Property Law

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I. INTRODUCTION

This survey covers decisions of the Florida courts and Florida legislation produced during the period of July 1, 1993 to June 31, 1994 which should be of interest to the real estate professional.

II. ACKNOWLEDGEMENTS

*Gardner v. Weiler.* Judge Farmer wrote the opinion with which Judges Gunther and Warner concurred. The seller signed a warranty deed conveying property to her lawyer. She did not know that the deed had been “fraudulently constructed” so as to effect a transaction different from the one actually agreed upon. The lawyer had the acknowledgement notarized out of the presence of the seller by a notary who was not aware of the scheme nor a party to the scheme. The lawyer then recorded it. The seller sued the notary and won a jury verdict for damages based on the theory that the notarization allowed the deed to be recorded, which was a necessary component in the buyer’s fraudulent scheme, and thus, was the proximate cause of the seller’s harm.

The district court disagreed and reversed. It held that the notary’s conduct was not a substantial cause of the seller’s loss, and consequently, it was not the proximate cause. The unstated reasoning is probably based on the court’s belief that the seller would have acknowledged her signature in person to the notary, if she had been asked to do so. Thus, her negligence in taking the acknowledgement did not really further the fraudulent scheme, which was the cause of her harm.

1. 630 So. 2d 670 (Fla. 4th Dist. Ct. App. 1994).
2. *Id.* at 670. It is unclear from the opinion what actually happened, but footnote one reveals that a judgment was obtained rescinding the conveyance.
3. *Id.* at 671.
4. *Id.*
III. ADVERSE POSSESSION

_Wheeling Dollar Bank v. City of Delray Beach._ Judge Klein wrote the opinion with which Judges Gunther and Farmer concurred. A landowner died in 1931. His brother inherited a one-quarter interest and became a tenant in common with the other heirs. The estate was closed in 1933. The brother conveyed his interest to the City which took possession and built a municipal tennis center on this land no later than 1937.

In 1990, the City brought an action to quiet the title. The owners of the other three-quarter interest argued that the city was a co-tenant, and that the applicable rule was that one co-tenant cannot acquire title by adverse possession against another co-tenant who has not received actual notice of the adverse possession claim. The circuit and district courts rejected this argument. They interpreted the precedents as requiring either actual notice or possession which is so open and notorious as to put a co-owner on notice of the adverse claim. In this case, the operation of a municipal tennis center on the land for over fifty years was sufficient to satisfy the latter test.

The court also provided an alternative rationale for its holding. It stated that the basis for the notice requirement is that “cotenants ought to be able to repose confidence in each other.” However, the owners of the three-quarter interest were not even aware that they owned an interest during the period of adverse possession. Thus, there was no need to protect an expectation of confidence.

IV. ATTORNEY’S FEES

_Arana v. Hutchison._ Chief Judge Harris wrote the opinion with which Judges Dauksch and Thompson concurred. The buyer and sellers agreed to the sale of a house. Complying with the terms of the document which the buyer signed, the buyer put down a substantial initial deposit, two months later put down an additional deposit, and for a period of two years made monthly payments. The document also required that the buyer obtain a financing commitment within two years. However, the seller never executed a copy of the contract. Because the buyer did not have a signed copy of the

5. 639 So. 2d 113 (Fla. 4th Dist. Ct. App. 1994).
6. _Id._ at 114-15.
7. _Id._ at 114 (citing Cook v. Rochford, 60 So. 2d 531 (Fla. 1952) and Gracy v. Fielding, 70 So. 625 (Fla. 1916)).
8. _Id._ at 115.
9. 638 So. 2d 564 (Fla. 5th Dist. Ct. App. 1994).
contract, she had difficulty obtaining a mortgage commitment. A "Contingent Approval" was obtained from a lender two days before the end of the two-year period, but notice was not sent to the sellers until two days after the period ended. Consequently, the sellers declared the contract terminated.

The buyer sued for specific performance and won, but the trial court held that each party was to bear the expense of its own attorney’s fees. The buyer appealed because the contract contained a provision that the prevailing party in litigation would be entitled to attorney’s fees. The district court agreed. It noted that part of the specific performance decree required the seller to execute the contract document. The court concluded that the trial court apparently thought the terms of the contract document were not in effect until it had been executed. However, the attorney’s fees provision was a term in the contract as embodied by that document, and the sellers consistently admitted that it existed. Specific performance of the contract was ordered. Thus, logically the attorney’s fees provision of the contract was also in force.

_Diaz v. Security Union Title Insurance Co._ This was a per curiam opinion by Judges Hubbart, Gersten, and Goderich. A husband and wife owned a condominium as tenants in common. On the husband’s death, the wife began probate proceedings and then recorded a quitclaim deed which appeared to vest the whole title in her. The other beneficiaries intervened in the probate proceeding to contest the wife’s claim to the unit. The probate court enjoined the wife from disposing or encumbering her late husband’s interest.

The wife then sued to reform the deed, by which she and her husband had taken title, so as to create a tenancy by the entirety. The estate counterclaimed for partition and slander of title. The trial court held that the wife and her husband’s estate each owned a one-half interest, that the estate was entitled to rent, and that the estate was entitled to attorney’s fees under section 64.081 of the _Florida Statutes_.

On appeal, the district court affirmed except as to the amount of attorney’s fees. The statute provided for attorney’s fees in a partition action and in litigation which benefits the partition. Proving title was

10. _Id._ at 566.
11. _Id._
12. _Id._
13. The statute of frauds was not an issue discussed in this opinion.
15. _Id._ at 1006.
16. _Id._
critical to the partition, thus, the attorney's fees expended by the estate in
the probate proceeding were for the benefit of the partition and could
properly be awarded. However, the statute provided that fees were to be
determined "on equitable principles in proportion to his interest." Therefore, since each party to the partition had a one-half interest, the estate
should have been awarded only one half of its attorney's fees.

Prosperi v. Code, Inc. Justice Grimes wrote the majority opinion
with which Chief Justice Barkett and Justices Overton, McDonald, Shaw,
Kogan, and Harding concurred. The opinion addressed the two following
certified questions from the Fourth District Court of Appeal:

IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CON-
TRACTOR OR SUB-CONTRACTOR TO ENFORCE A MECHANIC'S
LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES
(1989), ENTITLED TO ATTORNEY'S FEES UNDER 713.29, EVEN
THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED
AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES
FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING
OUT OF THE SAME TRANSACTION?

DOES THE TEST OF MORITZ V. HOYT FOR DETERMINING WHO
IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARD-
ING ATTORNEY'S FEES APPLY TO FEES AWARDED UNDER
SECTION 713.29, FLORIDA STATUTES?

Prosperi, the owner, hired Code, a contractor, to make improvements
on real property. A dispute arose over the amount Prosperi had paid to
Code. Code then left the job site. Code brought suit to foreclose on a
mechanic's lien and for breach of contract against Prosperi, who counter-
claimed for breach of contract. The trial court determined that $31,898.01
remained unpaid, and that $14,588.95 should be deducted for payments to
another contractor to finish the job. The court denied Code's attorney's
fees. The court also denied Prosperi attorney's fees, because he was not the
prevailing party, even though Code had filed false affidavits on mechanic's
liens. Prosperi appealed and the trial court's decision was quashed.

17. Id.
18. Id.
19. 626 So. 2d 1360 (Fla. 1993).
20. Id. at 1361.
21. Id.
22. Id.
23. Id. at 1362-63.
The Florida Supreme Court stated that there is no unqualified answer as to the first certified question.24 Had Prosperi prevailed solely on an issue of a mechanic's lien, which was brought forward with fraudulent affidavits, he would have been awarded attorney's fees. It was not the intent of the legislature to grant attorney's fees to a defendant who successfully defended against a mechanic's lien, but was still found liable for labor and materials and for breach of contract in the same case. Simply receiving a judgment does not mean that one is the prevailing party. Neither is the net judgment rule dispositive on the issue. The owner was innocent as to the lien, and as such, was entitled to attorney's fees. The contractor was not entitled to attorney's fees under the circumstances of this case. Therefore, the court answered the second certified question in the affirmative.25

State, Department of Transportation v. Ben Hill Griffin, Inc.26 Judge Blue wrote the opinion. Acting Chief Judge Threadgill and Judge Quince concurred. The Department of Transportation brought an action to condemn property. The respondent was joined as a party because it possibly had acquired a prescriptive easement. The respondent retained an attorney and filed an answer. After it concluded that it did not have any interest in the property and agreed to be dropped from the action, the trial court granted its motion for attorney's fees.27

The district court reversed.28 A claim for attorney's fees must be based upon a contract or a statute. This claim was based on section 73.091 of the Florida Statutes which provides: "Except as provided in s. 73.092, the petitioner shall pay all reasonable costs of the proceedings in the circuit court, including, but not limited to, a reasonable attorney's fee . . . ."29 There was nothing in section 73.092 to prevent this respondent from recovering attorney's fees. However, the district court used the purpose approach to deny fees to this respondent.

The purpose of this statute was to make whole a landowner whose property has been taken. This respondent did not have any property. Therefore, the purpose of this statute would not be accomplished by allowing this respondent to recover attorney's fees. While the court was

24.Prosperi, 626 So. 2d at 1363.
25.Id.
27.Id. at 826.
28.Id.
29.FLA. STAT. § 73.091 (1993).
following established precedent, the reasoning was based upon an unacceptable premise. In fact, the purpose of requiring compensation for landowners whose land has been taken by the government is to prevent public burdens of society from being unduly shifted to a narrower class. The attorney’s fees statute should further that purpose as well. In this case, the respondent had not become part of a narrower class forced to shoulder the cost of a societal need when it became obligated to pay attorney’s fees to protect whatever interest it might have had in this land.

V. BROKERS

_Baxas Howell Mobley, Inc. v. BP Oil Co._ Judge Gersten wrote the opinion for the panel which included Judges Nesbitt and Jorgenson. A broker was allegedly offered the following deal: the buyer would pay a commission if it acquired a particular property; but, the buyer would pay the commission only if the broker could not get a commission from the seller. The seller filed for bankruptcy and the buyer eventually bought the property from the bankrupt’s estate. The broker filed a claim in bankruptcy for its commission. The claim was denied because the bankruptcy court concluded the broker was not employed by the seller and was not the procuring cause of the sale.

The broker then sued the buyer in state court. The buyer raised the defenses of: 1) claim preclusion (res judicata) and 2) issue preclusion (collateral estoppel). The buyer’s theory was that the seller’s bankruptcy also had relieved it of its obligation to pay a commission, which could not be obtained from the seller. The trial court granted summary judgment for the buyer, but the district court reversed.

Claim preclusion would only apply if the two cases involved the same claim or cause of action. This action involved breach of a commission contract with the buyer. The bankruptcy claim involved breach of a commission contract with the seller. Because these were different contracts, claim preclusion was inapplicable.

Since the bankruptcy court is a federal court, the federal theory of issue preclusion was applied. For issue preclusion to apply, the issue decided in

30. _Ben Hill Griffin, Inc.,_ 636 So. 2d at 826 (citing _Shavers v. Duval County,_ 73 So. 2d 684 (Fla. 1954)). The rule is that only a landowner whose land was taken may recover attorney’s fees under this statute. _See id.; see also Grieser v. State, Dep’t of Transp.,_ 371 So. 2d 164 (Fla. 2d Dist. Ct. App. 1979).
31. 630 So. 2d 207 (Fla. 3d Dist. Ct. App. 1993).
32. _Id._ at 208-09.
33. _Id._ at 210.
the first case must be the same as the issue in the later case. The issue in this case was whether the broker had a commission contract with the buyer. However, the issues decided in the bankruptcy court were whether the broker was employed by the seller and whether the broker had been the procuring cause of the sale. These issues were not the same. Thus, issue preclusion was inapplicable.

_Edelstein v. Flanagan._ Judge Klein wrote the opinion. Chief Judge Dell and Senior Judge Downey concurred. The sole shareholder of a business listed it for sale with a real estate broker. A buyer was located and a contract for the sale of the business’s assets was executed. Later, the parties entered into a new contract for the sale of seller’s shares of stock, rather than the business’s assets. The seller accepted promissory notes for part of the purchase price. The buyer then defaulted on the notes. Consequently, the seller sued.

The buyer claimed, _inter alia_, that he was entitled to rescission based upon the Florida Securities and Investor Protection Act. The theory was that the transaction involved the sale of securities, the broker was not licensed as a securities broker, and under Florida law any sale of securities by someone not licensed is subject to rescission. The court rejected this claim. It noted that the broker was engaged to find a buyer for the business, which is what the broker did. Even though the transaction was ultimately structured to be the sale of the corporate stock, it did not transform the nature of the brokerage into securities brokerage covered by the Securities Act.

The legislature has amended chapter 475 of the _Florida Statutes_, which regulates real estate brokers and salespeople, to deal with the responsibilities to the buyer. Definitions are provided for “disclosed dual agent,” who is the agent of both the buyer and seller and owes each a fiduciary duty, and “transaction broker,” who is not the agent of either the buyer or the seller but acts to facilitate the sale and owes each a duty of disclosure of known facts. The broker or salesperson must disclose whether he or she is

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34. 630 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1994).
35. FLA. STAT. ch. 517 (1989).
36. _Id._ § 517.211(1).
37. _Edelstein_, 630 So. 2d at 1206.
acting as an agent or as a transaction broker. If the broker or salesperson is going to act as a dual agent, he must get written permission to do so, and he must disclose for whom he is acting as an agent.

VI. CONDOMINIUMS

Bisque Associates of Florida, Inc. v. Towers of Quayside No. 2 Condominium Ass'n. Judge Nesbitt wrote the opinion. Bisque Associates is the owner of a condominium at the Towers of Quayside. A series of drainage backups caused approximately $10,000 in damage. Bisque sought damages for diminution of value to the rental property. At trial, Quayside requested that the judge exclude all evidence of the diminution of value, arguing that the difficulties were temporary. Bisque argued that it could no longer rent the unit. The trial judge held for Quayside. The jury found damages for repairs only.

Bisque appealed. The question was whether determination of a permanent or temporary injury to real property is a matter of law or a jury question. This was a question which had not been explicitly addressed in Florida. Bisque wanted to plead impairment to value because of its requirement to disclose material facts to potential buyers. Per the majority, even though the court can rule on the expertise of witnesses, it should not prevent the jury from hearing evidence because it decided the damage was not permanent. Therefore, the judgment as to the permanent nature of the damages was reversed.

Braemer Isle Condominium Ass'n v. Boca Hl, Inc. In a prior settlement over construction defects, the condominium association released Hyman from all claims known or unknown. Subsequently, further defects were discovered in the same buildings which were the subjects of the previous litigation. Braemer brought suit against Hyman on these damages. Hyman was awarded a summary judgment based upon the previous settlement.

Braemer appealed the summary judgment. The settlement which ended the previous litigation was the culmination of a two-year discovery process.

40. 639 So. 2d 997 (Fla. 3d Dist. Ct. App. 1994).
41. Id. at 999.
42. Id.
43. Id.
44. Id.
45. Bisque Assocs., 639 So. 2d at 1000.
46. 632 So. 2d 707 (Fla. 4th Dist. Ct. App. 1994).
47. Id. at 707.
which went to a jury trial. The settlement was entered by two parties of equal bargaining power and was not the result of fraud, coercion, or undue influence. Therefore, the court affirmed the summary judgment.

Brooks v. Ocean Village Condominium Ass'n. Brooks was the owner of a condominium at Ocean Village. As a result of unpaid condominium assessments totaling $3984.44, the association sought to foreclose a lien against Brooks. At trial, a default judgment was entered against Brooks. The trial court denied Brooks’ motion to set aside the default.

Brooks appealed, asserting that the trial court, a circuit court, was without jurisdiction to enter the default judgment. County courts are now included among the courts with competent jurisdiction to hear foreclosure matters. The district court held that, as the amount at issue was within the jurisdictional limit of the county court, the circuit court was without jurisdiction to enter the default and default judgment, and therefore reversed and remanded the case to county court.

Fisher v. Tanglewood at Suntree Country Club Condominium Ass'n. Fisher owns several units in the Tanglewood condominiums, all of which are located in building 1100. Fisher refused to pay special assessments, as none of his units were in the buildings on which the association levied the assessments. The association filed a three count complaint seeking foreclosure, money damages, and injunctive relief. Fisher counterclaimed with declaratory judgment, slander of title, abuse of process, and breach of fiduciary duty. The trial court awarded summary judgment for the association on foreclosure, abuse of process, and breach of fiduciary duty. The other counts were not disposed of by the trial court.

Count I of the complaint was a non-final judgment. Count II alleged the same grounds, but sought a different remedy (money damages). Count III of the counterclaim, abuse of process, was moot, as the court granted the foreclosure. Misuse of process, after the process issues, constituted abuse of process. Count IV was properly dismissed because the counterclaim failed to state a cause of action in that Tanglewood was named in the action, not the board of directors.

48. Id.
49. Id. at 708-09.
50. 625 So. 2d 111 (Fla. 3d Dist. Ct. App. 1993).
51. Id. at 111.
52. Id. at 112.
54. Id. at D483.
55. Id.
The trial court also required Fisher to pay $7200 during the pendency of the trial to Tanglewood. This amount reflected a compromise wherein monies were paid in lieu of the appointment of a receiver. Fisher failed to include any transcript of the record, and as such, could not prove reversible error. Therefore, the order was affirmed.

Glynn v. Siegal. This is an opinion written by Judge Stevenson with which Judges Anstead and Pariente concurred. The question before the court was whether the trial court erred in granting summary judgment of foreclosure against those unit owners who failed to pay their monthly fee on a community facilities lease.

The question arose when certain unit owners challenged the procedure used by the lessor of the facilities. The lessor devised a program by which a unit owner could purchase an undivided interest in the lease. This resulted in a warranty deed to the purchasing unit owner for that share. That unit owner would receive a monthly sum equivalent to the rent. On the books, the lessor showed the due payments as counterbalancing entries. The result was that the purchasing unit owner no longer had to mail in his or her rent under the lease. Non-purchasing unit owners asserted that the transaction resulted in a rent reduction for the purchasing unit owners. As a result, they claimed it violated the mandate that all unit owners were obligated equally for common expenses.

The appellate court affirmed the summary judgment. It reasoned that each owner still had the obligation to pay the monthly rent. The only difference was that the purchasing unit owners were to receive an equal amount in return for their investment. Thus, the court stated that eliminating double check writing did not alter the obligation to pay rent.

Islander Beach Club Condominium Ass'n of Volusia County v. Johnston. Johnston was the owner of three condominium unit weeks at Islander Beach Club. On December 5, 1992, a meeting was to be held in order to elect three directors for the Board of Administration. Proxy votes were maintained in a secure area and unopened until inspected by an independent Certified Public Accounting firm prior to election. Johnston

56. Id. at D484.
57. Id.
58. 637 So. 2d 324 (Fla. 4th Dist. Ct. App. 1994).
59. Id. at 325.
60. Id.
61. Id.
62. Id.
63. 623 So. 2d 628 (Fla. 5th Dist. Ct. App. 1993).
waged a proxy fight and demanded to see the sealed proxies. Islander refused, as it considered the proxies "non-public" until three days before the election when they would be opened. Johnston obtained an injunction to inspect the voting proxies as they were received.64

Islander appealed. The district court stated that the most logical interpretation of section 718.111 of the Florida Statutes is that voting proxies are not "official records" subject to inspection until after the election for which they were given. However, this does not mean that sealed proxies cannot be inspected as they come in. If the management has information, then such information must be made available to the membership. Nevertheless, a voting proxy has no legal effect until the vote is actually cast. As proxies are reversible until cast, they are not official records.65

Korandovitch v. Vista Plantation Condominium Ass'n.66 Judge Klein wrote the opinion with which Chief Judge Dell and Judge Anstead concurred. The front doors of the individual condominium units at Vista Plantation are on the outside of the building. The declaration of condominium prohibits unit owners from making alterations in the appearance of the exterior of the buildings.67 The problem arose when the condominium association permitted Mr. and Mrs. Korandovitch and other condominium owners to replace their screen doors with storm doors having tinted windows. The storm doors blocked the view of the units' address numbers located on the units' front doors. The owners, inquiring into whether the association would approve a request to permit them to install address numbers on their walls, next to the doors, received information that the board would not permit it. The unit owners installed the numbers without getting the association's approval and the board sued to obtain a permanent injunction prohibiting the current placement of the numbers. The trial court granted, by summary judgment, a permanent injunction in favor of the board.68 The Fourth District Court of Appeal reversed.69

In determining whether it was proper for the trial court to resolve the dispute on summary judgment, the district court noted there are two categories of restrictions with regard to condominiums.70 One category involves restrictions actually located in the applicable declaration of the

64. Id. at 629.
65. Id.
66. 634 So. 2d 273 (Fla. 4th Dist. Ct. App. 1994).
67. Id. at 274.
68. Id.
69. Id. at 275.
70. Id. at 274-75.
condominium. These are more like covenants running with the land. As such, courts presume they are valid. The only bases for invalidating these types of restrictions is finding that the particular restriction is completely arbitrary as applied, that it violates public policy, or that it abrogates a fundamental constitutional right.\textsuperscript{71} Another category involves restrictions not expressly found in the declaration. These restrictions are usually made by the board at its discretion. Such restrictions are judged by a measure of reasonableness. Since the declaration in this case did not expressly address the placement of the units' address numbers, the court determined that the restriction fell into the second category.\textsuperscript{72} In this category the board has discretion to pass rules and make decisions that are reasonably related to the unit owners' health, happiness, and peace of mind.\textsuperscript{73}

The owners argued that there was a safety issue as the numbers could not be seen through the tinting, and as the board approved the tinted storm doors, the board should be estopped from preventing the application of the numbers. After considering these arguments and looking at the photographs included in the record, the appellate court reversed the summary judgment.\textsuperscript{74}

\textit{Pine Ridge at Haverhill Condominium Ass'n v. Hovnanian of Palm Beach II, Inc.}\textsuperscript{75} Damages were awarded to the condominium association for construction defects which included inadequate lighting and water intrusion from improperly installed windows. After the verdict was entered, the motion for prejudgment interest was denied, because the jury did not determine a date of loss.\textsuperscript{76}

The association appealed and the Fourth District Court of Appeal reversed.\textsuperscript{77} Because no date of loss was set, the damages could have been fixed at the time the property was turned over. As such, interest should be awarded from that date forward.\textsuperscript{78} The court also reversed the appellee's award of attorney's fees and stated that after the calculation of prejudgment interest, the amount recovered would not be over 25% less than the offer.\textsuperscript{79}

\textsuperscript{71}. Korandovitch, 634 So. 2d at 274-75.
\textsuperscript{72}. Id.
\textsuperscript{73}. Id.
\textsuperscript{74}. Id.
\textsuperscript{75}. 629 So. 2d 151 (Fla. 4th Dist. Ct. App. 1993), review denied, 639 So. 2d 978 (Fla. 1994).
\textsuperscript{76}. Id. at 151.
\textsuperscript{77}. Id.
\textsuperscript{78}. Id.
\textsuperscript{79}. Id. at 151-52.
Therefore, an award of fees based on a rejection of an offer would be in error.\textsuperscript{80} 

\textit{Rogers \& Ford Construction Corp. v. Carlandia Corp.}\textsuperscript{81} Chief Justice Barkett wrote the majority opinion and Justices McDonald, Shaw, Grimes, Kogan, and Harding joined. Justice Overton concurred with an opinion. Carlandia purchased a condominium developed by Rogers and Ford. Four years later, Carlandia brought suit for defects to the common areas, but alleged no defects to the individual unit.\textsuperscript{82} The circuit court dismissed the claim with prejudice, finding that Carlandia did not have individual standing and did not join the condominium association as an indispensable party.\textsuperscript{83} The Fourth District Court of Appeal reversed finding that Carlandia had standing to sue, since it possessed an individual share of the common areas.\textsuperscript{84} Nevertheless, the district court certified to the Florida Supreme Court the question "[m]ay an individual condominium unit owner maintain an action for construction defects in the common elements or common areas of the condominium?"\textsuperscript{85} The supreme court restated the question as two questions:

(1) Does a condominium unit owner have 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?
(2) If so, must the interests of the other unit owners be represented in the suit for the unit owner with standing to maintain the action?\textsuperscript{86} Thereafter, it answered both questions affirmatively.\textsuperscript{87} The supreme court reasoned that the legislature cannot determine who has standing to sue, for that is a judicial function.\textsuperscript{88} Usually, the courts look to one holding a legally protectable right or interest in jeopardy, or having an interest in some other justiciable controversy, as being one who may seek judicial determination of that issue. Such a person or entity typically is classified as a real party in interest for the purposes of Florida

\textsuperscript{80} \textit{Pine Ridge}, 629 So. 2d at 152.
\textsuperscript{81} 626 So. 2d 1350 (Fla. 1993).
\textsuperscript{82} \textit{Id.} at 1351.
\textsuperscript{83} \textit{Id.} at 1351-52.
\textsuperscript{84} \textit{Id.} at 1352.
\textsuperscript{85} \textit{Id.} at 1351.
\textsuperscript{86} \textit{Rogers \& Ford Constr. Corp.}, 626 So. 2d at 1351.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 1352.
Rule of Civil Procedure 1.210(a). The allegations in Carlandia's complaint identified a sufficient threatened interest. Carlandia's undivided share of the common elements would be affected by damages to them.

