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NOVA LAW REVIEW



THE 2001 SURVEY OF FLORIDA LAW

Community Associations	<i>Joseph E. Adams</i>
Estates and Trusts	<i>Eloisa C. Rodriguez-Dod</i>
Evidence Law	<i>Leonard Birdsong</i>
Property Law	<i>Ronald Benton Brown</i> <i>Joseph M. Grohman</i>
Public Employment Law	<i>John Sanchez</i>
Tort Law	<i>William E. Adams, Jr.</i>

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Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word?	<i>Dan Cytryn</i>
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NOTES AND COMMENTS

Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded Can No Longer Be Tolerated?	<i>Lindsay Raphael</i>
In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida's Public Records Law Under the Hot Lights	<i>Patrick N. Bailey</i>
Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations	<i>Edward L. Holloran, III</i>
Troubled Waters: Florida's Isolated Wetlands in the Aftermath of <i>Solid Waste Agency of Northern Cook County v.</i> <i>U.S. Army Corps of Engineers</i>	<i>Debra Alise Spungin</i>

VOLUME 26

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2001-2002

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TABLE OF CONTENTS

THE 2001 SURVEY OF FLORIDA LAW

Community Associations	<i>Joseph E. Adams</i>	1
Estates and Trusts	<i>Eloisa C. Rodriguez-Dod</i>	37
Evidence Law	<i>Leonard Birdsong</i>	59
Property Law	<i>Ronald Benton Brown</i>	109
	<i>Joseph M. Grohman</i>	
Public Employment Law	<i>John Sanchez</i>	191
Tort Law	<i>William E. Adams, Jr.</i>	225

ARTICLES

Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word.....	<i>Dan Cytryn</i>	249
---	-------------------	-----

NOTES AND COMMENTS

Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded Can No Longer Be Tolerated?	<i>Lindsay Raphael</i>	269
---	------------------------	-----

In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida's Public Records Law Under the Hot Lights.....	<i>Patrick N. Bailey</i>	305
---	--------------------------	-----

Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations.....	<i>Edward L. Holloran, III</i>	331
--	--------------------------------	-----

Troubled Waters: Florida's Isolated Wetlands in the Aftermath of <i>Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers</i>	<i>Debra Alise Spungin</i>	371
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Community Associations:¹ Statutory Changes and Appellate Law 7/1/00–6/30/01

Joseph E. Adams*

TABLE OF CONTENTS

I. LEGISLATION	2
A. <i>Condominiums</i>	2
B. <i>Cooperatives</i>	3
C. <i>Homeowners' Associations</i>	3
D. <i>Miscellaneous Legislation Affecting Community Association Operations</i>	4
II. APPELLATE CASE LAW	6
A. <i>Introduction</i>	6
B. <i>Breach of Fiduciary Duty/Tort Claims</i>	7
C. <i>Attorney Malpractice Claims</i>	17
D. <i>Condominium Cases</i>	20
E. <i>Homeowners' Association and Covenant Cases</i>	25

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1. The reference to "community associations" means any mandatory membership corporation tied to the ownership of real property, which corporation has a right of lien for the collection of assessments. See FLA. STAT. § 468.431(1) (2001). The most common forms of community associations are condominium associations, cooperative associations, and homeowners' associations. This survey covers 2001 Florida legislation and appellate court cases from July 1, 2000 to June 30, 2001. Condominium related arbitration decisions, Declaratory Statements, and Division of Florida Land Sales, Condominiums and Mobile Home rules should also be examined by readers for a comprehensive review of legal authorities affecting Florida community associations for the period covered by this survey. Further, this survey does not cover issues involving timeshare developments, nor mobile home parks.

I. LEGISLATION

A. *Condominiums*

The most notable aspect of condominium legislation considered by the 2001 Florida Legislature was the bills that were not passed out of the session. Indeed, the only bill involving chapter 718 that was ultimately approved was a reviser's bill.² Among the potentially significant bills that did not pass, including a couple that died on the calendar in the waning moments of the session, were the following: 1) proposed amendments to chapter 718 dealing with a variety of operational issues, including the ability to amend condominium declarations to restrict rental rights,³ the ability to amend documents regarding alterations of common elements,⁴ amendments regarding the transfer of limited common element rights,⁵ and miscellaneous other operational provisions;⁶ 2) reorganization of the Department of Business and Professional Regulation, including the elimination of condominium arbitration;⁷ 3) a proposal to substantially limit the scope of warranty rights enjoyed by condominium unit owners and their associations regarding construction deficiencies;⁸ and 4) a proposed amendment to eliminate the contention⁹ that documentary stamps be paid on a community association's foreclosure of its lien interests.¹⁰

2. H.R. 667, 2001 Leg., (Fla. 2001). H.R. 667 corrects numerous perceived typographical and citation errors in various sections of the *Florida Statutes*, including several amendments to chapter 718. This bill was approved by the Governor on May 25, 2001, 2001-64 Fla. Laws, effective July 3, 2001.

3. See *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 754 So. 2d 831, 833 (Fla. 2d Dist. Ct. App. 2000).

4. See *Wellington Prop. Mgmt. v. Parc Comiche Condo. Ass'n, Inc.*, 755 So. 2d 824, 825 (Fla. 5th Dist. Ct. App. 2000).

5. See *Brown v. Rice*, 716 So. 2d 807, 808 (Fla. 5th Dist. Ct. App. 1998); 2000-302, § 50 Fla. Laws.

6. H.R. 1907, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted). Also treated at H.B. 207; S.B. 348 and S.B. 2210.

7. H.R. 1923, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

8. S. 1742, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

9. See *State v. 100 La Peninsula Condo. Ass'n, Inc.*, Case No. 99-6646, Leon County, Florida (Fla. 1st Dist. Ct. App. 2001).

10. H.R. 1835, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

B. Cooperatives

To the knowledge of the author, no bills affecting cooperatives or cooperative associations¹¹ were considered nor adopted during the 2001 legislative session.

C. Homeowners' Associations

Likewise, no substantial legislation directly affecting the operation of homeowners' associations was passed during the legislative session. A local bill was considered which would have permitted Marion County to adopt special legislation for homeowners' associations.¹² A bill which did pass, but was vetoed by the Governor,¹³ would have permitted homeowners' associations to apply for the vacation of public roads and the simultaneous conveyance of the same to a residential homeowners' association for the purpose of creating a gated subdivision upon a vote of four-fifths of the owners therein.

One clause that was added to the homeowners' association statute was a newly enacted section 720.3075 of the *Florida Statutes*.¹⁴ This law, dealing with a variety of other topics,¹⁵ provides that any homeowners' association documents, including declarations of covenants, articles of incorporation, or bylaws, entered into after October 1, 2001, "may not prohibit any property owner from implementing Xeriscape or "Florida-friendly landscape as defined in section 373.185(1)" of the *Florida Statutes*.¹⁶ The statute defines "Xeriscape" or "Florida-friendly landscape" as "quality landscapes that conserve water and protect the environment and are adaptable to local conditions and which are drought tolerant."¹⁷

11. See FLA. STAT. § 719 (2001).

12. H.R. 1901, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

13. H.R. 1053, 2001 Leg., Reg. Sess. (Fla. 2001) (unenacted).

14. FLA. STAT. § 720.3075 (2001).

15. Including a county's authority to convey property, tax deed application procedures, and tourist taxes. *Id.*

16. FLA. STAT. § 720.3075 (2001).

17. FLA. STAT. § 373.185 (2001).

D. Miscellaneous Legislation Affecting Community Association Operations

The 2001 Florida Legislature amended section 760 of the *Florida Statutes*, regulating, *inter alia*, “housing for older persons.”¹⁸ The 2001 amendment provides that a community claiming to be exempt from prohibitions of state law against discrimination on the basis of familial status,¹⁹ must register with the Florida Commission on Human Relations (“Commission”) stating that the community complies with the requirements of the law.²⁰ The statute provides that a letter shall be submitted on the letterhead of the community and shall be signed by the president of the community.²¹ Registration must be renewed biannually.²² Unfortunately, the filing of these registration forms confers no presumption of compliance with the law, and failure to comply with the law does not disqualify a community from holding itself out as “fifty-five and over housing.”

The Commission is required to make information in the registry available to the public, and the Commission shall include this information on an Internet website. The Commission has also promulgated rules,²³ which were scheduled for a potential Rule Development Workshop on September 7, 2001.²⁴

Section 482 of the *Florida Statutes*, relevant to pest control, was also amended in the 2001 Legislature.²⁵ Newly enacted section 482.242(1)(c)(1) of the *Florida Statutes* permits local governments to require, for multi-complex dwellings in excess of ten units, annual inspections for termite activity or damage, as well as the remediation of same. It is important to note that this law does not mandate the inspections and treatment, but simply permits local governments to adopt such standards; pest control is generally preempted by state regulation and is not susceptible to local regulation.²⁶

18. FLA. STAT. § 760.29(4) (2001).

19. For example, “fifty-five and over communities.”

20. FLA. STAT. §§ 760.29(4)(e), .31 (2001).

21. *Id.*

22. *Id.*

23. Housing for Older Persons Registration and Documentation, 27 Fla. Admin. Weekly 3907 (proposed Aug. 24, 2001) (to be codified at FLA. STAT. § 760.29(4)(e) (2001)).

24. See FLA. STAT. § 760.29(4)(e) (2001).

25. FLA. STAT. § 725.06 (2001).

26. *Id.*

For the second time in as many years,²⁷ section 725.06 of the *Florida Statutes*, which regulates indemnity provisions in construction contracts, was amended with an effective date of July 1, 2001.²⁸

The new statute applies to any construction contract entered into on or after July 1, 2001.²⁹ Included within the ambit of the law are not only contracts directly between the owner and the contractor, but also contracts with architects, engineers and subcontractors.³⁰ Indemnification provisions in such contracts, which do not comply with the law, are declared void and unenforceable.³¹ In order to be valid, an indemnity clause must contain a dollar limit on the obligations of the indemnitor.³² The indemnity obligations must bear a commercially reasonable relationship to the value of the work.³³ Unless otherwise provided in the agreement between the parties, one million dollars is established as the per se minimum level of reasonable indemnity undertakings.³⁴

The new proviso also permits the indemnitor to indemnify the indemnitee for the indemnitee's own negligence, if so provided in the agreement between the parties.³⁵ However, the law specifically limits the parameters of such undertakings, and excludes indemnification caused by "gross negligence, or willful, wanton or intentional misconduct," or for "statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions" of the indemnitor, or for those acts the indemnitor is responsible.³⁶

Attorneys for community associations are frequently called upon by their clients to prepare and/or review various forms of construction related agreements, which will be subject to this statute. Extreme care should be taken in insuring that the relevant provisions of the agreement comply with the statute, particularly when "industry boilerplate" forms, such as those

27. Ch. 2001-372, § 31, 2001 Fla. Laws 4334 (to be codified at FLA. STAT. § 725.06 (2001)).

28. Ch. 2001-211, § 10, 2001 Fla. Laws 1887-88 (to be codified at FLA. STAT. § 725.06 (2001)).

29. FLA. STAT. § 725.06(1) (2001).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. § 725.06(1).

35. § 725.06(1)(c).

36. *Id.*

used by the American Institute of Architects, or similar organizations, form the basis of the contract documents.

II. APPELLATE CASE LAW

A. Introduction

Although the period encompassed by this survey was unusually quiet in terms of legislation,³⁷ there was no shortage of appellate case law impacting the operation of community associations. One interesting side note is that the substantial amendments to the condominium statute in the early 1990s,³⁸ which mandated arbitration of many condominium “disputes,”³⁹ have resulted in the near elimination of what many consider as “trivial” condominium controversies⁴⁰ being decided in the appellate courts. Indeed, with the exception of a jurisdiction case⁴¹ and a couple of collection related cases,⁴² there were no appellate decisions involving what has historically been the fodder of condominium litigation. This is a clear departure from the volume of appellate court cases prior to the implementation of the arbitration program. Thus, to the extent the legislature sought to avoid crowding the circuit courts with disputes of this nature,⁴³ the program appears to be accomplishing that result, at least at the appellate court level. Hopefully, future efforts in the legislature to address the operation of the arbitration program⁴⁴ will be undertaken with due regard for what has gone before.

37. Several Tallahassee lobbyists have advised author that the activity surrounding the Bush/Gore Presidential contest, including involvement by the Florida Legislature, resulted in delays in the pre-session committee process, which precluded many legislative initiatives, even if uncontested, from being guided through the process.

38. FLA. STAT. § 718.111 (1991).

39. See FLA. STAT. § 718.1255(1) (2001) (defining “disputes”).

40. By way of example, but not limitation, these include pet cases, vehicle parking controversies, and election challenges.

41. Fla. Tower Condo., Inc. v. Mindes, 770 So. 2d 210, 211 (Fla. 3d Dist. Ct. App. 2000)

42. Nationsbanc Mortgage Corp. v. The Gardens N. Condo. Ass’n, Inc., 764 So. 2d 883, 884 (Fla. 4th Dist. Ct. App. 1997); Schooner Oaks Ltd. Co. v. Schooner Oaks Condo. Ass’n, Inc., 776 So. 2d 304 (Fla. 4th Dist. Ct. App. 2000).

43. FLA. STAT. § 718.1255 (2001).

44. H.R. 1923, 2001 Leg., Reg. Sess. (Fla. 2001).

B. Breach of Fiduciary Duty/Tort Claims

The period covered by the survey includes what appears to be an unusual number of cases involving breach of fiduciary duty or intentional tort claims in varying forms. The condominium statute⁴⁵ provides that each officer and director has a fiduciary relationship to the unit owners. Further, the statute confers a cause of action by unit owners or the Association, against directors who willfully or knowingly fail to comply with the law,⁴⁶ or directors designated by the developer, for actions taken by them prior to the time control of the Association⁴⁷ is assumed by unit owners other than the developer.⁴⁸ The cooperative statute⁴⁹ contains similar provisions.⁵⁰ The statute applicable to homeowners associations⁵¹ similarly imposes a fiduciary duty on officers and directors⁵² and likewise confers a cause of action in favor of the Association or a homeowner against directors who willfully and knowingly fail to comply with the law.⁵³ Notably missing from the parallel clause in the statute for condominium associations is the direct conferral of a cause of action against directors appointed by the developer for pre-turnover acts or omissions.

The case of *Stevens v. Cricket Club Condominium, Inc.*⁵⁴ although benign in result, creates a basis for substantial concern for condominium associations and their boards of directors.⁵⁵ According to the per curiam decision, at the time the underlying dispute went to trial, only counts III and V of the five count complaint remained.⁵⁶

Count III, presented in a class action capacity,⁵⁷ sought compensatory damages for breach of fiduciary duty against the Association.⁵⁸ The plaintiff

45. FLA. STAT. § 718.111(1)(a) (2001).

46. § 718.303(1)(d) (2001).

47. Commonly referred to as "turnover"

48. § 718.303(1)(d).

49. § 719.104.

50. § 719.303(1)(c)-(d).

51. § 720.301.

52. See § 720.303(1).

53. See § 720.305(1)(c).

54. 784 So. 2d 517 (Fla. 3d Dist. Ct. App. 2001).

55. *Id.*

56. *Id.* at 518.

57. See *Cricket Club Condo., Inc. v. Stevens*, 695 So. 2d 826, 827 (Fla. 3d Dist. Ct. App. 1997).

58. *Stevens*, 784 So. 2d at 518.

complained that the Association's board made "false statements concerning new wiring and price savings in regard to cable television service."⁵⁹

Count V, which again pled the unit owner's putative status as class representative, also sounded in breach of fiduciary duty.⁶⁰ Stevens alleged that the board of directors spent funds from a 1992 special assessment on items other than those set forth in the "Notice of Special Assessment."⁶¹ Apparently, \$50,000 was assessed to repair the pool area, however the board did not have that work done.⁶² The funds were instead largely used⁶³ to repair the south terrace area, which was described as an area leading to the pool.⁶⁴

The trial court found in favor of the Association on count III (the cable television claim).⁶⁵ In regard to count V, the trial court ruled in favor of the unit owner, concluding that he had sustained his burden of proof on the misapplication of the 1992 special assessment.⁶⁶ However, the trial court awarded only nominal damages in the amount of \$1.⁶⁷ The unit owner appealed the trial court's judgment on count III and the award of only nominal damages on count V.⁶⁸ The Association cross appealed the finding of liability on count V.⁶⁹ Citing *GNB, Inc. v. United Danco Batteries, Inc.*,⁷⁰ the reviewing appellate panel indicated it would not reweigh the evidence, and that the record supported the trial court's conclusions.⁷¹

With regard to count III (the cable television issue), the court noted that the Association held a "town meeting" to explain cable television options and that various reports were made available for inspection by the unit owners.⁷² The court concluded that the board of directors did not mislead

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Except for about \$2000 which was used for cleaning the pool. *Stevens*, 784 So. 2d at 518.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Stevens*, 784 So. 2d at 518.

69. *Id.*

70. 627 So. 2d 492, 493 (Fla. 2d Dist. Ct. App. 1993).

71. *Stevens*, 718 So. 2d at 518.

72. *Id.* at 519.

the unit owners, but allowed them to draw their own conclusions as to which cable company should be chosen.⁷³

Although the rationale for the court's affirmance of the dismissal of count III is brief, the troubling aspect is the suggestion that under different factual circumstances, a prima facie case for breach of fiduciary duty could have been made. The courts have historically given condominium association boards wide "business judgment" latitude⁷⁴ and indeed the condominium statute permits the board of directors to normally, absent a contrary restriction in the declaration of condominium, choose the bulk cable provider.⁷⁵ Hopefully, the court's disposition of count III will not be construed to imply a broader standard of liability than Florida's case law currently provides.⁷⁶

The more troubling aspect of the court's decision in *Stevens* is the affirmance of count V and the award of nominal damages. Even though it was not contested that the repair of the south terrace area was a proper function of the Association, the court concluded that the Association "did misapply funds."⁷⁷ Although the decision does not include a detailed review of the underlying facts in the matter, the court does note that when Mr. Stevens charged the board with "misapplying" the funds, the board returned the assessment to the unit owners, and thereafter, presumably properly, specially assessed the funds necessary to repair the south terrace.⁷⁸ Although the use of special assessment funds for purposes other than that for which they were levied appears to violate the condominium statute,⁷⁹ the court does not address⁸⁰ why the dispute did not become moot when the assessment was returned.⁸¹ Clearly, of greatest practical significance to the Association is the fact that Mr. Stevens would presumably be declared the "prevailing party" in count V, and as such, would be entitled to the recovery of reasonable attorney's fees incurred with the prosecution of that count.⁸²

73. *Id.*

74. *Farrington v. Casa Solana Condo. Ass'n*, 517 So. 2d 70, 72 (Fla. 3d Dist. Ct. App. 1987).

75. *Id.* FLA. STAT. § 718.115(1)(d) (2001).

76. *See, e.g., Perlow v. Goldberg*, 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

77. *Stevens*, 784 So. 2d at 519.

78. *Id.*

79. FLA. STAT. § 718.112(2)(c) (2001).

80. It is unknown whether the issue was raised in the pleading or the briefs.

81. *See, e.g., 51 Island Way Condo. Ass'n, Inc. v. Williams*, 458 So. 2d 364, 367 (Fla. 2d Dist. Ct. App. 1984).

82. FLA. STAT. § 718.303(1) (2001).

Another breach of fiduciary duty case which is troubling from the perspective of unit owner or homeowner controlled associations is *Turkey Creek Master Owners Ass'n, Inc. v. Hope*.⁸³ In this case, a homeowners association sued the officers and directors of the Association who had been appointed by the developer.⁸⁴ The Association's claims sounded in breach of fiduciary duty, conversion, breach of contract, and accounting.⁸⁵ In connection with the underlying action, the trial court entered an order that required the Association to pay the attorney's fees of the developer's board appointees.⁸⁶ The basis of the trial court's award was section 607.0850(9) of the *Florida Statutes*, the section of the corporation laws applicable to indemnification.⁸⁷ The statute provides that a trial court may order a corporate plaintiff to indemnify a defendant for fees and expenses incurred in defending a suit filed by the corporation against one or more of its directors or employees.⁸⁸ The statute limits indemnification in such situations to cases where the court finds that the defendant or defendants are "fairly and reasonably entitled to indemnification or advancement of expenses or both, in view of all of the relevant circumstances"⁸⁹

Although disagreeing with the Association's contention that the trial court should have dismissed the claim to indemnification entitlement on the pleadings, the appellate court ruled that the trial court did not set forth a sufficient basis for determining whether the "fairly and reasonably" entitlement standard was met, nor did the trial court explicate the "relevant circumstances" upon which such judgment was rendered.⁹⁰ The parties stipulated that the trial courts order of indemnification was based upon the pleadings; the appellate panel, writing per curiam, sent the order back to the trial court, on remand, for reconsideration in light of the standards explicated in the opinion.⁹¹

In dicta, the appellate court noted that the indemnification statute is more likely to be applied when a corporate employee or director is sued by a third party in relation to the actions of the employee or director as a

83. 766 So. 2d 1245 (Fla. 1st Dist. Ct. App. 2000).

84. *Id.* at 1246.

85. *Id.*

86. *Id.*

87. Although most condominium and homeowners associations are not-for-profit corporations, the indemnity provisions of the Florida Business Corporation Act are incorporated into the Florida Not-for-Profit Corporation Act. FLA. STAT. § 617.0831 (2000).

88. § 607.0850(9).

89. *Id.*

90. *Turkey Creek*, 766 So. 2d at 1246.

91. *Id.* at 1246-47.

corporate agent.⁹² Conceding that the statute recognizes circumstances where the corporation must indemnify the agent it is suing, the court further noted that, since the corporation faces the possibility of being required to pay the legal fees and the expenses of the very party it is suing, it is “especially important to determine whether the circumstances justify a finding that the agent is reasonably entitled to indemnification.”⁹³

Perhaps most puzzling, the *Turkey Creek* court does not discuss the effect of section 617.0831 of the Florida Not-for-Profit Corporation Act which provides that “the term director, as used in section 617.0850, does not include a director appointed by the developer to the board of directors of a condominium association under chapter 718, a cooperative association under chapter 719, a homeowners association defined in section 720.301, or a timeshare managing entity under chapter 721.”⁹⁴ Unfortunately, the court’s decision does little to develop objective standards in the law as it pertains to the unique circumstances of the relationship between associations and those directors who were appointed by the developer.

Obviously, the specter of paying a developer-appointee’s attorney’s fees, pursuant to the corporate indemnification statute, could create a chilling affect on an associations’ vindication of legal rights, and the pursuit of recognized causes of action. Interestingly, the court does not address the standards for indemnification for cases of this nature, as enunciated in *Old Port Cove Property Owners Ass’n, Inc. v. Ecclestone*.⁹⁵ In *Old Port Cove*, the Association sued the principal in the development entity, also a member of the Association’s board, for selling the road system within the development back to the Association at a price of approximately two million dollars.⁹⁶ The developer prevailed on the Association’s claim of breach of fiduciary duty.⁹⁷ The trial court awarded Mr. Ecclestone his attorney’s fees, based upon language in the Association’s articles of incorporation, which entitled directors of the Association to indemnification.⁹⁸ The appellate court, relying on the then existing version of the law struck down the indemnification award.⁹⁹ The *Old Port Cove* court also cited *Penthouse*

92. *Id.* at 1247.

93. *Id.*

94. FLA. STAT. § 617.0831 (2000).

95. 500 So. 2d 331 (Fla. 4th Dist. Ct. App. 1986).

96. *Id.* at 332.

97. *Id.* at 333.

98. *Id.* at 336.

99. *Id.* at 335. The version of the indemnification statute litigated in *Turkey Creek* is different than the version that existed when the *Old Port Cove* case was decided.

North Ass'n, Inc. v. Lombardi,¹⁰⁰ where the Supreme Court of Florida held, on essentially public policy grounds, that the indemnification provision in the articles of incorporation of a condominium association could not be invoked to support a claim by the developer-appointees to the board.¹⁰¹

Another "pre-turnover" breach of fiduciary duty type case,¹⁰² *Larsen v. Island Developers, Ltd.*¹⁰³ has the twist of the not-for-profit corporation structured as an "equity club."¹⁰⁴ At issue in the case was the trial court's dismissal of the derivative action complaint, brought by members of the club, against the developer of Fisher Island, an exclusive development in Miami-Dade County.¹⁰⁵

According to the complaint, the club's developer enticed prospective purchasers of equity memberships in the club on the basis of representations that a right of first refusal existed for undeveloped land on Fisher Island and a similar right with respect to the developer's unsold condominium units, if the developer decided to offer the units for sale below a stated price level.¹⁰⁶ The developer ostensibly breached the agreement by marketing to third parties its remaining undeveloped land, along with its inventory of unsold condominium units.¹⁰⁷ After having sold the property in question, the developer gave notice of a proposed sale to its own employee, as president of the club, but provided no opportunity to purchase.¹⁰⁸

The trial court dismissed the complaint, holding that derivative actions could not be brought for the benefit of, or on behalf of, not-for-profit corporations.¹⁰⁹ The trial court's ruling was based upon a 1993 amendment to chapter 617¹¹⁰ which "burned the bridge" between that statute and chapter

100. 461 So. 2d 1350 (Fla. 1984).

101. *Id.* at 1351.

102. The reported decision does not specifically identify the theories of action pled in the case. The case does, however, involve actions of the developer's appointee to the board.

103. 769 So. 2d 1071 (Fla. 3d Dist. Ct. App. 2000).

104. *Id.* Although the term "equity club" has no statutory definition, it generally involves property interests and use rights with respect to recreational amenities (golf courses, country clubs, etc.) which are not tied to the ownership of real estate, and which do not involve mandatory membership in a community association. Community association practitioners are, however, frequently called upon to address issues pertaining to "equity clubs," which are often included as a feature of master planned developments.

105. *Larsen*, 769 So. 2d at 1071.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1072.

110. *Larsen*, 769 So. 2d at 1071 (citing The Florida Not-for-Profit Corporation Law, section 617.1908 of the *Florida Statutes*).

607.¹¹¹ The appellate court acknowledged that chapter 617 contains no specific grant of authority to bring a derivative action on behalf of a not-for-profit corporation.¹¹² However, the court further noted that the derivative rights conferred upon shareholders in corporations for profit were not initially derived from the legislature, but granted at common law as an equitable remedy.¹¹³

Thus, and in light of there being no specific prohibition in chapter 617 against derivative suits, the court applied the same rationale that led to imposition of derivative action rights at common law for profit making corporations.¹¹⁴ The court's opinion, written by Judge Ramirez, confesses that the intent of the 1993 amendments to the relevant statute is unclear.¹¹⁵ The court reasoned, however, that there were likely other reasons why the statute was amended, and there was no indicia of legislative intent to "completely eliminate a long-recognized, common law cause of action."¹¹⁶ Going a step further, the court went on to say that, "[t]o hold otherwise could likely raise the possibility of an unconstitutional restriction on access to courts."¹¹⁷ The procedural vehicle of a derivative suit is a potentially important right to homeowners or unit owners within associations still controlled by developers. Indeed, prior to the definitive announcement of the *Larsen* court, the existence or non existence of derivative actions for not-for-profit corporations remained an open question since the 1993 statutory amendments.

A relatively straightforward breach of fiduciary duty case, *Florida Discount Properties, Inc. v. Windermere Condominium, Inc.*,¹¹⁸ presents a fact pattern in a unit owner-controlled association which is most notable for the ostensible audacity of the two condominium association directors involved.¹¹⁹ Harold Glover and Jack Gerzina sat on the board of directors of Windermere Condominium, Inc.¹²⁰ Windermere Condominium was subject to a "recreation lease."¹²¹ Over a period of some twenty five years, the

111. *Id.* (citing The Florida Business Corporation Act, section 607 of the *Florida Statutes*).

112. *Id.* at 1072.

113. *Id.*

114. *Id.*

115. *Larsen*, 769 So. 2d at 1072.

116. *Id.*

117. *Id.*

118. 786 So. 2d 1271 (Fla. 4th Dist. Ct. App. 2001).

119. *Id.* at 1272-73.

120. *Id.* at 1271-72.

121. *Id.* at 1272; FLA. STAT. § 718.401 (1997).

association paid a total of \$750,000 in lease payments.¹²² In 1995, the board of the association voted to buy out the lease.¹²³ The association was able to negotiate a purchase price with the developer of \$35,000.¹²⁴ At a December 1996 Board meeting, Gerzina and Glover, along with the Association's attorney, urged the association to contest the lease based upon the argument that it was unconscionable.¹²⁵ Initially, a quorum was not present because only three of the seven directors were at the meeting.¹²⁶ Apparently at the attorney's recommendation, two more Board members were appointed, making the Board nine members in total, and thus creating a quorum of five.¹²⁷

Subsequently, a dispute in the condominium developed as to who was lawfully on the Board.¹²⁸ A receiver was appointed in 1997 to operate the association and Gerzina and Glover were recalled from the Board, as ultimately confirmed by an arbitrator.¹²⁹ Prior to their removal from the board, however, Gerzina and Glover began negotiating with the recreation lease's owner to purchase the recreational lease property.¹³⁰ A week after Gerzina and Glover were recalled from the board, they entered into a contract to purchase the property from the owner.¹³¹ Thereafter, they filed suit against the association to collect back rents.¹³² Although the opinion, written by Judge Stevenson, does not involve a detailed recitation of the trial court's legal findings, the appellate court summarily upheld the trial court's order that Gerzina and Glover "utilized their position on the [board] to negotiate an advantageous economic position for themselves personally to the detriment of Windermere."¹³³ The trial court also ordered that the association be given a right of first refusal to purchase the property for

122. *Id.*

123. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1272.

124. *Id.* The decision does not specify why such an apparently low purchase price was involved in light of the fact that the lease presumably provided a substantial income stream. *Id.* at 1271-73.

125. *Id.* (citing FLA. STAT. § 718.122(1)(a)(i) (1997) ("detailing guidelines for determining whether a lease is presumptively unconscionable.")).

126. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1272.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1272-73.

131. *Fla. Disc. Proprs., Inc.*, 786 So. 2d at 1273.

132. *Id.*

133. *Id.*

\$20,000, the same amount Gerzina and Glover paid for it.¹³⁴ One of the issues on appeal was whether or not the subject lease was subject to the right of first refusal found in section 718.401(1)(f) of the *Florida Statutes*.¹³⁵ The appellate court found that it was not necessary to reach this question, because the trial judge properly granted the right of first refusal based on Gerzina's and Glover's "disgorgment for usurping the corporate opportunity."¹³⁶

Unfortunately, it is not uncommon in condominium governance for disputes to erupt as to who is, or is not, legally seated on the Board. The action of appointing two directors as an emergency matter at a Board meeting certainly seems suspect, although the relevant provisions of the association's bylaws are not set forth in the decision.¹³⁷ However, when unit owners and Board members engage in conduct that implicates personal profit making pertinent to condominium business, this case drives home the fact that the liability limitations and immunities generally sprinkled throughout the applicable statutes and relevant case law will find no application.

The final tort based conduct related case, *Hollywood Lakes Country Club, Inc. v. Community Ass'n Services, Inc.*,¹³⁸ presents yet another twist. Here, it was the developer who sued a management company, arising out of services provided by the management company regarding the community the developer had developed.¹³⁹ The developer's complaint sounded in breach of contract, misrepresentation, equitable subrogation, and malpractice.¹⁴⁰ The "trial court dismissed the fourth amended complaint with prejudice," resulting in the appeal.¹⁴¹

The issue in the underlying dispute was whether the management company hired by the developer-controlled association failed to take appropriate steps to collect assessments from unit owners.¹⁴² The developer claimed to be damaged since the governing documents for the community required the developer to fund any shortfalls in assessments collected from non-developer unit owners.¹⁴³ The legal hurdle faced by the developer was that the management agreement was between the association and the

134. *Id.*

135. The 1997 version of the statute was stated to apply to these proceedings. *Id.*

136. *Fla. Disc. Props., Inc.*, 786 So. 2d at 1273.

137. *See id.* at 1271-73.

138. 770 So. 2d 716 (Fla. 4th Dist. Ct. App. 2000).

139. *Id.* at 717.

140. *Id.*

141. *Id.*

142. *Id.* at 718.

143. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

management company, not the developer and the management company.¹⁴⁴ The appellate court held that the fourth amended complaint contained all of the necessary allegations to sustain a *prima facie* case for fraud (misrepresentation) by the management company as to the developer.¹⁴⁵ Citing applicable authorities, the court held that the developer sufficiently alleged misrepresentations by the management company, which caused the developer to refrain from independently acting to collect assessments.¹⁴⁶

The court also addressed the dismissal of the count for equitable subrogation.¹⁴⁷ Citing relevant authorities, and primarily relying on *National Union Fire Insurance Co. v. KPMG Peat Marwick*,¹⁴⁸ the Fourth District's panel, through Chief Judge Warner, found sufficient grounds to sustain a *prima facie* case for a claim of equitable subrogation.¹⁴⁹ The court ruled that the debt was due to the association from the individual homeowners, the management company was responsible for collecting the debt, and the management company's negligence caused the loss of the assessment.¹⁵⁰ The developer's payment of that debt allows it to succeed to the position of the original creditor, the association, under the doctrine of equitable subrogation.¹⁵¹

The court did, however, affirm the dismissal of a breach of contract count, which had been pled under a third party beneficiary theory.¹⁵² Citing *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*,¹⁵³ the court found that there was no indication that both parties to the contract, the association and the management company, intended to benefit the developer.¹⁵⁴ Finally, without discussion, the court dismissed the "malpractice" complaint against the management company, "as there was no allegation that [the management company] was a professional, and no privity of contract alleged."¹⁵⁵

This case presents developers with some interesting food for thought in terms of structuring the contractual relationship for communities they

144. *Id.*

145. *Id.*

146. *Id.* (citing *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984)); *see also* *Frenz Enters, Inc. v. Port Everglades*, 746 So. 2d 498, 502-03 (Fla. 4th Dist. Ct. App. 1999).

147. *Id.*

148. 742 So. 2d 328, 332 (Fla. 3d Dist. Ct. App. 1999).

149. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

150. *Id.* at 718-19.

151. *Id.* at 719.

152. *Id.*

153. 647 So. 2d 1028, 1031 (Fla. 1994).

154. *Id.*

155. *Id.*

develop with the manager or management company that is typically retained to administer the day-to-day affairs of the development and the association. Although many homeowners in communities under development see the management company as “working for the developer,” in most cases the privity of contract is between the association and the management company, albeit under developer control. Clearly, a manager’s negligence or other tortious conduct can cause as much, perhaps more, damage to the developer than to the association itself, since various statutory provisions and common law theories may result in the developer, and its board appointees, being exposed to liability claims for pre-turnover acts or omissions.

C. Attorney Malpractice Claims

Perhaps as a reminder that community association law is hardly a risk-free endeavor, two decisions announced during the period covered by this survey explore legal malpractice exposure for those engaged in the practice. In decisions issued only three days apart, the first and second districts addressed slightly different scenarios.

*Hunt Ridge at Tall Pines, Inc. v. Hall*¹⁵⁶ involved a malpractice suit filed by a homeowners association¹⁵⁷ against the attorney retained by the developer to draft the governing documents for the community and its governing associations.¹⁵⁸ According to the suit, one of the declaration supplements prepared by the Developer’s attorney incorrectly listed the owner of the property,¹⁵⁹ resulting in the alleged invalidity of the declaration of covenants as to certain lots and the consequent inability to perform anticipated duties and collect corresponding maintenance fees.¹⁶⁰

At issue was whether the attorney-client relationship between the lawyer and the developer, as opposed to the developer and the association, conferred any standing on the association for a malpractice claim, as an intended third party beneficiary of the lawyer-client relationship.¹⁶¹ Citing the *Caretta* case,¹⁶² the second district, through Judge Threadgill, enforced

156. 766 So. 2d 399 (Fla. 2d Dist. Ct. App. 2000).

157. Although not specifically stated in the opinion, it appears that this was the post-turnover association that acted as plaintiff in the suit.

158. *Hunt Ridge*, 766 So. 2d at 400.

159. Allegedly the general partner of the development entity, rather than the limited partnership which was the developer entity itself, was named.

160. *Hunt Ridge*, 766 So. 2d at 400.

161. *Id.*

162. See *Caretta Trucking*, 647 So. 2d at 1028.

the long-standing legal principle that a party is an intended beneficiary to a contract only if the parties clearly express or the contract itself expresses an intent to primarily and directly benefit a third party.¹⁶³

The court observed that the declaration expressly indicated that it benefited the property owners, but made no mention of benefiting the association.¹⁶⁴ Reasoning that the association is not an “owner,” the party whom benefited from the document drafting, the court concluded that the association could not state a cause of action.¹⁶⁵

Although this case was resolved favorably from the perspective of the developer’s counsel, query whether a different result would have obtained if individual owners had filed the suit, rather than the association. Indeed, and although not so expressly stated by the second district, a review of the Court’s rationale could lead one to conclude that the court would have reviewed the matter in an entirely different light, given the language in the Declaration, which could be construed to confer third party beneficiary status on the property owners in the development.

The flip side of the *Hunt Ridge* case involved a malpractice lawsuit by unit owners in a unit-owner controlled condominium association against the association’s attorney. In *Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane*,¹⁶⁶ a group of unit owners sued the association’s attorney for legal malpractice, arising out of allegedly negligent advice given to the association relative to reconstruction of the condominium after Hurricane Opal, which inflicted major damage in the Florida Panhandle in 1995.¹⁶⁷

Silver Dunes, the condominium operated by the association, sustained substantial damage after Hurricane Opal. John Daniel, an attorney with the Law Firm of Beggs and Lane, was retained to provide advice and counsel to the association.¹⁶⁸ Ultimately, it was discovered that insurance proceeds would not be sufficient to repair all of the damage that had been caused by the storm.¹⁶⁹ The Board, with Daniel’s assistance, announced a plan whereby additional units would be built during the reconstruction and sold to make up the monetary shortfalls that were expected due to insufficient insurance proceeds.¹⁷⁰

163. *Hunt Ridge*, 766 So. 2d at 400.

164. *Id.* at 400–01.

165. *Id.* at 401.

166. 763 So. 2d 1274 (Fla. 1st Dist. Ct. App. 2000).

167. *Id.* at 1276.

168. *Id.* at 1275.

169. *Id.* at 1275–76.

170. *Id.* at 1276.

Controversy erupted over the board's plan. At one point, Daniel wrote letters to some of the individual unit owners, threatening legal action if they did not vote in favor of the board's plan.¹⁷¹ In their suit, the unit owners contended that the attorney provided erroneous legal advice to the board in connection with the reconstruction expansion plan, which led to a delay in the ultimate reconstruction of the destroyed units, and a resulting loss of rental income to the affected owners.¹⁷² The trial court entered summary judgment in favor of the attorney and the law firm.¹⁷³

Citing the general rule that an attorney's liability for negligence is generally limited to the persons with whom the attorney shares privity of contract, the court, in its per curiam opinion, noted that a "narrow exception" exists when the non-clients can demonstrate that they are a third-party beneficiary of the agreement for legal services.¹⁷⁴

Without cited authority from other case decisions, the court went on to observe that a condominium association is a "closely held corporation."¹⁷⁵ Thus, the court concluded that the issue was governed, at least in part, by a case from the fourth district.¹⁷⁶ On the authority of *Brennan*, the first district likened the unit owners to "minority stockholders," and accordingly found no basis to conclude that the attorney was representing the legal interests of the individual unit owners.¹⁷⁷ Indeed, the court noted that it would be unusual to argue that the attorney was representing the individual interests of the unit owners when he had sent them letters threatening to sue them.¹⁷⁸

The relationship between a community association attorney and its unit owners is one that is often problematic for community association practitioners. Many unit owners and homeowners feel that they are "paying for" the services, and therefore feel that the attorney's loyalty should be directed to their interests. Unfortunately, the interests of the association and particular unit owners often diverge, and an attorney cannot serve two masters. This case is a common sense result and is consistent with other cases involving the role of community association attorneys and the unit

171. *Silver Dunes*, 763 So. 2d at 1276.

172. *Id.*

173. *Id.* at 1277.

174. *Id.* at 1276; see also *Hunt Ridge*, 766 So. 2d at 400.

175. *Id.* at 1276.

176. *Silver Dunes*, 763 So. 2d at 1276 (discussing *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994)).

177. *Id.* at 1277.

178. *Id.*

owners.¹⁷⁹ However, the case is also instructive that association lawyers need to be constantly on the guard to insure that their representational roles are clear, and to insure that they remain so.

D. Condominium Cases

An interesting case, apparently reviewing issues of first impression, involves the liability of unit owners in a condominium for the negligent acts or omissions of their association. *Cooley v. Pheasant Run at Rosemont Condominium Ass'n, Inc.*¹⁸⁰ involved claims made by a person who was injured on the common elements of the condominium, while a guest at the condominium.¹⁸¹

However, in addition to suing the Association as a corporate entity, the plaintiff also sued each unit owner individually.¹⁸² The trial court dismissed the action against the individual unit owners, with prejudice, and indeed suggested that it would favorably entertain motions filed pursuant to section 57.105 of the *Florida Statutes*, which provides sanctions for frivolous litigation.¹⁸³ On appeal before the fifth district, Judge Cobb writing for the panel, examined the provisions of section 718.119 of the *Florida Statutes*.¹⁸⁴ Finding the issue to be one of "legislative intent,"¹⁸⁵ the court reasoned that

179. See, e.g., *Ocean Club of Palm Beach Shores Condo. Ass'n v. Estate of Daly*, 504 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1987).

180. 781 So. 2d 1182 (Fla. 5th Dist. Ct. App. 2001).

181. *Id.* at 1183.

182. *Id.*

183. *Id.*

184. Same provides:

Limitation of liability.—

(1) The liability of the owner of a unit for common expenses is limited to the amounts for which he or she is assessed for common expenses from time to time in accordance with this chapter, the declaration, and bylaws.

(2) The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit.

(3) In any legal action in which the association may be exposed to liability in excess of insurance coverage protecting it and the unit owners, the association shall give notice of the exposure within a reasonable time to all unit owners, and they shall have the right to intervene and defend.

Id. at 1183–84.

185. *Cooley*, 781 So. 2d at 1184.

the requirement that an association give notice to unit owners of potential liability in excess of insurance proceeds was indicative of the intention that the unit owner would not be an original party to the action, otherwise such notice would not be necessary.¹⁸⁶ The court found the focus of section 718.119 of the *Florida Statutes* to stand for the proposition that the association, as a corporate entity, would be the party liable for personal injuries on the condominium common elements, while the individual unit owners would be liable for assessments proportionate to such damage, up to the value of the unit.¹⁸⁷ Citing cases relative to a condominium association's status as a defendant in class action proceedings,¹⁸⁸ the court found¹⁸⁹ that the association, and only the association, would serve as the appropriate defensive class representative in matters of this nature.¹⁹⁰ The result in this case is consistent with the apparent legislative intent of section 718.119 of the *Florida Statutes*, which the court found to be less than "clear-cut," and is also consistent with the unique feature of condominium associations¹⁹¹

As noted previously, the introduction of mandatory, non-binding arbitration for most condominium "disputes" has resulted in a paucity of appellate cases exploring the limits of the dos and don'ts of condominium living. However, exploration of the limits of arbitrators' jurisdiction continue to emanate from the courts.¹⁹² *Florida Tower Condominium, Inc. v. Mindes*,¹⁹³ authored by Chief Judge Schwartz, dealt with a controversy over the right to use a particular parking space at the condominium.¹⁹⁴ Finding

186. *Id.*

187. *Id.*

188. *Graves v. Ciega Verde Condo. Ass'n, Inc.*, 703 So. 2d 1109, 1111 (Fla. 2d Dist. Ct. App. 1997); *Kesl, Inc. v. Racquet Club of Deer Creek II Condo, Inc.*, 574 So. 2d 251 (Fla. 4th Dist. Ct. App. 1991).

189. While apparently disagreeing with the trial court's perception that the issue was so clear-cut so as to invoke section 57.105 of the *Florida Statutes*.

190. *Cooley*, 781 So. 2d at 1184.

191. *Id.* See *The Florida Bar*, 353 So. 2d 95, 97 (Fla. 1977); *Avila South Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977).

192. See *Neate v. Cypress Club Condo. Inc.*, 718 So. 2d 390 (Fla. 4th Dist. Ct. App. Dist. 1998); *Ruffin v. Kingswood E Condo. Ass'n, Inc.*, 719 So. 2d 951 (Fla. 4th Dist. Ct. App. 1998); *Clark v. England*, 715 So. 2d 365 (Fla. 5th Dist. Ct. App. 1998); *Summit Towers Condo. Ass'n, Inc. v. Coren*, 707 So. 2d 416 (Fla. 4th Dist. Ct. App. 1998); *Carlandia Corporation v. Obermauer*, 695 So. 2d 408 (Fla. 4th Dist. Ct. App. 1997); *Seamaan v. Sea Ranch Club Condo. Ass'n, Inc.*, 695 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997); *Blum v. Tamarac Fairways Ass'n, Inc.*, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996).

193. 770 So. 2d 210 (Fla. 3d Dist. Ct. App. 2000).

194. *Id.* at 211.

that because the statutory definition of “dispute”¹⁹⁵ does not include disagreements that involve “title to a unit or any common element,” the court ruled that such controversies were not arbitrable, and that original jurisdiction for the adjudication of such claims therefore lies in the courts.¹⁹⁶ Noting that the Arbitration Section of the Department of Business and Professional Regulation has, nonetheless, accepted jurisdiction over a variety of parking assignment disputes,¹⁹⁷ the court “decline[d] to follow [those] contrary decisions of arbitrators.”¹⁹⁸

It can be argued that the court ascribed a definition to the term “title” which is different from the use of that term in normal legal parlance.¹⁹⁹ Since common elements by their nature are not “owned” by individual unit owners,²⁰⁰ the legal basis for concluding that a disagreement as to who may use a parking space involves “title” is perhaps debatable. However, unless addressed in a contrary fashion by the Legislature, or treated differently outside of the third district, practitioners should add to their rule enforcement checklist the existence of this case in jurisdictional determination. The case of *Schooner Oaks Ltd. Co. v. Schooner Oaks Condominium Ass’n, Inc.*,²⁰¹ is the latest in the “phantom unit cases” rising out of the Fourth District Court of Appeal²⁰² which appears to address the “phantom issue” differently than the second district.²⁰³ Schooner Oaks Limited Company (“Schooner Oaks”) constructed Schooner Oaks Condominium, a phase condominium, “which ultimately consisted of four phases.”²⁰⁴ When Schooner Oaks stopped making payments on unconstructed units, Schooner Oaks Condominium Association, Inc. (“Association”) initiated foreclosure action against the unconstructed units.²⁰⁵ The trial court entered summary

195. FLA. STAT. § 718.1255(1) (2001).

196. *Florida Tower*, 770 So. 2d at 211.

197. *Id.*

198. *Id.* at 211 n.1.

199. See BLACK’S LAW DICTIONARY 1485 (6th ed. 1990) (defining title to include “the union of all the elements which constitute ownership”).

200. FLA. STAT. § 718.106(2)(a) (2001).

201. 776 So. 2d 304 (Fla. 4th Dist. Ct. App. 2000).

202. See also *RIS Inv. Group, Inc. v. Dep’t of Bus. & Prof’l Regulation*, 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997); *Welleby Condo. Ass’n, Inc. v. The William Lyon Co.*, 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987). Cf. *Winkelman v. Toll*, 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

203. See *Estancia Condo. Ass’n v. Sunfield Homes, Inc.*, 619 So. 2d 1008, 1010 (Fla. 2d Dist. Ct. App. 1993); *Hyde Park Condo. Ass’n v. Estero Island Real Estate, Inc.*, 486 So. 2d 1, 2 (Fla. 2d Dist. Ct. App. 1986).

204. *Schooner Oaks*, 776 So. 2d at 305.

205. *Id.*

judgment finding that Schooner Oaks was liable for assessments on the unconstructed “units,” from which order Schooner Oaks appealed.²⁰⁶

On appeal, the central issue was whether unimproved land was subject to assessments.²⁰⁷ As the grant of a summary judgment was on appeal, the court, in its per curiam opinion, felt constrained to review the matter in a light most favorable to Schooner Oaks.²⁰⁸ In reviewing the various provisions of the declaration of condominium, which largely tracks statutory definitions verbatim, the court concluded that a reasonable inference could be drawn that “units” were created immediately upon a new phase being added, regardless of the phase of construction.²⁰⁹

However, the court noted that section four of the Declaration of Condominium, which defines the “unit boundaries,” supported a different conclusion.²¹⁰ Recognizing that these “boundaries” did not exist, the court ruled that a genuine issue of material fact as to the intention of the declaration of condominium was presented.²¹¹ The court held that the declaration permitted differing reasonable inferences, and thus remanded the case to the trial court for plenary proceedings.²¹²

This case, although perhaps judicious in terms of summary judgment standards, continues the judicial trend in the fourth district, which fails to recognize that in condominiums, there are only two types of property, common elements and units. Property that is submitted to a declaration must be one or the other, it can not be neither, nor can it be both. In fact, after the fourth district’s *Welleby* decision, the statute was specifically amended to provide that upon the recording of a declaration, or an amendment adding a phase to the terms of the declaration, all units described in the declaration or phase amendment as being located in or on the land then being submitted to condominium ownership shall come into existence “regardless of the state of completion of planned improvements in which the units may be located.”²¹³ Although it was not stated in the opinion whether this declaration pre-dates or post-dates the 1990 amendment to the statute, it appears that the views of the Fourth District continue demonstrating the court’s hesitation to impose

206. *Id.*

207. *Id.*

208. *Id.* at 306.

209. *Schooner Oaks*, 776 So. 2d at 306.

210. The boundary definition in this declaration contained typical “interior shell” definitions, with the “unit” being encompassed within the perimeter walls, floors, and ceilings. *Id.* at 305–06.

211. *Schooner Oaks*, 776 So. 2d at 306.

212. *Id.*

213. FLA. STAT. § 718.104(2) (2001).

liability on raw land. If this case is litigated again to appeal after remand, it will certainly be interesting to see how the court resolves the issues, particularly to the extent that a post-1990 condominium may be involved.²¹⁴

In *Nationsbanc Mortgage Corp. v. The Gardens North Condominium Ass'n, Inc.*,²¹⁵ the quality of title obtained after foreclosure of a condominium lien, where service of process was subsequently contested, was at issue.²¹⁶ In 1997, the bank purchased the subject unit at a foreclosure sale.²¹⁷

The association alleged that, thereafter, the bank failed to pay assessments.²¹⁸ The association filed a lien and subsequent action to foreclose on the same.²¹⁹ Nationsbanc did not file a response to the complaint and a default judgment was ultimately entered.²²⁰ The foreclosure sale was held on March 2, 1998, and a third-party bidder purchased the unit.²²¹

Nearly a year later, the bank moved to quash service of process and dismiss the complaint.²²² Nationsbanc alleged that service of process was defective, specifically that service was effectuated on an administrative assistant in violation of section 48.081 of the *Florida Statutes*.²²³ The association responded that the attempt of service was voidable, not void.²²⁴ The trial court found service to be facially defective, but refused to grant NationBanc's motion to vacate the sale and void the certificate of title.²²⁵

Stating that it was undisputed that the association did not comply with the statute applicable to service of process on corporations, Judge Polen, writing for the court, held that as statutes governing service of process must be strictly construed, attempted service on a random employee without a showing of necessity negated the court's personal jurisdiction over the defendant corporation.²²⁶

214. The *RIS* decision also involved a pre-1990 Declaration of Condominium. *RIS Inv. Group, Inc. v. Dep't of Bus. & Prof'l Regulation*, 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997).

215. 764 So. 2d 883 (Fla. 4th Dist. Ct. App. 1997).

216. *Id.* at 844.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Nationsbanc Mortgage Corp.*, 764 So. 2d at 884.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Nationsbanc Mortgage Corp.*, 764 So. 2d at 884.

226. *Id.* at 884-85 (citing *York Communications, Inc. v. Furst Group Inc.*, 724 So. 2d 678 (Fla. 4th Dist. Ct. App. 1999)).

Distinguishing cases where a judgment is only voidable where service of process does not violate the essential requirements of law, the court concluded that the association's attempted service was facially void, as the affidavit accompanying the proof of service did not contain any statement of supporting the necessity of substitute service on a random employee.²²⁷

Obviously, the consequences for insurers of title, the foreclosure sale purchaser, and the association itself in a case of this nature could be substantial. Since the statute of limitations in a matter of this nature would appear to be seven years,²²⁸ exposure to the foreclosing associations and the attorney handling the case could continue for a substantial period of time. Attorneys handling association foreclosure cases should view this case as inducement to insure that the foreclosure checklist includes verification of appropriate service of process in every collections case before it is taken to foreclosure judgment and sale.

E. Homeowners' Association and Covenant Cases

Another decision involving the occasional legal no man's land of undeveloped phases of a development is *Villages at Mango Key v. Hunter Development, Inc.*²²⁹ At issue in *Villages at Mango Key* was voting rights for lands that were originally intended to be reserved as potential future development in the Mango Key development.²³⁰ Vacations Villages of American Inc. ("VVA") purchased Tract A of Lindfields Unit Six, which consisted of 18.89 acres.²³¹ It replatted a portion of this land into "Villages at Mango Key," consisting of thirty-three platted townhouse lots.²³² An exhibit to the Declaration of Covenants and Restrictions reflected eighty-eight additional proposed lots in the unplatted portion of Tract A, which was set aside for future development.²³³ VVA's interest in the undeveloped portion of the project was ultimately foreclosed, and purchased out of foreclosure by a company who ultimately sold it to Hunter Development

227. *Id.* at 885.

228. *See* FLA. STAT. § 95.12 (2001).

229. 763 So. 2d 476 (Fla. 5th Dist. Ct. App. 2000).

230. *Id.* at 477.

231. *Id.*

232. *Id.*

233. *Id.*

("Hunter").²³⁴ Hunter obtained approval to develop 236 condominium units on the land, including additional adjoining land owned by Hunter.²³⁵

Desiring to use the amenities servicing the Village at Mango Key, Hunter took the position that its purchase of the lands set aside for future phases entitled it to eighty-eight votes (the maximum number of potential lots), which thus would entitle it to control of the homeowners association.²³⁶ The trial court agreed with Hunter's position.²³⁷

In reversing the trial court, Judge Harris writing for the court, opined that the definition of a "lot"²³⁸ contained in the original governing documents was key to the adjudication of the issue.²³⁹ Finding that the voting rights appurtenant to "lots" was limited to the actual "Villages" development, or lands "subsequently added to the project," the court found that the attachment reserving the lands in question for future development was not a "recorded subdivision map" sufficient to grant voting rights.²⁴⁰ The court's reasoning was that there were no lots specifically described, but rather a large developable tract of land.²⁴¹ The court found that Hunter was "at best the fee simple owner of acreage which may or may not be developed into townhouse lots."²⁴²

Had the court stopped here, it seems clear that its decision was well-founded and based upon the intent of the documents and normal allocation of rights and interests in potential future phases of typical real estate developments. The court arguably going a step farther than it needed to, went on to find that the proposed construction of substantially more condominium units than would have been permitted under the original plan "reveals most convincingly that the foreclosure of the Developer's interest in the property released the unplatted land from the Developer's proposed expansion of the Villages project."²⁴³ The court found that Hunter abandoned the right to develop the property as part of Villages of Mango

234. *Villages of Mango Key*, 763 So. 2d at 477.

235. *Id.*

236. *Id.*

237. *Id.*

238. The Declaration provided: "Lot" shall mean and refer to any plot of land on which a Living Unit may be constructed as shown on any recorded subdivision map of the Property or which may hereafter be platted or otherwise created . . ." *Id.* at 477-78. "Living Unit" is defined as a "townhouse residence." *Villages of Mango Key*, 763 So. 2d at 478.

239. *Id.* at 478.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Villages of Mango Key*, 763 So. 2d at 478.

Key by converting the property to condominium project.²⁴⁴ It is perhaps troubling that the court looked at the foreclosure as the act eliminating the developer's interest in the potential future phases pertaining to Villages of Mango Key. Obviously, when developments go sour, the lender or foreclosure purchaser, who may wish to continue the original scheme of development, wants to be sure that a foreclosure will not extinguish reserved rights under the documents. Although the court's statement is perhaps dicta, it is a lesson for document drafters that clear reservation of use rights and the provision for what shall or may happen if potential future phases are put to different uses than originally anticipated, are key elements in drafting initial project documentation.

