In *Robinson v. Albanese*, the Fifth District Court of Appeal addressed this old issue and denied a contractor recovery based on insufficient evidence. There are two permissible measures of damages on behalf of a contractor for a partially completed contract which is breached by the owner. The contractor may recover the reasonable value of the labor performed and materials furnished, or the contractor may recover the reasonable costs incurred plus the lost profit under the contract.

In *Robinson*, there was no evidence of the reasonable value of the work when the contractor left the job. There was, likewise, no showing of costs and lost profit. Accordingly, the judgment in favor of the contractor was reversed.

C. *Unjust Enrichment*

In *Hillman Construction Corp. v. Wainer*, a general contractor hired by a tenant of commercial premises to make improvements sued the landlord of the rental property after the tenant failed to pay for those improvements and later filed bankruptcy. The contractor argued that by allowing the owner to reap the benefit of the improvements by renting the premises at increased rent, the owner had been unjustly enriched. The trial court ruled

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47. *Id.* at 292.
48. 636 So. 2d 831 (Fla. 5th Dist. Ct. App. 1994).
49. *Id.* at 834.

"[T]he proper measure of damages in a breach of contract action by a subcontractor against the contractor, where the contract has not been fully performed, is either quantum meruit, or the subcontractor's lost profit in addition to an amount representing the reasonable cost of labor and materials incurred in good faith and in the partial performance of the contract."

*Marshall Constr.,* 569 So. 2d at 847.
51. *Robinson*, 636 So. 2d at 834.
52. *Id.* at 835.
53. 636 So. 2d 576 (Fla. 4th Dist. Ct. App. 1994).
54. *Id.* at 577.
that the contractor did not state a cause of action for unjust enrichment. The Fourth District Court of Appeal reversed, and opined that the complaint was valid. 55

The appellate court stated the elements of unjust enrichment as: 1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; 2) defendant voluntarily accepts and retains the benefit conferred; and 3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff. 56 In this case, the court thought that the contractor had sufficiently pleaded a claim for unjust enrichment. 57

In *Maloney v. Therm Alum Industries*, 58 the Fourth District Court of Appeal held that before pursuing an equitable claim against an owner with whom the subcontractor did not have a contract, the subcontractor must first exhaust his legal remedies against the contractor. 59 This case arose out of a construction contract which provided that construction was to be substantially completed no later than nine months from commencement. Due to problems with ordering and installing materials, the certificate of occupancy was issued nearly ten months late. In addition to these delays, the owner claimed that the material was defective and therefore refused to make final payment. The contractor and subcontractor filed claims of lien. The subcontractor sought to foreclose its lien and also sought damages against the contractor. The contractor and subcontractor agreed to submit their disputes with each other to arbitration. Meanwhile, the lender foreclosed its mortgage and extinguished the construction liens. The subcontractor then amended its complaint to add a claim against the owner for equitable relief on the basis of unjust enrichment. 60 A jury awarded the subcontractor damages on its claim against the owner and the owner appealed. 61

Under these circumstances, the appellate court questioned the award of damages to the subcontractor against the owner. The subcontractor had no contract with the owner. The court pointed out that the subcontractor was entitled to receive payment from the contractor for work performed. However, because the dispute between the contractor and subcontractor was

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55. *Id.* at 578.
56. *Id.* at 577.
57. *Id.* at 577-78.
58. 636 So. 2d 767 (Fla. 4th Dist. Ct. App. 1994).
59. *Id.* at 770.
60. *Id.*
61. *Id.*
in arbitration, the court could not determine whether the subcontractor would ultimately receive its payment from the contractor. Therefore, the court disapproved the award against the owner and ruled that the subcontractor could not show that there was no adequate legal remedy. Absence of an adequate legal remedy is an element of unjust enrichment against the owner.

D. Negligence/Economic Loss Rule

In *Brass v. NCR Corp.*, the United States District Court for the Southern District of Florida held that the economic loss rule does not bar claims of fraudulent inducement and negligent misrepresentation. The court distinguished claims of fraud in the performance, which would be barred by the rule, from claims of fraud in the inducement, which would not be barred. If the law were otherwise, the economic loss rule would have the effect of abolishing the tort of fraud in the inducement altogether.