A further question was whether the legislature affected the right to sue for such defects by transferring that right to the condominium association. In looking at section 718.111(3) of the Florida Statutes, the supreme court noted that the statute does not designate the condominium association as the sole holder of the right to sue. The statute merely gives the association the capacity to bring suit. The court noted that the statute expressly reserved to the unit owners their statutory and common law rights to sue without necessarily involving the association. Those rights include the right to sue for construction defects. Therefore, the supreme court 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. However, as a matter of judicial economy to avoid "piecemeal litigation," the individual owner may bring such suits only after the owner has taken steps necessary to assure that the other unit owners' interests are represented in the immediate litigation. Finally, the Florida Supreme Court expressly stated that it did not determine whether a unit owner might proceed with an individual action against the association or its board members for failing to pursue the claims, since that question was not presented by this case.

Taylor v. Wellington Station Condominium Ass'n. The association filed a complaint that Taylor, a member of the association's Board of Directors, had breached his fiduciary duty. Taylor was also an officer of the developer and a 25% shareholder in the developer. The association alleged that Taylor failed to enforce obligations of the developer, and failed to designate expenses properly chargeable to the developer. The trial court entered partial summary judgment finding Taylor personally liable for willfully breaching his duties. The question of willfulness is properly decided by a jury. The evidence did not eliminate the factual issue as to

89. Id. at 1352-53.
90. Id. at 1353.
92. Id.
93. Id.
94. Id. at 1355 n.7.
95. 633 So. 2d 43 (Fla. 5th Dist. Ct. App. 1994).
96. Id. at 44.
whether Taylor's conduct rose to the level required for individual liability. Therefore, the district court reversed.\textsuperscript{97}

\textit{Torres v. K-Site 500 Associates}.\textsuperscript{98} On October 22, 1989, Torres and Lueckhardt entered into a contract to purchase a condominium from K-Site 500 Associates. A deposit of $25,580 was placed on the unit, but Ms. Lueckhardt stated that she wanted the unit placed in her name only. The two buyers were not married and Torres had an inadequate financial history for a mortgage. K-Site informed the buyers that although the two names were on the agreement, Lueckhardt could finance by herself. Lueckhardt submitted the application for financing and received a thirty-year fixed mortgage at 9.625\%.\textsuperscript{99}

In February of 1991, the buyers received a letter from K-Site informing them that the project was near completion and they would be receiving information about closing. Additionally, in the fifth paragraph, there was a sentence which stated that the letter constituted notification concerning paragraph three of the purchase agreement. Paragraph three stated that the buyer's obligation to purchase was contingent upon a commitment for a mortgage, and specified a ten-day period for submission of a mortgage application.\textsuperscript{100}

The application was rejected because Torres was not on the application.\textsuperscript{101} When resubmitted the terms were 11\%. The buyers sought to recover the deposit. The trial court found for the sellers, because the application was submitted after the ten-day period.\textsuperscript{102}

According to the appellate court, although the application was not submitted within the ten-day period after receipt of the letter, the letter was not proper notification that an application was required to be submitted. Therefore, the ten-day period could be waived. It would be inequitable to allow the sellers to recover the deposit when they acquiesced in the breach. Therefore, it reversed the lower court.\textsuperscript{103}

Further, as to condominiums, an amendment to section 718.116 of the \textit{Florida Statutes} became law on June 3, 1994 without the governor's approval.\textsuperscript{104} The amendment includes greater detail as to the liability of

\begin{footnotesize}
\begin{enumerate}
\item[97.] \textit{Id.} at 45.
\item[98.] 632 So. 2d 110 (Fla. 3d Dist. Ct. App. 1994).
\item[99.] \textit{Id.} at 111.
\item[100.] \textit{Id.}
\item[101.] \textit{Id.}
\item[102.] \textit{Id.}
\item[103.] \textit{Torres}, 632 So. 2d at 112.
\end{enumerate}
\end{footnotesize}
unit owners for unpaid assessments, regardless of how they acquired title to the property. Particularly, a first mortgagee which acquires title by foreclosure or by deed in lieu of foreclosure would be liable for prior assessments. However, limitations have been provided in the amendment. Of note, the amendment as to first mortgagees applies only to those first mortgagees whose mortgages were recorded after April 1, 1992. The act as amended will take effect October 1, 1994.

VII. CONSTITUTIONAL LAW

Moorman v. Department of Community Affairs. Judge Gersten wrote the opinion. Judge Baskind filed a concurring opinion. Chief Judge Schwartz filed an opinion specially concurring in part and dissenting in part. The property involved was located within the Big Pine Key Area of Critical Concern in Monroe County. Some landowners had obtained permits to build fences on their land. When the Florida Land and Water Adjudicatory Commission rescinded their permits, the landowners appealed. The reason for the rescission was that Monroe County Land Development Regulations banned all fences in the area; the regulation provided there would be no exceptions.

The court pointed out that an exercise of the police power must relate to public health, safety, and welfare and that the means chosen to implement the regulation must "bear a reasonable and substantial relation to the purpose sought to be attained." Following a basic rule of construction, the court should try to sustain the constitutionality of a statute by indulging every reasonable doubt in favor of its constitutionality, i.e., by interpreting it, if possible, to be in harmony with the constitution. On the other hand, the Florida Constitution recognizes the importance of private property and the importance of minimizing government intrusion into the lives of its citizens. Consequently, the means chosen must be narrowly tailored to be the least restrictive means. The district court found that the record would not support a finding that the statute was unconstitutional as applied.

105. Id. at 2357.
106. 626 So. 2d 1108 (Fla. 3d Dist. Ct. App. 1993), review granted, 639 So. 2d 977 (Fla. 1994).
109. See id. § 23.
110. Moorman, 626 So. 2d at 1111.
Thus, it proceeded to consider a facial challenge, concluding that it was unconstitutional because the statute was not narrowly tailored.\(^{111}\)

Chief Judge Schwartz correctly, but without explanation, challenged this logic.\(^{112}\) The purpose of the regulation was to protect an endangered species, the Key Deer. The record revealed that only one of the four properties involved was actually in the Key Deer's natural habitat, so that fences on the other three properties would not harm the deer. In some cases, fences might actually be beneficial to the Key Deer. In addition, the fence was necessary for one landowner to protect his children from falling into the nearby canal, a serious danger. These facts could and should have been sufficient to demonstrate that the regulation was not constitutional as applied to these properties.

VIII. CONSTRUCTION

The legislature amended the State Emergency Management Act\(^ {113}\) by adding a new statute\(^ {114}\) to deal with contractor rip-offs during a declared emergency,\(^ {115}\) that causes "damage to a significant number of residential structures,"\(^ {116}\) or during the two years following enactment, in the area covered by the Hurricane Andrew emergency proclamation.\(^ {117}\) If the contract is to make repairs or improvements to residential real property, the contractor can use deposits or advances only: a) to purchase materials related to the contract;\(^ {118}\) b) to pay for work done under the contract; or c) to pay for governmental fees or charges, e.g., permit fees needed to perform the contract. Additionally, the contractor can only use up to 15% to pay necessary expenses and overhead connected with the contract.\(^ {119}\)

A contractor who has received over 10% of the contract price is required to apply for permits within thirty days and to begin work within

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111. Id.
112. See Chief Judge Schwartz's special concurrence and dissent. Id.
113. FLA. STAT. §§ 252.31-.63 (1993).
115. An emergency can be declared by the governor. It may not continue for longer than sixty days unless renewed by the governor. It may be terminated by the governor or by a concurrent resolution of the legislature. FLA. STAT. § 252.36(2) (1993).
116. Ch. 94-110, § 1, 1994 Fla. Laws at 152.
117. Id. §2, at 152.
118. FLA. STAT. § 252.361(2) (1993).
119. Id.
ninety days after receiving the permits. A contractor is prohibited from not performing for a ninety-day period, if it is done with an intent to defraud. The statute provides an inference that intent to defraud exists if the contractor has received money for future work, and has failed to perform for thirty days after the date of receiving notice to perform. Notice to perform could be given after sixty days of nonperformance.

Violation of this statute constitutes theft. Depending on the amount, the conduct may be classed as petit theft, which is a misdemeanor, or grand theft, which may be classified as a felony of the first, second, or third degree. The penalty could be as much as thirty years imprisonment.

Castro v. Sangles. Chief Judge Schwartz wrote the opinion. Landowners hired an unlicensed contractor and then obtained a building permit by making the sworn misrepresentation that no contractor would be involved in the construction. Subsequently, the landowners sued the contractor over his alleged breach of the construction contract. The trial court dismissed the case, holding that the contract was unenforceable under section 489.128 of the Florida Statutes. The district court affirmed.

The statute provided:

As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain his license in accordance with this part [chapter 489, Part I] shall be unenforceable in law, and the court in its discretion may extend this provision to equitable remedies.

The district court pointed out the general rule, that no action can be maintained on an illegal contract if a person is himself guilty of a wrongdoing. Certainly that is consistent with the plain language of the statute, which

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120. Id. § 252.361(3).
121. Id. § 252.361(4)(a).
122. Id. § 252.361(4)(b). The contents of the notice to perform are specified in § 252.361(4)(c) of the Florida Statutes.
124. Id. § 812.014(2).
125. Id. § 775.082(3)(b).
126. 637 So. 2d 989 (Fla. 3d Dist. Ct. App. 1994).
127. Id. at 990.
128. Id. at 992.
129. Id. at 990 n.1.
provides that the contract is “unenforceable.” Next, the district court explained why the exceptions to this rule would not apply.

When a statute makes a contract illegal in order to protect a narrow class of victims, the contract’s illegality may not be used to further victimize that class. Thus, if this statute was intended to protect consumers, it could not be invoked to victimize consumers. However, the purpose of this subsection is to protect the general public from a wide range of ills associated with unlicensed contractors. Therefore, this exception was not applicable.

Another exception is that a wrongdoer may not invoke the rule to the detriment of an innocent party. However, the parties here were in pari delicto. The landowners had engaged in prohibited conduct, when apparently in order to get a lower price, they had misrepresented the facts to get the permit. They claimed to have suffered from one of the anticipated harms of using an unlicensed contractor, shoddy work.

It should be noted that in 1993, the legislature moved to strengthen the statute. The 1991 version of the statute made the contract unenforceable at law. The court of equity could, in its discretion, extend that protection to equity. Now the contract is unenforceable in equity as well.

IX. COVENANTS, DEEDS, AND RESTRICTIONS

Loveland v. CSX Transportation, Inc. Judge Jorgenson, joined by Judges Ferguson and Goderich, wrote the court’s opinion. The court reversed summary judgment in favor of titleholders in an action to enforce a reversionary interest in a 1926 deed.


The Legislature recognizes that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Therefore, it is necessary in the interest of the public health, safety, and welfare to regulate the construction industry.

Id.


132. “As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain his license in accordance with this part [chapter 489, Part I] shall be unenforceable in law or in equity.” FLA. STAT. § 489.128 (1993) (emphasis added).

133. 622 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1993).

134. Id. at 1123.
In 1926, Redlands Sales Co. transferred property to the predecessor in interest to CSX. The warranty deed provided that in the event the property was abandoned and not used for railroad purposes, it would revert to the grantor. In 1984, 1985, and 1987, CSX sold portions of this property to purchasers who did not use their respective lots for railroad purposes. In 1990, Loveland, the successor in interest to Redlands, brought an action for declaratory relief seeking a reverter, quiet title, and ejectment against CSX and the subsequent purchasers of the property. All parties filed motions for summary judgment. The trial court granted a summary judgment against Loveland, holding that CSX had not abandoned the property, and even if it did, that the statute of limitations and laches barred any action because of earlier leases by CSX.

The district court, in reversing the summary judgment noted that, although a restriction is construed strongly against the grantor, it must be construed within the intent of the parties. If there is only one construction which gives full effect to the instrument’s words, that construction should be used. CSX contended that reverter is improper as long as the railroad operated on the property, even if there were a substantial transfer of property. The district court rejected this. The intent of the restriction was for the property to be used for railroad purposes.

Since CSX still operated a railroad on the property, the district court decided that two questions needed to be answered. The first was whether the transferred parcels were abandoned or no longer used for railroad purposes. A “railroad purpose” is one for the primary benefit of the public and not an individual. Therefore, if parcels are conveyed to those who are not using the property for railroad purposes, the restriction is violated and the reverter clause may apply. The sales in this case violated the restriction.

The second question, if the reverter clause applied, is whether there might be a reversion only as to those parcels which were no longer used for railroad purposes. The district court noted that partial reversion has

135. Id. at 1121.
136. Id.
137. Id.
138. Loveland, 622 So. 2d at 1121.
139. Id. at 1122.
140. Id.
141. Id.
142. Id.
143. Loveland, 622 So. 2d at 1122.
been appropriate where the parcels violating the restriction could equitably be separated from the main parcel.\textsuperscript{144}

The time for the triggering of the reverter clause must be considered. Some portions of the main tract were leased prior to being sold. The lease may trigger the reversion, which may then be barred as a result of the statute of limitations of laches. However, the date of sale triggers the reversion for other parcels. These questions were not answered by the record. Therefore, this was a premature summary judgment.\textsuperscript{145}

\textit{Margate Investment Corp. v. Lupowitz.}\textsuperscript{146} This is an opinion written by Judge Polen with which Judges Glickstein and Warner concurred. The question before the court was whether the grantor, under a warranty deed containing a warranty against encumbrances, would be liable for a breach of such warranty when the grantor had failed to pay 1980 real estate taxes which were not assessed until 1985.\textsuperscript{147} Noting that taxes cannot become due and give rise to a lien until they are assessed, the court found that the grantor was not liable under the subject covenant, since the taxes assessed in 1985 did not encumber the property in 1981 when the warranty deed was made and delivered.\textsuperscript{148}

\textit{Palm Point Property Owners' Ass'n v. Pisarski.}\textsuperscript{149} Justice Kogan wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Harding concurred. The matter came to the Florida Supreme Court from the certified question:

\begin{quote}
ABSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPER-TY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCES-SOR TO THE INTERESTS OF THE DEVELOPER AND PROVISION FOR WHICH DOES NOT APPEAR IN THE GRANTOR'S ORIGI-NAL SUBDIVISION SCHEME HAVE STANDING TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?\textsuperscript{150}
\end{quote}

Palm Point Property Owners' Association sought to enjoin Pisarski from violating deed restrictions regarding constructing a swimming pool, stem walls, and docks. Pisarski sought a dismissal, alleging the association

\begin{thebibliography}{9}
\bibitem{144} Id.
\bibitem{145} Id.
\bibitem{146} 638 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).
\bibitem{147} Id. at 143.
\bibitem{148} Id. at 144.
\bibitem{149} 626 So. 2d 195 (Fla. 1993).
\bibitem{150} Id. at 195.
\end{thebibliography}
had no standing because it was not a successor in interest to the developer. The trial court dismissed the complaint and the district court affirmed.\textsuperscript{151}

The supreme court noted the general rule, that a restrictive covenant can only be enforced by the party whom the covenant was intended to benefit.\textsuperscript{152} There was no intent that these covenants benefit Palm Point.\textsuperscript{153} Thus, enforcement by the association would be proper only if the association was a direct successor in interest to the developer, or the developer expressly assigned to the association the enforcement rights.\textsuperscript{154} Neither occurred here. In addition, the supreme court expressly rejected the theories of associational standing, and homeowners' associations' automatic standing to enforce covenants as representatives of the associations' members, without legislative authority.\textsuperscript{155}

\textit{Sunshine Vistas Homeowners Ass'n v. Caruana}.\textsuperscript{156} Justice Shaw wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. Before the court was the certified question:

\begin{quote}
WHETHER THE FLORIDA MARKETABLE RECORD TITLE ACT HAS THE EFFECT OF EXTINGUISHING A PLAT RESTRICTION WHICH WAS CREATED PRIOR TO THE ROOT OF TITLE WHERE THE MUNIMENTS OF TITLE IN THE CHAIN OF TITLE DESCRIBE THE PROPERTY BY ITS LEGAL DESCRIPTION WHICH MAKES REFERENCE TO THE PLAT AND THE MUNIMENTS OF TITLE STATE THAT THE CONVEYANCE IS GIVEN SUBJECT TO COVENANTS AND RESTRICTIONS OF RECORD.\textsuperscript{157}
\end{quote}

Townsend Construction Corporation and Caruana purchased a parcel of land in Sunshine Vistas and began construction of a building. The association sought to enforce a setback restriction contained in a plat predating the root of title. Townsend and Caruana argued that the Marketable Record Title Act extinguished the setback restriction, because it was not specifically identified in the muniments of title beginning with the

\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 196.
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Pisarski, 626 So. 2d} at 196.
\item \textsuperscript{155} \textit{Id.} at 197.
\item \textsuperscript{156} \textit{623 So. 2d} 490 (Fla. 1993).
\item \textsuperscript{157} \textit{Id.} at 491.
\end{itemize}
root of title. The trial court agreed and granted summary judgment. The Third District Court of Appeal agreed.

The Florida Supreme Court quashed the results of the lower courts and answered the certified question in the negative. In doing so, the supreme court reasoned that Florida's Marketable Record Title Act specifies that marketable record title will not affect restrictions found in muniments of title on which the current estate is based beginning with the root of title. However, the same statute provides an exception where there is a specific reference in the root of title, the muniments to the book and page of the recorded instrument give rise to the restriction, or a reference by name to the plat contains the restriction.

In this case, the root of title was a 1951 deed. This deed specifically referred to Sunshine Vistas, the name of the recorded plat containing the restriction. Likewise, subsequent deeds, muniments of title, referred to Sunshine Vistas. Therefore, the court felt that to have held otherwise would have been to ignore the words in the statute.

Sweeney v. Mack. Judge Griffin wrote the opinion with which Chief Judge Harris and Judge Diamantis concurred. The Fifth District Court of Appeal reversed the trial court's finding that applicable covenants and restrictions prohibited the construction in question even though the developer's architectural review committee approved the plans.

The Sweeneys purchased a lot in a fly-in development in 1988 and submitted plans for the construction of their dwelling and hangar to the developer's designated architectural review committee. The committee approved the plans and the Sweeneys began constructing their dwelling. Their neighbors, the Macks, objected to the design and the committee again reviewed and re-approved the plans. Subsequently, the Macks sought and obtained an injunction against the Sweeneys. The trial court found the covenants and restrictions to be clear and unambiguous and the design to violate the provisions.

158. Id.
159. Id.
160. Id.
161. Sunshine Vistas, 623 So. 2d at 491.
162. Id. at 490.
163. Id.
164. Id. at 492.
165. 625 So. 2d 15 (Fla. 5th Dist. Ct. App. 1993), review denied, 634 So. 2d 625 (Fla. 1994).
166. Id. at 17.
167. Id. at 16.
The district court noted that even where a developer or an architectural review committee retains the absolute power to approve building plans, they may not act arbitrarily. However, there is no evidence in this case that the committee’s actions were arbitrary. Furthermore, even though covenants and restrictions must be construed in favor of the freer use of the property, the clear and reasonable intent of the parties will be honored. However, where the covenant or restriction is ambiguous, the construction will go against the party attempting enforcement. The district court found these provisions to be far from unambiguous, with terms such as hangar and garage being undefined.

X. EASEMENTS

Bell v. Cox. Judge Thompson wrote the majority opinion with which Judge Peterson concurred with opinion and Chief Judge Harris dissented with opinion. The question before the court was whether Florida’s statutory way of necessity easement provisions found in sections 704.01(2) and 704.04 of the Florida Statutes were unconstitutional.

The question arose from the servient land owner, Bell, who challenged an award of a statutory way of necessity to Cox for the benefit of his land. Bell argued that the statute’s referring to land “outside any municipality” denied equal protection under article I, section 2 of the Florida Constitution because it created an arbitrary distinction between property outside a municipality and property inside a municipality.