Although primarily presented as an agency case, *Lensa Corporation v. Poinciana Gardens Ass'n, Inc.*²⁴⁵ is perhaps most enlightening as to the difference in judicial treatment between condominium associations and homeowners associations. Although Florida's appellate courts have suggested that it takes unanimous approval for a condominium association to build a new swimming pool,²⁴⁶ or obtain super majority approval to change the color of a condominium building's paint,²⁴⁷ the *Lensa* court suggests that the board of directors of a homeowners association has the authority to sell all of the property and assets of the Association.²⁴⁸

The president of the Association, Dr. Goodman, negotiated and agreed to sell substantially all of the association's assets, consisting of land, to a company called BBG Appraiser Co. ("BBG"), which was owned by Ms. Sandel.²⁴⁹ It was understood that BBG would assign its contract rights to *Lensa Corporation*, which would develop the property.²⁵⁰

The parties executed an agreement, which Dr. Goodman signed on behalf of the Association.²⁵¹ After discovering that Dr. Goodman's signature had been witnessed by Mr. Sandel (also the owner of *Lensa*), Dr. Goodman was asked to execute a second contract to avoid any problems.²⁵² Prior to that time, however, Mr. Sandel had a discussion with Ms. Stole, the secretary

244. *Id.*

245. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).

246. *See* Downey v. Jungle Den Villas Recreation Ass'n, 525 So. 2d 438, 441-42 (Fla. 5th Dist. Ct. App. 1988). It is likely that this aspect of *Jungle Den* is no longer good law.

247. *Islandia Condo. Ass'n v. Vermut*, 501 So. 2d 741, 743 (Fla. 4th Dist. Ct. App. 1987)

248. *Lensa*, 765 So. 2d at 298.

249. *Id.* at 297.

250. *Id.*

251. *Id.*

252. *Id.*

of the homeowner's association board.²⁵³ Ms. Stole apparently told Mr. Sandel that she was not aware that a sales contract existed for the sale of the land.²⁵⁴ In response to Mr. Sandel's concerns, Dr. Goodman assured him that he would straighten out the matter with the board.²⁵⁵

Consequently, a board meeting was held to address the issue.²⁵⁶ According to the court's opinion, it was undisputed that a quorum was not in attendance for this meeting.²⁵⁷ Those who were in attendance agreed that Dr. Goodman was authorized to sign the purchase documents for the sum of \$50,000.²⁵⁸ The signed minutes of the meeting were subsequently faxed to Mr. Sandel, and several days later, a second contract, identical to the first, was entered into.²⁵⁹ Thereafter, the board elected a new president, and informed Mr. Sandel that the contract would not be honored because the selling price was too low.²⁶⁰ Lensa filed a breach of contract action against the Association.²⁶¹

Lensa conceded during the jury trial of the case that Dr. Goodman did not have actual authority to sell the property and that the board had not approved it.²⁶² The jury entered a verdict in favor of Lensa, totaling \$18,000, finding that Dr. Goodman had apparent authority to sign the agreement.²⁶³ The trial court granted the Association's motion for directed verdict and judgment notwithstanding the verdict, finding that Dr. Goodman had no actual authority because the true board of directors did not vote on the agreement.²⁶⁴ Further, the trial court ruled that Dr. Goodman failed to obtain the approval of the directors as required under the Association's bylaws,²⁶⁵ as well as section 617.1202 of the *Florida Statutes*.²⁶⁶ Judge

253. *Lensa*, 765 So. 2d at 297.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Lensa*, 765 So. 2d at 297.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Lensa*, 765 So. 2d at 297.

264. *Id.*

265. *Id.*

266. *Id.*

Sale, lease, exchange, or other disposition of corporate property and assets requiring member approval.—

A sale, lease, exchange, or other disposition of all or substantially all of the property and assets of a corporation, in all cases other than those not requiring member approval

Stone, writing for the court's majority, found that because the bylaws did not require membership approval, the directors had the authority to sell the property and assets of the corporation.²⁶⁷ It being undisputed that the board never approved the transaction, the court then concluded that any liability of the Association would need to be based on Dr. Goodman's apparent authority.²⁶⁸ Discussing the traditional elements of apparent authority, the court held that because sale of the Association's property was not in the ordinary course of business, there could be no presumed authority that Dr. Goodman had the authority to act for the Association.²⁶⁹ Accordingly, in the absence of representation from the Board that Dr. Goodman was authorized to act in this capacity, the court concluded that there was not representation by the purported principal, the Board, as to the agent's, the president's, authority.²⁷⁰

as specified in ss. 617.1201, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares, bonds, or other securities of any corporation or corporations for profit, domestic or foreign, and must be authorized in the following manner:

(1) If the corporation has members entitled to vote on the sale, lease, exchange, or other disposition of corporate property, the board of directors must adopt a resolution approving such sale, lease, exchange, or other disposition, and directing that it be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, or other disposition of all or substantially all of the property and assets of the corporation must be given to each member entitled to vote at such meeting in accordance with the articles of incorporation or the bylaws. At such meeting, the members may authorize such sale, lease, exchange, or other disposition and may approve or fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization requires at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast. After such authorization by a vote of members, the board of directors may, in its discretion, abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating to such sale, lease, exchange, or other disposition, without further action or approval by members.

(2) If the corporation has no members or if its members are not entitled to vote thereon, a sale, lease, exchange, or other disposition of all or substantially all the property and assets of a corporation may be authorized by a majority vote of the directors then in office.

FLA. STAT. § 617.1202 (2001).

267. *Lensa*, 765 So. 2d at 298.

268. *Id.*

269. *Id.* See *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So. 2d 416, 418 (Fla. 5th Dist. Ct. App. 1982).

270. *Id.*

Judge Gross, specially concurring, agreed with the conclusion that apparent authority had not been demonstrated by *Lensa*.²⁷¹ Judge Gross, noting the absence of a corporate resolution and the absence of a history of completed deals between the parties that would give rise to apparent authority, found there was no formal act by the board which would denote the holding out of Dr. Goodman as possessing the authority to act on the Association's behalf.²⁷²

While the decision appears to accomplish justice, at least from the perspective of the Association, there are a couple of aspects that are noteworthy to the practitioner. First, in most dealings with community Associations, the authority of the board president to bind the corporation is often accepted as a given. This case demonstrates, at least when actions do not involve the ordinary course of business, the practitioner should acquire additional indicia of the president's authority, such as a board resolution, signed minutes, and the like.²⁷³

Perhaps of greater theoretical interest is the court's suggestion that had a full quorum of the board been at the meeting where the second contract was authorized, the action would have been a valid act of the Association.²⁷⁴ Keeping in mind that common properties for homeowners associations are often a central nature of the homeowners' investment in the community recreational facilities, open spaces, etc., one can certainly question the wisdom of applying the general provisions of the Florida Not-for-Profit Corporation Statute relevant to asset disposition, and to disposition of the common areas of a homeowners association.²⁷⁵

In what the court described as a "classic case of waiver," Judge Orfinger, writing for the Fifth District Court of Appeal in the *Woodlands Civic Ass'n, Inc. v. Darrow*,²⁷⁶ reviewed a neighborhood dispute regarding the use of property, which had been originally deed restricted to residential use and which was being used as a chiropractor's office.²⁷⁷ The deed restriction in question²⁷⁸ had apparently been in effect for a number of

271. *Id.*

272. *Id.* at 299 (Gross, J., concurring).

273. *Lensa*, 765 So. 2d at 298. Especially true where the magnitude of the transaction or undertaking justifies same.

274. *Id.*

275. *Id.*

276. 765 So. 2d 874 (Fla. 5th Dist. Ct. App. 2000).

277. *Id.* at 875.

278. In pertinent part:

No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family

years.²⁷⁹ Prior to acquisition of the property in question by Dr. Darrow, the property had been used for the conduct of a real estate business, including exterior parking signage indicating that the property was used primarily for commercial purposes.²⁸⁰ According to the court, the real estate business had been conducted on the property since 1989.²⁸¹

When Dr. Darrow decided to purchase the property for his chiropractor's office, it came to his attention that the president of the voluntary homeowners' association which existed in the development was not happy about his plans, although Association representatives apparently told Dr. Darrow there was nothing they felt they could legally do to stop him.²⁸² After Dr. Darrow closed on the property in 1996 and began his chiropractic practice, the homeowners association²⁸³ and three individual property owners filed suit against Dr. Darrow.²⁸⁴ At trial, testimony was adduced to the effect that prior to Dr. Darrow's acquisition, for at least seven years, the property had openly and notoriously been used for commercial, not residential, purposes.²⁸⁵ For example, Dr. Darrow's predecessor undertook substantial renovations in 1993 and 1994, all geared toward the property's commercial utilization, without objection from the Association, which took no action to stop it.²⁸⁶

The appellate court began its opinion by noting that the trial court, apparently attempting to fashion a solution that it hoped would make all parties happy, made no findings in its final order denying enforcement of the

dwelling not to exceed two stories in height and a private garage for not more than two cars.

No building shall be erected, placed or altered on any lot until the construction plans and specifications and a plan allowing the location of the structure have been approved by the Architectural Control Committee as to quality of workmanship and materials, harmony of external design with existing structures and as to location with respect to topography and finish grade elevation.

Id.

279. *Id.*

280. *Id.*

281. *Woodlands*, 765 So. 2d at 875.

282. *Id.* at 876.

283. *See Palm Point Prop. Owners Ass'n, Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993) (indicating it is not clear as to the legal basis upon which the association filed suit).

284. *Woodlands*, 765 So. 2d at 874.

285. *Id.* at 876.

286. *Id.* at 875. Even though the association was aware of the work, as evidenced by testimony of a telephone call between the then president of the association and Dr. Darrow's predecessor. *Id.*

restrictions.²⁸⁷ On the authority of *Home Depot U.S.A. v. Taylor*,²⁸⁸ the Fifth District concluded that it was obligated to uphold the trial court's conclusion if it was correct for any reason.²⁸⁹ After quotation of black letter law regarding waiver of enforcement of restrictive covenants,²⁹⁰ the standards required to demonstrate waiver,²⁹¹ and Supreme Court cases from Indiana²⁹² and Mississippi,²⁹³ the court concluded, without embellishment, that the substantial delay in objecting to the commercial use of the property resulted in a waiver of the restriction and that the doctrine of laches likewise barred enforcement of the covenant.²⁹⁴

Although the voiding of a covenant running with the land is a harsh result, enforcement of covenants lies largely within the equity jurisdiction of the court.²⁹⁵ While the appellate panel seemed to gently criticize the trial judge for ruling in favor of Dr. Darrow simply based upon an oral pronouncement that it would be inequitable to enforce the restriction.²⁹⁶ It is equally obvious that the appellate court did not fundamentally disagree that enforcement of the covenant would be inequitable in this case.²⁹⁷ Although the concept is not particularly well-developed in the published decision, implicit in the court's holding is that laches will defeat a covenant's enforceability when there is injury flowing from the non-action.²⁹⁸ Here, the Association and the neighbors sat by idly for years while the property was used for commercial purposes, was substantially improved, and then subsequently sold to Dr. Darrow.²⁹⁹

Another pair of cases involving deed restrictions and voluntary homeowners associations are *Cudjoe Gardens Property Owners Ass'n, Inc. v. Payne*,³⁰⁰ (*Cudjoe I*) and *Cudjoe Gardens Property Owners Ass'n, Inc. v.*

287. *Woodlands*, 765 So. 2d at 876.

288. 676 So. 2d 479, 480 (Fla. 5th Dist. Ct. App. 1996).

289. *Woodlands*, 765 So. 2d at 876.

290. 20 AM. JUR. 2d *Covenants* § 239 (1995).

291. *Woodlands*, 765 So. 2d at 876-77 (citing *Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So. 2d 581, 587 (Fla. 1st Dist. Ct. App. 1985)).

292. *Wischmeyer v. Finch*, 107 N.E.2d 661 (Ind. 1952).

293. *Twin States Realty Co., v. Kilpatrick*, 26 So. 2d 356 (Miss. 1946).

294. *Woodlands*, 765 So. 2d at 877.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Woodlands*, 765 So. 2d at 875.

300. 770 So. 2d 190 (Fla. 5th Dist. Ct. App. 2000).

Payne,³⁰¹ (*Cudjoe II*). In *Cudjoe I*, standing of the plaintiff Association was at issue.³⁰² The Association was seeking to enforce a deed restriction that included minimum setback requirements against the Paynes.³⁰³ Because the property owners association was a voluntary organization, the Paynes moved to dismiss the complaint based upon the Association's lack of standing and on the authority of a 1993 case decided by the Supreme Court of Florida.³⁰⁴

In reversing the trial court's order of dismissal, the *Cudjoe I* Court, through Judge Ramirez, distinguished the standing of the Association in the instant dispute from that in *Palm Point*, because the Cudjoe Association owned a platted lot within the subdivision.³⁰⁵ Although the lot was apparently not buildable, the third district held that same would not defeat the Association's standing as a property owner to enforce the deed restrictions. The appellate court remanded the cause to the trial court with instructions that the Association should be granted standing to pursue relief, resulting in *Cudjoe II*.³⁰⁶

After remand, the *Cudjoe II* trial judge again entered judgment against the Association, this time on the grounds that the deed restrictions, as previously amended by a majority vote of the property owners and as authorized by the original deed restriction, were void.³⁰⁷ The written ballots of the property owners did not comply with the two witness requirement of Florida's version of the Statute Deeds, section 689.01 of the *Florida Statutes*.³⁰⁸ The appellate court's opinion, written by Chief Judge Schwartz,

301. 779 So. 2d 598 (Fla. 3d Dist. Ct. App. 2001).

302. *Cudjoe I*, 770 So. 2d at 190.

303. *Id.*

304. *Id.* (discussing *Palm Point Prop. Owners Ass'n, Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993)).

305. *Id.*

306. *Id.* at 190–91.

307. *Cudjoe II*, 779 So. 2d at 598.

308. In pertinent part:

No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in or out of any messages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate, interest, or term of more than 1 year, or by the party's agent thereunto lawfully authorized, unless by will and testament, or other testamentary appointment, duly made according to law; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to or out of any messages, lands, tenements or hereditaments, shall be assigned or surrendered unless it be by instrument signed in the presence of two subscribing witnesses by the party so assigning or surrendering, or by the party's agent

found it clear that deed restrictions of this type are “simply equitable rights arising out of the contractual relationship between and among the property owners and emphatically do not constitute interest in real estate which § 689.01 applies.”³⁰⁹

Although both *Cudjoe I* and *Cudjoe II* do not recite facts which enable the reader of the decision to comprehend the precise nature of the underlying disputes involving the setback controversy, it does appear that amendments to the deed restrictions may have been involved. While the condominium statute³¹⁰ contains clear guidance as to the procedure for certifying amendments to condominium documents, there is no parallel guidance in the statute applicable to homeowners associations.³¹¹ Obviously, it remains necessary for those seeking to amend deed restrictions to comply with the amendatory procedures contained therein,³¹² but this case provides safe harbor from adherence to the technicalities of conveyancing laws applicable to real property transfers at least where not specifically required.

*Sugarmill Woods Oaks Village Association, Inc. v. Wires*³¹³ involves the following issue:

Does the issuance of a tax deed to a lot extinguish a homeowner association’s lien placed on such lot, pursuant to a declaration of covenants, recorded prior to issuance of the tax deed, where the declaration provided for homeowner association liens to be placed on lots for delinquent homeowner association assessments, and the homeowners association recorded a lien pursuant to the declaration prior to the issuance of the tax deed?³¹⁴

thereunto lawfully authorized, or by the act and operation of law. No seal shall be necessary to give validity to any instrument executed in conformity with this section. Corporations may convey in accordance with the provisions of this section or in accordance with the provisions of sections 692.01 and 692.02 of the *Florida Statutes*.

FLA. STAT. § 689.01 (2000).

309. *Cudjoe II*, 779 So. 2d at 598–99. *Cudjoe I* states that a setback requirement was in controversy.

310. FLA. STAT. § 718.110 (2000).

311. FLA. STAT. § 720.301 (2000).

312. *Cudjoe II*, 779 So. 2d at 598. Many covenants applicable to homeowners associations and other non-condominium deed restricted communities do require recordation of individual lot owner consents. *Id.*

313. 766 So. 2d 487 (Fla. 5th Dist. Ct. App. 2000).

314. *Id.* at 488.

“The trial court ruled that the liens were extinguished.”³¹⁵ The Fifth District Court of Appeal, through Judge Sharp, agreed, and affirmed the trial court.³¹⁶ According to the court’s opinion, the case turned solely on the interpretation of applicable statutes.³¹⁷ The court first considered a 1973 amendment to section 197.552 of the *Florida Statutes*,³¹⁸ which governs tax deeds. The 1973 amendment to the statute provided that “[n]o right, interest, restriction, or other covenant shall survive the issuance of a tax deed.”³¹⁹ In 1979, this provision was amended to exempt from tax deeds extinguishment, a lien of record held by a municipality or governmental unit.³²⁰ In the same Act, the legislature also amended section 197.573 of the *Florida Statutes*, to provide that certain restrictions and covenants would survive issuance of a tax deed.³²¹ Subsection 2 of the law limited those restrictions that survived to usual restrictions and covenants limiting the use of property.³²² However, the 1979 law also specifically provided that the limited exception for survival of restrictions or covenants “shall not protect covenants creating any debt or lien against or upon the property . . .”³²³ After considering the legislative history of the 1979 amendments, the court concluded that the obvious public policy of the 1979 amendments was to allow local governments to protect their taxing basis by limiting those financial obligations that would survive issuance of a tax deed.³²⁴

The gravamen of the issue in the *Sugarmill Woods* case involved a 1995 amendment to section 617.312 of the *Florida Statutes*.³²⁵ The 1995 amendment was, according to the court, enacted in recognition of the need for homeowners associations to provide governance to the communities encumbered by plats or declarations.³²⁶ The 1995 amendment provided, in pertinent part, that all “provisions of a declaration of covenants relating to

315. *Id.*

316. *Id.*

317. *Id.*

318. *Sugarmill Woods Oaks Village Ass'n v. Wires*, 766 So. 2d at 487, 488 (Fla. 5th Dist. Ct. App. 2000) (citing ch. 73-332, § 21, 1973 Fla. Laws).

319. *Id.*

320. *Id.* at 489 (citing ch. 79-334, § 1, 1979 Fla. Laws).

321. *Id.*

322. *Id.*

323. *Sugarmill Woods*, 766 So. 2d at 489. *See also* Gainer v. Fiddlesticks Country Club, Inc., 710 So. 2d 76 (Fla. 2d Dist. Ct. App. 1998).

324. *Sugarmill Woods*, 766 So. 2d at 489.

325. *Id.* (citing renumbered FLA. STAT. § 720.312 (2000)).

326. *Id.* (citing FLA. STAT. § 617.312 (1995)).

the parcel that has been sold for taxes survive the tax deed.”³²⁷ The issue for the court was whether the provisions of a declaration of covenants relating to a parcel included assessments accruing against the lot prior to the tax deed sale.³²⁸ The court held that it did not.³²⁹ The court further opined that the intent of the statute was obvious, and even though assessments accruing prior to issuance of the tax deed would be extinguished, assessments accruing *in futuro* would be preserved.³³⁰ The court’s distinction of the difference between “covenants” and “assessments” is founded on sound legal principles.³³¹ The court’s interpretation of the 1995 amendment to the statute applicable to homeowners associations strikes a proper balance between the interests of municipalities in encouraging the purchase of tax certificates and the needs of the homeowner association to insure that the right to collect assessments against a particular lot is not abolished in perpetuity.³³² Although one may argue that the equities should lie with the Association,³³³ the situation is no different than in typical mortgage foreclosure situations where the lien of the Association is typically inferior to the lien of the mortgagee, either by declaration proviso³³⁴ or statute.³³⁵

327. *Id.*

328. *Id.*

329. *Id. Sugarmill Woods*, 766 So. 2d at 489.

330. *Id.*

331. *Palm Beach Polo, Inc. v. Hill*, 757 So. 2d 1287, 1288 (Fla. 4th Dist. Ct. App. 2000).

332. *Sugarmill Woods*, 766 So. 2d at 489–90.

333. The association is, after all, continuing to provide services to benefit the property, for which the other homeowners must then pay.

334. *See Federal Nat’l Mortgage Ass’n v. McKesson*, 639 So. 2d 78, 79 (Fla. 4th Dist. Ct. App. 1994).

335. *See* FLA. STAT. § 718.116(1) (2000).

Estates and Trusts: 2001 Survey of Florida Law

Eloisa C. Rodriguez-Dod*

TABLE OF CONTENTS

I. INTRODUCTION	37
II. STATUTORY CHANGES.....	38
A. <i>Elective Share Provisions</i>	38
B. <i>Other Changes to Probate Code</i>	47
C. <i>Changes to Trust Administration and Related Statutes</i>	49
D. <i>Other Related Statutory Changes</i>	50
III. PROBATE RULES	51
IV. CASES	51
V. CONCLUSION.....	57

I. INTRODUCTION

The previous survey of Florida law on trusts and estates discussed statutes, cases, and rules through the middle of 1998.¹ This survey attempts to update the prior survey through the middle of 2001.

This article highlights and summarizes, in Part II, some aspects of the elective share provisions and other legislative changes to the *Florida Probate Code* and trust administration statutes.² Part III addresses amendments to the *Florida Probate Rules*. Lastly, Part IV discusses a few recent cases affecting this area of the law.

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1. Michael D. Simon & William T. Hennessey, *Estates, Trusts and Guardianships: 1998 Survey of Florida Law*, 23 NOVA. L. REV. 119, 120 (1998). The 1998 survey also included a discussion of guardianship law. *See generally id.* However, this survey will be limited to the laws affecting probate estates and trusts and will not include references to statutes or rules governing guardianships.

2. It is impractical to discuss all the changes to the probate estate and trust administration statutes or other related statutes. Therefore, I will focus on what I deem the more important or more interesting changes.

II. STATUTORY CHANGES

The Florida Legislature has been quite active in the past three years in amending the *Florida Probate Code* (“*Probate Code*”). Many of the changes have been minor in nature, enacted for clarification purposes,³ to eliminate redundancies with the *Florida Probate Rules* (“*Probate Rules*”),⁴ or to correlate a statute with another statute, such as the renumbering of statutes.⁵ However, the legislature did overhaul the elective share provisions of the *Florida Probate Code*, bringing it somewhat more in line with the *Uniform Probate Code*.⁶

A. Elective Share Provisions

The new elective share provisions took effect October 1, 1999.⁷ However, they only apply to estates of decedents dying after October 1, 2001.⁸ Most of the existing elective share provisions were repealed, rather than merely amended, and new statutes were added in their place.⁹

The spousal right to an elective share¹⁰ under section 732.201 has not changed, but the statute was amended to reflect the right to a thirty percent¹¹ share in the newly augmented “elective” estate.¹² A spouse’s right to this

3. See, e.g., FLA. STAT. § 732.302 (2001); FLA. STAT. § 733.805(1)(a) (2001) (changing language in abatement rule from a “[p]roperty not disposed of by will” to a “[p]roperty passing by intestacy”).

4. See, e.g., FLA. STAT. § 731.301 (2001).

5. See, e.g., Ch. 2001-226, §§ 60–61, 2001 Fla. Laws 2010 (renumbering FLA. STAT. § 732.910–911 (2001) as FLA. STAT. § 765.510–511 (2001)).

6. See, e.g., UNIF. PROBATE CODE § 2-203 (amended 1993) (outlining augmented estate).

7. § 732.2155(1) (2000).

8. *Id.*

9. See FLA. STAT. §§ 732.201–2155 (2001).

10. Of course, a spouse may have waived rights to an elective share pursuant to a prenuptial or post nuptial agreement. For the requirements of a valid waiver effective January 2, 2001, see *infra* Part II.B. Any valid waiver executed prior to October 1, 1999, is valid under the new provisions.

11. § 732.2065. An ad-hoc committee of the Florida bar had recommended increasing the percentage of the estate payable to the surviving spouse based on the length of the marriage but the legislature ultimately decided against that. See Florida’s Elective Share Revised Executive Summary 2, (revised Sept. 24, 2001), available at <http://www.dpowell.com> [hereinafter Executive Summary].

12. § 732.201. The statute previously stated that “[the] surviving spouse . . . [has] the right to a share of the estate of the [decedent].” FLA. STAT. § 732.201 (1999). The statute, as

elective share is still in addition to the spouse's rights to other statutory entitlements under Part IV of the *Florida Probate Code*,¹³ but the legislature clarified that the homestead rights were included as well.¹⁴

Previously, only a spouse or guardian of the surviving spouse's property could exercise the right to the elective share.¹⁵ The new statute also permits a surviving spouse's attorney-in-fact to exercise the right to elect against the estate.¹⁶ As always, if someone other than the surviving spouse exercises the right, then court approval is required;¹⁷ however, the court must now take into account the surviving spouse's lifetime needs when reviewing whether the election is in the spouse's best interest.¹⁸

In addition, the time period within which to make the election has been extended "from four months from the date of the first publication of [the] notice of administration"¹⁹ to the earlier of six months from the date the surviving spouse or "an attorney in fact or guardian of the property of the surviving spouse" are served with a copy of the notice of administration,²⁰ or two years after the decedent's death.²¹ Conceivably, a surviving spouse may not discover that the decedent has died until some time after the second anniversary of the decedent's death and thus, under the new statute, the surviving spouse may be precluded from electing against the estate. The

amended, now reads, "[the] surviving spouse . . . has the right to a share of the elective estate of the decedent." § 732.201.

13. § 732.2105.

14. Ch. 99-343, § 10, 1999 Fla. Laws 3568 (renumbered from FLA. STAT. § 732.208 (1999) and amended at FLA. STAT. § 732.2105 (2000)). Section 732.2105 also states that a spouse who takes against the estate is treated as having predeceased the decedent; this provision was previously codified under section 732.211, which has since been repealed (Ch. 99-343, § 16, 1999 Fla. Laws 3571).

15. FLA. STAT. § 732.210 (1999).

16. FLA. STAT. § 732.2125 (2001). The change finally codifies the court's holding in *In re Estate of Schriver*, wherein the court stated that a holder of a durable power of attorney could exercise the elective share right on behalf of a surviving spouse. 441 So. 2d 1105, 1108 (Fla. 5th Dist. Ct. App. 1983) *approved in part* by *Harmon v. Williams*, 615 So. 2d 681 (Fla. 1993).

17. FLA. STAT. § 732.2125(2). If a surviving spouse's attorney-in-fact or guardian of the property petitions the court for approval of the right to take the elective share, such petition tolls the time for exercising the election. § 732.2135(4).

18. § 732.2125(2).

19. § 732.212.

20. FLA. STAT. § 732.2135(1) (2001). As originally enacted in 1999, it was the earlier of six months from the first date of publication, rather than service of a copy, of notice of administration. *See id.* It was recently amended to its present language.

21. *Id.*

statute, though, provides that a court may grant an extension for good cause.²²

Nevertheless, this mechanism does not solve the problem, as the petition for an extension of time must be made within the time period provided for making the election itself.²³ In the above hypothetical then, it seems that the spouse, within two years after the other spouse is missing, would have to file for an extension of time in order to preserve the surviving spouse's right to later elect against the estate. But then the question remains as to whether a court would consider this to be good cause for granting any extension. Is this really what the legislature intended?

After a petition for the elective share has been filed, the petition may be withdrawn as long as it is done so within eight months after the decedent's death and the court has not yet ordered contribution.²⁴ However, upon withdrawal, the court, in its discretion, may assess attorneys' fees and costs against the surviving spouse.²⁵

The biggest change to the elective share provisions concerns the property that is included in computing the elective share amount. First, the new elective share provisions no longer exclude real property located outside of Florida from the probate assets included in the computation of the elective share.²⁶ Section 732.2035 of the *Florida Statutes* includes all of the decedent's "probate estate."²⁷ The "probate estate" is defined within the *Probate Code* as "all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia."²⁸ The *Probate Code* clarifies that the decedent's "protected homestead" is not included as an asset subject to administration, and thus, its value is excluded from the elective share computation.²⁹

22. § 732.2135(2). A petition for an extension of time tolls the time for exercising the election against the estate. § 732.2135(4).

23. § 732.2135(2).

24. § 732.2135(3).

25. *Id.* The surviving spouse's estate may also be assessed for such fees and costs should the surviving spouse die. *Id.*

26. § 732.2035(1).

27. *Id.*

28. § 732.2025(7).

29. FLA. STAT. § 732.2045(1)(i). The legislature recently added a provision to the *Probate Code* defining "protected homestead" as the property described under article X, section 4 of the Florida Constitution, except for property held as a tenancy by entireties. FLA. STAT. § 731.201(29).

The decedent's interest in jointly held property is also included in the elective estate.³⁰ This includes accounts or securities held by the decedent at the time of death in "pay on death," Totten trust, or other similar right of survivorship form, or as a tenancy by the entireties.³¹ For tenancies by the entireties, one-half of the value of the account or security is included in the computation.³² For all other jointly held survivorship accounts or securities, the amount included is the amount that could be withdrawn by the decedent without accounting to the others.³³

Likewise, the elective estate includes other property held by the decedent at the time of death as a joint tenant with right of survivorship or as a tenancy by the entireties.³⁴ As with jointly held accounts and securities,³⁵ one-half of such other property held as a tenancy by the entireties will be included.³⁶ Other property held as a tenancy with right of survivorship will be valued based on the decedent's "fractional interest."³⁷ Thus, if a decedent owned real property with three others as a tenancy with right of survivorship, one-third of the value of the property is included in the elective estate.

When a transferred interest in property is revocable, the value of the property at the time of the decedent's death is added into the computation of the elective estate;³⁸ revocable trusts fall into this category. However, only those transfers that are revocable by the decedent individually or with another person are taken into account;³⁹ those transfers that are revocable only upon the consent of all beneficiaries are excluded.⁴⁰

Irrevocable property transfers made by the decedent are also computed into the elective estate.⁴¹ The *Probate Code* addresses two categories of these irrevocable transfers. The first category consists of transfers by the decedent in which the decedent retained the right to, or actually enjoyed the possession or use of, income or principal at the time of the decedent's death.⁴² The second category are those transfers by the decedent in which, at

30. § 732.2035(2), (3).

31. § 732.2035(2).

32. *Id.*

33. *Id.*

34. § 732.2035(3).

35. *See supra* note 32 and accompanying text.

36. § 732.2035(4).

37. § 732.2035(3).

38. *Id.*

39. § 732.2035(4).

40. *Id.*

41. § 732.2035(5).

42. § 732.2035(5)(a)(1).

the time of decedent's death, another person had discretionary powers to distribute principal to the decedent,⁴³ such as in an irrevocable discretionary trust.

However, if the spouse possessed the discretionary power to distribute the principal to the decedent, then the transfer is excluded,⁴⁴ as the spouse presumptively would have consented to any such distribution to the decedent. Both of these types of irrevocable transfers are valued, for elective estate purposes, based on the interest that benefits any person other than the decedent's estate.⁴⁵ Notwithstanding the foregoing, there are some exclusionary rules applicable to these irrevocable transfers.⁴⁶ Excluded are those distributions to the decedent permitted only upon the consent of all beneficiaries,⁴⁷ as are those distributions made possible only through an exercisable general power of appointment.⁴⁸ In addition, those distributions that are made or would have been made to satisfy the decedent's obligations to support are not considered.⁴⁹ Lastly, the statute excludes the value of any contingent right of the decedent to receive principal when the contingency was beyond the decedent's control and, in fact, never occurred before the decedent's death.⁵⁰

The decedent's interest immediately prior to death, in the net cash surrender value of insurance on the decedent's life is also computed into the elective estate.⁵¹ The elective share provisions do not apply, though, to any excess life insurance proceeds⁵² or proceeds from court ordered insurance policies on the decedent's life.⁵³

The elective estate also consists of the value of amounts payable upon decedent's death under public or private pension, retirement, deferred compensation or other similar plans, except for those benefits payable under the Federal Railroad Retirement Act or Federal Social Security System.⁵⁴ Also excluded are proceeds in excess of the cash surrender value of life

43. § 732.2035(5)(a)(2).

44. *Id.*

45. § 732.2035(5)(b).

46. § 732.2035(5)(c).

47. § 732.2035(5)(c)(1).

48. § 732.2035(5)(c)(2).

49. § 732.2035(5)(c)(3). The statute does not limit these distributions to court ordered support obligations; however, it would seem to create a proof problem otherwise.

50. § 732.2035(5)(c)(4).

51. § 732.2035(6).

52. § 732.2045(1)(d).

53. § 732.2045(1)(e).

54. § 732.2035(7).

insurance policies related to certain contribution plans defined under the *Internal Revenue Code*.⁵⁵

The elective estate provisions also apply to property transferred by the decedent within one year prior to death due to the termination of the decedent's rights in a revocable trust under section 732.2035(4) or in an irrevocable trust under section 732.2035(5) that would otherwise have been included in the elective estate under those sections.⁵⁶ Also included is other property transferred by the decedent within one year prior to death, with certain exceptions.⁵⁷ Payment for medical or educational expenses and \$10,000 payments, which qualify under the *Internal Revenue Code* gift tax exclusions, are excepted from the elective estate computation.⁵⁸

Lastly, the elective estate includes "[p]roperty transferred in satisfaction of the elective share."⁵⁹ This transfer is further defined as an "irrevocable transfer by the decedent to an elective share trust."⁶⁰ An elective share trust is defined⁶¹ as one wherein: 1) the surviving spouse is entitled to lifetime use of the property or to all of the income of the trust payable at least annually;⁶² 2) the trust is subject to the Florida "underproductive property" provision for trust administration⁶³ or the surviving spouse has the right under the trust or state law to require the trustee to make the property productive;⁶⁴ and 3) the surviving spouse has sole lifetime power to distribute principal or income to anyone other than the spouse.⁶⁵

The property discussed above is subject to additional exclusions under the elective share provisions.⁶⁶ Property transferred before October 1, 1999,

55. *Id.*

56. § 732.2035(8)(a). A termination of rights occurs when the decedent ends or relinquishes such right. § 732.2035(8)(c)(1). Similarly, a termination of a power over property occurs upon the "exercise, release, lapse, [or] default" of the power or other similar to termination. *Id.* Termination under this section does not occur pursuant to the terms of the governing instrument unless such terms were purposefully included to avoid the elective share provisions. § 732.2035(8)(d)(1).

57. § 732.2035(8)(b).

58. *Id.*

59. § 732.2035(9).

60. § 732.2025(10).

61. § 732.2025(2). A trust created before October 1, 1999, the effective date of the new elective share provisions, which meets all the requirements of an "elective share trust" is treated as one for purposes of the new elective share provisions. § 732.2155(4).

62. § 732.2025(2)(a).

63. § 738.12 (2000).

64. § 732.2025(2)(b).

65. § 732.2025(2)(c).

66. § 732.2045.

the effective date of the new elective share provisions, is excluded.⁶⁷ Property transferred prior to the decedent's marriage to the surviving spouse is likewise excluded.⁶⁸ The elective estate also excludes transfers made by the decedent for adequate consideration⁶⁹ or with the surviving spouse's written consent.⁷⁰ The decedent's interest in any community property is not included in the computation of the elective estate.⁷¹ Property deemed part of the decedent's gross estate for federal tax purposes solely because the decedent held a general power of appointment over that property is also excluded.⁷²

In addition to the foregoing, property transferred by the decedent into a "qualifying special needs trust" remains as property separate from the elective estate.⁷³ The "qualifying special needs trust" is a court-approved trust created before or after the decedent's death for the benefit of an incapacitated spouse and, commencing on the decedent's death,⁷⁴ the income and principal are distributable to the surviving spouse for life "in the discretion of one or more trustees less than half of whom are ineligible family trustees,"⁷⁵ and the spouse has sole lifetime power to distribute income or principal to anyone else.⁷⁶

In computing the elective estate, most of the property is computed based on the fair market value on the date of the decedent's death, after deducting mortgages, claims and liens on that property and claims payable from the estate.⁷⁷ In the case of the net cash surrender value of life insurance policies, the computation takes into account the value immediately before

67. § 732.2045(1)(a).

68. *Id.* This includes property transferred to a revocable or irrevocable trust if the assets were in trust from at least October 1, 1999, through the date of decedent's death and were non-marital assets. § 732.2155(6) (2001).

69. § 732.2045(1)(b); *see also* § 732.2155(5).

70. § 732.2045(1)(c). However, "spousal consent to split-gift treatment under [federal] gift tax laws does not constitute written consent . . ." *Id.*

71. § 732.2045(1)(f).

72. § 732.2045(1)(h).

73. § 732.2045(1)(g).

74. § 732.2025(8).

75. § 732.2025(8)(a). Ineligible family trustees are the decedent's grandparents and their descendants who are not also descendants of the surviving spouse. *Id.*

76. § 732.2025(8)(b).

77. § 732.2055(5). As originally enacted, section 732.2055(5) excluded funeral expenses as a claim payable by the elective estate for these purposes. § 732.2055. For a discussion concerning funeral expense inclusion, see Executive Summary, *supra* note 11, cmt. at 6.

the decedent's death.⁷⁸ Any property transferred within one year prior to decedent's death and includable in the elective estate pursuant to section 732.2035(8) is computed based on the fair market value of the property as of the date of the termination or transfer of the property, after deducting mortgages, claims and liens on that property.⁷⁹ Pension plans and the like are included based on the tax transfer value of the date of the decedent's death.⁸⁰

Once the elective estate is computed, the elective share is satisfied by property in the following order of priority, unless the decedent's will or a trust referred to in the will, if any, provides otherwise.⁸¹ First, property benefiting the surviving spouse is applied to satisfy the elective share.⁸² Property benefiting the spouse includes: 1) proceeds from insurance policies, owned by another person, on the decedent's life to the extent paid to or benefiting the surviving spouse;⁸³ 2) amounts paid to or benefiting the surviving spouse under pension plans and similar arrangements described in section 732.3025(7);⁸⁴ 3) the decedent's one-half of community property to the extent paid to or benefiting the surviving spouse;⁸⁵ 4) property in a qualifying special needs trust;⁸⁶ 5) property in the elective estate that passes to the surviving spouse;⁸⁷ and 6) property that would have satisfied the elective share but for the surviving spouse's disclaimer.⁸⁸

Then, if that property is insufficient, the balance is satisfied from the recipients of the remaining property in the elective estate apportioned according to four classes, in that order of priority.⁸⁹ Class 1 consists of the decedent's probate estate, as defined in section 732.2025(7) and revocable trusts.⁹⁰ Class 2 includes accounts, securities, and other property held by the

78. § 732.2055(1). However, any right or interest in life insurance policies transferred within one year prior to the decedent's death and includable in the elective estate pursuant to section 732.2035(8) is valued as of the date of the termination or transfer of the right or interest. § 732.2055(2).

79. § 732.2055(4).

80. § 732.2055(3).

81. § 732.2075(1).

82. *Id.*

83. § 732.2075(1)(a).

84. § 732.2075(1)(b).

85. § 732.2075(1)(c).

86. § 732.2075(1)(d).

87. § 732.2075(1)(e).

88. § 732.2075(1)(f).

89. § 732.2075(2).

90. § 732.2075(2)(a).

decedent with another in a survivorship form, such as Totten trusts, joint tenants with right of survivorship, and tenancy by the entireties.⁹¹ It also includes the decedent's property interests in irrevocable transfers described in section 732.2035(5) and pension plans and similar arrangements described in section 732.2035(7) where the decedent died owning the power to designate the recipient of those property interests.⁹² Class 3 takes into account all other property interests, except protected charitable interests.⁹³ Class 4 consists of "protected charitable lead interests," as defined in the statute, to the extent allowable without disqualifying such interest from being deducted under the federal gift tax laws.⁹⁴ As in the computation of the elective estate, most of the property used to satisfy the elective estate is valued as of the date of the decedent's death.⁹⁵

Only direct recipients of the elective estate and beneficiaries, including trusts, are liable for contribution to the elective share.⁹⁶ The abatement rules under section 733.805 continue to apply for distribution of the Class 1 probate estate used to satisfy the elective estate.⁹⁷ Recipients of property designated as Class 2 and Class 3 pay according to their proportionate share within each class.⁹⁸ Trust beneficiaries contribute a percentage based on the amount of principal distributed to such beneficiaries after the decedent's death.⁹⁹ Contribution may be in cash or in kind.¹⁰⁰ Once payment has been made to the surviving spouse, as under the old provisions, the spouse is treated as having predeceased the decedent.¹⁰¹

These new provisions have yet to be challenged in court. However, before they applied to any estates, the legislature found itself tweaking its

91. § 732.2075(2)(b).

92. *Id.*

93. § 732.2075(2)(c).

94. § 732.2075(2)(d).

95. § 732.2095.

96. § 732.2085(1). Section 732.2115 protects certain payors and third parties acting in good faith in reliance on a governing instrument. *Id.* For the definitions of "payor," "governing instrument," and certain other terms included in the new elective share provisions, *see generally* § 732.2025.

97. § 732.2075(4).

98. § 732.2085(1)(a).

99. § 732.2085(1)(b).

100. § 732.2075(3). *See also* § 732.2085(2). Section 732.2145 describes the personal representative's duties in collecting the contribution.

101. § 732.2105(2) (2000). This provision was previously codified in section 732.211.

own drafted language.¹⁰² It will be interesting to see how the new provisions play out.

B. *Other Changes to Probate Code*

This year, the legislature passed the “Barry Grunow Act,” which provides benefits to public school teachers and administrators who are intentionally killed or injured in the line of duty.¹⁰³ As part of the Act, any paid benefits are included as exempt property under section 732.402.¹⁰⁴ The Act applies retroactively to incidents occurring on or after May 26, 2000.¹⁰⁵

The following changes become effective on January 1, 2002.¹⁰⁶ In order for a spouse residing in Florida to effectively waive rights to the elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as the personal representative of an intestate estate, that spouse must sign the waiver in the presence of two subscribing witnesses.¹⁰⁷ Removal of contents from safe deposit boxes is now governed by section 733.6065.¹⁰⁸ The biggest change to the previous provision is that, in addition to the safe deposit box inventory, the personal representative will have to file a copy of the safe deposit box entry record from the period of time commencing six months prior to the decedent’s death through and including the date of the inventory.¹⁰⁹ A personal representative will now be required to serve formal notice of a copy of the Notice of Administration on “[p]ersons who may be entitled to exempt property.”¹¹⁰

A much needed change was made to the intestacy statute governing spousal share. When the decedent’s lineal descendants are also the surviving spouse’s lineal descendants, the surviving spouse will receive the first \$60,000 of the intestate estate, an increase of \$40,000.¹¹¹ Property used to

102. *See generally* ch. 2001-226.

103. Ch. 2001-180, §§ 1–6, 2001 Fla. Laws 1–3 (codified in FLA. STAT. §§ 112.1915, 732.402). Barry Grunow was a Florida public school teacher shot and killed in the school by one of his students. Kellie Patrick, *Tolerance Dips to Zero as Schools’ End Nears*, SUN SENTINEL (Ft. Lauderdale), May 31, 2001, at 1A.

104. FLA. STAT. § 732.402(2)(d) (2001).

105. § 112.1915.

106. § 731.155.

107. § 732.702(1).

108. § 733.6065.

109. *Id.*

110. § 733.212(1)(d).

111. § 732.102.

effect such a payment will be valued as of the date of distribution, rather than as of the date of the decedent's death.¹¹²

The maximum amount of family allowance payable to dependents of the decedent has also been increased to \$18,000,¹¹³ three times the maximum previously permitted by law.¹¹⁴ Exempt property, under section 732.402 of the *Florida Statutes*, will now be deducted from the estate before computing any residuary, intestacy, pretermitted, or elective shares.¹¹⁵ The suggested form for the self-proving affidavit includes two separate declarations, one by the testator/testatrix and another by the witnesses.¹¹⁶ What is most interesting about this change is that the testator/testatrix will have to declare to the witnesses that the document is that person's will for the affidavit to be valid.¹¹⁷

The anti-lapse statutes will now apply to beneficiaries of testamentary trusts.¹¹⁸ Family administration is completely repealed;¹¹⁹ however, the threshold for estates subject to summary administration increases to estates valued at \$75,000¹²⁰ from \$25,000.¹²¹ Before the court enters an order granting summary administration, a petitioner for summary administration will have to conduct a diligent and reasonable search for ascertainable creditors, serve a copy of the petition on any such creditors, and provide for payment to those creditors.¹²²

The legislature has amended the language of section 732.515¹²³ to make it consistent with section 732.505 concerning revocation of a will or codicil by a subsequent writing.¹²⁴ The legislature added a sentence stating that, where there exists more than one separate writing disposing tangible

112. *Id.* My students in Wills and Trusts will be elated with this change.

113. § 732.403.

114. *Id.*

115. § 732.402. I would presume that for these purposes homestead would be treated in the same manner as exempt property, but this issue has not been addressed by either the legislature or the courts. Likewise, the statute does not address whether any family allowance is excluded before determination of those shares.

116. § 732.503.

117. *Id.*

118. § 732.603.

119. Ch. 2001-226, § 178, 2001 Fla. Laws 108-09.

120. § 735.201(2).

121. *See* FLA. STAT. § 735.201(2) (2000).

122. § 735.206(2) (2001).

123. § 732.515.

124. Section 732.505 of the *Florida Statutes* states: "[a] will or codicil, or any part of either, is revoked . . . by a subsequent inconsistent will or codicil . . . only so far as the inconsistency."

personal property, the more recent writing revokes any inconsistent provisions in any other prior writings.¹²⁵ A provision has been added to section 733.613 of the *Florida Statutes*, where, upon the issuance of a court order authorizing the personal representative to sell or mortgage real property, the purchaser or lender takes the property free of creditors' claims against the estate, except for existing mortgages and liens, and rights of estate beneficiaries.¹²⁶

C. Changes to Trust Administration and Related Statutes

As opposed to the Probate Code, the trust administration statutes have remained fairly unchanged.¹²⁷ However, the following are some points of interest. Effective July 1, 1999, any attorney rendering services to a trust as of that date may petition for a court order awarding attorneys' fees; the petition must be served on the trustee and beneficiaries.¹²⁸ Also, the legislature further limited the personal liability of a successor trustee beyond those succeeding only grantor trustees of revocable trusts.¹²⁹ Under this provision, a successor trustee is also not personally liable¹³⁰ to the trust beneficiaries for any prior trustee's actions or omissions where a super majority of the beneficiaries has released the successor trustee¹³¹ or to any particular beneficiary that has effectuated such a release.

The next legislative session rewrote the trust "slayer statute"¹³² and added a provision concerning evidence of death.¹³³ The language of both

125. § 732.515.

126. § 733.613. The legislature seems to have somewhat codified the result in *Anderson v. Johnson*; in that case, the court held that a bona fide buyer who took title to the estate owned real property, pursuant to a court order, free of an interested party's claim for partition. 732 So. 2d 423, 425 (Fla. 5th Dist. Ct. App. 1999).

127. That is not to say that the legislature did not perform some minor housekeeping in that area as well, such as omitting legalese and changing the word "settlor" to "grantor" in some provisions. *See, e.g.*, Ch. 2001-226, §§ 187-88, 190, 2001 Fla. Laws 113-16, 116-17.

128. FLA. STAT. § 737.2035 (2000). Service on beneficiaries is required only on those beneficiaries entitled to an accounting. *Id.*

129. FLA. STAT. § 737.306 (2001). Former section 737.306 of the *Florida Statutes* applied only with respect to a trust "that was revocable during the time that the grantor served as trustee." FLA. STAT. § 737.306 (1999).

130. For a complete list of circumstances under which a successor trustee is not personally liable, see FLA. STAT. § 737.306 (2001).

131. § 737.306(3)(e)(1). "Super majority" is defined as "at least two-thirds in interest of the beneficiaries" where the interests are ascertainable or, otherwise, "two-thirds in number of the beneficiaries." § 737.306(3)(f).

132. § 737.625.

statutes conforms to the language found in the Probate Code counterparts.¹³⁴ In addition, the legislature extended the savings clause of the rule against perpetuities from 99 years to 360 years for nonvested property interests and powers of appointments in trusts created after December 31, 2000.¹³⁵

D. Other Related Statutory Changes

It has become a bit easier for the estate practitioner regarding estate tax filings with the Florida Department of Revenue. The Preliminary Notice and Report has been eliminated for those estates where the decedent died as of January 1, 2000.¹³⁶ If no estate tax is due, a practitioner may now simply file with the clerk of the court an affidavit to this effect.¹³⁷

The Medicaid Estate Recovery Act¹³⁸ was enacted effective July 1, 1999.¹³⁹ This Act establishes the right, pursuant to federal law, of the Agency for Health Care Administration to file a claim against an estate of a Medicaid recipient at least fifty-five years old.¹⁴⁰ However, there will be no recovery by the Agency where the decedent is survived by a spouse, minor children, or a blind or permanently disabled child.¹⁴¹ Other heirs may petition for a hardship waiver under certain circumstances.¹⁴² In addition, the claim is not enforceable against property exempt from creditors' claims pursuant to Florida law.¹⁴³ In order to ensure compliance, a personal representative must serve a copy of the Notice of Administration on the Agency when a decedent was at least fifty-five years old.¹⁴⁴

Lastly, the anatomical gifts provisions have been removed from the *Probate Code* and added to the chapter on "Health Care Advance

133. § 737.626.

134. See FLA. STAT. §§ 731.103, 732.802 (2000).

135. FLA. STAT. § 689.225(2)(f).

136. Ch. 99-208, § 3, 1999 Fla. Laws 1260, 1265 (repealing FLA. STAT. § 198.12).

137. FLA. STAT. § 198.32(2). For a copy of the "Affidavit of No Estate Tax Due," see Form DR-312, available at <http://sun6.dms.state.fl.us/dor/forms/1999/dr312.pdf>. If an estate tax return is in fact filed with the Department of Revenue and yet no estate tax is due, the Department will still issue a certificate of nonliability. § 198.13(2).

138. § 409.9101.

139. *Id.*

140. § 409.9101(3).

141. § 409.9101(6).

142. § 409.9101(8).

143. § 409.9101(7).

144. § 733.2121(3)(d).

Directives.”¹⁴⁵ Chapter 765 had also been amended earlier to, among other things, permit the termination of life prolonging procedures for persons with an end-stage condition¹⁴⁶ or in a persistent vegetative state.¹⁴⁷

III. PROBATE RULES

There have not been any significant substantive changes to the *Florida Probate Rules*. However, one particular rule should please most probate attorneys. Under rule 5.110, an attorney serving as resident agent for a personal representative need only state the attorney’s office address and mailing address rather than the attorney’s residence address as previously required.¹⁴⁸ This amendment became effective January 1, 2001.¹⁴⁹

IV. CASES

This Part highlights a few select Florida cases that may be of interest to a trust and estates practitioner.

The courts had an opportunity to address the distribution of wrongful death proceeds between the decedent’s survivors and estate. In *In re Estate of Wiggins*,¹⁵⁰ the appellate court upheld a lower court’s admission of expert witness testimony concerning the distribution of those proceeds.¹⁵¹ In that case, an estate recovered, on behalf of the decedent’s survivors and estate, \$100,000 in proceeds from the insurer of the driver that killed the decedent.¹⁵² The hospital where the decedent was taken when the accident occurred filed a claim against the estate for services rendered in the amount of \$19,030.90.¹⁵³ The trial court permitted the personal representative to introduce the testimony of an attorney specializing in wrongful death cases.¹⁵⁴ Because a jury never heard the case, the attorney, as an expert,

145. §§ 765.510–.522.

146. “End-stage condition” is defined as a severe and permanent irreversible deterioration. § 765.101(4).

147. § 765.302(1). A “persistent vegetative state” is one where there is permanent and irreversible unconsciousness. § 765.101(12).

148. Amendments to Florida Probate Rules, 778 So. 2d 272, 280 (Fla. 2001) (amending, among others, 5 FLA. PROBATE R. 120).

149. *Id.* at 273.

150. 729 So. 2d 523 (Fla. 4th Dist. Ct. App. 1999).

151. *Id.* at 526.

152. *Id.* at 524.

153. *Id.*

154. *Id.*

testified as to the probable jury verdict on damages, and the apportionment of these damages had the case gone to trial.¹⁵⁵ The expert estimated that the jury would probably have awarded \$775,000 in damages, 3.3% of which (or \$26,000) would have been distributed to the estate.¹⁵⁶ Since the actual recovery totaled only \$100,000 (the policy's limit), rather than distributing 3.3% of the actual recovery (\$3300), the personal representative recommended that the court distribute a greater amount, ten percent of the total recovery (\$10,000), to the estate.¹⁵⁷ Due to the order of priority for paying claims and expenses under the *Probate Code*, there were barely any funds remaining to pay the hospital.¹⁵⁸ The hospital appealed the trial court's use of the expert testimony as to the value of the wrongful death claim and apportionment of the estimated value.¹⁵⁹ The appellate court held that as long as the trial court fairly apportions the value of a wrongful death claim among the decedent's survivors and estate, based on substantial and competent evidence, then the trial court's ruling stands.¹⁶⁰

Another case also involved the distribution of proceeds recovered in a settlement before a wrongful death action was instituted.¹⁶¹ In that case, a minor child was killed in a car accident caused by her mother.¹⁶² The father, who was appointed personal representative of the child's estate, asked the court to award him the full amount of the settlement; the father argued that the mother was at fault in the accident and thus should be awarded nothing.¹⁶³ The trial court disagreed and apportioned damages among the two parents based on the intestacy statute.¹⁶⁴ The appellate court reversed.¹⁶⁵ The court applied the Florida Wrongful Death Act in reaching its decision.¹⁶⁶ The court noted that, in wrongful death claims, a court must consider the comparative negligence of a survivor in reducing or denying an apportionment of damages to that survivor.¹⁶⁷ Thus, even though the issue of apportionment was before the probate court because the claim was settled

155. *Wiggins*, 729 So. 2d at 524.

156. *Id.* at 525.

157. *Id.*

158. *Id.* (citing FLA. STAT. § 733.707).

159. *Id.* at 526.

160. *Wiggins*, 729 So. 2d at 526.

161. *Hess v. Hess*, 758 So. 2d 1203 (Fla. 4th Dist. Ct. App. 2000).

162. *Id.* at 1204.

163. *Id.*

164. *Id.*

165. *Id.* at 1206.

166. *Hess*, 758 So. 2d at 1204–05 (citing FLA. STAT. §§ 768.16–.27).

167. *Id.* at 1205 (citing FLA. STAT. § 768.20).

before suit, the probate judge could not avoid the application of the wrongful death statutes.¹⁶⁸ Accordingly, the appellate court remanded the case for an entry of an order awarding all the proceeds to the father.¹⁶⁹

In a case that will surely disturb creditors, the Fourth District Court of Appeal held that, under the facts, a brother-in-law and a niece related by marriage were heirs for homestead protection purposes.¹⁷⁰ In *Moss v. Moss*,¹⁷¹ a decedent devised a share of her homestead property to the brother and niece of her predeceased spouse.¹⁷² The lower court afforded homestead protection to blood relatives of the decedent, but not to her deceased husband's relatives; therefore, the court awarded the property only to the decedent's relatives.¹⁷³ The appellate court noted that in *Snyder v. Davis*, the Supreme Court of Florida held that, where a homestead is properly devised, the homestead provision extends homestead protection to any person categorized within the intestacy statute.¹⁷⁴ Because the intestacy statute includes familial heirs of the last deceased spouse as heirs of an intestate estate, the decedent's brother-in-law and niece by marriage were her heirs for homestead purposes and thus entitled to the devise of the decedent's homestead property protected from creditors' claims.¹⁷⁵

In *In re Estate of DeLuca*,¹⁷⁶ the Fourth District Court of Appeal addressed the issue of whether service of a copy of the Notice of Administration is required when there are later discovered codicils.¹⁷⁷ In that case, Josephine Hyland, a beneficiary of the decedent's will, received a copy of the Notice of Administration.¹⁷⁸ Hyland desired to challenge the validity of the will; however, she did not file a claim within the limitations period pursuant to section 733.212.¹⁷⁹ After the time period for objections had expired, the co-personal representatives of the estate filed two newly discovered codicils, which were promptly admitted to probate.¹⁸⁰ The personal representatives did not send Hyland a Notice of Administration

168. *Id.* at 1205–06.