In *Southland Construction, Inc. v. Richeson Corp.*, the Fifth District Court of Appeal had an opportunity to discuss a key exception to the economic loss rule, first discussed in *A.R. Moyer, Inc. v. Graham*, when the Florida Supreme Court decided *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.* The court retained an exception to this doctrine for instances of negligence by a supervising architect, upholding its earlier decision in *A.R. Moyer*.

Southland Construction sued Richeson Corporation and Thomas E. Richeson, individually, for breach of contract in the faulty design of a retaining wall and for negligence. The trial court granted summary judgment in favor of both defendants with respect to the negligence claim.

62. Id.
63. *Maloney*, 636 So. 2d at 770.
64. 826 F. Supp. 1427 (S.D. Fla. 1993).
65. Id. at 1428.
66. Id.
67. Id.
68. 642 So. 2d 5 (Fla. 5th Dist. Ct. App. 1994).
69. Id. at 7.
70. 285 So. 2d 397 (Fla. 1973).
71. 620 So. 2d 1244 (Fla. 1993).
72. Id. at 1247.
73. *A.R. Moyer*, 285 So. 2d at 403.
based on the economic loss rule. Southland appealed this decision to the Fifth District Court of Appeal.74

The appellate court reversed on the negligence claim, citing A.R. Moyer.75 The court reasoned that Southland, as user of the plans, would be injured if the designs were professionally below acceptable standards, and caused damages. Richeson, as an individual professional, owed Southland a duty to perform his professional duties in a professional, competent manner. Thus, Moyer is authority for allowing a tort suit against Richeson, individually, for professional malpractice.76

The appellate court, in Southland, however, did not rely only on the Moyer exception to the economic loss rule, but noted that there was evidence that other property had been damaged by the failure of the retaining wall.77 The Moyer exception, while valid, is narrow. The supreme court in Casa Clara strictly limited Moyer to the facts of a general contractor damaged by a supervising architect.78

In Tillman v. Howell,79 the Fourth District Court of Appeal held that “one who breaches a contract is answerable only for damages that were or reasonably should have been in the contemplation of the contracting parties.” One who is liable for the tort of negligence, on the other hand, “must answer for all of the natural, direct, and proximate consequences of his tortious conduct . . . .” These consequences generally include personal injury and property damage, but not economic loss.80

This case arose when the purchasers of a home refused to pay the balance on a promissory note after they began to encounter problems which they attributed to construction defects. The homeowners brought a breach of contract claim after a faulty pipe caused a flood which damaged their wood floors and cabinets. Additionally, they claimed damages for further flooding when a carpenter, hired by the homeowners to repair the original flood damage, put a nail through another water pipe. Additional damages were incurred due to this flooding, and the homeowners sought compensation from the contractor. In support of this additional claim, the homeown-

75. Id.
76. See A.R. Moyer, 285 So. 2d at 403.
78. Id.; see Casa Clara, 620 So. 2d at 1246 (explaining the distinction between contract law, which protects expectations, and tort law, in which the plaintiff must prove the duty owed by the other party).
79. 634 So. 2d 268 (Fla. 4th Dist. Ct. App. 1994).
80. Id. at 270.
ers argued that the carpenter’s negligence was foreseeable and that the contractor was not absolved of liability because his conduct had set in motion the chain of events which caused the second flooding and related damage.\(^{81}\)

The court rejected the homeowner’s arguments and reasoned that actions in negligence are unlike actions based upon breach of contract. In contract, the parties are limited to damages which “were or reasonably should have been in [their] contemplation,” at the time they made the contract.\(^{82}\) The second flooding occurred due to “an unforeseeable independent intervening cause,” and, therefore, damages were not recoverable under the contract for the carpenter’s negligence.\(^{83}\)