The appellate court affirmed the trial court. In so doing it determined that the statute did not abridge any fundamental right and did not affect a suspect class. Therefore, the appellate court determined that the applicable test was a rational basis standard rather than strict scrutiny. The inquiry, therefore, was whether there was any conceivable basis on which the classification bore a rational relationship to a legitimate state purpose. In reviewing the record, the appellate court found that Bell did not meet the burden of showing that there was no conceivable factual basis

168. Id. at 17.
169. Id.
170. Sweeney, 625 So. 2d at 17.
171. Id.
173. Id. at D963.
174. Id.
175. Id. at D964.
176. Id.
Likewise, the court dismissed Bell’s challenges of unconstitutionality for not defining the term “unreasonable refusal” to allow attorney’s fees under section 704.04 and found that the two sections in question were not contrary to the public policy goal of protecting ecologically sensitive land pursuant to section 187.201 of the Florida Statutes.178

Chicago Title Insurance v. Florida Inland Navigation District.179 This is a per curiam opinion with which Chief Judge Dell, Judge Klein and Senior Judge Owen concurred. The appellate court affirmed the trial court’s judgment that a perpetual easement in favor of the United States was not extinguished either by a patent to Florida, not making the patent subject to the easement, or by Florida’s Marketable Record Title Act.180

Chicago Title sought a judicial declaration that the property, the title to which it insured, was not subject to a perpetual easement granted by Florida to the United States. Title to the subject property vested in Florida in 1850 as a result of the Swamp Lands Act.181 However, the title rights were inchoate until Florida requested a patent and the United States, in turn, issued one. These were not done until 1970. Prior to 1970, Florida conveyed two interests in the property: the perpetual easement to the United States in 1941, which was recorded in 1942; and in 1953 fee simple title subject to the perpetual easement to the insured’s predecessor in title to said property prior to 1970.182

Chicago Title argued that the 1970 patent, in not mentioning the easement, passed fee simple title and the easement to the state which title, by way of the doctrine of relation, passed to the state’s subsequent grantee. The district court held that the 1970 patent was merely an administrative action providing only the record evidence of the transfer of title.184 It did, however, perfect the title vested in the state in 1850.185

Alternatively, Chicago Title argued that the 1953 transfer constituted the root of title under Florida’s Marketable Record Title Act. The court found that the Marketable Record Title Act did not apply to federal property

177. Bell, 19 Fla. L. Weekly at D963.
178. Id. at D964.
179. 635 So. 2d 104 (Fla. 4th Dist. Ct. App. 1994).
180. Id. at 104-05.
181. Id. at 104.
182. Id. at 105.
183. Id.
184. Chicago Title, 635 So. 2d at 105.
185. Id.
interests as it would violate the Supremacy Clause extending to Congress the right to dispose of federal property rights.\textsuperscript{186}

\textit{Colonial Acquisitions, Inc. v. Titus.}\textsuperscript{187} This is an opinion written by Chief Judge Harris with which Judges Dauksch and Griffin concurred. It reversed the trial court's finding of an ingress and egress easement and to remand the matter for a judgment consistent with the Fifth District Court of Appeal's opinion.\textsuperscript{188}

Since it was clear that the trial court had not found an express easement, the question was whether one existed through prescription or necessity. The use was permissive. Therefore, it was not a prescriptive easement, even though they used the property for over twenty years.\textsuperscript{189} In addition, even though the land owners closed off access from the alleged easement holder's property to Highway 50, there was no evidence presented that there was no reasonable access to their property. Therefore, there was insufficient evidence to support an easement by necessity.\textsuperscript{190}

\textit{Dance v. Tatum.}\textsuperscript{191} Justice Shaw wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. The Florida Supreme Court approved the district court's decision and answered in the negative the following certified question:

\begin{quote}
\textbf{WHETHER, IN LIGHT OF MOORINGS ASSOCIATION, INC. V. TURTLE ISLAND COMMUNITIES, THE STATEMENT IN ALBRECHT V. DRAKE LUMBER CO., TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, MEANS THAT AN IRREVOCABLE LICENSE CAN NO LONGER EXIST IN FLORIDA.}\textsuperscript{192}
\end{quote}

In 1975, Dance purchased a tract of land. Included in the deal was an architectural design by the seller for a car dealership. The paving of the tract required drainage onto an adjacent lot, also owned by the seller, even though there was no written easement to do so. In 1984, the sellers sold the adjacent lot to the respondent who sold the parcel to petitioner Dance in 1987, subject to a purchase money mortgage and note.\textsuperscript{193} Dance defaulted

\begin{flushright}
\textsuperscript{186} Id. \\
\textsuperscript{187} 636 So. 2d 877 (Fla. 5th Dist. Ct. App. 1994). \\
\textsuperscript{188} Id. at 878. \\
\textsuperscript{189} Id. \\
\textsuperscript{190} Id. \\
\textsuperscript{191} 629 So. 2d 127 (Fla. 1993). \\
\textsuperscript{192} Id. at 128 (citations omitted). \\
\textsuperscript{193} Id.
\end{flushright}
on the note and a foreclosure ensued. Dance did not challenge the judgment which was entered for Tatum, but argued that he had an easement to the borrow pit on the adjacent parcel for drainage, even though no written easement was ever executed between any of the parties.\footnote{194. \textit{Id}.}

The trial court held that Dance had an irrevocable drainage license which survived the foreclosure.\footnote{195. \textit{Id}.} The district court held that the license was irrevocable but was personal to Dance and could not be transferred.\footnote{196. \textit{Dance}, 629 So. 2d at 128.}

The Florida Supreme Court held that a license sometimes becomes irrevocable when substantial improvements have been made by the licensee. However, previous case law holding that such licenses become easements is in conflict with other case law holding that an easement must be created by express grant, prescription, or implication.\footnote{197. \textit{Id}.} The supreme court found that the district court was correct in finding the use of the adjacent parcel to be an irrevocable license and not an easement.\footnote{198. \textit{Id}. at 129.}

\textit{Haight v. Hall}.\footnote{199. 625 So. 2d 1311 (Fla. 3d Dist. Ct. App. 1993).} This is a per curiam opinion with which Judges Ferguson, Jorgenson, and Levy concurred to affirm the trial court's judgment annulling an easement deed.\footnote{200. \textit{Id}. at 1312.} In 1982, Haight attempted to install an air conditioning unit and a gas tank on his property. Because he had to comply with setback requirements, Haight sought a perpetual easement covering a thirty-foot section on the eastern border of his neighbor Hall's property. In consideration of the easement, Haight paid Hall ten dollars. Thereafter, he constructed a driveway on her property.\footnote{201. \textit{Id}.} In 1990, Hall decided to sell the property and, during a title search, the grant of an easement was discovered. Thus, the buyer refused to purchase unless the easement was extinguished. Haight refused to relinquish the easement voluntarily and Hall sought, and was granted, a declaratory judgment annulling the instrument. Haight appealed.\footnote{202. \textit{Id}.}

Hall testified that she granted Haight temporary use of the property. She admitted to signing a letter granting this temporary use, but claimed she was fraudulently induced into signing an easement document and that there were no witnesses or notary present when she signed the purported...
The notary could not recall the execution of the easement document and the witnesses to the deed gave conflicting testimony as to its execution and their witnessing. Furthermore, Haight's wife testified that when she saw the deed it contained no witnesses or notary. As a result, the trial court found Hall's testimony more persuasive. The Third District Court of Appeal affirmed, finding there to be substantial competent evidence to support the trial court decision.

Howell v. Miller. This opinion, written by Judge Parker with Acting Chief Judge Campbell and Judge Fulmer concurring, affirmed the trial court's awarding an injunction to remove a fence and remedied the case for further consideration of the servient estate owner's counterclaim.

The Howells and the Millers owned lots in a subdivision where all lots have a perpetual nonexclusive road right-of-way easement. Additionally some lots, including the Howells' and the Millers', had perpetual nonexclusive canal easements. The Howells constructed a fence across the road right-of-way easement on their lot, and the Millers filed their suit for injunctive relief. The trial and appellate courts found the fence an unreasonable interference with the easement. The trial court, however, failed to address the issue in the counterclaim dealing with the scope of the easement. Thus, the district court affirmed the injunction but remanded the counterclaim's issues for consideration.

Phelps v. Griffith. This is a per curiam opinion with which Acting Chief Judge Campbell and Judges Parker and Patterson concurred in reversing the trial court's judgment establishing a prescriptive easement. The Phelps were the owners of an unpaved road, known as Lemon Patch Road, running across the southernmost portion of their property to the Griffiths' property. Adjacent to that road was a fifteen-foot wide easement which was deeded to the Griffiths for ingress and egress to their property.

203. Id.
204. Haight, 625 So. 2d at 1312.
205. Id.
206. Id.
207. 638 So. 2d 544 (Fla. 2d Dist. Ct. App. 1994).
208. Id. at 545.
209. Id. at 544.
210. Id.
211. Id. at 544-45.
213. Id. at 305.
Thus, there were two parallel dirt lanes, with Lemon Patch Road being the more improved of the two. Phelps fenced off the Lemon Patch Road, which the Griffiths preferred to use. However, there was no evidence that the use of the road adversely affected the Phelps, or their use of the property. The Griffiths brought an action for a prescriptive easement and were awarded that easement by the trial court,\textsuperscript{215} even though the Phelps took the position that the use was neither continuous nor adverse to their own interests, despite the continued use since 1965.\textsuperscript{216}

The appellate court acknowledged the rebuttable presumption that use is permissive. However, the court took the position that the real inquiry was whether the use was beneficial to the actual owner or whether it interfered with the owner's property rights.\textsuperscript{217} Recognizing that the burden is on the one alleging the use to be adverse, the appellate court noted that there was implicit evidence of permissive use and a record devoid of evidence that the use of the road prevented the Phelps from using the property as they intended.\textsuperscript{218} Therefore, the district court reversed the judgment and remanded the matter to the trial court with instructions to enter a judgment consistent with the appellate court's opinion.\textsuperscript{219}

\textit{Water Control District of South Brevard v. Davidson.}\textsuperscript{220} Judge Sharp wrote the opinion with which Judges Goshorn and Peterson concurred. The court reversed part of a lower court judgment against the Water Control District ("District"). The lower court ruled that the District had failed to obtain title to uncultivated and unimproved portions of the disputed lands. Therefore, the District's claims to the drainage and maintenance easements on those portions were invalid.\textsuperscript{221}

The first question addressed was whether the District had acquired title to the properties. After reviewing the establishment procedure of drainage districts in general, and analyzing the procedures followed as to this district, the court concluded that the District was properly formed and had appropriately acquired title to the properties.\textsuperscript{222}

\begin{thebibliography}{99}
\bibitem{215} Id.
\bibitem{216} Id.
\bibitem{217} Id. at 306.
\bibitem{218} Phelps, 629 So. 2d at 306.
\bibitem{219} Id.
\bibitem{220} 638 So. 2d 521 (Fla. 5th Dist. Ct. App. 1994).
\bibitem{221} Id. at 521.
\bibitem{222} Id. at 523.
\end{thebibliography}
The next question was whether the District’s interests in the properties were properly preserved after it acquired title.\textsuperscript{223} Specifically, the court had to address whether the Marketable Record Title Act ("MRTA") extinguished the District’s interests in the unused portions of the easement.\textsuperscript{224} Even though the root of title for some portions of the disputed lands referred to the District’s interests, the roots of title to other portions of the disputed lands did not.\textsuperscript{225} Therefore, the question was whether the District’s easement interests fell under other MRTA exceptions. Relying on sections 717.03(1) and (5), and 704.05(1) and (3) of the \textit{Florida Statutes}, the court found that where the District’s interests were in one easement, its partially using one section of the easement preserves its rights in the entire easement.\textsuperscript{226} Therefore, MRTA did not extinguish the District’s drainage and maintenance easement interests.\textsuperscript{227}

\textbf{XI. EMINENT DOMAIN}

\textit{Broward County v. Patel.}\textsuperscript{228} Justice Kogan wrote this unanimous opinion. The Florida Supreme Court had been asked the following certified question:

\textbf{MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNTEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNTEE’S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING JURISDICTION OVER THE PROPERTY?}\textsuperscript{229}

The question was answered in the affirmative. The court, relying heavily upon a treatise, \textit{Nichols’ The Law of Eminent Domain},\textsuperscript{230} pointed out that the fact that the landowner can probably obtain rezoning of the land has long been considered relevant evidence in determining a condemnation award. There is persuasive authority that the reasonable probability of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{223} \textit{Id.} at 525.
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Water Control Dist. of S. Brevard}, 638 So. 2d at 525.
\item \textsuperscript{226} \textit{Id.} at 526.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} 641 So. 2d 40 (Fla. 1994).
\item \textsuperscript{229} \textit{Id.} at 41.
\item \textsuperscript{230} JULIUS L. SACKMAN, \textit{NICHOLS’ THE LAW OF EMINENT DOMAIN} (3d ed. 1994).
\end{itemize}
\end{footnotesize}
obtaining a variance should also be considered relevant evidence.\textsuperscript{231} There is no reason why it should not be considered relevant evidence in determining severance damages. The one claiming that the variance could be obtained would have the burden of proof on the issue. Whether it is reasonably probable that the variance could be obtained would be a question of fact.

Once the reasonable probability of the variance being obtained had been determined, then the amount of damages is the question. The proper test is "the price that would be paid by a knowledgeable buyer willing but not obligated to buy, to a knowledgeable owner willing but not obliged to sell."\textsuperscript{232} That would have the effect of properly factoring into the price the possibility, however remote, that the variance might be denied. In this case, the trial court had erred in calculating damages. It had awarded damages lower than those testified to by any of the expert witnesses, including the government’s expert witness. Thus, its decision was not supported by substantial competent evidence. Secondly, the possibility of obtaining a variance was treated as a certainty. Finally, the costs involved in adapting the property to take advantage of the variance were not included in the damages.

\textit{American Dive Center, Inc. v. State, Department of Transportation.}\textsuperscript{233} This was a per curiam opinion with which Judges Hersey, Polen, and Stevenson concurred. American Dive Center purchased another dive shop in 1989. The shop was never closed but the name was changed. In 1990, the Florida Department of Transportation ("DOT") began the condemnation of an area which included the location of the dive shop. American Dive Center sought lost business damages but, to receive them, the business would have to be "an established business of more than 5 years’ standing."\textsuperscript{234} The trial court granted summary judgment to the DOT on the basis that American Dive Center did not qualify.\textsuperscript{235}

The district court reversed.\textsuperscript{236} The supreme court had established that in such cases "[t]he essential inquiry . . . is whether there was ‘continuous operation of the business at the location where the business damages [were]
alleged to have been suffered.\textsuperscript{237} Whether the current owner had operated the business that was there for five years was not the issue. The trial court erred in granting summary judgment because the record did not conclusively show that a dive shop had not been operated at that site for five years.

\textit{Bolduc v. Glendale Federal Bank}.\textsuperscript{238} Judge Pariente wrote the opinion with which Chief Judge Dell and Judge Glickstein concurred. This case did not follow the normal order of proceedings for a condemnation of leased property. One tenant entered into a stipulated final judgment for its full damages. The other tenant had a jury trial to determine its total condemnation award, including business damages. Thereafter, the owner settled with the DOT. Subsequently, the tenants sought the apportionment of the owner's award and won. The trial court granted them the "'bonus value' of their leasehold interests in the condemned property."\textsuperscript{239}

The district court reversed, however.\textsuperscript{240} Had the tenants followed the normal procedure, the value of the property would have been determined first. A subsequent hearing would have been held to apportion the award according to the respective rights of the claimants. But the tenants here had taken other quicker routes to get full recovery. They were not entitled to more than that. The effect of the apportionment was to allow the tenants a double recovery. That was impermissible. This case should serve as a warning to tenants faced with condemnation.

\textit{Broward County v. Ellington}.\textsuperscript{241} Chief Judge Dell wrote the opinion. Judge Glickstein and Senior Judge Owen, William C., Jr., concurred. A consultant had been hired by the county to forecast the future needs of the Fort Lauderdale-Hollywood International Airport and had concluded that additional land should be acquired to meet the airport's needs and to minimize noise conflicts with the surrounding communities. A second consultant was hired to determine how much additional property to acquire. Acting on these reports, the county began to buy the properties west of the airport. When one landowner would not sell, the county brought this eminent domain suit. Even though the landowner did not present any witnesses, the trial court found in his favor because it had concluded that the

\textsuperscript{237} \textit{Id.} at 278 (quoting Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Allignment Serv. Inc., 444 So. 2d 926, 930 (1983)).
\textsuperscript{238} 631 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1994).
\textsuperscript{239} \textit{Id.} at 1128.
\textsuperscript{240} \textit{Id.} at 1129.
\textsuperscript{241} 622 So. 2d 1029 (Fla. 4th Dist. Ct. App. 1993).
county had enough land for the airport's needs and that the land was not being taken for a public purpose.\textsuperscript{242}

The district court reversed.\textsuperscript{243} The trial court was right in that private property may only be taken for a public purpose, but limiting uses which are incompatible with the operation of an airport is a public purpose.\textsuperscript{244} The trial court was also right in that private property may not be taken unless the taking is necessary to accomplish the public purpose. But the "necessity" requirement is of a reasonable necessity, not an absolute one. For the uninitiated, that may seem confusing. "Necessity" is an absolute term. How can it be modified to be less than absolute? The critical question is: necessary for what? As this case illustrates, that question may make necessary seem like a relative rather than an absolute term.

The Florida Supreme Court has provided a two-tier test to determine if property can be taken.\textsuperscript{245} First, the condemning authority must show it has a reasonable need for the condemnation. The Director of Planning and Development for the county's Aviation Department had testified that, in order to guarantee that commercial uses in this area would be airport related, the land must be taken by the government and subjected to the government's development scheme before being leased or sold for commercial use. The Director's conclusions were based upon studies by the consultants. The use was consistent with the county's master plan. That amounted to substantial competent evidence of the reasonable need, so it was enough to satisfy the first tier.

Once the first tier has been satisfied, the burden shifts. The second tier requires the challenger to show that the government has acted illegally, in bad faith, or has grossly abused its discretion. Here, the challenger had not submitted any evidence, so it failed to establish its affirmative defense.

\textit{City of Cocoa v. Holland Properties, Inc.}\textsuperscript{246} Judge Peterson wrote the opinion with which Judges Goshorn and Thompson concurred. This case also involved the question of reasonable necessity and the Fifth District Court of Appeal relied on \textit{Ellington}.\textsuperscript{247} The first tier of the two-tier test required the condemnor to show that it had a reasonable need to take the

\begin{footnotes}
\item[242.] Id. at 1030-31.
\item[243.] Id. at 1032.
\item[244.] See Test v. Broward County, 616 So. 2d 111 (Fla. 4th Dist. Ct. App. 1993).
\item[245.] See City of Jacksonville v. Griffin, 346 So. 2d 988 (Fla. 1977).
\item[246.] 625 So. 2d 17 (Fla. 5th Dist. Ct. App. 1993), \textit{review denied}, 634 So. 2d 624 (Fla. 1994).
\item[247.] \textit{Ellington}, 622 So. 2d at 1029.
\end{footnotes}
property. Under *Broward County v. Steele*, the quantum of proof required to satisfy the first tier is the introduction of "some evidence showing reasonable necessity for taking." The land was to be used for well sites and the city had obtained permits for the consumption of water to be produced from the St. Johns River Water Management District. The trial court then held a hearing to determine whether events since the issuance of the permit had eliminated the necessity, and decided that there was no necessity. The district court, however, concluded that this was an error. The issuance of the use permit was enough to satisfy the first tier. The evidence at the hearing would be relevant to the second tier, in order to determine whether the condemning authority had acted in bad faith or abused its discretion.

The legislature has revised certain procedural aspects of chapter 73 of the *Florida Statutes*. It has provided that section 73.032 shall be the "exclusive offer of judgment provisions for eminent domain actions." It provides the time when offers of judgment must be made and the technical requirements of such offers. Sections on costs and on attorney's fees were also modified, the most notable change being a schedule for determining the fee based on the benefit produced.

**XII. ENVIRONMENTAL LAW**

*Hughes Supply, Inc. v. Department of Environmental Regulation.* Chief Judge Harris wrote the majority opinion with which Judges Sharp and Peterson concurred. Hughes operated a fuel storage facility and paid the annual premiums to participate in the Florida Petroleum Liability Insurance and Restoration Program. Subsequently, Hughes discovered a discharge of diesel fuel coming from one of its storage tanks. Hughes reported the leak to the Florida Department of Environmental Regulation. The Department ordered the tank drained. Hughes, however, neglected to drain the tank in a timely manner. Thus, the Department denied Hughes

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248. 537 So. 2d 650 (Fla. 4th Dist. Ct. App. 1989).
249. *City of Cocoa*, 625 So. 2d at 19 (quoting *Steele*, 537 So. 2d at 651-52).
250. *Id.* at 20-21.
251. Act of May 11, 1994, ch. 94-162, § 1, 1994 Fla. Laws 564 (amending *FLA. STAT.* §§ 73.032, .091, .092 (1993)).
252. See *id.* at 565.
254. *Id.* § 73.092.
255. 622 So. 2d 1056 (Fla. 5th Dist. Ct. App. 1993).
256. *Id.* at 1057.
coverage for the restoration; as it determined that Hughes was not in substantial compliance with chapter 376 of the *Florida Statutes*.\(^{257}\)

The Fifth District Court of Appeal upheld the Department's determination.\(^{258}\) The court reasoned that the owner need be knowledgeable of the rules but cannot rely on others for guidance. An instruction for drainage, while not ordered to be immediate, must, according to the rules, be accomplished within three days of discovering the leak. Hughes' actions failed to comply with the provisions required.\(^{259}\)

*Young v. Department of Community Affairs*.\(^{260}\) Justice Harding wrote the majority opinion with which Justices Overton and Grimes concurred, Chief Justice Barkett concurred specially with an opinion with which Justices Shaw and Kogan concurred, and Justice Kogan concurred with an opinion with which Justice Shaw concurred in result only, and from which Justice McDonald dissented with an opinion.\(^{261}\) In rendering its opinion, the supreme court answered the Third District Court of Appeal's certified question by holding "that when the state land planning agency initiates a proceeding before the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, *Florida Statutes* (1987), that agency carries both the ultimate burden of persuasion and the burden of going forward."\(^{262}\)

In 1988, the Youngs applied for clearing permits on Big Pine Key. Monroe County granted the permits and transmitted copies to the Department of Community Affairs as required. The Department appealed those permits to the Florida Land and Water Adjudicatory Commission. The Youngs failed to participate at an administrative hearing because the Commission ruled that they had the burden of proof. The Commission denied the permits.\(^{263}\) Although the Third District Court of Appeal affirmed the Commission's denial, the supreme court quashed the decision and remanded the matter for a new hearing before a hearing officer.\(^{264}\) In so doing, the supreme court reasoned that the effect of the Department's purported appeal to the Commission was really a request to stay the effectiveness of an otherwise valid county order. Therefore, since it was the Department which asserted that the proposed development failed to comply

\(^{257}\) *Id.* at 1059.
\(^{258}\) *Id.* at 1061.
\(^{259}\) *Id.* at 1060.
\(^{260}\) 625 So. 2d 831 (Fla. 1994).
\(^{261}\) *Id.* at 831.
\(^{262}\) *Id.* at 835.
\(^{263}\) *Id.* at 832.
\(^{264}\) *Id.* at 835.
with chapter 380 of the Florida Statutes, the Department should bear the burden.  