169. *Id.* at 1206.

170. *Moss v. Moss*, 777 So. 2d 1110, 1113 (Fla. 4th Dist. Ct. App. 2001).

171. *Id.* at 1110.

172. *Id.* at 1111.

173. *Id.*

174. *Id.* at 1112 (citing *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997)).

175. *Moss*, 777 So. 2d at 1112–13.

176. 748 So. 2d 1086 (Fla. 4th Dist. Ct. App. 2000).

177. *Id.* at 1086–87.

178. *Id.* at 1087.

179. *Id.*

180. *Id.*

regarding these codicils.¹⁸¹ Hyland then filed a petition to revoke the will and codicil.¹⁸²

The personal representatives argued that her petition was untimely because the three-month objection period had expired from the time they had served the Notice of Administration.¹⁸³ Hyland's argument was that the original time period did not apply because a new Notice of Administration was necessitated with regard to the codicils.¹⁸⁴ The appellate court agreed with Hyland.¹⁸⁵ The court first noted that a codicil is included in the definition of a will.¹⁸⁶ It then reviewed section 733.212 that limits the time for an interested person to challenge a will, and thus a codicil, only when a Notice of Administration has been served.¹⁸⁷ Because no notice as to the codicils was served on Hyland, she was not time barred and could object to the validity of the will and codicils under section 733.109.¹⁸⁸

In *May v. Illinois National Insurance Co.*, the Supreme Court of Florida addressed another limitations issue.¹⁸⁹ In that case, the court reviewed section 733.702, entitled "Limitations on presentation of claims,"¹⁹⁰ and section 733.710, entitled "Limitations on claims against estate."¹⁹¹ The question certified to the court was:

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED

181. *DeLuca*, 748 So. 2d at 1088.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *DeLuca*, 748 So. 2d at 1088.

187. *Id.*

188. *Id.* at 1089.

189. *May v. Ill. Nat'l Ins. Co.*, 771 So. 2d 1143 (Fla. 2000).

190. *Id.* at 1145; FLA. STAT. § 733.702 (2000).

191. *May*, 771 So. 2d at 1145; FLA. STAT. § 733.710.

AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID
WAIVER.¹⁹²

After analyzing the language in the statutes, the court decided that section 733.710 is a self-executing statute of repose that absolutely bars any claims filed on an untimely basis.¹⁹³ On the other hand, the court held that section 733.702 is a statute of limitations.¹⁹⁴ The court based its decision on the language found in section 733.702. That statute permits an enlargement of time to file a claim upon a showing of fraud, estoppel or insufficiency of notice of the claims period.¹⁹⁵ However, section 733.702(5) explicitly states that “nothing in this section shall extend the limitations period set forth in [section] 733.710.”¹⁹⁶ In reading the two statutes together, the court stated that holding otherwise would result in both statutes being “all but indistinguishable.”¹⁹⁷ Thus, since there is no provision for extending section 733.710, that statute is a statute of repose which absolutely prohibits untimely claims.¹⁹⁸

There are four other cases also worthy of mention. In *Williams v. Estate of Pender*,¹⁹⁹ the First District Court of Appeal held that the elements of a virtual adoption must be proven by clear and convincing evidence.²⁰⁰ The court noted that, to date, no other court had affirmatively ruled on the issue, but it was guided in making its decision by the courts’ reasoning in prior virtual adoption cases.²⁰¹

192. *May*, 771 So. 2d at 1145. The question was certified by the United States Court of Appeals for the Eleventh Circuit. *May v. Ill. Nat’l. Ins. Co.*, 190 F.3d 1200, 1208 (11th Cir. 1999). Prior to that, two Florida district courts of appeal had certified a conflict to the Supreme Court on the same issue. See *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 168 (Fla. 4th Dist. Ct. App. 1996) (certifying conflict with *Baptist Hosp. of Miami v. Carter*, 658 So. 2d 560 (Fla. 3d Dist. Ct. App. 1995)); *Lutheran Bhd. Legal Reserve Fraternal Benefit Soc’y v. Estate of Petz*, 744 So. 2d 596, 598 (Fla. 2d Dist. Ct. App. 1999) (aligning itself with *Comerica* and certifying conflict with *Baptist Hospital*).

193. *May*, 771 So. 2d at 1145.

194. *Id.*

195. *Id.*

196. *Id.* at 1156.

197. *Id.*

198. *May*, 771 So. 2d at 1145.

199. 738 So. 2d 453 (Fla. 1st Dist. Ct. App. 1999).

200. *Id.* at 456.

201. *Id.* at 454–56.

*Snyder v. Bell*²⁰² concerned the award of attorneys' fees in a claim of breach of a trustee's fiduciary duties.²⁰³ At trial, the jury found in favor of the trustee; however, the court denied the trustee an award of attorneys' fees under section 737.627.²⁰⁴ On appeal, the court reversed and addressed the issue of the amount that could be awarded.²⁰⁵ The court noted that section 737.627 is similar to section 733.106, which provides for the award of attorneys' fees in defending a probate action.²⁰⁶ The court then relied on the opinion in *Dayton v. Conger* where the Third District Court of Appeal held that there is no personal liability for attorneys' fees under section 733.106.²⁰⁷ Accordingly, the court held that the trustee's award of attorney's fees could be no greater than the beneficiary's share in the trust.²⁰⁸

In the third case, also concerning attorneys' fees, the Third District Court of Appeal issued a warning regarding duplication of such fees.²⁰⁹ The *Brake* court stated, in dicta, that needless legal work should not be rewarded.²¹⁰ In a strongly worded opinion, it stated that the public has become repulsed by a probate process which "they perceive to be a sharing of the estate with an attorney."²¹¹ It suggested that courts "seize control" as they are the "ultimate guardian[s] of the public's . . . property."²¹²

Finally, in *Persan v. Life Concepts, Inc.*,²¹³ the court stated that "[m]aking a gift to a charity for a specific project or purpose does not create a charitable trust."²¹⁴ There, some donors had given twenty-four acres of real property to Central Florida Sheltered Workshop, Inc. ("CFSW") to construct homes for disadvantaged adults.²¹⁵ CFSW built the homes but sold the property fifteen years later.²¹⁶

202. 746 So. 2d 1100 (Fla. 2d Dist. Ct. App. 1999).

203. *Id.* at 1100.

204. *Id.* at 1101. Section 737.627 provides for the award of attorneys' fees in challenges to trustees' exercise of powers. FLA. STAT. § 737.627 (2000).

205. *Snyder*, 746 So. 2d at 1103-04.

206. *Id.* at 1104 (citing FLA. STAT. § 733.106).

207. *Id.* at 1104 (citing *Dayton v. Conger*, 448 So. 2d 609, 611 (Fla. 3d Dist. Ct. App. 1984)).

208. *Id.*

209. *Brake v. Murphy*, 736 So. 2d 745, 748 (Fla. 3d Dist. Ct. App. 1999).

210. *Id.*

211. *Id.* at 749.

212. *Id.*

213. 738 So. 2d 1008 (Fla. 5th Dist. Ct. App. 1999).

214. *Id.* at 1010.

215. *Id.* at 1009.

216. *Id.*

A lawsuit was filed against Life Concepts, Inc., the successor charity to CFSW, for breach of a charitable trust or, in the alternative, an imposition of a resulting trust.²¹⁷ The court held that neither type of trust existed.²¹⁸ In order to create a charitable trust in land, the trust must be in writing, signed by the party creating the trust and evincing the intent to create a trust.²¹⁹ In this case, the real property was given by deed with no restrictions, right of reverter or other conditions creating an express charitable trust.²²⁰ Again, because the court found that the property was transferred directly by the owner to CFSW as a gift, the court found that a resulting trust did not exist.²²¹

V. CONCLUSION

It is evident from this survey that the law of trusts and estates is not well settled in this state. In some instances, the Florida Legislature was motivated by a need to implement clarifications to the language in the law. Other changes reflect the need to fulfill the legislature's role in responding to public policy needs. Similarly, the courts' decisions in recent cases attempt to meet these goals. Clearly, it is imperative that the practitioner in this dynamic field closely monitor changes in the law of trusts and estates.

217. *Id.* at 1009–10.

218. *Persan*, 738 So. 2d. at 1012.

219. *Id.* at 1012 (citing FLA. STAT. § 689.05).

220. *Id.* at 1011.

221. *Id.* at 1012.

The Residual Exception to the Hearsay Rule—Has It Been Abused—A Survey Since the 1997 Amendment

Leonard Birdsong*

TABLE OF CONTENTS

I. INTRODUCTION	59
II. HEARSAY, THE FEDERAL RULES OF EVIDENCE, AND THE STATES	63
III. AN ANALYTICAL FRAMEWORK FOR EXAMINING THE RESIDUAL EXCEPTION	67
A. <i>Appropriate Indicia of Reliability</i>	67
B. <i>Notice</i>	69
IV. RULE 807 CASES IN THE FEDERAL COURTS	71
A. <i>Civil Cases</i>	71
B. <i>Criminal Cases</i>	84
V. THE RESIDUAL EXCEPTION IN STATE COURT CASES	94
A. <i>Civil Cases</i>	94
B. <i>Criminal Cases</i>	97
C. <i>The Florida Cases</i>	104
VI. CONCLUSION	108

I. INTRODUCTION

In our legal system of trial by jury, a good deal of the law of evidence is given to exploring hearsay and its exceptions. “The factors upon which the value of testimony depends, are: the perception, memory, narration, and sincerity of the witness.”¹ In order to encourage witnesses to put forth their

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best efforts and to expose inaccuracies that might be present with respect to any of these factors, our trial system has developed what is known as the testimonial ideal. That is, witnesses are required to testify under oath, testify in person, and be subject to cross examination. The rule against hearsay is designed to insure compliance with these ideals. When one of them is absent, a hearsay objection becomes pertinent.² Hearsay evidence is often characterized as unreliable and untrustworthy. Nevertheless, courts constantly admit hearsay evidence under the numerous exceptions found in the common law and in latter day statutes. "Hearsay evidence exhibits a wide range of reliability. The effort to adjust the rules of admissibility [of hearsay evidence] to variations in reliability has been a major motivating factor in the movement to liberalize evidence law."³

The *Federal Rules of Evidence*, adopted in 1975⁴ for use in the federal courts and adopted by many states, have helped liberalize the introduction of trustworthy hearsay evidence at trials.⁵ The *Federal Rules of Evidence* recognize twenty-eight standard exceptions to the hearsay rule.⁶ In addition to those exceptions and the "nonhearsay" exceptions,⁷ Congress, in promulgating the *Federal Rules of Evidence*, adopted rules 803(24) and 804(b)(5), as residual hearsay exceptions. Such rules allowed the introduction of hearsay statements not specifically covered by any of the named exceptions but having circumstantial guarantees of trustworthiness if the court determined that certain stated conditions were met.⁸

wishes to thank Professor Stephen Leacock of Barry University School of Law for reading and offering helpful insights to the preparation of this article.

1. MCCORMICK ON EVIDENCE § 245 (John W. Strong ed., 5th ed. 1999).

2. *Id.*

3. *Id.*

4. See GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: 1996 COURTROOM MANUAL (1995).

5. Rule 102 of the *Federal Rules of Evidence* provides that "these rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

6. FED. R. EVID. 803(1)-(23), 804(b)(1)-(4), (6).

7. FED. R. EVID. 801(d).

8. FED. R. EVID. 803 (1997) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as witness:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence

It was intended that the residual exceptions would be used sparingly by the courts and only in rare and exceptional circumstances.⁹ The Advisory Committee cautioned that the residual exceptions “do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate trustworthiness within the spirit of the specifically stated exceptions.”¹⁰

“Of all the exceptions [to the hearsay rule], the residual exceptions have probably generated the greatest amount of controversy.”¹¹ One evidence scholar, James Beaver, who has examined the use of the residual exceptions, fears that the residual exceptions will swallow the hearsay rule.¹² Another scholar, Thomas Black, believes that the residual exceptions may be used in such a manner in the federal courts as to abuse traditional concepts of evidence.¹³ As this article will demonstrate, such fears are totally unfounded.

In 1997, the residual exceptions of rules 803(24) and 804(b)(5), were amended and cast into one new rule, 807 of the *Federal Rules of Evidence*.¹⁴ The amended rule provides:

which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by the admission of statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including name and address of the declarant.

FED. R. EVID. 804(b)(5) (1997). Rule 804(b)(5) of the 1997 *Federal Rules of Evidence* is identical in language except for its preamble which states “the following are not excluded by the hearsay rule if the declarant is unavailable as a witness.”

9. See Senate Comm. on Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 16 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7065–66.

10. See James W. Moore et al., *MOORE’S FEDERAL PRACTICE, FEDERAL RULES OF EVIDENCE* § 803.12 (1997 ed.).

11. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 789 (1993).

12. *Id.* at 790; but cf. G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265, 303 (2000) (“the residual exception is the safety valve of the hearsay rule.”).

13. Thomas Black, *Federal Rules of Evidence 803(24) & 804(b)(5)—The Residual Exceptions—An Overview*, 25 HOUS. L. REV. 13, 56 (1988).

14. Rule 807, of the *Federal Rules of Evidence*, became effective on December 1, 1997. See *FEDERAL RULES OF EVIDENCE HANDBOOK* (Anderson Publ’g 1999).

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.¹⁵

In amending the residual exception the Advisory Committee noted that “[t]he contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.”¹⁶

Prior to the 1997 amendment, the aforementioned scholar, James Beaver, surveyed the use of the residual exceptions and found that between 1975 and 1993, the residual exceptions and their state equivalents were reported in more than 140 federal cases and in more than 90 state cases.¹⁷ He concludes that such figures suggest that the residual exceptions were being used more than just in rare and exceptional circumstances.¹⁸ He also maintained that the residual exceptions weaken the hearsay rule and cautioned states to refuse to adopt the residuals on the ground that they were undesirable and unnecessary.¹⁹ Another scholar, John Strong, the general editor of *McCormick on Evidence*, believes resort to the exception has been substantial and is surprised by its prominent use by prosecutors in federal courts.²⁰

A review of recent cases reveals that the admission of residual hearsay pursuant to the exception is being used sparingly and only after a good deal of analysis by both the federal courts and by the courts of states which allow

15. FED. R. EVID. 807.

16. *Id.*

17. Beaver, *supra* note 11, at 790.

18. *Id.* at 791.

19. *Id.*

20. See MCCORMICK, *supra* note 1, § 324.

the exception.²¹ In Beaver's survey, he found that the residual exception was reported in 140 federal cases and 90 state cases. He believes that this was abuse of the rule and that we better be careful. However, such analysis, relying solely on the number of reported cases, is flawed. Everything is relative. The use of the residual exception as reported in 140 cases over a 23 year period does not seem astounding, given there are 13 federal circuit courts of appeals in the country. Nor does it seem astounding that the residual exception was reported in 90 state cases during the same period. We have 50 state court systems, many with a two tier appellate court system consisting of a court of appeal and a higher state supreme court.

If Beaver had analyzed exactly how the residual exception was used in each case, he would have found no abuse. The purpose of this article is to survey and analyze the pertinent reported federal and state decisions addressing admission of residual hearsay since the 1997 amendment to the residual exception. Such survey and analysis reveal that there is little likelihood that the hearsay rule will be swallowed by the residual exception. A secondary purpose of this article is to provide civil trial lawyers, defense attorneys, prosecutors, and judges examples of how the circumstantial guarantees of trustworthiness of the residual exception have been argued and analyzed in federal and state courts in recent years.

II. HEARSAY, THE FEDERAL RULES OF EVIDENCE, AND THE STATES

In order to understand the residual exception, one must appreciate the definition of hearsay under the Federal Rules. The rules first define a statement as, "an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."²² Thus, hearsay, under the rules, is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²³ The definition is an affirmative one, which says that "an out-of-court assertion offered to prove the truth of the matter asserted is hearsay."²⁴ "Exceptions to the hearsay rule usually are justified on the ground that evidence meeting the requirements of the exception possess special reliability and often special need, such as the unavailability of the

21. In May, 2001 the author, with assistance from the Barry University School of Law Library reference staff, undertook an on-line search of cited cases referencing the residual exception since 1997. The cases cited herein are a result of that search.

22. FED. R. EVID. 801(a).

23. FED. R. EVID. 801(c).

24. See MCCORMICK, *supra* note 1, § 246.

declarant.”²⁵ That is, there is an objective guaranty of trustworthiness to such statements.²⁶

The often cited examples of exceptions that exhibit such guarantees of trustworthiness are the excited utterance,²⁷ statements for purposes of medical diagnosis,²⁸ records of regularly conducted activity,²⁹ statements in ancient documents,³⁰ the dying declaration,³¹ and, of course, statements against interest.³²

Forty-one states, Puerto Rico, and the military have adopted the *Federal Rules of Evidence*.³³ The majority of these states adopted rules of evidence based on the final *Federal Rules of Evidence*.³⁴ As the *Federal Rules of Evidence* are amended, some states also promptly amend their corresponding rules to maintain similarity with the federal rules.³⁵ “The following states have not adopted rules of evidence based on the *Federal Rules of Evidence*:

25. *Id.* § 254.

26. *Id.* § 256.

27. FED. R. EVID. 803(2).

28. FED. R. EVID. 803(4).

29. FED. R. EVID. 803(6).

30. FED. R. EVID. 803(16).

31. FED. R. EVID. 804(b)(2).

32. FED. R. EVID. 804(b)(3).

33. 6 WEINSTEIN'S FEDERAL EVIDENCE, T1 (2d ed. 2000)

34. *Id.* at T2–T7. The Alabama Rules of Evidence became effective 1/1/96; Alaska Rules effective 8/1/79; Arizona Rules effective 9/1/77; Arkansas Rules effective 7/1/76; Colorado Rules effective 1/1/80; Delaware Rules effective 1/1/80; Florida Rules effective 7/1/79; Hawaii Rules effective 1/1/81; Idaho Rules effective 1/1/85; Indiana Rules effective 1/1/94; Iowa Rules effective 1/1/83; Kentucky Rules effective 1/1/92; Louisiana Rules effective 1/1/89; Maine Rules effective 2/2/76; Maryland Rules effective 1/1/94; Michigan Rules effective 3/1/78; Minnesota Rules effective 7/1/77; Mississippi Rules effective 1/1/86; Montana Rules effective 7/1/77; Nebraska Rules effective 8/24/75; Nevada Rules effective 1/1/71 (based on Preliminary Draft of the Federal Rules); New Hampshire Rules effective 1/1/85; New Jersey Rules effective 1/1/93; New Mexico Rules effective 1/1/73 (amended 7/1/76 to conform to the changes made to the draft Federal Rules by Congress); North Carolina Rules effective 7/1/84; North Dakota Rules effective 2/15/77; Ohio Rules effective 7/1/80; Oklahoma Rules effective 10/1/78; Oregon Rules effective 1/1/82; Pennsylvania Rules effective 10/1/98; Puerto Rico Rules effective 10/1/79; Rhode Island Rules effective 10/1/87; South Carolina Rules effective 9/3/95; South Dakota Rules effective 7/1/78; Tennessee Rules effective 1/1/90; Texas Rules effective 3/1/98; Utah Rules effective 9/1/83; Vermont Rules effective 4/1/83; Washington Rules effective 4/2/79; West Virginia Rules effective 2/1/85; Wisconsin Rules effective 7/1/74 (based on Final Draft of the Federal Rules); Wyoming Rules effective 1/1/78. The Military Rules of Evidence are based on the Federal Rules and were adopted 3/12/80. *Id.* at T2–T7 (citations omitted).

35. *Id.* at T1.

California, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, Virginia, and the Virgin Islands.”³⁶

The forty-one states, Puerto Rico, and the military that have adopted the *Federal Rules of Evidence* have all adopted rules similar to the hearsay rule of 801.³⁷ However, not all of these states have adopted the residual exceptions.³⁸ Of the states that have adopted such residual exceptions, Colorado appears to be the only state to have already amended its rules to combine the 803(24) and 804(b)(5) into one rule 807 as have the *Federal Rules of Evidence*.³⁹ The states which have not adopted a residual exception are: Alabama, Florida, Indiana, Kentucky, Maine, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, and Washington.⁴⁰ Louisiana limits its residual exception to civil cases.⁴¹ Nevada⁴² and Wisconsin omit the notice requirement of the federal rule.⁴³

Although Florida has not adopted a residual exception akin to rule 807, it has two sections of its evidence code⁴⁴ which speak to the kinds of circumstances where residual hearsay exceptions often are applied. These may be thought of as “quasi residual” exceptions. Section 90.803(23) of the *Florida Evidence Code*, allows the use of out-of-court statements of a child, eleven years old or less, describing child abuse, neglect, or sexual abuse against the child,⁴⁵ after the court holds a hearing to determine reliability of such statements.⁴⁶ The statute is applicable whether the child is available or unavailable to testify.⁴⁷ If the child is unavailable to testify and the statements are deemed to be reliable by the court, there must be other

36. *Id.* at T7.

37. *Id.* at T106–12.

38. WEINSTEIN, *supra* note 33, at T159–61. The states that have adopted residual exceptions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Dakota, Utah, West Virginia, Wisconsin, Wyoming, and the United States Military.

39. *Id.* at T159–61; *see also* COLO. R. EVID. 807, effective January 1, 1999.

40. *Id.* at T159–61.

41. *Id.* at T160.

42. The State of Nevada has no residual exception where the declarant is available. Nevada does provide a residual exception akin to rule 807 when the declarant is unavailable. However, the Nevada rule omits the notice requirement. *Id.* at T160.

43. WEINSTEIN, *supra* note 33, at T160, T162.

44. *See* FLA. R. EVID. § 90.803(23), (24) (2000).

45. FLA. R. EVID. § 90.803(23)(a) (2000).

46. § 90.803(23)(a)(1).

47. § 90.803(23)(a)(2)(a), (b).

corroborating evidence of the offense before such statement may be used.⁴⁸ There is also a ten day notice requirement that must be given to a defendant in a criminal case.⁴⁹ Finally, the court, under this statute must make specific findings of fact on the record as to the basis for its ruling to admit or exclude the statements.⁵⁰ Section 90.803(24) of the *Florida Evidence Code* is identical, except that it applies to elderly or disabled adults.⁵¹

Florida promulgated such hearsay exceptions for children in 1985.⁵² The Florida exception was expanded to the elderly in 1995.⁵³ However, it was not until after 1990 that a number of other states were confronted with the need for such exceptions. This was as a result of the Supreme Court's ruling in *State v. Wright*.⁵⁴ In *Wright*, a child sexual abuse case, the Court was required to decide whether the admission at trial of certain hearsay statements admitted under Idaho's residual exception violated the defendant's rights under the Confrontation Clause of the Sixth Amendment.⁵⁵ The hearsay statements were made by a child declarant to an examining pediatrician.⁵⁶ At trial, the child was unavailable as a witness⁵⁷ and the pediatrician testified as to the child's statements concerning the abuse.⁵⁸

The Supreme Court affirmed the Supreme Court of Idaho, which ruled that the defendant's right to confrontation had been denied by admission of the testimony.⁵⁹ The Court held that the State of Idaho could not use other evidence corroborating the truth of such a hearsay statement to support a finding that the statement bore "particularized guarantees of trustworthiness."⁶⁰ In other words, to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.⁶¹ The Court in *Wright* declined to endorse a mechanical

48. § 90.803 (23)(a)(2)(b).

49. § 90.803(23)(b).

50. § 90.803(23)(c).

51. § 90.803(24)(a)-(c).

52. *See In re Amendments to Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).

53. § 90.803(24).

54. 497 U.S. 805 (1990).

55. *Id.* at 808.

56. *Id.* at 809.

57. *Id.*

58. *Id.*

59. *Wright*, 497 U.S. at 827.

60. *Id.* at 823.

61. *Id.*

test for determining “particularized guarantees of trustworthiness,”⁶² however, the Court alluded to a number of factors that might make the hearsay statements made by a child in an abuse case reliable, including spontaneity and consistent repetition, lack of motive to fabricate, mental state of the declarant, and use of terminology unexpected of a child of similar age.⁶³

III. AN ANALYTICAL FRAMEWORK FOR EXAMINING THE RESIDUAL EXCEPTION

A. *Appropriate Indicia of Reliability*

All hearsay exceptions must exhibit an element of trustworthiness which derives from certain appropriate indicia of reliability. One often cited example of a trustworthy hearsay exception is the dying declaration.⁶⁴ It has long been considered reliable that a man would not go to his death with a lie on his lips. Obviously, fear of retribution in the afterlife provides the appropriate indicia of reliability to make the dying declaration trustworthy. So how do we find the appropriate indicia in the residual hearsay exception? Rule 807 provides that “a statement not specifically covered by 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule”⁶⁵ “In applying the residual exceptions, the most important issue is whether the statement offers ‘equivalent circumstantial guarantees of trustworthiness’ to those found in other specific hearsay exceptions.”⁶⁶

The factors supporting trustworthiness are varied, but a few recurring factors may be pertinent to the determination of admissibility. Among them would be: 1) whether the declarant had a motivation to speak truthfully; 2) the spontaneity of the statement; 3) the time lapse between the event and the statement; 4) whether the declarant was under oath; 5) whether declarant has been cross-examined; 6) whether the declarant has recanted or reaffirmed the statement; and 7) whether the declarant’s first hand knowledge is clearly demonstrated.⁶⁷ A court may also consider whether an out-of-court statement was corroborated by the declarant, who was available and testified

62. *Id.* at 824–25.

63. *Id.* at 826.

64. *See* FED. R. EVID. 804(b)(2).

65. FED. R. EVID. 807.

66. MCCORMICK, *supra* note 1, § 324.

67. *Id.*

at trial.⁶⁸ Further, a court might look to circumstances surrounding the extrajudicial statement to determine trustworthiness.⁶⁹

In an effort to determine whether circumstantial guarantees of trustworthiness exist, a court may look to: 1) matters that occur at trial; 2) extrinsic corroboration of the statement; 3) surrounding circumstances concerning the statement; or 4) all of these to determine trustworthiness.⁷⁰ Beaver is troubled by this approach. He complains that with respect to the residual exception “a court need not be consistent in its use of such standards.”⁷¹ “The standard used can very easily be changed to meet the necessities of current political expediency or judicial whim.”⁷² “We have a container into which anything can be poured.”⁷³

Such criticism of the standards for allowing statements pursuant to the residual exception is flaccid. The appropriate position with respect to the question of standards is that espoused by Fenner who maintains that “[w]ithout some residual exception, a statutory set of rules of evidence simply would not work.”⁷⁴ “The pressure to admit hearsay evidence that does not fall under the fixed, specific exceptions would inevitably lead to one of two things: the evidence would not be admitted and injustice would be done, or one of the other exceptions would be misread to say that it does cover the evidence in question.”⁷⁵ We should always remember that the *Federal Rules of Evidence* are to be construed to secure fairness in administration, and to help the development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.⁷⁶

The standards for determining the circumstantial guarantees of the trustworthiness of residual statements must vary. In the cases reviewed herein, decided since the 1997 amendment to rule 807, we find courts that admitted residual hearsay because there was little likelihood of fabrication or inaccuracies with respect to the statements admitted.⁷⁷ We also find a court

68. See Beaver, *supra* note 11, at 797.

69. *Id.* at 797–98 (citing *Karme v. Commissioner*, 673 F.2d 1062 (9th Cir. 1982), where the court found that bank records bore circumstantial guarantees of trustworthiness because of the distant location of the bank and because there was no evidence to suggest the bank records were anything other than what they purported to be).

70. See *id.*

71. Beaver, *supra* note 11, at 798.

72. *Id.*

73. *Id.*

74. Fenner, *supra* note 12, at 303.

75. *Id.*

76. See FED. R. EVID. 102.

77. See *Gonzalez v. Digital Equip. Corp.*, 8 F. Supp. 2d 194 (E.D.N.Y. 1998).

that admitted such out-of-court statements on the ground that they were business records produced by a defendant against his interest in litigation and thus trustworthy.⁷⁸ In the criminal area, we find courts that undertook extensive analysis to determine: whether the residual hearsay statements were sufficiently detailed so that they would have been difficult to fabricate; whether there was a lack of evidence of coercion; whether the declarants had personal knowledge of the events; and, how soon the statements were made after the event.⁷⁹

Other courts examined whether the statements sought to be admitted pursuant to the residual exception were made under oath and subject to the penalty of perjury; whether such statements had been made voluntarily; and whether they contradicted previous statements by the declarants.⁸⁰ Finally, we find a criminal case in which the court examined: whether the declarant was offered leniency in exchange for his statement; whether the declarant attempted to shift blame from himself to the accused; whether the declarant took full responsibility for his role in the offense; whether the declarant was caught “red-handed” and merely tried to share his blame by implicating another; and, whether the declarant was given his *Miranda* rights.⁸¹

As Beaver notes, the courts need not be consistent in their use of standards.⁸² What is most important with respect to any residual exception analysis is the determination that such evidence, which might meet the standard of circumstantial guarantees of trustworthiness, is evidence offered as evidence of a material fact; that the evidence is the most probative evidence available on the point for which it is offered; that the interests of justice will be served by admitting the evidence; and that there was notice of the evidence.⁸³ One must bear this analytical framework in mind as we survey the recent cases in an effort to determine whether the residual hearsay rule is being abused.

B. Notice

The notice requirement of rule 807 is very important. What does notice mean? When and how must notice be given? The residual exception is not

78. See *John Paul Mitchell Sys. v. Quality King Distrib. Inc.*, 106 F. Supp. 2d 462 (S.D.N.Y. 2000).

79. See *United States v. Gomez*, 191 F.3d 1214 (10th Cir. 1999).

80. See *United States v. Sanchez-Lima*, 161 F.3d 545 (9th Cir. 1998).

81. See *State v. Hallum*, 585 N.W.2d 249 (1998).

82. Beaver, *supra* note 11, at 798.

83. FED. R. EVID. 807.

available unless offering counsel gives opposing counsel advance notice of his or her intention to offer the out of court statement, and the particulars of the statement, including the name and address of the out of court declarant.⁸⁴ Rule 807 does not require pretrial notice of an intention to use rule 807. All it requires is notice of an intention to offer the particular statement; not notice of an intention to use any particular hearsay exception. Once counsel has notified opposing counsel of an intention to offer the statement in question, then it can be offered under rule 807.⁸⁵ The notice may be formal or less formal. Fenner reminds us the pretrial notice may be a document filed with the court styled "Notice of Intention to Use Rule 807 Evidence," or it may be a letter sent to opposing counsel stating an intention to introduce particular statements, including the names and addresses of the proposed declarants.⁸⁶

The timing of the notice has been problematic. Both Fenner and Beaver note that prior to the 1997 amendment, some courts interpreted the notice requirement more in accord with the spirit of the law than with the letter of the law. This often creates inconsistency in application of the notice requirement.⁸⁷ The rule provides that notice must be "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet [the evidence]."⁸⁸ Fenner claims that "some courts stress the 'fair opportunity' part of the notice requirement over the 'in advance of the trial or hearing' part."⁸⁹ He notes that "[o]ne influential court has said that in cases where the need to use this exception does not become apparent until after the trial has begun, midtrial notice given enough in advance of the actual use of the evidence can satisfy the rule's pretrial notice requirement."⁹⁰

The cases surveyed herein reveal that variations of the flexible approach to notice requirement predominate. Although this does not appear consistent with the plain meaning of the rule, we shall see that the interests of justice require such flexibility. Even less formal notice is better than no notice. With this analytical framework in mind with respect to appropriate

84. *Id.*

85. *Id.*

86. Fenner, *supra* note 12, at 280.

87. *See id.* *See also* Beaver, *supra* note 11, at 802.

88. FED. R. EVID. 807.

89. Fenner, *supra* note 12, at 281.

90. *See* Fenner, *supra* note 12, at 280 (citing *United States v. Iaconetti*, 406 F. Supp. 554 (E.D.N.Y. 1976), *aff'd*, 540 F.2d 574 (2d Cir. 1976)).

indicia of reliability and notice, let us survey the recent cases relying on the residual exception to determine whether the rule is being abused.

IV. RULE 807 CASES IN THE FEDERAL COURTS

A. Civil Cases

Since the 1997 amendment to the *Federal Rules of Evidence*, the residual exception was cited as an issue in seven civil cases in the federal courts. The cases come from the Second and Eleventh Circuit Courts of Appeal, federal district courts in the Eastern District of New York, and the district court for Puerto Rico. It will be clear from a review of these civil cases that judges are not abusing their authority with respect to admitting unreliable hearsay pursuant to the residual exception.

The Eleventh Circuit Court of Appeals gave short shrift to a plaintiff's argument that the residual exception of rule 807 should be admissible to allow hearsay of a dead witness to help substantiate her claim of copyright infringement.⁹¹ In *Herzog v. Castle Rock Entertainment*⁹² the plaintiff, Herzog, brought a copyright action against the writer, director, producer, and distributor of the motion picture "Lone Star."⁹³ Plaintiff alleged that defendants infringed her copyright for a screenplay she had written entitled "Concealed."⁹⁴ The district court granted defendant's motion for summary judgment and Herzog appealed.⁹⁵ The Eleventh Circuit, relying on the district court's opinion, upheld the grant of summary judgment on the grounds that Herzog had failed to establish that Sayles, the writer-director of "Lone Star," had a reasonable opportunity to view her screenplay, and that the motion picture and screenplay were not substantially similar.⁹⁶

Herzog's burden was to show that her screenplay was a copyrighted work, and that Sayles had copied it.⁹⁷ Herzog submitted a certificate of copyright for her screenplay to the court.⁹⁸ The second requirement, proof of

91. *Herzog v. Castle Rock Entm't*, 193 F.3d 1241 (11th Cir. 1999).

92. 193 F.3d 1241 (11th Cir. 1999).

93. *Id.* at 1243.

94. *Id.*

95. *Id.* at 1244.

96. *Id.* at 1263.

97. *Herzog*, 193 F.3d at 1249.

98. *Id.*

copying, she attempted to prove circumstantially by demonstrating that the person who copied the work had access to her copyrighted screenplay.⁹⁹

Herzog averred that she had written the screenplay as a requirement for her Master Degree in film studies at the University of Miami.¹⁰⁰ She had given her screenplay to Cosford, one of her professors for review.¹⁰¹ He had never returned it to her.¹⁰² After "Lone Star" was released, she learned that Sayles was an acquaintance of Cosford and that Sayles and Cosford had met for lunch in Miami during the time Cosford had her screenplay.¹⁰³ Herzog theorized that Cosford had shown Sayles her work.¹⁰⁴ By the time of the lawsuit, Cosford had died and was, thus, unavailable to testify as to whether he had shown Sayles the screenplay.¹⁰⁵

Herzog sought to introduce, under rule 807, hearsay statements of Allegro, another Professor at the University of Miami.¹⁰⁶ Allegro testified at deposition that Cosford told him that he was reading Herzog's screenplay and he found it interesting.¹⁰⁷ Allegro, further, testified that during this same time period Sayles was in Miami and Cosford came out of his office at the university and announced to Allegro that he was on his way home to pick up Sayles to take him to lunch.¹⁰⁸ Allegro also testified that he only inferred from Cosford's statements that he was picking up Sayles at his home and that he had never actually saw Sayles and Cosford together.¹⁰⁹

Courts cannot properly consider hearsay evidence in ruling on motions for summary judgment.¹¹⁰ Defendants argued that the proffered testimony of Allegro would be inadmissible hearsay.¹¹¹ There were no equivalent guarantees of trustworthiness found in those conversations.¹¹² The Eleventh Circuit Court of Appeals agreed on the ground that rule 807 requires the equivalent circumstantial guarantees of trustworthiness covered by exceptions in rule

99. *Id.*

100. *Id.* at 1244.

101. *Id.*

102. *Herzog*, 193 F.3d at 1244–45.

103. *Id.* at 1245.

104. *Id.*

105. *Id.* at 1252.

106. *Id.* at 1252–53.

107. *Herzog*, 193 F.3d at 1252–53.

108. *Id.*

109. *Id.*

110. *Id.* at 1254 (citing *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir.1987)).

111. *Id.* at 1254.

112. *Herzog*, 193 F.3d at 1255.

803 and rule 804.¹¹³ The court undertook the requisite analysis for circumstantial guarantees of trustworthiness and found that the conversations had taken place five years earlier and Allegro was vague and not precise or knowledgeable in his memory of the conversations.¹¹⁴

This was hearsay of the worst kind. The court found that even if such hearsay was admissible to show that Cosford had a copy of Herzog's screenplay and that Sayles had stayed at Cosford's home in 1993, said evidence did not establish that Cosford had a copy of the screenplay with him when he met Sayles for lunch and that he allowed Sayles to see it, and that Sayles was not truthful when he averred he had never heard of Herzog's composition.¹¹⁵ Also, there was no allegation that Cosford previously contributed creative ideas or material to Sayles.¹¹⁶

The hearsay was not admitted despite proper pretrial notice being given under the residual exception. No appropriate indicia of reliability could be found on the facts of the case. The Eleventh Circuit did not abuse its powers by allowing the admission of unreliable hearsay pursuant to the residual exception in Herzog.

In *Schering Corp. v. Pfizer, Inc.*,¹¹⁷ the Second Circuit found that although certain surveys offered by plaintiffs in a false advertising case called for statements concerning memory, this did not automatically preclude their admission under the residual exception of rule 807.¹¹⁸ The plaintiff, Schering, was a pharmaceutical company that produces Claritin, a prescription antihistamine.¹¹⁹ UCB, a European pharmaceutical company, developed a competing product called Zyrtec.¹²⁰ UCB licensed Pfizer, a Delaware corporation to promote Zyrtec in the United States.¹²¹ In 1996, Schering brought an action against UCB and Pfizer alleging false advertising with respect to Zyrtec in violation of the Lanham Act and a prior settlement agreement between the parties.¹²²

At a 1998 hearing on a preliminary injunction, Schering sought to introduce five surveys concerning the marketing and sale of Zyrtec to

113. *Id.* at 1254.

114. *Id.*

115. *Id.* at 1255.

116. *Id.*

117. 189 F.3d 218 (2d Cir. 1999).

118. *Id.* at 240.

119. *Id.* at 221.

120. *Id.*

121. *Id.* at 222.

122. *Schering Corp.*, 189 F.3d at 222.

doctors.¹²³ Pfizer responded to the motion on grounds that the surveys were inadmissible as hearsay.¹²⁴ The district court agreed and issued a written opinion disallowing the surveys for any purpose.¹²⁵ The trial court denied the injunction and Schering appealed.¹²⁶ The Second Circuit found that the surveys should have been allowed, vacated the judgment, and remanded the case for further hearing regarding the surveys concerning memory statements.¹²⁷

Five surveys Schering had sought to introduce called for more information than rule 803(3) would allow.¹²⁸ The court found that those surveys went beyond the state of mind of those surveyed and called for memory or belief to prove the facts remembered or believed.¹²⁹ However, Pfizer had also sought to introduce the surveys under the residual hearsay exception.¹³⁰ The court examined the surveys and rule 807 and found that the lower court had abused its discretion by not allowing admission of the surveys pursuant to the residual exception.¹³¹ The Second Circuit held that the trial court had been in error to rule against the use of out-of-court memory statements to prove facts remembered.¹³² The court reminded us that:

Unlike Rule 803(3), which explicitly excludes from its purview memory statements offered to establish the facts remembered, the residual hearsay rule contains no such express limitation. There is a reason for this difference. Almost any statement used to describe events that a speaker has experienced in the past can be characterized as a 'memory,' which is a presently-existing state of

123. *Id.* at 223.

124. *Id.* at 224.

125. *Id.*

126. *Id.*

127. *Schering Corp.*, 189 F.3d at 239–40.

128. Rule 803 of the *Federal Rules of Evidence* provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

FED. R. EVID. 803(3).

129. *Schering Corp.*, 189 F.3d at 231.

130. *Id.* at 224.

131. *Id.* at 231.

132. *Id.*

mind when it is conveyed. If such statements were admissible under Rule 803(3) to prove the facts remembered, parties could thus offer hearsay to establish almost any past fact, a result that would indeed mark the 'the virtual destruction of the hearsay rule' The residual hearsay rule, by contrast, escapes this problem by setting forth its own set of requirements, which include necessity and trustworthiness, before it will allow for a statement's admission.¹³³

The court held that memory surveys, in principle, may have greater circumstantial guarantees of trustworthiness than many other traditional exceptions to the hearsay rule, but that it was the methodological validity of the survey that had to be examined before a guaranty of trustworthiness could be assured.¹³⁴

In *Schering Corp.*, the court found that there was long standing notice of the intent to introduce the surveys.¹³⁵ The court further found that the surveys were trustworthy and necessary, and concluded that in the context of survey evidence, the interests of justice and the general purposes of the rules of evidence are generally best served by the admission of the surveys that meet these two criteria.¹³⁶ A review of the case shows that the residual exception is not being abused in the Second Circuit, rather, the exception is being put to a strong analytical process as to its application.

In *Rotolo v. Digital Equipment Corp.*,¹³⁷ the Second Circuit overturned a trial court judgment on the ground that the notice requirement of 807¹³⁸ had not been met.¹³⁹ In this case, plaintiff brought a products liability case against Digital, alleging that she suffered repetitive stress injuries resulting from the use of their computer keyboard.¹⁴⁰ Plaintiff presented evidence of her injuries and evidence from medical witnesses to bolster her claim.¹⁴¹

133. *Id.* at 232.

134. *Schering Corp.*, 189 F.3d at 234.

135. *Id.* at 238.

136. *Id.*

137. 150 F.3d 223 (2d Cir. 1998).

138. The notice requirement of FED. R. EVID. 807 provides:

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, . . . including the name and address of the declarant.

FED. R. EVID. 807.

139. *Id.* at 226.

140. *Rotolo*, 150 F.3d at 224.

141. *Id.*

Plaintiff's attorneys also came into possession of a videotape made by Apple Computer Corporation.¹⁴² The tape, which was received in evidence, contained the voice and images of three Apple consultants who asserted and emphasized the existence of a possible causal connection between computer keyboard use and repetitive stress injury.¹⁴³ Digital objected to the introduction of the videotape as hearsay.¹⁴⁴

The Second Circuit agreed that the videotape contained inadmissible hearsay and vacated judgment and remanded the case.¹⁴⁵ The court found that the consultants that appeared in the videotape, two identified as physicians and one as an engineer, were unsworn witnesses, whose qualifications were not expounded upon or subjected to cross-examination.¹⁴⁶ Rotolo's counsel had informed the trial court that he was not offering the videotape because it was publicly available, but offered it "as appropriate and compelling state of the art proof as to what could be known."¹⁴⁷ The court held it was error to admit the report.¹⁴⁸ Before a defendant, who has never seen an unpublished report that is not part of the published literature, can be said to have non-hearsay notice, it must be shown that the defendant "was at least inferentially put on notice by the report."¹⁴⁹ Digital presented proof that it had no such notice of the report or that they should have seen it as a part of the published literature on the industry.¹⁵⁰

The court held a rule 807 residual exception inapplicable to the videotape evidence because the advance notice of intent to use that section was not used.¹⁵¹ The court further found that the district court "misadvised the jury that it might consider the videotape as evidence of 'what might have been made available [to] these defendants [sic] and what was in the field to show what their state of mind was or should have been' Simply put, the Apple videotape was inadmissible hearsay."¹⁵² No notice, no residual exception. No abuse there.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Rotolo*, 150 F.3d at 223.

146. *Id.* at 223.

147. *Id.* at 225.

148. *Id.*

149. *Id.*

150. *Rotolo*, 150 F.3d at 225.

151. *Id.*

152. *Id.*

Rotolo v. Digital Equipment Corp. was decided on July 24, 1998.¹⁵³ A month earlier the same company, Digital, had not fared as well in a similar case heard in the District Court of the Eastern District of New York. On June 8, 1998, plaintiffs prevailed in the case of *Gonzalez v. Digital Equipment Corp.*¹⁵⁴ Much of that case concerned the rule 807 residual exception. Although notice was also at issue, the court in *Gonzalez* reached a result opposite that of the court in *Rotolo*.

In *Gonzalez*, a number of plaintiffs had sued Digital claiming that their upper body, arm, or hand problems had been caused by repeated use of Digital's computer keyboards and that they had not been properly warned by Digital of the possibility of such injury.¹⁵⁵ Plaintiffs sought to introduce documents and two videotapes, one produced by IBM and the other produced by Apple Computer which addressed the comfort disorders of keyboard users.¹⁵⁶ Digital moved to exclude such evidence, alleging among other reasons, that it was hearsay.¹⁵⁷ The district court found that the proffered evidence was relevant to the proceedings on the theory that evidence of the current state of mind of large producers in this industry was relevant.¹⁵⁸ It allowed the inference that given the state of the art at that time, members of the industry as a whole had, or should have had, the same "state of mind" with respect to possible users that needed to be considered by each of the manufactures even though they were operating separately.¹⁵⁹ Since Digital had "a duty to keep abreast of scientific knowledge, discoveries and advances it [was] presumed to know what [was] imparted thereby."¹⁶⁰ Thus, the documents and videos were deemed relevant.¹⁶¹

The court ruled that with respect to the hearsay objection such documents would be admitted pursuant to the residual exception.¹⁶² The court specifically found that the notice requirement of 807 had been met, because Digital had notice for an extended time (a whole year and one half prior to trial) that the evidence had been proposed.¹⁶³ The court also found that the proffered evidence offered evidence of a material fact and the

153. *Id.* at 223.

154. 8 F. Supp. 2d 194 (E.D.N.Y. 1998).

155. *Id.* at 196.

156. *Id.*

157. *Id.*

158. *Id.* at 197.

159. *Gonzalez*, 8 F. Supp. 2d at 197.

160. *Id.* at 198.

161. *Id.*

162. *Id.* at 201.

163. *Id.*

internal materials were highly probative.¹⁶⁴ The court further found that the “general interests of justice and the standards of trustworthiness” had been met in the case.¹⁶⁵ The court maintained that the fear of fabrication or of inaccuracies inherent in much hearsay was unfounded because these videos had been created for legitimate business reasons and were less likely to have been fabricated than would testimony of a live witness.¹⁶⁶ The court also found that with respect to inaccuracies, the videos were more likely to be more accurate than a live witnesses because they were created internally and with great care.¹⁶⁷ The court did not find the inability to cross-examine with respect of the videotapes compelling, because Digital could call its own experts or those who created the videotapes to refute contentions of notice.¹⁶⁸

The court allowed admission of the documents and videotapes under the residual rule to show the state of mind of other producers in the industry on the issue of notice.¹⁶⁹ Although notice was informal in this case, the court found that a proposal made by plaintiffs to use the evidence a year and a half prior to trial met the notice requirement.¹⁷⁰ This stands in stark contrast to *Rotolo*, where there was no advance notice of the intent to use the evidence.¹⁷¹ Again, in *Gonzalez*, the district court followed a well-reasoned analytical framework to determine whether the evidence bore adequate circumstantial guarantees of trustworthiness and that there was proper notice. Such analytical approach to admitting evidence pursuant to the residual exception should put to rest fears by Beaver and others that the residual exception will swallow the hearsay rule.

In *Vasquez v. National Car Rental Systems, Inc.*,¹⁷² the district court in Puerto Rico held that a statement by a driver in an auto accident was not admissible under the rule 807 residual exception.¹⁷³ Mr. and Mrs. Lopez had rented a car from defendant at Puerto Rico’s international airport on December 26, 1997.¹⁷⁴ Shortly thereafter, they were in a auto accident with

164. *Gonzalez*, 8 F. Supp. at 201.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Gonzalez*, 8 F. Supp. at 202.

170. *Id.*

171. *Id.*

172. 24 F. Supp. 2d 197 (D.P.R. 1998).

173. *Id.*

174. *Id.* at 198.

another vehicle driven by Gonzalez.¹⁷⁵ Mr. Lopez, the driver of the rented vehicle, died several days later as a result of his injuries.¹⁷⁶ Mrs. Lopez, the passenger, was also injured and subsequently died.¹⁷⁷ Suit was brought pursuant to a diversity action by Mrs. Lopez's daughters, the Vazquez.¹⁷⁸ Plaintiffs sued National, because under Puerto Rico Law, the owner of a leased vehicle is accountable for its lessee's negligence.¹⁷⁹

National sought admission into evidence of certain portions of Ms. Vazquez's deposition testimony in which she described Mr. Lopez's utterances right after the accident.¹⁸⁰ According to plaintiff, Vasquez, her mother told her that immediately after the accident Mr. Lopez uttered to her the words "[w]hat hit us?"¹⁸¹ National offered this evidence because it cast doubt as to who hit whom.¹⁸² National argued that because Mr. Lopez did not explicitly say that he ran a red light or was negligent in his driving, there was uncertainty as to whether he was negligent.¹⁸³ Under Puerto Rico Law, defendant's liability hinged on the driver's liability (i.e. lessee's liability).¹⁸⁴ If National could prove that Mr. Lopez was not driving negligently, the defendant would not be liable. National acknowledged that such statement would be hearsay but sought to have it admitted under the residual hearsay rule.¹⁸⁵

The court reviewed rule 807 and the facts and found that there was adequate notice of intent to use the statements.¹⁸⁶ Yet, the court did not allow the hearsay evidence on the grounds that the evidence fell below the threshold of trustworthiness required by the rule.¹⁸⁷ The court found that even though in the hospital, the circumstances surrounding Mr. Lopez's remarks did not assure the court that he was under a condition that would still his capacity of reflection or that he was under any pressure to tell the truth.¹⁸⁸ The court found further that the defendant had "failed to prove that

175. *Id.*

176. *Id.*

177. *Vasquez*, 24 F. Supp. 2d at 198.

178. *Id.*

179. *See* 9 P.R. LAWS ANN. § 1751 (1996).

180. *Vasquez*, 24 F. Supp. 2d at 199.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* 9 P.R. LAWS ANN. § 1751 (1996).

185. *Vasquez*, 24 F. Supp. 2d at 199.

186. *Id.*

187. *Id.* at 200.

188. *Id.*

Mr. Lopez had reliable knowledge of the events that transpired on the night of the accident.”¹⁸⁹ Ms. Vazquez in her deposition testified that Mr. Lopez was not clear as to the events that transpired, and that he really did not recall what happened.¹⁹⁰ The court disallowed the evidence and said it could not rely on an individual’s account of an event, if that individual acknowledged that he did not recall the specifics of the event,¹⁹¹ as had Mr. Lopez.¹⁹²

Mr. Lopez’s lack of recall would not support a finding of trustworthiness to his statements. In accord with our analytical framework, the court found no support to substantiate appropriate indicia of reliability for his statements.¹⁹³ To keep such evidence out was the correct decision. Here, the hearsay rule prevailed. Critics have little to fear about the use of the residual exception when a court explains its analysis of the circumstantial guarantees of trustworthiness as in *Vasquez*.¹⁹⁴ The hearsay rule prevails despite the residual exception.

In the case of *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*,¹⁹⁵ the court allowed admission, pursuant to the residual exception, into evidence, of a news article that had appeared in a Chinese newspaper.¹⁹⁶ In 1998, Chase Bank, acting as a trustee, and Traffic Stream, had entered into an indenture agreement in which Traffic Stream issued secured notes to finance a business venture involving the construction of toll roads in China.¹⁹⁷ In 1999, plaintiff Chase commenced litigation contending that Traffic Stream had defaulted on payment.¹⁹⁸ Chase sought summary judgment.¹⁹⁹ Defendant Traffic admitted default but argued that its default should be excused pursuant to the contract doctrine of impossibility of performance.²⁰⁰ Traffic Stream contended that a change in Chinese policy delayed recoupment of money from the toll road projects, making it impossible for them to fulfill their obligation under the indenture.²⁰¹

189. *Id.*

190. *Vasquez*, 24 F. Supp. 2d at 200.

191. *Id.*

192. *Id.*

193. *Id.* at 200.

194. *Id.*

195. 86 F. Supp. 2d 244 (S.D.N.Y. 2000).

196. *Id.*

197. *Id.* at 246.

198. *Id.*

199. *Id.*

200. *Chase Manhattan Bank*, F. Supp. 2d at 247.

201. *Id.* at 250.

The facts of the case reveal that in the wake of the 1997 Asian financial crisis, the Chinese government had taken steps to strengthen its supervision of disbursement of foreign exchange involving Chinese companies doing business with foreign partners.²⁰² On September 14, 1998, the Chinese State Administration of Foreign Exchange gave notice of its change in policy.²⁰³ The notice was a confidential document of the Chinese government that had not been publicly released.²⁰⁴ However, news of the notice appeared in the *People's Daily*, the official newspaper of the government on September 18, 1998.²⁰⁵ Traffic Stream maintained that it was this change in foreign exchange supervision that made it impossible for them to perform.²⁰⁶

Chase objected to the introduction of the newspaper article on grounds that it was hearsay.²⁰⁷ The court agreed that the article was hearsay but found the article admissible pursuant to the residual exception of rule 807.²⁰⁸ The court found that Traffic Stream had given Chase adequate notice of its intention to introduce the article.²⁰⁹ Perhaps, more importantly, the court found the newspaper article had been offered as evidence of a material fact, namely a change in Chinese policy, which could have rendered Traffic Stream's performance under the indenture impossible.²¹⁰ The court also found that the article was the most probative evidence of the notice of change of policy that Traffic Stream could reasonably procure, because the notice itself had not been publicly released by the Chinese government.²¹¹ Similarly, the court found because the notice itself was unavailable, "the interests of justice would best be served by the admission of the article."²¹² The court further found, with respect to rule 807, the *People's Daily* newspaper article had a sufficient guarantee of trustworthiness since it was published by the Chinese Communist Party Central Commission.²¹³ Therefore, it was deemed to be authoritative and representative of the official opinion of the Chinese government.²¹⁴

202. *Id.* at 251.

203. *Id.*

204. *Id.*

205. *Chase Manhattan Bank*, 86 F. Supp. 2d at 251.

206. *Id.*

207. *Id.* at 253.

208. *Id.* at 254.

209. *Id.*

210. *Chase Manhattan Bank*, 86 F. Supp. 2d at 254.

211. *Id.* at 251.

212. *Id.*

213. *Id.*

214. *Id.*

Although the article was admitted as evidence, Chase was ultimately granted summary judgment on the claim.²¹⁵ Nevertheless, the court gave a well reasoned analysis as to why the evidence should be found admissible pursuant to the residual exception.²¹⁶ There had been adequate notice of the intent to use the newspaper article, and there was a thorough analysis of the circumstantial guarantees of trustworthiness that surrounded the introduction of the article.²¹⁷ There was no abuse to the traditional hearsay rule in this case.

In *John Paul Mitchell Systems v. Quality King Distributors, Inc.*,²¹⁸ the residual exception was used to allow the introduction of certain business records at a hearing on an injunction.²¹⁹ In this case, John Paul Mitchell sought a preliminary injunction restraining the distributor Quality King from selling over a million dollars of Paul Mitchell hair care products.²²⁰ Allegedly these products had traveled to China for distribution, but were diverted to Holland and then back to Quality King's Long Island, New York warehouse.²²¹ Paul Mitchell sought an injunction against Quality King in order to prevent irreparable damage to its exclusive salon only distribution policy.²²² In order to prove its case, Paul Mitchell sought introduction of business records of the company which it arranged to sell its products in China.²²³ This firm, China Marketing & Distribution (CDM), was a company that Paul Mitchell found defrauded it by diverting products from the Chinese market where it would be sold only in salons to other wholesalers who intended sale to direct retailers.²²⁴ Quality King objected to introduction of the CDM business records on the ground that they were not authenticated.²²⁵

The court found, pursuant to rule 901(b)(4),²²⁶ that the document authentication requirement in this case was satisfied by the document's form

215. *Chase Manhattan Bank*, 86 F. Supp. 2d at 262.

216. *Id.* at 253–61.

217. *Id.*

218. 106 F. Supp. 2d 462 (S.D.N.Y. 2000).

219. *Id.*

220. *Id.* at 466.

221. *Id.* at 466–67.

222. *Id.* at 467.

223. *John Paul Mitchell Sys.*, 106 F. 2d at 468.

224. *Id.* at 467–69.

225. *Id.* at 471–72.

