ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

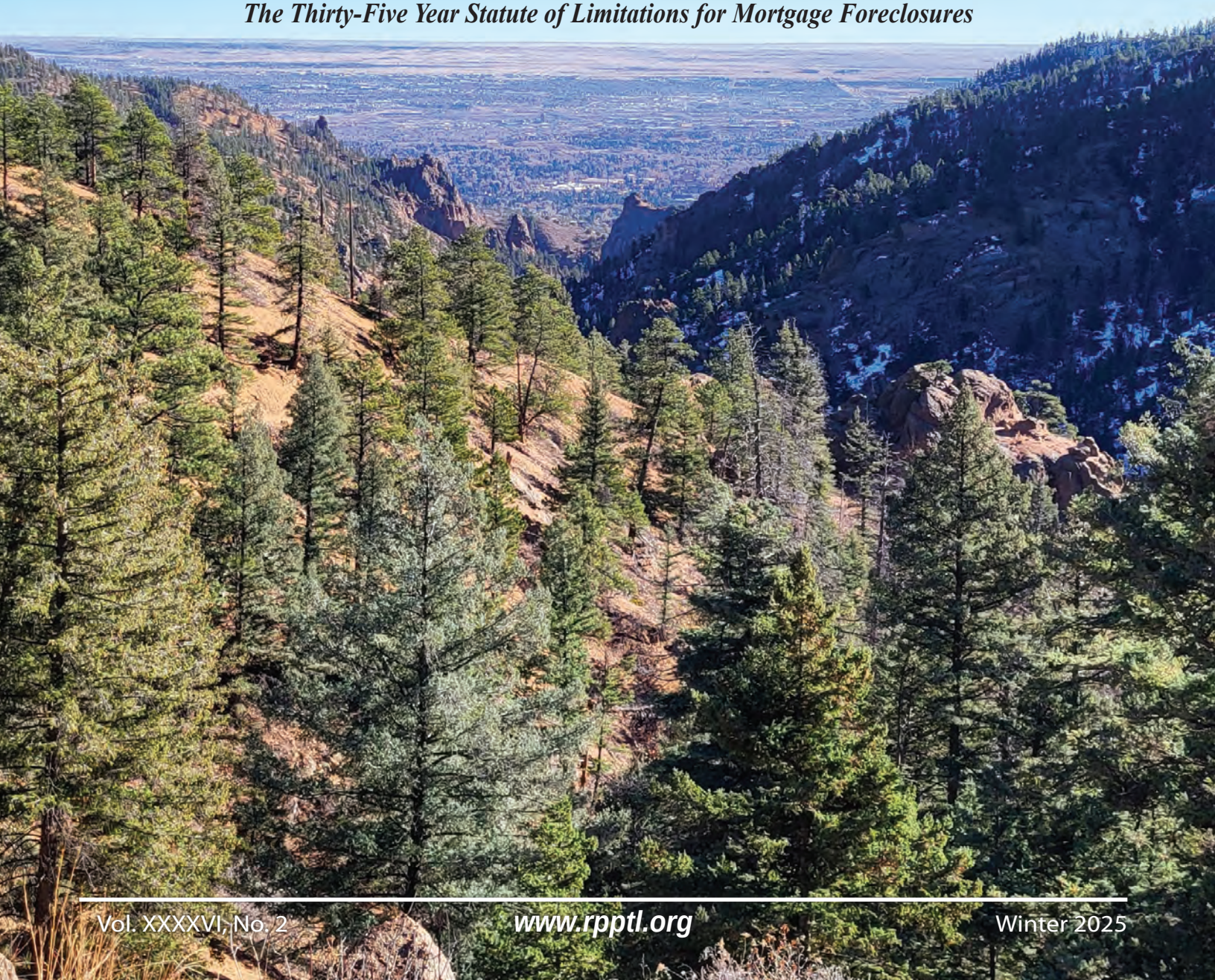
Equitable Claims Despite A Construction Contract: Paschen Affirms The Right To Equitable Relief For Out Of Scope Work

Applying Florida's Valued Policy Law to Wind vs. Flood Hurricane Claims

Limited Scope Audits of Florida Use Tax: An Efficient and Effective Way to Identify Noncompliant Multi-State Individuals and Transactions

The FR/Bar Contract In The Courts – A Survey Of Decisions

The Thirty-Five Year Statute of Limitations for Mortgage Foreclosures



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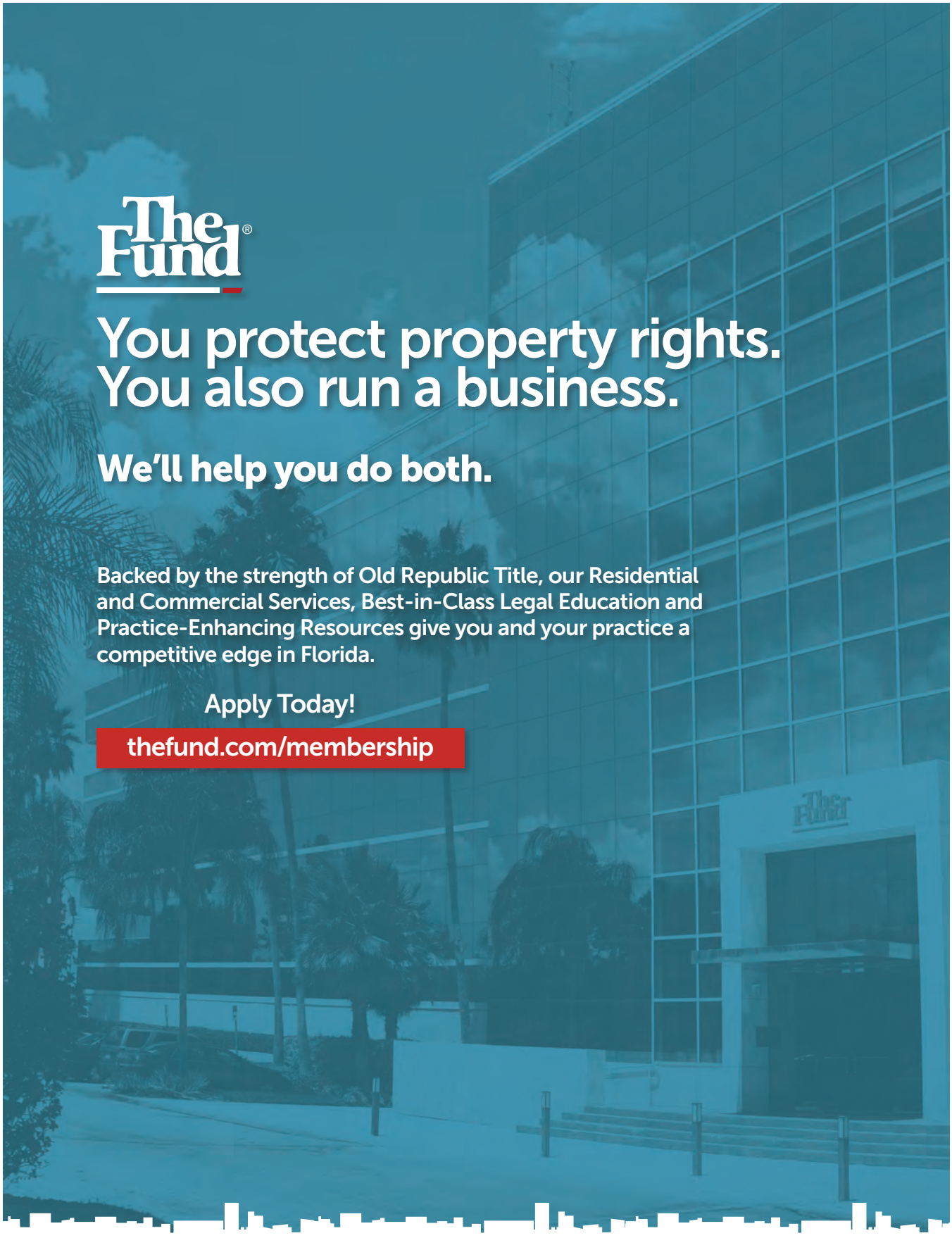

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Safeguarding Humanity in a Digital Age:

THE COUNSELOR'S TOUCH



By John Moran, Esq., Section Chair 2024-2025

Not long ago, I used an AI program to review a draft contract, cross-check for inconsistencies, and generate a summary. The process was seamless. Yet, as I reviewed the draft with my client, I realized my job was only half-finished. The listening, advising, and counseling part was just beginning. It made me wonder: How do we balance the power of AI with the irreplaceable human side of our profession?

AI is everywhere in the headlines. As I write this, news outlets are reporting that technology companies, including Amazon, Google, and Microsoft, are lobbying for a 10-year nationwide ban on states regulating AI. Meanwhile, newly elected Pope Leo XIV has identified the potential threat of AI to humanity as a signature issue. LexisNexis and Harvey, an AI platform designed for legal professionals, just announced a strategic alliance under which Lexis will share its proprietary data with Harvey users. It's an exciting time.

But beneath all the excitement, I sense an undercurrent of quiet anxiety, especially in our field. We are all talking about what AI can do, but no one is really talking about what it's doing to us. As we welcome these advances, what are we gaining? And what might we be losing?

AI can now draft contracts, summarize depositions, and even generate legal arguments. For many of us, especially those newer to the profession, this raises a very real question: If a machine can do what I do – faster and cheaper -- what's left for me? I'd argue that the answer lies not in what AI can do, but in what it can't.

AI can process information, but it can't build trust. It can generate text, but it can't read a room. It can spot patterns, but it can't navigate the emotional terrain of a grieving client or a contentious negotiation. In other words, AI may be a powerful tool, but it's not a replacement for human judgment, empathy, or ethics, which are some of the key qualities that define us as counselors at law.

In his recent book "The Coming Wave," Mustafa Suleyman, the CEO of Microsoft AI, predicts that, "Within the next couple of years, whatever your job, you will be able to consult an on-demand expert … quiz it on the specifics of a legal dilemma … getting ever more detailed answers grounded in the very cutting edge of knowledge, delivered with exceptional nuance." He continues, "All of the world's knowledge, best practices, precedent, and computational power will be available, tailored to you … instantaneously and effortlessly." That's an extraordinary promise, but it also raises a question: If knowledge is free and instant, what becomes of wisdom?

Again, that's where we come in. As lawyers, our job is not just to know the law; it's to apply it with care, with context, and with compassion. That's not something AI can do ... at least not yet. But it is something we can teach, model, and pass on. As we face an uncertain future, our Section is uniquely positioned to respond with curiosity, courage, and the spirit of hospitality that makes this group so special. Together, we should strive to ensure that technology enhances, not replaces, our wisdom, empathy, and professionalism.

So, let's keep the conversation going. Our Section's strength has always been our willingness to learn from each other, to adapt, and to lead with both heart and mind. As we navigate this new landscape, I am confident we will continue to set the standard for excellence, professionalism, and humanity in Florida's real property, probate, and trust law community.

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Letter From The Co-Editors-In-Chief



E. FINLEN



M. HINDEN

Greetings fellow readers!

We're thrilled to bring you another exciting edition of ActionLine magazine, and we hope you enjoy exploring the thought-provoking content that we have put together for this issue.

In his Chair's Column, Chair John Moran, shares valuable insight on the growing role of Artificial Intelligence in the legal profession. As AI continues to revolutionize the industry, his reflection on the enduring need for human connection, wisdom, empathy, and professionalism, reminds us of what truly sets great legal service apart. This is a must-read!

You'll also find an informative article on page 6, by authors **Matthew R. Skaroff** and **Ryan P. Sullivan**, who examine the rise of equitable relief claims for out-of-scope work in construction contracts. On page 12, author **Michael A. Cassel**, provides a timely and relevant article on Florida's Valued Policy Law as it applies to wind and flood hurricane claims, which is especially important now as we are in hurricane season.

Don't miss **Jeanette Moffa's** insightful article on page 16, which breaks down how Florida's sales and use tax laws impact not just sellers but consumers as well. On page 20, **Richard S. McIver** offers a compelling deep dive into case law affecting the FR/Bar Contract and how these case law decisions shape residential real estate transactions in Florida. Also, take a look at page 28, where authors **Matthew Baylor** and **Jason Ellison** present an interesting strategy for addressing statute of limitations in mortgage foreclosure actions.

Be sure to flip to the photo centerspread on pages 32 through 33, which captures moments from the Section's Executive Council Meeting in Coral Gables, Florida, and check out the photos from the Section's out-of-state trip to Colorado Springs, Colorado, on page 34.

We extend our deepest gratitude to our generous sponsors; it is your support that makes this publication possible. We also thank our incredible authors; it is your contributions that make this magazine possible, and we couldn't do it without you.

Thanks,

Erin and Michelle

Equitable Claims Despite A Construction Contract:

Paschen Affirms The Right To Equitable Relief For Out Of Scope Work

By Matthew R. Skaroff, Esq., Cohen Seglias Pallas Greenhall & Furman PC, Fort Lauderdale, Florida, and Ryan P. Sullivan, Esq., Hill, Ward & Henderson, P.A., Tampa, Florida

Florida courts have long recognized the causes of action of *quantum meruit* and its relative, unjust enrichment, including in the context of construction disputes. However, as projects grow larger, construction contracts grow more complex, creating tension with these traditional legal theories.

Indicative of that tension is the common blanket argument in construction litigation that equitable claims cannot stand when an express contract exists. In 2021, in *F.H Paschen, S.N. Nielsen & Associates LLC v. B&B Site Development Inc.,*[1] the District Court of Appeals for the Fourth District clarified this statement, holding that contractors and subcontractors can make equitable claims for out-of-scope work, notwithstanding the existence of an express contract. Although, unlike much of the prior case law, *Paschen* permitted equitable theories to prevail in the context of a complex construction contract more representative of the modern contracts used today.

In this article, we review the history leading up to *Paschen*, examine *Paschen* in detail and the court's analysis, explore cases after *Paschen*, and discuss potential implications of *Paschen*'s principles.

Paschen's Predecessors

In 1951, the Supreme Court of Florida decided *DeLotto v. Fennell*,[2] where it affirmed the simple concept that costs for out-of-scope work performed at the request of the opposing party could be recovered on the basis of an obligation implied at law. Though the Court did not categorize this relief explicitly as "*quantum meruit*," the *Paschen* court would later do so.

The fact pattern of *DeLotto* offers a glimpse at the purest form of *quantum meruit* in the construction context. *DeLotto* involved an oral agreement for a residential remodel initially estimated to cost $4,800. During the course of work, the scope grew to include removal of rotten material, as well as changes to the plumbing work and other items. It was undisputed that the aforementioned work was not contemplated by the parties at the time of their original agreement, but upon receiving a statement for $6,790.82, the owner challenged the claim on the basis that the "extras" should be included in the guaranteed maximum price of $4,800. Unsurprisingly, the Court rejected this argument and confirmed the award for the extra work, explaining simply, "the law implies an obligation [on the owner] to pay the reasonable costs."[3] Thus, the Court established the principle that an implied contract may arise notwithstanding an express contract where a contractor or a subcontractor performs "extras" not covered by the original contract.

The facts of *DeLotto* appear almost alien in comparison to modern complex construction contracts. It is free from rigorous change order procedures, thoroughly detailed "Contract Documents," site inspection and survey requirements, and unforeseen site conditions clauses, among other things. Though a small number of cases following *DeLotto* carried on its general principle, they did so in unique contexts and with somewhat haphazard logic.[4]

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One may speculate that *DeLotto's* somewhat limited progeny resulted from the Court's failure to explicitly use the term "*quantum meruit*." As every lawyer is aware, phrasing and terminology are of paramount importance in the presentation of a case and in the development of the law. Strongly phrased legal points not only can persuade a court, but they can also get cited in subsequent cases.