XIII. EQUITABLE REMEDIES

Jordan v. Boisvert. 266 Judge Joanos wrote the opinion with which Judges Miner and Kahn concurred. The parties signed an agreement for the sale of real property. The contract included a description of the property and a sketch, but provided for a survey to determine the exact legal description. Three surveys were conducted, each different due to the uncertainty as to which of several willow trees was intended to be a critical monument. When the parties could not agree on a legal description, the buyer brought this action for specific performance.

The First District Court of Appeal affirmed the denial of relief. Pointing out that the “trial court’s judgments are entitled to a presumption of correctness,” 267 it added that

[i]he fact that the surveyor performed three surveys, each of which varied the boundary lines of the property at issue, constitutes substantial evidence to support the trial court’s finding that even considering the description in the contract for sale, attached drawing, and extrinsic evidence, the description was insufficient to permit a surveyor to establish the boundaries of the property.  

Since the exact property could not be identified, there had been no meeting of the minds. Consequently, there was no contract.

The trial court had reserved jurisdiction to determine the attorney’s fees to be awarded. The district court found this to be an error because the basis for the award was the attorney’s fees provision in the contract. 269 Since the contract did not exist, logically fees could not be awarded under one of its terms.

Long v. Moore. 270 This is a per curiam decision with which Judges Smith, Kahn, and Lawrence concur. The Longs bought a home for $100,000 from the Moores. The terms were $50,000 down with the sellers taking back a $50,000 purchase money mortgage. When the Longs could

265. Young, 625 So. 2d at 835.
266. 632 So. 2d 254 (Fla. 1st Dist. Ct. App. 1994).
267. Id. at 256.
268. Id. at 257.
269. Id.
270. 626 So. 2d 1387 (Fla. 1st Dist. Ct. App. 1993).
not make the payments, Mr. Moore took them to the courthouse where they executed a deed conveying the property back to the Moores. Apparently, the Longs were allowed to remain in possession under a lease. Subsequently, the Moores filed an action to recover unpaid rent and evict the Longs from the property. The Longs counterclaimed for rescission of both the original sale and the subsequent reconveyance, and for the imposition of an equitable lien on the property.  

The rescission claim was based upon Mr. Long being a paranoid schizophrenic. This condition prevented him from understanding the nature and effect of this long-term real estate transaction, even though he was able to comprehend the arithmetic involved. A conveyance to or from a party under such mental disability would be voidable. However, this author cannot help but wonder who, besides Mr. Long, constituted the “Longs.” Presumably, it was Mrs. Long. But there was no mention of her existence, or her mental capacity or condition. The existence of a competent co-grantee or co-grantor would certainly seem to be relevant to the issue of rescission.  

A critical issue in granting rescission was whether the court would be able to return the parties to the status quo ante. Here, it appears that the Moores were not in a position to return the down-payment to the Longs. However, the court notes that it would be sufficient to fashion an equitable remedy “which would be fair to both parties.” An example provided is to subject the property to an equitable lien in favor of the Longs for whatever amount the trial court subsequently determines is due to them.  

*Zanakis v. Zanakis.* The opinion was written by Judge Klein and concurred with by Judge Hersey and Senior Judge Owen, William C., Jr. This case involved the imposition of a constructive trust and the clarification of the terms “resulting trust” and “constructive trust.” The mother of two sons owned property. She quitclaimed the property to herself and her responsible son so they would hold it as joint tenants with the right of survivorship. The purpose of the transfer was to hold the property for the other son who had problems with drugs and alcohol.  

When the problem son was killed, the responsible son abandoned his wife and moved in with his late brother’s widow. They later married. A dispute arose with his mother, so the “responsible” son quitclaimed the property to his new wife. She brought this action for partition. Granting

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271. *Id.* at 1388.  
272. *Id.* at 1389.  
the mother’s counterclaim, the trial court “imposed a resulting trust” on the property for the benefit of the mother.

A constructive trust is a remedy imposed by the court of equity to avoid unjust enrichment, even though it is not what the parties intended. In contrast, a resulting trust arises because that is what the parties intended and equity regards the substance rather than the form of a transaction. The trial judge correctly recognized that this was a situation for a resulting trust, although to characterize it as “impos[ing] a resulting trust” would be incorrect. This resulting trust arose upon the delivery of the deed by the mother because the parties intended the title to be held for the benefit of the problem son. However, the result was correct even if the labeling was not.

The “responsible” son also argued that the parol evidence rule should have prevented the admission of evidence regarding a resulting or constructive trust. The district court correctly rejected that argument. It is, as the court stated, “well-established . . . that constructive or resulting trusts involving real estate can be based on parol evidence.”

The parol evidence rule provides that the terms of an integrated agreement may not be contradicted by proof of a prior or contemporaneous oral agreement or an earlier tentative draft. In this resulting trust, there was no attempt to vary the terms of the deed. The legal title was vested in the grantee exactly as the deed specified. However, equity recognized that the parties intended an additional consistent term, that the “responsible” son, the legal title holder, hold that title in trust. Similarly, the parol evidence rule is inapplicable to a constructive trust. The constructive trust is not based upon a prior or contemporaneous agreement. It is not based upon any agreement. It is a remedy to prevent unjust enrichment.

XIV. HOMESTEAD

Hubert v. Hubert. Judge Klein wrote the majority opinion with which Judges Anstead and Senior Judge Owen, William C., Jr., concurred. The court reversed a trial court order establishing that the appellant’s remainder interest in his deceased father’s homestead was not exempt from

\[274. \text{Id. at 182.} \]
\[275. \text{Id.} \]
\[276. \text{Id. at 183.} \]
\[277. \text{Id.} \]
\[278. \text{See John D. Calamari & Joseph M. Perillo, The Law of Contracts, ch. 3 (3d ed. 1987).} \]
\[279. 622 \text{So. 2d 1049 (Fla. 4th Dist. Ct. App. 1993), review denied, 634 So. 2d 624 (Fla. 1994).} \]
the levy of creditors because his remainder was subject to a life estate in someone other than the decedent's heirs. 280

Decedent was survived by two sons, Donald and Richard. The father bequeathed to Donald the entire estate, except for a present life estate in the homestead to his father's friend or until the father's friend remarried. Richard was a judgment creditor of the estate and maintained that the remainder was not exempt. Richard's theory was that the homestead lost its exempt status when the decedent bequeathed a life estate to someone other than an heir. Donald argued that if the current life estate had been held by a surviving spouse, his interest would still be exempt. Likewise, a vested remainder interest can be granted to a lineal descendant and a life estate given to the surviving spouse, while both of them are protected. The trial court agreed with Richard. 281 The district court ruled that while the homestead protection did not inure to the life estate, it did inure to the remainder interest. 282

_Jacobs v. Jacobs._ 283 Judge Cobb wrote the majority opinion reversing and remanding the trial court's awarding attorney's fees. Judge Dauksch concurred and Judge Griffen concurred with an opinion. In determining the attorney's fee issue, the court had to decide whether Mary Jacobs' position was frivolous. In essence, she claimed that she could waive her homestead rights after her spouse passed away and that it would have the same effect as if she had waived her homestead rights while he was alive. 284

Jake and Mary Jacobs married in 1954. Jake had four children from a previous marriage and Mary had one child from a previous marriage. Jake had a piece of property titled solely in his name. In 1984, he executed a will which devised all of his property as follows: 30% to Mary and 70% to his children and stepson. However, in 1989, Jake executed a warranty deed of the property to Mary. After his death, Mary attempted to rescind the deed, stating that Jake did not have the mental capacity to execute it. The trial court denied recission and the four stepchildren demanded and received attorney's fees on the ground that the action was frivolous. Their contention was that Mary would fair the same regardless of whether the property was received through deed or by homestead. 285

280. _Id._ at 1049.
281. _Id._ at 1050.
282. _Id._ at 1051.
283. 633 So. 2d 30 (Fla. 5th Dist. Ct. App. 1994).
284. _Id._ at 31.
285. _Id._
Mary argued that she could have taken under Jake's will, rather than accept the life estate in the homestead property under Florida law. Mary never executed a waiver of her rights to the homestead property, either before or during the marriage. Jake could not devise his property other than to a surviving spouse. The question was whether he could devise in part.

According to the appellate court, there should be no impediment of a spouse choosing to accept less than 100% of the fee or the life estate. The only issue was the attorney's fees, as such, the argument was not frivolous and the award of fees was reversed.²⁸⁶

King v. Ellison.²⁸⁷ Judge Polen wrote the majority opinion with which Judge Dell and Senior Judge Walden, James H., concurred. The court affirmed the trial court's dismissing with prejudice a complaint seeking a declaratory decree that the testators became the constructive trustees of the subject property for all of the children and stepchildren named in the will.²⁸⁸ In so doing, the district court certified the following question:

WHETHER SECTION 732.401(1), FLORIDA STATUTES (1991), WHICH VESTS A REMAINDER INTEREST IN HOMESTEAD PROPERTY IN LINEAL DESCENDANTS, IS UNCONSTITUTIONAL WHEN APPLIED TO DEFEAT A TESTATOR'S INTENT TO DEVISE HOMESTEAD PROPERTY EQUALLY TO ADULT STEPCHILDREN AS WELL AS ADULT LINEAL DESCENDANTS?²⁸⁹

King is the natural daughter of Florence Calhoun, and Ellison is the natural daughter of Hubert Calhoun. Florence and Hubert were married and executed wills deeding their individual estates to all of their children and stepchildren to share and share alike. After Florence died, Hubert married Rosemarie. Two years later Hubert died, leaving Rosemarie with a life estate and the remainder in Hubert's lineal descendant, Ellison. Appellants purchased the life estate from Rosemarie. King argued that the remarriage should not cause the lineal descendants of Florence to be divested of what was their and their natural mother's home. King asked at trial for the appellees to be named as constructive trustees of the property and be given proportional credit for the purchase price of the life estate. King argued that

²⁸⁶. Id. at 32.
²⁸⁷. 622 So. 2d 598 (Fla. 4th Dist. Ct. App. 1993), review granted, 632 So. 2d 1026 (Fla. 1994).
²⁸⁸. Id. at 600.
²⁸⁹. Id.
section 732.401 of the *Florida Statutes* was unconstitutional as the adult children of Hubert were benefitted over the wishes contained in Florence's will. The trial court dismissed the complaint.²⁹⁰

The Fifth District Court of Appeal, while finding merit in King's argument, failed to agree that the state has no legitimate interest in vesting the remainder in adult descendants. Therefore, it certified the above question to the Florida Supreme Court.²⁹¹

*LaBelle v. LaBelle.*²⁹² Judge Cobb wrote the majority opinion with which Judge Thompson and Associate Judge Hauser concurred. Dorothy LaBelle was permitted to intervene in the dissolution involving her ex-husband Rupert and his then wife Carmel without objection from either party. Rupert fraudulently used Dorothy's funds to obtain a residence which he claimed was protected from a constructive trust since it was his homestead.²⁹³ Since the homestead protection does not apply to properties which are purchased with traceable fraudulently obtained funds, Rupert could not validly rely on the homestead protection.²⁹⁴

*Sigmund v. Elder.*²⁹⁵ Judge Smith wrote the opinion with which Judges Ervin and Allen concurred. The First District Court of Appeal affirmed the trial court's finding that a deed executed by the decedent to himself and his wife to create a tenancy by the entirety in homestead property was void *ab initio* under the 1885 Florida Constitution since the surviving wife did not join in the execution.²⁹⁶ At trial, Ruth was found to possess a life estate with the surviving adult children possessing the remainder interest.²⁹⁷

The district court rejected the surviving spouse's arguments that the Marketable Record Title Act should cure the problem and that section 689.11 of the *Florida Statutes* permitted such a transfer, since the constitutional requirements controlled.²⁹⁸

²⁹⁰. *Id.* at 599.
²⁹¹. *Id.* at 600.
²⁹². 624 So. 2d 741 (Fla. 5th Dist. Ct. App. 1993).
²⁹³. *Id.* at 742.
²⁹⁴. *Id.*
²⁹⁶. *Id.* at 330.
²⁹⁷. *Id.*
²⁹⁸. *Id.* at 331.
XV. INSURANCE

State Farm Fire and Casualty Co. v. Metropolitan Dade County. This is a per curiam opinion from an appeal heard before Chief Judge Schwartz and Judges Baskin and Levy. The question before the court was whether the replacement cost homeowner's insurance policy in question would provide coverage for the cost of complying with the county's requirement that homeowners, after the impact of Hurricane Andrew, make structural improvements to their houses to bring them into compliance with the South Florida Building Code including, but not limited to, elevating the houses to conform to the county's flood elevation requirements.

Noting that the construction of ambiguities in an insurance policy is a question of law, the court found that the language in question was not ambiguous and needed no construction. The policy in question was not subject to more than one interpretation. It first excluded enforcement of an ordinance or law regulating construction or repair of a structure. It provided that there would be no insurance for losses or increased costs associated with the enforcement to be in compliance with construction laws or regulations. Therefore, the appellate court held that the trial court erred in finding the policy and its exclusions ambiguous and unclear as a matter of law.

XVI. INVERSE CONDEMNATION

Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp. Justice Grimes wrote the opinion in which Chief Justice Barkett and Justices Overton, Shaw, Kogan, Harding, and Senior Justice McDonald concurred. Chief Justice Barkett also wrote a brief concurrence, in which Justice Kogan concurred, to clarify that total takings and temporary takings were not the only categories of unconstitutional takings possible. Until 1990, when it was declared unconstitutional in Joint Ventures, Inc. v. State, Department of Transportation, a statute had allowed certain agencies to designate privately owned land as being reserved for road construc-

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299. 639 So. 2d 63 (Fla. 3d Dist. Ct. App. 1994).
300. Id. at 64.
301. Id. at 65.
302. Id. at 66.
303. 640 So. 2d 54 (Fla. 1994), opinion clarified, 1994 WL 275841 (Fla. Apr. 7, 1994).
304. 563 So. 2d 622 (Fla. 1990).
tion. No building permits could be issued for new construction or for substantial renovation of nonresidential structures for at least five years on land so designated. Two landowners claimed, in inverse condemnation suits, that they were entitled to compensation because the designation of their land had amounted to a taking, a temporary taking during the period between the land's designation and decision striking down the statute which allowed the designation. In the trial court, the landowners prevailed on a motion for summary judgment and the district court affirmed, but certified the following question to the Florida Supreme Court:

**WHETHER ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.**

The supreme court responded with a negative answer.

The crux of the problem was that the supreme court had not clearly stated the basis for its decision in *Joint Ventures.* If the basis for invalidating the statute had been its violation of the taking clause, then compensation would have been required and the only issue in question would have been the amount. However, if the basis had been the violation of the Due Process Clause, then no compensation would be required unless provided for by a statute.

The Florida Supreme Court concluded that *Joint Ventures* relied upon a due process violation because: the plaintiffs had not sought compensation for a taking; the court's analysis had focused on the method, not the effect of the statute; and the decision was to invalidate the statute, not to require the agency to choose between abandoning its action or providing compensation. Thus, the relief sought, the court's analysis, and the court's conclusion were all consistent with a due process violation.

The conclusion would not necessarily deprive the plaintiffs of relief. It merely deprived them of a head start in their litigation. Because the taking had already been established in the earlier case, on remand the

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306. Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d Dist. Ct. App. 1992), review granted, 621 So. 2d 433 (Fla. 1993), and quashed by 640 So. 2d 54 (Fla. 1994).
307. *Joint Ventures*, 563 So. 2d at 622.
308. *Tampa-Hillsborough*, 640 So. 2d at 57-58.
plaintiffs would have to prove that their land had, in fact, been taken during the period that it was designated as being reserved for road construction.

_Palm Beach County v. Wright._ Chief Justice Grimes wrote the opinion with which Senior Justice McDonald and Justices Overton, Shaw, Kogan, and Harding concurred. The Palm Beach County Comprehensive Plan ("Plan") included a section on traffic circulation. On a map, it identified transportation corridors for new roads or the expansion of existing roads. The Plan prohibited the granting of any permits for development within the corridors which would interfere with the future roadway construction. Owners of property along an existing road challenged the constitutionality of the Plan because the map showed that part of their land would be the site of possible future road widening. The constitutionality of this part of the Plan was attacked based upon the precedent of _Joint Ventures_ in which the supreme court had declared a similar statute unconstitutional. The issue was presented to the supreme court in the form of the following certified question:

**IS A COUNTY THOROUGHFARE MAP DESIGNATING CORRIDORS FOR FUTURE ROADWAYS, AND WHICH FORBIDS LAND USE ACTIVITY THAT WOULD IMPEDE FUTURE CONSTRUCTION OF A ROADWAY, ADOPTED INCIDENT TO A COMPREHENSIVE COUNTY LAND USE PLAN ENACTED UNDER THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT, FACIALLY UNCONSTITUTIONAL UNDER _Joint Ventures, Inc. v. Department of Transportation_?**

The supreme court provided a negative answer. The statute in _Joint Ventures_ had been found to violate the Due Process Clause, not the taking clause. Consequently, it could not be used as the basis for a claim that a taking _per se_ had occurred.

Furthermore, the supreme court concluded that this ordinance did not, on its face, violate the Due Process Clause. Comprehensive planning for future growth protects the public and is, consequently, a proper exercise

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309. 641 So. 2d 50 (Fla. 1994).
310. _Joint Ventures_, 563 So. 2d at 622 (Fla. 1990); see also _A.G.W.S. Corp._, 608 So. 2d at 52.
312. _Wright_, 641 So. 2d at 51 (citation omitted).
313. _Id._
314. _Id._ at 53.
of the police power. That planning must logically include plans to handle increased traffic. Thus, a legitimate state interest was substantially advanced. While the statute in Joint Ventures was intended only to depress the price that the public would have to pay if it eventually took the land, this ordinance was intended to ensure that future development would be compatible with the Comprehensive Plan. It provided the county flexibility in dealing with placement of the roads and issuance of permits to offset particular hardships. Moreover, most land adjacent to the corridors would increase in value, giving its owners benefits to offset any loss.

The court recognized that some landowners may suffer harm due to their particular circumstances. They would be able to claim that they had suffered from a taking. But the court went on to remind readers that: the landowner’s entire parcel would be considered in making that determination; a taking would only occur when the landowner had been deprived of substantially all economically beneficial use of the land; and such a claim would probably be premature until a landowner had been denied a development permit.

Department of Transportation v. Gefen. Chief Justice Grimes wrote the unanimous opinion. The landowner’s property fronted on a street on which there were access ramps to the interstate highway. When the access ramps were closed, the property decreased in value as a commercial site. The landowner brought this inverse condemnation action for compensation for his loss and prevailed at trial and before the district court. The supreme court reversed, answering in the negative the following certified question:

WHETHER AN OWNER OF COMMERCIAL PROPERTY HAS SUFFERED A COMPENSABLE TAKING WHERE ACCESS TO AN INTERSTATE HIGHWAY BY MEANS OF A STREET FRONTING ON APPELLEE’S PROPERTY IS CLOSED, AND SAID CLOSING RESULTS IN SUBSTANTIALLY DIMINISHED ACCESS TO THE SUBJECT PROPERTY, ALTHOUGH NO ACCESS FROM ABUTTING STREETS HAS BEEN CLOSED.

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315. Id.
316. Id. at 54.
317. 636 So. 2d 1345 (Fla. 1994).
318. Id. at 1345.
The supreme court found that *Palm Beach County v. Tessler*[^319] was distinguishable from *Gefen*. In *Tessler*, the court held that an inverse condemnation action might lie for substantial loss of access even though none of the landowner's property is appropriated. However, in this case, access to a public road was not diminished, i.e., there was no loss of access. The harm was caused by a diminution in traffic flow along the fronting road. That was not a compensable loss.^[320^]

More interesting is the dicta in this case. The Department has plans to condemn a portion of this land at some time in the future. When it does happen, the Department will not be allowed to take advantage of the value reduction which resulted from its having closed the access ramps. The court held that would be like a condemning authority trying to take advantage of the decrease in property values caused by the announcement of its plans to condemn, which has long been prohibited.^[321^]

*Alexander v. Town of Jupiter.*[^322^] Judge Warner wrote the opinion with which Judges Anstead and Gunther concurred. Landowner applied for a permit to clear property so that a survey could be conducted. The permit was refused because zoning ordinances had not yet been adopted to conform the zoning to the comprehensive plan. It took over two years to obtain the permit. The landowner sued, *inter alia*, for temporary taking of her property. The trial court rejected the claim based upon the ripeness doctrine. It reasoned that the original denial was not a final decision on the application.

The district court disagreed and reversed.^[324^] A claim of permanent taking would be precluded by the ripeness doctrine. But the claim here was for compensation for a temporary taking. It would turn on whether the delay was reasonable, i.e., merely a normal delay associated with the public land use planning process or not. As a statute required inconsistencies between zoning and the comprehensive plan be resolved within one year,^[325^] the district court concluded that a temporary taking might have occurred here.^[326^]

[^319]: 538 So. 2d 846 (Fla. 1989).
[^320]: See *State, Dep’t of Transp. v. Capital Plaza, Inc.*, 397 So. 2d 682 (Fla. 1981).
[^321]: See *Dade County v. Still*, 377 So. 2d 689 (Fla. 1979); *State v. Chicone*, 158 So. 2d 753 (Fla. 1963).
[^322]: 640 So. 2d 79 (Fla. 4th Dist. Ct. App. 1994).
[^323]: See *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), review denied, 570 So. 2d 1304 (Fla. 1990) (adopting the federal ripeness doctrine).
[^324]: *Alexander*, 640 So. 2d at 83.
[^325]: FLA. STAT. § 163.3202 (1985).
[^326]: *Alexander*, 640 So. 2d at 83.
Chief Judge Frank wrote the opinion with which Judges Ryder and Patterson concurred. A bald eagle nest was discovered in the 173 acres which a developer had bought. Development within 750 feet of the nest was prohibited until inspectors concluded, three years later, that the eagles had abandoned the nest. The developer sued, claiming that his land had been taken. The Second District Court of Appeal disagreed.

First, the court pointed out that the nature of the claim was that a regulatory taking had occurred. The government had not physically taken the property. One factor to be considered was "whether the regulation precludes all economically reasonable use of the property." In this case, the development was to proceed in six phases, but protection of the eagle's nest only delayed one phase. The developer "retained the desired use of the majority of its land; most of the property was developed. Because the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable."

The court went on to point out that "[t]he government neither owns nor controls the migration of the wildlife species it protects." Consequently, "[o]f the few courts that have encountered this question, most agree that the government owes no compensation for and may constitutionally protect wildlife whose unwanted occupation on private land arguably diminishes the market value of that land." It seems to be suggesting that compensation would never be required where the regulation is for the protection of wildlife. It is doubtful that such a sweeping rule should, or could, ever develop.