226. Rule 901(b)(4) of the *Federal Rules of Evidence* provides, in relevant part: “the following are examples of authentication or identification conforming with this rule: (4)

and content, taken together with other circumstances that indicated reliability of the documents.²²⁷ Thus authenticated, the court found the documents admissible pursuant to the residual exception because the records were particularly trustworthy.²²⁸ In its analysis, the court found that the trustworthiness of the documents was established by the fact that they were produced by the president of CDM against his interests in the litigation.²²⁹ The court also found the issue of whether the Paul Mitchell product was sold and shipped to Quality King material to the litigation, and the documents were probative of the fact that CDM believed the product was shipped from its warehouse in China to Rotterdam.²³⁰ The court further found that the documents were the most probative evidence available of the route the goods followed.²³¹ The court found further still that Quality King had sufficient notice of the documents, as demonstrated by Quality King's motion in limine to exclude them.²³² In the final analysis, the court found that it was in the best interests of justice to admit the documents.²³³

Although the documents were admitted pursuant to the residual exception, Paul Mitchell's motion for preliminary injunction was denied.²³⁴ The court found that it did not have the power to issue an injunction on a replevin claim.²³⁵ Again, there appeared to be no abuse by the court of the residual exception in this case.

The foregoing has been a survey of the federal civil cases found since the 1997 amendment of rule 807. It does not appear from a review of these cases that there should be fear that the use of the residual exception is being abused. In *Herzog* and *Vasquez* the courts did not allow statements pursuant to the exception because they could find no circumstantial guarantees of trustworthiness to the statements in question. In *Rotolo* the statements were disallowed by the appeals court because adequate notice of the intended use of the evidence had not been given prior to trial by the plaintiffs. In *Schering, Gonzalez, Chase Manhattan Bank, and John Paul Mitchell*

Distinctive Characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

227. *John Paul Mitchell Sys. Inc.*, 106 F. Supp. 2d at 472.

228. *Id.*

229. *Id.* at 473.

230. *Id.*

231. *Id.*

232. *John Paul Mitchell Sys. Inc.*, 106 F. Supp. 2d at 473.

233. *Id.*

234. *Id.*

235. *Id.* at 478.

Systems, both the notice requirements and the requirement of circumstantial guarantees of trustworthiness were found to be adequate. However, admission of such hearsay pursuant to the residual exception seldom determined the ultimate outcome of the case. Let us now turn to the federal criminal cases involving the residual exception since the 1997 amendment. We will see that the analytical framework is just as important as in the civil cases, if not more so.

B. *Criminal Cases*

Since the 1997 Amendment, the residual exception has been reported in few federal criminal cases. No more than eight such cases have been found. This is approximately equal to the number of civil cases in which the exception was either mentioned or reported in federal civil cases during the same time period. Although anecdotal, this provides further evidence that the residual exception is not being abused by the federal courts as a way of allowing inadmissible hearsay into evidence. The cases reported on herein come to us from the Second, Fourth, Fifth, Eighth, and Ninth Circuit Courts of Appeals.

The introduction of hearsay statements in the context of criminal cases, whether federal or state, must be assessed in the light of a defendant's right to confrontation under the Sixth Amendment.²³⁶ The Confrontation Clause does not operate as an absolute ban on hearsay evidence.²³⁷ If the declarant is unavailable and the statement bears adequate "indicia of reliability," hearsay declarations may be received into evidence without violating a defendant's right to confrontation.²³⁸ The indicia of reliability requirement can be met in two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'"²³⁹

In *United States v. Sanchez-Lima*,²⁴⁰ the Ninth Circuit reversed the conviction of Sanchez-Lima for assault on a federal officer and determined that evidence he sought to admit at trial under the residual exception should

236. Amendment VI of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"

237. See *Wright*, 497 U.S. at 805, 825.

238. *Roberts*, 448 U.S. at 66.

239. *Wright*, 497 U.S. at 816.

240. 161 F.3d 545 (9th Cir. 1998).

have been admitted.²⁴¹ In 1996, Sanchez-Lima, an alien, and others illegally entering the United States from Mexico, were arrested two miles east of the Otay Mesa port of entry by border Patrol Agents.²⁴² At the time of his apprehension, Sanchez-Lima struck an agent with a rock.²⁴³ Defendant was arrested for assault on a federal officer in violation of title 18, section 111 of the *United States Code*.²⁴⁴ At trial, Sanchez-Lima asserted a self-defense claim alleging he had been pistol whipped by the federal officer before striking him.²⁴⁵

In all, the Border Patrol agents apprehended twenty-two aliens that night.²⁴⁶ The Border Patrol and the FBI interviewed and videotaped all of these aliens the night of their apprehension.²⁴⁷ At trial, Sanchez-Lima alleged that these interviews contained evidence in support of his self-defense theory.²⁴⁸ The remaining aliens were deported on May 31, 1996.²⁴⁹ The trial court did not allow admission of the videotaped statements.²⁵⁰

On appeal, Sanchez-Lima asserted that the failure to admit the videotaped interviews, pursuant to the residual exception, denied him of his Sixth Amendment right to present a defense.²⁵¹ The Ninth Circuit agreed.²⁵² That court reviewed rule 807 and determined that the videotaped statements contained circumstantial guarantees of trustworthiness and met the other criteria of the rule.²⁵³ The government had adequate notice of the intended use of the evidence.²⁵⁴ The court found the statements were trustworthy because the declarant's statements: 1) were under oath and subject to the penalty of perjury; 2) were voluntary; 3) were based on facts within their own personal knowledge; 4) did not contradict any previous statements to government agents or defense investigators; and 5) was preserved on

241. *Id.* at 546.

242. *Id.*

243. *Id.*

244. Title 18, section 111(a)(1) of the *United States Code* provides, in relevant part: "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person shall be fined or imprisoned not more than one year."

245. *Sanchez-Lima*, 161 F.3d at 547.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Sanchez-Lima*, 161 F.3d at 547.

251. *Id.*

252. *Id.*

253. *Id.* at 547-48.

254. *Id.* at 548.

videotape for the jurors to view their demeanor.²⁵⁵ The court also found that the government had the opportunity to develop the testimony of these witnesses and had notice of the videotapes.²⁵⁶ The court further found that the videotaped statements constituted evidence of a material fact regarding Sanchez-Lima's self-defense theory.²⁵⁷ Finally, the court found that "these statements [were] more probative than any other evidence which could be procured by reasonable efforts"²⁵⁸

In refusing to admit the sworn videotaped statements, the district court effectively prevented Sanchez-Lima from exercising his Sixth Amendment right to present a defense. The decision appears well reasoned and does not abuse the hearsay rule.

In *United States v. Bryce*,²⁵⁹ the Second Circuit reviewed Bryce's convictions for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine.²⁶⁰ The convictions grew out of law enforcement surveillance of persons suspected of narcotics trafficking.²⁶¹ Agents intercepted and recorded seven telephone conversations between Bryce and his co-defendant Johnson, and one conversation between Johnson and another individual named Gomez.²⁶²

During the Bryce and Johnson conversations, Bryce arranged to sell cocaine to Johnson.²⁶³ Johnson, in turn telephoned Gomez and informed him that Bryce was selling cocaine.²⁶⁴ Johnson and Gomez expressed concern during the conversation that the price quoted would depress the price in other transactions.²⁶⁵ Nevertheless, after discussing matters with Gomez, Johnson called Bryce back and said he would buy two kilograms of cocaine.²⁶⁶ Johnson and Bryce agreed to meet in fifteen minutes.²⁶⁷ The meeting never took place, because Bryce called Johnson several hours later to say he had only one left.²⁶⁸ Johnson pleaded with Bryce to sell him the

255. *Sanchez-Lima*, 161 F.3d at 547.

256. *Id.* at 548.

257. *Id.*

258. *Id.*

259. 208 F.3d 346 (2d Cir. 1999).

260. *Id.* at 348.

261. *Id.* at 349.

262. *Id.*

263. *Id.*

264. *Bryce*, 208 F.3d at 349.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

one kilogram.²⁶⁹ Bryce agreed and they arranged to meet later that day.²⁷⁰ This meeting never happened, because Johnson called Bryce five days later and asked if he still had the cocaine.²⁷¹ Bryce indicated that he did and they agreed to meet.²⁷² Several days later Johnson was arrested.²⁷³ Soon thereafter, Bryce was also arrested.²⁷⁴ No evidence of the cocaine itself was presented at trial.²⁷⁵

On appeal, Bryce challenged his conviction on, among other grounds, that the taped telephone conversation between Johnson and Gomez, in which Johnson repeated Bryce's claim that he had cocaine for sale and had distributed it to others, was inadmissible hearsay.²⁷⁶ The district court had admitted the telephone conversation pursuant to the residual exception of rule 807.²⁷⁷

The Second Circuit in analyzing the rule and the facts found that Bryce "[did] not dispute that the statements in the Johnson-Gomez tape were material, that the declarants were unable to testify, or that the government complied with the Rule's notice requirement."²⁷⁸ The court found that Bryce's objection was that the admission of the tape violated his Sixth Amendment confrontation rights and therefore could not have been deemed to advance the interests of justice.²⁷⁹ The court believed that the resolution of the argument was linked to trustworthiness.²⁸⁰ The court found that the Johnson-Gomez tape had a high degree of trustworthiness.²⁸¹

The Second Circuit had already held in *United States. v. Matthews*²⁸² that:

[O]rdinarily a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of guilt of an accused, absent some circumstance indicating authorization or adoption. On the other hand, if the statement is made to a person

269. *Bryce*, 208 F.3d at 349.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Bryce*, 208 F.3d at 349.

275. *Id.* at 352.

276. *Id.* at 350.

277. *Id.*

278. *Id.* at 351.

279. *Bryce*, 208 F.3d at 351.

280. *Id.*

281. *Id.*

282. 20 F.3d 538 (2d Cir. 1994).

whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that inculpatory portion is any less trustworthy than the part of the statement that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the Confrontation Clause.²⁸³

Under this theory, the court found that the Johnson-Gomez tape did not violate Bryce's Confrontation rights. The court specifically found:

1) the statements were obtained via a covert wiretap that neither Johnson nor Gomez was aware; 2) the statements were made during the same time period that Johnson was conversing with Bryce; 3) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and 4) Gomez was Johnson's colleague in the narcotics trade.²⁸⁴

Based on these factors, the court found there was little reason to believe that Johnson and Gomez had any motive to lie, or were lying.²⁸⁵ With this analysis, the court found the admission of the tape was proper under both rule 807 and the Confrontation Clause.²⁸⁶ Here, the court rightfully looked to the surrounding circumstances of Bryce's drug activities to find support for the appropriate indicia of reliability that made the statement trustworthy. With such analysis, it is unlikely that the residual exception will swallow the hearsay rule. Ultimately, the Second Circuit upheld Bryce's conspiracy conviction, but reversed the possession with intent to distribute cocaine conviction on the ground that there was no corroborating evidence that Bryce actually did possess cocaine on the dates specified in the indictment.²⁸⁷

In *United States v. Papajohn*,²⁸⁸ the Eighth Circuit found that use of the grand jury testimony of an unavailable witness, admitted pursuant to the residual exception in an arson and conspiracy trial, was proper.²⁸⁹ Ms.

283. *Id.* at 545-46.

284. 208 F.3d at 351.

285. *Id.*

286. *Id.* at 351.

287. *Id.* at 356.

288. 212 F.3d 1112 (8th Cir. 2000).

289. *Id.* at 1119.

Papajohn and her husband, Donald Lee Earles, were suspected of burning down their convenience store in order to gain insurance proceeds.²⁹⁰ A grand jury was convened before which Mr. Earles' son, Donnie, testified three times.²⁹¹ During Donnie's first grand jury appearance, he testified that he did not know who burned down the store.²⁹² During his second grand jury appearance, he changed his story, stating that Ms. Papajohn and his father conspired to burn down the store for the insurance money.²⁹³ "During Donnie's third grand jury appearance, he claimed his Fifth Amendment right to remain silent and refused to testify."²⁹⁴

At the subsequent trial of Papajohn and Earles, Donnie again refused to testify.²⁹⁵ The trial court declared Donnie an unavailable witness and allowed the government, over objections of the defense, and pursuant to the residual exception to the hearsay rule, to read to the jury portions of the transcripts of all three of Donnie's appearances before the grand jury.²⁹⁶ The jury convicted both defendants.²⁹⁷

On appeal, Papajohn argued that she should be granted a new trial on the basis of the Supreme Court's holding in the case of *Lilly v. Virginia*.²⁹⁸ In *Lilly*, the Court held that the admission of a non-testifying accomplice's confession violated the defendant's right to confront his accuser.²⁹⁹ However, the Eighth Circuit distinguished the facts of *Lilly*:

Donnie was never arrested or charged with a crime. The obvious incentive that the captured accomplice in *Lilly* had to shift blame is not present in our case. We recognize that although Donnie was not charged with a crime at the time he made the statements, he might still have had some incentive to blame [defendants], so that he would not later be charged with the arson. It seems to us, however, that it can almost always be said that a statement made by a declarant that incriminates another person in a crime will make it less likely that the declarant will be charged for that crime We

290. *Id.* at 1116.

291. *Id.*

292. *Id.*

293. *Papajohn*, 212 F.3d at 1116.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 1116. The appeal in this case was only brought by Ms. Papajohn. She appealed her convictions for one count of conspiracy to commit arson and mail fraud, one count of aiding and abetting arson, and two counts of mail fraud. *Id.* at 1115.

298. 527 U.S. 116 (1999).

299. *Id.* at 119.

also find that the conditions under which the disputed hearsay statement was made in our case differ significantly [than] in *Lilly*. In *Lilly* . . . the accomplice's statements were made in response to leading police questions, asked during a custodial interrogation that took place very late at night, shortly after his arrest.³⁰⁰

The court in *Papajohn* found that the grand jury testimony satisfied the requirement of having equivalent circumstantial guarantees of trustworthiness required of rule 807.³⁰¹ The court found that Donnie's testimony had been: 1) given in a formal proceeding; 2) under oath; 3) before a grand jury.³⁰² Also, Donnie was not in police custody, nor had he been charged with any crime at the time the testimony was given.³⁰³ Further, he had been asked non leading questions by the government, and he answered them with lengthy narratives.³⁰⁴ *Papajohn*'s convictions were affirmed by the Eighth Circuit.³⁰⁵ The Eighth Circuit's analysis of the appropriate indicia of reliability factors supporting residual exception as it applied to this situation does not harm the hearsay rule. It is difficult to argue abuse of the hearsay rule here.

In *United States v. Brothers Construction*,³⁰⁶ the Fourth Circuit reached an opposite result with respect to grand jury testimony that had been admitted pursuant to the residual exception. *Brothers Construction Company of Ohio and Tri-State Asphalt Corporation* were convicted of conspiracy to defraud the United States, mail fraud, and with making false statements to the government.³⁰⁷ Their trial and convictions grew out of a scheme whereby the two companies falsified records in connection with obtaining highway construction subcontract work in West Virginia.³⁰⁸ Specifically, the companies obtained federal highway money to comply with the development of "disadvantaged business enterprises" ("DBEs").³⁰⁹ However, no disadvantaged business employees ever performed any of the subcontract work.³¹⁰

300. *Papajohn*, 212 F.3d at 1119.

301. *Id.* at 1119.

302. *Id.* at 1120.

303. *Id.*

304. *Id.*

305. *Papajohn*, 212 F.3d at 1122.

306. 219 F.3d 300 (4th Cir. 2000).

307. *Id.* at 308.

308. *Id.* at 304-06.

309. *Id.* at 304.

310. *Id.* at 306-08.

Robert Samol, an officer and in-house counsel for Tri-State, had testified in the grand jury investigating the case, that prior to sending the state a letter of certification of the company meeting its DBE goals under its subcontract, he learned that there had never been an independent DBE work force.³¹¹ At trial, Samol invoked his rights under the Fifth Amendment and refused to testify.³¹² The trial court determined that Samol was unavailable, and “concluded that [his] grand jury testimony was sufficiently reliable.”³¹³ The court admitted the grand jury testimony pursuant to the residual exception.³¹⁴ On appeal, both Brothers and Tri-State asserted that it was improper to have allowed the grand jury testimony read to the jury.³¹⁵ Here, the Fourth Circuit agreed.³¹⁶

The court observed that the nature of grand jury testimony provided some indicia of trustworthiness, because it was “given in the solemn setting of the grand jury, under oath and the danger of perjury, in the presence of jurors who are free to question and assess credibility, and a court reporter made an official transcript of the proceedings.”³¹⁷ The court held that with respect to grand jury testimony they were still “required to consider ‘the totality of the circumstances’ [of the testimony] for ‘particularized guarantees of trustworthiness.’”³¹⁸

In considering the totality of the circumstances in this case, the court found that Samol’s grand jury testimony was suspect.³¹⁹ During the oral argument of the case, the government acknowledged that after Samol’s appearance before the grand jury, the government began an investigation to determine whether Samol committed perjury through the same testimony that the government sought to introduce.³²⁰ The court held that it had “serious reservations about the reliability of testimony which, at least in part, the [g]overnment finds so untrustworthy that it would consider bringing a perjury charge.”³²¹ As a result, the court concluded that Samol’s grand jury

311. *Bros. Constr.*, 219 F.3d at 309.

312. *Id.*

313. *Id.*

314. *Id.* at 309–10.

315. *Id.*

316. *Bros. Constr.*, 219 F.3d at 310.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Bros. Const.*, 219 F.3d at 310.

testimony was not properly admitted pursuant to the requirements of the residual exception.³²²

Such reasoning is similar to that used by the district court in Puerto Rico in the *Vasquez* case, that found Mr. Lopez's memory problems to be a weak foundation for the admission of statements pursuant to the residual exception.³²³ The determination to not admit the grand jury testimony in *Brothers* was the correct one and not in conflict with *Papajohn* when all of the circumstances are analyzed. Although the court found that the admission of the grand jury testimony against Brothers was an error, they found it to be harmless error.³²⁴ The Fourth Circuit found that there was other sufficient evidence to affirm the convictions of both Brothers and Tri-State.³²⁵

In *United States v. Phillips*,³²⁶ the Fifth Circuit found that the trial court did not abuse its discretion in refusing to apply the residual exception to admit alleged exculpatory statements of a witness proffered by defendants.³²⁷ The case involved convictions on several schemes of local corruption involving ghost employees, payment of salary kickbacks, and misuse of state government funds by Phillips, the tax assessor for St. Helena Parish, Louisiana, and Newman, a friend and political supporter who owned the largest hardware store in the Parish.³²⁸

Phillips and Newman were involved in many schemes.³²⁹ The Fifth Circuit found that the salient scheme for purposes of the review of the use of the residual exception involved Phillips, Newman, and Newman's wife, Jean, who was deceased by the time of trial.³³⁰ Starting in 1990, Phillips put Newman and his wife on the tax assessor payroll, at a salary of \$800 per month, and health benefits.³³¹ The health benefits were important because Jean had been diagnosed with cancer. Jean subsequently died of cancer in 1992.³³² She remained on the tax assessor payroll until one month prior to

322. *Id.*

323. *See Vasquez*, 24 F. Supp. 2d at 197.

324. *Id.* at 320.

325. *Id.* at 320–21.

326. 219 F.3d 404 (5th Cir. 2000).

327. *Id.* at 419.

328. *Id.* The defendants were each convicted on all counts of a twenty-nine count indictment charging conspiracy, mail fraud, engaging in an illegal monetary transaction, theft from a federally funded program, money laundering, and perjury. *Id.* at 407.

329. *Id.*

330. *Id.* at 408, 419.

331. *Id.* at 407–08.

332. *Phillips*, 219 F.3d at 407.

her death.³³³ Facts at trial showed that over the time period of this scheme Newman kicked back most of their \$800 a month salary to Phillips, less what was needed to pay federal taxes at the end of the year.³³⁴ Evidence at trial showed that Newman and his wife did little or no work for the tax assessor.³³⁵

At trial, defendants sought to admit exculpatory statements made by Jean Newman to her friend Margaret Carter to show that she was working for the assessors office.³³⁶ The trial court would not admit the statements under the residual exception.³³⁷ If she had been allowed to testify, defendants maintained

that Carter would have testified that one day, while in the hardware store, she noticed Jean working with several pieces of paper. When Carter inquired about the nature of the paperwork, Jean allegedly responded that she was working on a project for Phillips that had something to do with land.³³⁸

The Fifth Circuit, in a footnote, enumerated the requirements of rule 807, and then held:

The passing comment made by Jean concerning her employment is arguably vague. It may be correct that Jean would have no reason to lie in making a passing comment to a casual acquaintance concerning the nature of any paperwork she was doing. It may also be correct, however, that Jean's motivation to lie—her desire to maintain the favorable status of her pseudo-employment for the purpose of receiving health coverage—was so strong that any statements made concerning her supposed employment with the assessor's office cannot be trusted.³³⁹

The court found that “[r]egardless of which option seemed more persuasive, neither presents a ‘definite and firm conviction the [district] court made a clear error of judgment’” by excluding the statements.³⁴⁰ As such, the court did not disturb the ruling of the trial court with respect to the

333. *Id.* at 408.

334. *Id.*

335. *Id.*

336. *Id.* at 419.

337. *Phillips*, 219 F.3d at 419.

338. *Id.*

339. *Id.*

340. *Id.*

hearsay exclusion.³⁴¹ Again, good analysis by the court of the circumstances and motivations for the proffered statement found that there was inadequate indicia of reliability to support the trustworthiness of the statement.

Can one find abuse of the residual exception with respect to any of these federal criminal cases? Of course not. The federal courts have used good analysis and common sense in assessing the equivalent guarantees of trustworthiness required of evidence admitted under rule 807. In *Sanchez-Lima*, *Bryce*, and *Papajohn*, the court found equivalent guarantees of trustworthiness for the statements after thoroughgoing analysis. In *Brothers* and *Phillips*, analysis by the courts showed that the admission of the statements sought to be admitted were unreliable and not supported by equivalent guarantees of trustworthiness. Although the standard used to reach the decision to admit the evidence pursuant to the residual exception was different, it appears that such decisions were solid and reasonable in each case,

Let us now turn our attention to the various states who, since 1997, have reported cases that involved the residual exception. Could it be that state courts are abusing the hearsay rule by its overindulgent use of the residual exception? The evidence from the cases says no.

V. THE RESIDUAL EXCEPTION IN STATE COURT CASES

A. Civil Cases

Our search of the reported use of the residual exception in state cases since 1997, yielded only a small number of such reports in civil cases. Such cases were reported from Colorado,³⁴² Delaware,³⁴³ and Arkansas.³⁴⁴ A

341. *Id.*

342. Rule 804(b)(5) of the *Colorado Rules of Evidence* provides:

A statement not specifically covered by [Rule 803 or 804] but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

COLO. R. EVID. 804(b)(5). On January 1, 1999, Colorado transferred its two part residual exceptions into one new rule 807 Residual Exception.

343. Rule 803(24) of the *Deleware Rules of Evidence* provides: the following is not excluded by DEL. R. EVID. 803(24) 802, the hearsay rule:

review of these cases shows that fears of the residual exception in state court cases swallowing the hearsay rule as we know it is highly unlikely. The judges in the state courts appear to be very careful with respect to the admission of hearsay pursuant to the residual exception. These judges use the same analytical framework of seeking to determine whether there are appropriate indicia of reliability to give the statements trustworthiness. These same judges seek to determine whether there has been proper notice of intent to use the exception.

In the Colorado case, *Board of County Commissioners v. City and County of Denver*,³⁴⁵ the court of appeals upheld the introduction by plaintiffs, pursuant to the residual exception to the hearsay rule, of a study prepared for defendant.³⁴⁶ The case involved a breach of contract action brought by the county concerning excessive noise levels by the defendant, City of Denver's airport.³⁴⁷ The study, prepared for Denver, showed that a sixth runway would increase noise levels.³⁴⁸ The court found the report was probative of the validity of Denver's defenses and that it was not inherently

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

- (A) the statement is offered as a evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

DEL. R. EVID. 803(24).

344. Rule 803(24) of the *Arkansas Rules of Evidence* provides:

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

ARK. R. EVID. 803(24).

345. *Board of County Comm'rs v. City & County of Denver*, No. 00CA0217, 2001 Colo. App. LEXIS 564, *1 (Colo. Ct. App. Mar. 29, 2001).

346. *Id.* at *1.

347. *Id.*

348. *Id.* at *25.

unreliable.³⁴⁹ Plaintiff county ultimately prevailed and received damages for the excessive noise.³⁵⁰

The admission of hearsay statements were also admitted pursuant to the residual exception in a Delaware case. In *Juran v. Bron*,³⁵¹ the Delaware Court of Chancery reviewed the trial of parties involved in a partnership venture.³⁵² Plaintiffs alleged fraud and breach of fiduciary duty against defendants.³⁵³ The trial court had admitted into evidence a conversation of the son of one of the defendants that went to the heart of the plaintiff's fraud, bad faith, and fiduciary duty claims.³⁵⁴ The Appeals Court upheld this ruling, finding that the statements had circumstantial guarantees of trustworthiness. The court found that, "in an action for fraud and breach of fiduciary duty where few nonparties have knowledge of the facts, statements by a witness in a position to know the truth should . . . be admitted."³⁵⁵

*Lincoln v. AAA Bail Bond Co.*³⁵⁶ was an Arkansas case where the introduction of evidence pursuant to the residual exception was found to be reversible error.³⁵⁷ In *Lincoln*, appellant Lincoln brought suit "to collect unpaid commissions he claimed to have earned prior to his termination."³⁵⁸ A judgment, however, was entered in favor of the appellee bail bond company.³⁵⁹ The court of appeals reviewed the admission of an exhibit relied upon by appellee to show that Lincoln owed the company money. The exhibit was a list concerning accounts receivable, which allegedly reflected monies collected by Lincoln, but not turned in to the company.³⁶⁰

The court of appeals found the introduction of this evidence was inadmissible under the residual exception.³⁶¹ They held that the list had not been prepared in the regular course of business, but was prepared for a special purpose to show the court that Lincoln owed the company money.³⁶² The court also found that the source of the information contained in the

349. *Id.* at *26.

350. *Id.* at *29.

351. No. 16464, 1999 Del. Ch. LEXIS 232, at *1.

352. *Id.* at *1.

353. *Id.*

354. *Id.* at *10-11.

355. *Id.* at *12.

356. No. CA 98-365, 1998 Ark. App. LEXIS 863, at *1 (Ark. Ct. App. Dec. 9, 1998).

357. *Id.* at *1.

358. *Id.*

359. *Id.*

360. *Id.* at *3.

361. *Lincoln*, 1998 Ark. App. LEXIS 863, at *6.

362. *Id.*

exhibit lacked trustworthiness, since the information was provided by criminal defendants who had the incentive to inflate the amount of monies paid, so as to reduce their own debts.³⁶³

Each of these state courts was cognizant and discerning of the requirement that there be circumstantial guarantees of trustworthiness before evidence could be admitted under the residual exception. Although these state cases are far less analytical than those reported from the federal courts, they all articulate, in a well reasoned way, the reason the hearsay statements were admissible or inadmissible. Again, in these states there should be no worry that the residual exception will swallow the hearsay rule. It is clear the state court judges in the civil cases reported on here have not abused their power with respect to the residual exception.

B. *Criminal Cases*

Let us now briefly examine the state criminal law cases reported since 1997 involving the residual exception. The state courts must often balance the residual exception against a defendant's confrontation rights. A review of the state criminal cases shows that such state courts are very careful concerning admission of hearsay pursuant to the residual exception. In Arkansas, the Court of Appeals of the state has upheld trial judges' refusal that a defendant be allowed to admit hearsay pursuant to that state's residual exception on several occasions. In *Clark v. State*,³⁶⁴ the defendant, on trial for murder, sought to introduce statements through a police detective who had allegedly heard that other persons had bragged to confidential police informants that they, and not the defendant, had committed the murder.³⁶⁵ The trial court and the court of appeals found no guarantees of trustworthiness to such alleged statements and excluded the evidence.³⁶⁶

In *Bilyeu v. State*,³⁶⁷ the Arkansas court of appeals again upheld the trial court's refusal to admit statements pursuant to residual exception.³⁶⁸ Bilyeu, on trial for the death of his girlfriend's nineteen-month-old son, sought to introduce a diary, purportedly written by the girlfriend, to show that he could

363. *Id.*

364. No. CACR 98-86, 1998 Ark. App. LEXIS 747, at *1 (Ark. App. Ct. Oct. 14, 1998).

365. *Id.* at *1.

366. *Id.* at *12.

367. No. CACR 97-505, 1998 Ark. App. LEXIS 66, at *1 (Ark. Ct. App. Feb. 4, 1998).

368. *Id.* at *5.

not have killed the child on the day in question.³⁶⁹ The court found that since the diary was unsigned and undated, that it did not contain equivalent guarantees of trustworthiness required by the state's residual exception.³⁷⁰

In *Williams v. State*,³⁷¹ defendant's attempt to introduce hearsay through the residual exception also failed.³⁷² In this murder and kidnapping case, Williams gave a statement concerning his involvement in the crimes at the time of his arrest.³⁷³ He later made a different and less inculpatory statement to county detectives prior to trial.³⁷⁴ At trial the State introduced, in its case in chief, only Williams' first statement.³⁷⁵ Williams sought to introduce his second statement. The court ruled that it was inadmissible under the residual exception because there was no guarantee of trustworthiness to this second statement, which Williams made after a co-defendant had implicated him.³⁷⁶ The court contended that Williams had every reason to give detectives a self-serving statement to minimize his participation in the crimes.³⁷⁷

The Arkansas cases show that there is little likelihood that the residual exception will swallow the hearsay rule, or that judges are abusing the use of the exception. In *Clark*, *Bilyeu*, and *Williams*, none of the defendants could show the requisite indicia of reliability surrounding the statements they proffered to make one believe that they were trustworthy.

In *People v. Meyer*,³⁷⁸ the court of appeals of Colorado upheld the prosecution's right to introduce, pursuant to the residual exception, a verified complaint to obtain a restraining order sworn out by the murder victim against defendant.³⁷⁹ The court found that the complaint possessed sufficient indicia of reliability as a court document, and that the victim had little reason to fabricate.³⁸⁰ Because the statement possessed the necessary guarantees of trustworthiness, admission of the statement did not violate defendant's right of confrontation.³⁸¹

369. *Id.* at *4.

370. *Id.* at *5.

371. 946 S.W.2d 678 (Ark. 1997).

372. *Id.* at 680.

373. *Id.* at 684.

374. *Id.*

375. *Id.* at 683.

376. *Williams*, 946 S.W.2d at 684.

377. *Id.*

378. 952 P. 2d 774 (Colo. Ct. App. 1997).

379. *Id.* at 777.

380. *Id.*

381. *Id.*

In *State v. Anderson*,³⁸² the court did not allow the prosecution to introduce, pursuant to Delaware's residual exception, statements made by the victim in a felony murder case while he was in the hospital. The victim gave three statements concerning the identity of the defendants before he died.³⁸³ The court found that over the course of the victim's hospitalization he suffered from nightmares and hallucinations.³⁸⁴ The court also found that over the course of the hospitalization the victim discussed the case with numerous people.³⁸⁵ The court maintained that such facts raised doubts as to whether the proffered statements against defendants came from the victim's unaided memory.³⁸⁶ Lacking particularized guarantees of trustworthiness, the court excluded the statements because to admit them would have deprived defendants of their right to confrontation.³⁸⁷

In an earlier case, *State v. Bowe*,³⁸⁸ the court reached a similar finding with respect to the in hospital photo identifications of defendants by the victim nine days after an assault. The court found that the photo identifications, sought to be introduced by the prosecution came after the victim had spoken with the detective investigating the case nine times.³⁸⁹ The court was not convinced that the identification was not influenced by the detective or by something other than a desire to tell the truth.³⁹⁰ There was no appropriate indicia of reliability to the identifications to be found in this situation. The identifications were disallowed pursuant to the residual exception.

In *State v. Castaneda*,³⁹¹ the Supreme Court of Iowa overturned the defendant's conviction for child abuse and remanded the case. The court provided an explanation supporting the use of the residual exception on remand. Yet, the court gave no thoroughgoing analysis for the trial court to follow in order to determine whether there existed particularized "guarantees of trustworthiness" with respect to the reintroduction at the retrial of a videotaped statement of the child victim.³⁹² *Castaneda* is disappointing in this respect.

382. 2000 Del. Super. LEXIS 60 (Mar. 20, 2000).

383. *Id.* at 1.

384. *Id.* at 12.

385. *Id.*

386. *Id.*

387. 2000 Del. Super. LEXIS 60 at 12.

388. 1997 Del. Super. LEXIS 603 (1997).

389. *Id.* at 4.

390. *Id.* at 9.

391. 621 N.W.2d 435 (Iowa 2001).

392. *Id.* at 443-48.

The same court gave an excellent analysis of its findings of particularized guarantees of trustworthiness in the case of *State v. Hallum*.³⁹³ In *Hallum*, the court allowed the prosecution during a murder trial, pursuant to the residual exception, to introduce defendant's accomplice's videotaped narrative of the crime.³⁹⁴

The accomplice in *Hallum* was Carlos Medina. The Supreme Court of Iowa allowed Medina's statement into evidence pursuant to the residual exception after finding: 1) Medina was not offered leniency in exchange for his statement; 2) he did not attempt to shift blame to the defendant; 3) he unequivocally acknowledged that he committed serious offenses and did not attempt to avoid responsibility for his own acts; 4) he did not attempt to curry favor with the police; 5) he voluntarily gave his statement after being given his Miranda rights; 6) he had not been caught "red-handed" and so was not in a situation where his only recourse was to share blame by implicating the defendant; 7) his statement was given shortly after the commission of the crime while his memory was fresh; and 8) his statement was extremely detailed.³⁹⁵ This thoroughgoing analysis by the court demonstrated that there were appropriate indicia of reliability to show that the statement was trustworthy.

In *State v. Martin*,³⁹⁶ the Supreme Court of Minnesota upheld the trial court's refusal to allow the defendant, who was on trial for murder, to introduce a double hearsay statement as part of his defense.³⁹⁷ The court found that the defendant had failed to establish sufficient guarantees of trustworthiness because he made no offer of proof about the circumstances of the conversations about the declarant's memory.³⁹⁸ Additionally, the court found that before defendant had offered this double hearsay testimony, he had already introduced extrinsic evidence to contradict the proffered testimony.³⁹⁹

A year earlier in *State v. Martin*,⁴⁰⁰ involving the same defendant, the Supreme Court of Minnesota reversed the state appellate court's ruling that prior testimony of Martin's co-defendants who were tried separately could

393. 585 N.W.2d 249 (Iowa 1999).

394. *Id.* at 257-59.

395. *Id.* at 257.

396. 614 N.W.2d 214 (Minn. 2000).

397. *Id.* at 225.

398. *Id.*

399. *Id.*

400. 591 N.W.2d 481 (Minn. 1999).

be introduced at his trial by the prosecution.⁴⁰¹ The supreme court found that the appeals court erred when it concluded that the entire portions of the co-defendants' trial testimony bore sufficient indicia of reliability to merit admission under the residual exception and the Confrontation Clause.⁴⁰² The supreme court found that some of the proffered testimony was so unreliable it would have to be subjected to cross examination.

In re L.E.P.,⁴⁰³ a case involving a juvenile, the Supreme Court of Minnesota examined the criteria state courts should articulate in evaluating statements by young children admitted pursuant to the residual exception.⁴⁰⁴ The criteria included evaluating the "lack of motive to fabricate, spontaneity and demeanor of the child, expressions unexpected from a child of that age, and the absence of leading questions."⁴⁰⁵

In *State v. Wikan*,⁴⁰⁶ the Court of Appeal of Minnesota upheld the prosecution's introduction of prior inconsistent statements of a victim of spousal abuse pursuant to the state's residual exception.⁴⁰⁷ The court found that the prior statements implicating her spouse, which differed from her testimony at trial, possessed the requisite guarantees of trustworthiness.⁴⁰⁸ The court found that the statements were reliable, because: 1) they were against interest due to the relationship; 2) she did not appear confused when she made the statements; 3) the statements were corroborative of what other witnesses testified, and 4) they were made just after the event.⁴⁰⁹

In *People v. Lee*,⁴¹⁰ the court of appeal of that state upheld the admission, pursuant to the state's residual exception, statements of a victim of an armed robbery who died before the trial. The declarant identified defendant as the perpetrator. The court found the statements had particularized guarantees of trustworthiness.⁴¹¹ Among other factors, the court found were that 1) the victim suffered no memory loss from the incident; 2)

401. *Id.* at 484.

402. *Id.*

403. 594 N.W.2d 163 (Minn. 1999).

404. *Id.* at 170-71.

405. *Id.* at 173.

406. No. C1-96-880, 1997 Minn. App. LEXIS 271, at *1 (Minn. Ct. App. Mar. 11, 1997) (unpublished opinion).

407. *Id.* at *11.

408. *Id.* at *6.

409. *Id.* at *6-7.

410. 622 N.W.2d 71 (2000).

411. *Id.* at 79.

that he was coherent when he made the statements; 3) he was not confused; and 4) the statements were voluntary.⁴¹²

In *People v. Welch*,⁴¹³ the Michigan Court of Appeals upheld the trial court's decision not to allow a hearsay statement offered by the defendant pursuant to the residual exception.⁴¹⁴ Defendant, on trial for the murder of a girlfriend he allegedly pushed off a bridge to her death, sought the introduction of statements by witnesses who allegedly heard the victim say she was going to kill herself moments before her plunge.⁴¹⁵ Here, the court held that the statements were not reliable. The court found that statement had not been related directly to the police officer who would testify. The defense sought to have the police officer testify to what a witness had overheard from others.⁴¹⁶ However, there was 1) no evidence that this witness actually heard the statement by the victim; 2) no other witnesses testified as to such statement; 3) sixteen minutes had elapsed between the victim's plunge and the witness relating the information to the officer.⁴¹⁷ The court also found unreliable the fact that the officer who approached the group of witnesses 4) found them laughing and giggling about the situation.⁴¹⁸ Finally, the court found the officer 5) had not written down the statement.⁴¹⁹ A sad set of facts here would not support a finding of equivalent guarantees of trustworthiness.

In *State v. Garner*,⁴²⁰ the Supreme Court of Nebraska upheld the trial court's refusal to introduce tapes of a false confession at a murder trial.⁴²¹ Defendant, on trial for murder sought introduction of the taped confession of an eleven-year-old boy who confessed to the crime.⁴²² The eleven-year-old had been seen at the victim's house prior to the murder.⁴²³ He was questioned by police for seven hours before defendant became the true suspect of the crime. The eleven year old later said he made up the confession so that he could go home and go to sleep.⁴²⁴ The eleven year old

412. *Id.* at 80–81.

413. 574 N.W.2d 682 (Minn. Ct. App. 1977).

414. *Id.* at 685.

415. *Id.* at 684.

416. *Id.*

417. *Id.*

418. *Welch*, 574 N.W. at 684.

419. *Id.*

420. 614 N.W. 2d 319 (Neb. 2000).

421. *Id.* at 329–30.

422. *Id.* at 323.

423. *Id.* at 323.

424. *Id.* at 323.

was available and testified at trial.⁴²⁵ The court found the tapes were inadmissible hearsay and that it was not an abuse of discretion for the trial court to not allow the tapes pursuant to the residual exception.⁴²⁶ There was no guarantee of trustworthiness to the tapes made under the conditions of this case. The court rightly decided in this situation that it was best that the eleven-year-old, who was available for the trial, testify and be subjected to cross examination.

In *State v. Jacob*,⁴²⁷ the Supreme Court of Nebraska again upheld a trial court's refusal to allow a defendant, on trial for murder, to introduce evidence pursuant to the residual exception.⁴²⁸ In this case, Jacob sought introduction of a videotape deposition of a used car salesman in Maine.⁴²⁹ Jacob, who had planned to fly to England, sought to sell his vehicle in Maine, where he had driven after killing his girlfriend and her new lover in Nebraska.⁴³⁰ He sought introduction of the videotape to show his innocent behavior prior to his arrest.⁴³¹ The Nebraska trial court did no analysis, but held that the videotape would not be admitted pursuant to the residual exception.⁴³² The Supreme Court found the trial court had not abused its discretion for the "residual hearsay exception is to be used rarely and only in exceptional circumstances."⁴³³ The opinion infers that the defense did little to show that the proffered videotape possessed any particularized guarantees of trustworthiness. The court was correct not to admit the evidence.

As this review illustrates, the state courts are very cautious concerning introduction of hearsay pursuant to the residual exception in criminal cases. The Supreme Court of Arkansas, in three separate cases, would not allow introduction of defense evidence pursuant to the residual exception. In Delaware, the court, in separate cases, twice denied prosecutors the use of residual hearsay of unreliable identifications by crime victims who were hospitalized. The Supreme Court of Iowa gave a very thoroughgoing analysis of appropriate indicia of reliability for introduction of the statements in *Hallum*. In the four cases considered by the Supreme Court of Minnesota, the court found particularized guarantees of trustworthiness in

425. *Garner*, 614 N.W.2d at 330.

426. *Id.*

427. 574 N.W.2d 117 (Neb. 1998).

428. *Id.* at 139.

429. *Id.*

430. *Id.* at 126–28.

431. *Id.* at 139.

432. *Id.* at 139–40.

433. *Id.* at 139.

only two of the cases. The Michigan courts allowed testimony pursuant to the residual exception in one case, but not the second. The Nebraska court gave short shrift to defendants' requests to introduce hearsay pursuant to the residual exception in the two cases it considered. As a result of this review, we need not fear that the use of the residual exception is being abused by judges in state criminal court cases.

C. *The Florida Cases*

As noted earlier in this article, Florida does not have a residual exception akin to rule 807. However, Florida does have two sections of its evidence code directed to the types of circumstances where residual exceptions often are applied. Section 90.803(23) allows the use of out-of-court statements of children eleven years old or younger in child abuse cases. Section 90.803(24) allows introduction of such statements by elderly or disabled adults. These may be viewed as "quasi-residual" exceptions.

This survey would not be complete without commenting on the cases in Florida where hearsay statements have been offered pursuant to these "quasi-residual" exceptions. The initial question is whether such cases require the same type of rule 807 analysis to determine whether there are appropriate indicia of reliability and notice to establish trustworthiness. The answer is, of course, no. There is no need for an independent analytical framework in Florida because the statutes in question set out the requirements to be followed. If the requirements of the statute are not met, the evidence is not allowed. A review of the cases reveals that the courts of Florida are very careful with the hearsay evidence sought to be introduced pursuant to their "quasi-residual" statutes.

The essence of both statutes is that they seek to test the reliability of out of court statements. In criminal cases, notice must be given. In all cases the judge must hold a hearing outside of the hearing of the jury to determine the reliability of such statements.⁴³⁴ If reliable, such statements may be introduced whether the declarant is available or unavailable.⁴³⁵ If the declarant is unavailable:

the trial judge must determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the judge must determine whether other corroborating evidence is present. If the

434. See FLA. R. EVID. 90.903(23)(a)(1), 90.803(24)(a)(1).

435. See FLA. R. EVID. 90.903(23)(a)(2), 90.803(24)(a)(2).

answer to either question is no, then the hearsay statements are inadmissible.⁴³⁶

In *Doe v. Broward County School Board*,⁴³⁷ a trainable mentally retarded girl with Down's Syndrome had been digitally penetrated by a mentally disabled male in an after school care program at an elementary school in Broward County.⁴³⁸ Her mother brought a personal injury lawsuit claiming negligent supervision.⁴³⁹ The victim was unavailable to testify at the trial. The School Board made a motion in limine to exclude from trial the victim's hearsay statements to her mother and a psychologist on the ground that the hearsay statements were not admissible pursuant to section 90.803(23), because the victim was unavailable and there was no corroborating evidence of the incident.⁴⁴⁰ The trial court granted the motion in limine.⁴⁴¹ The court then granted the School Board's motion for summary judgment "based upon the court's conclusion that section 90.803(23) preempted all other hearsay exceptions, and as a result, [the victim] had no evidence with which to prove her case."⁴⁴²

The Florida District Court of Appeal found that the trial judge had not abused its discretion in finding that there was no corroborating evidence of the incident which would allow the introduction of the hearsay statements pursuant to section 90.803(23).⁴⁴³ The appeals court reversed the summary judgment and remanded the case for the trial judge to determine whether the victim's out of court statements may have been admitted pursuant to other hearsay exceptions.⁴⁴⁴

In *Florida v. Townsend*,⁴⁴⁵ the Supreme Court of Florida reversed defendant's conviction for abuse of a child of a two year old because of

436. *Id.*

437. 744 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1999).

438. *Id.* at 1070.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Doe*, 744 So. 2d at 1070.

443. *Id.* at 1071.

444. *Id.* at 1073. Specifically, the court remanded the case in order that the trial court might determine whether the victim's out-of-court statements to the psychologist, not relating to the identity of the perpetrator, were admissible under the medical diagnosis and treatment exception and whether the victim's out of court statements to her mother were admissible as excited utterances. *Id.*

445. 635 So. 2d 949 (Fla. 1994).

errors in the trial court's failure to make adequate findings for the admission of the child victim's hearsay statement.⁴⁴⁶ The court found that:

Section 90.803 (23) (a) (1) mandates that the trial judge, in a hearing conducted outside the presence of the jury, determine whether a hearsay statement is trustworthy and reliable by examining the 'time, content, and circumstances' of the statement, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim and any other factor deemed appropriate Other factors may include . . . a consideration of the statements's spontaneity; whether the statement was made at the first available opportunity following the alleged incident . . . whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement . . . [I]n sum, as noted by the United States Supreme Court in *Wright*, a court is to use a totality of the circumstances evaluation in determining reliability.⁴⁴⁷

The court in *Townsend* found, however, that "the trial judge merely listed each of the statements to be considered and summarily concluded, without explanation or factual findings, that the time, content, and circumstances of the statements to be admitted at trial were sufficient to reflect that the statements were reliable."⁴⁴⁸ The court found such findings insufficient under both the Florida statute and the constitutional requirements of *Idaho v. Wright*.⁴⁴⁹

Similarly, in *Hill v. State*,⁴⁵⁰ the district court of appeal reversed and remanded defendant's conviction for sexual battery and a lewd and lascivious act committed in the presence of a four year old.⁴⁵¹ The court found that, although some of the child's out-of-court hearsay statements had been found reliable pursuant to section 90.803(23), the trial court had erred when it allowed the examining physician to testify as to the child victim's

446. *Id.* at 958.

447. *Id.* at 957-58.

448. *Id.* at 958.

449. *Id.*

450. 643 So. 2d 653 (Fla. 2d Dist. Ct. App. 1994).

451. *Id.* at 654.

statements about the defendant's culpability, without observing the safeguards of section 90.803(23) with respect to such testimony.⁴⁵²

In *State v. Jones*,⁴⁵³ the Supreme Court of Florida determined that by providing safeguards outlined in section 90.803(23), the legislature of Florida had sought to strike a balance between the need to consider child hearsay statements in judicial proceedings and the rights of the accused.⁴⁵⁴ The court held that section 90.803(23) comported "with the confrontation clauses of both the federal Constitution and the Florida Constitution."⁴⁵⁵

In stark contrast to these child abuse cases, the Supreme Court of Florida in *Conner v. State*,⁴⁵⁶ held that the use of hearsay exception for elderly adults, pursuant to section 90.803(24), was, in criminal cases unconstitutional.⁴⁵⁷ In that case, the defendant was convicted, on a plea of nolo contendere, of armed burglary, armed robbery and armed kidnapping.⁴⁵⁸ The victim was an eighty year old man who died prior to trial.⁴⁵⁹ The trial court ruled that hearsay statements he gave to police about the crime were corroborated by other evidence, and that the state would be allowed in a hearing "to establish that the circumstances surrounding the statements guaranteed their reliability."⁴⁶⁰

The Supreme Court of Florida found deficiencies in the statute as it applied to elderly persons. The court found that section 90.803(24), in defining elderly as an adult sixty years of age or older, applies to a much broader class of adult declarants than did the child abuse statute of section 90.803(23).⁴⁶¹ As written, the statute applied to all persons over sixty years old. The court also found, unlike the child abuse statute which was limited to acts describing child abuse, neglect, or sexual abuse, that under the 90.804(24) exception for the elderly, declarants could describe "any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act."⁴⁶² Thus, the elderly hearsay exception would not be limited to crimes concerning elder abuse. Finally, the court could not determine a list of

452. *Id.*

453. 625 So. 2d 821 (Fla. 1993).

454. *Id.* at 826.

455. *Id.*

456. 748 So. 2d 950 (Fla. 2000).

457. *Id.* at 954.

458. *Id.* at 953.

459. *Id.* at 952.

460. *Id.* at 953.

461. *Conner*, 748 So. 2d at 958.

462. *Id.* (quoting FLA. STAT. § 90.803(24)(a)).

factors for the elderly, unlike the factors for children set out in section 90.803(23), that would guarantee the reliability of the hearsay statements of the elderly adult.⁴⁶³

The case was well reasoned. From such reasoning, it is easy to presume that though Florida has no residual rule akin to 807, the “quasi-residual” exceptions it has adopted for the elderly and children will not swallow the hearsay rule as we know it.

VI. CONCLUSION

This review of the twelve federal cases and twenty-two state cases, which relied on the residual exception in some part, show that there has been no abuse of the rule by the courts at the federal or the state level since the 1997 amendment to the residual exception. Courts appear vigilant with respect to analyzing the need for particularized guarantees of trustworthiness for statements proffered pursuant to the exception. Very often, such analysis shows that the statements lack the particularized guarantees of trustworthiness needed to pass muster. We need the residual exception to the hearsay rule. It is the exception that gives flexibility to the rule. If the states are reluctant to adopt such residual exceptions, they may well be advised to look at the Florida model, especially for child abuse and neglect cases.

463. *Id.* at 958–59.

Property Law: 2001 Survey of Florida Law

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TABLE OF CONTENTS

I. INTRODUCTION	110
II. AGENCY	110
III. ARBITRATION.....	110
IV. ATTORNEY'S FEES	112
V. BROKERS.....	116
VI. CONDOMINIUMS.....	122
VII. CONSTRUCTION.....	123
VIII. COVENANTS AND RESTRICTIONS	127
IX. DEEDS	128
X. EASEMENTS	132
XI. EMINENT DOMAIN	134
XII. EQUITABLE LIENS	138
XIII. EQUITABLE REMEDIES	139
XIV. FORECLOSURES.....	142
XV. HOMESTEAD.....	149
XVI. INVERSE CONDEMNATION	155
XVII. LANDLORD AND TENANT.....	165
XVIII. LIENS	171
XIX. <i>LIS PENDENS</i>	173
XX. MORTGAGES	174
XXI. OPTIONS.....	175
XXII. SALES.....	176
XXIII. TAXATION.....	181
XXIV. TAX DEEDS	186
XXV. TITLE INSURANCE.....	186
XXVI. ZONING	187
XXVII. CONCLUSION.....	189

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I. INTRODUCTION

This survey covers the decisions of the Florida courts and Florida legislation produced during the period from July 1, 2000 through June 30, 2001 especially selected for this article as being of potential interest to the real estate practitioner. The legislative changes affect numerous provisions. So, the legislation comments included in this review are purely for informational purposes. We do not intend this to be all inclusive. Reading the complete amendments is highly recommended.

II. AGENCY

*Lensa Corp. v. Poinciana Gardens Ass'n.*¹ The issue in this case is whether apparent authority can be established when the president of a non-profit corporation negotiates and executes the sale of property.²

In this case, the president of an association negotiated and executed sales documents.³ The purchaser relied on the president's alleged apparent authority and failed to comply with statutory requirements which require a corporate resolution.⁴

The appellate court held that the sale of all or substantially all of a non-profit corporation's assets is strictly controlled by section 617.1202 of the *Florida Statutes* providing that a vote by the members must take place authorizing the transaction.⁵ Therefore, the purchaser was wrong in relying on the president's position because of this statute. Also, it appears the corporate principal never made a representation that the president was its agent for this sale.⁶ Therefore, the appellate court affirmed the lower court's decision disallowing the sale.⁷

III. ARBITRATION

*Zager Plumbing, Inc. v. JPI National Construction, Inc.*⁸ The issue here is whether the trial court erred in finding that a contractor did not waive

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1. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).
 2. *Id.* at 297.
 3. *Id.*
 4. *Id.*
 5. *Id.* at 297-98.
 6. *Lensa*, 765 So. 2d at 298.
 7. *Id.*
 8. 785 So. 2d 660 (Fla. 3d Dist. Ct. App. 2001).

its right to arbitration when it filed an action to shorten the time in which a construction lien could be foreclosed prior to making a demand for arbitration.⁹

JPI National Construction (“JPI”), a general contractor, entered into a subcontract with Zager Plumbing, which contained an arbitration clause.¹⁰ When it was not paid timely, Zager filed a construction lien against the owner’s property, and JPI filed a complaint under section 713.21(4) of the *Florida Statutes*.¹¹ Under this statute, the lienor has twenty days to show cause why its lien should not be enforced by action or vacated and canceled of record.¹² Failure to respond timely results in an order canceling the lien.¹³ Attached to the complaint was JPI’s demand for arbitration, which was submitted to the American Arbitration Association simultaneously with the filing of the complaint.¹⁴ Zager filed a motion to dismiss contending that JPI waived its right to arbitration by filing suit under section 713.21.¹⁵ The trial court denied the motion, and Zager appealed.¹⁶

The appellate court agreed with the trial court that there was no waiver of the right to arbitration.¹⁷ Public policy is not only in favor of the prompt clearance of construction liens from real property, it also strongly favors arbitration.¹⁸ “All questions concerning the scope or waiver of the right to arbitrate under contracts should be resolved in favor of arbitration rather than against it.”¹⁹

In this case, JPI acted reasonably when it invoked expedited procedure for clearing liens from real property, while at the same time seeking to resolve the parties’ dispute through arbitration.²⁰ Zager was not prejudiced by the trial court’s decision to allow the procedure.²¹

9. *Id.* at 661.

10. *Id.*

11. *Id.*

12. *Id.* (quoting FLA. STAT. § 713.21(4) (1999)).

13. *Zager Plumbing, Inc.*, 785 So. 2d at 661 (quoting FLA. STAT. § 713.21(4) (1999)).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 661–62.

18. *Zager Plumbing, Inc.*, 785 So. 2d at 662.

19. *Id.* (quoting *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. 5th Dist. Ct. App. 1995)).

20. *Id.* at 662.

21. *Id.*

IV. ATTORNEY'S FEES

*Amerada Hess Corp. v. Department of Transportation.*²² The Department took a temporary construction easement to facilitate bridge repairs.²³ It made an offer of \$112,300 to compensate the landowner.²⁴ The landowner's reaction to the offer was to hire a lawyer.²⁵ Eventually, the landowner agreed to accept \$142,000 as compensation and filed a motion for attorney's fees.²⁶ By statute, attorney's fees in eminent domain cases are based on the benefits the lawyer achieved for the client.²⁷ Monetary benefits are defined as the difference between the compensation the client receives and the last written offer received from the condemning authority.²⁸ The trial court awarded attorney's fees as thirty-three percent of the difference between \$142,000 and \$112,300.²⁹ The landowner's attorney claimed that was inadequate and appealed.³⁰

The appeal was based on two claims. First, the landowner claimed that its attorney had achieved nonmonetary benefits by making the Department change its plans.³¹ However, the district court found that the trial court's decision was supported by competent substantial evidence on the record.³² A trial court's award of attorney's fees should be disturbed only if the trial court clearly abused its discretion.³³ Consequently, that claim was rejected.³⁴

The second claim was more interesting. The landowner had filed a motion to strike the Department's offer of \$112,300.³⁵ Without that offer, the attorney's fees would be based on achieving the benefit of \$142,000, so the award would be significantly higher.³⁶ The basis for the motion was that the Department had subsequently made substantial changes to its plans, so

22. 788 So. 2d 276 (Fla. 4th Dist. Ct. App. 2000).

23. *Id.* at 277.

24. *Id.*

25. *Id.*

26. *Id.*

27. FLA. STAT. § 73.092(1) (1999).

28. § 73.092(1)(a).

29. *Amerada Hess Corp.*, 788 So. 2d at 277.

30. *Id.*

31. *Id.*

32. *Id.* at 278.

33. *Id.* at 277.