On September 8, 1994, the Florida Supreme Court decided *Murthy v. N. Sinha Corp.*\(^{84}\) In that case, the court held that while there may be negligence of a qualifying agent under principles of common law, there is no statutory duty created by sections 489.119 or 489.1195 of the *Florida Statutes* which would support a private cause of action.\(^{85}\)

E. *Products Liability*

In *Square D Co. v. Hayson*,\(^{86}\) the court held that in products liability cases, “[w]hen the manufacturer of an article involving an inherently dangerous instrumentality (which includes electricity) places that product in the stream of commerce, the manufacturer assumes the duty of conveying to those who might use the product a fair and adequate warning of [the products’] dangerous potentialities.”\(^{87}\)

VI. CONSTRUCTION LITIGATION

A. *Settlement Agreements*

In *Crosby Forrest Products, Inc. v. Byers*,\(^{88}\) the Fifth District Court of Appeal held enforceable a stipulation agreement which provided that in the event of a default, a stipulated sum in excess of the agreed settlement

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81. *Id.* at 269.
82. *Id.* at 270.
83. *Id.* at 269.
84. 19 Fla. L. Weekly S429 (Sept. 8, 1994).
85. *Id.* at S430.
86. 621 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1993).
87. *Id.* at 1377.
88. 623 So. 2d 565 (Fla. 5th Dist. Ct. App. 1993).
would become due.\textsuperscript{89} While "[a] contract term which provides that a party must pay a penalty for breaching a contract is unenforceable,"\textsuperscript{90} in this case, the parties stipulated that a settlement amount was payable, but in the event of default of payment of the settlement amount when agreed, the higher amount related to the sum originally sought in the suit would be the amount owed.\textsuperscript{91} The court reasoned that, where the larger amount payable upon default represents a legitimate amount, courts may consider the parties' right of freedom of contract as a basis for upholding the agreement to pay the higher sum.\textsuperscript{92}

A per curiam decision in Suggs v. Defranco's, Inc.,\textsuperscript{93} held that where a settlement letter left "a number of essential terms . . . open for future negotiation[,]" there was no enforceable settlement agreement.\textsuperscript{94} The letter was only an agreement in concept.\textsuperscript{95}

B. Condominiums

The Florida Supreme Court, in Rogers & Ford Construction Corp. v. Carlandia Corp.,\textsuperscript{96} held that "a condominium unit owner [has] standing to sue the developer or general contractor to recover damages for construction defects or deficiencies in the common elements or common areas of the condominium."\textsuperscript{97}

C. Attorney's Fees

The United States Supreme Court, in Fogerty v. Fantasy, Inc.\textsuperscript{98} considered the interpretation of the attorney's fee provision of the Copyright Act of 1976,\textsuperscript{99} which provides for the recovery of the prevailing party's attorney's fees. The Court settled a split among the circuits, abolishing the so-called "dual standard" of awarding fees, which treated plaintiffs and defendants differently.\textsuperscript{100} Chief Justice Rehnquist noted that "[p]revailing
plaintiffs and prevailing defendants are to be treated alike [under § 505 of the Copyright Act],” and that any award of attorney’s fees is at the discretion of the court.\textsuperscript{101}

In \textit{Heidle v. S & S Drywall & Tile, Inc.},\textsuperscript{102} a contractor sued a homeowner to foreclose a construction lien for labor and materials provided in the construction of her home. Heidle, the homeowner, filed an answer and counterclaim alleging that the contractor’s lien was fraudulent, and sought damages and attorney’s fees for discharging the lien.\textsuperscript{103}

“\textit{A} year passed \[\textit{with no action in the case, [and]}\] Heidle moved to dismiss the entire case for lack of prosecution pursuant to Florida Rule of Civil Procedure 1.420(e).”\textsuperscript{104} The complaint, answer, and counterclaim were duly dismissed by the trial court, and Heidle sought attorney’s fees under section 713.29.

The trial court denied the homeowner’s motion for attorney’s fees, citing the case of \textit{Stockman v. Downs},\textsuperscript{105} which held that a claim for attorney’s fees, whether based on statute or contract, must be pled.\textsuperscript{106} Once the pleadings were dismissed, the court reasoned, the statute no longer applied. Heidle appealed.