XVII. LANDLORD AND TENANT

The Florida Bar re Advisory Opinion-Non Lawyer Preparation of and Representation Of Landlord in Uncontested Residential Evictions. Last year, the Florida Supreme Court decided to conduct an experiment. For one year, it would allow property managers to complete, sign, and file com-

327. 636 So. 2d 761 (Fla. 2d Dist. Ct. App. 1994).
328. Id. at 764.
330. Id. at 765.
331. Id.
332. Florida Game, 636 So. 2d at 765-66.
333. 627 So. 2d 485 (Fla. 1993) [hereinafter Advisory Opinion].

https://nsuworks.nova.edu/nlr/vol19/iss1/9
plaints and motions for default\(^3\) using approved forms\(^4\) in uncontested residential evictions for nonpayment of rent. Further, in uncontested cases, property managers could also obtain final judgments and writs of possession. But the terms “property manager” and “uncontested residential eviction” had not been defined.

The supreme court, after reviewing numerous comments and suggestions, decided that, for the purpose of this experiment, a property manager would be “one who is responsible for the day-to-day management of the residential rental property, as evidenced by such factors as responsibility for renting of units, maintenance of rental property, and collection of rent.”\(^5\) A corporate manager could qualify under this definition. The manager must have written authorization from the landlord to perform these responsibilities.

A case would be considered contested, for the purposes of this experiment, when a hearing was scheduled. Once a hearing is scheduled in a case, the landlord will have to hire an attorney for representation or the landlord will have to go to the hearing himself.

*Hillman Construction Corp. v. Wainer.*\(^6\) Judge Farmer wrote the opinion with which Judges Glickstein and Pariente concurred. A tenant had hired a general contractor to improve the rental property. The contractor had not been paid and the tenant had filed bankruptcy. The landlord regained possession and rented the premises to a new tenant. The contractor filed an action against the landlord for unjust enrichment based upon the allegations that the improvements enhanced the value of the premises and allowed the landlord to charge the new tenant a higher rent. The trial court had dismissed for failure to state a claim, but the district court reversed.\(^7\) In so doing, the district court stated:

> The elements of a cause of action for unjust enrichment are: (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 inequita-

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\(^4\) See The Florida Bar re Approval of Forms Pursuant to Rule 10-1.1(b) of the Rules Regulating The Florida Bar, 591 So. 2d 594 (Fla. 1991).

\(^5\) *Advisory Opinion*, 627 So. 2d at 487.

\(^6\) 636 So. 2d 576 (Fla. 4th Dist. Ct. App. 1994).

\(^7\) *Id. at 577.*
ble for the defendant to retain the benefit without paying the value thereof to the plaintiff.  

The facts in plaintiff's complaint sufficiently alleged these elements. The court emphasized that it was not ruling on the merits of the claim. It was only deciding that if the plaintiff managed to prove what it had alleged, then theoretically it might prevail.

The plaintiff had also made a claim for an equitable lien based upon the same facts. The trial court had also dismissed that claim and, in a footnote, the district court agreed.  

It is interesting that the case did not involve a construction lien; perhaps the contractor had not complied with the statutory requirements for obtaining one. A construction lien can attach to the landlord's interest if the improvements are made in accordance with the terms of the lease. However, the landlord may protect its property from construction liens by  1) having the lease provide that construction liens will not attach to the landlord's interest and  2) recording the lease or a notice of that clause if all leases on this property include the same clause. If the lease specifically provided that no construction lien could attach and the contractor had notice, even constructive notice, of that, it would seem inequitable to allow the contractor to circumvent the spirit of that agreement by recovering under the unjust enrichment theory.

_Homeowner's Corp. of River Trails v. Saba._ Judge Altenbernd wrote the opinion with which Acting Chief Judge Ryder and Judge Patterson concurred. A homeowners/tenants association had challenged an increase in the lot rentals. When mediation failed, the association filed an action to have the rent increase declared unreasonable. Section 723.033(1) of the _Florida Statutes_ provides:

> If the court, as a matter of law, finds a mobile home lot rental amount, rent increase, or change, or any provision of the rental agreement, to be unreasonable, the court may: (a) Refuse to enforce the lot rental agreement. (b) Refuse to enforce the rent increase or change. (c) Enforce the remainder of the lot rental agreement without the unreasonable provision. (d) Limit the application of the unreasonable provision.

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339. _Id._
340. _Id._ at 577 n.1.
342. _Id._ § 713.10.
343. _Id._
344. 626 So. 2d 274 (Fla. 2d Dist. Ct. App. 1993).
so as to avoid any unreasonable result. (e) Award a refund or a reduction in future rent payments. (f) Award such other equitable relief as deemed necessary.\textsuperscript{345}

The trial judge, however, entered a partial final judgment based upon a finding that the statute was unconstitutional on its face for a number of reasons, including: 1) that it violated the due process clause of the Florida Constitution;\textsuperscript{346} 2) that it violated the due process clause of the United States Constitution;\textsuperscript{347} 3) that it was an unconstitutional delegation of legislative authority;\textsuperscript{348} and, 4) that it was a per se taking of private property without payment of just compensation in violation of both the Florida Constitution and the United States Constitution.\textsuperscript{349} The district court found the conclusions to be premature.\textsuperscript{350} The questions involved both law and fact, but the trial court had not heard any evidence.

It also pointed out that this was not a rent control statute in the traditional sense. Such statutes require landlords to rent at below market prices and are justified by an emergency. But this statute only would prevent rent that was in excess of the market rate.\textsuperscript{351} Consequently, this statute could not be invalidated on the basis that there was no legislative finding of an emergency.

\textit{Hutchinson v. Kimzay of Florida, Inc.}\textsuperscript{352} Judge Thompson wrote the opinion with which Judge Peterson concurred specially, without opinion. Judge Griffin concurred in part, but dissented in part. Kimzay had a long term ground lease. The ground rent would escalate when one of the following events occurred: twenty-five years had expired or Kimzay was no longer the largest subtenant. Hutchinson claimed that the latter had occurred and sent Kimzay a twenty-day notice of default because the rent payment was inadequate. When the increased payments were not made, the landlord sent a three-day notice letter demanding the rent due or possession of the property.\textsuperscript{353}

The tenant in this case was in an odd situation. The rent was to be adjusted according to the Commodity Price Index, which no longer existed.

\begin{itemize}
\item \textsuperscript{345} FLA. STAT. § 723.033(1) (1991).
\item \textsuperscript{346} FLA. CONST. art. I, § 9.
\item \textsuperscript{347} U. S. CONST. amend. XIV.
\item \textsuperscript{348} FLA. CONST. art. II, § 3; id. art. III, § 1.
\item \textsuperscript{349} Id. art. X, § 6.
\item \textsuperscript{350} Saba, 626 So. 2d at 275.
\item \textsuperscript{351} See FLA. STAT. § 723.033(4) (1993).
\item \textsuperscript{352} 637 So. 2d 942 (Fla. 5th Dist. Ct. App. 1994).
\item \textsuperscript{353} Id. at 943.
\end{itemize}
So the rent could not be determined with certainty and yet the tenant was being threatened with eviction for nonpayment of the correct amount. The tenant then filed suit for a declaratory judgment on the amount of the rent and also for an injunction to prevent the landlord pursuing the eviction until the amount had been determined. The trial court granted a temporary injunction, but the landlord counterclaimed for possession of the premises and damages. The tenant filed a motion to dismiss that counterclaim, alleging its filing violated the injunction. After the ensuing motions and hearings, the trial court affirmed its earlier injunction. The district court interpreted this as the granting of a second injunction.

The district court found that the first injunction had expired by its own terms when the tenant failed to post the required bond. Moreover, it concluded that the trial court had erred by granting the first injunction because the tenant had an adequate remedy at law and would not have suffered irreparable harm without the injunction. It could simply have raised the need to determine the rent as a defense in the eviction action.

The district court also found that the second injunction had been improperly granted because: the court had not stated the reasons for its decision; the decision was not based upon affidavits, verified pleadings, or sworn testimony; and the trial judge failed to require that a bond be posted as was required by the Rules of Civil Procedure.

It seems logical to allow a tenant a reasonable opportunity to have the rent determined and make the payment before the tenant can be evicted for nonpayment. If the county court could fashion that relief, then the remedy at law would be adequate. There is apparently nothing in this case to suggest that the county court could not have determined the rent and then have given the tenant a reasonable time to pay before any eviction order would take effect. But the case provides an example of why a rent escalation clause should provide not only a formula for determining the rent, but a procedure by which the rent can be determined if a planned formula fails for some reason. Arbitration or the provision of alternative formulae might be considered by the parties.

354. Id. at 944.
355. The first was issued on June 26, 1992 and the second was issued on December 18, 1992.
356. Hutchinson, 637 So. 2d at 944.
357. Id.
358. Id.; see also FLA. R. CIV. P. 1.610(b).
Meli Investment Corp. v. O.R.\textsuperscript{359} This was a per curiam opinion in which Judges Barkdull, Nesbitt, and Goderich joined. Claiming the tenants had heldover beyond the end of the lease, a landlord sued for eviction and damages. The tenants disputed the holdover claim and counterclaimed based upon wrongful eviction, harassment and discrimination against a victim of AIDS which was, and is, prohibited by statute.\textsuperscript{360} After the tenants prevailed, the court considered their motion for attorney's fees.

Both the Florida Residential Landlord and Tenant Act\textsuperscript{361} and section 760.50(6)(a)(3) of the Florida Statutes provide for the recovery of reasonable attorney's fees by the prevailing party.\textsuperscript{362} The trial court, after hearing evidence, determined that tenants' counsel had expended sixty hours on the case and were entitled to an hourly rate of $175. It then applied a risk multiplier of two to reach a total award of $21,000.

The district court vacated this decision and remanded the case with directions not to use a risk multiplier.\textsuperscript{363} The court noted that attorney's fees cases are divided into "three basic categories: 1) public policy enforcement cases; 2) tort and contract claims; and 3) family law, eminent domain, and estate and trust matters."\textsuperscript{364} A risk multiplier is applicable in the public policy category only to offset a litigants facing substantial difficulties in finding legal counsel. However, there was no evidence in the record that such substantial difficulties existed in this case. The trial court erred in applying a risk multiplier to counsel's efforts in that aspect of the case.\textsuperscript{365}

The risk multiplier is applicable to tort and contract claims. The trial court would have been correct in applying it to the portion of counsel's time spent on the issue of whether the tenants had held over or whether either party had breached the terms of the lease. On remand, the trial court would have to divide counsel's time between these two categories and then recalculate the total fee.

\textit{N.E.P. International, Inc. v. Falls.}\textsuperscript{366} Judge Hersey wrote the opinion with which Judges Gunther and Warner concurred. The tenant breached the lease. The lease allowed rent acceleration in the event of the tenant's

\textsuperscript{359} 621 So. 2d 676 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{361} Id. ch. 83, pt. II (1991).
\textsuperscript{362} See id. § 83.48.
\textsuperscript{363} Meli Inv. Corp., 621 So. 2d at 677.
\textsuperscript{364} Id. (citing Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 833 (Fla. 1990)).
\textsuperscript{365} Id.
\textsuperscript{366} 629 So. 2d 1019 (Fla. 4th Dist. Ct. App. 1993).
default, so the trial court awarded judgment for the full amount of the rent, including charges and real estate taxes for the full unexpired term. That was error. In awarding damages, future damages must be reduced to their present value.\textsuperscript{367}

What complicated this case further was that the property was taken by eminent domain after the breach but before the term was scheduled to end. When a landlord has been allowed to recover future rent, taxes, or other charges (even at the reduced present value), there must be a provision to credit the tenant with any rent the landlord received or any overpayment for the taxes or charges by the tenant. An accounting must eventually take place. A trial court could retain jurisdiction to perform this accounting, or simply provide that an independent action for an accounting may be brought later.

In this case, the lease had been terminated by the taking. There would be no future damages to reduce when the trial court reconsidered the case on remand. At that time, the court could also perform the accounting and then award damages along with prejudgment interest.

\textit{Orlando Regional Center, Inc. v. Ivey Properties, Inc.}\textsuperscript{368} Judge Peterson wrote the opinion with which Judges Dauksch and Cobb concurred. This was a declaratory judgment action brought to determine the rent due under the terms of a commercial lease. The rent included a percent of the gross annual revenues, over a base amount, and a credit for capital expenditures. The lease provided instructions for calculating these amounts in narrative form, so calculating the rent was a complicated matter, at best. The trial court's decision was reversed because "[n]either the result proposed by the lessee nor the result proposed by the lessor and accepted by the trial court represents an end product of a logical straightforward application of the lease provisions in question."\textsuperscript{369}

What is noteworthy about this case is the court's suggestion for the future. "The lease does not provide an example of a computation, a common method of aiding the interpretation of narrative instructions in making mathematical calculations. An example could have avoided this litigation."\textsuperscript{370} The court demonstrated this by reducing the narrative to mathematical formulae\textsuperscript{371} and then applying the formulae to the numbers.

\textsuperscript{367} \textit{Id.} at 1019.
\textsuperscript{368} 622 So. 2d 1094 (Fla. 5th Dist. Ct. App. 1993).
\textsuperscript{369} \textit{Id.} at 1095.
\textsuperscript{370} \textit{Id.} at 1094 n.1.
\textsuperscript{371} \textit{Id.} at 1095.
on which the parties had agreed.\textsuperscript{372} Those drafting or negotiating a commercial lease would be well advised to follow the court's advice.

\textit{Seymour v. Adams.}\textsuperscript{373} Judge Griffin wrote the opinion. Chief Judge Harris and Judge Dauksch concurred. The landlords obtained an eviction judgment, including a judgment for $8600 in unpaid rent. When the sheriff executed the eviction writ, the tenant could not remove his personal property, so it remained in the landlords' possession. The tenant demanded access to the property, but the landlords refused, claiming a lien for the unpaid rent. The tenant paid the rent due and again demanded his personal property. The landlords again refused, this time based on a claim for the unpaid storage fees.\textsuperscript{374}

The tenant sued for conversion, property damage, civil theft, and return of the property. The trial court granted the landlords' motion for summary judgment, but the district court reversed.\textsuperscript{375} The lease did not give the landlord the right to retain possession of the tenant's personal property. The landlords were not entitled to retain possession for unpaid storage fees based on the "Disposition of Personal Property Landlord and Tenant Act"\textsuperscript{376} because they had not complied with its requirement of notice.\textsuperscript{377} The statutory landlord's lien for unpaid rent did not give them the right to retain possession.\textsuperscript{378} Furthermore, docketing the writ of execution did not give them the right to retain possession. Consequently, summary judgment should not have been granted on these claims because they were based upon the landlords' wrongful refusal to return personal property to the tenant.

\textit{Thal v. S.G.D. Corp.}\textsuperscript{379} This was a per curiam opinion by Judges Jorgenson, Levy, and Gersten. One of the terms of the lease to Foljan, the tenant, required that he pay the property taxes. After the taxes fell three years in arrears, the landlord sued to terminate the lease and evict the possessors. Landlord and tenant entered into a settlement agreement, supported by consideration, under which Foljan surrendered the lease. The problem was that Foljan had subleased the premises to S.G.D., and S.G.D.

\textsuperscript{372} Id.
\textsuperscript{373} 638 So. 2d 1044 (Fla. 5th Dist. Ct. App. 1994).
\textsuperscript{374} Id. at 1046.
\textsuperscript{375} Id.
\textsuperscript{376} FLA. STAT. §§ 715.10-.111 (1991).
\textsuperscript{377} Seymour, 638 So. 2d at 1048 (citing FLA. STAT. § 715.104 (1991)).
\textsuperscript{378} Id. (citing FLA. STAT. § 83.08 (1991)).
\textsuperscript{379} 625 So. 2d 852 (Fla. 3d Dist. Ct. App. 1993), review dismissed, 632 So. 2d 1027 (Fla. 1994).
had refused to settle the case. The trial court refused to evict the subtenant. 380

The case turned on whether the settlement agreement amounted to a termination of the Foljan’s lease or whether it amounted to a surrender. If the master lease is terminated, the rights of subleases are also terminated because they are based upon the master lease. However, if the master lease is voluntarily surrendered, then the landlord is the recipient of the tenant’s interest encumbered by the subleases. The district court concluded that the master lease had been canceled due to the tenant’s default in not paying property taxes. Thus, since the master lease fell, the sublease also fell. 381 The fact that the judgment was entered based upon an agreement of the parties did not change that characterization.

The subtenant argued that it should not be evicted because it would lose $400,000 in improvements. The district court had little sympathy for this argument. 382 It pointed out that this was a commercial sublease, entered into at arm’s length between sophisticated business people. The corporation knew that the sublease was no better than the lease of its mesne landlord and, therefore, it had the opportunity to protect itself. Consequently, there was nothing in the record to justify equitable relief. 383

XVIII. LIENS AND MECHANIC’S LIENS

All-Brite Aluminum, Inc. v. Desrosiers 384 Acting Chief Judge Parker wrote the majority opinion with which Justices Altenbernd and Blue concurred. All-Brite filed this appeal challenging a lower court decision that it was not the prevailing party under section 713.29 of the Florida Statutes 385 and, therefore, was not entitled to an award of attorney’s fees and costs. 386 The dispute arose from a construction contract between the Desrosiers, the owners of the real property, and a general contractor. The general contractor filed for bankruptcy after being paid in full by the Desrosiers but failed to pay All-Brite, a subcontractor. After All-Brite timely filed its claim of lien and a complaint to foreclose the construction lien, the Desrosiers advised All-Brite that some of the work was incomplete.

380. Id. at 852.
381. Id. at 853.
382. Id.
383. Id.
384. 626 So. 2d 1020 (Fla. 2d Dist. Ct. App. 1993).
386. All-Brite, 626 So. 2d at 1021.
All-Brite completed the work requested by the Desrosiers and amended its claim of lien and complaint to reflect the additional money due for the completed work. The Desrosiers then tendered payment to All-Brite for only the moneys due under the original claim of lien and complaint. The parties stipulated to a lien amount that was fifty-four cents less than the sum claimed under the amended claim of lien and complaint. The trial court, granting a lien for the stipulated amount, held there was no prevailing party. Therefore, each party was responsible for its own costs and fees.  

The appellate court found that All-Brite was the prevailing party. The court acknowledged that one must have recovered an amount exceeding that which was earlier offered in settlement of the claim in order to be a prevailing party and entitled to the award of attorney’s fees. Thus, the Second District Court of Appeal reasoned that the amount offered in settlement of the claim must have been made before the lienor filed his complaint to foreclose the lien.

The Dollar Savings & Trust Co. v. Soltesiz. Judge Campbell wrote the majority opinion in this case with which Acting Chief Judge Danahy and Judge Altenbernd concurred. The question before the court arose from a consolidated appeal from two circuit court cases. The cases held that Dollar Savings’ foreign judgement, which it recorded pursuant to section 55.503 of the Florida Statutes, was subordinate and inferior to Barnett Bank’s mortgage, which was recorded within thirty days following Dollar’s issuance of recordation of the foreign judgment. In essence, the question was one of whether a foreign judgment’s lien priority arises as of the date the foreign judgment is recorded pursuant to section 55.503 of the Florida Statutes or the expiration of thirty days after the judgment creditor issues its notice of recordation.

In the instant case, Mr. and Mrs. Soltesiz executed a second mortgage in favor of Barnett three days after they received notice that Dollar had recorded its Ohio judgment in Sarasota, Florida. The second mortgage had the effect of diminishing the Soltesiz’s equity in their Sarasota County, Florida condominium. Dollar did not know of Barnett’s second mortgage and did not learn of it until the Soltesizs attempted to convey title to that condominium. Thereafter, Barnett filed a mortgage foreclosure action on both its first and second mortgages on the property, joining Dollar as a

387. Id.
388. Id.
389. Id. at 1022.
390. 636 So. 2d 63 (Fla. 2d Dist. Ct. App. 1994).
391. Id. at 63.
defendant to determine lien priority. Both the court hearing the Soltesiz's declaratory decree petition, and the court hearing the Barnett foreclosure action found Dollar's foreign judgment subordinate to Barnett's second mortgage.392

The appellate court perceived the question as one of whether section 55.503 of the Florida Statutes established a priority date for the lien, and whether that date may be different than when the lien becomes enforceable.393 Ultimately, it concluded that the priority of a foreign judgment lien is established when it is recorded pursuant to the requirements of chapter 55 and section 695.11 of the Florida Statutes, even though the enforcement of that lien may be delayed by further statutory provisions such as sections 55.507 and 55.509.394

Emerald Designs, Inc. v. Citibank F.S.B.395 Judge Klein wrote the majority opinion with which Judge Glickstein and Associate Judge Gross concurred. The question before the appellate court was whether a subcontractor has the right to claim an equitable lien against the undisbursed construction loan funds in the hands of a lender, where although the construction project is completed, the lender forecloses.396

This question arose out of a foreclosure action in which Emerald Designs, a subcontractor/defendant, filed a counterclaim to establish an equitable lien on the undisbursed construction loan funds held by Citibank. The gist of Emerald Designs' allegations was that Citibank would be unjustly enriched if it were permitted to foreclose on the completed homes and still retain the undisbursed loan funds. Contrary to the position taken by the circuit court, the appellate court found for the subcontractor.397 It stated that, since the subcontractor was not seeking priority over a recorded mortgage, the subcontractor did not need to allege fraud or misrepresentation to establish an equitable lien on the undisbursed construction loan funds.398 Therefore, the appellate court reversed the dismissal of the subcontractor's counterclaim for failure to state a cause of action.399

392. Id. at 64.
393. Id. at 65.
394. Id. at 66.
395. 626 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1993).
396. Id. at 1084.
397. Id. at 1085.
398. Id.
399. Id.
Federal National Mortgage Ass’n v. McKesson. 400 Associate Judge Ramírez wrote the majority opinion with which Judges Gunther and Stone concurred. The question before the court was whether the trial court erred in granting summary judgment in favor of a mobile home park homeowners’ association, declaring the associations’ maintenance assessment lien superior to the lien of the first mortgagee. 401

To support its claim that its lien was superior, the association relied on a declaration of covenants, which was the source of the lien rights for the association. The association was the holder of a first mortgage that was recorded after the declaration of covenants but before the association’s claim of lien. Citing “first in time is the first in right,” the appellate court reversed the summary judgment and found the first mortgage lien to be superior. 402 Nevertheless, it certified to the Florida Supreme Court the following question:

WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNER’S ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE. 403

Gazebo Landscape Design, Inc. v. Bill Free Custom Homes, Inc. 404 This is an opinion written by Judge Polen with which Judges Anstead and Stone concurred. The question before the court was whether the trial court erred in refusing to enforce Gazebo’s mechanics lien against the homeowners for landscaping work done by Gazebo through a general contractor, when Gazebo had not provided notice to the owner within the forty-five day period after furnishing services or materials, as required by section 713.06(2)(a) of the Florida Statutes. 405

The gist of the question was when does a subcontractor begin to furnish services for the purpose of timely providing the required notice to the owner. In this case it was November 7, 1990, when one of Gazebo’s

400. 639 So. 2d 78 (Fla. 4th Dist. Ct. App. 1994).
401. Id. at 79.
402. Id.
403. Id. at 80.
404. 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).
405. Id. at 88.
representatives traveled with the property owners to meet with the tree collector so that the property owners could select the trees. On December 5, 1990, Gazebo's employees dug the holes in preparation for the trees, and December 7, when they planted the trees. On January 15, Gazebo sent notice to the owner as required. However, the notice was returned unclaimed. Therefore, on January 18, 1991, Gazebo posted a notice to the owner on the gate of the homeowner's residence.  