34. *Amerada Hess Corp.*, 788 So. 2d at 278.

35. *Id.* at 277.

36. *Id.*

the original offer involved a different taking and could not, logically, be used to measure the benefits achieved here.³⁷ The district court rejected that argument.³⁸ The landowner's attorney claimed the benefit it had achieved was "a substantial reduction in [Landowner's] costs to cure, a lesser impact upon [Landowner's] property, and an entitlement to greater compensation."³⁹ Thus, the benefit achieved had already been used in calculating the attorney's fees, and it would be getting a windfall to increase those fees even more.⁴⁰

Dow v. McKinley.⁴¹ Landowners hired a contractor to build their single-family house.⁴² A dispute arose and the landowners refused to honor the contractor's final invoice.⁴³ The contractor filed this suit for damages based on, inter alia, breach of contract and to foreclose its mechanic's lien.⁴⁴ The landowners raised four affirmative defenses and three counterclaims based substantially on allegations of faulty workmanship.⁴⁵ The trial court granted judgment in favor of the contractor, but also granted judgment for the landowners on their counterclaim.⁴⁶ The court also entered an order for attorney's fees under the construction lien statute.⁴⁷

The net award to the contractor was \$16,026.98, but the court awarded attorney's fees of \$62,125 based on 355 hours at \$175 per hour.⁴⁸ The court of appeal decided that this was erroneous.⁴⁹ The critical factor was that the contractor had won less than thirty percent of his original claim of \$56,086.87.⁵⁰ Consequently, the trial court should have considered whether the attorney's fee should be reduced based on the level of success, a low level in this case, achieved by the attorney.⁵¹ The district court also found several items for which costs should not have been awarded including an

37. *Id.*

38. *Id.*

39. *Amerada Hess Corp.*, 788 So. 2d at 277.

40. *Id.* at 278.

41. 776 So. 2d 1017 (Fla. 5th Dist. Ct. App. 2001).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1018.

46. *Dow*, 776 So. 2d at 1018.

47. *Id.* (citing FLA. STAT. § 713.29 (1997)).

48. *Id.* at 1018.

49. *Id.*

50. *Id.*

51. *Dow*, 776 So. 2d at 1018.

appraisal report, which was not submitted into evidence, and trial transcripts, whose use and purpose was not established.⁵²

*Hartleb v. Department of Transportation.*⁵³ Plaintiff in an eminent domain case prevailed and was awarded attorneys' fees.⁵⁴ The Department of Transportation deposited the money into the registry of the court.⁵⁵ Unsatisfied with the terms of his win, plaintiff filed a motion for a rehearing.⁵⁶ When that failed, plaintiff appealed.⁵⁷ Because a statute provided any withdrawal of the funds would result in the appeal being dismissed,⁵⁸ plaintiff left the money in the court registry for the three years it took to complete the appeal process.⁵⁹ Ultimately, the appeal was unsuccessful.⁶⁰ Then, plaintiff withdrew the money from the court registry and moved for an award of interest for the three-year period from entry of judgment to the withdrawal.⁶¹ Reversing the trial court, the district court concluded he was entitled to it.⁶² The Florida Constitution mandates full compensation for land taken.⁶³ That mandate would be violated if a plaintiff is denied interest on land held in the court's registry pending appeal, even if that appeal is unsuccessful.⁶⁴

*Sayre v. JMC Painting, Inc.*⁶⁵ Plaintiff filed her action against the landowner and the general contractor in county court.⁶⁶ The action was based on the claim that a contract had been breached.⁶⁷ Among the counts were claims for a mechanic's lien and the transfer bond surety.⁶⁸ There were also claims against the payment bond.⁶⁹ However, the county court did not have subject matter jurisdiction over a claim against a surety bond,⁷⁰ so these

52. *Id.* at 1018–19.

53. 778 So. 2d 1063 (Fla. 4th Dist. Ct. App. 2001).

54. *Id.* at 1064.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Hartleb*, 778 So. 2d at 1064 (citing FLA. STAT. § 73.131(1) (2000)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. FLA. CONST. art. X, § 6.

64. *Hartleb v. Dep't of Transp.*, 778 So. 2d 1063, 1064 (Fla. 4th Dist. Ct. App. 2001).

65. 778 So. 2d 430 (Fla. 4th Dist. Ct. App. 2001).

66. *Id.* at 431.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Sayre*, 778 So. 2d at 431.

claims were dismissed.⁷¹ The county court then granted attorney's fees to the two sureties.⁷² Unfortunately, the county court failed to specify its basis for granting attorney's fees.⁷³ If attorney's fees were granted under the Mechanic's Lien Act,⁷⁴ then the attorney's fees award was improper. Lacking subject matter jurisdiction over the claim, the court also lacked jurisdiction to award attorney's fees based on that claim.⁷⁵ Therefore, the case was remanded to the trial court to determine the basis of its decision to grant attorney's fees.⁷⁶

*Department of Transportation v. Patel.*⁷⁷ The Department brought a condemnation action to take part of the landowner's land.⁷⁸ At the close of the evidence, the Department moved for a whole taking of the land, rather than a partial taking, if that turned out to be less expensive, as was then allowed by section 337.27(2) of the *Florida Statutes*.⁷⁹ The landowner opposed the motion.⁸⁰ The court denied the motion, but ordered an interrogatory verdict be distributed to the jury.⁸¹ The court made a compensation award and then proceeded to consider attorney's fees.⁸²

One component of the attorney's fees awarded was for nonmonetary benefits achieved for the landowner,⁸³ including the value of the land that the Department failed to take when the motion for a whole taking was defeated.⁸⁴ In addition, the nonmonetary benefits included the income from that land.⁸⁵ However, the district court rejected this characterization.⁸⁶ Rather, attorney's fees for defeating that motion should be calculated as if a condemnation had been defeated under the other part of the statute.⁸⁷ That constituted reversible error.⁸⁸ However, the Department conceded that

71. *Id.*

72. *Id.*

73. *Id.* at 432.

74. FLA. STAT. § 713.29 (1999).

75. *Sayre*, 778 So. 2d at 431.

76. *Id.* at 432.

77. 768 So. 2d 1173 (Fla. 2d Dist. Ct. App. 2000).

78. *Id.* at 1174.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Patel*, 768 So. 2d at 1174.

83. FLA. STAT. § 73.092(1)(b) (1997).

84. *Patel*, 768 So. 2d at 1174.

85. *Id.*

86. *Id.* at 1175.

87. *Id.* (citing FLA. STAT. § 73.092(2)).

88. *Id.*

where the attorney's efforts had extended the period that the landowner remained in possession of the premises, there was a benefit achieved for which attorney's fees could be recovered.⁸⁹ The trial court also committed reversible error by awarding expert witness fees when the testimony's sole use was as a basis for claiming attorney's fees.⁹⁰ Since the condemnee has no interest in the attorney's fees obtained, there is no right to recover attorney's fees and litigation costs.⁹¹

V. BROKERS

*Framer Realty, Inc. v. Ross.*⁹² Out-of-state buyers were looking for an expensive house.⁹³ Framer showed them numerous properties when they visited Florida.⁹⁴ They expressed particular interest in a certain house which they had seen twice, but indicated they first had to complete an out-of-state transaction.⁹⁵ Eventually they did return to Florida to complete the purchase, but they used another broker, Ross, to make the offer and handle the closing.⁹⁶ Ross collected and kept the entire commission.⁹⁷ As a result, Framer sued Ross, who was aware that Framer had shown the house to the buyers, for unjust enrichment.⁹⁸ The trial court granted Ross's motion for summary judgment.⁹⁹

The Third District Court of Appeal reversed.¹⁰⁰ To recover, Framer would have to show that he had an implied contract or that he was the procuring cause of the sale.¹⁰¹ "Genuine issues of material fact remain for a determination by the trier of fact as to whether Framer was a procuring cause of the sale . . ."¹⁰² Framer might have been entitled to a broker's commission because he brought the buyers to see the property.¹⁰³ The

89. *Patel*, 768 So. 2d at 1175.

90. *Id.*

91. *Id.*

92. 768 So. 2d 5 (Fla. 3d Dist. Ct. App. 2000).

93. *Id.* at 6.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Ross*, 768 So. 2d at 6.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Ross*, 768 So. 2d at 6.

103. *Id.*

evidence might lead to the conclusion that he was intentionally excluded by the buyer and seller from the negotiations that led to the sale.¹⁰⁴ Also, “it could be reasonably inferred that Ross accepted the benefit of Framer’s efforts” to sell the house.¹⁰⁵ Consequently, summary judgment was inappropriate and the case was remanded for further proceedings.¹⁰⁶

*Media Services Group, Inc. v. Bay Cities Communications, Inc.*¹⁰⁷ The plaintiff had a ninety-day exclusive right to sell defendant’s radio station.¹⁰⁸ Defendant terminated the agreement when the ninety days ran out.¹⁰⁹ However, plaintiff continued to try to find a buyer for the station.¹¹⁰ It was on a list of stations that were available that plaintiff sent to Root Communications.¹¹¹ Plaintiff also arranged for personnel from Root to tour the station and meet with a major shareholder of defendant.¹¹² Plaintiff also included the station in a offering sent to Root.¹¹³ Defendant knew about these efforts and cooperated.¹¹⁴

Plaintiff directed its sales appeals to other prospective buyers.¹¹⁵ Those efforts produced Hochman Communications which signed a “letter agreement”¹¹⁶ with defendant.¹¹⁷ Hochman had difficulty getting the necessary financing, but plaintiff did not give up.¹¹⁸ It worked to make the deal happen.¹¹⁹ Before that could occur, defendant started negotiating with another buyer.¹²⁰ Plaintiff finally discovered that buyer was Root; so it notified defendant that it had produced Root and wanted to be involved in the negotiations.¹²¹ Plaintiff was not allowed to participate.¹²² The station

104. *Id.*

105. *Id.*

106. *Ross*, 768 So. 2d at 7.

107. 237 F.3d 1326 (11th Cir. 2001).

108. *Id.* at 1328.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Media Servs. Group, Inc.*, 237 F.3d at 1328.

113. *Id.*

114. *Id.* at 1328 n.1.

115. *Id.* at 1328.

116. *Id.*

117. *Media Servs. Group Inc.*, 237 F.3d at 1328.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Media Servs. Group, Inc.*, 237 F.3d at 1328.

was sold to Root, and defendant refused to pay plaintiff a commission for the sale.¹²³

Plaintiff sued in federal district court.¹²⁴ Its complaint for compensation had three counts: breach of an oral contract, unjust enrichment, and quantum meruit.¹²⁵ The oral contract and quantum meruit claims were tried by a jury which returned a verdict for defendant.¹²⁶ The unjust enrichment claim, being equitable in nature, was tried by the court without a jury.¹²⁷ The district judge held defendant liable based on unjust enrichment.¹²⁸ Defendant appealed.¹²⁹

Defendant claimed that under Florida law, a broker could not recover for unjust enrichment.¹³⁰ That argument was rejected.¹³¹ Florida case law showed that a broker could recover for unjust enrichment based on “either the existence of an implied contract to pay him for [his] services in finding and negotiating with the ultimate purchasers or that he was the procuring factor in the sale.”¹³² The problem for plaintiff was that it had not negotiated with the ultimate purchasers and the district court had expressly stated in its final order that plaintiff was not the procuring cause of this sale.¹³³ The court of appeal noted that in order to be considered the procuring cause of the sale, “the broker must have brought the [parties] together and effected the sale as a result of continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations.”¹³⁴ The facts in the record demonstrated that this broker brought the parties together.¹³⁵ The facts in the record also demonstrated that the buyer and seller intentionally excluded the broker from the negotiations.¹³⁶ There was no need to show that the buyer and

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Plaintiff did not appeal. *Id.* at 1328–29 n.4.

127. *Media Servs. Group, Inc.*, 237 F.3d at 1328 n.4.

128. *Id.* at 1328.

129. *Id.* at 1327.

130. *Id.* at 1329.

131. *Id.*

132. *Media Servs. Group, Inc.*, 237 F.3d at 1329 (citations omitted).

133. *Id.*

134. *Id.* (quoting *Sheldon Greene & Assoc., Inc. v. Rosinda Inv., N.V.*, 475 So. 2d 925, 927 (Fla. 3d Dist. Ct. App. 1985); *rev. dismissed*, *Horn v. Sheldon Greene & Assoc., Inc.*, 502 So. 2d 421 (Fla. 1987)).

135. *Id.* at 1330.

136. *Id.*

seller had acted in bad faith.¹³⁷ The record also showed that the property had been sold.¹³⁸ Consequently, the district court must have meant that plaintiff was not the procuring cause in this case only because the buyer and seller had prevented it from bringing the sale to closure.¹³⁹ Thus, the court's finding of facts was consistent with defendant's being held liable.¹⁴⁰ Since that was the only possible explanation, a remand for further proceedings was unnecessary.¹⁴¹ The court of appeal could not disturb the findings of the federal district court because they were not clearly erroneous.¹⁴²

*Newbern v. Mansbach.*¹⁴³ Buyers sued the real estate broker and the insurance agent for fraudulent and negligent misrepresentation.¹⁴⁴ Buyer alleged that they would not have purchased the land if they had known that it was located in a Coastal Barrier Resource Area (CBRA) or that they could not get federal flood insurance.¹⁴⁵ The broker conceded that she represented that the land was not located in the CBRA even though she had information that it was.¹⁴⁶ Because it was located in the CBRA, federal flood insurance could not be obtained.¹⁴⁷ The insurance agent knew this before the real estate closing, but failed to reveal it, despite having represented to the buyers that the insurance had been obtained.¹⁴⁸

The trial court granted summary judgment for both defendants.¹⁴⁹ Its theory was that whether the land was located in the CBRA was a matter that could be determined from the public records by reasonable efforts.¹⁵⁰ Consequently, recovery for misrepresentation was precluded as a matter of law.¹⁵¹ The First District Court of Appeal rejected that analysis.¹⁵²

137. *Media Servs. Group, Inc.*, 237 F.3d at 1329.

138. *Id.* at 1330.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Media Servs. Group, Inc.*, 237 F.3d at 1330.

143. 777 So. 2d 1044 (Fla. 1st Dist. Ct. App. 2001).

144. *Id.* at 1045.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Newbern*, 777 So. 2d at 1045.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

The elements for recovery based on negligent misrepresentation are borrowed from section 552 of the *Restatement (Second) of Torts*.¹⁵³ It provides that a person may be held liable for a negligent misrepresentation if

in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information.¹⁵⁴

However, he will only be liable for harm that resulted from justifiable reliance on the misrepresentation.¹⁵⁵ “[J]ustifiable reliance is an issue of comparative negligence that should be resolved by a jury.”¹⁵⁶ Therefore, the trial court should have allowed the jury to determine if the buyers justifiably relied upon the misrepresentations or had been negligent in not discovering these facts from the public records.

The claim of fraudulent misrepresentation raised a slightly different issue. The recipient of a fraudulent misrepresentation may rely on it, “even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.”¹⁵⁷ That presents questions of disputed fact that could not be properly disposed of by summary judgment based on the information being available in the public records.¹⁵⁸ The CBRA regulations and documents are complicated and so the falsity of the misrepresentations was not obvious.¹⁵⁹

Scott v. Simpson.¹⁶⁰ A real estate salesman signed a contract to sell units at a condominium project.¹⁶¹ The contract provided that he would receive a 1.5% commission on each sale but it was to be payable half when the statutory right to rescission expired and the other half when the sale was completed.¹⁶² The contract also provided that the salesman would forfeit any

153. *Newbern*, 777 So. 2d at 1045.

154. RESTATEMENT (SECOND) OF TORTS § 552(1).

155. *Id.* § 552(2).

156. *Newbern*, 777 So. 2d at 1046 (citing *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997)).

157. *Id.* (quoting from *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980)).

158. *Id.* at 1047.

159. *Id.* at 1046.

160. 774 So. 2d 881 (Fla. 4th Dist. Ct. App. 2001).

161. *Id.* at 882.

162. *Id.*

pending commissions if the contract was terminated.¹⁶³ Eighteen units were under contract when the salesman received notice alleging certain shortcomings in his performance, and therefore, termination of the contract.¹⁶⁴

The salesman sued for the unpaid commissions on the eighteen units and won in the trial court, but the Fourth District Court of Appeal reversed.¹⁶⁵ "Interpretation of a written contract is a matter of law,"¹⁶⁶ so the appellate court engaged in a de novo review.¹⁶⁷ It found that the contract clearly and unambiguously provided that unpaid commissions would be forfeited upon termination of the contract.¹⁶⁸ "Agreements entitling sales persons to commissions only after the sales have actually closed are standard in this business, and have been upheld by this and other courts."¹⁶⁹ Consequently, the salesman was not entitled to these commissions under the contract.¹⁷⁰ Moreover, since the parties had a valid express contract covering these sales, the salesman could not recover on the theory of quantum meruit.¹⁷¹

It is worth noting that there is no mention of any claim that the termination was unjustified or in any way wrongful. Nor was there any mention of a claim that disparate bargaining power was exerted to get the salesman to agree to these terms. If such factors had appeared, they might have changed the outcome of the case.

*Southampton Development Corp. v. Palmer Realty Group, Inc.*¹⁷² The broker negotiated a fee arrangement with the seller that provided "if my [b]uyer goes to contract with you, the following commission schedule will apply . . ."¹⁷³ The buyer and seller had not signed a contract when seller filed for bankruptcy reorganization.¹⁷⁴ Later, with the approval of the bankruptcy court, seller did reach an agreement with buyer.¹⁷⁵ After the closing, the broker filed a claim for a commission with the bankruptcy

163. *Id.* at 882.

164. *Id.*

165. *Scott*, 774 So. 2d at 883.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Scott*, 774 So. 2d at 884.

171. *Id.*

172. 769 So. 2d 1113 (Fla. 2d Dist. Ct. App. 2000).

173. *Id.* at 1114.

174. *Id.*

175. *Id.* at 1115.

court.¹⁷⁶ That claim was dismissed without prejudice, allowing the broker to file suit in state court.¹⁷⁷ The broker first had to prove it did not have adequate notice of the bankruptcy to succeed in state court.¹⁷⁸ The broker was able to surmount that hurdle, but winning on the merits was a different story.¹⁷⁹

The district court concluded that the broker never had a contract with the seller.¹⁸⁰ Careful scrutiny revealed that the fee arrangement between the broker and seller was merely an offer to enter into a unilateral brokerage contract.¹⁸¹ The offer would be accepted by performance, i.e., the buyer and seller signing a sales contract.¹⁸² That had not occurred before the bankruptcy was filed.¹⁸³ Afterwards, the seller was operating as a debtor in possession.¹⁸⁴ The debtor in possession was considered a different person from the debtor, i.e., the seller, who had made the offer of the unilateral brokerage contract.¹⁸⁵ Consequently, neither the debtor in possession signing the sales contract nor closing on the contract could be considered an acceptance of that offer to enter into the contract to pay a commission.¹⁸⁶ It is worth noting that there is no mention of a claim for quantum meruit. Such a claim might have succeeded, but it would also present interesting theoretical problems.

VI. CONDOMINIUMS

*Cooley v. Pheasant Run at Rosemont Condominium Ass'n.*¹⁸⁷ The issue here was whether a condominium unit owner could be joined as a party to a suit against the condominium association for an injury that occurred on the common elements of the condominium.¹⁸⁸ Appellant brought an action against appellees for an injury sustained while on the appellees property in

176. *Id.*

177. *Southampton Dev. Corp.*, 769 So. 2d at 1115.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Southampton Dev. Corp.*, 769 So. 2d at 1115.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 781 So. 2d 1182 (Fla. 5th Dist. Ct. App. 2001).

188. *Id.* at 1183.

which he joined individual unit owners as defendants in the suit.¹⁸⁹ Appellant alleged that he was injured while an invited guest upon the common elements of the condominium grounds.¹⁹⁰ The circuit court dismissed the individual unit owners from the suit, holding that Florida law did not support such an action against unit owners, but could only be maintained against the association.¹⁹¹ Plaintiff appealed.¹⁹²

The appellate court held that under section 718.119(2) of the *Florida Statutes*, the only liability of individual unit owners was for those additional assessments by the condominium association in relation to the use of the common elements.¹⁹³ Therefore, the court held that the trial court properly dismissed the individual unit owners from plaintiff's personal injury suit.¹⁹⁴

VII. CONSTRUCTION

*Gainesville-Alachua County Regional Airport Authority v. R. Hyden Construction, Inc.*¹⁹⁵ The construction contract had a change order provision.¹⁹⁶ In the event there were alterations in the work, those alterations, and an adjustment in the price, were to be agreed upon by the parties.¹⁹⁷ The parties executed one such change order which included a price increase.¹⁹⁸ Subsequently, the contractor submitted another change order for another price increase based upon costs associated with the earlier change order.¹⁹⁹ The Airport Authority rejected the second change order and refused to pay the higher price.²⁰⁰ The contractor sued for the higher price on the theory of breach of contract.²⁰¹ The Airport Authority's motion for summary judgment was denied and the jury found in favor of the contractor.²⁰² The Fourth District Court of Appeal reversed.²⁰³

189. *Id.*

190. *Id.*

191. *Id.*

192. *Cooley*, 781 So. 2d at 1183.

193. *Id.* at 1184.

194. *Id.* at 1184-85.

195. 766 So. 2d 1238 (Fla. 1st Dist. Ct. App. 2000).

196. *Id.* at 1238-39.

197. *Id.* at 1239.

198. *Id.*

199. *Id.*

200. *R. Hyden Constr., Inc.*, 766 So. 2d at 1239.

201. *Id.*

202. *Id.*

203. *Id.*

The change order, once executed by both parties, became part of the contract.²⁰⁴ Here, the executed change order clearly established the total sum due for the work.²⁰⁵ “[S]ince there was no ambiguity, the interpretation of the parties’ agreement is a question of law to be resolved by the court.”²⁰⁶ Consequently, it was reversible error to submit to the jury the question of whether the contractor was entitled to recover the additional costs generated by the change order.²⁰⁷ To the contrary, summary judgment should have been entered for the Airport Authority.²⁰⁸

*Gables v. Choate.*²⁰⁹ Prior to the completion of a luxury condominium residence, the buyer contracted to purchase it for \$700,000.²¹⁰ One clause provided that the buyer would forfeit his substantial deposit if he failed to close.²¹¹ The contract also contained a date when construction had to be completed and a liquidated damages provision giving the buyer a credit of \$5000 for each month of delay.²¹² Six months after the due date, the construction was still not finished and the developer was in severe financial trouble.²¹³ The parties entered into an improvement contract that gave the developer thirty days to finish the construction.²¹⁴ Any delay would result in the developer having to pay the buyer \$5000 per week.²¹⁵ The buyer finally moved into the unit over a year later, but the unit was far from finished and what had been completed was done badly.²¹⁶ It still had not been finished when the developer walked off the job six months later.²¹⁷ The buyer hired another contractor who put the apartment into proper order for about \$8000.²¹⁸ Buyer sued the developer and, based on the liquidated damages clause, was awarded over \$125,000.²¹⁹

204. *Id.*

205. *R. Hyden Constr., Inc.*, 766 So. 2d at 1239.

206. *Id.*

207. *Id.*

208. *Id.*

209. 792 So. 2d 520 (Fla. 3d Dist. Ct. App. 2001).

210. *Id.* at 521.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Gables*, 792 So. 2d at 521.

215. *Id.*

216. *Id.* at 521–22.

217. *Id.* at 522.

218. *Id.* at 523.

219. *Gables*, 792 So. 2d at 522.

The developer's point on appeal was that the liquidated damages clause was invalid because it was really a penalty.²²⁰ The district court rejected the argument.²²¹ The parties were sophisticated and represented by counsel.²²² Buyer had bargained for a luxury residence and ended up having to live in a construction zone while struggling to complete the construction properly.²²³ Buyer had suffered "prolonged inconvenience, discomfort, invasion of privacy and renegotiation . . ."²²⁴ Calculating damages for that injury would be difficult and the amount was not necessarily disproportionate to the figure agreed upon.²²⁵ On this final point, Senior Judge Nesbitt disagreed in a brief dissent.²²⁶

*The Palms v. Magil Construction Florida, Inc.*²²⁷ The contractor sued a landowner claiming breach of a construction contract.²²⁸ The landowner raised, as a defense, that the contractor did not have a license and was, therefore, barred from recovering.²²⁹ The contractor had applied for a license before entering into the contract, but a license had never been issued.²³⁰ The contractor asserted the right to cure its missing license problem by obtaining a license, relying on a sentence in the statute that stated, "[h]owever, in the event the contractor obtains or reinstates his license, the provisions of this section shall no longer apply."²³¹ The problem facing the court was that the quoted sentence had been subsequently eliminated by the legislature.²³² So the amendment would only apply to this case if it had retroactive effect.²³³ The district court concluded that the amendment "worked a change in the substantive rights of contractors . . . [s]ince [it] is a substantive change in law, the 2000 amendment does not operate retroactively."²³⁴ However, the court avoided interpreting the

220. *Id.*

221. *Id.*

222. *Id.* at 523.

223. *Id.*

224. *Gables*, 792 So. 2d at 523.

225. *Id.*

226. *Id.*

227. 785 So. 2d 597 (Fla. 3d Dist. Ct. App. 2001).

228. *Id.*

229. *Id.* at 597-98.

230. *Id.* at 597.

231. *Id.* (quoting FLA. STAT. § 489.128 (1995)).

232. *See* Ch. 2000-372, § 35, 2000 Fla. Laws 4307, 4338 (codified at FLA. STAT. § 489.128 (2000)).

233. *Palms*, 785 So. 2d at 598.

234. *Id.*

effect of the 2000 amendment.²³⁵ It based its ruling on the assumption that the amendment would bar the contractor from avoiding the statute's effect by getting a license.²³⁶

*Performing Arts Center Authority v. Clark Construction Group, Inc.*²³⁷

When a puddle was found on the floor of the Performing Arts Center in February, 1995, the manager suspected a roof leak and contacted the roofing contractor.²³⁸ An inspection revealed that the leak was in the exterior stucco.²³⁹ Minor cracks were discovered and the stucco subcontractor explained that the cracking was caused by the building settling.²⁴⁰ In June 1995, a consultant advised that the building could not be repainted because the cracks in the exterior stucco were too extensive.²⁴¹ After heavy rains, another consultant concluded that the exterior walls had been improperly designed and built.²⁴² The Performing Arts Center filed suit against the general contractor and the stucco subcontractor on May 14, 1999, less than four years from receiving the report identifying the nature of the defect, but more than four years after the other events.²⁴³ The trial court granted defendants' motion for summary judgment based on the four-year statute of limitations.²⁴⁴

The Fourth District Court of Appeal reversed, holding that it was a question of fact when the plaintiff had notice of the latent defect.²⁴⁵ The court distinguished cases in which there were leaks immediately after a new roof had been installed because they involved a situation in which it was "not only apparent, but obvious, that someone is at fault."²⁴⁶ "However, as in this case, where the manifestation is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred."²⁴⁷

235. *Id.*

236. *Id.*

237. 789 So. 2d 392 (Fla. 4th Dist. Ct. App. 2001).

238. *Id.* at 393.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Clark Constr. Group, Inc.*, 789 So. 2d at 394.

243. *Id.*

244. *Id.* See FLA. STAT. § 95.11(3)(c) (2001).

245. *Clark Constr. Group, Inc.*, 789 So. 2d at 394.

246. *Id.* (quoting *Kelly v. Sch. Bd. of Seminole County*, 435 So. 2d 804, 806 (Fla. 1983)).

247. *Id.*

*Shapiro v. Department of Business & Professional Regulation.*²⁴⁸ Mr. and Mrs. Shapiro contracted to buy a new home to be built by Centron.²⁴⁹ Title to the land passed from Centron to the Shapiros little more than a month later.²⁵⁰ After a year, the house still had not been completed, and eventually, Centron abandoned the project leaving the house incomplete.²⁵¹ Mr. and Mrs. Shapiro won a judgment against Centron, but were unable to collect, so they filed a claim on the Construction Industries Recovery Fund administered by the Department of Business and Professional Regulation.²⁵² Their claim was denied on the grounds that they were not the owners of the land when the contract was signed.²⁵³ The governing statute provided: "A person is not qualified to make a claim for recovery from the Construction Industries Recovery Fund if: . . . (c) Such person's claim is based upon a construction contract in which the licensee [builder] was acting with respect to the property owned or controlled by the licensee"²⁵⁴

The Fifth District Court of Appeal applied the purpose approach of statutory interpretation. The legislature passed the statute to protect consumers who are harmed by defaulting contractors.²⁵⁵ To deny a consumer protection merely because the builder owned the land at the time of contracting would undermine the protection that the legislature had provided.²⁵⁶ Such an interpretation was "unreasonable" and, consequently, the decision of the Board was reversed.²⁵⁷

VIII. COVENANTS AND RESTRICTIONS

*Eckerd Corp. v. Corners Group, Inc.*²⁵⁸ The issue here is whether a restriction in a deed prevented the use of a piece of property as a parking lot for the type of business proscribed by the restriction.²⁵⁹

In this case appellant bought land to build a pharmacy.²⁶⁰ When it was unable to purchase enough adjoining property, appellant sold the property

248. 788 So. 2d 1100 (Fla. 5th Dist. Ct. App. 2001).

249. *Id.* at 1101.

250. *Id.*

251. *Id.*

252. *Id.* at 1102.

253. *Shapiro*, 788 So. 2d at 1102.

254. FLA. STAT. § 489.141(2)(c) (2000).

255. *Shapiro*, 788 So. 2d at 1102.

256. *Id.*

257. *Id.*

258. 786 So. 2d 588 (Fla. 5th Dist. Ct. App. 2000).

259. *Id.* at 589.

imposing a restrictive covenant against use of that property as a drugstore.²⁶¹ Appellant then purchased land on the opposite corner and built a pharmacy.²⁶² Appellees purchased the restricted property as well as an adjacent tract of land and submitted a development plan for a competing pharmacy to be built, with its parking lot located on that portion of the land which carried the restrictive covenant entered by appellant.²⁶³ The appellate court found that the purpose of the restrictive covenant was to prevent the restricted parcel from being used as any part of a competing pharmacy.²⁶⁴

The appellate court held that the restricted parcel was a necessary part of the proposed pharmacy.²⁶⁵ Therefore, use of any part of the restricted parcel for parking or ingress or egress violated the restrictive covenant.²⁶⁶

IX. DEEDS

*American General Home Equity, Inc. v. Countrywide Home Loans, Inc.*²⁶⁷ The issue in this case is whether a deed is valid when it only has one signature of an identified witness, the signature of the grantor, and the signature of the notary.²⁶⁸

The appeals court noted section 689.01 of the *Florida Statutes* provides “that an interest in land be conveyed ‘by instrument in writing, signed in the presence of two subscribing witnesses by the party . . . conveying . . . such . . . interest’”²⁶⁹ American argued against summary judgment because there allegedly were questions of material fact supposedly raised by the deed having three signatures and the notary having seen the grantor sign the deed as evidenced by its affidavit in opposition to summary judgment.²⁷⁰ The appeals court found the affidavit insufficient because it failed to state the notary signed in the capacity of a witness.²⁷¹ There is no presumption that

260. *Id.*

261. *Id.*

262. *Id.* at 590.

263. *Eckerd Corp.*, 786 So. 2d at 590.

264. *Id.* at 593.

265. *Id.*

266. *Id.*

267. 769 So. 2d 508 (Fla. 5th Dist. Ct. App. 2000).

268. *Id.* at 509.

269. *Id.*

270. *Id.*

271. *Id.* at 509–10.

when a notary acknowledges an instrument the notary is signing also as a witness.²⁷² The lower court was affirmed.²⁷³

Mattox v. Mattox.²⁷⁴ The issue here is whether decedent delivered a properly executed and recorded deed to the husband.²⁷⁵

In this case the decedent divided a three-acre parcel of land into three one-acre lots by executing a deed to each lot, and by naming as grantee each of her three sons.²⁷⁶ She kept a life estate to herself in each deed and recorded them in 1979.²⁷⁷ In 1996, when decedent's health began to fail, she prepared a deed reconveying appellant husband's lot, appellee's lot, and one-half of the third son's lot to appellee.²⁷⁸ The deed was executed by decedent in the hospital and was recorded by appellee.²⁷⁹ After decedent's death, appellants sued appellee to quiet title, for slander of title, and for unjust enrichment.²⁸⁰ The trial court failed to determine whether the title to appellant husband's lot had vested and appellants filed an appeal.²⁸¹

The court held that the recording of the 1979 deed to appellant husband in the absence of fraud vested the remainder interest in appellant husband, so that, upon decedent's death, he was vested with fee simple title.²⁸² Therefore, the judgment was vacated except as to its denial of appellee's unlawful entry claim.²⁸³

Zurstrassen v. Stonier.²⁸⁴ The issue is whether the trial court erred in entering summary judgment for defendants in plaintiff Zurstrassen's quiet title action where factual issues existed as to whether Zurstrassen should be estopped from asserting that deed was a forgery, whether he waived his right to contest the forged deed, and whether he ratified the forged deed.²⁸⁵

In June 1997, Klaus Zurstrassen, a citizen of Germany, and his brother Rolf, a United States citizen, purchased two lots in Indian River County with

272. *Am. Gen. Home Equity, Inc.*, 769 So. 2d at 509 (citing *Walker v. City of Jacksonville*, 360 So. 2d 52 (Fla. 1st Dist. Ct. App. 1978)).

273. *Id.* at 510.

274. 777 So. 2d 1041 (Fla. 5th Dist. Ct. App. 2001).

275. *Id.* at 1043.

276. *Id.* at 1042.

277. *Id.*

278. *Id.*

279. *Mattox*, 777 So. 2d at 1042.

280. *Id.*

281. *Id.* at 1042-43.

282. *Id.* at 1043.

283. *Id.*

284. 786 So. 2d 65 (Fla. 4th Dist. Ct. App. 2001).

285. *Id.* at 67.

the intent to build on the lots and then sell them.²⁸⁶ On September 10, 1997, Klaus returned to Germany leaving Rolf in charge of commencing construction.²⁸⁷ A deed was recorded fifteen days later, conveying Klaus' interest to Rolf.²⁸⁸ Klaus returned in October, unaware of the deed, and contacted a realtor to list the property in February 1998.²⁸⁹ When the listing agent's preliminary title search indicated that Klaus' name did not appear on the last deed of record, his brother Rolf led him to believe it was just a mix up and that he shouldn't worry about title problems.²⁹⁰ The two brothers entered into a written agreement that stated title was in Rolf's name alone and then outlined the process by which the proceeds of sale would be distributed after closing.²⁹¹ Because his visa was expiring, Klaus had to return to Germany shortly thereafter.²⁹²

In June of 1998, Rolf transferred title to both lots to David Stonier by quit claim deed.²⁹³ Two months later, Stonier transferred title to the Wihlborgs by warranty deed.²⁹⁴ The deed was inadvertently recorded in the wrong county and not correctly recorded in Indian River County until November 23, 1998.²⁹⁵ Klaus had received notice while in Germany that the lots had been sold, and as soon as he returned to the United States, he investigated the title and filed a suit to quiet title to the property and for rescission.²⁹⁶ The *lis pendens* was recorded on November 10, 1998, thirteen days before the Wihlborg deed.²⁹⁷

The trial court entered summary judgment in favor of the defendants.²⁹⁸ The court concluded that Klaus either waived or was estopped from asserting his rights to object to the forged deed when he entered into the February 1998 agreement with his brother, on the basis that he was aware of the forged deed in 1998 and failed to take action.²⁹⁹

286. *Id.*

287. *Id.*

288. *Id.*

289. *Zurstrassen*, 786 So. 2d at 67.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Zurstrassen*, 786 So. 2d at 67.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 68.

299. *Zurstrassen*, 786 So. 2d at 68.

The appellate court held that because the deed from Klaus to Rolf was void, it had no legal effect to transfer Klaus' ownership of the property to Rolf.³⁰⁰ "[A] forged deed is void and thus creates no legal title nor affords protection to those claiming under it."³⁰¹ If fraud in the inducement is present, then the deed may still convey title but be voidable in equity.³⁰² When applied to titles of land, a party who allows another to purchase title to the property under an erroneous opinion of title and who by acts, words or silence, does not disclose his claim, cannot come back later and exercise his legal right against the purchaser.³⁰³ In this case, because Klaus made no representations to either Stonier or the Wihlborgs, and the record contained no evidence indicating he knew of the forged deed at the time he entered into the February 1998 agreement with his brother, the trial court erred in concluding he had knowledge of the forgery and failed to take action on it.³⁰⁴ Appellees' argument for equitable estoppel fails because they cannot show Klaus misrepresented a material fact (clear title) that they relied on to their detriment.³⁰⁵

The appellate court also found issues of fact as to whether Klaus waived his right to contest the forged deed.³⁰⁶ In order to waive a right, a party has to have: "(1) . . . a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge of [that] right; and (3) the intention to relinquish the right."³⁰⁷ "Waiver of fraud can occur where a party should have discovered the fraud through ordinary diligence."³⁰⁸

Waiver can also be implied; forbearance for a reasonable time alone is not enough, but conduct that leads a party to believe a right has been waived may imply such a waiver.³⁰⁹ In this case, the appellate court found questions

300. *Id.* at 68.

301. *Id.* See *McCoy v. Love*, 382 So. 2d 647, 648 (Fla. 1979).

302. *Zurstrassen*, 786 So. 2d at 68.

303. *Id.* at 69; see also *Coram v. Palmer*, 58 So. 721, 722 (Fla. 1912).

304. *Zurstrassen*, 786 So. 2d at 70.

305. *Id.* at 71.

306. *Id.* at 70.

307. *Id.* See also *Leonardo v. State Farm Fire & Cas. Co.*, 675 So. 2d 176, 178 (Fla. 4th Dist. Ct. App. 1996).

308. *Zurstrassen*, 786 So. 2d at 70; see *Hurner v. Mut. Bankers Corp.*, 191 So. 831, 833 (Fla. 1939).

309. *Zurstrassen*, 786 So. 2d at 70; see *Am. Somax Ventures v. Touma*, 547 So. 2d 1266, 1268 (Fla. 4th Dist. Ct. App. 1989); *Arbogast v. Bryan*, 393 So. 2d 606, 608 (Fla. 4th Dist. Ct. App. 1981).

of fact existing as to whether Klaus used due diligence in discovery of the forgery.³¹⁰

The appellate court also found that the lower court erred in granting summary judgment on the issue of ratification of the fraud.³¹¹ Ratification of fraud is an issue of fact.³¹² If Klaus knew of the fraud, did not reject it, and took a material act inconsistent with an intent to avoid it, or delayed in asserting any remedial rights, then he would have ratified the fraud.³¹³ Here, there was no evidence indicating he had knowledge of the fraud.³¹⁴ The document acknowledging title in Rolf's name alone and authorizing Rolf to sell the property was based on his good faith belief that the title problems were merely a mix up, not the true state of ownership of the property.³¹⁵

X. EASEMENTS

*Perkins v. Smith.*³¹⁶ The issue is whether the trial court erred in its finding that a recorded easement agreement between Perkins' predecessor in title and Smith precludes Perkins from obtaining a statutory way of necessity across Smith's property.³¹⁷

Perkins purchased a landlocked parcel of land for residential and agricultural purposes.³¹⁸ His land is bordered by property owned by Smith, a Mr. Clemmons, the South Florida Water Management District, and the Kissimmee River.³¹⁹ He accessed his property by using an existing private road over Smith's land, which had been there for eight years.³²⁰ Perkins knew before taking title that his seller had entered into an easement agreement with Smith regarding the use of the road.³²¹ The recorded agreement required extensive improvements to the road, at the expense of the grantee for permanent use of the road.³²² Smith offered Perkins the same

310. *Zurstrassen*, 786 So. 2d at 70–71.

311. *Id.* at 71.

312. *Id.*

313. *Id.* See *Ball v. Ball*, 36 So. 2d 172, 177 (Fla. 1948).

314. *Zurstrassen*, 786 So. 2d at 71.

315. *Id.*

316. 794 So. 2d 647 (2d Dist. Ct. App. 2001).

317. *Id.* at 648.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Perkins*, 794 So. 2d at 648.

322. *Id.*

contractual use of the easement afforded his seller.³²³ Perkins took the position that this was a unilateral offer, and he declined.³²⁴ There was testimony at trial that if he built a new road, Perkins could access his land from a public road to the north.³²⁵ Although the route would be shorter than the one presently used, the new road would have to be built over mostly raw land and bodies of water.³²⁶ The trial court entered a judgment that Perkins had “an express right to build a paved road onto his property” pursuant to the recorded easement and Smith’s offer.³²⁷

The appellate court reversed, holding that Perkins was not barred from the benefits of section 704.01(2) of the *Florida Statutes*.³²⁸ A statutory way of necessity, exclusive of any common-law right exists when a parcel of land is landlocked so that no practicable route of egress or ingress is available to the nearest public or private road.³²⁹ The land must be outside any municipality and either used or intended to be used for residential or agricultural purposes.³³⁰ The owner or tenant thereof may use and maintain an easement over the lands lying between the landlocked parcel and the nearest practical route.³³¹

The term “practical” used in section 704.01 of the *Florida Statutes* is defined in section 704.03 of the *Florida Statutes* to mean “without the use of bridge, ferry, turnpike road, embankment, or substantial fill.”³³² In this case, in order for Perkins to reach the public road to the north, he would have to construct a road over mostly raw land and bodies of water, requiring embankment, and involving substantial fill.³³³ Based on the foregoing reasoning, the appellate court concluded that the existing road across Smith’s land constituted the shortest, practical route, and Perkins was entitled to a statutory way of necessity across Smith’s lands, notwithstanding the terms of the easement.³³⁴

323. *Id.*

324. *Id.*

325. *Id.*

326. *Perkins*, 794 So. 2d at 648.

327. *Id.*

328. *Id.*

329. *Id.* (citing FLA. STAT. § 704.01(2) (1999)).

330. *Id.*

331. *Perkins*, 794 So. 2d at 648.

332. *Id.* (citing FLA. STAT. § 704.03 (1999)).

333. *Id.* See *Keene v. Jackson*, 732 So. 2d 1138 (Fla. 1st Dist. Ct. App. 1999); *Trammell v. Ward*, 667 So. 2d 223 (Fla. 1st Dist. Ct. App. 1995); *Walkup v. Becker*, 161 So. 2d 893 (Fla. 1st Dist. Ct. App. 1964).

334. *Perkins*, 794 So. 2d at 648.

XI. EMINENT DOMAIN

*Armadillo Partners, Inc. v. Department of Transportation.*³³⁵ The Department was engaged in a road improvement project that required taking part of the landowner's parking lot.³³⁶ The landowner was entitled to severance damages for the loss in value the taking effected on its remaining land.³³⁷ Ordinarily, severance damages are calculated as the difference between the value of the land before the taking and after.³³⁸ However, an alternative valuation is the cost of curing the harm the taking caused.³³⁹ In this case, the Department took seventy-three of the 140 parking spaces in the parking lot.³⁴⁰ The Department proposed a plan to cure part of that loss by locating twenty-six parking spaces elsewhere on the landowner's land.³⁴¹ Over the landowner's objection, the trial court admitted valuation testimony that was based upon that plan.³⁴² The district court found that testimony inadmissible because it was based on a misconstruction of the law and, consequently, reversed the case.³⁴³

The Department's expert used the relocation of twenty-six parking spaces to reduce the severance damages suffered by the landowner.³⁴⁴ However, the expert failed to offset the loss the landowner would suffer by that relocation.³⁴⁵ In this case, the twenty-six parking spaces were to be carved out of an "Arbor Area" located in front of some of the businesses.³⁴⁶ "In a consistent line of cases, Florida courts have held that where property outside the parcel taken is converted to parking to effect a cure of severance damages, the loss of that property must be taken into account in determining severance damages."³⁴⁷ The valuation did not include independent consideration to the landowner's loss of that area, so the valuation should not have been admitted into evidence.³⁴⁸

335. 780 So. 2d 234 (Fla. 4th Dist. Ct. App. 2001).

336. *Id.* at 235.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Armadillo Partners, Inc.*, 780 So. 2d at 235.

341. *Id.*

342. *Id.*

343. *Id.* at 236.

344. *Id.* at 235.

345. *Armadillo Partners, Inc.*, 780 So. 2d at 236.

346. *Id.* at 235.

347. *Id.*

348. *Id.*

The cure was also based upon a proposal to build new driveways at particular locations.³⁴⁹ However, the driveways could not be built there without violating the regulations of the Water Management District.³⁵⁰ Thus, the cure was based upon mere speculation that it could be put into effect.³⁵¹ Equally important, the relocation of the driveways did not appear in the pleadings or in the construction plans entered into evidence.³⁵² It was an error to allow testimony about a plan that was inconsistent with the plans that were in evidence.³⁵³

*Cordones v. Brevard County.*³⁵⁴ The county condemned an easement to the beach as part of a beach renourishment project.³⁵⁵ Evidence showed that without the project, the beach would erode through the dune line.³⁵⁶ In order to obtain federal funds, the county needed at least a fifty-year easement.³⁵⁷ The landowners unsuccessfully asserted that the county had not established the taking was necessary for the public purpose claimed.³⁵⁸ The district court rejected this claim.³⁵⁹ It recognized that “[n]o bright line test is available to determine what constitutes ‘reasonable necessity’ for a taking by a condemning authority.”³⁶⁰ However, “[a] trial court’s order approving condemnation of private property for public use should not be disturbed on appeal when the taking is supported by good faith considerations of cost, safety, environmental protection and long-term planning.”³⁶¹ The county had followed the directions of the United States Corps of Engineers and condemned only what was required to do the job.³⁶² Thus, there was sufficient evidence of a public purpose and no evidence to suggest bad faith or over reaching by the county.³⁶³

349. *Id.* at 236–37.

350. *Armadillo Partners, Inc.*, 780 So. 2d at 237.

351. *Id.*

352. *Id.*

353. *Id.*

354. 781 So. 2d 519 (Fla. 5th Dist. Ct. App. 2001).

355. *Id.* at 521.

356. *Id.*

357. *Id.*

358. *Id.* at 521–22.

359. *Cordones*, 781 So. 2d at 522.

360. *Id.*

361. *Id.*

362. *Id.* at 521.

363. *Id.* at 522.

The landowners also claimed that the county failed to introduce a valid appraisal into evidence.³⁶⁴ The county's appraiser had not produced a written report, but testified that he used his perceptions of the market and how the taking would reduce the value of the servient lands.³⁶⁵ The court recognized that the valuing of easements is problematic and that no Florida case establishes how they should be valued.³⁶⁶ Because the property taken was unique, the normal valuation methods would not be appropriate.³⁶⁷ Consequently, the method used was appropriate.³⁶⁸

The trial court, however, made an error in granting a temporary easement of unlimited duration.³⁶⁹ All the testimony, including the County's Resolution of Necessity, concerned the taking of a fifty-year easement.³⁷⁰ The order should have set the duration of the easement at fifty years and the case was remanded for the trial court to modify its order accordingly.³⁷¹

Nutt v. Orange County.³⁷² The landowner owned a 512-acre tract.³⁷³ The county took a triangular parcel of 2.545 acres for a road straightening project that was scheduled for the distant future.³⁷⁴ Exactly how the road would be straightened had not yet been determined.³⁷⁵ The landowner sought severance damages because one possible route across the triangle would have had a serious negative impact on the value of the remaining land.³⁷⁶ However, the trial court rejected the claim for severance damages and the district court affirmed.³⁷⁷ "Everyone is at the mercy of future governmental planning."³⁷⁸ However, that risk is not compensable.³⁷⁹ Severance damages can be recovered only for the diminution in value caused when part of one's land is taken, not because of the potential uses to which

364. *Cordones*, 781 So. 2d at 523.

365. *Id.*

366. *Id.*

367. *Id.* at 524.

368. *Id.*

369. *Cordones*, 781 So. 2d at 522.

370. *Id.*

371. *Id.* at 524.

372. 769 So. 2d 453 (Fla. 5th Dist. Ct. App. 2000).

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Nutt*, 769 So. 2d at 453.

378. *Id.*

379. *Id.*

the taken land may eventually be put.³⁸⁰ Consequently, this landowner was not entitled to severance damages based upon these facts.³⁸¹

*Youth for Christ of Sarasota, Inc. v. Sarasota County.*³⁸² This apparently involved a quick taking pursuant to chapter 74 of the *Florida Statutes*, which allows the condemning authority to take the property first and litigate the taking later.³⁸³ As required by the statute, the county made a "good faith" estimate of the property taken and deposited that amount into the court's registry.³⁸⁴ The landowner withdrew the money, so the only issue remaining for trial was the amount of compensation to which the landowner was entitled.³⁸⁵ To the landowner's surprise, the jury decided that the county's deposit was too generous and that the county was owed a refund of over fifty-seven thousand dollars.³⁸⁶ Accordingly, a final judgment for that amount was entered in favor of the county.³⁸⁷ The landowner subsequently filed a motion to tax costs, and the parties reached an agreement as to the appropriate figure.³⁸⁸ Then the county convinced the judge to enter an order to amend the final judgment, offsetting the costs the county owed the landowner against the refund the landowner owed the county.³⁸⁹ When the landowner's objection was overruled, the landowner appealed.³⁹⁰

The district court determined that amending the final judgment was a reversible error.³⁹¹ The county had not filed a timely motion to amend the final judgment as required by rule 1.540 of the *Florida Rules of Civil Procedure*.³⁹² The time for filing such a motion had run.³⁹³ Thereafter, the trial court no longer had jurisdiction to amend the final judgment.³⁹⁴ On remand, the trial court was ordered to enter a judgment for costs in favor of the landowner.³⁹⁵

380. *Id.* at 453–54.

381. *Id.* at 454.

382. 765 So. 2d 794 (Fla. 2d Dist. Ct. App. 2000).

383. *Id.* at 795.

384. *Id.* (citing FLA. STAT. §§ 74.051, .061 (1993)).

385. *Id.* at 795.

386. *Id.*

387. *Youth for Christ of Sarasota, Inc.*, 765 So. 2d at 795.

388. *Id.*

389. *Id.*

390. *Id.* at 794.

391. *Id.*

392. *Youth for Christ of Sarasota, Inc.*, 765 So. 2d at 795.

393. *Id.* at 795.

394. *Id.*

395. *Id.* at 796.

XII. EQUITABLE LIENS

*Liddle v. A.F. Dozer, Inc.*³⁹⁶ The contractor's complaint included claims for the foreclosure of a mechanic's lien, and also for the imposition and foreclosure of an equitable lien.³⁹⁷ Apparently, both claims were based on the same facts because the trial court found that the contractor was entitled to a mechanic's lien in the amount of \$11,042.08 and an equitable lien in the amount of \$11,042.08.³⁹⁸

A party may seek more than one remedy to redress a particular wrong.³⁹⁹ "[I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his [or her] injuries."⁴⁰⁰ The plaintiff here was not required to elect one of the remedies until it was time for the court to enter the judgment.⁴⁰¹ However, the entry of judgment containing both the mechanic's lien and the equitable lien was reversible error because it amounted to a double recovery.⁴⁰²

*Spridgeon v. Spridgeon.*⁴⁰³ Years after their divorce, former spouses were on such friendly terms that the ex-husband loaned his ex-wife the money she needed to purchase a condominium apartment.⁴⁰⁴ He also loaned her money to make repairs and renovations.⁴⁰⁵ Their understanding was that these loans would be repaid when the ex-wife was able to get a conventional mortgage loan.⁴⁰⁶ However, when the opportunity arose to get a conventional mortgage at favorable terms, the ex-wife refused to apply.⁴⁰⁷ That is when the friendship dissolved into this suit.⁴⁰⁸

The circuit court granted the ex-husband an equitable lien on the unit.⁴⁰⁹ The ex-wife appealed, claiming that the ex-husband failed to prove she had committed fraud or misrepresentation, or that they had an agreement that the

396. 777 So. 2d 421 (Fla. 4th Dist. Ct. App. 2000).

397. *Id.*

398. *Id.* at 422 n.1.

399. *Id.* at 422.

400. *Id.*

401. *Liddle*, 777 So. 2d at 422.

402. *Id.*

403. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Spridgeon*, 779 So. 2d at 501.

409. *Id.*

property would secure the loan.⁴¹⁰ The district court rejected those claims, holding such a showing was not necessary because an equitable lien could be imposed on property, even homestead property, based upon unjust enrichment.⁴¹¹ In this case, the ex-wife accepted the benefits of the loan while knowing that her ex-husband was relying upon her promise to use the property, once renovated, as security for a mortgage loan and use the proceeds to repay him.⁴¹² Allowing her to enjoy the benefits of that agreement while escaping her obligation would unjustly enrich her.⁴¹³ Conversely, imposing the lien would put her in no worse position that she would be in had she performed as promised, but it would protect her ex-husband from injury.⁴¹⁴

XIII. EQUITABLE REMEDIES

*Hollywood Lakes Country Club, Inc. v. Community Ass'n Services, Inc.*⁴¹⁵ The developer of a common interest community filed this action based on the management company's failure to take the steps needed to collect assessments from the homeowners.⁴¹⁶ The management company represented to the developer that it took those steps, despite its knowledge to the contrary.⁴¹⁷ Believing that the assessments were being collected properly, the developer did not take any action of its own to collect the assessments or see that they were collected.⁴¹⁸ The failure to collect the assessments produced a shortfall for the association.⁴¹⁹ Under the terms of the declaration, the developer was liable for such shortage.⁴²⁰ The trial court dismissed the developer's four-count complaint, but the Fourth District Court of Appeal reversed on the counts of fraud and equitable subrogation.⁴²¹

The elements of fraud are: "(1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the

410. *Id.*

411. *Id.* at 502.

412. *Id.*

413. *Spridgeon*, 779 So. 2d at 502.

414. *Id.*

415. 770 So. 2d 716 (Fla. 4th Dist. Ct. App. 2000).

416. *Id.* at 717.

417. *Id.* at 718.

418. *Id.*

419. *Id.*

420. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

421. *Id.* at 417.

representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party.”⁴²² The facts alleged included allegations of fact sufficient to establish all of the elements if proved.⁴²³ Moreover, when the developer paid the shortfall to the association, it was paying the debt for assessments owed by individual homeowners to the association.⁴²⁴ That sets up a claim for equitable subrogation, i.e., that the developer would be subrogated to the associations right to collect unpaid assessments.⁴²⁵ A person is entitled to subrogation when: “(1) the subrogee made the payment to protect his or her own interest; (2) the subrogee did not act as a volunteer; (3) the subrogee was not primarily liable for the debt; (4) the subrogee paid off the entire debt; and (5) subrogation would not work any injustice to the rights of a third party.”⁴²⁶ The developer was secondarily liable under the terms of the Declaration. So a developer should “be given the opportunity to show that the equities are in its favor in this action.”⁴²⁷

*Liddle v. A.F. Dozer, Inc.*⁴²⁸ The contractor’s complaint included claims for the foreclosure of a mechanic’s lien, and also for the imposition and foreclosure of an equitable lien.⁴²⁹ Apparently both claims were based on the same facts because the trial court found that the contractor was entitled to a mechanic’s lien in the amount of \$11,042.08 and an equitable lien in the amount of \$11,042.08.⁴³⁰

A party may seek more than one remedy to redress a particular wrong. “[I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his [or her] injuries.”⁴³¹ The plaintiff here was not required to elect one of the remedies until it was time for the court to enter the judgment.⁴³² However, the entry of judgment containing both the

422. *Id.* at 718 (quoting *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984)).

423. *Id.* at 719.

424. *Id.*

425. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 719.

426. *Id.* at 718.

427. *Id.* at 719.

428. 777 So. 2d 421 (Fla. 4th Dist. Ct. App. 2000).

429. *Id.*

430. *Id.* at 422, n.1.

431. *Id.* at 422 (quoting *Goldstein v. Serio*, 566 So. 2d 1338, 1339 (Fla. 4th Dist. Ct. App. 1990)).