Parallel to the limited progeny of *DeLotto*, numerous opinions have been published in Florida stating and citing some variation of the superficial principle that "the law will not find an implied contract if an express contract exists concerning the same subject matter."[5] This general statement, well supported by citations, makes for an easy first attack in a construction dispute. Such an attack is generally intended to defeat equitable claims and keep the dispute within the confines of the parties' contract, which may contain exculpatory provisions and administrative requirements providing defenses to such claims.

Paschen Brings *Quantum Meruit* and *DeLotto* into the Modern Era

Paschen was decided by the District Court of Appeals for the Fourth District in 2021.[6] *Paschen* involved a scope dispute between a general contractor and a subcontractor on a project for a United States Postal Service ("USPS") facility in Okeechobee, Florida. The general contractor's scope of work included the demolition of a parking lot, which contained both concrete and asphalt sections. The general contractor failed to properly review the parking lot prior to bidding and mistakenly submitted its bid to USPS with the assumption that the entire parking lot was concrete. It offered to demolish and replace the entire area without qualification or exclusion.

The documents used to solicit bids reflected this mistake, interchangeably using the terms "pavement," "cement concrete pavement," "existing Portland cement concrete pavement," and "existing PCC pavement" to describe the entire lot. The subcontractor, therefore, submitted a lump-sum bid to replace

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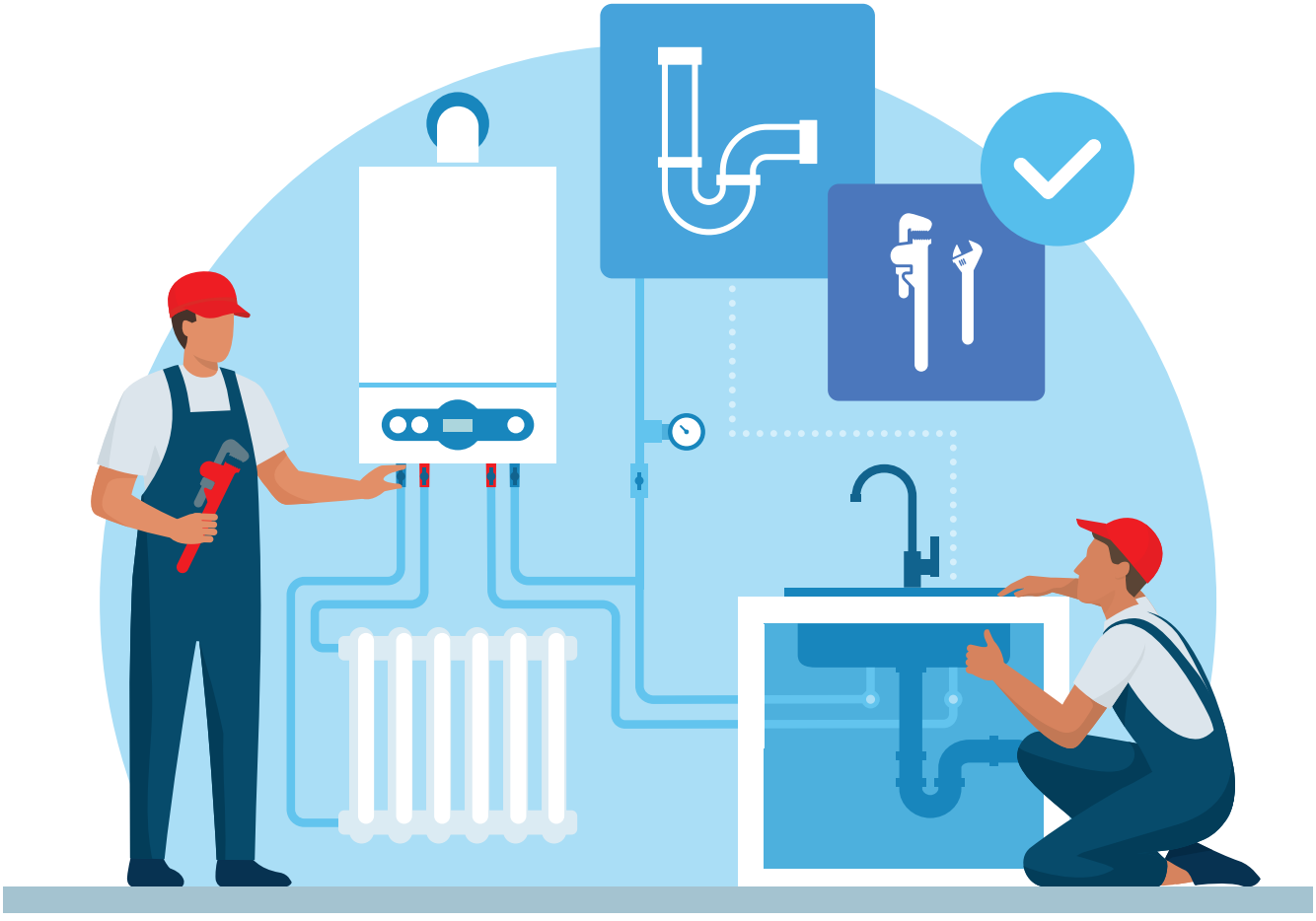

the concrete portion only (i.e., the "pavement") without including the asphalt, after it had inspected the asphalt and saw it to be relatively new.

The general contractor and the subcontractor subsequently entered into a subcontract that, when describing the scope of work, contained general titles and headings such as "Replace Pavement" and "Replace Parking Area," contained a general description stating that "the existing pavement should be demolished," and contained specific descriptions stating that the subcontractor was required to replace "the existing concrete pavement" or "the existing Portland cement concrete pavement."

During construction, a dispute arose regarding the asphalt, with the general contractor claiming it was within the subcontractor's scope. The subcontractor performed the work under protest and submitted a change order request. The general contractor submitted the change order request to the architect, who opined that the asphalt demolition was included in the cost of the project.

The dispute proceeded to litigation, where the subcontractor alleged breach of contract as well as *quantum meruit* and unjust enrichment claims for the asphalt. On summary judgment and in response to the general contractor's argument that "the law will not find an implied contract if an express contract exists concerning the same subject matter," the court addressed the often-cited adage head on. The Fourth District stated, "[t]his general principle has often been misapplied to *all* disputes arising out of an express contract," and cited *Corbin on Contracts* for support in its analysis:

> [W]here the parties have made an express contract, the court should not find a different one by "implication" concerning the same subject matter if the evidence does not justify an inference that they intended to make one. ... [T]he fact that an express contract has been made does not prevent the parties from making another one tacitly, concerning the same subject matter or a different one.[7]

Alongside this reasoning, the court implicitly established a short and obvious test to determine whether a party can maintain an implied contract equitable claim for alleged out-of-scope work, despite the existence of an express contract: the court should construe the express contract to determine the claimant's scope of work, and then review the content of the claim to determine whether the work at issue falls within the express scope.[8] Though this analysis should be second nature to any seasoned construction attorney, *Paschen* cleanly establishes this simple but important concept in Florida case law.

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In the process of its analysis, the *Paschen* court addressed several "catch all" provisions and arguments routinely relied upon by upper-tiered parties to "broaden" a lower-tiered party's scope of work in a scope dispute.

For example, in arguing that the asphalt removal fell within the subcontractor's scope, the general contractor relied on the general headings in the scope of work referenced above (e.g. "Replacement Parking Area" and "Replace Pavement"), as well as a general reference to "the contract plans and specifications." The court, however, properly recognized that the specific descriptions within the subcontract regarding the work controlled and actually modified the cited general descriptions.[9] The court found that the repeated explicit mentions of concrete without any reference to asphalt made clear that the latter was not within the subcontractor's scope.[10]

The general contractor also attempted to rely on the architect's determination to support its argument regarding the scope of work. The general contractor cited the "Disputes" section of the subcontract, which provided that USPS (and its design professional) served as the final arbiter of disputes concerning the plans and specifications (and, as a result, the subcontractor's scope of work). The court similarly rejected this argument, finding the general contractor could not rely on this clause to effectively "rewrite the express language of the contract" and dubbing the architect's determination as "gross mistake" and "manifestly arbitrary," with "little to do with the actual language of the subcontract."[11]

Ultimately, the court permitted the subcontractor to proceed with a damage determination on its equitable claims for the asphalt work. In deciding *Paschen*, the court undertook a sophisticated scope analysis and affirmed a crucial principle for construction litigators regarding the interplay of contractual claims, equitable claims, and out-of-scope work.

Paschen's Progeny and Related Cases

In the time since *Paschen*, Florida courts have further addressed where equitable implied contract theories may be used to assert claims in construction disputes. The overarching theme in these cases follows *Paschen* and maintains that the equitable claims may stand, so long as there is not an express contract covering the disputed work. These decisions have analyzed situations where the implied contract involves third parties.

One example is *WB's Septic & Sitework v. Tucker*.[12] In that case, WB's Septic & Sitework ("WB") signed an express contract with Eddie Tucker to perform work on property owned by his mother, Cybil. WB claimed that the Tuckers failed to pay for the services it provided and sued both Tuckers for lien foreclosure, breach of contract, and *quantum meruit*.

The trial court found Eddie Tucker liable for damages under theories of breach of contract and *quantum meruit*, but not lien foreclosure, because he was not the owner of the property. WB appealed, arguing that the trial court should have found Cybil Tucker, the property owner, liable for *quantum meruit* (thereby establishing lien rights), even if there was no express contract between her and WB. The appellate court correctly held that a contract implied in fact would not stand where an express contract providing relief exists, because the existence of a valid legal remedy against one party bars recovery in equity against a third-party.[13]

When pleading an implied contract theory, many practitioners treat *quantum meruit* (contract implied in fact) and unjust enrichment (contract implied in law) as interchangeable. As the *Paschen* court explained, while these theories often apply in the same factual setting, they are distinct. The contract implied in fact is premised on a tacit promise that is "inferred in whole or in part from the parties' conduct, not solely from their words."[14] By contrast, the contract implied in law is not based on the finding of a tacit agreement between the parties, but is rather "an obligation created by the law without regard to the parties' expression of assent by their words or conduct."[15] The distinction can have significant implications.

Rhythm & Hues, LLC v. Nature's Lawn Care, Inc.[16] involved a dispute where the owner requested the subcontractor perform work outside the scope of the prime contract. The owner paid the general contractor in full, but the subcontractor brought a claim for nonpayment against the owner for the extra work. The county court determined that a contract implied *in fact* was formed between the owner and the subcontractor and awarded damages to the subcontractor.

On appeal, the owner asserted that: 1) the existence of its direct contract with the general contractor barred the subcontractor's claims for a contract implied in fact, and 2) the subcontractor failed to establish the elements for an implied contract, specifically that the subcontractor had exhausted all remedies against the general contractor, and that the owner had not given consideration to *any person* for the improvements furnished by the subcontractor. Following *Paschen*, the Fourth District Court of Appeals rejected the first argument, holding that:

> while an implied contract is generally barred where an express contract exists concerning the same subject matter, Florida courts have 'long recognized that an implied contract may arise out of an express contract where a contractor or subcontractor performs 'extras' not covered by the original contract.'[17]

Regarding the second argument, the court distinguished contracts implied in fact from those implied in law, explaining that a subcontractor could maintain an action for a contract implied in law against an owner only if it could plead and prove that: (1) the subcontractor had exhausted all remedies

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against the general contractor and still remained unpaid, and (2) the owner had not given consideration to *any person* for the improvements furnished by the subcontractor.[18] Though the court described these elements as "essential" to a claim for contract implied in law, it explained that "these elements are not elements of a contract implied in fact cause of action," and affirmed the trial court's holding.[19]

While the distinction between contracts implied in fact and contracts implied in law seems purely academic, the more serious implication in the context of modern construction cases is that *construction liens can arise only from contracts implied in fact; they cannot arise from contracts implied in law*.[20] This is because contracts implied *in fact* signify a "meeting of the minds" between the parties even in the absence of an express contract, whereas contracts implied *in law* do not require such a tacit promise.[21]

Other Implications and Open Questions

Questions still remain as to how the *Paschen* scope analysis will apply in various scenarios.

Time-Related Costs. Florida courts recognize that a contractor can recover in equity for time-related costs, such as for overtime, inefficiency, and extended general conditions.[22] However, when such costs arise from both in-scope work and out-of-scope work being performed at the same time, time-related costs might blend together. Claimants may be able to present a colorable case by allocating portions of such costs to the specific categories of work and separating them into their corresponding causes of action.

Contractual Limits on Claims. Most sophisticated construction contracts contain detailed notice and claim procedures for equitable adjustment and change orders, specifically intended to address out-of-scope work and bring it within the scope of the contract. These procedures generally include waivers of such claims to the extent the lower-tiered party fails to comply. In the context of *Paschen*, the question then arises as to whether such failure in turn would waive the right to an equitable claim.

One can logically reach the conclusion that failing to comply with the contract terms should not bar equitable claims for work that falls outside the scope of the contract. With that said, the protections underlying such notice procedures are still at work in the equitable context. Though upper-tiered parties routinely use such procedures as a defensive bar against claims, the true fair purpose of those procedures is to give a party timely notice that work is drifting beyond the agreed-upon scope and an opportunity to fairly address the "drift" (including by, for example, stopping it, making a timely claim upstream to a more responsible party, or coming to a determination on a fair price before performance). The lost opportunity for these activities can constitute real prejudice to an upstream party, which can serve as a legitimate defense to an equitable claim.

Changes in Means and Methods. Finally, changes in means and methods present potentially one of the more difficult scenarios to undertake a *Paschen* analysis. Generally, means and methods constitute a party's discretionary approach in how it achieves and completes the scope of work (e.g., what equipment to use, potentially the sequence of performance). Often on projects, events occur outside of a party's control that may impact its means and methods (e.g., limited site access that may prevent a contractor from using certain equipment). It is unclear whether a *Paschen* analysis would permit a party to make an equitable claim for extra costs relating to a forced change in its means and methods due to interference or impacts from the other party. At least one pre-*Paschen* case touched on the issue, though it did not include any claimed "bad act" or interference by the opposing party.[23]

Final Thoughts

Paschen formalized in Florida law a crucial building block for construction litigation. Though it recognized a fundamental principle, it has left open various scenarios where its application can be explored. We expect to see future cases developing the concepts in *Paschen* and further expanding construction law in Florida.


M. SKAROFF

Matthew R. Skaroff, *Matthew concentrates his practice in construction litigation, handling multi-million dollar matters on both private and public projects. He primarily represents specialty subcontractors, general contractors, and developers. His practice regularly involves complex time-related claims and scope disputes. Matthew has litigated and arbitrated cases nationwide and is actively involved in various construction trade organizations, including the American Institute of Steel Construction (AISC), for which Cohen Seglias serves as general counsel. He has participated in the development of various initiatives for AISC as well as the development of the most recent version of the Code of Standard Practice for Steel Buildings and Bridges.*


R. SULLIVAN

Ryan P. Sullivan *Ryan focuses his practice on construction transactions and litigation, and is a Board-Certified Specialist in construction law by the Florida Bar. He has experience representing owners, condominium and homeowners associations, developers, contractors, subcontractors, material suppliers, design professionals, and sureties. He has significant experience in construction*

defect litigation and construction contract disputes on both public and private projects, and has advised clients in all phases of construction. Additionally, Ryan is an active member of the Construction Law Committee, and currently serves as a co-vice-chair of the Construction Certification Review Course Committee.