The appellate court reversed, and instructed the lower court to award Heidle attorney’s fees and costs.\textsuperscript{107} The court noted that the purpose for requiring a claim for attorney’s fees to be pled is to afford the opposing party notice that attorney’s fees would be sought.\textsuperscript{108} In this case, S & S received appropriate notice of the claim for attorney’s fees in Heidle’s answer and counterclaim. Dismissing the suit for lack of prosecution did not mean the claim was not made.

Where the statutory requirements of an offer of judgment are met under section 768.69 of the \textit{Florida Statutes}, an award of attorney’s fees is mandatory, unless the offer was not made in good faith.\textsuperscript{109}

\textsuperscript{101.} \textit{Id.}
\textsuperscript{102.} 639 So. 2d 1105 (Fla. 5th Dist. Ct. App. 1994).
\textsuperscript{103.} \textit{Id.} at 1105.
\textsuperscript{104.} \textit{Id.} at 1105-06; \textit{see} FLA. R. CIV. P. 1420(e).
\textsuperscript{105.} 573 So. 2d 835 (Fla. 1991).
\textsuperscript{106.} \textit{Id.} at 837.
\textsuperscript{107.} \textit{Heidle}, 639 So. 2d at 1106.
\textsuperscript{108.} \textit{Id.} (quoting \textit{Stockman}, 573 So. 2d at 837).
\textsuperscript{109.} Stunkel v. Hanley Landscape, Inc., 633 So. 2d 117 (Fla. 4th Dist. Ct. App. 1994) (citing Schmidt v. Fortner, 629 So. 2d 1036 (Fla. 4th Dist. Ct. App. 1993)).
D. Prejudgment Interest

In *Interamerican Engineers & Constructors Corp. v. Palm Beach County Housing Authority*, the Fourth District found no error when the trial court disallowed prejudgment interest in light of the law which holds that "prejudgment interest is not absolute and may depend upon equitable considerations." "

E. Limitation of Actions

In the case of *Stokes v. Huggins Construction Co.*, a property owner built a new beach house. The house was placed on pilings. After the house was built, the adjoining property owner excavated between six and seven feet of soil from a portion of his property adjacent to the east side of the new house. Sand and soil from the beach house lot then began to shift into the excavation. The beach house contractor warned the property owner of the dangerous condition, and recommended immediate action to prevent major problems from occurring. The owner took no action. After a summer storm, the beach house fell and was destroyed. More than four years passed before the owner sued his neighbor and his neighbor's excavating contractor. The neighbor and excavating contractor contend that the claim is past the four year statute of limitations for negligence action, and should therefore be barred.

The issue for the First District Court of Appeal to decide was: when does the limitation period begin to run in an action for negligent removal of lateral support? Section 95.031 of the *Florida Statutes* states that "[a] cause of action accrues when the last element constituting the cause of action occurs." The neighbor and excavating contractor argued that the cause of action accrued when the owner was put on notice of the problem by his contractor. At that time the owner knew or should have known of the negligent acts which caused the loss of lateral support. The appellate court disagreed. It reasoned that the beach house owners "did not have knowledge of the permanency of their injury until their house fell down,

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110. 629 So. 2d 879 (Fla. 4th Dist. Ct. App. 1993).
111. *Id.* at 882 (citing Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990)).
112. 626 So. 2d 327 (Fla. 1st Dist. Ct. App. 1993).
113. *Id.* at 328.
114. FLA. STAT. § 95.031(1) (1993).
115. *Stokes*, 626 So. 2d at 329.
even though they may have been on notice of probable or possible injury” when their contractor informed them of the serious condition.\footnote{Id. at 330.}

In \textit{Palm Beach County v. Savage Construction Corp.},\footnote{627 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1993).} the Fourth District Court of Appeal held that an error in the naming of the surety in a complaint was a misnomer which entitled the plaintiff to have its amended complaint relate back to the date of original filing, thus avoiding the statute of limitations defense.\footnote{Id. at 1333.}