432. *Id.*

mechanic's lien and the equitable lien was reversible error because it amounted to a double recovery.⁴³³

*Sander v. Ball.*⁴³⁴ The option violated the Rule Against Restraints on Alienation because it lacked a time limit.⁴³⁵ The trial court was wrong to reform the option by adding a time limit so as to avoid the rule violation. Reformation is available to make the writing agree with what the parties had actually agreed. It cannot be used to cure a defect in their agreement. Here, the parties never even discussed a time limit for the option.⁴³⁶ The court could not supply the term under the guise of reformation.⁴³⁷

*Spridgeon v. Spridgeon.*⁴³⁸ Years after their divorce, former spouses were on such friendly terms that the ex-husband loaned his ex-wife the money she needed to purchase a condominium apartment.⁴³⁹ He also loaned her money to make repairs and renovations.⁴⁴⁰ Their understanding was that these loans would be repaid when the ex-wife was able to get a conventional mortgage loan.⁴⁴¹ However, when the opportunity arose to get a conventional mortgage at favorable terms, the ex-wife refused to apply.⁴⁴² That is when the friendship dissolved into this suit.⁴⁴³

The circuit court granted the ex-husband an equitable lien on the unit.⁴⁴⁴ The ex-wife appealed, claiming that the ex-husband had failed to prove she had committed fraud or misrepresentation, or that they had an agreement that the property would secure the loan.⁴⁴⁵ The district court rejected those claims, holding such a showing was not necessary because an equitable lien could be imposed on property, even homestead property, based upon unjust enrichment.⁴⁴⁶ In this case, the ex-wife accepted the benefits of the loan while knowing that her ex-husband was relying upon her promise to use the property, once renovated, as security for a mortgage loan and use the

433. *Liddle*, 777 So. 2d at 422.

434. 781 So. 2d 527 (Fla. 5th Dist. Ct. App. 2001). This case is discussed *infra* in Part XXI.

435. *Id.* at 528–29.

436. *Id.* at 530.

437. *Id.* at 530–31.

438. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

439. *Id.* at 501.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Spridgeon*, 779 So. 2d at 501.

444. *Id.*

445. *Id.*

446. *Id.* at 502.

proceeds to repay him.⁴⁴⁷ Allowing her to enjoy the benefits of that agreement while escaping her obligation would unjustly enrich her.⁴⁴⁸ Conversely, imposing the lien would put her in no worse position than she would have been in had she performed as promised, but it would protect her ex-husband from injury.⁴⁴⁹

XIV. FORECLOSURES

*Dailey v. Leshin.*⁴⁵⁰ This is an appeal of a final summary judgment against Dailey and Warmus “on their counterclaims raising Truth-in-Lending Act (“TILA”) violations as a defense to a mortgage foreclosure.”⁴⁵¹ The main issue is whether a contract to sell property terminates a mortgagor’s right to rescind a refinance transaction.⁴⁵² The second issue is whether appellants’ motion alleging new and different TILA violations was erroneously dismissed by the trial court as moot and should have been construed as a motion to amend their counterclaim based upon its substantive content and not its heading.⁴⁵³

Nancy Dailey and Thomas Warmus, appellants, experiencing financial difficulties, hired attorney Randall Leshin to represent them in various matters.⁴⁵⁴ Leshin put them in touch with Arthur M. Walker as Trustee, who agreed to hold a mortgage on their homestead property.⁴⁵⁵ Dailey and Warmus executed a promissory note and mortgage for \$100,000 in April 1998 and a \$300,000 future advance and note at the end of May 1998.⁴⁵⁶ They were never given the required TILA notice of their right to rescind the transaction.⁴⁵⁷ When Leshin received the future advance proceeds of \$300,000, he refused to disburse it to Dailey and Warmus, claiming they owed him attorney’s fees for earlier work.⁴⁵⁸ Dailey and Warmus

447. *Id.*

448. *Spridgeon*, 779 So. 2d at 502.

449. *Id.*

450. 792 So. 2d 527 (Fla. 4th Dist. Ct. App. 2001).

451. *Id.* at 528.

452. *Id.* at 530.

453. *Id.* at 532–33.

454. *Id.* at 529.

455. *Dailey*, 792 So. 2d at 529.

456. *Id.*

457. *Id.*

458. *Id.*

subsequently failed to make the mortgage payments to Walker because they believed Leshin and Walker were conspiring together.⁴⁵⁹

Walker filed an action in 1998 to foreclose the mortgage, and appellants filed an answer, affirmative defenses and counterclaim.⁴⁶⁰ The counterclaim did not allege any TILA claims, but in its prayer for relief, sought rescission and cancellation of the \$300,000 note due to fraudulent inducement and negligent non-disclosures.⁴⁶¹ During this litigation, Dailey and Warmus entered into a contract to sell the subject property in March 1999.⁴⁶² The pending foreclosure action resulted in a cloud on their title, and the original closing date of April was extended to May, but there is no indication that the transaction actually closed.⁴⁶³ On May 3, 1999, Dailey and Warmus' motion to amend their answer and counterclaim to allege TILA violations, RESPA violations and violations of the Mortgage Brokers Act and Fair Credit Reporting Act was granted.⁴⁶⁴ Walker moved for summary judgment on the amended counterclaim, claiming that appellant's right of rescission under TILA had expired because they contracted to sell the property.⁴⁶⁵ The trial court granted the summary judgment and determined that all remaining motions were moot.⁴⁶⁶ Walker subsequently filed a motion for summary judgment on the foreclosure complaint, attaching an affidavit of the amounts due under both notes at the default interest rate of eighteen percent.⁴⁶⁷ Dailey and Warmus responded with a motion alleging new TILA violations, which was never heard by the court.⁴⁶⁸ The property was eventually sold in December 1999.⁴⁶⁹ Walker was paid, and Dailey and Warmus then appealed the summary judgment entered in Walker's favor on their counterclaim.⁴⁷⁰

The appellate court first addressed the issue of whether Dailey and Warmus' contract for sale in March 1999 terminated their right of rescission

459. *Id.*

460. *Dailey*, 792 So. 2d at 529.

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Dailey*, 792 So. 2d at 529.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Dailey*, 792 So. 2d at 529.

under Section 1635(f) of the Federal Truth-in-Lending Act.⁴⁷¹ Section 1635(f) provides:

An obligor's right of rescission shall expire three years after the date of consummation of the transaction *or upon the sale of the property*, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor⁴⁷²

A consumer has the right to rescind up to three business days after the closing of the transaction or delivery of the TILA disclosures.⁴⁷³ If the consumer does not receive the disclosures, the right to rescind expires three years after the closing date or upon the sale of the property, whichever occurs first.⁴⁷⁴ Following the analysis used by the Ninth Circuit Court of Appeals,⁴⁷⁵ the appellate court held that Dailey and Warmus' TILA claims based on failure to disclose the right to rescind expired when they entered into a contract to sell the property.⁴⁷⁶ In this case, when Dailey and Warmus contracted to sell their property in March, their right to rescind expired before they exercised it in April.⁴⁷⁷ The fact that the sale is pending is sufficient to trigger the expiration of the right to rescind.⁴⁷⁸ The transaction does not have to close.⁴⁷⁹

471. *Id.* Section 1635(a) provides that where a security interest is retained or acquired against the principal residence of the obligor in a consumer credit transaction, "the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section," whichever is later, by notifying the creditor of his right to do so. 15 U.S.C. § 1635(a) (1997).

472. 15 U.S.C. § 1635(f) (1997) (emphasis added).

473. *Dailey*, 792 So. 2d at 530.

474. *Id.* at D1547-48.

475. *See Hefferman v. Bitton*, 882 F.2d 379, 384 (9th Cir. 1989) (contract for sale of property terminates the right of rescission pursuant to section 1635(f) rather than the actual sale).

476. *Dailey*, 792 So. 2d at 530. *See Hefferman*, 882 F.2d at 384. A sale is defined as a "contract between two parties," in which the seller, "in consideration of the payment of money or promise of payment . . . , transfers to the [buyer] the title and possession of the property." *Dailey*, 792 So. 2d at 531 (quoting BLACK'S LAW DICTIONARY 1200 (5th ed. 1979)).

477. *Dailey*, 792 So. 2d at 532.

478. *Id.*

479. *Id.*

The appellate court then reviewed the issue of whether the trial court should have heard Dailey and Warmus' motion filed in response to Walker's motion for summary judgment.⁴⁸⁰ In reviewing the motion, the appellate court found that even though it is not titled a "Motion to Amend the Counterclaim," in substance it seeks to amend.⁴⁸¹ The prayer for relief requested that the court "address the issues of the motion as a new and separate" TILA violation.⁴⁸² Motions to amend should be liberally granted.⁴⁸³ The motion described an arguable additional violation of TILA that caused appellants additional damages.⁴⁸⁴ For this reason, the trial court improperly concluded it was moot.⁴⁸⁵ So, the appellate court reversed to permit the lower court to hear and rule on the motion.⁴⁸⁶

*Deluxe Motel, Inc. v. Patel.*⁴⁸⁷ The issue is whether due process rights have been violated when the right of redemption granted in an order has expired prior to the time the order is signed by the court.⁴⁸⁸

The parties had entered into a land sale contract where appellees were to purchase appellants' motel.⁴⁸⁹ The consideration for the purchase consisted of an unsecured promissory note and another promissory note secured by a mortgage on the property with installment payments over the course of twenty years.⁴⁹⁰ The appellee defaulted on both promissory notes, and appellants foreclosed on the property with the court granting the foreclosure.⁴⁹¹ Appellees argued mistakes in the trial court's order essentially denied them the right to exercise their right of redemption.⁴⁹² The appellate court noted that the trial court's order providing appellees' right of redemption was eliminated prior to the execution of the order.⁴⁹³ The court held a right to redeem foreclosed property was considered to be an estate in land and was a valued right.⁴⁹⁴ As such, the failure of a trial court to provide

480. *Id.*

481. *Id.*

482. *Dailey*, 792 So. 2d at 532.

483. *See Dimick v. Ray*, 774 So. 2d 830, 833 (Fla. 4th Dist. Ct. App. 2000).

484. *Dailey*, 792 So. 2d at 533.

485. *Id.*

486. *Id.*

487. 770 So. 2d 283 (Fla. 5th Dist. Ct. App. 2000).

488. *Id.* at 284.

489. *Id.* at 283.

490. *Id.*

491. *Id.*

492. *Patel*, 770 So. 2d at 284.

493. *Id.*

494. *Id.*

that opportunity was not harmless error.⁴⁹⁵ Therefore, the court reversed and remanded the matter to allow appellees the right to exercise their redemption rights.⁴⁹⁶

*Indian River Farms v. YBF Partners, Inc.*⁴⁹⁷ The issue in this case is whether the right of redemption was timely and properly exercised.⁴⁹⁸ Appellee purchased property at a judicial sale, and a certificate of sale was filed with the clerk on the same day.⁴⁹⁹ Appellants objected to the sale, and the trial court overruled appellants' objections.⁵⁰⁰ The assignee of appellants intervened and attempted to exercise their right of redemption by tendering payment to the clerk of the court, which was refused.⁵⁰¹ A certificate of title was issued to appellee, and appellants moved to compel the clerk to accept assignee's tender for redemption of the property.⁵⁰² The appellate court found that appellants' objections did not concern any defect or irregularity with the foreclosure sale itself which is required in order to be a legally sufficient ground to set aside the sale.⁵⁰³

However, the appellate court did find that when assignee tendered payment under the judgment of foreclosure to the clerk of court, it properly exercised its right of redemption and did not require the court's permission.⁵⁰⁴ The appellate court held that while the clerk of court erred in failing to accept tender, such error did not render assignee's exercise of its right of redemption untimely because its tender was made prior to the filing of the certificate of title.⁵⁰⁵ The case was reversed and remanded.⁵⁰⁶

*Norwest Mortgage, Inc. v. King.*⁵⁰⁷ This is a petition for writ of certiorari seeking review of a non-final order of the Broward County Circuit Court.⁵⁰⁸ The issue is whether the trial court erred in ordering Norwest Mortgage, Inc. to issue a satisfaction on its mortgage when it received a portion of its payoff amount and the funds remaining on deposit in the court

495. *Id.*

496. *Id.*

497. 777 So. 2d 1096 (Fla. 4th Dist. Ct. App. 2001).

498. *Id.* at 1097.

499. *Id.*

500. *Id.* at 1098.

501. *Id.*

502. *Indian River Farms*, 777 So. 2d at 1098.

503. *Id.*

504. *Id.* at 1099.

505. *Id.* at 1100.

506. *Id.*

507. 789 So. 2d 1139 (Fla. 4th Dist. Ct. App. 2001).

508. *Id.*

registry did not allow for additional interest, expenses or costs accruing on the note/mortgage subsequent to the payoff statement date.⁵⁰⁹

Norwest Mortgage, Inc. commenced foreclosure proceedings against Barbara King in 1997.⁵¹⁰ At that time, the outstanding principal and interest totaled approximately \$8000.⁵¹¹ Its motions for summary judgment were continued repeatedly in order to allow King to quiet title to the property and then arrange financing to satisfy the mortgage.⁵¹² King received a payoff statement on December 20, 1999, valid until January 14, 2000.⁵¹³ The payoff was for \$23,396.47, and included Norwest's payment of taxes and insurance on the property for the period of time during which the mortgage was in default.⁵¹⁴ King requested a breakdown of the payoff amount along with copies of invoices and receipts.⁵¹⁵ Because she did not receive them timely, she did not satisfy the mortgage by January 14, 2000.⁵¹⁶ She did, however, close on new financing, and funds were withheld to pay off Norwest.⁵¹⁷ In March 2000, King filed a motion for expedited final hearing and to shorten the discovery period and time for production.⁵¹⁸ She requested that the court toll the interest and attorney's fees on the open mortgage from the date of her closing.⁵¹⁹ Norwest argued that it did not produce the requested information timely because, as a result of the delays in waiting for King to quiet title and arrange financing, some of the records were hard to obtain.⁵²⁰

The trial court granted King relief, and on May 25, 2000, ordered \$23,396.47 (the December 20 payoff statement amount) placed in the court registry.⁵²¹ Of these funds, \$11,228.34 was to be disbursed to petitioner, and the disputed balance would remain in the court registry pending a determination of the appropriate expenses.⁵²² In addition, the order required Norwest to issue a satisfaction of its mortgage within ten days of its receipt

509. *Id.* at 1140.

510. *Id.*

511. *Id.*

512. *King*, 789 So. 2d at 1140.

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. *King*, 789 So. 2d at 1140.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *King*, 789 So. 2d at 1140.

of the \$11,228.34.⁵²³ Norwest appealed the order on the basis that the amount recovered is insufficient to cover the amount due.⁵²⁴

Under Florida law, a mortgagee is required to issue a satisfaction of mortgage after full payment of the obligations contained in the note.⁵²⁵ The appellate court quashed the order, holding that it could lead to irreparable harm to Norwest if it were later discovered that Norwest was entitled to additional interest and expenses.⁵²⁶ The issuance of a satisfaction of mortgage terminates the right to foreclose on the property to collect for any additional funds owed.⁵²⁷ In this case, because the payoff amount was in dispute, absent an evidentiary hearing, the trial court was unable to determine that Norwest was *not* entitled to receive additional funds in excess of the payoff figure quoted.⁵²⁸ The amount deposited did not include additional interest, advances, or funds for attorney's fees and costs that continued to accrue subsequent to January 14, 2000 through the date of an evidentiary hearing.⁵²⁹ The appellate court concluded that the trial court forced Norwest to settle its foreclosure action on King's terms, with or without an evidentiary hearing, which constitutes a departure from the essential requirements of law.⁵³⁰

Secretary of Veteran Affairs v. Tejedo.⁵³¹ This is a rehearing *en banc*.⁵³² The issue in this case is whether the court will grant leave to amend a complaint when the original case was heard over a year ago and the party who instigated the original lawsuit seeking redemption sold the property in question.⁵³³

In this case, the appellant instigated a suit to force redemption against the appellee, an omitted lienor in a foreclosure action.⁵³⁴ During the course

523. *Id.*

524. *Id.*

525. FLA. STAT. § 701.04(1) (2000).

526. *King*, 789 So. 2d at 1140.

527. *See generally* *Atkins v. Rybovich Boat Works, Inc.*, 561 So. 2d 594 (Fla. 4th Dist. Ct. App. 1990), *quashed on other grounds*, 585 So. 2d 594 (Fla. 1991); *State-Wide Constr. Inc., v. Dowda*, 424 So. 2d 198, 198–99 (Fla. 5th Dist. Ct. App. 1983); *Hallmark Mfg. Inc. v. Lujack Constr. Co.*, 372 So. 2d 520 (Fla. 4th Dist. Ct. App. 1979).

528. *King*, 789 So. 2d at 1140.

529. *Id.*

530. *Id.*

531. 774 So. 2d 709 (Fla. 3d Dist. Ct. App. 2000).

532. *Id.* at 712.

533. *Id.*

534. *Id.*

of the trial, the appellant transferred the property without notifying the court or appellee.⁵³⁵

The appeals court held that this “amounts to *mala fides* and cannot be condoned.”⁵³⁶ Also, “[p]arties must come to courts of equity with clean hands as equity does not condone concealment of affirmative misconduct.”⁵³⁷ The Appellate Court remanded the case with instructions allowing for leave to amend the pleadings to seek damages for the difference between the property’s fair market value and the amount tendered by appellee, plus costs and fees.⁵³⁸

*South Palm Beach Investments, Inc. v. Regatta Trading Ltd.*⁵³⁹ The issue raised here is whether an emergency motion to intervene, filed by a prior titleholder, was properly denied by the trial court.⁵⁴⁰

South Palm Beach Investments sold its property, and the new owner obtained a mortgage at closing.⁵⁴¹ When the mortgage was foreclosed, South Palm Beach Investments filed a motion to intervene, which was dismissed.⁵⁴²

The appellate court affirmed the order.⁵⁴³ Once a party has conveyed all of its rights, title, and interest in a parcel of land to another, that party will not be a proper party to a suit foreclosing the mortgage.⁵⁴⁴ Here, Regatta Trading was seeking only to foreclose its mortgage.⁵⁴⁵ It was not seeking a deficiency judgment.⁵⁴⁶

XV. HOMESTEAD

*Dyer v. Beverly & Tittle, P.A.*⁵⁴⁷ The issue here is whether the marital property or homestead can be subject to forced sale when the home is awarded as a form of child support under the divorce proceeding.⁵⁴⁸

535. *Id.* at 713.

536. *Tejedo*, 774 So. 2d at 713.

537. *Id.* (citing Dep’t of Revenue v. David, 684 So. 2d 308 (Fla. 1st Dist. Ct. App. 1996)).

538. *Id.*

539. 789 So. 2d 396 (Fla. 4th Dist. Ct. App. 2001).

540. *Id.* at 397.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Regatta Trading Ltd.*, 789 So. 2d at 397.

545. *Id.*

546. *Id.* at 397.

547. 777 So. 2d 1055 (Fla. 4th Dist. Ct. App. 2001).

548. *Id.* at 1056.

In this case, the couple divorced and the house was awarded to the wife as a form of child support.⁵⁴⁹ The court also awarded the wife her attorney's fees.⁵⁵⁰ The wife then assigned her orders of final judgment for attorney's fees to her attorneys so that they may pursue their fees.⁵⁵¹ The attorney's placed a judgment lien against the home that the wife lived in which was owned in the name of the former husband.⁵⁵²

The appellate court found that the homestead exemption statute is to protect not only the husband, but also his family from destitution and becoming public charge.⁵⁵³ The courts have declined to act in equity to permit the forced sale of a homestead property, unless there is evidence of the debtor's fraudulent or egregious conduct.⁵⁵⁴

The appellate court held that the evidence presented in this case did not support the application of equitable exception to the homestead exemption and, therefore, reversed.⁵⁵⁵

*Havoco of America, Ltd. v. Hill.*⁵⁵⁶ This is a certified question of law to the Supreme Court of Florida, from the United States Court of Appeals for the Eleventh Circuit, that is determinative of a case pending in the federal courts for which there appears to be no controlling precedent. "Does Article X, Section 4⁵⁵⁷ of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or defrauding creditors in violation of Fla. Stat. § 726.105 or §§ 222.29 and 222.30?"⁵⁵⁸

In 1981, Havoco sued Hill, claiming damages for fraud, conspiracy, tortious interference with contractual relations, and breach of fiduciary duty.⁵⁵⁹ When the case finally went to trial, nine years later, a jury found for

549. *Id.*

550. *Id.* at 1057.

551. *Id.*

552. *Dyer*, 777 So. 2d at 1057.

553. *Id.* at 1059 (quoting *Anderson v. Anderson*, 44 So. 2d 652, 655 (Fla. 1950)).

554. *Id.* (citing *Smith v. Smith*, 761 So. 2d 370 (Fla. 5th Dist. Ct. App. 2000)).

555. *Id.* at 1059-60.

556. 790 So. 2d 1018 (2001).

557. Art. X, Section 4(a)(1) of the Florida Constitution provides in part: There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon; obligations contracted for the purchase, improvement or repair thereof; or obligations contracted for house, field, or other labor performed on the realty

Id.

558. *Hill*, 790 So. 2d at 1019.

559. *Id.*

Havoco and awarded it \$15,000,000 in damages.⁵⁶⁰ The district court entered judgment in accordance with the verdict on December 19, 1990; the judgment became enforceable on January 2, 1991.⁵⁶¹ Hill purchased the Destin property on December 30, 1990, for which he paid \$650,000 in cash and spent approximately \$75,000 for household furnishings.⁵⁶² Hill claims that although he was a long time resident of Tennessee, he intended to make the Destin property his retirement home.⁵⁶³

In July, 1992, Hill filed a voluntary Chapter Seven bankruptcy petition, in which he claimed that real property located in Destin, Florida was exempt as his homestead under Article X, Section 4 of the Florida Constitution.⁵⁶⁴ Havoco objected, arguing that Hill converted nonexempt assets into the homestead with the intent to hinder, delay or defraud his creditors.⁵⁶⁵ The bankruptcy court denied Havoco's objections to Hill's homestead claims, concluding that Havoco had not proven by a preponderance of the evidence that Hill acted with the specific intent to defraud his creditors.⁵⁶⁶

Havoco appealed, and the district court reversed, finding error in the bankruptcy court's conclusion that a debtor's specific intent to defraud his creditors could provide a ground to deny the homestead exemption.⁵⁶⁷ The mandate ordered the bankruptcy court "to determine whether and under what circumstances Florida law prevented debtors . . . from converting nonexempt property to exempt property."⁵⁶⁸ On remand, the bankruptcy court held that under Florida law, Hill was not prohibited from converting nonexempt assets into a homestead, even if he had the intent to put those assets outside the reach of his creditors.⁵⁶⁹ They further held that a debtor's right to the homestead exemption is not affected by Florida's fraudulent conveyance statute.⁵⁷⁰ The district court affirmed the decision and Havoco appealed.⁵⁷¹ The Eleventh Circuit certified the instant question to the Supreme Court of Florida, detailing the inconsistent treatment of the issue in the bankruptcy

560. *Id.*561. *Id.*562. *Id.*563. *Hill*, 790 So. 2d at 1019.564. *Id.*565. *Id.*566. *Id.* at 1020.567. *Id.*568. *Hill*, 790 So. 2d at 1020 (citing *Havoco of Am., Ltd. v. Hill*, 197 F.3d 1135, 1138 (11th Cir. 1999)).569. *Id.*570. *Id.*571. *Id.*

courts based on prior applications of the homestead exemption by the Supreme Court.⁵⁷²

The Supreme Court of Florida answered the certified question in the affirmative.⁵⁷³ “The transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in article X, section 4.”⁵⁷⁴

The court applied a liberal construction to the exemption in the interest of protecting the family home, but a strict construction of the exceptions contained therein.⁵⁷⁵ In applying strict construction to the exceptions, the Court has refused to allow civil forfeitures of property following convictions under the RICO Act or findings of fact that debtors converted nonexempt assets into exempt homestead property with the intent to defraud their creditors.⁵⁷⁶

The disparate treatment of the exception appears in cases where the Supreme Court of Florida, in certain instances has allowed the imposition of equitable liens against homestead property under the “doctrine of equitable subrogation.”⁵⁷⁷ The Supreme Court of Florida rejected Havoco’s argument that its equitable lien jurisprudence created a fourth exception in cases where fraud or conversion of nonexempt assets into a homestead for purposes of avoiding creditors.⁵⁷⁸

*Moss v. Estate of Moss.*⁵⁷⁹ In this case, the issue is whether the homestead property inures to the deceased spouse’s descendants.⁵⁸⁰

The decedent died testate leaving no surviving spouse or minor children.⁵⁸¹ The personal representative of the estate, who is also a beneficiary under decedent’s will, filed a petition to determine homestead status of

572. *Id.*

573. *Hill*, 790 So. 2d at 1019.

574. *Id.* at 1028.

575. *Id.* at 1021.

576. *See* *Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992) (“[A]rticle X, section 4 expressly provides for three exceptions to the homestead exemption. Forfeiture is not one of them.”); *Bank Leumi Trust Co. v. Lang*, 898 F. Supp. 883, 887 (S.D. Fla. 1995), (“[H]omestead exemption does not contain an exception for real property which is acquired in the state of Florida for the sole purpose of defeating the claims of out-of-state creditors.”).

577. Legal Subrogation, a/k/a equitable subrogation. Subrogation that arises by operation of law or by implication in equity to prevent fraud or injustice. BLACK’S LAW DICTIONARY 1440 (7th ed. 1999).

578. *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1024 (Fla. 5th Dist. Ct. App. 2000).

579. 777 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2001).

580. *Id.* at 1111.

581. *Id.*

real property.⁵⁸² The petition requested an order to determine 1) that the decedent's condo was homestead property; 2) that the condo descended to the beneficiaries named in the will; and 3) that the constitutional exemption of a decedent's homestead from creditors' claims against the decedent's estate inured to the beneficiaries.⁵⁸³

A creditor of the estate filed an objection to the petition, claiming the petitioner failed to establish that the devisees of the real estate were qualified heirs of the decedent.⁵⁸⁴ The trial court found that the constitutional exemption from claims of the decedent's creditors inured to three intestate heirs, but the exemption did not inure to the heirs of the predeceased spouse of the decedent.⁵⁸⁵

The appellate court held that the trial court erred in excluding the brother of the decedent's last deceased spouse and the niece of the decedent's last deceased spouse as devisees of the decedent's homestead.⁵⁸⁶

*Reinish v. Clark.*⁵⁸⁷ The appellants raise three separate issues as to why they and the class like them should receive homestead exemption on their Florida house.⁵⁸⁸

The first count alleged that denying the homestead tax exemption to the Reinishes and their class solely on the basis of their out-of-state residency was a constitutional and statutory discrimination in violation of the Fourteenth Amendment of the United States Constitution.⁵⁸⁹ The appellate court held that:

Whether the person is a Florida resident or not, only one homestead exemption is allowed, irrespective of how many other residences the person owns. Thus, the exemption distinguishes between real estate used in good faith as a Florida permanent residence, on the one hand, and (by implicit exclusion) any other real estate such as secondary or vacation residences or rentals, on the other hand.⁵⁹⁰

582. *Id.*

583. *Id.*

584. *Moss*, 777 So. 2d at 1111-12.

585. *Id.* at 1112.

586. *Id.* at 1113.

587. 765 So. 2d 197 (Fla. 1st Dist. Ct. App. 2000).

588. *Id.* at 201.

589. *Id.* at 203.

590. *Id.* at 205.

The appellate court found that the statute did not treat Florida residents who had more than one home in Florida any differently than those from out of town.⁵⁹¹

The second count alleged that the Florida constitutional and statutory homestead tax exemption provisions unconstitutionally infringe upon the fundamental rights to travel interstate and to own property, in violation of the Privileges and Immunities Clause.⁵⁹² The appellate court held that the exemption is closely and substantially related to the State's valid objective to promote and protect taxpayers' financial ability to purchase and maintain the primary shelter, which is totally unrelated to state residency.⁵⁹³ The appellate court found that because the Reinishes had not demonstrated the denial of a right protected by the Privileges and Immunities Clause, the count was properly dismissed.⁵⁹⁴

The third count alleged that the constitutional and statutory homestead tax exemption provisions constitute a per se violation of the Dormant Commerce Clause in that they "attempt to create customs duties, barriers, or taxes that discriminate against and unduly burden interstate commerce and impermissibly impose a tariff on citizens whose primary residence is located outside Florida."⁵⁹⁵ The appellate court found no facial discrimination against interstate commerce nor any burden on interstate commerce that outweighs its potential benefits.⁵⁹⁶ The appellate court concluded, "the Florida exemption is an even-handed regulation that promotes the legitimate, strong public interest in promoting the stability and continuity of the primary permanent home."⁵⁹⁷ The case was affirmed.⁵⁹⁸

*Spridgeon v. Spridgeon.*⁵⁹⁹ The issue here is whether an equitable lien can be placed on a homestead.⁶⁰⁰

In this case, the parties were divorced from each other and had remained friendly after the divorce.⁶⁰¹ Mr. Spridgeon purchased a condo and performed renovations on it for Mrs. Spridgeon.⁶⁰² It was determined by the

591. *Id.*

592. *Reinish*, 765 So. 2d at 207.

593. *Id.* at 210.

594. *Id.*

595. *Id.* at 210–11.

596. *Id.* at 215.

597. *Reinish*, 765 So. 2d at 215.

598. *Id.*

599. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

600. *Id.*

601. *Id.*

602. *Id.*

trial court that Mr. and Mrs. Spridgeon had agreed that this was to be a loan to Mrs. Spridgeon that she would repay by getting a conventional loan with a bank and paying the proceeds to Mr. Spridgeon.⁶⁰³

The court looked to the case of *Palm Beach Savings & Loan Ass'n v Fishbein*⁶⁰⁴ in which the wife received the homestead in a divorce.⁶⁰⁵ In that case, the husband had forged her name onto a note from the savings and loan company.⁶⁰⁶ The Supreme Court of Florida ruled that an equitable lien should be placed on the property to the extent the funds were used to pay down the previous mortgage on the property.⁶⁰⁷ The court held that Ms. Fishbein was in no worse position than she would have been if the mortgage had not been paid off.⁶⁰⁸

In this case, the judge followed *Fishbein*.⁶⁰⁹ Here, the judge ruled that an equitable lien was proper to prevent unjust enrichment and that Mrs. Spridgeon was no worse off than she would have been had she honored her agreement.⁶¹⁰

XVI. INVERSE CONDEMNATION

Department of Environmental Protection v. Youel.⁶¹¹ The trial court awarded judgment for the plaintiff based upon a finding that there had been a temporary taking when the Department improperly asserted jurisdiction and imposed development conditions that deprived the landowner of all use of the land.⁶¹² The Department of Environmental Protection (DEP) issued a final notice of violation to the landowner, but the landowner never appealed, so she is bound by the finding that the violation existed.⁶¹³ "Basically, the trial court's finding of a temporary taking was predicated upon a theory of estoppel—i.e., that DEP misled Youel in regard to permitting and mitigation."⁶¹⁴ Equitable estoppel can only be applied to the state in

603. *Id.*

604. 619 So. 2d 267 (Fla. 1993).

605. *Spridgeon*, 779 So. 2d at 502.

606. *Id.*

607. *Fishbein*, 619 So. 2d at 270.

608. *Spridgeon*, 779 So. 2d at 502.

609. *Id.*

610. *Id.*

611. 787 So. 2d 923 (Fla. 5th Dist. Ct. App. 2001).

612. *Id.* at 923–24.

613. *Id.* at 924.

614. *Id.*

exceptional cases.⁶¹⁵ Essential to the claim is proof that the reliance was on the positive act of an authorized official.⁶¹⁶ However, the record lacked those elements.⁶¹⁷ Youel was never denied a development permit because she never tried to get a development permit, and the official with whom she was dealing was not even in the permitting division of the DEP.⁶¹⁸

*Keshbro, Inc. v. City of Miami.*⁶¹⁹ Two cases were joined for consideration by the Supreme Court of Florida.⁶²⁰ Both involved the forcible closing of multiple dwelling unit structures by a Nuisance Abatement Board following the finding of a pattern of illegal activity on the premises.⁶²¹ The Supreme Court of Florida, in a unanimous opinion, upheld the action of the Nuisance Abatement Board in one case but not in the other.⁶²² The court first concluded that the temporary closing of a motel or a rental apartment building might constitute a taking under the Fifth Amendment so as to require the payment of compensation.⁶²³ The prospective regulation did not change that conclusion.⁶²⁴ The court approved the district court's reliance on *Lucas*.⁶²⁵ There had been no physical invasion of the properties, but the owners had been deprived of the beneficial use of their properties for the proscribed time because the structures could not be reasonably used for any but the prohibited uses during the period of the prohibition.⁶²⁶

A critical question was whether the governmental action fit within the nuisance exception.⁶²⁷ If the activity was a public nuisance, it could have been prohibited by a court at common law.⁶²⁸ Consequently, governmental action preventing that nuisance activity would not be a taking under the Fifth Amendment.⁶²⁹ Both cases involved illegal activities: one case involved sales of illegal drugs and the other involved prostitution as well as illegal

615. *Id.* at 924–25.

616. *Youel*, 787 So. 2d at 925.

617. *Id.*

618. *Id.*

619. 26 Fla. L. Weekly S469 (July 13, 2001).

620. *Id.*

621. *Id.*

622. *Id.* at S472.

623. *Id.* at S470.

624. *Keshbro, Inc.*, 26 Fla. L. Weekly at S471.

625. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

626. *Id.* at S471–72.

627. *Id.* at S472.

628. *Id.*

629. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

drug sales and usage.⁶³⁰ So both would fit within the nuisance exception.⁶³¹ However, “[i]t is well settled in this State that injunctions issued to abate public nuisances must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise.”⁶³² The nuisance exception had the same limits. The record revealed that in the Miami case,⁶³³ the record supported the Board’s conclusion that the operation of the motel “had become inextricably intertwined with the drug and prostitution activity”⁶³⁴ The only way to prevent the nuisance activity was to close the motel, so that order was upheld.⁶³⁵ However, in the St. Petersburg case,⁶³⁶ the record had evidence of only two cocaine sales.⁶³⁷ Consequently, closing the entire apartment house was far beyond what was necessary to prevent future sales and, in fact, prohibited legal activity as well as the illegal.⁶³⁸ Such an overly broad order could not fit within the nuisance exception, so it could not be allowed to stand.⁶³⁹

*Millender v. Department of Transportation.*⁶⁴⁰ In 1975, the Department of Transportation moved the channel in the Carrabelle River.⁶⁴¹ The change caused the landowner’s river front land to begin eroding.⁶⁴² After the hurricane of 1985, state agents issued to the landowner, along with many others, permits to put in sea walls.⁶⁴³ However, after the seawall was completed, the Florida Department of Environmental Protection cited the seawall as illegal.⁶⁴⁴ Eight years of litigation followed.⁶⁴⁵ The Department of Environmental Protection finally prevailed, and in 1993, the landowner was forced to remove the seawall.⁶⁴⁶ Without the seawall, the erosion continued and the landowner said, “[o]ur property is vanishing, going in the

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.*

634. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

635. *Id.*

636. *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. 2d Dist. Ct. App. 1999).

637. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

638. *Id.*

639. *Id.*

640. 774 So. 2d 767 (Fla. 1st Dist. Ct. App. 2000).

641. *Id.* at 768.

642. *Id.*

643. *Id.* at 771 n.4.

644. *Id.*

645. *Millender*, 774 So. 2d at 768.

646. *Id.*

river, washing down the river Our docks is (sic) torn down, our buildings is falling in,”⁶⁴⁷ The landowner brought this inverse condemnation suit for damages and an injunction.⁶⁴⁸ The trial court granted summary judgment for the Department of Transportation based on the statute of limitations, but the First District Court of Appeal reversed.⁶⁴⁹

Under the Continuing Tort Theory, an injunction may be granted to prevent further tortious conduct even though the statute of limitations would bar suit for the original tort.⁶⁵⁰ Where the tort is a continuing one, the statute of limitations does not begin to run until the last tortious act.⁶⁵¹ Therefore, the trial court should not have ruled as a matter of law that the landowner could not get injunctive relief under these circumstances.⁶⁵²

Furthermore, the district court recognized the Dickinson Stabilization Doctrine.⁶⁵³ That doctrine is based on the United States Supreme Court’s 1947 decision in *United States v. Dickinson*.⁶⁵⁴ It provided that the statute of limitations for inverse condemnation does not begin to run until the situation “becomes stabilized.”⁶⁵⁵ While the doctrine had never been officially adopted in Florida, it had been cited in one earlier Florida case.⁶⁵⁶ This court found that the doctrine was sound and should be applied in Florida, but it did certify the question of the doctrine’s viability in Florida to the Supreme Court of Florida.⁶⁵⁷ Furthermore, the district court concluded the doctrine should be applied in this case because the landowner was the victim of an unforeseeable future event, the order of the Department of Environmental Regulation, that prevented the landowner from stopping the erosion with a seawall.⁶⁵⁸

647. *Id.* at 768 n.2.

648. *Id.* at 768.

649. *Id.*

650. *Millender*, 774 So. 2d at 769.

651. *Id.*

652. *Id.* at 771.

653. *Id.* at 769.

654. 331 U.S. 745 (1947).

655. *Id.* at 749.

656. See *Hillsborough County Aviation Auth. v. Benitez*, 200 So. 2d 194, 200 (Fla. 2d Dist. Ct. App. 1967).

657. The exact question certified as being of great public importance was: “DOES THE DOCTRINE STATED IN *UNITED STATES V. DICKINSON*, 331 U.S. 745 (1947), APPLY IN AN APPROPRIATE FLORIDA CASE SO AS TO DELAY THE ACCRUAL OF AN ACTION FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF?” *Millender*, 774 So. 2d at 771 (citations omitted).

658. *Id.*

*Sayfie v. Department of Transportation.*⁶⁵⁹ In order to encourage abutting property owners to donate rights of way for the construction of Alligator Alley across southern Florida, the following language was inserted into the donation deeds: "Reserving to the Grantor, his heirs or assigns, the right of access from his remaining property to any service road which may be constructed on the outer 50 feet of the right of way described above."⁶⁶⁰ This gave those abutting landowners access to a service road, if one ran parallel to Alligator Alley.⁶⁶¹ Generally, the service road did exist and had an entrance to the highway at two-mile intervals.⁶⁶² Years later, the Department expanded Alligator Alley into a modern multilane, high speed, limited access highway, Interstate-75.⁶⁶³ To do so, the Department acquired an additional 125-foot-wide strip on the southern side of Alligator Alley.⁶⁶⁴ The plaintiffs here claimed compensation based on their loss of access.⁶⁶⁵ The trial court had granted summary judgment to the Department based on an earlier case that had denied claims for compensation to landowners on the north side of I-75.⁶⁶⁶ However, the district court found that case distinguishable because the claimants here had land on the south side, the side on which the Department had expanded.⁶⁶⁷ In effect, the claimants here had lost their easement to the abutting land where the service road might be built and that was a compensable loss.⁶⁶⁸

*Department of Environmental Protection v. Burgess.*⁶⁶⁹ The landowner acquired undeveloped wetlands in 1956.⁶⁷⁰ He had the vague idea that the land would appreciate in value and thought it would be a good investment.⁶⁷¹ Until 1992, he used the land for occasional nature walks and fishing.⁶⁷² That year he decided to develop the land.⁶⁷³ He subdivided it into smaller tracts

659. 770 So. 2d 193 (Fla. 2d Dist. Ct. App. 2000).

660. *Id.* at 194.

661. *Id.*

662. *Id.*

663. *Id.*

664. *Sayfie*, 770 So. 2d at 194.

665. *Id.*

666. *Id.* (citing *Dep't of Transp. v. Edwards*, 545 So. 2d 479 (Fla. 2d Dist. Ct. App. 1989)).

667. *Id.* at 195.

668. *Id.*

669. 772 So. 2d 540 (Fla. 1st Dist. Ct. App. 2000).

670. *Id.* at 541.

671. *Id.* at 542.

672. *Id.* at 542-43.

673. *Id.* at 542.

and put them up for sale.⁶⁷⁴ He also made plans to build a large wooden dock, boardwalk, and A-framed camping shelter.⁶⁷⁵ To build the camping shelter, he needed a dredge and fill permit from the Department of Environmental Protection, but his application was refused.⁶⁷⁶ Rather than appeal, he filed this action claiming inverse condemnation of his property.⁶⁷⁷

The landowner based his claim on *Lucas v. South Carolina Coastal Council*.⁶⁷⁸ The district court, however, pointed out that in *Lucas* the state trial court had determined that the regulation had rendered the land valueless.⁶⁷⁹ That determination had not been challenged on appeal, so the United States Supreme Court had not based its decision on that unchallenged premise.⁶⁸⁰ In contrast, in this case, the Department vigorously challenged his claim that the land was valueless or that the regulation effected a regulatory taking.⁶⁸¹ The district court concluded that no taking had occurred.⁶⁸²

To constitute a regulatory taking, the regulation must deprive the landowner of all, or substantially all, economically viable use of his land.⁶⁸³ That question turned on whether the permit denial “interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property.”⁶⁸⁴ The record showed that, at the time he bought the land, he had only a general hope of finding a way to make a profit from the land in the future.⁶⁸⁵ He did not have a specific plan that he was putting into effect at that time.⁶⁸⁶ However, a landowner does not have a right to make a profit from his investment.⁶⁸⁷ He also had an expectation that he would be able to use the land for recreation.⁶⁸⁸ The permit denial does not interfere with the way he used the land for recreation for over thirty years.⁶⁸⁹

674. *Burgess*, 772 So. 2d at 541.

675. *Id.*

676. *Id.*

677. *Id.*

678. 505 U.S. 1003 (1992); *Burgess*, 772 So. 2d at 542.

679. *Burgess*, 772 So. 2d at 542.

680. *Id.*

681. *Id.* at 543.

682. *Id.* at 544.

683. *Id.* at 543.

684. *Burgess*, 772 So. 2d at 543.

685. *Id.*

686. *Id.*

687. *Id.* at 544.

688. *Id.*

689. *Burgess*, 772 So. 2d at 544.

It merely prevents him from changing that recreational use.⁶⁹⁰ In fact, he could still build his dock and expand the recreational use without the permit.⁶⁹¹ Consequently, the landowner failed to prove his case for inverse condemnation.⁶⁹²

*State Department of Transportation v. Gayety Theatres, Inc.*⁶⁹³ A road improvement project included the building of a concrete median down the middle of a busy thoroughfare.⁶⁹⁴ Before the project, drivers coming north or south could turn directly into the theater's parking lot; similarly, patrons leaving the theater could turn directly north or south.⁶⁹⁵ After the project was completed, northbound patrons would have to go a half mile beyond the theater, make a u-turn, and come back half a mile in the southbound lane to enter the theater's parking lot.⁶⁹⁶ The theater sued for loss of access and won in the trial court.⁶⁹⁷ The district court, however, reversed.⁶⁹⁸

A landowner is not entitled to recover compensation merely because government action has caused a lessening of traffic in an abutting road.⁶⁹⁹ Compensation would only be due where access to the property had been substantially diminished.⁷⁰⁰ Whether that has happened is a question for the judge.⁷⁰¹ This case fit squarely within the first rule because the project had merely modified the flow of the northbound traffic.⁷⁰² The theater still had the same access to the roadway even if it was only from the southbound lane.⁷⁰³

*State Department of Transportation v. Suit City of Aventura.*⁷⁰⁴ The landowner operated a large shopping center at the intersection of two busy roads.⁷⁰⁵ To alleviate the severe traffic problems at the intersection, the Department changed the traffic patterns and built elevated lanes to divert

690. *Id.*

691. *Id.*

692. *Id.*

693. 781 So. 2d 1125 (Fla. 3d Dist. Ct. App. 2001).

694. *Id.* at 1126.

695. *Id.*

696. *Id.*

697. *Id.* at 1126–27.

698. *Gayety Theaters Inc.*, 781 So. 2d at 1128.

699. *Id.* at 1127.

700. *Id.*

701. *Id.*

702. *Id.* at 1127–28.

703. *Gayety Theaters Inc.*, 781 So. 2d at 1127–28.

704. 774 So. 2d 9 (Fla. 3d. Dist. Ct. App. 2000).

705. *Id.* at 10.

traffic over the intersection.⁷⁰⁶ The project resulted in the closing of one entrance to the mall and an obstruction of the view of the mall.⁷⁰⁷ The landowner sought compensation for both.⁷⁰⁸ The district court found both to be noncompensable.⁷⁰⁹

Closing the entrance would be compensable only if it substantially deprived the landowner of access to the property.⁷¹⁰ Here, the landowner still had two entrances on each of the busy roadways.⁷¹¹ In addition, the project had, to some effect, improved the access by at least one of those entrances.⁷¹² So, there was no compensable loss of access.⁷¹³ Nor did building the elevated lanes, which to some extent, blocked the light, air, and view of the mall, constitute a compensable taking.⁷¹⁴ The Department was validly exercising its police power in redesigning the traffic patterns to protect the public welfare.⁷¹⁵ To the extent that this interfered with the rights of the landowner, it would be compensable only if the interference was unreasonable.⁷¹⁶ The court concluded that “[r]educing the traffic distress at this intersection by elevated lanes is certainly within the discretion of the DOT and is well within the bounds of reason.”⁷¹⁷

State Department of Transportation v. Kirkland.⁷¹⁸ The landowner operated a restaurant with direct access to State Road 77.⁷¹⁹ A short distance from the restaurant, State Road 77 proceeded to cross the bay by a bridge.⁷²⁰ Then the Department built a new bridge and relocated State Road 77 to cross the bay by the new bridge.⁷²¹ The old bridge was closed and converted into a fishing pier.⁷²² That part of old State Road 77 was renamed and could still be reached from the new State Road 77, but it now reached a dead end at the

706. *Id.* at 11.

707. *Id.*

708. *Id.* at 10.

709. *Suit City of Aventura*, 774 So. 2d at 14.

710. *Id.* at 12.

711. *Id.*

712. *Id.*

713. *Id.* at 12–13.

714. *Suit City of Aventura*, 774 So. 2d at 13.

715. *Id.* at 12.

716. *Id.* at 14.

717. *Id.*

718. 772 So. 2d 566 (Fla. 1st Dist. Ct. App. 2000).

719. *Id.* at 567.

720. *Id.*

721. *Id.*

722. *Id.*

pier.⁷²³ The restaurant parking lot still opened onto that road in exactly the same way as it had before, but the landowner brought this inverse condemnation action.⁷²⁴ The district court concluded that no compensable taking had occurred.⁷²⁵ What occurred here was the mere redirection of traffic.⁷²⁶ That was not a taking because it did not deprive the landowner of access.⁷²⁷

*VLX Properties, Inc. v. Southern States Utilities, Inc.*⁷²⁸ Glenn Abby Golf Course ("GAGC") owned a golf course.⁷²⁹ VLX owned a portion of James Pond which was adjacent to and, to some degree, within the confines of the golf course.⁷³⁰ GAGC was prohibited from watering the golf course with water from its wells, so it entered into a contract with the Public Utility for reclaimed wastewater.⁷³¹ However, when the Public Utility began discharging the reclaimed wastewater, James Pond was flooded.⁷³² VLX claimed the flooding caused the water quality in the pond to deteriorate seriously.⁷³³ The trial court concluded that wastewater had been discharged directly into James Pond but that did not amount to a taking because VLX had not been deprived of all reasonable and beneficial use of its property.⁷³⁴ The findings of fact were not challenged on appeal, but VLX claimed that the trial court had applied the wrong legal standard.⁷³⁵ The three-judge panel of the Fifth District Court of Appeal agreed and reversed.⁷³⁶

The court noted that "a distinction has been made between categories of takings in inverse condemnation cases."⁷³⁷ For example, taking may occur "by physical occupation, flooding, governmental regulation, and taking of access rights."⁷³⁸ The legal standard to be applied in determining whether a taking occurred depends on which category of taking is alleged.⁷³⁹ In this

723. *Kirkland*, 772 So. 2d at 567.

724. *Id.*

725. *Id.* at 568.

726. *Id.*

727. *Id.*

728. 792 So. 2d 504 (Fla. 5th Dist. Ct. App. 2001).

729. *Id.* at 506.

730. *Id.*

731. *Id.*

732. *VLX Props., Inc. v. S. States Utils., Inc.*, 25 Fla. L. Weekly D1745 (5th Dist. Ct. App. July 21, 2000).

733. *Id.*

734. *Id.*

735. *Id.* at D1746.

736. *Id.*

737. *VLX Props., Inc.*, 25 Fla. L. Weekly at D1745.

738. *Id.* at D1745-46.

739. *Id.* at D1746.

case, the trial court considered the allegation to be that a taking that had been effected by flooding which was caused by the Public Utility.⁷⁴⁰ That would be an indirect invasion and, consequently, it required the claimant to prove that the flooding had deprived the claimant of all reasonable and beneficial use of the land.⁷⁴¹ However, close analysis revealed that the claim was really that the Public Utility directly occupied VLX's land by discharging wastewater directly into the pond.⁷⁴² A direct invasion is a per se taking.⁷⁴³ The claimant need only show entry upon its land for more than a momentary period, under warrant or color of legal authority that devoted it to public use.⁷⁴⁴ Those factors were clearly established in the trial court's findings of fact.⁷⁴⁵ Any showing of the size of the encroachment or the economic loss it caused would only be elements of damages, not essentials to establishing liability.⁷⁴⁶ In sum, the trial court had erred in characterizing this case as one where flooding was alleged to having caused the taking when, in fact, it was a case in which the taking had caused the flooding.⁷⁴⁷

The Fifth District Court of Appeal granted a motion for rehearing *en banc*.⁷⁴⁸ The panel's opinion was withdrawn, and it decided to recede from its 1997 decision in this very litigation.⁷⁴⁹ The *en banc* opinion characterized the dispute as VLX's attempt to claim damages for the invasion of the wastewater into those parts of the pond that it had obtained after it had agreed to a flowage easement.⁷⁵⁰ Over Judge Sharp's and Judge Peterson's spirited dissents, the court found a flowage easement existed because it had been intended by all the necessary parties based on the facts.⁷⁵¹ The court then invoked the "tipsy coachman" rule to uphold the trial court's decision.⁷⁵²

740. *Id.*

741. *Id.*

742. *VLX Prop. Inc.*, 25 Fla. L. Weekly at D1745-46.

743. *Id.* at D1746.

744. *Id.* (citing *Shick v. Fla. Dep't of Agric.*, 504 So. 2d 1318 (Fla. 1st Dist. Ct. App. 1987), which in turn quoted from *Poe v. State Road Dep't*, 127 So. 2d 898, 900 (Fla. 1st Dist. Ct. App. 1961)).

745. *Id.*

746. *Id.*

747. *VLX Prop. Inc.*, 25 Fla. L. Weekly at D1745.

748. *VLX Prop., Inc. v. S. States Util., Inc.*, 792 So. 2d 504 (Fla. 5th Dist. Ct. App. 2001), referred to by the court as "VLX1." See Ronald Benton Brown & Joseph M. Grohman, *Property Law: 1998 Survey of Florida Law*, 23 NOVA L. REV. 229, 275 (1998).

749. *VLX Prop., Inc.*, 792 So. 2d at 506.

750. *Id.* at 506-07.

751. *Id.* at 507.

752. *Id.* at 509.

The “tipsy coachman” rule is that a decision that produces the right result will be affirmed even if it was reached for the wrong reasons. In this case, the trial court had ruled for the defendants because, it decided, no taking had occurred. The trial court should have ruled for the defendants because they had a flowage easement which allowed them to disburse the wastewater as they had. The “tipsy coachman” rule may be, to most of us, more interesting than the other parts of this tortured litigation. The phrase is based on a verse, first quoted from Goldsmith’s *RETALIATION* for this purpose in 1879 by the Supreme Court of Georgia:

The pupil of impulse, it forc’d him along
His conduct still right, with his argument wrong;
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home;⁷⁵³

In essence, if the coach gets home safely, the fact that the coachman was tipsy becomes irrelevant. This verse was repeated by the Supreme Court of Florida in 1963⁷⁵⁴ and, therefore, the “tipsy coachman” rule has become part of our legal culture.

XVII. LANDLORD AND TENANT

*Bailey v. Brickell Key Centre-FBEC, L.L.C.*⁷⁵⁵ The landlord brought an action for possession, damages and recovery on a guaranty.⁷⁵⁶ The trial court issued a final judgment of eviction and ordered a writ of possession to issue.⁷⁵⁷ The judgment reserved jurisdiction on collateral matters that included, but were not limited to, attorney’s fees.⁷⁵⁸ The landlord later requested and was granted a judgment for damages against the tenant’s guarantor.⁷⁵⁹ The guarantor appealed on the basis that the trial court lacked jurisdiction to issue and the district court of appeal reversed.⁷⁶⁰ The eviction

753. *Lee v. Porter*, 63 Ga. 345, 346 (1879). For the complete poem, see *RETALIATION: A POEM* which is reprinted with some explanatory notes on *BOB’S BYWAY* at <http://shoga.wva.com/~rgs/xgoldsmi.htm> or <http://cluster.wva.com/~rgs/xgoldsmi.htm>.

754. *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963).

755. 778 So. 2d 386 (Fla. 3d Dist. Ct. App. 2001).

756. *Id.*

757. *Id.*

758. *Id.*

759. *Id.*

760. *Bailey*, 778 So. 2d at 386.

order here was final as to damages because there was no reservation of jurisdiction on that issue.⁷⁶¹ Once a trial court issued that final judgment, it lost jurisdiction to award further damages.⁷⁶²

*Beacon Property Management, Inc. v. PNR, Inc.*⁷⁶³ PNR bought a restaurant.⁷⁶⁴ As part of the transaction, the commercial lease for the restaurant space was assigned to PNR.⁷⁶⁵ The corporate landlord was run by two shareholders who were also the corporate officers, identified herein as “A” and “B.”⁷⁶⁶ PNR alleged that A induced PNR to complete the transaction by certain statements regarding the landlord’s future plans for the premises.⁷⁶⁷ Unfortunately, the landlord allowed the premises to fall into such a bad state that one wall collapsed.⁷⁶⁸ After repairs were made, PNR tried to reopen the restaurant, but gave up after a short time.⁷⁶⁹ The landlord evicted the tenant from the closed restaurant.⁷⁷⁰

The tenant then filed this suit seeking damages from the corporate landlord, the company that managed the premises, and A and B.⁷⁷¹ The landlord did not appear to defend and A settled.⁷⁷² That left B and the management company to face the charges of violating Florida’s Deceptive and Unfair Trade Practices Act,⁷⁷³ fraud, negligent representation, tortious interference with contract, and wrongful eviction.⁷⁷⁴ The jury verdict awarded PNR compensatory and punitive damages, but the district court reversed.⁷⁷⁵

The district court held that the alleged conduct here could not constitute a violation of the Deceptive and Unfair Trade Practices Act.⁷⁷⁶ That act provides that: “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any

761. *Id.* at 386.

762. *Id.*

763. 785 So. 2d 564 (Fla. 4th Dist. Ct. App. 2001).

764. *Id.* at 566.

765. *Id.*

766. *Id.* at 566 n.1.

767. *Id.* at 566.

768. *PNR, Inc.*, 785 So. 2d at 566.

769. *Id.*

770. *Id.*

771. *Id.*

772. *Id.*

773. FLA. STAT. § 501.204 (2001).

774. *PNR, Inc.*, 785 So. 2d at 566.

775. *Id.*

776. *Id.* at 567.

trade or commerce are hereby declared unlawful.”⁷⁷⁷ The court noted the plain meaning of these terms and concluded, “[a] single instance of doing something does not make it a method or a practice.”⁷⁷⁸ Here the evidence was limited to a single lease, so a violation had not been established.⁷⁷⁹ Having reached that conclusion, the court found it unnecessary to address the question of whether the act even applied to commercial leases, a question that had been raised by the landlord.⁷⁸⁰

The district court also found that a case of fraud or negligent representation had not been proven against these defendants.⁷⁸¹ The alleged misrepresentations had been made by A.⁷⁸² There was no evidence that A was acting on behalf of B or the management company.⁷⁸³ A had been acting on his own behalf or on behalf of the corporate landlord.⁷⁸⁴ There was no basis for applying any legal theory which might hold shareholders of the corporate landlord personally liable for the statements of the corporation or another investor.⁷⁸⁵

The claim of tortious interference with a business relationship was initially based on the claim that the landlord’s conduct had prevented the restaurant from attracting future patrons.⁷⁸⁶ On its face, this claim should have failed because the tort requires the existence of a present relationship, not merely hopes of a future one.⁷⁸⁷ PNR also tried to claim that B and the management company tortiously interfered with the lease.⁷⁸⁸ That also failed to satisfy one of the elements of the tort which was that the interference must be done by a third party.⁷⁸⁹ B and the management company were not strangers to the lease transaction.⁷⁹⁰ Their involvement was on behalf of the landlord and the conduct complained of, in fact, benefited the landlord.⁷⁹¹

777. § 501.204 (1).