Endnotes

1 *F.H Paschen, S.N. Nielsen & Associates LLC v. B&B Site Development Inc.*,311 So.3d 39 (Fla. 4th DCA 2021).

2 *DeLotto v. Fennell*, 56 So.2d 518, 520 (Fla. 1951).

3 *Id.*

4 See, e.g., *Tassinari v. Chaney*, 187 So.2d 376, 379 (Fla. 1st DCA 1966) (affirming relief for out-of-scope work, but acknowledging absence of "*quantum meruit*" claim in underlying action and seemingly applying substantial compliance standard to satisfy contractual notice provisions); *Broderick v. Overhead Door Co. of Fort Lauderdale*, 117 So.2d 240, 243 (Fla. 2d DCA 1959) (affirming relief for performed out-of-scope work under theory of contract modification by course of conduct rather than *quantum meruit*).

5 See, e.g., *Hazen v. Cobb, 96. Fla. 151, (Fla. 1928); Moylan v. Estes*, 102 So.2d 855 (Fla. 3d DCA 1959); *Kovtan v. Frederiksen*, 449 So.2d 1 (Fla. 2d DCA 1984); *Cross v. Strader Const. Corp.*, 768 So.2d 465 (Fla. 2d DCA 2000); *Real Estate Value Co., Inc. v. Carnival Corp.*, 92 So.3d 255 (Fla. 3d DCA 2012).

6 *Paschen*, 311 So.3d 39.

7 *Id.* at 49-50.

8 *Id.*

9 *Id.* at 44-45.

10 *Id.* at 45.

11 *Id.* at 46.

12 *WB's Septic & Sitework v. Tucker*, 365 So.3d 1242 (Fla. 1st DCA 2023).

13 *Id.* at 1246-47.

14 *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So.2d 383, 385 (Fla. 4th DCA 1997).

15 *Id.* at 386.

16 *Rhythm & Hues, LLC v. Nature's Lawn Care, Inc.*, 368 So.3d 12 (Fla. 4th DCA 2023).

17 *Id.* at 14.

18 *Id.* at 15-16.

19 *Id.*

20 *Sheppard v. M & R Plumbing, Inc.*, 82 So.3d 950, 953 (Fla. 1st DCA 2011).

21 *Id.*

22 See, e.g., *S. Bell Tel. & Tel. Co. v. Acme Elec. Contractors, Inc.*, 418 So.2d 1187, 1188 (Fla. 4th DCA 1982) (permitting cause of action for *quantum meruit* by subcontractor against owner for time-related costs).

23 See *Forest Const., Inc. v. Farrell-Cheek Steel Co., Fla. Diversified Properties Div.*, 484 So.2d 40 (Fla. Dist. Ct. App. 1986).

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Applying Florida's Valued Policy Law to Wind vs. Flood Hurricane Claims

By Michael A. Cassel, Esq., LL.M., Cassel & Cassel, P.A., Hollywood, Florida

When hurricanes make landfall, wind damage is a given; however, more and more Floridians face the imminent threat of storm surge and flooding as a result of these intense tropical cyclones. It seems that buildings throughout the state, especially in coastal areas, are at a greater risk of damage caused by storm surge than ever before. Even so, the threat of, or destruction by, flood waters from a hurricane does not minimize the devastating effect of high speed, cyclonic winds. Understanding how these two types of risk interplay in property insurance policies is paramount to maximizing the coverages available to policyholders.

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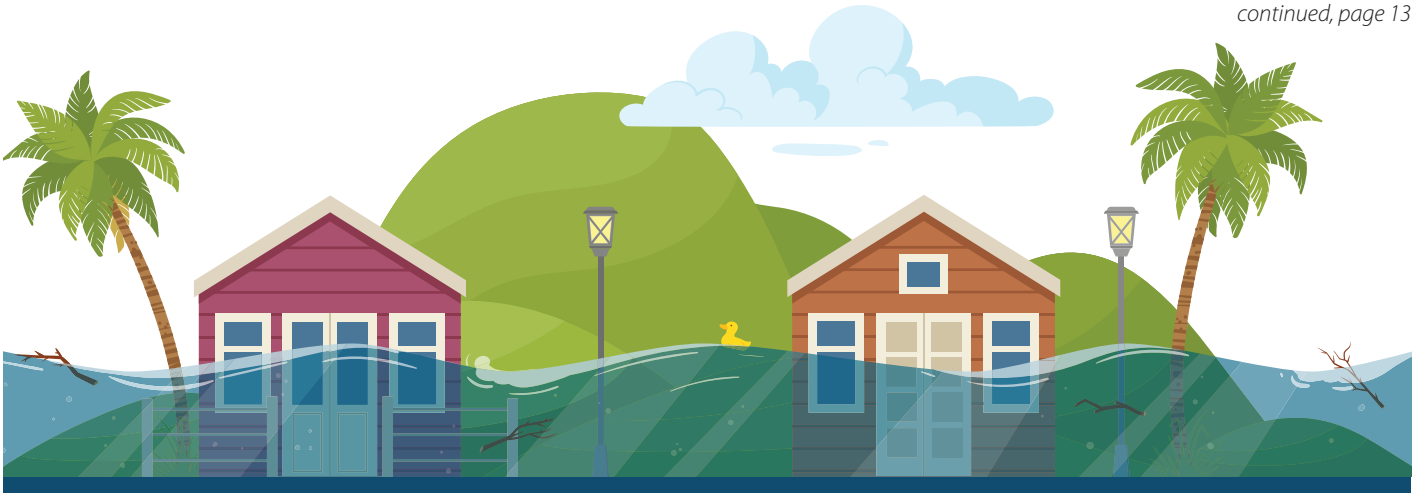

Property insurance policies which cover windstorms, such as hurricanes, generally exclude damage caused by flood or storm surge, whether driven by wind[1] or not. Accompanying such exclusionary provisions is a lead-in clause which states as follows, "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."[2] This is referred to as an "anti-concurrent causation" clause. When an anti-concurrent causation clause prefaces an exclusion, all damages affected by that excluded cause of loss, no matter the apportionment of fault or percent of contribution, are also excluded.[3] But how then, you ask, is one to address total losses caused by both wind and flood during a hurricane? Enter Florida's Valued Policy Law.

While originally enacted in 1899 for fire and lightning losses,[4] since 1982,[5] Florida's Valued Policy Law ("VPL") sets the amount of an insurer's liability in a total loss caused by any covered peril.[6] In the event of a total loss, the insurer's liability is for the total amount of the policy limits for which premiums were charged.[7] As a statute which is part of Florida's Insurance Code, VPL is incorporated into every property insurance policy issued by admitted carriers[8] for properties in Florida.[9]

A building is considered a total loss when there is no possibility of repair.[10] A total loss can be categorized in two ways: an actual total loss and a constructive total loss. An actual total loss occurs when a building "has lost its identity and specific character as a building, and becomes so far disintegrated, it cannot be possibly designated as a building, although some part of it may remain standing."[11] In essence, an actual total loss is based on an observation of the building, usually with the building materials being destroyed or gone. Alternatively, a constructive total loss occurs when a building, "although still standing, is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished."[12] A constructive total loss can also occur when the cost of repairing the property is prohibitive in relation to the value of the home or the cost to rebuild.[13]

Regarding constructive total losses, the Florida Building Code[14] defines Substantial Damage as "damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred."[15] In the event of a Substantial Damage determination, the property must be brought up to code in line with FEMA requirements as well as any state or local code in place.[16] While this does not always require demolition, more often than not, newer, more stringent, building codes will mandate repairs, which render the building a constructive total loss.

In the early aughts, a number of cases were released analyzing VPL as it related to the interplay between wind and flood as a result of hurricanes. At the time of those storms, the language of the VPL statute did not specify how to deal with total losses caused by covered and noncovered perils.[17] This resulted in appellate decisions, which applied VPL to claims where both wind and flood caused damages to the insured properties without providing the insurers the benefit of the flood exclusion.[18]

In one such opinion, *Mierzwa v. Florida Windstorm Underwriting Ass'n*, the appellate court addressed a total loss caused in 1999 by Hurricane Irene.[19] The *Mierzwa* court refused to apportion damages caused by both wind and flood to different insurance carriers stating that such action "would be contrary to the VPL."[20] Accordingly, the appellate court required the insurer to pay the face value of the policy even though part of the total loss was caused by flood, a noncovered peril. In doing so, the *Mierzwa* court held that "if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy."[21] This rationale was later disapproved by the Florida Supreme Court in *Florida Farm Bureau Cas. Ins. Co. v. Cox*.[22]

In *Cox*, the Supreme Court of Florida addressed a total loss, which occurred as a result of Hurricane Ivan in 2004. In analyzing the language of the VPL statute at the time, the *Cox* Court held that the VPL statute "does not establish any requirement for an insurer to pay for excluded or noncovered perils."[23] In its analysis, the *Cox* Court also noted that the legislature amended the VPL statute, seemingly in response to *Mierzwa*, in an attempt to clarify its language. This 2005 amendment has been referred to as the "*Mierzwa* fix."[24]

While there were other smaller changes throughout the statutory language, the 2005 amendment to the VPL statute included the following subsection:

> The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy, or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.[25]

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This subsection is clear that the legislative intent was not to create new coverage or deprive defenses; however, the legislature further addressed two important issues that would have benefitted the *Mierzwa* court. First, the revised VPL allows the apportionment of damages when covered and noncovered perils cause a total loss. In that situation, the insurer does not owe policy limits but rather can prorate the amount of loss caused only by the covered peril. Where the amended statute gets particularly interesting is the next sentence. By stating that the VPL liability applies when "covered perils alone *would have* caused the total loss,"[26] the legislature provided an avenue to seek policy limits for wind damages even when flood also affected the insured property. It is important to note that, because the VPL statute was changed in 2005, any analysis regarding the pre-amendment statutory language became obsolete moving forward.

The amended language is particularly important in wind versus flood hurricane claims where wind may first cause a constructive total loss only for flood to then sweep away the wind-damaged building, resulting in what appears to be an actual total loss. In such circumstances, because a covered peril alone would have caused the total loss even if the noncovered peril did not follow, VPL is triggered under the 2005 amendment and policy limits are owed. Of course, it can be argued that a total loss can only occur once, and if wind caused a total loss before the arrival of the storm surge, the flood did not actually cause any damage to the already destroyed building.

The analysis regarding multiple perils stemming from hurricanes causing total losses is seemingly more important than ever. In the fall of 2024, Hurricanes Helene and Milton ravaged the west coast of Florida within two weeks of one another. The storms caused extensive damage from both wind and storm surge in many cases resulting in total losses to property. As of February 19, 2025, Hurricanes Helene and Milton caused over six billion dollars in damage.[27] Of the combined 332,066 residential property claims filed, 140,850 claims were closed without payment.[28] Of these closed claims, 13,447 claims were closed without payment due to non-covered flood damage.[29]

In response to these statistics, on February 20, 2025, the Florida Office of Insurance Regulation ("FOIR") issued its informational memorandum to all authorized residential property insurers containing guidance for coverage determination of wind versus water claims.[30] In the memorandum, the FOIR instructs that it "expects insurers, before denying a total loss claim for wind damage when flood or storm surge damage may have also damaged the building . . . to be mindful of and apply the language contained in" the Florida Valued Policy Law statute.[31] The FOIR further warns that "[i]nsurers failing to comply with Florida law and inappropriately denying coverage due to concurrent causation will be subject to additional regulatory action."[32]

Accordingly, it is clear that the provisions of the VPL statute must be taken at face value, to wit, if "covered perils alone would have caused the total loss,"[33] VPL applies and coverage

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for the face value of the policy must be tendered. Because the plain language of the VPL statute is clear and unambiguous, "there is no occasion for judicial interpretation."[34] That is to say that the amendment to the VPL statute ensured clarity in a post-*Mierzwa* landscape making its application clear for Florida's recent onslaught of hurricanes bringing both wind and flood. This begs the question of exactly how many of the 13,447 claims denied for flood damage should be reevaluated for compliance with Florida's Valued Policy Law.


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Endnotes

1 *See Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486 (Fla. 5th DCA 2015).

2 *Id.*

3 *Id.* at 487, n. 1 ("An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and noncovered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage.").

4 Ch. 4677, §§ 1-2, Laws of Fla. (1899).

5 Ch. 82–243, § 539, Laws of Fla. (1982).

6 Fla. Stat. § 627.702 (2024).

7 Fla. Stat. § 627.702(a) (2024).

8 As VPL is incorporated into Chapter 627, Florida Statutes, it does not apply to non-admitted, surplus lines carrier. *See* Fla. Stat. § 626.913(4) (2024).

9 *Citizens Ins. Co. v. Barnes,* 98 Fla. 933, 124 So. 722 (1929); *Regency Baptist Temple v. Ins. Co. of N. Am.,* 352 So. 2d 1242 (Fla. 1st DCA 1977).

10 *Castro v. People's Tr. Ins. Co.*, 315 So. 3d 761, 765 (Fla. 4th DCA 2021).

11 *Citizens Prop. Ins. Corp. v. Hamilton,* 43 So. 3d 746, 754 (Fla. 1st DCA 2010) quoting Lafayette Fire Insurance Co. v. Camnitz, 111 Fla. 556, 149 So. 653, 654 (1933).

12 *Hamilton*, 43 So. 3d at 754; *see also Netherlands Ins. Co. v. Fowler,* 181 So. 2d 692, 693 (Fla. 2d DCA 1966); *Citizens Ins. Co. v. Barnes,* 98 Fla. 933, 124 So. 722, 723 (1929).

13 *State Farm Fla. Ins. Co. v. Ondis*, 962 So. 2d 923, 925 (1st DCA 2007), *rev'd on other grounds*, 979 So. 2d 930 (Fla. 2008).

14 The Florida Building Code governs "all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities" in the State of Florida. Fla. Stat. § 553.73(1)(a) (2024).

15 Florida Building Code, Existing Buildings, Chapter 2.202, (7th Edition) (2020).

16 *Bair v. City of Clearwater*, 196 So. 3d 577 (Fla. 2d DCA 2016).

17 *Cf.* Fla. Stat. § 627.702 (2004).

18 *See, generally, Florida Farm Bureau Cas. Ins. Co. v. Cox*, 943 So. 2d 823 (Fla. 1st DCA 2006), decision quashed, 967 So. 2d 815 (Fla. 2007) and *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774, 776 (Fla. 4th DCA 2004).

19 *Mierzwa,* 877 So. 2d at 776.

20 *Id.* at 778.

21 *Id.* at 775–76.

22 *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815 (Fla. 2007).

23 *Id.* at 820.

24 17 Fla. Prac., Insurance Law § 15:3, Amendment to the Valued Policy Law (2024-2025 ed.).

25 Fla. Stat § 627.702(b) (2005-2024).

26 *Id*. [emphasis added].

27 *See* Florida Office of Insurance Regulation, *Catastrophe Claims Data* (last visited March 13, 2025), https://floir.com/tools-and-data/catastrophe-reporting.

28 *Id.*

29 *Id.*

30 *See* Florida Office of Insurance Regulation, *Informational Memorandum: Notification to All Authorized Residential Property Insurers ~ Guidance for Coverage Determination of Wind versus Water Claims* (February 20, 2025), https://content.govdelivery.com/accounts/FLOIR/bulletins/3d319a7.