Noting that when a motion for an involuntary dismissal is made, the trial court should consider all facts in evidence in the light most favorable to the plaintiff, the appellate court held that the facts at bar determined that the subcontractor did not begin to furnish its services until the work was actually performed at the job site. Therefore, the trial court should look at all circumstances surrounding the particular job or transaction to determine when the time begins to run. It also certified the following question to the supreme court:

DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?

*Lehmann Development Corp. v. Nirenblatt.* This is a per curiam opinion by Acting Chief Judge Threadgill, Judge Blue, and Associate Judge Reese. The only question before the court was whether the time computations found in Florida Rule of Civil Procedure 1.090(a) control the time period within which one must commence an action to enforce a construction lien pursuant to section 713.22(1) of the *Florida Statutes.* Recognizing that those computations apply to calculating the time within which to serve a notice to owner under section 713.06(2)(a), the appellate court held that they would to the period within which an action to enforce a construction lien must be commenced under section 713.22(1).

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406. *Id.*
407. *Id.* at 89.
408. *Id.*
409. *Gazebo*, 638 So. 2d at 89.
410. *Id.*
411. 629 So. 2d 1098 (Fla. 2d Dist. Ct. App. 1994).
412. *Id.* at 1099.
Prosperi v. Code, Inc.\textsuperscript{413} This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Kogan, and Harding concurred. The Florida Supreme Court gave an ambivalent answer to the question of whether an owner, who prevails on a complaint filed to foreclose a mechanic's lien, would be entitled to attorney's fees even though the same suit resulted in a judgment in favor of the mechanic against the owner on a count for breach of contract for the same transaction.\textsuperscript{414} In so doing, the court reasoned that a claimant's obtaining a net judgment is merely a significant factor, but not necessarily a controlling factor, in determining the status of a prevailing party under section 713.29 of the \textit{Florida Statutes}. Thus, the trial judge is permitted discretion to balance the equities in determining which party in fact prevailed on the primary issues.\textsuperscript{415}

Roger Homes Corp. v. Persant Construction Co.\textsuperscript{416} Judge Jorgenson wrote the majority opinion with which Judges Barkdull and Goderich concurred. The question before the court was whether there was a sufficient lien interest to support a lis pendens, where there was no duly recorded instrument or mechanic's lien claim to support the lien interest.\textsuperscript{417}

The question arose out of a contract between Roger Homes and Persant for the construction of roads and a water, sewage, and drainage system. When Persant did not get paid for some of its work, it filed a mechanic's lien. Roger Homes then signed an unsecured promissory note for the balance due under the contract. Ultimately, Roger Homes failed to pay the full amount of the note. Persant sued on the promissory note and attempted to establish an equitable lien on Roger Homes' real estate on which Persant had made the improvements. Consistent with this, it filed a lis pendens on the property.\textsuperscript{418}

Noting that an equitable lien might be sufficient to support a lis pendens, the appellate court opined that, based on section 48.23 of the \textit{Florida Statutes}, such would have to be based on a duly recorded instrument or on a mechanic's lien.\textsuperscript{419} The court also noted that an allegation that Roger Homes was insolvent would support a claim by the contractor that

\begin{itemize}
\item \textsuperscript{413} 626 So. 2d 1360 (Fla. 1993).
\item \textsuperscript{414} \textit{Id.} at 1363.
\item \textsuperscript{415} \textit{Id.}
\item \textsuperscript{416} 637 So. 2d 5 (Fla. 3d Dist. Ct. App. 1994).
\item \textsuperscript{417} \textit{Id.} at 6.
\item \textsuperscript{418} \textit{Id.}
\item \textsuperscript{419} \textit{Id.}
\end{itemize}
there would be no adequate remedy at law.\textsuperscript{420} Therefore, it would be entitled to an equitable lien for which a lis pendens could be recorded.\textsuperscript{421} However, this is not shown in the record for Persant did not allege that Roger Homes was insolvent. Therefore, the lis pendens was improper in this case.\textsuperscript{422}

\textit{C.L. Whiteside \& Associates Construction Co. v. Landings Joint Venture.}\textsuperscript{423} Judge Farmer wrote the majority opinion with which Judge Anstead and Senior Judge Walden concurred. The primary question before the court was whether the trial court erred in entering summary judgment dismissing a subcontractor’s mechanic’s lien claim, where the subcontractor had not filed formal notice to the owner.\textsuperscript{424}

The Landings Joint Venture owned the property in question. RV Landings, Inc. and Virginias at Delray, Ltd. were equal partners in that joint venture. The joint venture, through its managing venture, RV Landings, entered into a construction contract with Ragland Construction as the general contractor. The same individual served as president of both RV Landings and Ragland Construction. In addition, he was the principal shareholder of RV Landings and the sole shareholder of Ragland, although he had no ownership interest and performed no functions for Virginias.\textsuperscript{425} That same individual signed the construction contract on behalf of the joint venture, signed the notice of commencement for the joint venture, and was the person to receive notice for the owner.\textsuperscript{426} Although an employee signed the construction contract on behalf of Ragland, the president of Ragland signed the contract with Whiteside for the structural shell work on the project. Knowing of the common relationships between the owner and the general contractor and having dealt with their president on prior occasions, Whiteside sent no notice to the owner, believing it was unnecessary.\textsuperscript{427} It was not until a dispute arose that Whiteside sent its notice to the owner, and subsequently, filed its claim of lien.\textsuperscript{428}

\begin{itemize}
\item \textsuperscript{420} \textit{Id.} at 7.
\item \textsuperscript{421} \textit{Roger Homes}, 637 So. 2d at 7.
\item \textsuperscript{422} \textit{Id.}
\item \textsuperscript{423} 626 So. 2d 1051 (Fla. 4th Dist. Ct. App. 1993).
\item \textsuperscript{424} \textit{Id.} at 1051.
\item \textsuperscript{425} \textit{Id.} at 1052.
\item \textsuperscript{426} \textit{Id.}
\item \textsuperscript{427} \textit{Id.}
\item \textsuperscript{428} \textit{C.L. Whiteside}, 626 So. 2d at 1052.
\end{itemize}
Referring to the Florida Supreme Court’s decision in *Aetna Casualty v. Buck*, the court stressed that the purpose of serving a notice to the owner was to inform the property owner that those not in privity of contract with the owner were providing improvements to the property, and that they would look to the property in the event they were not paid for their services and materials. Thus the owner would be protected from possibly paying the owner’s contractor money which ought to go to an unpaid subcontractor. Hence, the notice to owner provisions of section 713.06 of the *Florida Statutes* are excused when a subcontractor establishes privity with the property owner. To establish privity, the owner must have knowledge that a particular subcontractor is supplying services or materials and the owner either expressly or impliedly assumed the contractual obligation to pay those services. Therefore, the subcontractor may also establish privity where the owner and general contractor share a common identity. In this case, the appellate court held that there was a sufficient question as to whether there was an established relationship between the owner and general contractor so as to establish privity, thereby rendering the notice to owner unnecessary.

**XIX. Marketable Record Title Act**

*Sunshine Vistas Homeowners Ass’n v. Caruana.* Justice Shaw wrote the opinion in which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. The question was whether a setback restriction was extinguished by Florida’s Marketable Record Title Act (“MRTA”). The restriction was contained in a plat filed in 1925. A developer purchased two lots in the area in 1990. When building began, the homeowners’ association sought a declaratory judgment that the developer was violating the setback restriction. The developer’s root of title, by the time of this litigation, was a warranty deed dated October 6, 1951. That deed referred to the plat by book and page in the

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429. 594 So. 2d 280 (Fla. 1992), *appeal after remand sub nom.* Pappalardo Constr. Co. v. Buck, 630 So. 2d 682 (Fla. 4th Dist. Ct. App.), *and review denied,* 639 So. 2d 976 (Fla. 1994).

430. *C.L. Whiteside,* 626 So. 2d at 1052.

431. *Id.* at 1053.

432. *Id.*

433. *Id.*

434. 623 So. 2d 490 (Fla. 1993).

435. *Fla. Stat.* §§ 712.01-.10 (1989). The relevant portions of this chapter have not been changed to date.
public records and also stated that the conveyance was subject to covenants and restrictions of record.\textsuperscript{436} The trial court and the district concluded that the restriction had been extinguished,\textsuperscript{437} but the Third District Court of Appeal, with Chief Judge Schwartz dissenting only on the certification issue,\textsuperscript{438} certified as being of great public importance, the following question:

\begin{quote}
WHETHER THE FLORIDA MARKETABLE RECORD TITLE ACT HAS THE EFFECT OF EXTINGUISHING A PLAT RESTRICTION WHICH WAS CREATED PRIOR TO THE ROOT OF TITLE WHERE THE MUNIMENTS OF TITLE IN THE CHAIN OF TITLE DESCRIBE THE PROPERTY BY ITS LEGAL DESCRIPTION WHICH MAKES REFERENCE TO THE PLAT AND THE MUNIMENTS OF TITLE STATE THAT THE CONVEYANCE IS GIVEN SUBJECT TO COVENANTS AND RESTRICTIONS OF RECORD.\textsuperscript{439}
\end{quote}

MRTA would, in effect, extinguish any restriction or title defect which was in the record prior to the root of title.\textsuperscript{440} However, there is an exception for “[e]states or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title. . . .”\textsuperscript{441} But “a general reference . . . shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein . . . .”\textsuperscript{442} The district court found that the reference in this case was too general to satisfy the statutory requirement,\textsuperscript{443} but the supreme court unanimously disagreed\textsuperscript{444} because the deed referred to “Sunshine Vistas,” the name of the recorded plat that imposed the restriction.\textsuperscript{445}

\begin{itemize}
\item \textsuperscript{436} Sunshine, 623 So. 2d at 492.
\item \textsuperscript{437} Id. at 491.
\item \textsuperscript{438} Sunshine Vistas Homeowners Ass’n v. Caruana, 597 So. 2d 809, 811 (Fla. 3d Dist. Ct. App. 1992), review granted, 618 So. 2d 211 (Fla. 1992), and decision quashed by 623 So. 2d 490 (Fla. 1993). Judge Schwartz stated that “the issue involved here—while perhaps interesting and certainly arguable—is of no concern, let alone of great importance, to anyone but the litigants and an abstractor or two. The public as a whole could not care less.” \textit{Id.}
\item \textsuperscript{439} Sunshine, 623 So. 2d at 491.
\item \textsuperscript{440} See FLA. STAT. § 712.02 (1989).
\item \textsuperscript{441} Id. § 712.03(1).
\item \textsuperscript{442} Id.
\item \textsuperscript{443} Sunshine, 623 So. 2d at 492.
\item \textsuperscript{444} Id.
\item \textsuperscript{445} Id.
\end{itemize}
The supreme court used very traditional logic. The court stated that as a rule of statutory interpretation, every word or phrase included by the legislature must have been intended to have meaning. Why else would it have been included? Here, the statutory language "unless specific identification by reference to ... name of recorded plat be made therein ..." would be rendered meaningless by the district court's interpretation. Therefore, the court concluded that the reference in this deed satisfies the plain meaning of the statute.

That conclusion is bolstered by another line of logic. Reference in a deed description to a plat generally has the effect of incorporating the plat's terms into the deed. It is therefore consistent that such incorporation by reference would be specific enough to satisfy the requirements of MRTA for saving those terms, e.g., use restrictions, from being extinguished.

*Water Control District of South Brevard v. Davidson.* Judge Sharp wrote the opinion with which Judges Goshorn and Peterson concurred. Landowners claimed that the Water Control District ("District") did not have an easement for drainage and maintenance along the sides of a canal. The district court concluded that the District had sustained its burden of proof that it had acquired the easement by a 1922 decree which had not been lost by reason of MRTA.

The right of way on one side of the canal was being used. That placed the easement within one of the statute's exceptions. The exception still applied to the right of way on the other side of the canal even though it was not in use. The two sides were part of one reservation. Use of a part of the reserved easement was sufficient to place the entire easement within the statutory exception to MRTA. This result was reinforced by invoking the policy that "MRTA should be broadly construed to protect these rights [for the use and benefit of the public] to the extent possible under the law."

**XX. MOBILE HOME PARKS**

*Aspen-Tarpon Springs Ltd. Partnership v. Stuart.* Judge Barfield wrote the opinion with which Judges Wilfe and Mickle concurred. Owners

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446. 638 So. 2d 521 (Fla. 5th Dist. Ct. App. 1994).
447. *Id.* at 526.
448. *Id.* (citing FLA. STAT. § 712.03(5) (1991)).
449. *Id.*
450. *Id.* (citing City of Jacksonville v. Horn, 496 So. 2d 204 (Fla. 1st Dist. Ct. App. 1986)).
of mobile home parks sought a declaration that two provisions of the Florida Mobile Home Act were invalid. They first challenged section 723.033 of the *Florida Statutes*. This section enables a court to grant relief to park tenants upon a finding that the rent or a rental increase is unreasonable as a matter of law. It also provides that “a lot rental amount that is in excess of market rent shall be considered unreasonable.” The owners challenged this section as violating due process, but the trial court disagreed.

The court concluded that the statute satisfied the rational basis test because it was rationally related to a legitimate state interest, the protection of a class of tenants who are in a uniquely vulnerable situation because they only rent the lots on which the mobile homes are placed. The tenants own the mobile homes which are “mobile” only in theory. Thus, it is not economically feasible to move them because the moving expense may approach, or even exceed, the home’s value. Therefore, the tenants are at a tremendous disadvantage in dealing with the landlord.

The trial court also rejected the claim that the legislature failed to provide the Department of Business Regulation and the courts with sufficient standards to guide the application of the statute. The statutory test was whether the rent or rental increase was “reasonable.” The controlling principal is that a statute should be interpreted to avoid constitutional defects whenever it is reasonably possible. By reading subsections (3), (4), (5), and (6) *in pari materia*, the trial court was able to interpret the statement in subsection (3) that “a lot rental amount that is

452. *FLA. STAT.* ch. 723 (1993). Section 723.001 of the *Florida Statutes* provides that “[t]his chapter shall be known and may be cited as the ‘Florida Mobile Home Act.’”


454. *FLA. STAT.* § 723.033(1).

455. *Id.* § 723.033(3).

456. *Aspen*, 635 So. 2d at 63.

457. *Id.*

458. *Id.*

459. *Id.* Subsection (4) provided: “Market rent means that rent which would result from market forces absent an unequal bargaining position between mobile home park owners and mobile home owners.” Subsection (5) provided: “In determining market rent, the court may consider rents charged by comparable mobile home parks in its competitive area. To be comparable, a mobile home park must offer similar facilities, services, amenities, and management.” Subsection (6) provided: “In determining whether a rent increase or resulting lot rental amount is unreasonable, the court may consider economic or other factors. . . .” *FLA. STAT.* § 723.033(4)-(6) (1993).
in excess of the market rent shall be considered unreasonable" to be
"directory, rather than as mandatory and conclusive." The court could
also have pointed out that relief was not mandatory, but within the court's
discretion. Whether a court of equity should exercise its discretion is a
standard which has a long evolution.

The district court agreed with the trial court's reasoning and conclusion.
It pointed out that this was not a traditional rent control statute. Rather,
it was intended "to balance the interests of mobile home owners and park
owners in the context of their unique economic relationship." Section
723.061(2) of the Florida Statutes did not fare as well. This section
requires a mobile park owner who wishes to change his land use, either to
pay to have the tenants moved to another comparable park within fifty
miles, or to purchase the mobile homes and appurtenances from the tenants
at a statutorily determined value. The trial court held section 723.061-
(2) to be unconstitutional and the district court affirmed. Both conclud-
ed that its enforcement would cause an unconstitutional taking of the
landlord's private property without compensation. The district court pointed
out that "neither the 'buyout' option nor the 'relocation' option is even
economically feasible. Therefore, as a practical matter, the challenged
statute authorizes a permanent physical occupation of the park owner's
property and effectively extinguishes a fundamental attribute of ownership,
the right to physically occupy one's land. Thus, it would amount to
a physical taking of the land. Moreover, it "singles out mobile home park
owners to bear an unfair burden, and therefore constitutes an unconstitution-
al regulatory taking of their property."

The district court also stated that section 723.061(2) did "not substan-
tially advance a legitimate state interest." That was unnecessary to its
logic, and seems to this author, to be inconsistent with what the court said
about the previous section. Protection of this group of tenants is a
legitimate state interest. Requiring the landlord to buy them out or relocate
them before changing the land use is a substantial increase in their level of
protection. The legislature cannot accomplish that by superimposing that

460. Aspen, 635 So. 2d at 63.
461. Id. at 67.
462. Id.
463. FLA. STAT. § 723.061(2) (1993).
464. Aspen, 635 So. 2d at 67.
465. Id. at 68.
466. Id.
467. Id.
requirement upon existing landlord-tenant relationships. However, whether that could be made a prospective requirement on future mobile home park lot rentals is still an interesting question.

XXI. MORTGAGES

*Batchin v. Barnett Bank of Southwest Florida.* This is an opinion written by Acting Chief Judge Ryder with which Judges Parker and Lazzara concurred. The question before the court was whether, in a foreclosure action, where the lender's attorney had factual information in his file showing the defendant's address and phone number, service by publication was proper.

In finding that service by publication was improper under the circumstances, the appellate court noted that chapter forty-nine of the Florida Statutes permits service by publication only where personal service cannot be effected and that strict compliance with these statutory procedures for serving a defendant by publication is required. The one attempting to serve by publication must affirm under oath that the plaintiff reasonably employed the knowledge he had available and made an honest and conscientious effort to acquire the information necessary to effect personal service. The court stated that a diligent search would require an attorney to review his own law firm's files. Thus, failing to look in one's own files does not meet this test.

*Carteret Savings Bank v. Citibank Mortgage Corp.* This is an opinion written by Justice Overton with which Chief Justice Barkett and Justices McDonald, Shaw, Grimes, Kogan, and Harding concurred. This opinion addressed a certified question from the Fourth District Court of Appeal as follows:

WHERE A THIRD PARTY MORTGAGE LOAN IS USED NOT ONLY FOR THE PURPOSE OF PURCHASING PROPERTY, BUT IN ADDITION, FOR CONSTRUCTING IMPROVEMENTS ON THE PROPERTY, IS THE ENTIRE AMOUNT OF THE MORTGAGE ENTITLED TO PRIORITY AS A PURCHASE MONEY MORTGAGE

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469. *Id.* at D852.
470. *Id.*
471. *Id.*
472. 632 So. 2d 599 (Fla. 1994).
OVER A GENERAL JUDGMENT CREDITOR OF THE MORTGAGOR?\textsuperscript{473}

Although the parties reached settlement prior to the rendering of the supreme court's opinion, the court felt it was necessary to answer this question of first impression in Florida since it was a question likely to arise in the future, and other courts which had addressed the definition of a purchase money mortgage under these circumstances have not ruled consistently.\textsuperscript{474} Therefore, the supreme court answered the certified question in the negative. In so doing, it held that only the portion of a mortgage loan that extended to purchase the property and existing improvements would be entitled to priority as a purchase money mortgage.\textsuperscript{475}

\textit{City of Jacksonville v. Nashid Properties, Inc.}\textsuperscript{476} This is a majority opinion written by Judge Kahn with which Chief Judge Zehmer and Judge Benton concurred. The question before the court was whether the city was exempt from having its mortgage lien extinguished by a tax deed issued pursuant to section 197.552 of the \textit{Florida Statutes}.\textsuperscript{477}

The question arose when the city received an assignment of mortgage from Fidelity Federal Savings and Loan Association of Jacksonville prior to the issuance of the tax deed to Nashid. Nashid's position was that the statutory reference to a "lien of record" did not apply to a mortgage held by the city, but applied to governmental liens arising from taxes or other governmental services. The appellate court rejected Nashid's position, finding the statute clear on its face.\textsuperscript{478}

\textit{CSB Realty, Inc. v. Eurobuilding Corp.}\textsuperscript{479} This is a per curiam opinion from an appeal heard before Judges Nesbitt, Baskin, and Gersten. The question before the court was whether the trial court erred in allowing the mortgagor to redeem the property foreclosed upon at the foreclosure sale price, rather than for the amount of the judgment. The appellate court held that to redeem the property, the mortgagor must pay the mortgage debt.\textsuperscript{480}

\textsuperscript{473.} Id. at 599.
\textsuperscript{474.} Id.
\textsuperscript{475.} Id.
\textsuperscript{476.} 636 So. 2d 875 (Fla. 1st Dist. Ct. App. 1994).
\textsuperscript{477.} Id. at 875.
\textsuperscript{478.} Id. at 876.
\textsuperscript{479.} 625 So. 2d 1275 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{480.} Id. at 1275-76.
In so doing, it must pay the judgment amount when the foreclosure price is less than the judgment obligation.\footnote{Id.}

\textit{FDIC v. Diamond C Nurseries, Inc.}\footnote{629 So. 2d 157 (Fla. 4th Dist. Ct. App. 1993), review denied, 637 So. 2d 234 (Fla. 1994).} This is an opinion written by Judge Klein with which Judges Gunther and Polen concurred. The question presented to the court was whether an unrecorded satisfaction of mortgage which secured a loan from a lender, subsequently taken over by the FDIC, barred foreclosure by the FDIC.\footnote{Id. at 158.}

Diamond C Nurseries allowed Republic Bank For Savings to place a mortgage lien on Diamond C’s fifty-three acre nursery in Palm Beach County, Florida, as collateral for loans from the lender to business associates of Diamond C’s controlling shareholder. When the loan went into default, Republic Bank filed its foreclosure action. Diamond C raised satisfaction of the lien as an affirmative defense. It appears that the satisfaction was signed by a Republic’s president one month after the parties executed the note and mortgage and one month before Republic recorded the mortgage. However, the satisfaction was not recorded until almost two months after the foreclosure action began. Subsequently, FDIC, as manager of the FSLIC resolution fund, was substituted as plaintiff.\footnote{Id.}

Referring to both the \textit{D’Oench} doctrine and 12 U.S.C. § 1823(e), the court held that the unrecorded satisfaction did not preclude the foreclosure action in question.\footnote{Id.} The court recognized that D’Oench established a federal policy to protect the FDIC from misrepresentations as to lenders’ assets and liabilities in their portfolios, where the FDIC insured those lenders or made loans to those lenders.\footnote{Id.} The court also acknowledged that § 1823(e) was enacted so that bank examiners could rely on a bank’s records to evaluate the institution’s assets and to judge adequately the loan transactions in which those banks were involved. Therefore, no agreement which would reduce the FDIC’s interests in any asset acquired by it in taking over a lending institution would be valid against the FDIC, unless the agreement: 1) was in writing, 2) was executed by both the depository institution and anyone claiming an adverse interest under it, 3) was approved by the institution’s board of directors or its loan committee (reflected in the

\footnotesize{\begin{itemize}
\item \footnote{Id.}
\item \footnote{629 So. 2d 157 (Fla. 4th Dist. Ct. App. 1993), review denied, 637 So. 2d 234 (Fla. 1994).}
\item \footnote{Id. at 158.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}}
minutes of said board or committee), and 4) appeared continuously, after its execution, as an official record of a depository institution. 487

In the present case, the lender’s president responded to the examiner’s criticism of its dealings with the parties, by showing that the property in question had been appraised at over one million dollars and that the lender had obtained a mortgagee title insurance policy insuring the lien in question. This occurred one year after the loan had taken place. Two years after the loan had taken place another examination revealed that the property was still the primary asset securing that loan. 488 Therefore, the affirmative defense was defeated both by the D’Oench doctrine and by § 1823(e). 489

_Frohman v. Bar-Or._ 490 This is a per curiam opinion by Judges Anstead and Hersey, and Senior Judge Mager. The question was whether the trial court erred in dismissing a petition for a deficiency decree solely because it was filed more than one year after the final judgment of foreclosure was entered. 491 In affirming the dismissal, the court certified the following question to the Florida Supreme Court:

**DOES FLORIDA RULE OF CIVIL PROCEDURE 1.420(e) APPLY TO A POST-TRIAL PROCEEDING SUCH AS A MOTION FOR A DEFICIENCY JUDGMENT IN A MORTGAGE FORECLOSURE SUIT?** 492

_Mederos v. Selph (L.T.), Inc._ 493 This is an opinion written by Chief Judge Harris with which Judges Dauksch and Cobb concurred. The question presented to the court was whether a reformed mortgage, correcting the identification of the mortgagor, had priority over the liens of judgment creditors which were recorded between the recording of the original mortgage and the recording of the reformed mortgage ultimately identifying the correct mortgagor. 494

Mederos loaned money to Selph’s corporation. In return, Selph put up two parcels of real estate as collateral. Originally, the mortgage reflected the corporation as the owner and mortgagor for both parcels of property. In reality Selph individually owned one parcel as a tenant in common with

487. _Diamond C Nurseries_, 629 So. 2d at 159.
488. _Id._ at 160.
489. _Id._ at 160-61.
490. 637 So. 2d 369 (Fla. 4th Dist. Ct. App. 1994).
491. _Id._ at 370.
492. _Id._
493. 625 So. 2d 894 (Fla. 5th Dist. Ct. App. 1993).
494. _Id._ at 894.
his former wife. After the mortgage was originally recorded, Selph’s former wife and another judgment creditor properly recorded their judgments against Selph individually. Thereafter, Mederos filed an action to reform the mortgage. The trial court permitted the reformation but ruled that the reformed mortgage was subject to the judgment creditors as to Selph’s 50% interest in the property held with his ex-wife as tenants in common. In affirming the trial court, the appellate court reasoned that a recorded mortgage from one who is not the owner of record creates no mortgage lien on the property and provides no notice to anyone subsequently acquiring an interest in that property.