778. *PNR, Inc.*, 785 So. 2d at 568.

779. *Id.* at 567.

780. *Id.*

781. *Id.* at 568.

782. *Id.*

783. *PNR, Inc.*, 785 So. 2d at 568.

784. *Id.*

785. *Id.*

786. *Id.*

787. *Id.* at 569.

788. *PNR, Inc.*, 785 So. 2d at 569.

789. *Id.*

790. *Id.*

791. *Id.*

Finally, the wrongful eviction claim against B and the management company was also fatally defective.⁷⁹² Neither B nor the management company had brought the eviction action.⁷⁹³ It had been brought on behalf of the corporate landlord by A.⁷⁹⁴ So any wrongful eviction claim would have to be brought against A or the landlord.⁷⁹⁵

*Camena Investments & Property Management Corp. v. Cross.*⁷⁹⁶ Tenant leased the property as the location for her restaurant.⁷⁹⁷ The leasing agent assured her that she would be able to open for business by October 1st.⁷⁹⁸ However, when the tenant sought approval of her plans, she learned that there were zoning and restrictive covenant obstacles.⁷⁹⁹ Eventually, she was able to open the restaurant, but it was not a success.⁸⁰⁰ When she failed to pay the rent, the landlord brought an eviction action in the county court.⁸⁰¹ The tenant raised the affirmative defense of fraud in the inducement.⁸⁰² The parties later agreed that the defense could be stricken and a default judgment for possession entered in favor of the landlord.⁸⁰³

The landlord then brought an action for the unpaid rent in circuit court.⁸⁰⁴ The tenant counterclaimed for damages based on fraud in the inducement and breach of contract.⁸⁰⁵ The landlord first claimed that the counterclaim was barred by res judicata based on the judgment in the eviction action.⁸⁰⁶ That argument was rejected.⁸⁰⁷ The district court concluded that the tenant had voluntarily abandoned fraud in the inducement as a defense.⁸⁰⁸ It likened that to taking a voluntary dismissal which is without prejudice because it is not an adjudication on the merits.⁸⁰⁹ Thus, res judicata would be inapplicable.

792. *Id.*

793. *PNR, Inc.*, 785 So. 2d at 569–70.

794. *Id.* at 570.

795. *Id.*

796. 791 So. 2d 595 (Fla. 3d Dist. Ct. App. 2001).

797. *Id.* at 596.

798. *Id.*

799. *Id.*

800. *Id.*

801. *Cross*, 791 So. 2d at 596.

802. *Id.*

803. *Id.*

804. *Id.*

805. *Id.*

806. *Cross*, 791 So. 2d at 596.

807. *Id.*

808. *Id.*

809. *Id.* at 597.

The landlord also claimed that the tenant could not claim fraud in the inducement because she took with notice of what was on the public records.⁸¹⁰ It asserted that *Pressman v. Wolf*⁸¹¹ stood for the proposition that statements concerning public records can never form the basis for a claim of actionable fraud.⁸¹² The district court held that there was no such general rule.⁸¹³ The question is whether a person in the plaintiff's position would have been able to ascertain the true facts by taking reasonable steps such as checking the public records.⁸¹⁴ A buyer acting reasonably would check the public records.⁸¹⁵ A contractor pulling a permit would be expected to check the public records.⁸¹⁶ However, "these types of searches are not expected to be performed as standard procedure by a party entering into a commercial lease."⁸¹⁷

The district court did, however, reverse the trial court's dismissal of the tenant's motion for tax attorney's fees for lack of evidence.⁸¹⁸ The tenant had presented an expert witness who testified to having reviewed the agreement between the tenant and her attorney, what the agreed rate was, and that he had reviewed the time sheets kept by the attorney.⁸¹⁹ The tenant had moved for rehearing on the attorneys' fees issue, but that had been denied.⁸²⁰ "We fail to appreciate what was missing in [the tenant's] presentation of evidence regarding the amount of attorney's fees"⁸²¹ stated the district court. At the very least, the trial court should have granted the motion for rehearing and denying that motion was an abuse of discretion that required reversal.

*Horizon Medical Group, P.A. v. City Center of Charlotte County, Ltd.*⁸²² The commercial tenant signed a five year lease in March 1999, but less than nine months later the landlord filed this action alleging that tenant

810. *Id.*

811. 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999).

812. *Cross*, 791 So. 2d at 597 (citing *Pressman*, 732 So. 2d at 361).

813. *Id.*

814. *Id.*

815. *Id.*

816. *Id.*

817. *Cross*, 791 So. 2d at 598.

818. *Camena Inv. & Prop. Mgmt. Corp. v. Cross*, 791 So. 2d 595, 598 (3d Dist. Ct. App. 2001).

819. *Id.*

820. *Id.*

821. *Id.*

822. 779 So. 2d 545 (Fla. 2d Dist. Ct. App. 2001).

had breached the lease.⁸²³ The tenant admitted that it had abandoned the premises and owed back rent, so the trial court entered a final summary judgment.⁸²⁴ The damages awarded by the court included unpaid back rent and accelerated future rent for the entire term and the cost of reletting the premises.⁸²⁵ The possibility of reletting was the basis for the partial reversal.⁸²⁶ A landlord is not entitled to the windfall of collecting rent for a property from two different tenants.⁸²⁷ So if the landlord did relet the premises and collect rent from a third party for time covered by this lease, the tenant was entitled to credit against the accelerated future rent. The trial court was ordered to retain jurisdiction for the purpose of considering a motion by the tenant for an accounting to consider any credits to which it might become entitled based upon the landlord reletting the premises to a replacement tenant.⁸²⁸

The Florida Residential Landlord and Tenant Act was amended during the 2001 legislative session.⁸²⁹ The first change is to give the landlord more time to notify the tenant of an intent to impose a claim against the security deposit. Now the landlord has thirty days, rather than fifteen, to send the tenant notice by certified mail.⁸³⁰

The Disposition of Personal Property Landlord and Tenant Act has also been modified.⁸³¹ This act provides the method by which the landlord may dispose of personal property left behind by the tenant without incurring any risk that the tenant may later reappear and assert a conversion claim against the landlord.⁸³² The lease may now contain a provision which relieves the landlord of the statutory duty to give notice that personal property has been left behind to the tenant or any other person the landlord thinks to be the personal property's owner.⁸³³ Under the prior law, if the landlord reasonably believed that the personal property left behind was worth less than \$250, then the landlord could simply keep it rather than have to sell it at a public

823. *Id.* at 546.

824. *Id.*

825. *Id.*

826. *Id.*

827. *Horizon Med. Group*, 779 So. 2d at 546.

828. *Id.*

829. FLA. STAT. § 83.49 (2001).

830. FLA. STAT. § 83.49(3)(a) (2001) as amended by Ch. 2001-179, § 1, 2001 Fla. Sess. Law Serv. 581 (West).

831. FLA. STAT. §§ 715.10-.111 (2000).

832. *Id.*

833. *See* FLA. STAT. § 83.67(3) (2001) as amended by Ch. 2001-179, § 2, 2001 Fla. Sess. Law Serv. 581 (West).

sale.⁸³⁴ That threshold has been raised to \$500.⁸³⁵ The notice forms sent to former tenants and other possible owners have been modified to reflect this change.⁸³⁶

The legislature has also taken steps to provide further protections to members of the Armed Forces of the United States. If the tenant is a member of the military whose post is moved more than thirty-five miles from the rental unit or who is unexpectedly deactivated, that tenant may terminate the lease upon thirty days notice to the landlord.⁸³⁷ The tenant must include a copy of the military orders with the termination notice that is sent to the landlord to invoke this provision.⁸³⁸ If the member of the military dies while on active duty, the lease may be terminated in a similar fashion.⁸³⁹ Following termination, the landlord shall be entitled only to the prorated rent.⁸⁴⁰ If the lease was terminated more than fourteen days before the tenant was to take possession, the landlord is not entitled to any rent.⁸⁴¹ However, if the landlord has suffered actual damages due to the early termination of the lease, the landlord may recover liquidated damages, although the amount is limited if the lease was terminated after a period less than six months.⁸⁴²

XVIII. LIENS

*Slachter v. Swanson.*⁸⁴³ The issue in this case is whether a subsequent property purchaser's claim to property takes priority over the holder of a disputed mortgage.⁸⁴⁴

In this case, a mortgage company assigned a mortgage to its former president, mortgagee.⁸⁴⁵ The company filed a foreclosure action against the mortgagors which was dismissed with prejudice.⁸⁴⁶ The mortgagors then sued the company for wrongful foreclosure and fraud, and were awarded

834. FLA. STAT. § 715.109(1) (2000).

835. FLA. STAT. § 715.109(1) (2001).

836. *Id.*

837. FLA. STAT. § 83.682(1)(a) (2001).

838. *Id.*

839. § 83.682 (1)(b).

840. FLA. STAT. § 83.682 (2) (2001).

841. *Id.*

842. § 83.682 (3).

843. 26 Fla. L. Weekly D586 (3d Dist. Ct. App. Feb. 28, 2001).

844. *Id.*

845. *Id.*

846. *Id.*

damages.⁸⁴⁷ In order to collect on the judgment, the mortgagors got a trial court order discharging the note and mortgage as paid in full.⁸⁴⁸ The discharge judgment was duly recorded.⁸⁴⁹ But, the discharge judgment ultimately was reversed by a Supreme Court of Florida decision that dealt with numerous investors and appellants although the spelling and phonetics of the name were not the same.⁸⁵⁰ Thereafter, the mortgagors transferred the property by warranty deed to appellee.⁸⁵¹ After this transfer, the trial court vacated the discharge judgment.⁸⁵² Appellant then sued appellee to foreclose on the property and appellee's partial summary judgment motion was granted.⁸⁵³

The appellate court affirmed the judgment because appellant failed to show appellee had knowledge of appellant's claim that the mortgage had been reinstated after it was supposedly discharged, and thus, did not establish he had implied actual knowledge of that reinstatement or that it was readily ascertainable because of the difference in names in the Supreme Court of Florida decision.⁸⁵⁴ Therefore, the appellate court held that he was a bona fide purchaser of the property whose claim to that property took priority over appellant's disputed mortgage.⁸⁵⁵

Legislative amendments to changes in section 55.10 of the *Florida Statutes*, revising the duration period of certain liens, provide in subparagraph (1) that if a certified copy was first recorded between July 1, 1987 and June 30, 1994, the judgment, order, or decree is valid for an initial period of seven years from the date recorded.⁸⁵⁶ If the certified copy is first recorded on or after July 1, 1994, it is a lien for an initial period of ten years from the date of recording.⁸⁵⁷ Subparagraphs (2), (3), and (4) clarify the re-recording language.⁸⁵⁸ The lien in subsection (1) or an extension of that lien as provided by subsection (2), may be extended for an additional ten years.⁸⁵⁹ As an example, if a lien was recorded between July 1, 1987 and June 30,

847. *Id.*

848. *Slachter*, 26 Fla. L. Weekly at D586.

849. *Id.*

850. *Id.*

851. *Id.*

852. *Id.*

853. *Slachter*, 26 Fla. L. Weekly at D586.

854. *Id.* at D587.

855. *Id.*

856. S.B. 178, 102d Sess. (Fla. 2001).

857. *Id.*

858. *Id.*

859. *Id.*

1987 one can re-record it twice to reach the twenty year statute of limitations provided under section 55.081.

XIX. LIS PENDENS

*Seligman v. North American Mortgage Co.*⁸⁶⁰ The issue is whether notice of a *lis pendens* creates a property right that has priority over a mortgage, later recorded, when the property is part of the marital property in a marriage dissolution case.⁸⁶¹

Appellee tried to foreclose on its mortgage to appellant.⁸⁶² The mortgage in question was executed by appellant's former husband as a single man after appellant filed a notice of *lis pendens* regarding the property, upon her petition for dissolution of their marriage.⁸⁶³

Appellant properly recorded the notice of *lis pendens* and also properly procured a valid extension of the *lis pendens*.⁸⁶⁴ The *lis pendens* remained in effect, and was not dissolved at the time appellee's mortgage was executed and recorded and at the time appellee's foreclosure suit was filed.⁸⁶⁵ Because of the common law doctrine of *pendente lite*, the court in a dissolution of marriage proceeding, had jurisdiction over the property until final judgment, and whoever purchased or encumbered the property took subject to the dissolution judgment.⁸⁶⁶ The former husband was not allowed to encumber or alienate the property pending litigation.⁸⁶⁷ Appellee had record notice of the pending dissolution and should have known the husband was not in fact single.⁸⁶⁸ This court held that the fact that the notice of *lis pendens* referred to the action filed as a dissolution of marriage and listed the property at issue was sufficient for the requirements of section 48.23(1)(a) of the 1997 *Florida Statutes* to set forth the relief sought.⁸⁶⁹ The trial court's decision was reversed.⁸⁷⁰ The matter was remanded for entry of judgment for appellant.⁸⁷¹

860. 781 So. 2d 1159 (Fla. 4th Dist. Ct. App. 2001).

861. *Id.* at 1161.

862. *Id.* at 1160.

863. *Id.*

864. *Id.* at 1163.

865. *Seligman*, 781 So. 2d at 1163.

866. *Id.*

867. *Id.*

868. *Id.*

869. *Id.*

870. *Seligman*, 781 So. 2d at 1164.

871. *Id.*

XX. MORTGAGES

*Michel v. Beau Rivage Beach Resort, Inc.*⁸⁷² The issue in this case is whether a lien on a home is proper when it represents security for a commission earned by the real estate broker.⁸⁷³

In this case, the broker earned a commission on the sale of a property.⁸⁷⁴ The broker allowed the seller to be paid the funds owed to him, so the purchaser could get a loan in the amount of the commission from the seller.⁸⁷⁵ The trial court construed section 475.42(1)(j) of the *Florida Statutes*, which prohibits a broker or salesman from placing a mortgage in the public records in order to collect a commission, to disallow what occurred here.⁸⁷⁶ The appellate court found that the broker was placing a lien on the property.⁸⁷⁷ Here, the broker allowed the seller, who was obligated to pay the commission, to use the commission to grant a loan to the purchaser.⁸⁷⁸ The appellate court held that the funds were the seller's to do with as he pleased, and that the trial court had misconstrued the statute in this instance.⁸⁷⁹ Therefore, the appellate court reversed the trial court.⁸⁸⁰

*Suntrust Bank v. Riverside National Bank of Florida.*⁸⁸¹ The issue in this case involved the priority of a first mortgagee's refinanced loan.⁸⁸²

In 1993, appellant recorded a balloon first mortgage of \$148,500.⁸⁸³ In 1995, appellee recorded a \$100,000 second mortgage.⁸⁸⁴ In 1998, appellant refinanced the first mortgage, lending \$136,800.⁸⁸⁵ The sums paid off the original mortgage and appellant recorded a satisfaction of the original first mortgage and its new mortgage.⁸⁸⁶ Appellant assumed that its new mortgage was the first mortgage because its title search did not disclose the appellee's

872. 774 So. 2d 900 (Fla. 4th Dist. Ct. App. 2001).

873. *Id.* at 901.

874. *Id.*

875. *Id.*

876. *Id.* at 902; *see also* FLA STAT. § 475.42(1)(j).

877. *Michel*, 774 So. 2d at 902.

878. *Id.*

879. *Id.*

880. *Id.*

881. 26 Fla. L. Weekly D513 (4th Dist. Ct. App. Feb. 14, 2001), *withdrawn*, 26 Fla. L. Weekly 2109 (4th Dist. Ct. App. Aug. 29, 2001) (filling an identical opinion).

882. *Id.*

883. *Id.*

884. *Id.*

885. *Id.*

886. *Suntrust Bank*, 26 Fla. L. Weekly at D513.

mortgage.⁸⁸⁷ When the property went into foreclosure, appellant discovered the priority difficulties.⁸⁸⁸ The trial court denied appellant relief.⁸⁸⁹

The appeals court reversed, holding that the previous two cases upon which the trial court relied were incorrect, and that appellant was entitled to relief under the equitable subrogation doctrine.⁸⁹⁰ However, the appellate court held that appellant was only entitled to equitable subrogation to the extent that appellee would be no worse off than it would have been if appellant's original mortgage had not been satisfied.⁸⁹¹

XXI. OPTIONS

*Sander v. Ball.*⁸⁹² Buyer was interested in seller's land, but the parties anticipated that part of the seller's land would be taken by the county.⁸⁹³ So, buyer purchased a purchase option.⁸⁹⁴ The price would be \$483,351, but provided that the buyer would get credit for whatever the county paid for the acreage taken.⁸⁹⁵ Furthermore, it placed a maximum price of \$30,000 times the number of acres left after the condemnation.⁸⁹⁶ The option further provided that it would continue until October 24, 1998, but would be automatically extended until the seller had received the condemnation proceeds.⁸⁹⁷ So, in effect, the option did not include a time limit. Regretting the deal, the seller filed this action to have the option declared null and void.⁸⁹⁸ The buyer apparently counterclaimed for reformation and won in the trial court.⁸⁹⁹ The Fifth District Court of Appeal reversed.⁹⁰⁰

The court concluded that the option was void because it violated the Rule Against Unreasonable Restraints on Alienation.⁹⁰¹ Consequently, the court did not consider the assertion that the option violated the Rule Against

887. *Id.*

888. *Id.*

889. *Id.*

890. *Id.* at D514.

891. *Suntrust Bank*, 26 Fla. L. Weekly at D514-15.

892. 781 So. 2d 527 (Fla. 5th Dist. Ct. App. 2001).

893. *Id.* at 528.

894. *Id.*

895. *Id.* at 529.

896. *Id.*

897. *Sander*, 781 So. 2d at 528.

898. *Id.* at 528.

899. *Id.*

900. *Id.* at 531.

901. *Id.*

Perpetuities. The maximum price set by the option made it sufficiently similar to the fixed price repurchase option held invalid in *Inglehart v. Phillips*.⁹⁰² As the Supreme Court of Florida said in *Inglehart*, “[t]he validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable.”⁹⁰³ An option with a price cap and no time limit failed that test.⁹⁰⁴

The rule could not be avoided by reforming the option as the trial court had done.⁹⁰⁵ It simply added a time limit based upon circumstances in which the agreement was reached.⁹⁰⁶ Reformation, however, is available only to make the writing reflect what the parties had actually agreed.⁹⁰⁷ It cannot be used to cure a defect in that agreement.⁹⁰⁸ Here, the parties had not even discussed a time limit for the option, so the court could not supply the term under the guise of reforming the document.⁹⁰⁹

XXII. SALES

Buttner v. Talbot.⁹¹⁰ Seller was a real estate broker.⁹¹¹ Buyer was an attorney who had represented the seller in previous real estate matters.⁹¹² Seller was in financial trouble.⁹¹³ A valuable property was encumbered by liens and mortgages.⁹¹⁴ Worse, it was about to be auctioned off for unpaid taxes.⁹¹⁵ They agreed to the following deal: buyer would loan seller the money to pay off the tax deficit and seller would sell the land to a land trust that buyer would create.⁹¹⁶ The contract, which buyer hired another attorney

902. 383 So. 2d 610 (Fla. 1980).

903. *Sander*, 781 So. 2d at 529 (quoting *Inglehart v. Phillips*, 383 So. 2d 610, 614–15 (Fla. 1980)).

904. *Id.*

905. *Id.* at 530.

906. *Id.*

907. *Id.*

908. *Sander*, 781 So. 2d at 530.

909. *Id.*

910. 784 So. 2d 538 (Fla. 4th Dist. Ct. App. 2001).

911. *Id.* at 539.

912. *Id.*

913. *Id.*

914. *Id.*

915. *Buttner*, 784 So. 2d at 539.

916. *Id.*

to draft, required seller to deliver marketable title.⁹¹⁷ An addendum provided that if the sale was not consummated, the seller would give buyer a note for the tax money advanced and secure that with a mortgage on the property.⁹¹⁸

Buyer did advance the cash seller needed, and seller used that to pay off the taxes.⁹¹⁹ Then, it appears that seller had second thoughts about the wisdom of the deal because his accountant advised him that the price was too low.⁹²⁰ Buyer insisted on closing and had a title search done.⁹²¹ Several liens and encumbrances were discovered and seller was notified that they would have to be cleared.⁹²² Seller claimed he did not have the money to do that and refused to close, so buyer filed suit for specific performance.⁹²³

Seller's first defense was impossibility, that is, that he could not deliver marketable title.⁹²⁴ That defense was rejected.⁹²⁵ The marketable title provision was in the contract to protect the buyer, not the seller.⁹²⁶ It could be waived by the buyer.⁹²⁷ In this case, the buyer had done so by insisting on closing.⁹²⁸ The addendum requiring the seller to execute a note and mortgage for the money advanced did not change that.⁹²⁹ The addendum was only designed to provide buyer protection against the loss of the money she had already advanced if the sale was not completed due to unmarketable title.⁹³⁰

Seller also asserted that buyer was the trustee for a trust that had not yet been created and, therefore, could not bring the action.⁹³¹ The district court pointed out that this argument had not been raised below until the motion for rehearing.⁹³² Consequently, it had been waived.⁹³³ However, the court offered the dicta that it would not have been a successful argument

917. *Id.*

918. *Id.*

919. *Id.*

920. *Buttner*, 784 So. 2d at 540.

921. *Id.*

922. *Id.*

923. *Id.*

924. *Id.*

925. *Buttner*, 784 So. 2d at 540.

926. *Id.* at 541.

927. *Id.*

928. *Id.*

929. *Id.*

930. *Buttner*, 784 So. 2d at 541.

931. *Id.*

932. *Id.* at 540.

933. *Id.*

anyway.⁹³⁴ Under Florida law, a conveyance may be made to a person as trustee without reference to any trust document or beneficiary.⁹³⁵ Consequently, the plaintiff could have completed the closing by taking title in a deed to her as trustee. Since she had the ability to close, she could enforce the contract by specific performance.

Seller also claimed the contract lacked consideration.⁹³⁶ This argument failed because the contract called for buyer to execute a purchase money mortgage and allow seller to live on the property for two years in addition to advancing the cash to pay off the back taxes.⁹³⁷

Finally, seller asserted that buyer should be denied equitable relief because she had unclean hands.⁹³⁸ The essence of this claim rested on plaintiff being a lawyer who had represented him in the past and the price being, allegedly, inadequate.⁹³⁹ The court found this claim unconvincing.⁹⁴⁰ Buyer did not act as a lawyer in this transaction.⁹⁴¹ Another lawyer had been engaged to draft the documents.⁹⁴² All that the record reflects is a case of "seller's remorse" once it had enjoyed part of the benefits of the deal.⁹⁴³

*Cavallaro v. Stratford Homes.*⁹⁴⁴ The buyers put down a \$500 deposit and signed an agreement reserving a particular lot in the defendant's development.⁹⁴⁵ Under the terms of the agreement, the parties were expected to enter into a formal construction, purchase, and sale contract which would provide for the construction of a house by seller on the designated lot and the subsequent sale of that lot to the buyers.⁹⁴⁶ The reservation agreement provided that if the construction, purchase, and sale contract was not executed within fourteen days, either party could void the lot reservation agreement.⁹⁴⁷ A dispute arose and the buyers sued for specific performance of the sales agreement.⁹⁴⁸ The seller's defense was that the parties had never

934. *Id.*

935. FLA. STAT. § 689.07(1) (2001).

936. *Buttner*, 784 So. 2d at 541.

937. *Id.*

938. *Id.*

939. *Id.*

940. *Id.*

941. *Buttner*, 784 So. 2d at 539.

942. *Id.*

943. *Id.* at 541.

944. 784 So. 2d 619 (Fla. 5th Dist. Ct. App. 2001).

945. *Id.* at 621.

946. *Id.*

947. *Id.*

948. *Id.*

reached agreement on the terms of the contract of sale and, even if they had, enforcement was barred by the Statute of Frauds.⁹⁴⁹ The trial court awarded summary judgment to the seller.⁹⁵⁰

The record below revealed that the parties had gone through several different sets of plans and pricing calculations.⁹⁵¹ However, they had never reached a final agreement as to the essential terms of construction and the ultimate price.⁹⁵² Consequently, the summary judgment was affirmed.⁹⁵³ The court went on to offer interesting dicta about the Statute of Frauds.⁹⁵⁴ In this case, there admittedly was not a single document that was signed by the buyers and the seller.⁹⁵⁵ Buyers sought to satisfy the Statute of Frauds by combining an agreement and addendum that had been signed by them with the seller's price list.⁹⁵⁶ Assuming the price list was a writing "signed" by the seller, the court still found the list insufficient because there was nothing in the unsigned writing referencing the signed writing.⁹⁵⁷

The court also rejected the attempt to invoke the doctrine of part performance to take the contract out of the Statute of Frauds.⁹⁵⁸ When dealing with a contract for the sale of land, only delivery of possession will be sufficient part performance to take the contract out of the Statute of Frauds.⁹⁵⁹ In this case, the buyers were never put into possession, so the doctrine was inapplicable.⁹⁶⁰

Furthermore, the seller could not be held liable for breaching an obligation of good faith or fair dealing.⁹⁶¹ Those are duties that are imposed on a party in the performance of the contract.⁹⁶² However, those duties never arose because, "in this case . . . the parties never reached an agreement or executed an enforceable contract."⁹⁶³

949. *Cavallaro*, 784 So. 2d at 621.

950. *Id.* at 620.

951. *Id.* at 621.

952. *Id.* at 622.

953. *Id.*

954. *Cavallaro*, 784 So. 2d at 621.

955. *Id.*

956. *Id.* at 621-22.

957. *Id.* at 622.

958. *Id.*

959. *Cavallaro*, 784 So. 2d at 622.

960. *Id.*

961. *Id.*

962. *Id.*

963. *Id.*

Kroitzsch v. Steele.⁹⁶⁴ Mr. and Mrs. Kroitzsch encountered serious financial difficulties and lost their home in a mortgage foreclosure sale.⁹⁶⁵ Title was acquired by Federal National Mortgage Association (“FNMA”).⁹⁶⁶ At that point, Mr. and Mrs. Kroitzsch came into some money and wanted to buy the house back from FNMA.⁹⁶⁷ Under the circumstances of their financial problems, they believed that they could not make the purchase in their own names, so they arranged for Varner to be the buyer, using their money, and then execute a lease to Mr. and Mrs. Kroitzsch.⁹⁶⁸ Only Mr. Kroitzsch signed the one-year lease.⁹⁶⁹ The tenants never paid rent or a security deposit.⁹⁷⁰

The problem arose when Varner sold the house to the buyers four years later.⁹⁷¹ Varner told them the tenants were residing in the house, but that they were behind in their rent.⁹⁷² He also showed them the lease.⁹⁷³ The buyers drove by the property and observed that the house was occupied as they had been told.⁹⁷⁴ They also checked the public records which confirmed that Varner was the owner of record and the title seemed to be unencumbered.⁹⁷⁵ After becoming the owners, the buyers were never paid any rent, so they began this eviction proceeding.⁹⁷⁶ The trial court ordered the eviction of the tenants, but the district court of appeal reversed.⁹⁷⁷

“[S]uccessors to legal title take title subject to those equitable interests of which they have notice.”⁹⁷⁸ The plaintiffs here did not have actual notice that Mr. and Mrs. Kroitzsch were the equitable owners of the land rather than merely delinquent tenants.⁹⁷⁹ However, there were delinquent tenants in possession under a written lease that had never been properly executed and that appeared to have expired years earlier.⁹⁸⁰ Thus, “there were

964. 768 So. 2d 514 (Fla. 2d Dist. Ct. App. 2000).

965. *Id.* at 515.

966. *Id.*

967. *Id.*

968. *Id.*

969. *Kroitzsch*, 768 So. 2d at 516.

970. *Id.*

971. *Id.*

972. *Id.*

973. *Id.*

974. *Kroitzsch*, 768 So. 2d at 516.

975. *Id.*

976. *Id.*

977. *Id.* at 516–17.

978. *Id.* at 517.

979. *Kroitzsch*, 768 So. 2d at 516.

980. *Id.*

sufficient red flags raised in this residential purchase to require further inquiry by the [b]uyers."⁹⁸¹ But the plaintiffs did not make the inquiry that a reasonably prudent buyer would have made under the circumstances.⁹⁸² They did not contact the tenants to find out what claims they might have.⁹⁸³ They did not get an estoppel certificate from the tenants.⁹⁸⁴ They did not get an affidavit from the seller before the closing.⁹⁸⁵ They did not get title insurance protecting against the claims of the occupants.⁹⁸⁶ All they did was ask the seller and check the public records.⁹⁸⁷ That is not sufficient.⁹⁸⁸ Consequently, they took subject to Mr. and Mrs. Kroitzsch's interest and could not evict them.⁹⁸⁹

XXIII. TAXATION

*Fairhaven South, Inc. v. McIntyre.*⁹⁹⁰ The issue here is whether the trial court erred in upholding the property appraiser's denial of Fairhaven's applications for a homestead exemption on the ground that Fairhaven failed to establish that the property was used for a charitable purpose.⁹⁹¹

A nonprofit home for the aged qualified for homestead exemption under section 196.1975 of the 1995 *Florida Statutes* if: 1) it qualifies as a not-for-profit corporation under section 501(c)(3) of the *Internal Revenue Code*; and 2) at least seventy-five percent of its residents are either over the age of sixty-two or are disabled, partially or permanently.⁹⁹²

Fairhaven applied for a homestead exemption for the years 1996, 1997, and 1998, and attached documentation that its corporate charter is not-for-profit and a certificate of exemption under section 501(c)(3) of the *Internal Revenue Code*.⁹⁹³ It also established that at least seventy-five percent of its residents were over the age of sixty-two or were totally and permanently

981. *Id.* at 518.

982. *Id.*

983. *Id.*

984. *Kroitzsch*, 768 So. 2d at 518.

985. *Id.*

986. Plaintiffs did get a title insurance policy, but it contained the usual exception for claims of parties in possession. *Id.*

987. *Id.*

988. *Id.*

989. *Kroitzsch*, 768 So. 2d at 518.

990. 26 Fla. L. Weekly D1466 (2d Dist. Ct. App. June 8, 2001).

991. *Id.*

992. *Id.* at D1467.

993. *Id.*

disabled, that some portions of the home were used exclusively for religious or medical purposes, and that at least twenty-five percent of the home's residents had incomes below the maximum limitation.⁹⁹⁴ The property appraiser denied Fairhaven's applications, asserting that Fairhaven must also "meet the requirements of section 196.195 (determining the profit or nonprofit status of an applicant) and section 196.196 (determining whether property is entitled to charitable . . . exemption)."⁹⁹⁵ Fairhaven appealed.⁹⁹⁶

The appellate court reversed, holding that the trial court should have based its decision solely on section 196.1975.⁹⁹⁷ The appellate court examined the legislative history of section 196.1975 and Article VII, Section 6(e) of the Florida Constitution in reaching its decision.⁹⁹⁸ Prior to 1987, the exemption of a non profit home for the aged was based on Article VII, Section 3(a) of the Florida Constitution.⁹⁹⁹ At that time, property was required to be used for charitable, educational, literary, scientific, or religious purposes.¹⁰⁰⁰ Section 196.1975(7) now provides that subsection 3 relates to Article VII, Section 3(a) of the Florida Constitution, and the remaining subsections implement section 6(e) of the constitution, for purposes of granting homestead exemptions to homes for the aged.¹⁰⁰¹

Because Fairhaven met the requirements of the *Internal Revenue Code* and those of section 196.1975(1) and (2), it was entitled to homestead exemption for 1996 through 1998, without regard to the "charitable" use of the property.¹⁰⁰²

Florida Governmental Utility Authority v. Day.¹⁰⁰³ The issue here was whether a property owner must file suit within sixty days of receipt of assessment when the property owner is a governmental utility.¹⁰⁰⁴ Appellant appealed a final summary judgment entered by the circuit court against it,

994. *Id.*

995. *Fairhaven South, Inc.*, 26 Fla. L. Weekly D1467.

996. *Id.*

997. *Id.*

998. *Id.*

999. *Id.*

1000. *Fairhaven South, Inc.*, 26 Fla. L. Weekly at D1467.

1001. *Id.* Article VII, Section 6(e) of the Florida Constitution provides: "[b]y general law and subject to conditions specified therein, the [l]egislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law." FLA. CONST. art. VII, § 6(e).

1002. *Fairhaven South, Inc.*, 26 Fla. L. Weekly at D1467.

1003. 784 So. 2d 494 (Fla. 5th Dist. Ct. App. 2001).

1004. *Id.* at 495.

the Osceola County property appraiser, and the tax collector, after the court found appellant's complaint to be untimely.¹⁰⁰⁵

The utility was created by an interlocal agreement in accordance with the Florida Intergovernmental Cooperation Act of 1969.¹⁰⁰⁶ The tax collector disallowed the tax exemption to the utility because the utility was created under chapter 163 of the *Florida Statutes* and not chapter 196.¹⁰⁰⁷ Appellant argued that section 163.01(7)(g)(4) of the *Florida Statutes* specifically provided for exemptions "for entities created by interlocal agreements."¹⁰⁰⁸ The utility received a tax assessment that did not reflect its exempt status and filed suit.¹⁰⁰⁹ The assessor tried to get the suit dismissed because it was not filed within sixty days of the assessment.¹⁰¹⁰ This court held that the utility was not subject to the sixty-day period of section 194.171(2) of the *Florida Statutes* because the lawsuit did not challenge the tax assessment, the valuation of the property, but rather, only the classification of the property for valuation purposes.¹⁰¹¹

Greater Orlando Aviation Authority v. Crotty.¹⁰¹² The issue here was whether a privately operated hotel, located on municipal property is subject to property taxes?¹⁰¹³

The City of Orlando appealed a judgment in favor of the property appraiser for Orange County, which ruled that real and personal property used in the operation of a hotel on airport property was subject to ad valorem taxation.¹⁰¹⁴

The Greater Orlando Airport Authority (GOAA), an agency of the city of Orlando, occupied, used, controlled, and operated an airport built on land owned by the city.¹⁰¹⁵ Article VII, Section 3(a) of the Florida Constitution made land owned by a municipality exempt from ad valorem taxation under certain circumstances.¹⁰¹⁶ "The trial court ruled that the property was not

1005. *Id.*

1006. *Id.* See also FLA. STAT. § 163.01 (2001).

1007. *Day*, 784 So. 2d at 495.

1008. *Id.*

1009. *Id.* at 496.

1010. *Id.*

1011. *Id.* at 497. Classification at issue was status as a non-exempt governmental entity.

Id.

1012. 775 So. 2d 978 (Fla. 5th Dist. Ct. App. 2000).

1013. *Id.* at 979.

1014. *Id.*

1015. *Id.*

1016. *Id.* at 980.

exempt because GOAA was using it for private, profit-making purposes."¹⁰¹⁷ In affirmation of the case, the appellate court agreed with the trial court's conclusion that the hotel property did not provide for the comfort, convenience, safety, and happiness of the citizens of Orlando.¹⁰¹⁸ The purpose of the hotel was to serve persons who resided elsewhere and required public accommodations.¹⁰¹⁹

*The Sebring Airport Authority v. McIntyre.*¹⁰²⁰ The issue was whether an ad valorem tax exemption is valid when property is being used for a governmental-proprietary purpose.¹⁰²¹

Appellants got a review of the decision of the District Court of Appeal of Florida which made a part of section 196.012(6) of the 1994 *Florida Statutes* unconstitutional.¹⁰²² The portion that was invalidated would have created an ad valorem tax exemption for certain private enterprises by statutorily defining these types of activities as "serv[ing] a governmental, municipal, or public purpose or function."¹⁰²³

The appellate court found operation of the raceway to be commercial, proprietary, profit, and not governmental functions.¹⁰²⁴ The exemptions covered in the statute deal with "governmental-governmental" uses as opposed to "governmental-proprietary" uses.¹⁰²⁵ Legislatively deeming a governmental-proprietary purpose to be a "governmental-governmental" purpose did not change its true nature and did not result in the constitutional awarding of a tax exemption where, absent the legislation, there clearly could be no exemption.¹⁰²⁶ It is not for the court or legislature to decide who shall receive tax exemptions when we have the Florida Constitution by which to abide.¹⁰²⁷

*Wal-Mart Stores, Inc. v. Todora.*¹⁰²⁸ The issue in this case was whether sales tax should be included in the valuation of property.¹⁰²⁹

1017. *Crotty*, 775 So. 2d at 980.

1018. *Id.* at 981.

1019. *Id.*

1020. 783 So. 2d 238 (Fla. 2001).

1021. *Id.* at 240.

1022. *Id.* at 242.

1023. *Id.*

1024. *Id.* at 246-47.

1025. *McIntyre*, 783 So. 2d at 242.

1026. *Id.*

1027. *Id.* at 243.

1028. 791 So. 2d 29 (2d Dist. Ct. App. 2001).

1029. *Id.* at 30.

This case involved the assessment of tangible personal property used in one of Wal-Mart's stores, such as store fixtures and equipment.¹⁰³⁰ The question was whether any sales tax included as part of the original purchase price of the property, as reported on the tax return, was a "cost of sale" that must be deducted when determining just valuation.¹⁰³¹ The appellate court found no error in the assessment, and Wal-Mart's argument about not reducing the tax for valuation unavailing.¹⁰³² Since this court disagreed with an earlier decision, it certified the question based on conflict to the Supreme Court of Florida.¹⁰³³

*Wells v. Vallier.*¹⁰³⁴ This is a substituted opinion for the earlier opinion.¹⁰³⁵ The issue in the case was whether the appellants qualified for the homestead exemption for property taxes.¹⁰³⁶ The trial court granted a final summary judgment in favor of appellee.¹⁰³⁷

The appellee's sole reason for denying the homestead exemption tax deduction to the appellant was that the appellant received a \$100 per year residency based property tax credit in the State of New Hampshire.¹⁰³⁸ Other than receiving the tax credit in New Hampshire, the appellants for the past sixteen years: 1) have maintained a valid Florida's drivers license; 2) had one or more motor vehicles registered in Florida; 3) have been registered voters in Florida; 4) listed their Florida residence as their address for federal income tax purposes; 5) maintained their primary personal checking and savings accounts in Florida; 6) have been physically present for an average of seven to eight months a year; 7) had their primary physicians, accountants, brokers and church within Florida; 8) maintained family keepsakes; and 9) have executed their last will and testament in Florida.¹⁰³⁹

The appellate court held that while a tax credit received in another state may be a consideration in determining the individual is a permanent resident of the State of Florida, it alone is not a conclusive determining factor.¹⁰⁴⁰ The appellate court found that the overwhelming weight of the evidence

1030. *Id.*1031. *Id.*1032. *Id.* at 31.1033. *Todora*, 791 So. 2d at 31.

1034. 773 So. 2d 1197 (Fla. 2d Dist. Ct. App. 2000).

1035. *Id.* at 1198. For the earlier opinion, see *Wells v. Vallier*, 25 Fla. L. Weekly D1280a (2d Dist. Ct. App. May 26, 2000).1036. *Wells*, 773 So. 2d at 1198.1037. *Id.*1038. *Id.*1039. *Wells*, 773 So. 2d at 1198.1040. *Id.*

proved that appellants were residents of the State of Florida and have complied with the requirements for receiving a homestead tax exemption.¹⁰⁴¹

XXIV. TAX DEEDS

*Sugarmill Woods Oaks Village Ass'n v. Wires.*¹⁰⁴² The issue in this case was whether the issuance of a tax deed to a lot extinguished a homeowner association's lien placed on such lot.¹⁰⁴³

The declaration of covenants recorded prior to issuance of the tax deed permitted the homeowners association to record a lien in its favor for delinquent payments of homeowner association assessments, pursuant to the declaration prior to the issuance of the tax deed.¹⁰⁴⁴ The association placed such a lien on the subject property prior to the tax deed.¹⁰⁴⁵

In construing section 617.312 of the *Florida Statutes*, the appellate court found "[t]he [l]egislature could have expressly provided that liens assessed against lots by homeowners associations also survive the issuance of a tax deed; however, it did not."¹⁰⁴⁶ With that, the appellate court affirmed the lower court's decision in favor of the appellees.¹⁰⁴⁷

XXV. TITLE INSURANCE

*Chicago Title Insurance Co. v. Butler.*¹⁰⁴⁸ The issue in this case was whether certain statutes prohibiting title insurance agents from rebating a portion of their premiums is unconstitutional.¹⁰⁴⁹ The Supreme Court of Florida after considering the arguments of both sides found the statutes unconstitutional.¹⁰⁵⁰ The court found the anti-rebate statutes infringed on the citizens' property rights and unconstitutionally restricted the citizens' rights to freely bargain for services.¹⁰⁵¹

1041. *Id.*

1042. 766 So. 2d 487 (Fla. 5th Dist. Ct. App. 2000).

1043. *Id.* at 488.

1044. *Id.* at 489.

1045. *Id.* at 488.

1046. *Id.* at 489.

1047. *Wires*, 766 So. 2d at 489–90.

1048. 770 So. 2d 1210 (Fla. 2000).

1049. *Id.* at 1211.

1050. *Id.*

1051. *Id.* at 1215.

XXVI. ZONING

*Dixon v. City of Jacksonville.*¹⁰⁵² The issue here was whether a hotel is a proper use consistent with the counties' comprehensive plan when the hotel is to be built in an area zoned RPI.¹⁰⁵³ Appellants challenged an order of the circuit court denying appellants' motion for an injunction to prevent the implementation of an ordinance adopted by appellee, which would have rezoned certain real property to permit construction of a hotel.¹⁰⁵⁴

Appellee adopted a comprehensive plan for development and later adopted an ordinance to rezone certain portions of the real property to permit construction of a hotel on a site.¹⁰⁵⁵ Appellants tried to get a temporary and/or permanent injunction to prevent the implementation of the ordinance and argued that appellee's comprehensive plan for development did not permit construction of the hotel at the site.¹⁰⁵⁶ The trial court denied appellants' injunction.¹⁰⁵⁷

The appellate court applied the strict scrutiny standard in its review of the ordinance to see if it was consistent with the comprehensive plan for development.¹⁰⁵⁸ The appellate court found that the trial court erred in its interpretation of appellee's comprehensive plan.¹⁰⁵⁹ The appellate court ruled the hotel was not a proper land use consistent with any type of permissible use under the comprehensive plan's functional land use designation.¹⁰⁶⁰

*City of Jacksonville Beach v. Car Spa, Inc.*¹⁰⁶¹ The issue in this case was whether the city properly denied Car Spa, Inc.'s application for a conditional use permit.¹⁰⁶²

Car Spa filed an application for a conditional use permit for a car wash, automotive service, and gas service facility.¹⁰⁶³ The staff of the Jacksonville Beach Planning Commission concluded the use was consistent with relevant zoning and comprehensive plan policies, and recommended approval with

1052. 774 So. 2d 763 (Fla. 1st Dist. Ct. App. 2000).

1053. *Id.* at 764.

1054. *Id.*

1055. *Id.*

1056. *Id.*

1057. *Dixon*, 774 So. 2d at 764.

1058. *Id.*

1059. *Id.*

1060. *Id.* at 765-66.

1061. 772 So. 2d 630 (Fla. 1st Dist. Ct. App. 2000).

1062. *Id.* at 631.

1063. *Id.*

certain conditions.¹⁰⁶⁴ The Commission held a public hearing following which, the Commission denied the conditional use permit.¹⁰⁶⁵ Car Spa filed a petition for writ of certiorari in the circuit court alleging that the application for conditional use, as well as the record of the public hearing, clearly reflects that all criteria were met by Car Spa's proposed use and that there was no substantial or competent evidence of any fact proving or even inferring that the conditional use would be contrary to the public interest.¹⁰⁶⁶

The appellate court reviewed the circuit court's decision based on whether the circuit court (1) "afforded procedural due process" and (2) "applied the correct law."¹⁰⁶⁷

The circuit court concluded that Car Spa carried its initial burden of demonstrating entitlement to the conditional use permit, and as a result, the burden shifted to the city to demonstrate that Car Spa had not satisfied the relevant code criteria, and that the conditional use requested was, therefore, contrary to the public interest.¹⁰⁶⁸ The appellate court found that at that point, the circuit court failed to review the entire record to make its determination and only used portions of the record, and re-weighed the evidence, substituting its own judgement for that of the Planning Commission as to the relative weight of the evidence.¹⁰⁶⁹ The appellate court found that the circuit court rejected testimony of a professional land-use planner regarding non compliance of the proposed use with the comprehensive plan and that it also rejected testimony of an individual who had conducted tests to determine whether noise levels associated with the proposed use violated local noise ordinances.¹⁰⁷⁰ In addition, the circuit court failed to include the testimony of neighbors regarding traffic problems and realtors as to the value of the property.¹⁰⁷¹ The appellate court reversed and remanded the lower court's decision.¹⁰⁷²

*Lee v. St. Johns County Board of County Commissioners.*¹⁰⁷³ This case dealt with how long one has to bring an action when there are allegedly inconsistent actions which aggrieve a party.¹⁰⁷⁴

1064. *Id.*

1065. *Id.*

1066. *Car Spa, Inc.*, 772 So. 2d at 631.

1067. *Id.* (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

1068. *Id.*

1069. *Id.* at 631-32.

1070. *Id.* at 632.

1071. *Car Spa, Inc.*, 772 So. 2d at 632.

1072. *Id.*

1073. 776 So. 2d 1110 (Fla. 5th Dist. Ct. App. 2001).

1074. *Id.* at 1111-12.

Here, appellee developers filed an application to re-zone land from rural to a planned urban development, and appellee Board of County Commissioners re-zoned the land.¹⁰⁷⁵ The county zoning agency then approved appellee's final development plan for the property.¹⁰⁷⁶ Appellant requested a review of this approval from appellee, which ultimately agreed with the agency's decision.¹⁰⁷⁷

Less than thirty days later, appellant filed suit alleging that the re-zoning of the property and the order approving the final development plan were inconsistent with the county's comprehensive plan.¹⁰⁷⁸ The trial court dismissed the suit as untimely filed.¹⁰⁷⁹ On review, the appellate court reversed.¹⁰⁸⁰

The appellate court held that in order to challenge allegedly inconsistent actions under section 163.3215 of the *Florida Statutes*, appellant had to sue the governmental entity whose actions aggrieved her within thirty days of such actions.¹⁰⁸¹ Appellant missed the deadlines for the zoning agency's actions, but her claim as to the appellee board's approval of the development plan was timely.¹⁰⁸² The court decided that because appellee's board had the right to review the zoning agency's actions de novo, its decision was the final one which commenced the running of the thirty day time limit.¹⁰⁸³

XVII. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. Although there seems to be no consistent pattern to the case law and legislative development, the survey is useful in maintaining contact with the progression of real property law.

1075. *Id.* at 1111.

1076. *Id.*

1077. *Id.*

1078. *Lee*, 776 So. 2d at 1111-12.

1079. *Id.* at 1111.

1080. *Id.*

1081. *Id.* at 1112.

1082. *Id.*

1083. *Lee*, 776 So. 2d at 1113.

2001 Survey of Florida Public Employment Law

John Sanchez*

TABLE OF CONTENTS

I.	INTRODUCTION	192
II.	HIRING, RETENTION, AND PROMOTION	193
	A. <i>Residency</i>	193
	B. <i>Privatization</i>	194
	C. <i>Selection of Trial Judges; Hiring Senior Judges</i>	195
	D. <i>Teacher Shortage</i>	196
	E. <i>Background Checks</i>	197
	F. <i>Police Recruitment</i>	197
	G. <i>Cheating on Hiring Exam</i>	198
	H. <i>Promotions</i>	198
III.	TERMS OF EMPLOYMENT	198
	A. <i>Hours and Wages</i>	198
	B. <i>Benefits</i>	200
	1. <i>Jury Duty Release</i>	200
	2. <i>Disability and Death Benefits</i>	201
	3. <i>Public Pensions</i>	201
	a. <i>Legislation</i>	201
	b. <i>Ethical Opinion</i>	202
	c. <i>Misuse of Public Pension Funds</i>	202
	d. <i>Forfeiture of Public Pension Over</i> <i>Official Misconduct</i>	203
	e. <i>Public Pension Fund Investments</i>	203
	f. <i>Controversial Public Pension Options</i>	204
	4. <i>Privacy</i>	204
	a. <i>Drug Testing</i>	204
	b. <i>Disclosures by Public Employees</i>	205
	c. <i>Surveillance of Public Employees' Private Lives</i>	205
	5. <i>Loss of Job Security</i>	206
	6. <i>Health Benefits</i>	207

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7. Occupational Health and Safety Issues.....	207
8. Teacher Training.....	208
9. Tort Insurance for Teachers.....	208
IV. DISCIPLINE, DISCHARGE, AND REDUCTIONS-IN-FORCE.....	208
A. <i>Off-Duty Misconduct</i>	208
B. <i>On-the-Job Misconduct</i>	209
C. <i>Retaliation, Whistle-Blowing, the First Amendment</i>	211
1. Retaliation.....	211
2. Whistle-Blowing.....	212
3. The First Amendment.....	212
D. <i>Employment Discrimination</i>	214
1. Generally.....	214
2. Race	214
3. Gender.....	216
4. Age	218
5. Disability.....	218
6. Same-Sex Bias	220
E. <i>Reductions-in-Force</i>	220
F. <i>Remedies for Wrongful Discharge</i>	220
1. Attorneys' Fees.....	220
2. Appeals to the Public Employees Relations Commission.....	221
V. PUBLIC SECTOR, COLLECTIVE BARGAINING ISSUES	223
A. <i>Public Unions</i>	223
B. <i>Collective Bargaining Issues</i>	223
C. <i>Arbitration</i>	224
VI. CONCLUSION	224

I. INTRODUCTION

This article spans the several stages of public employment, beginning with the law governing the hiring of employees. Part II surveys current issues arising out of residency requirements for public employees; how privatization, also known as "outsourcing," a process high on Governor Jeb Bush's list of priorities, is fundamentally changing the nature of public employment; how Florida voters rejected a bid to change electing trial judges to appointment; how the teacher shortage is playing out in public schools; how cities and counties face liability if they fail to check the criminal background of applicants; how the police department has come up

with a novel way of recruiting police officers; how some public employees have been caught cheating on hiring exams and finally, Part II closes with a brief discussion of issues related to promotions.

Part III looks at the law governing the terms of public employment. This Part opens with a series of new developments on the hours and wages of public employees. The lion's share of Part III is devoted to current issues involving employee benefits, ranging from health benefits to public pensions; from disability and death benefits to occupational safety and health issues.

Part IV explores the wide array of legal issues surrounding the disciplining and discharging of public employees. While it is harder to dismiss an employee for off-duty misconduct than for on-the-job wrongdoing, both categories are addressed. Public employers must address the claims of whistle-blowers who report public misconduct to ensure that any sanction meted out is not in retaliation for expressing a view protected, for example, by the First Amendment. Part IV also looks at federal and state anti-discrimination laws that safeguard public employees from becoming targeted on grounds of race, gender, age, disability, or sexual orientation. A brief section touches on reductions-in-force, downsizing that becomes necessary when budgets are squeezed. Finally, Part IV addresses issues arising from the array of remedies public employees may recover in the event they prevail in court: damages, attorneys' fees and costs.

Part V surveys public sector collective bargaining issues, such as current issues involving public unions, the types of impasses unions and public employers face as they bargain in good faith over the terms and conditions of employment, and finally, Part V looks at a recent Supreme Court ruling that may result in more employment-related cases going to arbitration rather than to courts.

II. HIRING, RETENTION, AND PROMOTION

A. Residency

Former prosecutor Gina Mendez was removed from the Miami-Dade ballot because she lives in Pembroke Pines.¹ Miami-Dade judge Teri-Ann Miller was removed from the Broward ballot for failing to comply with residency rules.²

1. Larry Lebowitz & Jay Weaver, *Miller Files Ballot Lawsuit*, *MIAMI HERALD*, Sept. 12, 2000, at 1B.

2. *Id.*

Florida law requires school board members to live in the voter district when they file to run for a school board seat.³ One candidate for a District Seven seat in Miami-Dade allegedly registered to vote in District Six.⁴ Under state law, a rival, or some other District Seven resident must challenge a candidate's qualifications before a court can rule.⁵ Later, the candidate who claimed to live in a metal tool shed was ousted from the ballot.⁶

B. Privatization

Florida has become a leader in the movement to privatize governmental agencies. For example, in the last year Governor Bush pressured state agencies to shed 1800 state jobs in order to privatize posts ranging from janitors to food service.⁷ The move toward privatizing state jobs is fueled by the Governor's belief that "government can deliver high quality services with greater efficiency and lower costs."⁸ Grass cutting and cabin maintenance at state parks are also marked for privatization despite criticism about such "piecemeal privatization."⁹ The Department of Corrections and Transportation have likewise slated hundreds of positions for privatization.¹⁰

The state entered into a twenty year, \$700 million contract that privatizes a statewide police radio system.¹¹ "No other state has privatized its police radio system."¹² The old radio system was so old, parts had to be ordered from Russia.¹³

In a move that reverses teacher unions' hostility toward privatization, a Miami Dade public school teachers' union forged a partnership with New York-based Edison Schools to run ten charter schools in Miami-Dade.¹⁴

3. Analisa Nazareno, *Residence an Issue in Dade Schools Race*, MIAMI HERALD, July 25, 2000, at 7B.

4. *Id.*

5. *Id.*

6. *Residence Requirement*, N.Y. TIMES (Miami), Nov. 5, 2000, § 1, at 40.

7. Lesley Clark & Steve Bousquet, *State Agencies Tab 1800 Jobs for Elimination*, MIAMI HERALD, Sept. 16, 2000, at 9B.

8. *Id.*

9. *Id.*

10. *Id.*

11. Phil Long, *Two Companies Battling for State's Police Radio System*, MIAMI HERALD, Sept. 24, 2000, at 6B.

12. *Id.*

13. Phil Long, *Communications Network Has a Checkered History*, MIAMI HERALD, Sept. 24, 2000, at 6B.

14. Analisa Nazareno, *Dade Teachers' Union Enters Deal to Run 10 Charter Schools*, MIAMI HERALD, Sept. 8, 2000, at 7B.

Traditionally, teachers' unions have opposed charter schools, claiming they divert money from public schools, leaving the system weakened.¹⁵

National polls make clear that most voters oppose privatization especially when it comes to "more-complex services such as law enforcement, health inspections, fire protection, child support, nursing-home care, environmental protection and unemployment benefits."¹⁶

The Miami-Dade County Commission enacted an ordinance that will privatize the new building inspection procedure.¹⁷ The move has been criticized on grounds that private inspectors would be selected by the owners and developers of the projects under scrutiny.¹⁸

Governor Jeb Bush's move to privatize the care of ill veterans came under attack from some of Florida's 1.7 million veterans.¹⁹ The initiative is part of Bush's goal of reducing government by twenty five percent over the next five years.²⁰ What remains unclear is how a private firm can achieve better care than the state while also turning a profit. One lawmaker warned that so called "outsourcing" (i.e. privatization) removes civil service protections that make it harder to discipline or dismiss an unfit worker.²¹

C. Selection of Trial Judges; Hiring Senior Judges

Fort Lauderdale's attorney asked the Florida Attorney General's office to issue an opinion about the constitutionality of Broward's reliance on senior judges from other counties.²² Questions were raised over whether this practice deprives voters of the right to a trial in front of a locally elected jurist.²³

A measure on the November 2000 ballot that would have replaced elections for Florida trial court judges with an appointive system was

15. *Id.*

16. James Fendrich, *Privatization Costs Floridians Millions of Dollars*, MIAMI HERALD, May 4, 2001, at 13B.

17. Robert Steinback, *Privatizing Inspections: Promise and Peril*, MIAMI HERALD, July 18, 2001, at 3B.

18. *Id.*

19. Steve Bousquet, *Veterans Blast Bush Plan to Privatize*, MIAMI HERALD, Jan. 29, 2001, at 1A.

20. *Id.*

21. *Id.*

22. Sue Reisinger, *Ruling on Senior Judges Delayed*, MIAMI HERALD, Aug. 15, 2000, at 3B.

23. *Id.*

defeated by wide margins in every county.²⁴ The outcome was touted as a signal victory for Hispanic, black and female lawyers who have secured more slots on the bench in recent elections.²⁵

D. Teacher Shortage

In light of Florida's need to hire over 162,000 new teachers in the next decade, the state legislature considered a bill that would allot \$200 million annually for three years to raise teacher salaries.²⁶ The average teacher's pay in Florida is \$35,916, about \$5000 below the national average.²⁷ Along with an impending teacher shortage, the Broward County school district also faces a shortage of substitute teachers.²⁸ Apparently, "low pay, a lack of respect and the strong economy" make the job unattractive.²⁹ Substitute teachers must pass a state and federal background check and have earned 60 hours of college credit.³⁰ In Broward County, substitutes earn \$9.60 an hour; "permanent substitutes" earn \$12 an hour but receive no health benefits.³¹

Governor Jeb Bush has proposed a \$51 million teacher recruitment and retention plan.³² Under this program, first-time teachers in Florida public schools receive a \$1000 signing bonus.³³

State law requires school districts to hire new teachers for the next school year by May.³⁴ In light of this deadline, Broward's school district had a March 1 deadline on replacing interim substitutes with full-time-certified teachers.³⁵ But pressure from the teacher shortage led the district to eliminate the March 1 deadline.³⁶ In response, the teachers union claims the

24. William Glaberson, *States Taking Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES (Miami), June 15, 2001, at A1.