31 *Id.*

32 *Id.*

33 *Id*. [emphasis added].

34 *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992).

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Limited Scope Audits of Florida Use Tax:

An Efficient and Effective Way to Identify Noncompliant Multi-State Individuals and Transactions

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Increasingly, the Florida Department of Revenue is targeting use tax noncompliance through Limited Scope Audits of individuals and businesses. Limited Scope Audits are effective as they are generally issued only after the Department of Revenue has obtained evidence that sales tax was not paid on one or more taxable transactions. After evaluating a taxpayer for use tax compliance, the auditor may expand the audit scope if additional noncompliance is suspected. Rather than taking a shot in the dark with randomized, full scope auditing, the Department's shift towards more Limited Scope Audits is an efficient way to identify noncompliant taxpayers.

Florida's Use Tax

Florida imposes sales tax on: (1) retail sales of tangible personal property in this state; (2) rent, lease, or licenses to use real property; and (3) certain services.[1] What all those words mean is a source of unceasing controversy within Florida and every state with a sales tax. Unfortunately, it is so easy to get lost in sales tax controversy that taxpayers often forget about the use tax. Unlike sales tax, use tax is imposed on items used, consumed, distributed, or stored in the state. [2] In Florida, both sales and use tax are imposed at the state rate of 6%.[3]

The obligation of collecting and remitting sales tax is generally on the seller, while use tax remittance is generally the obligation of a consumer. Whether a taxing authority can impose its sales tax collection requirements upon a particular seller depends on whether the taxing authority has a sufficient connection, or "nexus," with the seller.[4] Until 2018, sufficient nexus required a physical presence within the state.[5] Currently, nexus can be established either by physical presence or by meeting certain economic thresholds, which vary by state.

Limited Scope Audits of Individuals

Increasingly, the Florida Department of Revenue is issuing Notices of Intent to Conduct a Limited Scope Audit (DR-846) to individual consumers. Although called a "limited scope" audit, the Department of Revenue auditor may require a wide range of records in what is essentially a fishing expedition for unpaid use tax. If the individual is found to be noncompliant with their individual use tax obligations, it can potentially trigger an audit of any businesses the individual owns.

The DR-846 does not identify why t*he taxpayer was audited, but it is generally issued due to an item of tangible personal property that was identified upon entry into the state. Often this occurs at customs and often the items are expensive, such as jewelry or artwork.*

Florida has a "six-month rule" applicable to use tax.[6] Specifically, there is a presumption that items purchased outside of the state six months or more prior to their entry into Florida were intended for use or consumption outside of Florida. Therefore, a piece of artwork purchased in New York and stored there for six months prior to entry into Florida would be presumed not taxable in Florida. However, the "six-month rule" is limited to purchases made in another state, territory of the United States, or Washington D.C.

The six-month rule's limitation to purchases made in other states, territories of the United States, and Washington D.C., leaves an open statute of limitations on purchases made outside of the United States. The statute of limitations on Florida tax audits is three years after the later of: the date the tax is due, the date any return with respect to the tax is due, or the date such return is filed.[7] For individuals who have never filed any returns with the Department of Revenue (which is most individuals in this state), the Department may assess back to the transaction date no matter how many years ago.

Under the current tax scheme, a worst-case scenario is that a high net worth individual moves with their family to Florida from another country and brings all their possessions with them. As no sales tax was paid on the purchase of these items, there is no credit for tax paid in another state. As it is outside the limitations of the six-month rule, there is no presumption of first use occurring outside the state. Further, as no return was ever filed, the transactions remain within reach. What may appear as a limited scope audit concerning a handful of transactions can spiral into something much larger for this type of taxpayer. Worse yet, if taxpayers "fail or refuse to provide records" for items purchased, the Department is authorized to estimate an assessment.[8] Those with particularly high dollar amount items, such as artwork, are particularly susceptible to this type of assessment.

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Remote Sales

Consumers may remember a time in the early 2000's when purchases made online were "sales tax free" compared to purchases in brick-and-mortar stores. The reason for this was that online retailers typically operated in one or few states while making sales across the country. States in which these online retailers were not physically located could not impose their sales tax collection requirements upon them. However, these transactions were never "tax free." Rather, the burden of tax collection shifted from seller to customer, and the nature of the tax from sales tax to use tax.

Sales tax compliance by sellers is easier to enforce than use tax compliance on individual taxpayers and individual transactions. Further, while taxing authorities are generally aware via licensure of businesses operating within their state, it is impossible to know, let alone audit, every individual or transaction for sales and use tax purposes. In the years leading up to 2018, brick-and-mortar stores were at a severe disadvantage having to charge sales tax on all transactions while online retailers had no such obligation and few consumers complied with, or were even aware of, their use tax obligations.

South Dakota v. Wayfair overturned the physical presence nexus requirement, opening the door for states to individually enact economic thresholds to establish nexus.[9] Entities can now be subject to a taxing authority's jurisdiction either by physical presence *or an economic threshold. In 2021, Florida enacted an economic nexus threshold of $100,000 determined by the preceding calendar year.*[10] With the new threshold, more online retailers are required to register with the Florida Department of Revenue to collect and remit sales tax.

Entities engaging in sales of less than $100,000 per calendar year and those who simply are not aware of their obligation to register with the state (particularly foreign entities unfamiliar with state and local tax) still may not charge sales tax. However, even out of this portion of "untaxed" transactions, use tax is often collected on behalf of consumers by marketplace facilitators, such as Amazon. Like many states, Florida has its own statute for the taxation of sales made through marketplace facilitators.[11]

With these new laws, the use tax compliance problem on remote sales has become largely resolved by shifting the burden back on the retailer to collect sales and use tax. However, with the major retailers now off the table, the Department of Revenue has turned its head to smaller online retailers and purchases of online goods through the use of Limited Scope Audits.

Automobiles, Boats and Planes

Automobiles, boats and planes are also easy targets for a Florida Limited Scope Audit because they are easy to identify through third-party records, seaports, or airports. Due to their high dollar amount, these items are also worthwhile for the Department of Revenue to target. Finally, they each have special and technical rules that make compliance difficult. These rules are numerous and outside the scope of this article, so are only identified in part below. However, all attorneys representing clients who own these types of items should be aware that their use in Florida is being tracked by the Florida Department of Revenue and could result in a Florida Limited Scope Audit.

Florida's sales and use tax rules for automobiles are unique in several ways. One of the most notable provisions is that a partial exemption is available for motor vehicles sold to residents of another state.[12] Whether a vehicle is driven out of state or shipped out of state does not seem to make a difference in the nature of the vehicle's use, and therefore, its taxability. However, this distinction impacts whether a full or partial exemption applies.[13] When possession of vehicles is taken in Florida, the partial exemption allows dealers to charge sales tax at the rate of the purchaser's home state if certain conditions are met. Once the vehicle arrives in its home state, there should be credit for tax paid in Florida. However, not all states will provide this credit resulting in a double tax on vehicles in some states.

When sales tax has not been paid on the purchase of a boat which enters Florida, use tax is generally due.[14] There are three scenarios in particular that catch taxpayers off-guard. The first is when the boat is purchased from a dealer not registered with the state and the boat is sold or delivered in Florida. The second is when the boat is purchased in another state, U.S. territory, or Washington D.C., and is brought into Florida within six months of purchase. Finally, another common scenario is when the boat is purchased in a foreign country and brought into Florida at any time. It is important to note that this area of Florida sales and use tax law is complex, with unique rules and exceptions to those rules. For example, various sales and use tax exemptions exist for boats sold to nonresidents, foreign-flagged vessels, boats imported for sale, and boats temporarily docked in Florida.[15] Also, sales and use tax is capped on boats in the amount of $18,000 to deter offshore sales.[16]

Use tax is also commonly assessed on aircraft under similar scenarios. As with boats, use tax is owed when an aircraft is: (1) purchased from a person who is not a registered aircraft dealer and the sale or delivery of the aircraft occurs in Florida; (2) purchased in another state, territory of the United States, or Washington D.C., and brought into Florida; or (3) purchased in a foreign country and brought into Florida at any time. As with boats, the sales and use tax laws for aircraft are also technical and sometimes counterintuitive. Exemptions categories include aircraft sold to nonresidents; aircraft temporarily in

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Florida; repairs, maintenance, parts, and labor; and fixed wing aircraft sales or leases, all of which have particular rules.[17]

These are only a few of the many use tax implications of bringing or using a motor vehicle, boat or aircraft in Florida. By nature, these items cross state lines frequently. Further, their entry into the state can be easy to identify, particularly with aircraft. Once a motor vehicle, boat or aircraft is identified as entering Florida, the Department of Revenue need only send a Notice of Intent to Conduct Limited Scope Audit to determine whether tax was paid or is required to be paid. As these are high dollar amount items, these cost-effective audits are well worth the Department of Revenue's time.

Construction

Use tax audits are often the most surprising to taxpayers because the tax is not well known or understood. Misunderstandings abound on both sides of transactions. Purchasers often believe sellers alone are liable for any taxes that weren't charged at the time of purchase. Those who are provided an Annual Resale Certificate of Sales Tax by the Department of Revenue can also be confused on the boundaries of its use.[18] Finally, even when used properly, it is critical that proper records are maintained in case of an audit.[19]

While all industries and people are impacted by Florida use tax, perhaps no industry is harder hit by it than the construction industry. One reason for this is the difficulty in identifying the transaction type for sales and use tax purposes. A transaction may be: (1) a real property contract; (2) sale of tangible personal property; or (3) retail sale plus install contract.[20] The rules are so complicated that some window coverings are considered real property improvements while others are not.

Limited Scope Audits in the construction industry commonly originate from materials identified upon delivery into the state. The auditor will generally request invoices for purchases made during the audit period. If tax has not been paid on those materials, the auditor can then expand the audit into a full scope audit. During a full scope audit, the Department of Revenue may determine the nature of the transaction is not what the taxpayer claims. If the Department of Revenue takes the position that a real property contract is in fact the sale and installation of tangible personal property, or vice versa, it can result in a substantial amount of tax due over a three-year period.

Limited Scope Audits are efficient and effective ways for the Department of Revenue to identify both noncompliant contractors and jobs for which sales or use tax was not properly remitted. All that is needed is one noncompliant subcontractor on a large construction project to be picked up for Limited Scope Audits to be issued to all others involved in the job. Preventing these limited scope audits from expanding into full scope audits is the next hurdle.

Conclusion

Increasingly, the Florida Department of Revenue is issuing Notices of Intent to Conduct Limited Scope Audits to test the waters for widespread use tax noncompliance amongst taxpayers and on certain projects. The dust is largely settled four years after Florida's economic nexus went into effect. With major online retailers collecting sales and use tax on items shipped into Florida, the Department of Revenue is now turning its attention to smaller businesses and individuals bringing high dollar amount items into the state. By focusing on high dollar amount items like artwork, jewelry, motor vehicles, boats, planes and construction materials, the Department has found an effective and efficient way to audit a group largely overlooked in prior years. Those who cross state borders or import items into the state are most vulnerable.


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Endnotes

1 Section 212.05(1)(a), Fla. Stat.
2 Section 212.05(1)(b), Fla. Stat.
3 In addition, counties are authorized to impose discretionary sales surtax. Section 212.054 Fla. Stat. Section 212.055, Fla. Stat.
4 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).
5 See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
6 Section 212.06(8), Fla. Stat.
7 Section 95.091(3)(a)(1.)(b.), Fla. Stat.
8 Section 212.12(5)(b), Fla. Stat.
9 *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).
10 Section 212.0596(b), Fla. Stat.
11 Section 212.05965, Fla. Stat.
12 Section 212.08(10), Fla. Stat.
13 Rule 12A-1.007(8), Fla. Admin. Code.
14 Section 212.05(1)(a)(2.), Fla. Stat.
15 See Section 212.08, Fla. Stat.; Rule 12A-1.007, Fla. Admin. Code.
16 Section 212.05(5), Fla. Stat.
17 See Section 212.08, Fla. Stat.; Rule 12A-1.007, Fla. Admin. Code.
18 See Rule 12A-1.039, Fla. Admin. Code.
19 Rule 12A-1.039(6), Fla. Admin. Code.
20 Rule 12A-1.051(3), Fla. Admin. Code.

The FR/BAR Contract In The Courts – A Survey Of Decisions

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On May 21, 2024, the Real Property, Probate and Trust Law Section of the Florida Bar issued a proclamation honoring the members of the Florida Realtor-Attorney Joint Committee for its 50 years of service in creating the FAR/BAR contract (now known as the "FR/BAR Contract") and comprehensive riders. It seems fitting to present this brief survey of decisions interpreting the FR/BAR Contract and other contracts for the sale of real estate. The Realtor-Attorney Joint Committee is composed of 11 lawyers (with at least one lawyer from each circuit in the State) and 11 Realtors, who hold frequent meetings to review and revise the FR/Bar Contract. The contracts and related addenda, riders, and other documents, are typically revised on 2-year cycles but can be updated more frequently to incorporate significant changes in the law, such as the recent legislative changes to the requirements for flood disclosures, and condominium inspections, maintenance and reserves after the Surfside tragedy.



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The 3rd District Court of Appeal has commented that:

> The 'as is' residential real estate contract developed jointly by the Florida Realtors and The Florida Bar reflects a middle-of-the-road form intended to reduce the legal fees that could be incurred if purchase contracts started from scratch for each transaction. The form reflects a wealth of experience with both successful and failed transactions among professional realtors and real estate attorneys.[1]

Historical Backdrop.

Most Florida real estate attorneys are familiar with the Florida Supreme Court's 1985 opinion in *Johnson v. Davis*[2], which held that the doctrine of *caveat emptor* ("buyer beware") does not apply to residential real estate transactions. In *Johnson*, the sellers induced the buyers to pay an additional deposit for the purchase of a home, representing there were "no problems" with the roof.[3] The record reflected that this was a false representation of a material fact, made with knowledge of its falsity, upon which the buyers relied to their detriment.[4] The Court found that the buyers were entitled to a return of their deposit, plus interest, costs, and attorney's fees.[5] This holding established that the seller, under a residential contract, has a duty to disclose to the buyer any material defects affecting the value of property, which are not readily observable, and failure to do so may constitute fraud in the inducement. The FR/Bar Contract appropriately contains a "seller disclosure" in paragraph 10(j), which provides that the "Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer."

Duties to Disclose.

In the recent case of *Smith v. Lynch*[6], a seller represented that the residential property had sustained "slight water damage," and was in a flood prone area, but failed to disclose that the property had been designated by FEMA as having had "severe repetitive loss." The evidence showed that a 2020 flood had resulted in payment of flood claims of $31,000, and that there were prior incidents of flood losses dating back to 1982. The buyer filed suit for damages against the seller, but the seller defended on the grounds that the home was in a neighborhood known for flooding. The trial court granted summary judgment for the seller, based on *Nelson v. Wiggs*,[7] which held that a seller was not liable for failing to disclose that a *neighborhood* was prone to flooding. The 2nd DCA reversed, holding that *Nelson* was distinguishable because the home in *Nelson* had never flooded, unlike the repeated floods that occurred in *Lynch*. The seller's failure to disclose the home's history of flooding was held to be a material misrepresentation, not readily observable to the buyer.

In the 2023 case of *Sage v. Pahlavi*,[8] a buyer made a claim for breach of contract for nondisclosure of the existence of settlement of the foundation of the property. However, on the property disclosure form, the seller had checked the boxes "yes" on the questions related to seller's knowledge of any past settling, soil movement, sinkholes or if any reinforcement had been added to any portion of the property. The buyer then obtained its own inspection, which showed cracks and shrinkage on the exterior walls of the property. The court found "no actionable claim" under *Johnson v. Davis*, as the seller had adequately disclosed the issues with the foundation.