Orlando Hyatt Associates, Ltd. v. FDIC. This is an opinion written by Chief Judge Harris with which Judges Sharp and Thompson concurred. The question before the court was whether the trial court committed error when it permitted a mortgagee to apply the income from the subject premises encumbered by the mortgage lien, against any debt owed to the mortgagee while the foreclosure proceedings were still in progress.

Orlando Hyatt borrowed money from Dollar Dry Dock Savings Bank, and secured the loan with a second mortgage on the Orlando Hyatt Hotel. Subsequently, the parties executed a mortgage modification agreement, a consolidated note replacing the original one, and an amended and restated second mortgage and security agreement. In addition, Orlando Hyatt secured the modified loan with a Present Assignment of Owner’s Remittance Amount, assigning absolutely all of its right, title, and interest in any remittance due it under the management agreement with the Hyatt Corporation, the corporation which managed the hotel.

Once the loan went into default, the FDIC, as successor mortgagee, filed its foreclosure action. In response to the FDIC’s motion seeking the appointment of a receiver and motion to compel the deposit of rents, the trial court ordered that the FDIC was to receive the hotel’s revenues directly and after paying the first mortgagee, apply them to its second mortgage which was involved in the foreclosure action.

495. Id.
496. Id.
497. 629 So. 2d 975 (Fla. 5th Dist. Ct. App. 1994).
498. Id. at 975.
499. Id.
500. Id. at 976.
The court reasoned that since section 697.07 of the *Florida Statutes* applies only to rents, it did not apply to hotel revenues.\(^{501}\) Therefore, the court and the parties would have to look to other statutory and case law. Citing numerous Florida cases,\(^{502}\) the court ruled that although a mortgagor may pledge rents and profits from realty, such a pledge does not become binding until the trial court either appoints a receiver, or the mortgagee goes into actual possession. Therefore, even if the assignment is absolute and unconditional, it does not give the mortgagee a right to the funds before the trial court has made a determination on the merits of the foreclosure action.\(^{503}\)

*Ormond Beach Associates Ltd. Partnership v. Citation Mortgage, Ltd.*\(^{504}\) This is an opinion written by Judge Griffin with which Chief Judge Harris and Judge Thompson concurred. The question presented to the court was whether section 697.07 of the *Florida Statutes* permitted the assignment of rents in the possession of the mortgagor at the time of the mortgagee’s written demand as well as to those collected after the demand.\(^{505}\)

Prior to the enactment of section 697.07, Florida’s lien theory provided for no transfer of ownership in rents until there was a change of the ownership in the underlying property.\(^{506}\) Although the 1991 version of section 697.07 apparently intended to permit the mortgagee to reach even those rents in the mortgagor’s possession at the time of demand, the courts were not clear on the subject. However, this court found that the 1993 revision to that statute clarified the intent and permitted the mortgagee to sequester both categories of rent.\(^{507}\)

*Padron v. Plantada.*\(^{508}\) This is an opinion written by Judge Levy. The question before the court was whether a mortgage broker performed as required under the contract with the prospective mortgagors, thereby entitling him to a broker’s fee.\(^{509}\)

The prospective borrowers and the broker entered into an agreement for the payment of a broker’s commission, if the broker were to procure a loan

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501. *Id.*
502. *Orlando Hyatt,* 629 So. 2d at 976-77.
503. *Id.* at 977.
504. *634 So. 2d 1091 (Fla. 5th Dist. Ct. App. 1994).*
505. *Id.* at 1092.
506. *Id.*
507. *Id.*
508. *632 So. 2d 113 (Fla. 3d Dist. Ct. App.), review denied, 639 So. 2d 980 (Fla. 1994).*
509. *Id.* at 113.
commitment at a fixed interest rate for thirty years. Instead, the broker procured a commitment in the required principal amount with a floating rate for thirty years. The borrowers immediately rejected the commitment. Ultimately the prospective borrowers acquired a mortgage through another broker and through another lender. When the broker sued for his commission, the trial court entered judgment in the broker's favor. The appellate court, however, held that the offered commitment with a floating interest rate did not comply with the contract requirement of a 10% fixed interest rate, since the floating interest rate was subject to increase anytime before closing. Therefore, the broker was not entitled to his commission.  

*Parker v. Heilpern.* 511 This is a per curiam opinion from an appeal heard by Judges Anstead, Glickstein, and Farmer. The question was whether the defendant in a mortgage foreclosure proceeding, who had not yet been successfully served with process, waived her objection to jurisdiction when she objected to a co-defendant's motion for sharing in the proceeds of any sale. The appellate court found that such a waiver had not occurred since the defendant sought no affirmative relief. 512

*Pici v. First Union National Bank of Florida.* 513 This is an opinion written by Judge Frank with which Acting Chief Judge Ryder and Judge Blue concurred. The question before the court was whether the trial court erred in issuing a prejudgment writ of replevin. 514

Pici defaulted on his note with First Union by failing to make the September and October 1992 payments. When First Union notified Pici of the default and demanded that the account be brought current on October 26, 1992, Pici paid all sums, including late charges on November 1992 to a teller at one of First Union's branches. After its default notice of October 26, and before Pici's payment on November 9, First Union, without notice to Pici, decided to accelerate the balance of the note. First Union filed its complaint on November 13, 1992 and sought an ex parte prejudgment writ of replevin, posted its bond, and seized the collateral. On November 16, 1992, Pici made the November payment to First Union. Subsequently, he moved the trial court for a dismissal of the writ of replevin. From the denial of that motion, Pici took this appeal. 515

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510. *Id.* at 113-14.
511. 637 So. 2d 295 (Fla. 4th Dist. Ct. App. 1994).
512. *Id.* at 296.
513. 621 So. 2d 732 (Fla. 2d Dist. Ct. App.), *review denied*, 629 So. 2d 132 (Fla. 1993).
514. *Id.* at 733.
515. *Id.*

https://nsuworks.nova.edu/nlr/vol19/iss1/9
In reversing the trial court, the appellate court noted that Florida law identifies equitable grounds for denying foreclosure on an accelerated basis. These grounds include circumstances where the mortgagor has tendered payment after default but before the notice of the mortgagee's accelerating the obligation has been given to the mortgagor. Noting that the key term is "tender," the court emphasized that it is not necessary for the mortgagee to accept the tender for this equitable principle to apply. Actual acceleration cannot be accomplished without notice to the debtor. Once the debtor tenders all sums due, his account is current and a prejudgment writ of replevin would not be sustained.

Republic National Bank v. Manzini & Associates, P.A. This is a per curiam opinion from an appeal held before Chief Judge Schwartz and Judges Nesbitt and Cope. The question presented to the court was whether the holder of a note and mortgage was estopped from asserting its mortgage on the ground that the FDIC gave mistaken information as to the mortgagee's satisfaction.

Manzini and Associates took a quitclaim deed to a condominium in place of receiving payment for legal services. At the time it knew that there was a mortgage on the subject property. Subsequently, the FDIC advised the firm that the mortgage was satisfied. Therefore, although this information was incorrect, the law firm took the position that the lender should be estopped from asserting its mortgage.

In reviewing this case, the district court noted that a satisfaction or release of the mortgage given as the result of a mistake will not benefit any person or entity who acquires an interest in the property so long as they did not rely on or advance any consideration on the faith of such representation. In this case, the law firm neither relied on nor advanced any consideration on the basis of the incorrect information. Therefore, Republic was not estopped from asserting its mortgage.

Sand Point Village, Ltd. v. Highlands Insurance Co. This is an opinion arising out of an appeal heard before Judges Baskin, Jorgenson, and

516. Id. at 734.
517. Id. at 733-34.
518. 621 So. 2d 709 (Fla. 3d Dist. Ct. App. 1993), review denied, 634 So. 2d 625 (Fla. 1994).
519. Id. at 710.
520. Id.
521. Id.
522. Id.
523. 634 So. 2d 311 (Fla. 3d Dist. Ct. App. 1994).
Levy. The question was whether the trial court erred in enforcing a settlement stipulation between an insurance company and property owner. The settlement provided for insurance payments to the first mortgagee, but not to the second mortgagee. The second mortgagee also challenged the dismissal of the action with a discharge of the insurance company's further liability relating to the fire in question. 524

The Third District Court of Appeal reversed the trial court. 525 In so doing, it reasoned that the second mortgagee had not been given adequate time to explore the ramifications of the settlement agreement. In addition, the court noted that the second mortgagee was not a party to the settlement. Therefore, since its rights are materially affected by the decision as to whether or not it receives proceeds from the insurance company and as to the amount of insurance paid to the first mortgagee, resulting in a reduction in the principal owed to the first mortgagee, the trial court erred in discharging the insurance company prior to the second mortgagee's being afforded the opportunity to conduct the necessary discovery to ascertain the ramifications of the settlement agreement. 526

Sciandra v. First Union National Bank. 527 This is a per curiam opinion from an appeal heard before Acting Chief Judge Hall and Judges Blue and Altenbernd. Judge Altenbernd concurred specially with an opinion. The question was whether the trial court erred in awarding interest on the amount found due as pre-judgment interest. The Second District Court of Appeal found that the trial court did err, and therefore, reversed that portion of the judgment. 528

Judge Altenbernd's concurring opinion raises the doctrine of merger, i.e., that the cause of action and the damages recoverable as a result of it, merge into the judgment entered on that cause of action. 529 Judge Altenbernd noted that the judgment's aggregate amount includes many elements of damages, including, but not limited to the interest in question. Once the judgment is entered it does not bear interest as a cause of action or as an element of damage but, rather, as a single judgment. Therefore, there would not be a compounding of interest. The concurring opinion

524. Id. at 312.
525. Id.
526. Id.
527. 638 So. 2d 1009 (Fla. 2d Dist. Ct. App. 1994).
528. Id. at 1009.
529. Id. at 1010.

https://nsuworks.nova.edu/nlr/vol19/iss1/9
suggests that it would be more appropriate to regard pre-judgment interest as an early award of judgment interest to solve the problem.\textsuperscript{530} Also, effective October 1, 1994 is Senate Bill No. 204 of chapter 94-288 of the \textit{Florida Statutes}.\textsuperscript{531} As of that date it will be unlawful for any person, with the intent to defraud the owner of real property, to engage in such activities as purchasing defined real estate subject to loans that either are in default at the time of purchase, or which go into default within one year after the purchase, where such loan is secured by a mortgage or deed of trust, and there is a failure to make the mortgage payments and the purchaser uses the income from such properties for his own use. These acts will constitute a third degree felony and will be punished as provided in sections 775.082, 775.083, and 755.084 of the \textit{Florida Statutes}.\textsuperscript{532}

**XXII. OPTIONS**

\textit{Drost v. Hill}.\textsuperscript{533} This is an opinion written by Judge Cope with which Judges Nesbitt and Levy concurred. A six month lease included a term option to extend the lease for a five year term. If the five year option would have been exercised, then the tenants would also have had the option to purchase the property. But neither a purchase price nor a method of determining a purchase price were specified. The price was to be established at some time in the future.

The tenant notified the landlord that it was exercising the five-year extension option, but the parties were unable to agree to the terms. The tenant sued for specific performance, which the trial court awarded, ordering the landlord to provide that the option purchase price would be the property’s fair market value. The district court reversed. It held that the lack of terms and the ongoing negotiations established there had been no meeting of the minds on a material term, i.e., the price. Consequently, the option was illusory and an illusory contract cannot be enforced.\textsuperscript{534}

**XXIII. TAXES**

\textit{Florida Hotel and Motel Ass’n v. State}.\textsuperscript{535} This is an opinion written by Judge Webster with which Judges Booth and Allen concurred. The

\textsuperscript{530} \textit{Id.}
\textsuperscript{532} \textit{See id.}
\textsuperscript{533} 639 So. 2d 105 (Fla. 3d Dist. Ct. App. 1994).
\textsuperscript{534} \textit{Id.} at 106.
\textsuperscript{535} 635 So. 2d 1044 (Fla. 1st Dist. Ct. App. 1994).
question before the court was whether the tangible personal property that hotels and motels purchase and use in guest rooms, incident to their business, is purchased for "resale," and thereby prohibited from a tax exemption on that ground. The court also considered whether imposing a sales tax or use tax on the purchase of that property and upon the rental of guest rooms constituted duplicate taxation.

The subject questions arose from a petition for a declaratory statement filed with the Department of Revenue by Florida Hotel and Motel Association, Inc. and Naples Golf and Beach Club, Inc. When the department rejected their claims, they took the subject appeal. Recognizing that hotels and motels are in the business of furnishing services and entertainment, the appellate court noted that hotels and motels are simply not in the business of buying and reselling or leasing guest room furniture, furnishings, and consumables. Therefore, they were not entitled to the exemption provided by section 212.05(1)(a)1.a of the Florida Statutes.

Fuchs v. Wilkinson. This is an opinion written by Justice Overton with which Chief Justice Barkett and Justices McDonald, Shaw, Grimes, Kogan, and Harding concurred. The question presented to the court was whether the trial court erred in holding that the limitations on the assessed value of homestead property contained in an amendment to article VII, section 4, of the Florida Constitution, were to become effective January 1, 1994, rather than January 1, 1995, thereby making 1993 the base year for the limitations' application. The question came before the Florida Supreme Court as one certified from the Second District Court of Appeal.

The Florida Supreme Court held that the amendment's clear language indicated January 1, 1994 as the first "just value" assessment date. Because of this, the operative date for the limitations contained in the amendment to establish the "tax value" of homestead property would be January 1, 1995.

The difficulty arising in this case came from the amendment's lack of an effective date provision. Where an amendment fails to establish an effective date, the Florida Constitution provides that the amendment shall become effective on the first Tuesday after the first Monday in January.
following the date of the election in which the voters adopted the amendment. The amendment in this case was adopted November 3, 1992, and thus became effective on January 5, 1993. Therefore, the year following the effective date of the amendment is 1994 and, pursuant to the express language of the statute, January 1, 1994 became the date for assessing the property at just value. As a result, January 1, 1995 became the first tax year date where the limitations in the amendment would be used to calculate the “tax value” of the homestead property.

**Margate Investment Corp. v. Lupowitz.** This opinion was written by Judge Polen with which Judges Glickstein and Warner concurred. The question before the court was whether the grantor, under a general warranty deed executed in 1981, breached its covenant against encumbrances by failing to pay those real property taxes levied for 1980, but were not assessed until 1985. Relying on section 197.056(1) of the *Florida Statutes*, the court opined that real estate taxes are liens as of the year the taxes are levied. Therefore, if they in fact encumber the property when the grantor makes the warranty, the grantor has not breached the warranty against encumbrances.

**Santana v. Metropolitan Dade County.** This is an opinion written by Judge Cope. The sole question before the court was whether one who was looking to redeem a tax deed had to pay not only what was due on the tax deed but, in addition, any other delinquent taxes that remained unpaid even if they had not yet been reduced to tax deeds. The Third District Court of Appeal answered the question in the affirmative.

**Sarasota County v. Sarasota Church of Christ, Inc.** This is a per curiam opinion with which Acting Chief Judge Campbell and Judge Threadgill concurred, and with which Judge Schoonover concurred in result only. The question was whether churches, which are exempt from taxation, would also be exempt from the payment of special assessments. The appellate court affirmed the trial court in finding that fire and rescue

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543. FLA. CONST. art. XI, § 5(c).
544. Fuchs, 630 So. 2d at 1046.
545. 638 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).
546. *Id.* at 143.
547. *Id.*
548. 641 So. 2d 117 (Fla. 3d Dist. Ct. App. 1994).
549. *Id.* at 118.
550. *Id.* at 119.
services were valid special assessments for which churches would be liable, but that stormwater management services would not be. 552

Section 3 Property Corp. v. Robbins. 553 This is an opinion written by Justice McDonald with which Justices Overton, Shaw, Grimes, Kogan, and Harding concurred, and with which Chief Justice Barkett concurred in the result only. The question before the court was presented as a certified question:

Is there a right to a jury trial under Article I, Section 22 of the Florida Constitution (1968), in a tax action to challenge a Property Appraiser's grant of an agricultural exemption? 554

The Florida Supreme Court answered the question in the negative. 555 The court reasoned that controversies surrounding the taxation of real property were typically found in equity, not in law. 556 The majority looked to section 194.171 of the Florida Statutes to ascertain whether the legislature had provided for an alternative approach. Finding that it had not, the court determined that, although it would require some factual determination to answer the question, the analysis was more like determining an interest in realty, thereby invoking the court's equitable jurisdiction. 557

SEC v. Elliott. 558 This is an opinion written by Justice Shaw with which Justices Overton, Kogan, and Harding concurred. However, Chief Justice Barkett dissented with an opinion with which Justices McDonald and Grimes concurred. The question presented to the court was a question certified by the Eleventh Circuit Court of Appeal as follows:

Does a Florida tax certificate represent an interest in land for purposes of the Florida Uniform Commercial Code, so that Article 9 does not govern the creation of a security interest therein by virtue of § 679.104(10) [ , Florida Statutes (1991)?] 559

552. Id. at 901.
553. 632 So. 2d 596 (Fla. 1993).
554. Id. at 596.
555. Id.
556. Id.
557. Id.
558. 620 So. 2d 159 (Fla. 1993). The Eleventh Circuit answered the certified question in the affirmative. See 998 F.2d 922 (11th Cir. 1993).
559. Id. at 159.
The question arose from Elliott’s use of Florida tax certificates as collateral for a loan. When his assets ended up in equitable receivership, the creditors attempted to collect the taxes paid on the subject properties. However, the district court’s order froze those assets. The district court concluded that those certificates were intangible personal property when used as collateral, i.e., general intangibles, and that the only way to protect a security interest in those assets would have been by filing a UCC financing statement with the secretary of state. Because the creditors had failed to do so, they were unsecured. The Florida Supreme Court answered the certified question in the affirmative, thereby finding that the UCC filing was unnecessary.

The majority opinion based its conclusion on the analysis of three statutes. The first was section 197.102. This statute defines a tax certificate as a legal document representing unpaid delinquent real property taxes which becomes a first lien on the subject property. The second statute was section 679.104(10). This statute provided that chapter 679 would not apply except to provide for fixtures, to the creation of or the transfer of interests in or liens upon real estate, including leases or rents. The third statute was section 679.102(2). This statute provided that chapter 679 would not apply to statutory liens. The court reasoned that because a tax certificate was a lien on real property and a statutory lien, the language of sections 197.02(3), 679.104(10), and 679.102(2) clearly excludes tax certificates from chapter 679. The majority felt that the primary question was whether the tax certificate itself was exempt from chapter 679.

On the other hand, Chief Justice Barkett and Justices McDonald and Grimes differed on that question. Chief Justice Barkett’s dissenting opinion pointedly criticized the majority opinion. The dissent agreed that one’s holding of a tax certificate creates an interest that is not subject to chapter 679. However, it pointed out that the question here was whether the transfer of an interest in those certificates as collateral for a loan would be subject to chapter 679. To support their position, the dissenters pointed to the UCC’s official comment to section 679.102(3). The gist of the official comment is that the UCC does not apply to the creation of a

560. Id. at 159-60.
561. Id. at 159.
563. Id. § 679.104(10).
564. Id. § 679.102(2).
565. Elliott, 620 So. 2d at 160.
566. Id. at 161.
mortgage. In addition, it will not apply to the sale of the note by the mortgagee. On the other hand, if the mortgagee pledges the note to secure the mortgagee's separate indebtedness to a third person, the UCC would apply to that security interest. The dissenters felt that the circumstances involved in the instant case were analogous to the last scenario in the official comment.  