In \textit{Wylie v. Investment Management & Research, Inc.},\footnote{629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993).} the Fourth District Court of Appeal held that “[n]onclaim statutes differ from statutes of limitations in that the former are jurisdictional provisions which the parties may not ordinarily waive, while the latter are procedural bars which may be waived by the failure to plead or assert them.”\footnote{Id. at 902.}

F. Expert Witnesses

There were several important decisions regarding the use of expert witness testimony, beginning with the United States Supreme Court’s decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\footnote{113 S. Ct. 2786 (1993).} The Court held that the test for admissibility of expert scientific evidence established in \textit{Frye v. United States}\footnote{293 F. 1013 (D.C. Cir. 1923).} was superseded by the adoption of the Federal Rules of Evidence.\footnote{Daubert, 113 S. Ct. at 2793. Specifically, Rule 702 supersedes the “Frye Test.”} According to \textit{Frye}, “expert opinion based on a scientific technique is inadmissible unless the technique used is ‘generally accepted’ as reliable in the relevant scientific community.”\footnote{Id. at 2792 (quoting Frye, 293 F. at 1014).} However, nothing in the Federal Rules of Evidence governing expert testimony gives any indication that “general acceptance” is a prerequisite to the admissibility of scientific evidence.\footnote{Id. at 2794.} Under the rules, a trial judge, faced with a proffer of expert scientific testimony, must determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.\footnote{Id. at 2796.}
In *Square D Co.*, the First District held it was not an error to permit the testimony of a mechanical engineer as to inadequate design, even though the witness had no specific training in labels and warnings, and in spite of the fact that he had not been qualified as an expert in electrical power distribution equipment. The court accepted the expert based on his prior design experience.

It has been determined that there must be "substantial competent evidence of the [expert] services performed and the reasonable value of those services," in order to recover expert witness fees as taxable costs in state court. In *Powell v. Barnes*, a trial attorney, who was not shown to have expertise in the same field as the expert whose fees were sought to be taxed as costs, testified as to the expert witness fee. The court determined that this was not substantial competent proof of the expert witness fee. The court stated that the expert, or another qualified expert in the same field, should provide the requisite proof.

G. Piercing the Corporate Veil

In *Walton v. Tomax Corp.*, the Fifth District Court of Appeal reversed a directed verdict for the president and chief executive officer of a construction corporation whom the homeowner claimed had acted as the alter ego of the corporation. The court considered the factors discussed in *Dania Jai-Alai Palace, Inc. v. Sykes* and concluded that there was enough evidence for the jury to find the construction company president depleted corporate assets for his personal benefit so that the corporate veil should be pierced.

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127. *Square D Co.*, 621 So. 2d at 1373.
128. Id. at 1379.
129. Id.
131. Id.
132. Id.
133. 632 So. 2d 178 (Fla. 5th Dist. Ct. App. 1994).
134. 450 So. 2d 1114 (Fla. 1984).
H. Class Actions

The Second District Court of Appeal in *Barton-Malow Co. v. Bauer*\(^\text{136}\) reversed an order granting class certification to parties who claimed injury as a result of environmental problems within the Polk County Courthouse. The plaintiffs claimed to have health problems caused by the negligence of the building's general contractor and architect. The court held that an evidentiary hearing, while not necessary in all cases, was necessary here.

When it is not clear from the pleadings that common issues predominate or that the proposed class representatives provide a superior method for the fair and efficient adjudication of the controversy . . . . If the defendants contest the plaintiff's allegations, it will be necessary for the trial court to determine whether the facts actually support the allegations.\(^\text{137}\)

VII. BANKRUPTCY

In *In re American Ship Building Co.*,\(^\text{138}\) a debtor sought to assume its executory contract which the Department of the Navy had terminated. The United States Bankruptcy Court of the Middle District of Florida held that the bankruptcy court was without jurisdiction to determine the issue of wrongful termination of the government contract. That issue is controlled by the Contract Disputes Act,\(^\text{139}\) and the Bankruptcy Court should yield jurisdiction to the United States Court of Federal Claims.\(^\text{140}\)