In *Bydalek v. Saenz*,[9] the seller failed to deliver copies of the condominium governing documents prior to closing as required by law.[10] The contract, which incorporated the language of the statute, provided that the contract is voidable by the buyer if the condominium documents are not delivered to the buyer by the closing. The court held that because the documents were never delivered to the buyer, he could cancel the contract, even though the closing date had passed. Under the "plain language and unambiguous language of the statute," the buyer's right to void the agreement terminates at closing; because no closing was held, the buyer retained the right to cancel.

In *Busuttil v. Certified Home Inspectors, LLC*,[11] the court held that a real estate broker is not obligated under Fla. Stat. § 475.278 to investigate unknown defects that are not readily observable. The buyer sued the seller, the broker and the home inspector for a leaky roof that was represented to be one year old, and for unpermitted work on the property. The home had been inspected before closing by a professional inspector and no issues with the roof had been detected. Broker moved to dismiss on the basis that Chapter 475 does not impose a duty upon realtors to perform inspections and determine the existence of any latent defects that are not known or readily observable. The complaint against the broker was dismissed, and the appellate court affirmed on the basis that the statute requires a broker only to disclose known defects that materially affect the value of residential property, and it does not require brokers to perform their own investigations.

The appellate court in *Dziegielewski v. Scalero*[12] held that the seller's real estate agent may be liable for fraudulent inducement and fraudulent misrepresentations made as to properties included in the sale. Seller's agent claimed on the Multiple Listing Service that the sale of a condominium unit included, "Not one, not two, but three deeded garages…so bring your beach toys and collectable cars."[13] Despite being warned by the condominium association that the use of only one garage came with the unit, the agent repeatedly represented to the buyer that three garages were included in the sale. After closing on the purchase, the buyer learned that

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several prior contracts had fallen through over the garage issue, and the buyer sued the realtor, the seller and the closing agent. The trial court dismissed the complaint against the realtor, but the appellate court reversed, finding that the buyer's complaint stated a cause of action for fraudulent inducement and fraudulent misrepresentation. Chapter 475 authorizes a private cause of action against a real estate broker for violation of statutory duties when the broker engaged in fraudulent concealment in conjunction with the sale of residential real property, citing *Smith v. Rodriguez*.[14]

An "As Is" Contract Does Not Waive the Duty to Disclose Material Facts.

In a case involving an "as is" residential contract, the court in *Lorber v. Passick* held that genuine issues of material fact existed as to whether: 1) a "dank odor" possibly caused by a prior flood event was readily observable and discoverable through the exercise of diligent attention; 2) the buyer exercised due diligence in investigating potential water damage; and 3) the buyer should have known about and justifiably relied on a false disclosure form and the seller's statements.[15] The buyer claimed that the seller's agent convincingly dismissed the buyer's concern, saying the smell was the result of the air conditioning being turned off.[16] The court held that what is "readily observable" is "information that is within the diligent attention of any buyer," but is of less importance in claims involving misrepresentations by the seller, as the buyer is entitled to rely upon the seller's representations.[17]

Likewise, in *Syvrud v. Today Real Estate, Inc.*, an "as is" addendum to a purchase agreement and disclaimer of liability did not relieve the listing broker of the duty to disclose hidden defects.[18] The defects not disclosed to the buyers, included, water damage, mildew, cracks and structural defects, which required the condominium association to assess each unit in excess of $20,000 for repairs. The court held that the seller's broker may be liable for negligent or fraudulent misrepresentation, citing *Revitz v. Terrell*,[19] *Rayner v. Wise Realty Co. of Tallahassee*,[20] and *Young v. Johnson*.[21]

Caveat Emptor Still Applies in the Sale of Commercial Properties.

In *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*, the court held that the doctrine of *caveat emptor* still applies to commercial properties.[22] In *Futura*, the property was contaminated by ultrahazardous chemicals, and the buyer was strictly liable for its cleanup. In the buyer's ensuing lawsuit against the seller, the court held that the buyer could have protected itself by due diligence and price negotiation. "Nowhere does *Johnson* address or change the long line of case law establishing *caveat emptor* as the rule in the sale of commercial property."[23]

Similarly, a seller's "puffing" or statements of opinion in the sale of commercial property, made after the contract was signed do not relieve the purchaser of the duty to investigate truth of such statements and do not constitute fraudulent misrepresentations.[24] In *Wasser v. Sasoni*, the court held a sophisticated purchaser should not be misled by statements that a 67-year-old apartment building was "a very good building" requiring "normal maintenance" and is "an excellent deal." A negligent purchaser is not entitled to rely upon a misrepresentation, which is obviously false. Such false representations are not actionable where the truth might have been discovered by the exercise of ordinary diligence.[25]

In *Florida Holding 4800, LLC v. Lauderhill Mall Investment, LLC*,[26] a buyer of commercial property could not recover for fraud based on a vendor's alleged oral misrepresentations when the parties' purchase and sale agreement expressly contradicted purchaser's claims, and the doctrine of *caveat emptor* precluded purchaser's claims against the vendor. The buyer alleged that the seller represented the roof was well maintained with no history of leaking, and the HVAC system never had any issues. The buyer subsequently discovered roof leaks, HVAC failures and mold. The "as is" Contract disclaimed any representations and warranties, and the buyer hired an engineer to inspect the property, who apparently found no issues. The appellate court affirmed the trial court's summary judgment in favor of seller, finding that the buyer was not prevented by seller from making a full inspection of the property, the buyer contractually waived its claims and thus the doctrine of *caveat emptor* still applied.[27]

In contrast, a non-reliance clause in a commercial contract for sale will not protect a broker from a seller's claim for fraud, negligent misrepresentation, and breach of statutory duty to deal honestly and fairly, a court recently ruled in *Taylor v. Nicholson-Williams, Inc.*[28] In that case, the broker was alleged to have conspired with a developer to buy property from the seller, who had vowed never to sell the property to that party. The broker claimed that it was a third-party beneficiary of a clause in the contract that barred reliance upon non-contractual representations by the parties. The court found that the broker was not a third-party beneficiary, and that summary judgment in favor of the broker should be reversed. The court held that a jury could conclude that the broker's deceptive communications and conduct failed to live up to its obligation to deal "honestly and fairly."

Incomplete Contracts.

The *CNJ Realty v. Yankiv*[29] case demonstrates the problems that occur when a contract is not properly signed and dated by the parties. In *Yankiv*, the buyer signed the contract on March 12, and the seller initialed every page of the contract on March 17, but didn't sign the last page of the contract until

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April 25. A dispute arose over whether the buyers had timely complied with the financing contingency, allowing them to cancel the contract and receive the deposit back. The court recognized that initials on a contract are effective to bind the parties but found that the failure of the seller to sign the last page until over a month later created a material fact issue, precluding summary judgment, and judgment in favor of the buyers was reversed.

In *Mercado v. Sridhar*,[30] the appellate court held that proposed and unsigned addenda to a FR/BAR Contract were not part of the agreement, as the real estate contract was otherwise signed by all parties. The unsigned addenda for purchase of furnishings and for leaseback of the property by the sellers were never signed nor incorporated into the contract for the sale of the home and were, therefore, unenforceable, but the contract itself for the purchase and sale of the home was a binding agreement. The trial court's judgment in favor of the buyer on its action for specific enforcement of the sale of the home was affirmed.

The failure of the seller to timely designate a closing agent, which prevented the buyer from making the initial earnest money deposit, was held to be a breach of contract by the seller in *O'Donnell v. Lee*.[31] The buyer sued for specific performance after the seller decided not to sell, and the case was remanded to the trial court to determine an appropriate remedy due to the seller's breach of the contract.

In *Bowein v. Sherman*,[32] a patent ambiguity in the description of the property to be sold prevented the specific performance of the contract. The contract described one property to be sold in one section of the contract and described four properties to be sold in another section. The court held it could not choose one contradictory provision over another and was powerless to enforce the contract. Additionally, because of the patent ambiguity, extrinsic evidence could not be used to construe the contract terms where there was no meeting of the minds between the parties.

In *Walsh v. Abate*,[33] emails and texts were held to be insufficient to create a binding contract for sale of real estate under the statute of frauds and the FR/BAR Contract. Buyer's agent emailed a written offer to purchase a home for $3.1 million. Seller's agent sent a text with a counteroffer of $3.4 million, and buyer's agent texted back, "Perfect and confirmed." No written contract with the final price was ever signed by the buyer or the seller, and the seller backed out and contracted to sell to another party. The buyer sued for specific performance and filed a notice of lis pendens against the property. The trial court dismissed the complaint and dissolved the lis pendens, and the appellate court affirmed, as Florida law provides that no contract for sale of real estate is valid unless in writing and signed by the party to be charged.[34] Further, the FR/BAR Contract provided that it was not binding until the final offer was signed or initialed by both parties and delivered to the other.

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Enforcing Contracts as Written.

The parties' failure to engage in pre-suit mediation resulted in a denial of attorney's fees to the prevailing party in *Pesantes v. Kelley*.[35] In this case, the buyer sued the seller for failure to disclose material defects in the home. The buyer later voluntarily dismissed the case, and the seller sought to recover his attorney's fees. The trial court granted the motion, but the appellate court reversed, holding that paragraph 16 of the FR/BAR contract required pre-suit mediation for claims "arising out of" the contract. Attempting to harmonize that language with paragraph 17 of the contract authorizing the recovery of attorney's fees "in any litigation *permitted* by this Contract," the court held that entitlement to fees is limited to cases where pre-suit mediation has been held.

In *Smith v. Carlton*,[36] the court held that the buyer did not waive the seller's breach of its contractual requirements by exercising its option to close on the purchase. The sale involved a horse farm using the FR/BAR "As Is" Contract, which included a barn, horse stalls, fences and gates. The buyers notified the sellers that they intended to keep horses on the property. The buyers performed their first inspection within ten days of the contract and elected to proceed to closing. The contract provided for another "walk-through" inspection before closing, and the day before closing, the buyers found large amounts of trash remaining on the property and threatened to cancel the contract. The seller's agent represented that the sellers were "working on" removing the trash before closing. The buyer did not do another inspection, closed on the purchase and discovered the trash remained on the property, and there were also missing gates and fencing.[37]

The trial court in *Smith* found that the gates and fences were fixtures and were necessary to operate the horse farm. The trial court further found that the 15-20 dumpster loads of trash left by the seller was a breach of the contract. However, the trial court held that the buyer waived the right to sue for damages by proceeding with the closing. The appellate court reversed, holding that there was no waiver, because: 1) the buyer did not know that the gates and fencing had been removed until after closing; and 2) the deadline to remove the trash was the day of closing, not the day of the walk-through. The three elements of waiver were not present, which are: 1) the existence at the time of a right, privilege or benefit which may be waived; 2) the actual or constructive knowledge of the right; and 3) the intention to waive that right. Further, there was no implied waiver by conduct. The court said, "the anti-waiver provision in paragraph 18(q) does not support a finding that waiver of the right to inspect and the right to terminate somehow morphed into a waiver of Buyer's other rights to require full performance by Seller." This was the "antithesis of waiver," and the contract expressly provided for the ability to sue post-closing.[38] Judgment in favor of the seller was reversed, and the trial court was directed to enter judgment in favor of the buyer for damages, costs and attorney's fees.

In *Rockwell at Amelia Passage, LLC v. Williams*,[39] the appellate court held that COVID-19 did not excuse performance of the contract under the *force majeure* clause. The "as is" contract involved the sale of vacant land, contingent upon the buyer conducting a feasibility study to determine if the property was suitable for residential real estate development. The buyer could cancel during the feasibility study period or accept the property "as is." Time was of the essence in the contract, but the contract also contained a *force majeure* clause, which excused the seller's and the buyer's performance for "act of God" events such as hurricanes, earthquakes, floods, fire, wars, insurrections, and any other cause not reasonably within the control of seller or buyer, and which by the exercise of reasonable diligence the non-performing party is unable in whole or in part to prevent or overcome. The contract was extended multiple times while the buyer sought rezoning, but it was not contingent upon such rezoning. The parties were aware of the COVID-19 emergency at the time of the last contract extension, and the buyer's failure to cancel or close during the inspection period was thus within its control. Summary judgment granting the seller the right to retain the deposit was affirmed.

In *Estate of Wolfe v. 224 Via Marila, LLC*[40], the court held that whether providing a link to documents in a title search by email to the buyer satisfied the requirements of the contract was an issue of fact, precluding summary judgment. The FR/Bar "As Is" Contract provided in Section 9(c) that the seller was to provide a title commitment with "legible copies of instruments listed as exceptions attached thereto." Paragraph 18(A)(ii) gave the buyer five days after receipt to object to any exceptions that render title unmarketable. Paragraph 18 also permitted notice by electronic means. The seller sent a title commitment to the buyer by email, with links to the recorded exceptions. After a lengthy extension was agreed to, a second email was sent to the buyer with an updated title commitment and a reference to the previously sent exceptions. No timely objection to the title commitment was made by the buyer.

The buyer in *Wolfe* first attempted to invoke the *force majeure* provision in the contract due to COVID-19, then submitted a late objection to the updated title commitment, saying the exceptions were not included with the commitment. Both parties sought the $370,000 deposit, alleging breach of contract by the other party. The trial court granted summary judgment in favor of the buyer. The appellate court reversed, holding that whether providing a link to the recorded exceptions constituted "substantial compliance" with the terms of the contract was an issue of fact precluding summary judgment. If the seller substantially complied, then the buyer's

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objections were not timely. Further, the court held that whether the buyer's attempt to invoke the force *majeure clause* was an anticipatory breach of contract was also an issue of fact, and summary judgment was reversed.

In *Inlet Colony, LLC v. Martindale*,[41] the closing was delayed because litigation involving the property was not concluded through entry of a final order in an appeal. The date specified in an addendum to the contract constituted a "drop dead" closing deadline. The buyers did not waive, nor were they estopped, from asserting their right to insist on the "drop dead" closing deadline; and a notice of lis pendens filed against property rendered title of home unmarketable as of the contractual closing date. Even though the lis pendens was discharged, the 30-day time period for appeal had not run as of the closing date. Buyer was entitled to a return of the earnest money deposit.

In *M & M Realty Partners at Hagen Ranch, LLC v. Mazzoni*,[42] the 11th Circuit held that under Florida law, a purchaser seeking specific performance of a contract for sale of land did not provide evidence that it was ready, willing and able to perform under the contract by proving it was financially capable of closing. A buyer may show it is financially ready and able to close by showing it has: 1) the necessary cash in hand; 2) personal possession of assets and a credit rating that show a reasonable certainty to command the requisite funds; or 3) a binding commitment by a financially able third party. While the members of the buyer LLC had available funds to close, there was no evidence that those funds had been committed to the purchase, and thus, the buyer could not prove the elements required for specific performance.

In *Florida Investment Group 100, LLC v. LaFont*,[43] a buyer obtained conditional loan approval for financing that was different from the terms provided in the contract. After the loan approval period expired, the property did not appraise high enough for the buyer to get financing. The buyer obtained judgment for the deposit, which was reversed by the appellate court. The contract was based upon the 2017 FR/BAR Contract, which stated that the buyer was to apply for a 30-year conventional fixed rate loan. Instead, the buyer obtained a conditional loan approval for a 1-year adjustable-rate loan, but then the property appraisal was insufficient to qualify the property for that loan. The loan approval period had expired as of the date of the insufficient appraisal, and the appellate court held that the buyer was not entitled to return of the deposit because of her failure to receive a timely loan approval. It was "undisputed" that the buyer had waived the loan approval contingency provided by the contract. The FR/BAR Contract was subsequently revised by the FR/BAR committee to include the loan appraisal contingency as a part of the financing contingency.