XXIV. TITLE INSURANCE

Sommers v. Smith and Berman, P.A. This is an opinion written by Judge Klein with which Chief Judge Dell and Senior Judge Owen concurred. The question before the court was whether a title insurance company was liable to the purchasers of real estate for the purported negligence of the attorney who handled the closing and issued the title insurance policy through the underwriter.

The purchasers and the sellers of the real estate in question entered into a contract. However, the contract refers to the property only by street address. Because of representations made by the seller and the real estate broker, the purchasers thought that the property was larger than it actually was. The lawyer who represented the buyers at closing and who issued the title insurance policy through the underwriter was aware of a survey that obtained a legal description fitting the buyers' expectations but which was different from the legal description in the deed and the title insurance policy. The appellate court held that, since one can be an agent of the insurance company for one purpose and an agent of the insured for other purposes, there would be no liability on the part of the underwriter where the title insurer did not conduct the closing as a "closing agent."

XXV. VENDOR AND PURCHASER UNDER CONTRACT OF PURCHASE AND SALE

Bird Lakes Development Corp. v. Meruelo. This is an opinion written by Judge Ferguson. The buyer bought thirty-five acres of undeveloped land after the seller orally represented that there were sewer lines. On discovering that not to true, the buyer sued for specific performance and

567. Id.
568. 637 So. 2d 60 (Fla. 4th Dist. Ct. App. 1994).
569. Id. at 61.
570. Id. at 61-62.
571. 626 So. 2d 234 (Fla. 3d Dist. Ct. App. 1993), review denied, 637 So. 2d 233 (Fla. 1994).
damages. The judgment for the buyer was affirmed. The trial court did not err when it concluded that the parties entered into an oral contract to construct the sewers. The oral contract did not involve the transfer of any interest in land, e.g., an easement, so it was not required to be in writing by the Statute of Frauds. Furthermore, the contract to construct the sewers was collateral to, but independent of, the contract of sale. Consequently, the merger clause in the contract of sale would not be applicable to the sewer construction contract.

Citicorp Real Estate, Inc. v. Ameripalms 6B GP, Inc. This was a per curiam opinion from Judges Hubbart, Gersten, and Goderich. This case involved contract interpretation and the parol evidence rule. The buyer and seller began negotiating the purchase and sale of two properties, parcels 6 and 6B. The transaction was eventually structured as two separate contracts of sale. The terms of the first contract, which covered parcel 6B, required the buyer to give a $25,000 deposit, and to pay $2 million in cash, and to deliver a $675,000 promissory note at closing. The draft note provided that the note would be payable when the buyer and seller "close, or are obligated to close, on the sale of Unit 6 . . . ." However, the note they executed provided that it would only be payable when the city accepted their application for processing for development approval. When the city accepted the application for processing, the buyer paid the note. The seller used the money to satisfy some of its mortgage debt owed to Citicorp Real Estate.

But something went awry. There was never a closing on parcel 6. Consequently, the buyer sued for the return of its $675,000 from the seller and Citicorp Real Estate on the theories of conversion, money had and received, and unjust enrichment. The trial court granted summary judgment for the buyer and the Third District Court of Appeal affirmed.

The trial court apparently relied upon the contract to reach its conclusion that the money should be returned. It stated that "[t]he law is well established that two or more documents executed by the same parties, at or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract." The note

572. Id. at 236.
573. Id. at 238.
574. 633 So. 2d 47 (Fla. 3d Dist. Ct. App. 1994).
575. Id. at 48.
576. Id.
577. Id. at 48-49.
578. Id. at 49.
and the contract were not executed at the same time, but they were executed by the same parties and the contemporaneous requirement was satisfied by their having grown out of the same transaction. The contract provided the only evidence of the parties' intent to treat the two sales as one transaction, so summary judgment was appropriate.\textsuperscript{579}

\textit{Cruise v. Graham}.\textsuperscript{580} This is an opinion written by Judge Hersey with which Judges Gunther and Stone concurred. As part of a real estate transaction, the seller agreed to take back a second mortgage for part of the purchase price. The agreement provided that the buyer would obtain the rest of the purchase price from another lender who would have a first mortgage, but the first mortgage debt could not exceed $35,950. When it was foreclosed, the seller and his attorney discovered that the first mortgage debt was $45,000.\textsuperscript{581}

The seller had $35,950 in reserve to redeem the property from the first mortgage in the event of default. However, the seller apparently was not allowed to redeem for that amount and the foreclosure sale extinguished his security interest. As a result, the seller brought this suit for fraudulent misrepresentation against the mortgage broker and its employee, Ray Cruise. The seller prevailed in the trial court and the Fourth District Court of Appeal affirmed.\textsuperscript{582}

The first defense raised was that the defendants' representations had been made to plaintiff's attorney and not directly to the plaintiff. The appellate court had little difficulty in disposing with this argument. Generally, an attorney is an agent of his or her client. The acts of an agent are the acts of the principal. Therefore, misrepresentations made to the agent are, in effect, misrepresentations made to the client.

Another defense raised was that the seller, or seller's attorney, was negligent or at fault for not properly examining the documents prior to or at the closing. But this was an action based on fraud. Fraud is an intentional tort. Consequently, the seller's comparative fault or negligence was not a defense.

Finally, the defendants argued that punitive damages should not have been awarded since there was no evidence introduced that the defendants' conduct was outrageous or reprehensible. The district court rejected the argument.\textsuperscript{583} It is now an accepted rule in Florida that punitive damages

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\item \textsuperscript{579} Citicorp Real Estate, 633 So. 2d at 49.
\item \textsuperscript{580} 622 So. 2d 37 (Fla. 4th Dist. Ct. App. 1993).
\item \textsuperscript{581} Id. at 38.
\item \textsuperscript{582} Id. at 39-40.
\item \textsuperscript{583} Id. at 41.
\end{itemize}
\end{footnotesize}
can be awarded based upon a claim of fraud if there is sufficient evidence to support an award of compensatory damages.\textsuperscript{584} In this case there was sufficient evidence that: 1) the representations had been made, even if that had occurred in a telephone conversation two months before the closing, 2) the defendants had justifiably relied upon them, and 3) the plaintiff had been harmed.\textsuperscript{585}

\textit{Edelberg v. Monogram Building & Design}.\textsuperscript{586} This is an opinion written by Judge Hersey with which Judge Pariente and Senior Judge Walden, James H., concurred. Section 501.1375 of the \textit{Florida Statutes} concerns contracts to purchase one or two-family homes from building contractors or developers.\textsuperscript{587} The statute requires deposits of up to 10\% of the purchase price be put in interest bearing escrow accounts. According to the statute, that money can be released without the signature of both the buyer and seller in only five situations: 1) the posting of a surety bond; 2) the existence of a master security bond; 3) the buyer properly terminates the contract; 4) the buyer defaults; or 5) at closing, if the funds have not been previously disbursed.\textsuperscript{588} The Fourth District Court of Appeal interpreted the language of the fourth situation.\textsuperscript{589}

The escrow money had been in a law firm’s trust account. The buyers allegedly tried to withdraw from the transaction due to their financial reverses. The developer considered this to be a default which would entitle it to withdraw the money. As required by the statute, it gave the buyer notice of its intention to make the withdrawal, after a seventy-two hour wait, based upon the default. The buyers claimed that they were not in default because the contract was conditioned on their ability to get financing. They sought, but were refused, a temporary injunction. So the developer completed the statutory procedure and withdrew the money.\textsuperscript{590}

The trial court refused to issue the injunction because it involved only a dispute over money. The district court rejected the trial court’s logic. First, it pointed out that the statute allowed disbursal in the event of a buyer’s default, not in the event the developer certifies that the buyer is in

\textsuperscript{584} Id.
\textsuperscript{585} Cruise, 622 So. 2d at 39.
\textsuperscript{586} 630 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1994).
\textsuperscript{587} FLA. STAT. § 501.1375 (1989).
\textsuperscript{588} Id.
\textsuperscript{589} Edelberg, 630 So. 2d at 1228-29.
\textsuperscript{590} Id. at 1228.
default. There had been no determination here that the buyer was in default. 591

Furthermore, the statute was intended to be a consumer protection device. Both the spirit of the statute and procedural due process 592 require that the buyer receive a full and fair hearing on a disputed issue at a meaningful time. Consequently, the trial court should not have denied the injunction. There would have to be a judicial determination whether buyer had defaulted before the funds could be disbursed.

The district court, however, refused to speculate on the whether the act provided this escrow agent immunity. The act does provide immunity for the escrow agent who complies with the statutory procedure following default. 593 But in this case, a trial court would first have to determine if there had been a default. 594

Green Acres, Inc. v. First Union National Bank. 595 This is an opinion written by Judge Pariente with which Judges Polen and Farmer concurred. The buyers sued for damages, alleging that the sellers knew, but intentionally failed to disclose, that the land contained an Indian burial site which would interfere with their development plans. The trial court dismissed the complaint for failure to state a claim. The district court reversed, holding that the buyers should have been given the opportunity to amend the complaint to include the claim that the sellers had breached a contractual duty to disclose those facts. 596 The court reasoned that this claim could be based upon certain language in the documents. 597

The court declined to expand Johnson v. Davis, 598 which had abolished caveat emptor in residential real estate sales, to include commercial real estate transactions. 599 The First District Court of Appeal had taken that step, 600 but the Second and Third District Courts of Appeal had expressly refused to do so. 601 This court, however, left open the possibili-

591. Id. at 1229.
594. Edelberg, 630 So. 2d at 1229.
595. 637 So. 2d 363 (Fla. 4th Dist. Ct. App. 1994).
596. Id. at 364-65.
597. Id. at 364.
598. 480 So. 2d 625 (Fla. 1985).
599. Green Acres, 637 So. 2d at 365.
600. See Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st Dist. Ct. App.), review dismissed sub nom. Service Merchandise Co. v. Lane Co., 620 So. 2d 762 (Fla. 1993).
601. See Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d Dist. Ct. App.), review denied, 626 So. 2d 207 (Fla. 1993); Futura Realty v. Lone Star Bldg. Ctrs. Inc., 578
ty that it might conclude, at a later time, that commercial real estate sellers might have a duty to disclose material facts under particular circum-
stances. It is obviously time for the supreme court, or the legislature, to clarify the obligations of the commercial real estate seller.

*Mall v. Pawelski.* This was a per curiam opinion in which Judges Gunther and Pariente, and Senior Judge Downey concurred. The buyer had purchased a house with a seventeen-year-old roof which began to leak shortly after the home was purchased. The buyers eventually replaced the roof, sued for the replacement cost, and won in the circuit court. While agreeing that the seller was liable, the Fourth District Court of Appeal reversed on the issue of damages.

The buyers had bargained for a seventeen-year-old roof. To allow them to recover for the full cost of a new roof with a far greater life expectancy would give them far more than they had bargained for, unjustly enriching them at the seller’s expense. The buyers were entitled only to recover for the roof’s replacement, “prorated to account for the increased life expectancy of the new roof.”

*Walton v. Runck.* This is an opinion written by Judge Hall with which Chief Judge Frank and Judge Parker concurred. This case involved a contract to exchange a parcel of North Dakota land for some Florida land. A dispute arose, which resulted in this suit. The trial court concluded that the parties had abandoned the contract. Then, exercising its broad equity powers, the trial court divided the equity in the Florida land and ordered it sold even though neither party had asked for that relief. The district court concluded that, under established law, the trial court did not have jurisdiction to grant such relief without a request for it from one of the parties.

**XXVI. WATER AND WATER COURSES**

*Chiles v. Floridian Sports Club, Inc.* This is an opinion written by Chief Judge Harris with which Judges Sharp and Thompson concurred. The question before the court was whether the trial court erred in holding, as a
matter of law, that the waters of the St. Johns River in Welaka (Putnam County) were non-tidal waters. 609

Through a series of mesne conveyances, Floridian acquired title to real property abutting the St. Johns River, at which time a lease was in effect that required the abutting landowner to make annual rental payments to the state for the submerged land underlying the landowner’s boathouse and docks. However, when the state demanded the required lease payments, Floridian filed a declaratory judgment action to determine whether it was exempted from having to make such rental payments. Floridian’s argument in favor of such exemption was that, since prior cases have found that the St. Johns River waters were non-tidal in Welaka, the affidavits in opposition to Floridian’s motion for summary judgment, purportedly factually establishing that the waters in that area were tidally influenced, were ineffective for the purposes of defeating a motion for summary judgment. 610 To gain the protection of the Butler Act and to show that the state had no title to the submerged lands, Floridian needed to show that the waters were either non-tidal or that, if they were tidal waters, the improvements were completed prior to May 29, 1951 when the Butler Act was repealed as to submerged land in tidal waters. 611

The Florida Supreme Court reversed and remanded to the trial court for further proceedings since the supreme court took the position that, notwithstanding prior case law, the affidavits presented by the state in this case created genuine issues of material fact. 612

Concerned Citizens of Putnam County for Responsible Government, Inc. v. St. Johns River Water Management District. 613 This is an opinion written by Judge Peterson with which Judges Goshorn and Thompson concurred. The question before the court was whether the trial court erred in dismissing Citizens’ complaint for injunctive relief with prejudice. Citizens’ goals were that the St. Johns River Management District be required to establish minimum water flow levels; to refrain, until that time, from issuing consumptive water permits as to those areas of the district having critical water shortage problems; and, to cut back the water consumption volume in those critical areas until the region recovered sufficiently. 614

609. Id. at 50.
610. Id.
611. Id. at 51.
612. Id. at 52-53.
613. 622 So. 2d 520 (Fla. 5th Dist. Ct. App. 1993).
614. Id. at 521.
Citizens’ complaint sought to require the district to comply with the Florida Water Resources Act of 1972, chapter 373 of the Florida Statutes, particularly section 373.042 which requires each district to establish minimum flows and levels.\(^{615}\) The district had taken the position that, although the statute states that each district “shall” establish such minimums, the use of the word “shall” in this section is a directory word, rather than a mandatory one.\(^{616}\)

The Fifth District Court of Appeal pointed out that the usual meaning of “shall” is mandatory. Therefore, the question was whether there was anything in the particular statute to evidence that there was a legislative intent that it was merely directory. Finding that nothing existed to give the language that effect, the court held that the complaint was sufficient to require a response by the district.\(^{617}\) Therefore, the trial court erred. The appellate court vacated the lower court ruling and remanded for further proceedings.\(^{618}\)

Royal Palm Square Ass’n v. Sevco Land Corp.\(^{619}\) This is an opinion written by Chief Judge Frank with which Judges Ryder and Campbell concurred. The question presented to the court was whether the South Florida Water Management District (“District”) erred in entering a final agency action resulting in the dismissal with prejudice of Royal Palm’s amended petition for an administrative hearing in opposition to Sevco’s application for modification of an off-site surface water system permit.\(^{620}\)

The question arose when Sevco entered into a contract to purchase unsettled land next to Royal Palm’s property. To determine whether it could develop the area, Sevco applied to the District to modify the permit for an off-site surface water system so that Sevco could also run its waters into that system. To permit this, the District required the creation of an association between Sevco and Royal Palm to manage the entire water system. In response, Sevco produced what was entitled a final operation and maintenance agreement which supposedly showed the association between Sevco and Royal Palm. However, Royal Palm had not reached such an agreement with Sevco.\(^{621}\)

\(^{615}\) Id. at 522.
\(^{616}\) Id.
\(^{617}\) Id. at 523.
\(^{618}\) Concerned Citizens, 622 So. 2d at 525.
\(^{619}\) 623 So. 2d 533 (Fla. 2d Dist. Ct. App. 1993), review dismissed, 639 So. 2d 981 (Fla. 1994).
\(^{620}\) Id. at 534.
\(^{621}\) Id.
Believing that there was such an agreement between the two entities, the District approved the modification of the permit, provided that the association was given sufficient ownership of the system so that it had control over the entire water management facility. Royal Palm amended its petition challenging the modification because Sevco did not have any ownership interest in the water management system as required by the District. After an informal hearing, the Water Management District's governing board granted the amended petition. However, because Sevco subsequently agreed to assume the sole and comprehensive responsibility for the maintenance of that system, the District never had a formal hearing and dismissed Royal Palm's amended petition with prejudice. 622

In deciding to reverse the District and remand the matter with direction to initiate appropriate formal hearings, the appellate court found that Royal Palm had met its burden. First, it had to demonstrate that it had a substantial interest that would suffer immediate injury by the modification. Royal Palm met this requirement since it was a property owner possessed of legal right to drain into the system, and its rights could be diminished dramatically by the introduction of additional surface waters. 623 Second, it had to show that the injury suffered was the type for which such formal hearings were designed to protect. With respect to the second requirement, Royal Palm alleged in its amended petition that Sevco's application failed to satisfy the prerequisite that there was an entity with sufficient ownership for a proprietary control over the system. 624

XXVII. ZONING

Board of County Commissioners of Brevard County v. Snyder. 625 This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Kogan, and Harding concurred. Justice Shaw dissented without an opinion. Landowners sought rezoning of a one half acre parcel. The planning and zoning staff concluded that the rezoning would be consistent with the comprehensive plan except for the fact that it was located in the flood plain. After discovering the flood plain problem could be eliminated by raising the elevation with fill, the planning and zoning board approved the rezoning request. The application then went
to the county commission. A number of citizens appeared to oppose rezoning, expressing fears of increased traffic. Without stating a reason, the county commission denied the rezoning. From there, the case went to the circuit court, where the landowners were unsuccessful, and subsequently to the district court of appeal, where their degree of success was amazing. However, that success was short lived. The Florida Supreme Court quashed the district court's opinion.

The enactment of an original zoning ordinance is legislative in character. However, rezoning may be quasi-legislative or quasi-judicial. Legislative action "results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy." Therefore, "comprehensive rezonings affecting a large portion of the public are legislative in nature." Conversely, rezonings which affect a limited number or properties or property owners are judicial in nature. In this case, the rezoning decision of an area of one-half acre owned by one person was clearly quasi-judicial.

Such decisions are reviewable by the courts by writs of certiorari. The standard of review is strict scrutiny, but not in the way that term is used in describing review in constitutional cases. The review is to determine if the rezoning is in strict compliance with the comprehensive plan. Rezoning that is inconsistent with the comprehensive plan would be reversed. However, that does not mean that an application for rezoning consistent with the comprehensive plan must be granted. The purpose of planning is to deal with the future as well as the present. The government must be given leeway to conduct that planning. If the government's decision to deny the rezoning is based upon substantial, competent evidence, then the court should defer to that decision.

Accordingly, a landowner who seeks to rezone a particular property is involved in a quasi-judicial proceeding. He or she has the burden of proving that the proposal is consistent with the comprehensive plan and complies with the procedural requirements of the zoning ordinance. Then the burden of proof shifts to the government. The government must demonstrate that the denial accomplishes a legitimate public purpose, i.e.,

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626. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991), jurisdiction accepted, 605 So. 2d 1262 (Fla. 1992), and quashed by 627 So. 2d 469 (Fla. 1993).
627. Snyder, 627 So. 2d at 476.
628. Id. at 474.
629. Id.
630. Id.
that the refusal to rezone is not arbitrary, discriminatory, or unreasonable.\textsuperscript{631} Having failed to obtain the rezoning, the landowner might claim that the denial effects a taking of his or her property and seek compensation by an action for inverse condemnation.

\textit{Parker v. Leon County.}\textsuperscript{632} This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Kogan, and Harding concurred. Justice Shaw dissented without a written opinion. In \textit{Parker}, two cases were consolidated for review by the Florida Supreme Court.\textsuperscript{633} In both cases, developers had applied for approval of preliminary subdivision plats and met with denials from the County Planning Commission and the Board of County Commissioners on the theory that the proposed subdivisions were inconsistent with the comprehensive plan. Each developer filed a petition for a writ of certiorari with the circuit court which held in favor of the developers.\textsuperscript{634} The First District Court of Appeal reversed.\textsuperscript{635}

The district court reasoned that the developers’ sole route to circuit court review of the County Commission decision was via section 163.3215 of the \textit{Florida Statutes}.\textsuperscript{636} However, the filing of a verified complaint with the local government within thirty days of its “inconsistent action” is a condition precedent to relief under this section.\textsuperscript{637} Consequently, on remand the circuit court dismissed the developers’ actions.\textsuperscript{638} The district court affirmed and certified the following question to the supreme court:

\begin{center}
WHETHER THE RIGHT TO PETITION FOR COMMON LAW CERTIORARI IN THE CIRCUIT COURTS OF THE STATE IS STILL AVAILABLE TO A LANDOWNER/PETITIONER WHO SEEKS APPELLATE REVIEW OF A LOCAL GOVERNMENT DEVELOPMENT ORDER FINDING COMPREHENSIVE PLAN
\end{center}

\textsuperscript{631.} \textit{Id.}

\textsuperscript{632.} 627 So. 2d 476 (Fla. 1993).

\textsuperscript{633.} Emerald Acres Investments, Inc. \textit{v.} Board of County Comm’rs of Leon County, 601 So. 2d 577 (Fla. 1st Dist. Ct. App. 1992), \textit{quashed by} Parker \textit{v. Leon County, 627 So. 2d} 476 (Fla. 1993); Parker \textit{v. Leon County, 601 So. 2d} 1223 (Fla. 1st Dist. Ct. App. 1992), \textit{quashed by} 627 So. 2d 476 (Fla. 1993).

\textsuperscript{634.} Parker, 627 So. 2d at 477.

\textsuperscript{635.} Leon County \textit{v.} Parker, 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990).

\textsuperscript{636.} \textit{Id.} at 1316.

\textsuperscript{637.} Inconsistent action refers to governmental action inconsistent with the comprehensive plan. \textit{See} \textit{Fla. Stat.} § 163.3215(4) (1989).

\textsuperscript{638.} Parker, 627 So. 2d at 478.
INCONSISTENCY, NOTWITHSTANDING SECTION 163.3215, FLORIDA STATUTES (1989)?

The supreme court answered the question in the affirmative and quashed the district court opinion. The court used the traditional tools of statutory interpretation to reach its conclusion that section 163.3215 applied to intervenors, not to the unsuccessful applicant for a permit or approval.

XXVIII. CONCLUSION

The foregoing survey of cases and legislation evidences the continuing evolution of Florida property law. It does not seem to be developing in a manner inconsistent with the mainstream of real estate law in the United States. However, it is critical that the property practitioner remain current, despite the large number of judicial opinions and legislative enactments, to avoid the complications and pitfalls which befell some of the litigants discussed in the cases above.

639. Id. at 477.

640. See Board of Trustees of the Internal Improvement Trust Fund v. Seminole County Board of County Comm'rs, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993), review denied, 634 So. 2d 622 (Fla. 1994). The Fifth District Court of Appeal held in this case that the Department of Natural Resources and the Board of Trustees of the Internal Improvement Trust Fund, claiming that the county's development order was inconsistent with the comprehensive plan, were limited to relief under § 163.3215 of the Florida Statutes. Id. at 596.

641. Parker, 627 So. 2d at 479-80.