VIII. LIENS

A. Lien Priorities

In *Carteret Savings Bank v. Citibank Mortgage Corp.*,\(^\text{141}\) the Florida Supreme Court, on a certified question from the Fourth District Court of Appeal, held "that only the portion of a mortgage loan extended for the purpose of purchasing property and existing improvements is entitled to priority as a purchase money mortgage; priority in favor of a purchase

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136. 627 So. 2d 1233 (Fla. 2d Dist. Ct. App. 1993).
137. *Id.* at 1235.
141. 632 So. 2d 599 (Fla. 1994).
money mortgage does not extend to sums advanced for the improvement of real property."^{142}

B. Notice to Owner

In 1992, the Florida Supreme Court held, in the case of *Aetna Casualty & Surety Co. v. Buck*,^{143} that where a common identity exists between the owner and the contractor, privity of contract is established. Where privity of contract with the owner exists, service of a Notice to Owner is not required.^{144} However, whether privity exists depends on the facts of each case. In *C.L. Whiteside & Associates Construction Co. v. Landings Joint Venture*,^{145} the Fourth District Court of Appeal addressed the issue of whether there was common identity between an owner and an ostensible general contractor.

In *Whiteside*, the owner of the property was a joint venturer. The managing partner of the joint venture was a corporation whose president also happened to be the president of the construction company which entered into the subcontract with Whiteside. The construction company president personally signed the subcontract. The subcontractor did not serve a notice to the owner relying on the fact that it dealt with the president of the managing joint venture partner. Several months later, after a dispute occurred between the general contractor and the subcontractor, the subcontractor served its Notice to Owner. The subcontractor then suspended performance and recorded a claim of lien. The trial court concluded that there was not enough commonality of ownership between the owner and the general contractor and dismissed the action to enforce the lien on summary judgment due to lack of notice to the owner. The subcontractor appealed.

The Fourth District Court of Appeal agreed with the subcontractor that "the issue of common identity is not synonymous with common ownership," for purposes of determining privity.^{146} It reversed the summary judgment and remanded the case for trial, noting that questions of privity will depend on the facts of each case. Proof of common identity can establish privity.^{147}

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142. *Id.* at 599 (emphasis omitted).
143. 594 So. 2d 280 (Fla. 1992).
144. *Id.* at 281.
145. 626 So. 2d 1051 (Fla. 4th Dist. Ct. App. 1993).
146. *Id.* at 1052.
147. *Id.* at 1053.
The issue of when the forty-five days for serving a Notice to Owner begins to run was addressed by the Fourth District Court of Appeal in Gazebo Landscape Design, Inc. v. Bill Free Custom Homes, Inc.\textsuperscript{148} Gazebo, a landscaping contractor, sought to enforce a construction lien against a homeowner. After traveling with the homeowner to a tree supplier to choose specific trees in November and making a deposit for same, Gazebo began digging holes on the owner’s property for planting the trees on December 5, 1990. Gazebo timely served its Notice to Owner, utilizing the December 5th date, not the date of the November tree buying trip. The trial court refused to enforce the lien on the grounds that Gazebo did not serve its Notice to Owner within forty-five days after commencing to furnish service or materials.

The appellate court disagreed with this interpretation and suggested that the trial court look at all of the circumstances surrounding the particular job or transaction in determining when the furnishing of services or materials begins. While Gazebo did receive a deposit for the trees, the court determined “there were no affirmative acts taken by Gazebo which establish that Gazebo actually began to furnish materials” to the homeowner until it dug the holes on the owner’s property. Based upon the testimony of Gazebo’s representative, the Court determined it was reasonable to believe that the trip to Sarasota was merely a sales trip, and that there was no deal until “the job was in the ground.”