In *Diaz v. Kosch*,[44] the buyers' payment of the additional deposit and failure to cancel prior to expiration of the inspection period constituted a waiver of the buyers' right to terminate. The buyers, both experienced real estate attorneys, contracted to buy a home for $2.8 million. They paid an initial $50,000 deposit but found, during the inspection period, that some unpermitted work may have been done as part of extensive renovations by the sellers. Rather than seek an extension, or terminate the contract, the buyers accused the sellers of misrepresentation and threatened litigation that would tie up the property so that it could not be marketed, and which would cause the sellers to incur hundreds of thousands of dollars in attorney's fees. The buyers also sought a reduction in the purchase price. Despite these threats, the buyers paid a second deposit of $285,000 in "good faith."

The buyers in *Diaz* then filed an action against the sellers and their broker, alleging breach of contract, conversion, fraud in the inducement, fraud in concealment, negligent misrepresentation, conspiratorial fraud, and sought punitive damages. The sellers filed a counterclaim for breach of contract. The court held that under a plain reading of the contract, the buyers' payment of the second deposit constituted a waiver of buyers' right to terminate the contract without penalty; the buyers' anticipatory repudiation of their obligation to close the sale triggered the sellers' contractual right to elect the option to retain the escrowed deposit; and the trial court did not abuse its discretion in awarding $850,000 in attorney's fees and costs to the sellers. The buyers could have avoided this result if they had simply exercised their right to cancel the contract during the inspection period.

In *Antao Properties, LLC v. First American Title Insurance Company*,[45] a cash buyer sued a title company for charging it a closing fee, where the FR/BAR Contract did not provide for payment of any buyer fees in cash transactions. The federal court dismissed the buyer's claim under the Florida Deceptive and Unfair Trade Practices Act, but allowed other claims to stand against the title company. The case settled shortly thereafter. See also *Haines v. Fidelity National Title of Florida, Inc.*,[46] which is similar to Antao, but the cash buyer in that case sought class action certification. The federal court denied class action certification, and a stipulation for dismissal was filed shortly thereafter, presumably pursuant to a settlement. In response to this litigation, the FR/BAR committee has recently revised the language of paragraph 9(b) of the contract to provide that buyers shall pay for buyer's closing services. Accordingly, it is a good practice for title agents to have buyers and sellers sign an acknowledgement before closing, outlining the expected fees and costs that the title agent will charge to handle the closing.

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Conclusion

Words matter in the FR/BAR Contract. As these decisions show, the courts go to great lengths to construe the words as written. Buyers and sellers should be well informed of the terms, conditions and deadlines contained in their contracts to avoid unnecessary disputes and litigation.


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Endnotes

1 *Diaz v. Kosch*, 250 So.3d 156 (Fla. 3d DCA 2018).
2 *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).
3 *Id.*, at 627.
4 *Id.*, at 627.
5 *Id.*, at 629.
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7 *Nelson v. Wiggs*, 699 So.2d 258 (Fla. 3d DCA 1997).
8 *Sage v. Pahlavi*, 358 So. 3d 434 (Fla. 4th DCA 2023).
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10 Fla. Stat. §718.503(2)(d)2.
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13 *Id.*, at 933.
14 *Smith v. Rodriguez*, 259 So.3d 645 (Fla. 5th DCA 2019).
15 *Lorber v. Passick as Tr. of Sylvia Passick Revocable Tr.*, 327 So. 3d 297 (Fla. 4th DCA 2021).
16 *Id.*, at 300.
17 *Id.*, at 307, 308.
18 *Syvrud v. Today Real Estate, Inc.*, 858 So.2d 1125 (Fla. 2d DCA 2003).
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22 *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*, 578 So.2d 363 (Fla. 3d DCA 1991).
23 *Id.*, at 364.
24 *Wasser v. Sasoni*, 652 So. 2d 411 (Fla. 3d DCA 1995).
25 *Id.*, at 413.
26 *Florida Holding 4800, LLC v. Lauderhill Mall Investment, LLC*, 317 So.3d 121 (Fla. 4th DCA 2021).
27 *Id.*, at 125.
28 *Taylor v. Nicholson-Williams, Inc.*, 368 So.3d 1007 (Fla. 5th DCA 2023).
29 *CNJ Realty Associates, LLC v. Yankiv*, No. 2D2023-2132, 2025 Fla.App. LEXIS 87 (Fla. 2d DCA 2025).
30 *Mercado v. Sridhar*, 389 So.3d 625 (Fla. 3d DCA 2023).
31 *O'Donnell v. Lee*, 387 So.3d 447 (Fla. 1st DCA 2024).
32 *Bowein v. Sherman*, 374 So.3d 895 (Fla. 6th DCA 2023).
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35 *Pesantes v. Kelley*, No. 3D2024-0632, 2025 Fla.App. LEXIS 1586 (Fla. 3d DCA 2025).
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37 *Id.*, at 56.
38 *Id.*, at 58.
39 *Rockwell at Amelia Passage, LLC v. Williams*, 343 So.3d 627 (Fla. 1st DCA 2022).
40 *Estate of Wolfe v. 224 Via Marila, LLC*, 338 So.3d 912 (Fla. 4th DCA 2022).
41 *Inlet Colony, LLC v. Martindale*, 340 So. 3d 492 (Fla. 4th DCA 2022), review denied, SC22-865, 2022 WL 4102505 (Fla. Sept. 8, 2022).
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43 *Florida Investment Group 100, LLC v. LaFont*, 271 So.3d 1 (Fla. 4th DCA 2019).
44 *Diaz v. Kosch*, 250 So. 3d 156 (Fla. 3d DCA 2018).
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The Thirty-Five Year Statute of Limitations for Mortgage Foreclosures

**By Matthew Baylor, Esq., and Jason Ellison, Esq.,
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The year is 2035. Rampant inflation has resulted in the cost of eggs now being $18 per carton and milk $28 a gallon. Life is tough all around. A potential client comes to your office to discuss a litigation case, which you desperately need. The client reminds you of what seems like ancient history, back in 2020, when a world-wide pandemic caused a rift through the economic chain and shut down global economies. The client tells you about a high-interest, and unconventional, thirty-year private loan they made to a borrower just before the Great Recession (2005) and how the loan went into default in early 2020 when the borrower was unable to get enough COVID-19 relief funding for their small business.

You are told the borrower missed 8 payments in 2020 before getting "back on track" with regular payments. Although the loan documents are silent as to how to apply payments (whether to delinquent interest / payments first, or to the installments written on the payment remittance), there were oral discussions between the borrower and lender about the missed payments, but each party resolved to "deal with it later." In other words, the borrower made all subsequent payments, but the payments missed in 2020 remain outstanding. Now, the borrower and lender cannot agree on the final amount owed and your lender client wants to use the default from 2020 to foreclose on the missed payments and 15 years of accrued but unpaid interest on the missed payments. At first glance, you think the five-year statute of limitations has certainly run on the "missed" payments from 2020. The client tells you, however, that the loan has now matured and the total outstanding balance is due as of last month. Not one to give up so quickly, you tell the prospective client that you will get back in touch after some research.

The History of the "Free House" Case law

Florida has a five-year statute of limitations for actions on a contract, obligation, or liability founded on a written instrument or to foreclose a mortgage.[1] At first glance, it may seem that a lender would have five-years from the date of a default to bring a foreclosure action against a borrower under a promissory note and mortgage, but the calculation of the statute of limitations is less than clear.

Following the Great Recession, Florida jurisprudence on this issue picked up around 2014 in the case *Deutsche Bank Trust Co. Americas v. Beauvais*.[2] Following a few years of opinions, amicus curiae, and a brief time of *free-house-litigation*, the Third District Court of Appeal held that the five-year statute of limitations does not bar a second foreclosure lawsuit filed on a subsequent payment default provided that the subsequent default occurs within the five-years preceding the second lawsuit.[3]

Shortly thereafter, the Florida Supreme Court put the matter to rest in the case of *Bartram v. U.S. Bank Nat. Ass'n*.[4] The Court concluded that when there had not been a completion (whether voluntary or otherwise) of a lender's attempt to accelerate the debt and foreclose a mortgage, the lender is not barred from bringing a second foreclosure action more than five years after the initial default.[5]

In *Bartram*, the lender accelerated the debt and filed an initial action to foreclose its mortgage in 2006.[6] The initial foreclosure was involuntarily dismissed in 2011.[7] The next year, almost six years after the initial foreclosure, the borrower, in another action, sought a declaratory judgment to cancel the mortgage and quiet title based on a theory that the statute of limitations barred the lender from bringing another foreclosure action.[8] The trial court agreed with the borrower's statute of limitations argument, granted summary judgment and cancelled the note and mortgage.[9] On appeal, the Fifth District Court of Appeal agreed with the lender and overturned the trial court's summary judgment ruling.[10] The Florida Supreme Court took jurisdiction over the case and answered the following question of great public importance in the negative:

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DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?[11]

The Court held that "each *subsequent default* accruing after the dismissal of an earlier foreclosure action creates a new cause of action"[12] (Emphasis added). This being the case, you are concerned that your potential client *does not* have a default within the five-year limitation period of section Fla. Stat. § 95.11(2)(c).

But, then there's that Florida Supreme Court Justice Dicta…

Still not giving up, your research leads you to additional cases, which give you hope. You find the decision *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017) and its predecessor case *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 198 So. 3d 1140 (Fla. 2d DCA 2016). *Bollettieri*, a condominium association, argued that a lender was barred from recovering payments, which were due more than five years prior to filing a second complaint.[13] The Second District Court of Appeal rejected this argument, finding that "although the initial default occurred more than five years prior to the bank's foreclosure complaint, the bank affirmatively alleged that [the mortgagor] has failed to make any subsequent payments due on the note."[14] In other words, the lender alleged a *continuous state of default*, which appears to have become the beacon for statute of limitations analysis in mortgage foreclosures.[15] (Contrast the Third District Court of Appeal opinion in *Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012 (3d DCA 2016) where the lender failed to allege a continuous default or any default within the five-year statute of limitations.)

The *Bollettieri* decision appeared to conflict with the Fifth District Court of Appeal's opinion in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015), which reversed a judgment of foreclosure because the complaint was based upon a default that occurred outside of the five-year statute of limitations period.[16] Certifying conflict, the case proceeded to the Florida Supreme Court. The Court initially accepted jurisdiction to review the case but subsequently held that the certified question had been resolved, and thereafter, declined review after the Fifth District Court of Appeal distinguished *Hicks*.[17] Then, the gratuitous dicta of Justice Lawson sends you the lifeline you have been researching to find.

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In *Bollettieri*, Justice Lawson writes a specially concurring opinion, which provides his analysis to help resolve what he labeled "a widespread and fundamental misunderstanding, in Florida, regarding how the statute of limitations, Fla. Stat. § 95.11(2)(c), 2017, operates vis-à-vis a long term note (and mortgage)."[18] It once was settled and clear that "the default does not *ipso facto* start the running of the statute."[19] Justice Lawson noted that under *most* long-term notes and mortgages the total amount due under the note does not become due until maturity, which is most commonly thirty years after signing.[20] Lenders do not bring suit on individual missed payments but sue on all amounts due.[21] "This means that the cause of action on a thirty-year note does not accrue until thirty years after signing – when the full balance is due – unless the lender accelerates and declares the full balance due earlier."[22]

As noted by Justice Lawson, his concurring opinion has no precedential value; however, it has been adopted by the Second, Third, Fourth, and Fifth District Courts of Appeal.[23] Since Justice Lawson's dicta, the Florida Supreme Court has not taken back up the statute of limitations issue in this context. Therefore, the Florida Supreme Court precedent in *Bartram* continues to require a default within the five-year statute of limitations or a *continuing default*.[24]

Yeah… But I Thought a DCA Could Not Overrule the Florida Supreme Court?

The Florida Supreme Court does not overrule itself *sub silentio*.[25] It is an undisputed principle that the District Courts of Appeal are required to follow Florida Supreme Court decisions.[26] So how does one reconcile *Bartram* with Justice Lawson's concurrence as adopted by the Second, Third, Fourth, and Fifth District Courts of Appeal?

One could analyze similar case law on installment contracts in contexts outside of mortgages. As it relates to rental property, the First District Court of Appeal barred collection of rental payments due greater than five years prior to suit being filed as beyond the statute of limitations.[27] In the context of contractual child support payments, the statute of limitations runs against each individual missed payment rather than upon the termination of the contract when the child reaches the age of majority.[28] "Installments due at different times under a promissory note mature or accrue the day after each is due to be paid, and the statute of limitations may run on some and not others."[29]

Notwithstanding what appears to be clear language in Fla. Stat. § 95.11(2)(c), courts seem to view mortgages differently than other contractual relations, because of the "unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship."[30] The potential impact of a mortgage and a foreclosure on a person or real property is perhaps special and requires a different analysis than the other types of installment contracts. Alternatively, Justice Lawson's dicta might be reconciled with one small assumption: that the default continued, and payments *never* resumed through, and including, the maturity date. Although preceding Justice Lawson's statement in *Bollettieri*, the Second District Court of Appeal possibly reached this conclusion in its case *CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron*:

> We dispose first of the statute of limitations issue. Section 95.11(2)(c) provides that an action to foreclose a mortgage must be commenced within five years from when the right to foreclose accrues. In the case of an installment note, the right to foreclose accrues as to each installment on the date the installment becomes due. Obviously then, ***if the default is based on the failure to make the final payment***, the limitations period runs from the maturity date of the note (Internal citations omitted. Emphasis added.)[31]

Possibly, you think, since each payment potentially stands as an independent installment obligation, and since your borrower did not miss the final payment (or any payment in the last 15 years!) that your client's claim could be barred by the statue of limitations.

Does the Partial Payment Exception Apply?

While Fla. Stat. § 95.11(2)(c) governs the statute of limitations for a mortgage foreclosure, Fla. Stat. § 95.051(1)(f) provides a tolling mechanism for the statute of limitations for five years from "the payment of any part of the principal or interest of any obligation or liability founded on a written instrument."[32] Within the parameters of a promissory note, the Second District Court of Appeal has ruled that the limitation period can be tolled by verbal agreement and partial payment of a debt.[33] There you have it. For the past fifteen years, your borrower has been making principal and interest payments on the remaining sums due under your note and mortgage, constituting the payment of *any part of the principal or interest*, tolling the statute of limitations on the missed payments in 2020.

Conclusion

Although the Florida Supreme Court seems to have solidified the legal issue surrounding the statute of limitations for mortgage foreclosure actions based upon a borrower's "continuous default," there appears to be less certainty concerning the statute of limitations for a mortgage foreclosure action premised on an early loan default that is ignored by the mortgagor and mortgagee. As long as some payment has been made during the applicable statute of limitations period, however, the limitations period may very well be tolled. While *Bartram* has not been overturned and Justice

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Lawson's concurrence has not been adopted in an opinion of the Florida Supreme Court, it appears that whether by virtue of a *continuing state of default* or the partial payment exception to the statute of limitations, mortgagees of a traditional thirty-year mortgage in Florida have a thirty-five-year statute of limitations regardless.

Back to your law office in 2035. With potentially unsettled law on what constitutes a *continuing default* as of the note maturity and needing to prove the "oral discussions" concerning the missed payments and accounting of interest due, you decide to file your foreclosure action based on the 2020 defaults. You argue to the court that, in effect, mortgage foreclosure actions have a 35-year statute of limitations in the State of Florida, citing to Justice Lawson, the District Courts of Appeal, which have adopted his dicta, and Fla. Stat. § 95.051. It's novel, and you are prepared to argue the issue all the way to the Florida Supreme Court.



J. ELLISON

Jason M. Ellison *is a board-certified real estate attorney. Mr. Ellison focuses his practice on litigation and advises clients in business and real estate matters, including real estate litigation, contract litigation, mortgage foreclosure, lender liability, title defense & title fraud, commercial eviction, Johnson v. Davis matters, easement enforcement, and creditor's rights. He is licensed to practice in all State Courts in the State of Florida as well as the United States District Courts for the Northern, Middle, and Southern Districts of Florida.*



M. BAYLOR

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Endnotes

1 Fla. Stat. § 95.11(2)(b)-(c) (2024).

2 *Deutsche Bank Tr. Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016)

3 *Id*. at 941.

4 *Bartram v. U.S. Bank Nat. Ass'n*, 211 So. 3d 1009 (Fla. 2016).

5 *Id*. at 1022.

6 *Id*. at 1014.

7 *Id*. at 1015.

8 *Id*.

9 *Id*.

10 *Id*.

11 *Id*. at 1012.

12 *Id*. at 1020.

13 *Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon*, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016).

14 *Id*. at 1142.

15 *Bank of Am., N.A. v. Graybush*, 253 So. 3d 1188, 1192 (Fla. 4th DCA 2018) (alleging and proving separate and continuing defaults, some of which fall within five years of the filing of the complaint, satisfies the statute of limitation).

16 *Id*.

17 *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017).

18 *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017) (Lawson, J., concurring).

19 *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017) (Lawson, J., concurring) (quoting acceleration provision in note or mortgage as affecting the running of the statute of limitations, 34 A.L.R. 897 (1925)).

20 *Bollettieri Resort Villas Condo. Assn., Inc. v. Bank of New York Mellon*, 228 So. 3d 72, 73 (Fla. 2017) (Lawson, J., concurring).

21 *Id*.

22 *Id.*

23 See *Grdic v. HSBC Bank USA, N.A.*, 267 So. 3d 473, 475-76 (Fla. 2d DCA 2019); *Bank of Am., N.A. v. Graybush*, 253 So. 3d 1188, 1193 (Fla. 4th DCA 2018); *Gonzalez v. Fed. Nat'l Mortg. Ass'n*, 276 So. 3d 332, 336-37 (Fla. 3d DCA 2018); and *Grant v. Citizens Bank, N.A.*, 263 So. 3d 156, 157 (Fla. 5th DCA 2018).

24 *Graybush*, 253 So. 3d at 1192 (alleging and proving separate and continuing defaults, some of which fall within five years of the filing of the complaint, satisfies the statute of limitation).

25 *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding.").

26 *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. App. 1976)("The District Courts of Appeal are required to follow Supreme Court decisions."); *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.").

27 *Holiday Furniture Factory Outlet Corp. v. State, Dept. of Corrections*, 852 So. 2d 926, 928 (Fla. 1st DCA 2003).

28 *Isaacs v. Deutsch*, 80 So. 2d 657, 660 (Fla. 1955) ("We hold, then, that where an express contract requires the father to pay a definite sum at stated intervals for the support of his minor child, the statute of limitations starts running against each payment as it becomes due; and that the lower court erred in allowing recovery for all weekly payments solely on the ground that the statute did not start running on such payments until the time of the termination of the contract, that is, the date when the minor child attained his majority.").

29 *Central Home Trust Co. v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980).

30 *Bartram v. U.S. Bank Nat. Ass'n*, 211 So. 3d 1009, 1017 (Fla. 2016) (quoting Singleton v. Greymar Associates, 882 So. 2d 1004, 1007 (Fla. 2004)).

31 *CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron*, 198 So. 3d 3, 7 (Fla. 2d Dist. 2015).

32 Fla. Stat. § 95.051(1)(f).

33 *Shanks v. Bergerman*, 334 So. 3d 681 (Fla. 2d DCA 2022).

Executive Council Meeting & Legislative Update

LOEWS CORAL GABLES | CORAL GABLES, FLORIDA

SEPTEMBER 7, 2024









Photos by Silvia Rojas











Executive Council Meeting

THE BROADMOOR

COLORADO SPRINGS, COLORADO

DECEMBER 4-8, 2024

















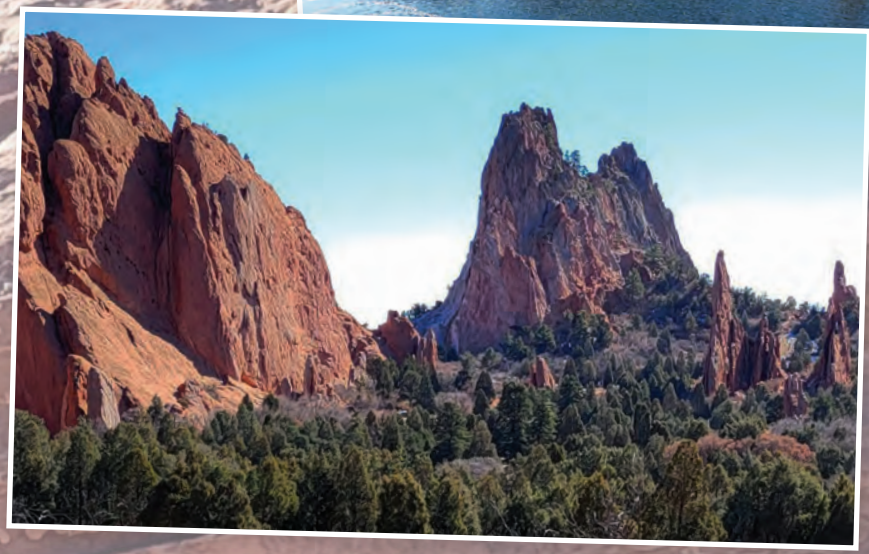

Photos by Silvia Rojas

Roundtable

Highlights of the Meeting of the RPPTL Section

REAL PROPERTY DIVISION and PROBATE AND TRUST DIVISION Joint Roundtable

SATURDAY, SEPTEMBER 7, 2024

Loews Coral Gables, Coral Gables, Florida

Prepared by John C. W. Cherneski, Esq., Jacksonville, Florida

Thank you to the Probate Roundtable Sponsors:
Stout Risius Ross, Inc. and Guardian Trust Foundation, Inc.

Thank you to the Real Property Roundtable Sponsor:
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The Chair of the Executive Committee, John Moran, called the meeting to order at 8:10 a.m.

"Living in the Shadows" Presentation – Len Prescott. Len gave a presentation about the local history of the development of the Loews Coral Gables and Orlando Capote, the owner of a one-story, Mediterranean-style house in the middle of the real estate development project. Len shared about the history of the development project, negotiations between the parties, and why the project was ultimately developed around Mr. Capote's home.

Update on NAR Settlement Agreement and Practice Changes – Kristen King Jaiven & Erin Michelle Miller. Kristen and Erin gave a presentation on the National Association of Realtors settlement and practice changes lawyers should implement. Kristen and Erin shared about the history of the litigation, settlement, and important changes to realtor compensation following the settlement. Specifically, they discussed changes prohibiting real estate agents from offering compensation to other agents on the Multiple Listing Service ("MLS") platform or as a condition for listing a property on MLS, and prohibiting buyer's agents from representing that their services are "free." Contracts between consumers and agents must state that commissions are fully negotiable. Kristen and Erin encouraged attendees to be sure to update agreements appropriately, especially for buyers, and for anyone performing real estate closings to be sure to ask how much the buyer's agent is being compensated and who is responsible for paying the compensation.

Action Items. No action items were presented at this Joint Roundtable.

Information Items. No information items were presented at this Joint Roundtable.

Committee Reports.

Ad Hoc TODI (Transfer on Death Instrument) Committee – Chris Smart and Steve Kotler, Co-Chairs. Chris and Steve presented a report about the history and current status of the Ad Hoc TODI Committee project to draft proposed Florida legislation modeled after the Uniform Real Property Transfer on Death Act. The purpose of the proposed legislation is to avoid the need for probate upon the death of the owner of real property, establish the requirements for creating a valid Transfer on Death Instrument under the statute, confirm the rights of the owner, the owner's creditors during lifetime, and confirm and clarify the rights and responsibilities of a death beneficiary and his or her creditors. The proposed legislation is a comprehensive statutory revision that would create a new Florida Real Property Transfer on Death Act (Fla. Stat. § 689.30), and also require amendments to the Florida Probate Code and minor changes to the Florida Guardianship Law. Chris and Steve shared that the act would have a prospective application and would not affect existing Lady Bird deeds or deeds created without reference to the statute. Chris and Steve explained the requirements of the statute, limitations of the property it would apply to, and application of homestead issues to TODI property.

Brief comments were made by attendees concerning whether this proposed legislation complicates matters instead of simplifying them, competing creditor claims and liability of beneficiaries for estate claims, and whether an agent of a power of attorney can revoke the TODI. Additional discussion was tabled due to time constraints to be resumed at future Roundtable or Executive Council meetings.

Adjournment. The meeting was adjourned at 9:28 a.m.

PRACTICE CORNER

Probate And Trust Division

Practical Applications of the Florida Slayer Statute

By Lyudmyla Kolyesnik, Esq., BridgeTRUST, PLLC, Jacksonville, Florida

This article explores the effects of the Florida Slayer Statute on the slayer's right to inheritance and the jointly-owned property. The Florida Slayer Statute, codified at Fla. Stat. § 732.802, ensures that a person who unlawfully and intentionally kills another cannot benefit from the decedent's estate. The statute treats the slayer as if they predeceased the decedent for purposes of inheritance and probate. Its scope is broad, impacting life insurance proceeds, joint tenancies, tenancies by the entirety (both in real and personal property), joint financial accounts, and any other forms of co-ownership with survivorship rights. The following are examples of how the slayer statute works outside the traditional probate context:

Life Insurance Policies. If the slayer is a named life insurance policy beneficiary, the slayer is treated as if he/she predeceased the policy holder. The life insurance benefit then inures to the contingent beneficiaries or the policyholder's estate.

Joint Tenancy with Right of Survivorship and Tenancy by Entirety. The Slayer Statute also affects property held as joint tenants with right of survivorship and as tenants by the entirety. When the statute applies, it severs the joint tenancy or tenancy by the entirety. Upon the decedent's death, the slayer's survivorship interest is extinguished, and the decedent's share passes to their estate. The slayer does not inherit the decedent's portion of the property.

In the case of property held as tenancy by the entirety, the statute treats the spouses as if they were tenants in common. Each spouse holds an equal share, but the slayer forfeits the right to automatically inherit the decedent's share. Importantly, the Slayer Statute is not a forfeiture statute. The slayer retains their separate interest in the property; only the decedent's share passes to their estate. This distinction was highlighted in *LoCascio v. Sharpe*, 23 So. 3d 1209 (Fla. 3d DCA 2009), where the court affirmed that the slayer's own property remains with the slayer and does not revert to the decedent's estate.

Homestead. If a slayer spouse would have inherited a life estate in the homestead, the statute voids this right by treating the slayer as predeceased. As a result, the slayer cannot claim any homestead rights based on the decedent's death.

Example: Jointly Owned Marital Property and Minor Children. A complex scenario arises with respect to the ownership of jointly owned marital property where a spouse intentionally kills the other spouse, leaving behind minor children. When Slayer Statute applies, the legal outcome is as follows:

- The slayer spouse will retain their 50% ownership interest in the joint property; and
- The minor children all share the other 50% ownership interest.

This situation creates a significant practical conundrum. While the slayer spouse may be facing criminal prosecution and imprisonment, the children—who inherit only the decedent's share of the property—are often left in a difficult financial situation further complicated by the inability to liquidate the property without the imprisoned parent's consent.



L. KOLYESNIK

Lyudmyla Kolyesnik *has been admitted to The Florida Bar since 2020. She is the founding attorney of BridgeTRUST, PLLC in Jacksonville, Florida, where she focuses her practice on probate and trust administration, fiduciary services, and trust and estate litigation. Ms. Kolyesnik earned her Juris Doctor from Florida Coastal School of Law, graduating in the top 5% of her class and serving as Managing Editor of the Law Review.*

Condominium Associations: New Official Records Requirements and Penalties

By Lisa M. Super, Esq., Zimmerman Kiser & Sutcliffe, P.A., Orlando, Florida

If you are a real estate practitioner who represents community associations or those who reside within them, you may already be familiar with the significant modifications to Florida's statutory framework governing condominium associations. These changes include modifications to the responsibilities of a condominium association and its board members in connection with the maintenance of the association's official records.

There has been an expansion of the types of documents that a condominium association is required to include as part of its official records. Pursuant to Fla. Stat. § 718.112(12) (2024), official records kept by a condominium association must now include all invoices, transaction receipts, or deposit slips that substantiate any receipt or expenditure of funds by the association,[1] a copy of building permits,[2] and a copy of all satisfactory completed board member education certificates.[3] Said records must be maintained in an organized manner that facilitates inspection of the records by a unit owner, and, in the event the records are lost, destroyed, or otherwise unavailable, the statute imposes a good faith obligation on the association to obtain and recover those records as may be reasonably possible.[4]

When receiving a written request to inspect official records, the association must provide a checklist of all records made available for inspection, and such checklist must identify any official records that were not made available.[5] Said checklist must be maintained as an official record of the condominium association for seven (7) years, as it creates a rebuttable presumption that the association has complied with these requirements.[6] In connection with requests to review the official records of a condominium association, it is now acceptable for condominium associations to direct requestors to the association's website or to an application that can be downloaded on a mobile device where said documents have been posted and made available for download.[7] Regarding what must be included on an association's website, at this time, there is not a consistent rule for associations of all shapes and sizes. Currently, condominium associations that have more than 150 units are required to post certain official records on a website or on an application where the official records can be downloaded on a mobile device, which must include copies of building permits issued for ongoing or planned construction.[8] Starting January 1, 2026, these same rules will also apply to condominium associations with 25 or more units.[9]

Most importantly, in addition to requiring removal from the association's board for certain acts of "bad behavior" in connection with the maintenance requirements or the delivery obligations of the association's official records, board members can now be subject to criminal penalties. It is now a first-degree misdemeanor, subject to civil penalties and automatic removal from the board, for any person, with the intention to cause harm to the association or its members, who knowingly or intentionally defaces or destroys accounting records, or fails to create or maintain accounting records, as required under Chapter 718, *Florida Statutes*.[10] It is also now a second-degree misdemeanor for a director, board member or association manager to knowingly, willfully and repeatedly violate Fla. Stat. § 718.111(12)(c)1 (2024).[11] Finally, it is now a third-degree felony for a person to refuse to release or provide requested official records with the intent to avoid or escape detection, arrest, trial or punishment for the commission of a crime, or to assist another person in doing so.[12]


L. SUPER

Lisa M. Super *practices with the law firm of Zimmerman, Kiser & Sutcliffe, P.A. in Orlando, Florida, and focuses on residential and commercial real estate transactions, and lender representation. Ms. Super completed her undergraduate studies at Eastern Michigan University and earned her juris doctor from Ave Maria School of Law. She is serves as the President of the Central Florida Real Estate Attorney's Council.*

Endnotes

1 Fla. Stat. § 718.111(12)(a)11.b (2024)
2 Fla. Stat. § 718.111(12)(a)18 (2024)
3 Fla. Stat. § 718.111(12)(a)19 (2024)
4 Fla. Stat. § 718.112(12)(b) (2024)
5 Fla. Stat. § 718.112(12)(c)1.b. (2024)
6 *Id.*
7 Fla. Stat. § 718.112(12)(c)1.a (2024)
8 Fla. Stat. §718.111(12)(g) (2024)
9 *Id.*
10 Fla. Stat. §718.111(12)(c)3 (2024)
11 Fla. Stat. §718.111(12)(c)2 (2024)
12 Fla. Stat. §718.111(12)(c)4 (2024)

Real Property Case Summaries

By Camille T. Bailey, Esq., – Sajdera, PA, Boca Raton, Florida

The court misinterpreted Florida law in finding that the landlord did not have a continuing duty to maintain the property when the tenant knew of the dangerous conditions in the property and put the landlord on notice. The court found that the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant.