The court pointed out that, for purposes of determining when materials and services were furnished, the test which may be utilized is “whether the contractor had actually suffered any economic detriment, or whether he simply engaged in certain activities on a gratuitous basis, in hopes of ‘landing’ a job.”\textsuperscript{149}

C. Jurisdiction

Two district courts of appeal have held that proper jurisdiction for an action to enforce a lien under $15,000 is the county court.\textsuperscript{150} However, the Florida Supreme Court recently determined that there is concurrent jurisdiction in both the county and circuit courts for the enforcement of liens not in excess of $15,000.\textsuperscript{151} The court disagreed with the reasoning of the

\textsuperscript{148} 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).
\textsuperscript{149} Id. at 89.
\textsuperscript{150} Blackton, Inc. v. Young, 629 So. 2d 938 (Fla. 5th Dist. Ct. App. 1993); Brooks v. Ocean Village Condominium Ass'n, 625 So. 2d 111 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{151} Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858, 860 (Fla. 1994).
Third District Court of Appeal when the lower court declared that an action to enforce a lien does not involve title and boundaries to property. 152

D. Legislative Changes

There were a few changes to the construction lien law enacted by the legislature in 1994, the most significant being a change to section 713.16, with respect to requests for sworn statements of account. 153 In order for the failure of the lienor to respond to the request to act as a complete defense to the lien, the request for sworn statement must be served on the lienor to the attention of the lienor’s designee at the address specified in the Notice to Owner. The change in the law does not make clear what happens when the party serving the Notice to Owner does not designate a person or address for service of the request for sworn statement in the Notice to Owner.

The same is true for the request for sworn statement served by a contractor on a job with an exemptory payment bond. 154 In order for the failure to respond to the request to act as a defense to the bond claim, the request for sworn statement must be served on the lienor to the attention of the person designated in the preliminary notice, at the address designated.

If the owner, or the contractor on a job with a payment bond, serves a request for sworn statement of account after having received a responsive sworn statement of account, and if there has been no change in the information between the time of giving of the sworn statement and the time of the next request for sworn statement, then the failure to respond to the second request for sworn statement does not act as a defense. 155

If a request for a sworn statement served after suit is filed to enforce the lien, or after suit is filed to recover against a payment bond claim, that request for sworn statement will not act as a defense.

Failing to furnish a response, or the furnishing of a false or fraudulent statement, has always acted as a complete defense to the lien claim. After July 1, 1994, the negligent inclusion or omission of any information in the requested sworn statement will act as a defense to the extent that the owner (or contractor with the payment bond) can demonstrate prejudice from the negligent inclusion or omission.

152. Id.


154. FLA. STAT. § 713.23 (1993).

155. See ch. 94-119, § 319, 1994 Fla. Laws at 635.
The warning at the top of the request for sworn statement has been changed to add the words "signed under oath." There has been other language added to the request which simply underscores the concept that the response to the request for sworn statement is not required to include information which is not known as to future work on the job. That was already the state of the law.

IX. LEGISLATION AFFECTING CONTRACTORS

In response to the problems encountered in the aftermath of Hurricane Andrew, the 1994 Florida Legislature created a statute dealing with restrictions on the use a contractor may make of funds received in payment for the repair, restoration, improvement, or construction of residential real property during the term of an executive order or proclamation declaring an emergency. This new law went into effect April 14, 1994.

There has been a Federal False Claims Act for many years. However, in 1994, the Florida Legislature created the Florida False Claims Act, which provides a civil cause of action, including treble damages for persons who present false claims, including any request or demand under a contract for money, property, or services against the state.

X. CONCLUSION

This year saw several significant decisions effecting the construction industry, most notably the recent Florida Supreme Court decisions in Murthy and Nachon. Although two years have passed since Hurricane Andrew, its effect on construction law continues to be felt from code changes and new legislation concerning emergency management, to increased litigation involving defective design and faulty construction. The consequences of these many changes will undoubtedly find expression in the evolving case law.

158. See Florida False Claims Act, ch. 94-316, §§ 1-17, 1994 Fla. Laws 2204, 2205-14 (to be codified at FLA. STAT. §§ 68.081-.092).