Perez v. Belmont at Ryals Chase Condo. Ass'n, Inc., 2D2023-0872, 2024 WL 4281360, at *1 (Fla. 2d DCA Sept. 25, 2024)

The Tenant, Geraldo Perez ("Perez"), alerted his Landlord, Belmont at Ryals Chase Condominium Association ("Belmont"), and the Property Management Company, Webb Realty Consultants ("Webb Realty"), about the floor tiles that had become loose in his entrance. As this was the sole entrance to the unit, Perez had to walk through the area with the loose tiles to access his unit. On two occasions, Perez' wife made complaints about the loose floor tiles to the owner of Webb Realty and the maintenance supervisor for Belmont. Later, on April 10, 2019, Perez fell on the loose floor tiles.

Perez sued both Belmont and Webb Realty alleging that they were negligent in failing to maintain the floor tiles; however, Belmont and Web Realty filed a Motion for Summary Judgment, and argued that they were entitled to Summary Judgment as a matter of law because the loose floor tiles were a dangerous condition that was open and obvious. The trial court entered a Final Summary Judgment, in favor of Belmont and Web Realty, finding that their continued duty to exercise reasonable care in repairing dangerous conditions was "limited to conditions that were inherently unsafe or dangerous that were not readily apparent." In reaching its conclusion, the trial court relied upon *Youngblood v. Pasadena at Pembroke Lakes South, Ltd.*, 882 So.2d 1097 (Fla. 4th DCA 2004). The trial court further held that because Perez knew of the dangerous conditions prior to his fall, it made the condition open and obvious, thus precluding Belmont and Web Realty from owing a duty to Perez.

Perez argued, on appeal, that the trial court's finding that Belmont and Web Realty's duty to Perez was limited because Perez knew of the condition or because it was open and obvious was a misinterpretation of Florida law. The appellate court agreed with Perez and reversed the trial court's ruling holding that a duty to make repairs necessary to transfer a reasonably safe unit to the tenant did exist.

The appellate court noted that the landlord's duty to its residential tenants could be divided into a pre-possession duty and a post-possession duty. The appellate court found that the trial court's reliance on the Youngblood case was misplaced, and that *Youngblood* was not instructive to the issues of the post-possession duty of the landlord to its tenant, which is what was at issue in this instant case.

The appellate court cited *Mansur v. Eubanks*, which held that "[a]fter the tenant takes possession, the landlord has a continuing duty to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless waived by the tenant." *Mansur v. Eubanks*, 401 So.2d 1328, 1330 (Fla. 1981). The court further noted that to require a tenant to provide notice to the landlord of dangerous defective conditions in order to trigger the landlord's continuing duty to repair, but then to discharge the landlord's duty because of the tenant's knowledge of the dangerous condition would completely insulate the landlord from liability. As a result, the appellate court held that Perez' notice to the landlord of the dangerous condition did, in fact, trigger Belmont and Web Realty's continuing duty to repair the loose floorboards, and the fact that the condition was open and obvious did not insulate the Belmont and Web Realty from their liability. Accordingly, the appellate court reversed and remanded the trial court's decision.

The trial court did not err in its interpretation of the terms "retail" and "to be used" in an easement agreement.

Seritage SRC Fin., LLC v. Town Ctr. at Boca Raton Tr., 4D2023-0982, 2024 WL 4219896, at *1 (Fla. 4th DCA Sept. 18, 2024)

The Appellee, The Town Center at Boca Raton Trust, entered into an easement agreement with a shopping mall in Boca Raton owned by the Appellant, Seritage SRC Finance, LLC, and its dominant retailers. The easement agreement included a provision, which stated that if certain property attached to the mall "is to be used for non-retail purposes," the Appellee would have the option to exercise a buyout process by requesting an appraisal of the property's fair market value.

Both parties filed competing Motions for Summary Judgment arguing different interpretations of the terms "retail" and "to be used" as referenced in the easement agreement. The trial court agreed with the Appellee's interpretation of the terms, finding that the interpretation of the term "retail"

continued, page 39

was consistent with its plain meaning, and concluded that, as used in the agreement, the term did "not include the proposed restaurants, entertainment services, and/or fitness clubs" that the Appellant sought to develop. Additionally, the trial court interpreted the phrase "to be used" as "referr[ing] to anticipatory use," rather than a prior or active use." Finding that such anticipatory use was "satisfied by [the Appellant's] repeated, clear, and progressive steps taken to redevelop the Sears Site." As a result, the trial court granted the Appellee's Motion for Summary Judgment and entered the Final Judgment.

On appeal, the appellate court found that "when the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent." *Talbott v. First Bank Fla.*, FSB, 59 So.3d 243, 245 (Fla. 4th DCA 2011).

The appellate court affirmed the trial court's Final Judgment and interpretation of the agreement's terms, finding that the trial court interpreted the agreement correctly and properly rejected the Appellant's "strained interpretation." The court interpreted "retail" consistent with its plain meaning and concluded that, as used in the agreement, the term "did not include the proposed restaurants, entertainment services, and/or fitness clubs" that Appellant proposed to develop. The court interpreted "to be used" as "referr[ing] to anticipatory use, rather than a prior or active use. As a result, the appellate court affirmed the trial court's ruling on the Final Summary Judgment.

The trial court did not err in finding that it did not have discretion under Fla. Stat. § 83.232(5), and properly entered the Final Judgment for Removal of the Commercial Tenant in accordance with the Statute.

Fabre v. 4647 Block, LLC, 3D24-387, 2024 WL 4219455, at *1 (Fla. 3d DCA Sept. 18, 2024)

Patrick Fabre ("Fabre"), Appellant, entered into a commercial lease agreement with 4647 Block, LLC ("4647 Block"), the Appellee, after it purchased the building where Fabre was a tenant. As part of the lease agreement, Fabre was supposed to provide 4647 Block, with a copy of any and all local, state or federal permits, which were required for use of the premises. 4647 Block, requested the permits and sent a 15-day notice to cure noncompliance or vacate the premises. Fabre produced only some of the required documents. Two months later, 4647 Block sent an additional 15-day notice to cure. However, Fabre still did not completely comply with the additional notice to cure. 4647 Block then filed a two-count complaint against Fabre. It alleged a count for eviction and a count for holdover damages.

In August 2023, 4647 Block petitioned the trial court for deposit of the rent monies into the court registry, pursuant to Fla. Stat. § 83.232. The Motion noted that, even though an Answer had been filed, Fabre had not deposited the rent into the court registry.

Subsequently, Fabre began paying rent monies into the court registry. He timely paid September, October and November rents but did not pay December rent into the court registry.

4647 Block filed a Motion for Default Judgment on possession alleging that Fabre failed to deposit December and January's rents. Fabre responded that, on January 3, 2024, he made a deposit and on January 4, 2024, he made two additional payments. Despite the dates, he maintained that these payments were timely.

The trial court entered a Final Judgment for Removal of the Tenant. The trial court relied on Fla. Stat. § 83.232(5), which provided in pertinent part:

> failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.

Fabre moved to stay the writ of possession and for relief from the judgment. The appellate court found that it did not have jurisdiction to consider Fabre's appeal of the Final Judgment for Removal of the Tenant because the Final Judgment order was not a Final Order as it did not fully dispose of the entire case. It only disposed of Count I of the Complaint. However, the appellate court found that it did have jurisdiction to review the Final Judgment as an appealable, nonfinal Order, under Florida Rule of Appellate Procedure 9.130, as it concerned a "right to immediate possession of property." Fla. R. App. P. 9.130(a)(3)(C)(ii); *Bryant v. Wells Fargo Bank, N.A.*, 182 So.3d 927, 929 (Fla. 3d DCA 2016); *Speedway SuperAmerica, LLC v. Tropic Enter., Inc.*, 966 So.2d 1, 2 (Fla. 2d DCA 2007).

As such, the appellate court held that the trial court correctly entered the Final Judgment for Removal of the Tenant. The appellate court found that once Fabre failed to timely pay the rent into the court registry, as required by the Statute and the Court Order, the trial court had no discretion in entering an immediate default for possession. Fla. Stat. § 83.232(5).; *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.*, 36 So.3d 811, 812 (Fla. 3d DCA 2010); Poal Wk Taft, LLC, 45 So.3d at 39 ("The trial court exercises no discretion, and the landlord is entitled to the issuance of the writ of possession as a matter of right.").

As such, the Final judgment for Removal of Tenant was properly entered by the trial court.

Probate Case Summaries

By Arienne C. Valencia, Esq., Roetzel & Andress LPA, Naples, Florida

A testator's intent, as expressed in the will, governs inheritance rights, regardless of changes in familial relationships or names.

Taulbee and Taulbee v. Kozel, 354 So. 3d 618 (Fla. 3d DCA 2023)

Appellants are the co-personal representatives of the decedent's estate. Appellee is the legal guardian of DAK formerly named DFT. The decedent named his wife as primary beneficiary and his biological son, DAK, as contingent beneficiary of his estate in his 2014 will. He later executed a codicil in 2016 naming his "second cousins" to serve as co-personal representatives.

In 2018, decedent's wife died, and decedent was adjudicated incapacitated. Because he lacked the mental capacity to care for DAK, his parental rights were terminated. Appellee legally adopted DAK. Decedent died the following year, and Appellants filed a petition for administration stating that DAK was not a beneficiary due to the change in family relationships. However, the trial court found that DAK could recover under the will.

Under Florida law, "adoption severs the ties between the adopted child and his prior parents and affiliates the child with his adoptive parents." This principle is codified in Fla. Stat. § 63.172. The only exception to these general rules is that "rights of inheritance shall be as provided in the Florida Probate Code."

The appellate court noted that the "Florida Probate Code, in turn, circumscribes the legal effect of adoption on intestate succession." However, inheritance under a will is different from inheritance at law, where the "intention of the testator as expressed in the will controls the legal effect of the testator's dispositions." Fla. Stat. § 732.6005(1) (2024). Here, the will expressly included DAK by name. Accordingly, the appellate court affirmed the lower court's decision, allowing D.A.K. to recover under the will, thereby upholding the decedent's wishes despite the complexities introduced by adoption and legal name changes.

Persons who have great-grandparents in common with a decedent but who otherwise have no familial relationship with a decedent are not in a class of persons recognized as heirs of an intestate decedent's estate.

State v. Estate of Kyle William Bruening, 373 So. 3d 337 (Fla. 4th DCA 2023)

Decedent died without a will with a substantial estate. He was unmarried, had no children, and his aunts, uncles, parents, and grandparents predeceased him at his time of death. Distant relatives sought to be deemed beneficiaries of the intestate estate where they only shared common great-grandparents with the decedent. The probate court erred and authorized the personal representative to distribute the estate to those relatives. However, the State of Florida intervened and said that there were no class of heirs under Fla. Stat. § 732.103, and that the estate must escheat to the state.

The estate tried to rely on Fla. Stat. § 732.103(4)(c). but the provision would only apply if that class of maternal or paternal kindred existed, which it did not. The estate also tried to rely on the definition of collateral heir, which did not apply either.

Ultimately, pursuant to the plain language of Fla. Stat. § 732.103, persons who have great-grandparents in common with a decedent, but who otherwise have none of the familial relationships with a decedent that are contemplated under the Florida Statute, are not in a class of persons recognized as heirs of an intestate decedent's estate. The trial court's decision was reversed.

The appellate court dismissed Appellant's appeal regarding the trial court's finding of incapacity for lack of timely jurisdiction; reversed the trial court's order requiring Appellant to transfer complete title of the Florida home to the guardian when it was previously owned as tenants by the entireties; reversed the trial court's order requiring all sales proceeds of the Florida condominium be distributed to the guardian because Appellant was denied due process; and affirmed the rest of the Order Appointing Plenary Guardian.

Hudkins v. Matthew L. Hudkins, Guardian of the person and property of the ward, Keith L. Hudkins, 360 So. 3d 446 (Fla. 5th DCA 2023)

Appellant is Keith L. Hudkins' ("Ward") spouse. Appellee is guardian of the person and property of the Ward. Appellant and Ward were married since 2017, and during their marriage purchased two pieces of property. The Cape Canaveral Condo was owned originally as tenants by the entirety and then deeded to their joint trust. The Ponte Vedra Home was owned as tenants by the entirety. The Ward also executed a durable power of attorney naming the Appellant as his agent.

The Ward was involved in a motorcycle accident, which required him to need long-term care Medicaid benefits. Appellant hired an attorney to qualify for Medicaid and began

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making transfers using the durable power of attorney as part of the process, including deeding the Cape Canaveral Condo and the Ponte Vedra Home into her individual trust then putting the Cape Canaveral Condo for sale. Appellee became involved in a dispute over the Ward's care and the Medicaid transfers were questioned.

Appellee instituted guardianship proceedings and an Order Determining Total Incapacity and Order Appointing Plenary Guardian were entered. Appellant took issue with the Order Determining Total Incapacity believing that the Ward had capacity and two issues with the Order Determining Plenary Guardian: (1) ordering Appellant to transfer title to the Ponte Vedra Home to the guardian for the benefit of the Ward and (2) ordering Appellant to transfer the proceeds from the sale of the Cape Canaveral Condo to the guardianship account for the sole benefit of the Ward.

The first issue regarding the Order Determining Incapacity was dismissed since the appeal was not timely filed.

The second issue regarding the transfer of the Ponte Vedra Home was reversed because the court cannot allocate the property contrary to established legal principles. Pursuant to Fla. Stat. § 744.457(1)(a) property that was owned as tenants by the entirety with an incapacitated person may be sold, transferred, conveyed, or mortgaged, if the spouse who is not incapacitated joins in the action. The court cannot transfer full title to the Ward without the spouse's consent. However, the Appellee can still pursue legal relief related to enjoin Appellant's from selling the property.

The third issue regarding the transfer of the proceeds of the Cape Canaveral Condo was reversed because the guardianship court did not provide the other owner of a joint account with adequate notice and meaningful opportunity to be heard.[1] Appellant brought up the issue of joint ownership and the distribution of funds was supposed to be discussed at a subsequent hearing, but a final order was issued, without notice to the Appellant, to transfer all the proceeds to the Appellee for the benefit of the Ward.

The appellate court remanded the second and third issues with instructions and affirmed the rest of the Order Appointing Plenary Guardian.

Endnotes

1 *Zelman v. Zelman*, 170 So. 3d 838, 839 (Fla. 4th DCA 2015)

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