25. Jay Weaver, *County Voters Reject Bid to Allow Governor to Appoint Trial Judges*, MIAMI HERALD, Nov. 8, 2000, at 14B.

26. *Teacher Shortage*, MIAMI HERALD, Mar. 21, 2001, at 12B.

27. *Id.*

28. Susan Ferrechio, *Shortage of "Subs" Troubling Schools*, MIAMI HERALD, Jan. 21, 2001, at 1BR.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Governor Bush in Miami Plugging Teacher Retention Plan*, MIAMI HERALD, Apr. 3, 2001, at 7B.

33. *Id.*

34. Jason Grotto, *Substitute Teachers Rule Upsets Some*, MIAMI HERALD, Mar. 26, 2001, at 1B.

35. *Id.*

36. *Id.*

district broke its contract by hiring substitutes (without benefits) instead of permanent, full-time teachers.³⁷

Teachers are entitled to a ten percent discount on their rent if they live in units owned by Equity Residential Properties Trust, one of the country's biggest apartment firms.³⁸

E. Background Checks

An associate dean at Florida A & M University resigned after the University found out about a 1996 rape conviction in Texas.³⁹ While the University conducts background checks for some positions, none is required for jobs entailing primarily teaching and administrative duties.⁴⁰ Similarly, Miami offered the directorship of the General Services Administration to a man forced to resign from a position in Homestead for lying on his resume.⁴¹ The offer of employment is under review.⁴²

The Florida Legislature approved a bill calling for "greater disclosure of incidents of inappropriate behavior by teachers" in the wake of reports about Broward teacher Harry Dellas, charged with propositioning a student to have sex for money.⁴³ The law makes clear that problem teachers cannot avoid losing their jobs merely by transferring to another district.⁴⁴ The law also penalizes a district superintendent who fails to report problem teachers to the Florida Education Commissioner's office.⁴⁵

F. Police Recruitment

To fill 200 job openings, Miami is resorting to forty billboards portraying police officers in action as a recruitment tool.⁴⁶ Police candidates undergo rigorous tests and background checks as well as completing a half-

37. *Id.*

38. *Rent Discount is Offered to Teachers*, MIAMI HERALD, May 22, 2001, at 3B.

39. *Dean Quits After Conviction Revealed*, MIAMI HERALD, Aug. 30, 2000, at 13B.

40. *Id.*

41. *City of Miami Official's Resume Under Scrutiny*, MIAMI HERALD, May 18, 2001, at 3B.

42. *Id.*

43. Charles Savage, "Bad Teachers" Bil-Eyed, MIAMI HERALD, May 4, 2001, at 7B.

44. *Id.*

45. *Id.*

46. Mireidy Fernandez & Tere Figueras, *Billboards to Entice Police for Recruits*, MIAMI HERALD, Nov. 18, 2000, at 4B.

year stint at the police academy to become an officer.⁴⁷ Pay starts at \$27,561 a year.⁴⁸

G. *Cheating on Hiring Exam*

The state and the Broward School District allege that an assistant principal at a Pompano Beach middle school cheated on the Florida Educational Leadership Exam by finding a substitute to take it for him.⁴⁹ Handwriting analysis and non-matching Social Security numbers tipped off the authorities.⁵⁰ The state could revoke the principal's certification.⁵¹

H. *Promotions*

The proper procedure for making temporary promotions in Miramar's fire department came before the city's Civil Service Board.⁵² The board addressed whether the city follows its own rules involving temporary promotions after a firefighter alleged the city wrongly passed him over for a temporary promotion to captain.⁵³ Under the city's rules, temporary promotions last up to six months. Then the post, if still unfilled, goes to the top scorer on the captain's exam.⁵⁴

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

The United States Supreme Court handed down two decisions last term that have an impact on the hours and wages of public employees. In *United States v. Hatter*,⁵⁵ the Court ruled that the compensation clause did not bar Congress from withholding Social Security taxes from judicial salaries.⁵⁶

47. *Id.*

48. *Id.*

49. Elena Cabral, *Schools: Assistant Principal Cheated*, MIAMI HERALD, Mar. 17, 2001, at 1B.

50. *Id.*

51. *Id.*

52. Natalie P. McNeal, *Miramar Board Hears Promotion Complaints*, MIAMI HERALD, Apr. 10, 2001, at 6B.

53. *Id.*

54. *Id.*

55. 121 S. Ct. 1782 (2001).

56. *Id.* at 1787.

All the same, the Court held that the Compensation Clause did prohibit Congress from collecting Social Security taxes, but not Medicare taxes, from federal judges appointed before the tax became law.⁵⁷

In *United States v. Cleveland Indians Baseball Co.*,⁵⁸ the Court ruled that back wages are subject to Federal Insurance Contributions Act ("FICA") and Federal Unemployment Tax Act ("FUTA") taxes according to the year in which wages are in fact paid, not the year(s) when they were earned.⁵⁹

In keeping with Governor Jeb Bush's aim of tying bonuses to performance, Florida Education Secretary Jim Horne's bonus package was put off until 2003.⁶⁰ Florida Board of Education members, however, say Florida's top education official's salary must be substantially raised to compete with other states for education leaders.⁶¹

Broward school district's \$18 million payroll computer upgrade suffered software glitches, delaying hundreds of school workers' checks.⁶² About 12,500 of the district's employees work during the summer.⁶³

Miami-Dade County commissioners voted to double their expense accounts by \$1000 a month.⁶⁴ Critics of the current system say elected officials should be held accountable for how they spend their allowances.⁶⁵ Some claim expense accounts are simply a way to sidestep the county charter, which limits commission salaries at \$6000 a year.⁶⁶

Schools that either earned an "A" or bettered itself by one grade level receive bonuses.⁶⁷ South Plantation High School won \$244,000 which came out to \$1500 per teacher who returned for the 2000-01 term.⁶⁸ One teacher who returned but left in the middle of the year is suing the school board after she was denied the bonus money.⁶⁹

57. *Id.*

58. 121 S. Ct. 1433 (2001).

59. *Id.* at 407.

60. *Governor Urges Delay in Education Bonuses*, MIAMI HERALD, July 31, 2001, at 9B.

61. *Id.*

62. Steve Harrison, *Computer Woes Delay Hundreds of School Workers' Checks*, MIAMI HERALD, Aug. 1, 2001, at 8B.

63. *Id.*

64. Don Finefrock, *Dade Leaders May Hike Pay for Expenses*, MIAMI HERALD, Sept. 19, 2000, at 9B.

65. *Id.*

66. *Id.*

67. Susan Ferrechio, *Schools Hit with Suit over Bonus*, MIAMI HERALD, Apr. 5, 2001, at 3B.

68. *Id.*

69. *Id.*

Soaring overtime pay led the Miramar Fire Department to put in place cost-saving measures, including clamping down on sick leave.⁷⁰ Overtime rose as five members of the department retired on disability.⁷¹

Under Miami-Dade County's Efficiency and Competition Commission, public employees earn incentive bonuses for suggesting cost-saving ideas that lead to higher productivity.⁷²

Broward County is considering a proposal to increase the minimum wage for county workers from \$5.15 an hour to \$8.56, patterned after an ordinance adopted in Miami-Dade County in 1999.⁷³ Sixty counties and cities have enacted so-called living wage ordinances since 1994.⁷⁴

Governor Jeb Bush's 2001 state budget contains an increase of \$739 million, or six and three tenths percent, for Florida public schools.⁷⁵ A group of educators, however, claim that most of that money goes to "one-time teacher bonuses and program funds, not salaries for teachers and school employees."⁷⁶

B. Benefits

1. Jury Duty Release

Under state law, employers are prohibited from dismissing employees or threatening to fire them because of jury duty.⁷⁷ Even so, a Hallandale Beach firefighter had to turn in his badge when he did not show up for work and complete his shift after jury duty.⁷⁸ A judge had ordered the jurors to go home and rest.⁷⁹

70. Natalie P. McNeal, *Overtime Cut Back by Fire Officials*, MIAMI HERALD, Dec. 8, 2000, at 1B.

71. *Id.*

72. *County Employees Save Taxpayers \$43 Million over Last Two Years*, MIAMI HERALD, Jan. 21, 2001, at 5B.

73. Brad Bennett & Lisa Arthur, *Higher Minimum Wage is Proposed*, MIAMI HERALD, Apr. 11, 2001, at 1B.

74. *Id.*

75. Amanda Riddle, *Bush Urged to Devote Vetoed Funds to Teacher Pay*, MIAMI HERALD, June 27, 2001, at 9B.

76. *Id.*

77. Daniel de Vise, *Firm Cited for Firing Juror Now Facing Judge*, MIAMI HERALD, Aug. 22, 2000, at 1B.

78. *Id.*

79. *Id.*

2. Disability and Death Benefits

Florida Attorney General Bob Butterworth approved a \$25,000 payment from a crime victim's fund to the same sex companion of a slain police officer.⁸⁰ At the same time, Tampa is assessing its benefits policy that denies pension benefits, life insurance, health insurance and family leave to same sex partners.⁸¹

In *State v. Herny*,⁸² a claimant secured a health insurance subsidy because of his eligibility for state disability retirement.⁸³ The subsidy aids state retirees in paying health insurance premiums.⁸⁴ It does not qualify as a disability benefit.⁸⁵ For this reason, the court did not treat the subsidy as a benefit from a collateral source which may be offset against workers' compensation benefits based upon claimant's receipt of in the line of duty disability retirement and social security disability benefits.⁸⁶ The Supreme Court of Florida sustained the decision of the judge of compensation claims and the decision of the First District Court of Appeal to refuse to include the claimant's subsidy within the limit on benefits under section 440.20(15) of the *Florida Statutes*.⁸⁷

3. Public Pensions

a. Legislation

Governor Jeb Bush and his cabinet approved a proposal that gives 650,000 state employees more control over their retirement.⁸⁸ Existing defined benefit pensions would be replaced by defined contribution plans that enable employees the chance to invest in funds with higher returns.⁸⁹ Under the program, about \$15 billion of the \$107 billion of the state's

80. *State Gives Slain Cop's Companion \$25,000*, MIAMI HERALD, July 21, 2001, at 9B.

81. *Id.*

82. 781 So. 2d 1067 (Fla. 2001).

83. *Id.* at 1068.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Herny*, 781 So. 2d at 1068; see FLA. STAT. § 440.20(15) (1985).

88. Brent Kallestad, *New Options Proposed for State Employees' Pensions*, MIAMI HERALD, Sept. 27, 2000, at 11B.

89. *Id.*

pension fund would be tapped beginning in the summer of 2002.⁹⁰ Another bill, HB 1505, aims at improving health and pension benefits for teachers.⁹¹

Miramar city commissioners, unhappy with three different levels of the city's contribution to firefighters' pension funds, settled on a single amount: thirteen and one tenth percent.⁹² The issue was the key reason firefighters had been working without a contract since 1999.

b. *Ethical Opinion*

Florida's Commission on Ethics ruled that a Pompano Beach commissioner, a retired firefighter, was entitled to vote on pension benefits issues for retired firefighters on the ground that those votes benefit a whole class, not the commissioner personally.⁹³

c. *Misuse of Public Pension Funds*

Former Miami Chief of Police Donald Warshaw was convicted of fraud consisting of a number of suspicious financial transactions that channeled money from a police pension fund to an alleged embezzler.⁹⁴ Warshaw also used a city police pension fund check to pay for personal shopping and entertainment.⁹⁵

An internal audit revealed that the Miami Police Department violated federal guidelines when it spent \$2.55 million in public pension fund money on non law enforcement related activities such as on operating expenses and charities.⁹⁶ Moreover, the report turned up that the "trust had not been audited since 1994,"⁹⁷ a violation of federal tax laws.

90. *Id.*

91. *Teacher Shortages*, MIAMI HERALD, Mar. 21, 2001, at 12B.

92. Elena Cabral, *Miramar OKs Changes in Firefighters' Fund*, MIAMI HERALD, Sept. 7, 2000, at 3B.

93. Steve Bousquet, *Case Against Jenne Fizzles*, MIAMI HERALD, Aug. 25, 2000, at 1B.

94. Tom Dubocq, *Warshaw Probed over Funds Taken from Pension Account*, MIAMI HERALD, Oct. 2, 2000, at 9B.

95. Tom Dubocq, *Pension Fund Paid Chief's Card Bill*, MIAMI HERALD, Sept. 10, 2000, at 1B.

96. Charles Rabin, *New Audit of Police Trust Fund Reveals Rules Were Broken*, MIAMI HERALD, Oct. 19, 2000, at 10B.

97. *Id.*

The president of the union representing Miami-Dade transit workers lost his post after allegations that he may have wrongfully taken money the county had paid the union for retirement benefits.⁹⁸

d. *Forfeiture of Public Pension over Official Misconduct*

Under Florida law,⁹⁹ pension boards have discretion to deny a public employee's pension for the following reasons: embezzling public funds, stealing from one's employer, accepting a bribe or for committing a felony that defrauds the public. Former Miami City Manager Donald Warshaw may lose his police pension after his conviction on public corruption charges.¹⁰⁰

In *Jacobo v. Board of Trustees of the Miami Police*,¹⁰¹ a police officer was convicted of a felony for lying on an arrest affidavit that a suspect who was injured by a fellow office was toting a firearm at the time.¹⁰² As a result, the police pension fund board ordered the police officer's pension be forfeited.¹⁰³ On appeal, the court sustained the administrative action, agreeing that the officer committed a breach of the public trust.¹⁰⁴

e. *Public Pension Fund Investments*

Governor Jeb Bush, together with two officials who run Florida's \$100 billion public pension fund voted to remove a ban on investments in tobacco companies to take advantage of rising tobacco stock prices.¹⁰⁵ The state pension fund covers teachers, firefighters, police officers and other city, county, and state public employees.¹⁰⁶ Altogether, 680 public employees make up the Florida Retirement System Trust Fund.¹⁰⁷

98. Karl Ross, *Union President Removed After Fiscal Inquiry*, MIAMI HERALD, Apr. 14, 2001, at 12B.

99. FLA. STAT. § 112.3173 (2000).

100. Tyler Bridges, *Personal Pension with City Could be at Stake*, MIAMI HERALD, Sept. 29, 2000, at 16A.

101. 788 So. 2d 362 (Fla. 3d Dist. Ct. App. 2001).

102. *Id.* at 363.

103. *Id.* at 364.

104. *Id.* at 365.

105. *National Briefing*, N.Y. TIMES, June 13, 2001, at A31.

106. Lesley Clark, *State Pension Fund Resumes Tobacco Stock Purchases*, MIAMI HERALD, July 4, 2001, at 9B.

107. *Id.*

f. *Controversial Public Pension Options*

Florida's Deferred Retirement Option Program ("DROP") enables older public employees to retire with an amount tied to their salary and years of service.¹⁰⁸ Broward Public Defender Alan Schreiber took advantage of this program, under which he receives between \$400,000 and \$500,000 when he retires after thirty years as a state employee and another \$100,000 a year.¹⁰⁹

In a controversial move touted as a cost-saving measure, the Hallandale Beach Commission gave management credit in the general employees' pension without forcing them to contribute, an arrangement that would be illegal in the private sector.¹¹⁰ Under the arrangement, managerial employees need only contribute for future credit in the plan, but not for retroactive credit.¹¹¹

4. Privacy

a. *Drug Testing*

In *State Department of Transportation v. Plummer*,¹¹² the court addressed the relationship between the state's Drug-Free Workplace Act¹¹³ and the Federal Omnibus Transportation Employee Testing Act and Regulation¹¹⁴ in a discovery case.¹¹⁵ While the court sustained the hearing officer and the Public Employees Relations Commission to the extent they ordered discovery of drug test results of a particular employee challenging a disciplinary action, the order releasing information on other test-takers was deemed preempted by federal law.¹¹⁶

A Fort Lauderdale firefighter who tampered with his drug test to dodge testing positive for passive inhalation of marijuana won both his job back

108. Beth Reinhard, *A Golden Parachute for Public Defender*, MIAMI HERALD, Feb. 22, 2001, at 1B.

109. *Id.*

110. Griff Witte, *Executive Pension Shuffle in Question*, MIAMI HERALD, Apr. 6, 2001, at 1B.

111. *Id.* at 2B.

112. 774 So. 2d 945 (Fla. 1st Dist. Ct. App. 2001).

113. FLA. STAT. § 112.0455(1)(b).

114. 49 U.S.C. § 31306; 49 C.F.R. § 382.405(g).

115. *Plummer*, 774 So. 2d at 945 (Fla. 1st Dist. Ct. App. 2001).

116. *Id.* at 947.

and a promotion to lieutenant.¹¹⁷ The arbitrator ruled that the city did not have in place a zero tolerance policy for employees who doctor a drug test, or refuse to take it altogether. Only firefighters who test positive for drug use on or off duty face mandatory dismissal.

b. *Disclosures by Public Employees*

In *State v. Webb*,¹¹⁸ the court sustained the conviction of a school board member who waited four months before allowing access to public records and unduly restricting that access once it was allowed.¹¹⁹

The Florida Legislature passed a public records exemption bill that omits the home addresses and telephone numbers from the personnel files of public sector human rights managers.¹²⁰ The bill aims at protecting the privacy of public officials who are open to threats after discharging public employees.¹²¹

Under rules set by the State Bureau of Archives and Records Management, police officers' personnel records are kept fifty years after an officer's retirement.¹²² But internal affairs inquiries that turn up no wrong-doing can be destroyed after a year.¹²³ Records are kept three years for inquiries leading to a reprimand and five years following discipline.¹²⁴ A *Miami Herald* editorial criticized the destruction after one year option as depriving "both the public and the police executives of essential information indicating patterns of behavior."¹²⁵

c. *Surveillance of Public Employees' Private Lives*

A fired lieutenant in the Broward Sheriff's office complained to the Commission on Ethics that the sheriff illegally ran background checks.¹²⁶

117. Brittany Wallman, *Fired Firefighter Gets Job Back, Promotion*, SUN-SENTINEL, (Ft. Lauderdale), Jan. 26, 2001 at 3B.

118. 786 So. 2d 602 (Fla. 1st Dist. Ct. App. 2001).

119. *Id.* at 603. See FLA. STAT. § 119.07(1)(a).

120. Beth Reinhard, *Lawmakers Nibble Away at Public-Records Laws*, MIAMI HERALD, May 3, 2001, at B1.

121. *Id.*

122. Leslie Clark, *Repeal This Rule*, MIAMI HERALD, July 17, 2001, at 6B.

123. *Id.*

124. *Id.*

125. *Id.*

126. Steve Bousquet, *Case Against Jenne Fizzles*, MIAMI HERALD, Aug. 25, 2000, at 1B.

The commission concluded such a practice is legal and threw out the complaint.¹²⁷ The ethics panel found no evidence the sheriff sought the information solely for personal gain.¹²⁸ State law bars public officials from “using information not available to the public . . . for the personal benefit of themselves or others.”¹²⁹

5. Loss of Job Security

The Florida Legislature shifted over 16,000 mid-level state employees from the career service system to management positions.¹³⁰ In effect, these workers shed job security (such as seniority and “bumping” rights) in exchange for the chance to earn bonuses.¹³¹ Specifically, managers and supervisors will be transferred from Career Service status to selected exempt service status.¹³²

Governor Jeb Bush’s “Service First” initiative, aimed at running the state like a business, also contemplates allowing state employees to cash in unused sick leave or have it allotted to early retirement.¹³³ Moreover, employees’ performances would be assessed every ninety days, not just once-a-year.¹³⁴ Opponents fear the new system will promote “cronyism, favoritism and discrimination.”¹³⁵ The burden in discipline cases would be shifted from the employer to the employee as well.¹³⁶

As a *Miami Herald* editorial put it: “[c]ivil-service reform came to Florida fifty years ago to stop the ‘suitcase parades’ occurring after every election where the friends of the winners were rewarded with cushy jobs and the losers were sent packing.”¹³⁷ It remains to be seen whether this year’s civil service reform does not revive patronage.

127. *Id.*

128. *Id.*

129. *Id.* at 2B.

130. *Top Issues of 2001*, MIAMI HERALD, May 6, 2001, at 28A.

131. *Id.*

132. Mario Diaz-Balart, *HB 369 Streamlines the Civil Service System*, MIAMI HERALD, Apr. 2, 2001, at 10B.

133. Steve Bousquet, *Governor Proposes Merit Pay System for State Employees*, MIAMI HERALD, Mar. 2, 2001, at 1B.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Civil-Service Reform*, MIAMI HERALD, Mar. 16, 2001, at 10B.

6. Health Benefits

Beginning in 2001, Broward County put into effect a self-insurance program for public employees prescription drug coverage.¹³⁸

President Bush announced that he would endorse enactment of a bill barring insurance companies and employers from applying newly developed tests of an individual's genetic composition to turn them down for medical coverage or for jobs.¹³⁹

About 30,000 Broward public school district workers most likely must pay more for their health insurance after the district's insurers failed to honor their contracts.¹⁴⁰ The school system is weighing whether to sue the insurers for damages.¹⁴¹ Subsequently, Humana was selected by the Broward public school district to take over health insurance for 9000 school employees and their families formerly insured by Foundation (who backed out of its contract to insure the district through 2001).¹⁴² The school district will pick up the \$16.5 million rate hike Humana insists upon to deliver the same level of service as Foundation.¹⁴³ For their part, employees may have to forego ten million dollars earmarked for a one percent pay raise.¹⁴⁴

A circuit court judge addressed the issue whether the city of Miami promised retirees that their health insurance rates would never increase.¹⁴⁵ The court ruled that the city broke its promise more than twenty years ago when it increased health insurance rates for retirees.¹⁴⁶

7. Occupational Health and Safety Issues

Hialeah firefighters held a protest over health and safety conditions at their station where they sleep and work. Remodeling has generated

138. Charles Savage, *County Overhaul Aims to Create Self-Funded Insurance*, MIAMI HERALD, Sept. 15, 2000, at 5B.

139. David E. Sanger, *President: Genes Shouldn't Bar Insurance or Job*, MIAMI HERALD, June 24, 2001, at 26A.

140. Susan Ferrechio, *School Employees Face Insurance Hike*, MIAMI HERALD, Oct. 31, 2000, at 3B.

141. *Id.*

142. Susan Ferrechio, *Schools Insurance Fix Could be Costly*, MIAMI HERALD, Nov. 7, 2000, at 3B.

143. *Id.*

144. *Id.*

145. Charles Rabin, *Pension Feud is Boiling*, MIAMI HERALD, Oct. 26, 2000, at 1B.

146. *Id.*

construction dust, exposed ceilings and weak walls.¹⁴⁷

Teachers at a center for youthful sex offenders had to leave after the state fire marshall uncovered several safety violations.¹⁴⁸ For example, keys to exit doors were not easily accessible; combustibles were left in the stairwell, furniture was blocking the hallway, and there were dangerously dangling electrical cords.¹⁴⁹

8. Teacher Training

Governor Jeb Bush vetoed \$275,000 set aside in the 2001 state budget that enables teachers to study Florida's history, literature and culture for a week.¹⁵⁰ Florida currently spends \$36 million on teacher-training programs.¹⁵¹

9. Tort Insurance for Teachers

Even though state law accords immunity for teachers who act properly within the scope of their employment, the legislature earmarked \$1.2 million for liability insurance for public school teachers.¹⁵² Instead of requiring competitive bids for teachers' insurance, the bill designates a specific private company known as an anti-union firm.

IV. DISCIPLINE, DISCHARGE, AND REDUCTIONS-IN-FORCE

A. *Off-Duty Misconduct*

A Miami-Dade police officer was prosecuted for plotting with a fellow patrolman and others to steal drugs and money from dope dealers.¹⁵³ The

147. Carolyn Salazar, *Job Conditions Trigger Protest by Firefighters*, MIAMI HERALD, May 27, 2001, at 3B.

148. Susan Ferrechio & Carol Manbin Miller, *Power Failure Forces Teachers from Center Again*, MIAMI HERALD, Mar. 15, 2001, at 3B.

149. *Id.*

150. *Bush Budget Cut Leaves Teachers Seeking Funds*, MIAMI HERALD, July 10, 2001, at 7B.

151. *Id.*

152. Steve Bousquet & Lesley Clark, *Insurer Plans Raise Issues*, MIAMI HERALD, May 4, 2001, at 6B.

153. Frances Robles, *Six Go to Trial in Drug Ripoffs*, MIAMI HERALD, Oct. 2, 2000, at 9B.

trial was notable for going through 300 prospective jurors unable to sit on a case that lasted four months.¹⁵⁴

A labor arbitrator concluded that Miami Beach had just cause to dismiss a police officer for conduct unbecoming an employee of the city.¹⁵⁵ The police officer allegedly committed misconduct with a seventeen-year-old girl, even though he was acquitted by a jury.¹⁵⁶

Two Palm Beach County Sheriff's deputies are under investigation for allegedly posing on pornographic websites.¹⁵⁷

B. *On-the-Job Misconduct*

A Broward County middle school security guard was arrested for allegedly molesting two male students.¹⁵⁸

A state corrections officer was discharged from his job after he was arrested for his part in a prostitution ring, run by his wife.¹⁵⁹

About a dozen detention officers at the Krome detention center were disciplined for alleged abuse, theft and sexual misconduct.¹⁶⁰

Two firefighters resigned from the fire department after they were arrested and charged for filing false tax returns and for tax evasion.¹⁶¹

Fort Lauderdale's Equal Opportunity Office director was placed on administrative leave with pay on grounds of a conflict of interest after she filed a retaliation complaint against the city.¹⁶²

154. *Id.*

155. *Arbitrator Upholds Ex-Officer's Termination*, MIAMI HERALD, July 22, 2001, at 3B.

156. *Id.*

157. Bill Douthat, *Cops Probed over Porn Websites*, MIAMI HERALD, Dec. 7, 2000, at 12B.

158. David Green, *Middle-School Security Guard Accused of Molesting Boys*, MIAMI HERALD, Nov. 14, 2000, at 1B. The allegation was for lewd and lascivious molestation and sexual battery. *Id.*

159. *Corrections Officer Arrested in Sex Ring Bust*, MIAMI HERALD, Oct. 4, 2000, at 13B.

160. Alfonso Chardy, *Ex Krome Center Officer Denies Wrongdoing, Admits Three Claims*, MIAMI HERALD, Sept. 19, 2000, at 3B.

161. Wanda J. DeMarzo, *Former Firefighter Gets Jail Time, IRS Tab*, MIAMI HERALD, Aug. 20, 2000, at 6B.

162. Brad Bennett, *Rights Official Ordered on Leave*, MIAMI HERALD, Aug. 8, 2001, at 1B.

Former Miami Finance Director plead guilty to soliciting kickbacks from a city contractor. The plea agreement included one felony count of conspiracy to commit extortion, bribery and money laundering.¹⁶³

A Manatee County sheriff's deputy was sent to federal prison for shaking down motorists, stealing from crime victims and aiding another deputy set fire to a truck to collect insurance.¹⁶⁴

A Florida Atlantic University professor resigned after he was accused of using FAU Visa cards to bet \$7000 on Internet gambling.¹⁶⁵

In *Miami-Dade County v. Jones*,¹⁶⁶ the court concluded the public employer was vested with discretion whether to take into account or to ignore mitigating factors before imposing discipline on a nursing technician dismissed for tardiness and absenteeism.¹⁶⁷

In *Declat v. Dep't of Children and Families*,¹⁶⁸ the court sustained a hearing officer's conclusion that discipline was warranted against a public employee who lied to his supervisor and was negligent in the performance of his duties.¹⁶⁹ Specifically, the employee told his supervisor he had reviewed the file of a child who later died from abuse when in fact the public employee had not reviewed the file.¹⁷⁰

The state attorney's office issued an opinion concluding that a candidate running for reelection as Broward clerk of courts did not break the law when he inserted thank-you notes in the pay envelopes of jurors.¹⁷¹

In *Bamawo v. Dep't of Corrections*,¹⁷² the court ruled that the Department of Corrections was entitled to dispense with the usual ten day notice for dismissal or suspension where the employee posed a physical threat to supervisors.¹⁷³ Moreover, the Public Employees Relations Commission did not abuse its discretion in refusing to mitigate the discipline

163. Luisa Yanez, *Miami's Ex-Finance Director Pleads Guilty to Kickbacks*, MIAMI HERALD, Aug. 7, 2001, at 3B.

164. Vickie Chacere, *Judge Sends Shakedown Officer to Federal Prison*, MIAMI HERALD, Aug. 19, 2000, at 5B.

165. *Professor Resigns Amid Inquiry*, MIAMI HERALD, Aug. 25, 2000, at 3B.

166. 778 So. 2d 409 (Fla. 3d Dist. Ct. App. 2001).

167. *Id.*

168. 776 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2001).

169. *Id.*

170. *Id.*

171. Caroline J. Keough, *Clerk's Thank-You Notes Not Illegal, State Says*, MIAMI HERALD, Oct. 4, 2000, at 2B.

172. 785 So. 2d 610 (Fla. 3d Dist. Ct. App. 2001).

173. *Id.* at 611.

imposed in light of the gravity of the employee's misconduct.¹⁷⁴ In this regard, the court made clear, the employee bears the burden of proving that his or her punishment ought to be reduced.¹⁷⁵

A community relations employee with the Broward County bus system was ordered to report to work "on a daily basis" after the *Miami Herald* reported that his job did not require him to come in to work and had few official duties.¹⁷⁶

A twenty-two-year veteran Miami-Dade sanitation employee lost his job after accepting money for looking the other way while someone dumped roof material at a trash center instead of a landfill.¹⁷⁷

A prominent researcher at Florida Atlantic University is under investigation over whether he used school resources to aid his private business.¹⁷⁸ In response, the university is drafting policies on conflict-of-interest cases in the area of technology transfer (i.e., turning research into business).¹⁷⁹

C. Retaliation, Whistle-Blowing, the First Amendment

1. Retaliation

A Fort Lauderdale parking enforcement officer has alleged in a lawsuit that she was retaliated against after she claimed that a co-worker sexually harassed her.¹⁸⁰ Retaliation came in the form of a poor evaluation and insistence that she get a doctor to sign-off whenever she sought sick leave.¹⁸¹

Black prison guards alleged they have been harassed for suing the Department of Corrections over racial discrimination.¹⁸² One guard had been reassigned to a desk job and another alleges he was assaulted at work

174. *Id.*

175. *Id.*

176. Charles Savage, *Walters Told to Be at Job Daily*, MIAMI HERALD, Aug. 16, 2000, at 3B.

177. Joan Fleischman, *Tale of 2 Waste Workers: Is This Equal Justice?*, MIAMI HERALD, Aug. 13, 2000, at 2B.

178. Holly Stepp, *Licensing Case Puts FAU in Spotlight*, MIAMI HERALD, Mar. 26, 2001, at 1B.

179. *Id.*

180. Brad Bennett, *Lauderdale Worker Charges City Retaliation*, MIAMI HERALD, June 14, 2001, at 2B.

181. *Id.*

182. Lesley Clark, *State to Inspect Guards' Reports of Harassment*, MIAMI HERALD, Apr. 20, 2001, at 5B.

owing to his role in the lawsuit.¹⁸³ Other forms of retaliation include: death threats, being passed over for promotion, and being denied training.¹⁸⁴

2. Whistle-Blowing

A Florida appeal court overturned a jury verdict entitling former Hollywood Police Chief Richard Witt to \$200,600 after finding that the city broke the state's whistle-blower law¹⁸⁵ when it dismissed him in 1996.¹⁸⁶ The Fourth District Court of Appeal held that the city charter makes clear that the police chief is an at-will employee who may be dismissed at the city manager's discretion.¹⁸⁷ Florida's public employee Whistle-Blower's Act¹⁸⁸ has been interpreted to be a remedial act entitled to a liberal construction.¹⁸⁹

A former attorney for the Florida Department of Health and Rehabilitative Service¹⁹⁰ recovered \$238,312 in back pay in a jury verdict six years after she had been discharged for reporting that her supervisor was neglecting his job and falsifying time records.¹⁹¹ The jury concluded the former attorney was dismissed in retaliation for whistle-blowing.¹⁹²

3. The First Amendment

In *Rice-Lamar v. City of Fort Lauderdale*,¹⁹³ the Eleventh Circuit reviewed the discharge of a city's affirmative action specialist who claimed her dismissal was in retaliation for exercising her first amendment rights.¹⁹⁴ Applying a four-part First Amendment retaliation test, the court assumed that plaintiff's speech touched on a matter of public concern but concluded that her first amendment right was outweighed by the city's interests:

183. *Id.*

184. *Id.*

185. State whistle-blower laws aim at protecting employees who report misconduct by their employer.

186. Erika Bolstad, *Hollywood Ex-Chief's Legal Victory Overturned*, MIAMI HERALD, June 28, 2001, at 1A.

187. *Id.*

188. See FLA. STAT. § 112.3187 (2000).

189. *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403 (Fla. 2001).

190. Now the Department of Children & Families.

191. Elaine De Valle, *Child Advocate Wins Whistle-Blower Case*, MIAMI HERALD, Aug. 11, 2001, at 6B.

192. *Id.*

193. 232 F.3d 836 (11th Cir. 2000).

194. *Id.*

plaintiff was not entitled to refuse to perform a lawful task well within the scope of her duties.¹⁹⁵

The President of Florida International University personally endorsed then-presidential candidate George W. Bush when he campaigned on campus before the November 2000 election.¹⁹⁶ Some in the FIU community complained that FIU's President abused his position by his endorsement while his defenders insist he was entitled to speak his mind as a matter of academic freedom.¹⁹⁷ Apparently, no clear-cut rules govern such political endorsements by a state university president.

The First Amendment right of on-duty police officers to engage in partisan politics arose in South Florida before the November 2000 election.¹⁹⁸ Over 50 people complained after 100 Hollywood police officers knocked on doors to urge citizens to vote for a measure involving police service in unincorporated areas.¹⁹⁹ Under Hollywood's administrative policy, employees are barred from engaging in political activity while on-duty.²⁰⁰ But a city attorney claimed that the rule only governs partisan politics.²⁰¹

A Florida trial judge faced a disciplinary proceeding after referring to an election opponent as "a part-time judge in a full-time job."²⁰² A trial judge in Pensacola, Florida, faced removal after calling an election opponent "Judge Let 'em Go Green."²⁰³

Miami-Dade's firefighters' union fought with the fire chief over members' display of mayoral campaign stickers and signs on their private cars in employee parking lots.²⁰⁴ An ordinance that governs political activity by public employees does not address the issue. The larger question of campaigning on public property is currently being sorted out by the county's attorney.

195. *Id.*

196. Mark Silva, *Outrage at FIU over President's Boost for Bush*, MIAMI HERALD, Aug. 30, 2000, at 11B.

197. *Id.*

198. Ana Rhodes & Erika Bolstad, *Police Campaign Sparks Complaints*, Nov. 3, 2000, at 5B.

199. *Id.*

200. *Id.*

201. *Id.*

202. William Glaberson, *States Rein in Truth Bending in Court Races*, N.Y. TIMES, Aug. 23, 2000, at A1.

203. *Id.*

204. Andres Viglucci, *Dade Firefighters in 4-Alarm Political Feud*, MIAMI HERALD, Aug. 18, 2000, at 8B.

D. Employment Discrimination

1. Generally

At least six complaints and lawsuits have been filed with the E.E.O.C. in the last couple of years against the city of Fort Lauderdale alleging discrimination, harassment and retaliation. Oddly enough, the city's own diversity manager filed a bias complaint.²⁰⁵ The United States Commission on Civil Rights is currently reviewing racial bias claims lodged by black city of Fort Lauderdale employees.²⁰⁶ The city risks losing federal funding for roads, low-income housing and added police.²⁰⁷ The Fort Lauderdale NAACP has come out in support of city employees who are suing the city for alleged racial discrimination.²⁰⁸

Highway patrol troopers in Miami-Dade face intensive sensitivity training in light of allegations that three supervisors uttered racial and ethnic epithets and pored over pornographic pictures on the job.²⁰⁹

Fort Lauderdale paralegal Brian Neiman was permanently enjoined from practicing law without a license.²¹⁰ Among other cases, Neiman filed a civil rights lawsuit on behalf of twenty nine employees against the Broward Clerk of Courts.²¹¹ The County paid \$1.3 million to settle the case.²¹²

2. Race

In *Crapp v. City of Miami Beach*,²¹³ the Eleventh Circuit addressed what evidence it would admit with regard to whether a termination was the product of unlawful race discrimination or for a legitimate reason.²¹⁴ Here,

205. Brad Bennett, *Lauderdale Worker Files Bias Complaint*, MIAMI HERALD, July 24, 2001, at 2B.

206. Brad Bennett, *Civil Rights Complaints Studied*, MIAMI HERALD, June 23, 2001, at 3B.

207. *Id.*

208. Brad Bennett, *NAACP Asks Lauderdale to Resolve Race Bias Claims*, MIAMI HERALD, June 15, 2001, at 8B.

209. Phil Long & Marika Lynch, *Troopers Will Get Wet Sensitivity Training*, MIAMI HERALD, Mar. 3, 2001, at 1B.

210. Sue Reisinger, *Judge Wants Paralegal Stopped*, MIAMI HERALD, Sept. 19, 2000, at 1B.

211. *Id.*

212. *Id.*

213. 242 F.3d 1017 (11th Cir. 2001).

214. *Id.* at 1020.

the court ruled that poor performance by the fired employees amounted to admissible evidence that their dismissal was non-race-related.²¹⁵

In *Bass v. Board of County Commissioners*,²¹⁶ the Eleventh Circuit ruled that all claims of race discrimination, no matter the skin color of the claimant, would face the same analysis.²¹⁷ Specifically, claims by white employees, instead of being framed as “reverse discrimination” claims, would undergo the same analysis as any other racial bias claim.²¹⁸ Moreover, the court ruled that any affirmative action plan must satisfy strict scrutiny under Title VII and the Equal Protection Clause.²¹⁹

In *Silvera v. Orange County School Board*,²²⁰ a black maintenance employee, fired for an old conviction for lewd assault on a child, claimed he was treated unfairly as compared to a similarly situated white employee.²²¹ The court ruled the two employees were not similarly situated: the black employee had three additional arrests for violent assaults, two of them recent and the employer was contractually bound not to dismiss the white employee owing to his conviction.²²²

In *Davis v. Town of Lake Park*,²²³ the Eleventh Circuit addressed a commonly litigated issue: what constitutes an “adverse employment action” for purposes of suing under Title VII?²²⁴ In *Davis*, an African-American police officer was accused of neglecting a key element of his job and was told that any future leave requests would be denied until all his paperwork was turned in.²²⁵ The court concluded that since the officer faced no loss of pay or benefits or suffer other discipline, he did not prove an adverse employment action.²²⁶

A federal jury awarded a former Fort Lauderdale city maintenance employee \$275,000 (including attorneys’ fees), finding that she was the victim of gender and race discrimination.²²⁷ Specifically, the jury awarded

215. *Id.*

216. 242 F.3d 996 (11th Cir. 2001). *See cases reversed by 256 F.3d 1095.*

217. *Id.* at 1003.

218. *Id.*

219. *Id.* at 1013.

220. 244 F.3d 1253 (11th Cir. 2001).

221. *Id.* at 1257.

222. *Id.*

223. 245 F.3d 1232 (11th Cir. 2001).

224. *Id.*

225. *Id.* at 1235.

226. *Id.* at 1246.

227. Brad Bennett, *\$275,000 to Lauderdale Bias Victim*, MIAMI HERALD, Feb. 16, 2001, at 3B.

\$200,000 for emotional distress in a hostile work environment and \$75,000 in back pay.²²⁸

The E.E.O.C. issued a memo concluding that the Broward Sheriff's Office "probably discriminated against five black and Hispanic deputies and one black sergeant by denying them promotions."²²⁹ Plaintiffs claim they passed a written exam but that the oral portion which they failed was subjective, allowing the employer to promote non-Hispanic whites with equal or less experience.²³⁰ In response, the sheriff simply recited that forty one percent of those promoted since he took office in 1988 have been minorities.²³¹ Plaintiffs seek lost wages and punitive damages among other remedies.²³²

3. Gender

In *Clark County School District v. Breeden*,²³³ the United States Supreme Court further refined the law governing sexual harassment,²³⁴ ruling that a hostile environment must be so severe or pervasive as to change the conditions of the victim's employment.²³⁵

In *Danskine v. Miami Dade Fire Department*,²³⁶ the Eleventh Circuit addressed the validity of a gender-based affirmative action plan under the Equal Protection Clause.²³⁷ The court sustained a county fire department's plan that set a goal of hiring thirty six percent more female firefighters.²³⁸ In this regard, the court made clear that the goal was not a rigid quota and there was no showing that the goal injured male applicants.²³⁹ The court did

228. *Id.*

229. Brad Bennett, *Bias Case Against BSO is Bolstered*, MIAMI HERALD, July 24, 2001, at 1B.

230. *Id.*

231. *Id.*

232. *Id.* at 2B.

233. 121 S. Ct 1508 (2001).

234. *Id.* at 1509; see Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); FLA. STAT. § 703(a)(1).

235. *Clark County Sch. Dist.*, 121 S. Ct. at 1509; see *A Crude Remark by Supervisor Short of Harassment, Court Rules*, MIAMI HERALD, Apr. 24, 2001, at 6A.

236. 253 F.3d 1288 (11th Cir. 2001).

237. *Id.* at 1289.

238. *Id.* at 1299.

239. *Id.* at 1300.

caution the employer that such an affirmative action plan may not go on forever.²⁴⁰

In *E.E.O.C. v. Joe's Stone Crab, Inc.*,²⁴¹ the court found that where an employer systematically barred women from food service positions premised on a sexual stereotype that equated "fine-dining ambience"²⁴² with all-male employees, plaintiff established intentional disparate treatment sex discrimination in violation of Title VII.²⁴³

In *Scelta v. Delicatessen Support Services, Inc.*,²⁴⁴ the court ruled that in analyzing hostile work environment sexual harassment claims under state law,²⁴⁵ courts are bound by federal caselaw governing Title VII.²⁴⁶ Separately, the court also made clear that not all harassment between men and women is automatically discrimination because of sex simply because the words uttered have a sexual meaning.²⁴⁷

A Fort Lauderdale city planner was terminated for creating "a hostile work environment"²⁴⁸ for a woman he supervised by harassing her about her pregnancy and maternity leave.²⁴⁹ In response, the planner claims he was targeted because he is of Philippine descent.²⁵⁰

Broward County's Chief Judge was accused of sexual harassment by a woman who served as an intern ten years ago.²⁵¹ The issue came to light because the woman's husband accused the judge of applying undue pressure on another judge presiding over the couple's divorce.²⁵²

A former Special Agent in the Miami-Dade office of the inspector general sued her boss for sexual harassment.²⁵³

240. *Id.*

241. 136 F. Supp. 2d 1311 (S.D. Fla. 2001).

242. *Id.* at 1313.

243. *Id.*

244. 146 F. Supp. 2d 1255 (M.D. Fla. 2001).

245. See Florida Civil Rights Act, FLA. STAT. § 760.10(1) (2001).

246. *Scelta*, 146 F. Supp. 2d at 1261.

247. *Id.* at 1263.

248. *Lauderdale Dismisses City Planner*, MIAMI HERALD, May 31, 2001, at 3B.

249. *Id.*

250. *Id.*

251. Larry Lebowitz, *Judge Accused of Sex Harassment*, MIAMI HERALD, Aug. 4, 2000, at 1B.

252. *Id.*

253. Joan Fleischman, *Legal Battle Brewing in Inspector General's Office*, MIAMI HERALD, Oct. 4, 2000, at 12B.

4. Age

In *Hipp v. Liberty National Life Insurance Co.*,²⁵⁴ the Eleventh Circuit spelled out the prima facie case for establishing a “pattern and practice”²⁵⁵ claim under the Age Discrimination in Employment Act (ADEA),²⁵⁶ the federal law barring age discrimination.²⁵⁷ In this regard, a plaintiff must show by a preponderance of the evidence that age discrimination was the employer’s “standard operating procedure.”²⁵⁸ To satisfy this burden, plaintiffs must establish more than isolated instances of discriminatory acts.²⁵⁹ Moreover, the court concluded that a constructive discharge can amount to an “adverse employment decision”²⁶⁰ under the Act.²⁶¹ Here, however, plaintiffs failed to show that the supervisor’s acts were so intolerable that a fair minded employee would have felt forced to resign.²⁶²

In *Adams v. Florida Power Corp.*,²⁶³ the Eleventh Circuit ruled that disparate impact claims do not lie under the ADEA.²⁶⁴ In other words, only intentional discrimination claims are cognizable under the Act.

5. Disability

In *Board of Trustees v. Garrett*,²⁶⁵ the United States Supreme Court ruled that Congress exceeded its power under the enforcement provision of the Fourteenth Amendment when it abrogated states’ Eleventh Amendment immunity from suits for damages under the Americans With Disabilities Act (ADA),²⁶⁶ the federal statute prohibiting disability discrimination in employment.²⁶⁷ As a result of this decision, state employees may not sue

254. 252 F.3d 1208 (11th Cir. 2001).

255. *Id.* at 1227.

256. 29 U.S.C. § 623(f)(1).

257. *Hipp*, 252 F.3d at 1227–28.

258. *Id.* at 1227.

259. *Id.* at 1227–28.

260. *Id.* at 1230.

261. *Id.*

262. *Hipp*, 252 F.3d at 1244.

263. 255 F.3d 1322 (11th Cir. 2001).

264. *Id.* at 1326.

265. 121 S. Ct. 955 (2001).

266. 42 U.S.C. § 12101 (Supp. V 1994).

267. *Garrett*, 121 S.Ct. at 967–68.

their state employers for damages for disability discrimination in employment.²⁶⁸

The United States Supreme Court has agreed to hear two ADA cases next term that may have an impact on Florida public employees. One, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²⁶⁹ addresses the proper definition of disability: is it enough for a court to find that an impairment merely affected, rather than significantly restricted, a major life activity?²⁷⁰

The second case, *United States Airways Inc. v. Barnett*,²⁷¹ addresses whether “reassignment is a reasonable accommodation to which disabled employees should have priority over nondisabled employees”²⁷² in violation of seniority rights.²⁷³

In *Chenoweth v. Hillsborough County*,²⁷⁴ the Eleventh Circuit, interpreting a key provision of the prima facie case of a disabled individual under the ADA, ruled that an inability to drive to work for six months fell short of an impairment drastically curbing a major life activity.²⁷⁵

In *Johnston v. Henderson*,²⁷⁶ the court ruled that post traumatic stress disorder, by itself, does not rise to the level of a “disability” under the ADA.²⁷⁷

A Palm Beach County traffic-light installer sued the county after he was discharged owing to an inability to distinguish between red and green wires.²⁷⁸ The suit claims discrimination on the basis of colorblindness violates the ADA.²⁷⁹

268. See *Connor v. Halifax Hosp. Med. Ctr.*, 135 F. Supp. 2d 1198, 1215 (M.D. Fla. 2001) (reciting “congruence and proportionality” test of Congress’ power to abrogate state’s Eleventh Amendment immunity under enforcement clause of Fourteenth Amendment).

269. 121 S. Ct. 1600 (2001).

270. Linda Greenhouse, *Justices Accept 2 Cases to Clarify Protection for Disabled*, N.Y. TIMES (Miami), Apr. 17, 2001, at A13.

271. 149 L. Ed. 2d 467 (2001).

272. Greenhouse, *supra* note 270, at A13.

273. *Id.*

274. 250 F.3d 1328 (11th Cir. 2001).

275. *Id.* at 1329; see 42 U.S.C. § 12102(2)(A) (1994).

276. 144 F. Supp. 2d 1341 (S.D. Fla. 2001).

277. *Id.* at 1350.

278. *Colorblind Man Sees Red over Pink Slip, Sues County*, MIAMI HERALD, June 29, 2001, at 9B.

279. *Id.*

6. Same-Sex Bias

Broward County's 1995 gay rights ordinance prohibits, among other things, discrimination in employment.²⁸⁰ The ordinance once again was in the news as opponents sought for the third time to overturn it by a petition drive.²⁸¹ This time, however, the Broward Republican Party will remain neutral on the issue.²⁸²

E. Reductions-in-Force

In *Moore v. Navy Public Works Center*,²⁸³ the court addressed whether public employees had standing to challenge the Navy's inaction that could lead to a reduction-in-force.²⁸⁴ The court concluded the plaintiffs failed to meet the constitutional standards for standing²⁸⁵ for the following reasons: 1) no loss of federal employment had taken place; 2) the alleged injury was not concrete or imminent; and 3) no nexus was established between the challenged conduct and the alleged injury.²⁸⁶

In light of a \$6 million revenue shortfall, Hollywood must either increase its property tax rate or layoff "20 police officers, 10 firefighters, 10 public works employees, five building inspectors or code enforcement officers and about 10 other jobs in various city departments."²⁸⁷

F. Remedies for Wrongful Discharge

1. Attorneys' Fees

The United States Supreme Court dealt a blow to civil rights plaintiffs who were formerly entitled to recover attorneys' fees if their lawsuits achieved their aims.²⁸⁸ In *Buckhannon Board & Care Home v. West Virginia*

280. Beth Reinhard, *GOP Sits Out Gay Petition Drive*, MIAMI HERALD, July 17, 2001, at 3B.

281. *Id.*

282. *Id.*

283. 139 F. Supp. 2d 1349 (N.D. Fla. 2001).

284. *Id.* at 1354.

285. *Id.* See U.S. CONST. art. III, § 1.

286. *Moore*, 139 F. Supp. 2d at 1355.

287. Erika Bolstad, *Hollywood Must Cut Jobs or Increase Taxes, Leaders Told*, MIAMI HERALD, May 8, 2001, at 5B.

288. Linda Greenhouse, *Ruling Limits Awarding of Legal Fees for Plaintiffs*, N.Y. TIMES, May 30, 2001, at A18.

Department of Health & Human Resources,²⁸⁹ the Court, in a 5-4 vote, ruled that a plaintiff must achieve an actual courtroom victory or court-approved settlement agreement before recovering attorneys' fees.²⁹⁰

In *Kelley v. Public Employees Relation Commission*,²⁹¹ a Florida appeals court interpreted the meaning of the phrase "a prevailing party"²⁹² for purposes of determining when attorneys' fees are recoverable.²⁹³ Kelley argued the Public Employees Relations Commission (PERC) erred in denying him attorneys' fees and costs since PERC ruled her termination was too severe a sanction and reinstated her.²⁹⁴ At the same time, PERC sustained the public employer's finding that just cause existed to discipline Kelley.²⁹⁵ The court concluded PERC did not abuse its discretion when it denied Kelley her attorneys' fees and costs.²⁹⁶

2. Appeals to the Public Employees Relations Commission

In *City of Jacksonville v. Jacksonville Supervisor's Association, Inc.*,²⁹⁷ the city appealed a final PERC order that the city had committed unfair labor practices in refusing to bargain with the union over a departmental reorganization by the city.²⁹⁸ PERC ruled that the public employer owed a duty to engage in "impact" bargaining about the consequences abolishing bargaining unit positions and promoting employees to supervisory positions would have upon the bargaining unit's wages, hours, and other terms and conditions of employment.²⁹⁹ In essence, PERC viewed the transfer of unit work to the city's non-unit employees as an after effect of translating into action a management decision which must be bargained.

On appeal, the court deemed the issue ill-suited for collective bargaining.³⁰⁰ In support of this position, the court reasoned that the decision to subcontract is mostly a political question best handled in a

289. 121 S. Ct. 1835 (2001).

290. *Id.* at 1843.

291. 781 So. 2d 1193 (Fla. 5th Dist. Ct. App. 2001).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Kelley*, 781 So. 2d at 1193. (Section 447.203(3) of the *Florida Statutes* gives PERC discretion in awarding attorneys' fees and costs to a prevailing party.)

297. 791 So. 2d 508 (Fla. 1st Dist. Ct. App. 2001).

298. *Id.* at 509.

299. *Id.*

300. *Id.* at 510.

political arena: “[a] public employer should have the authority to decide to change the ‘nature or direction’ of its business, and must be able to freely do so to restructure the organization of its operations.”³⁰¹

In *Hallandale Profession Firefighters, Local 2238 v. City of Hallandale*,³⁰² the union filed a grievance over discipline imposed by the city against three firefighters and demanded arbitration.³⁰³ At the same time, the union filed an unfair labor practice charge with PERC, claiming that the city wrongfully punished the firefighters for engaging in protected activities.³⁰⁴ The hearing officer ruled that the city had cause to sanction the firefighters over the way they handled a 911 call.³⁰⁵ PERC affirmed.³⁰⁶ Later, the union sought arbitration over the same grievance but the trial court ruled that the union was foreclosed from seeking arbitration on the same claims, relying in part on statutory law³⁰⁷ and case law.³⁰⁸

In *Palm Beach County Police Benevolent Ass’n v. City of Riviera Beach*,³⁰⁹ a police union filed an unfair labor practice charge against the city for wrongfully grilling and terminating three police officers for engaging in union activities.³¹⁰ The hearing officer ruled that the police officers were fired for engaging in protected, concerted union activity, including supporting candidates in city elections.³¹¹ PERC remanded the case, instructing the hearing officer to weigh whether the city would have fired the officers regardless of their protected political activity.³¹² On remand, the hearing officer reversed his views, concluding that the union did not meet its burden for proving that the discharge was unlawfully motivated.³¹³ PERC affirmed, and the union appealed.³¹⁴ The district court found that PERC

301. *Id.* at 511.

302. 777 So. 2d 435 (Fla. 4th Dist. Ct. App. 2001).

303. *Id.*

304. *Id.* at 435.

305. *Id.*

306. *Id.*

307. FLA. STAT. § 447.401 (1999).

308. *Hallandale*, 777 So. 2d at 435–36. See *Metropolitan Dade County v. Dade County Ass’n of Firefighters, Local 1403*, 575 So. 2d 289 (Fla. 3d Dist. Ct. App. 1991).

309. 774 So. 2d 942 (Fla. 1st Dist. Ct. App. 2001).

310. *Id.* at 943 (Under section 447.501(1)(a) and (b) of the *Florida Statutes*, public employees may engage in protected, concerted union activities.)

311. *Id.*

312. *Id.* at 944.

313. *Id.*

314. *River Beach*, 774 So. 2d at 944.

erred in remanding the case because the hearing officer's findings of fact were supported by substantial evidence and he applied the correct law.³¹⁵

IV. PUBLIC SECTOR, COLLECTIVE BARGAINING ISSUES

A. Public Unions

About 434,000 Florida employees belonged to a union in 2000, about 6.8% of the state's 6.26 million workers, an increase from 6.5% who belonged to a union in 1999.³¹⁶ Local government workers, together with service workers, account for much of the union growth.³¹⁷

B. Collective Bargaining Issues

In *Florida Senate v. Florida Public Employees Council 79, AFSCME*,³¹⁸ the Supreme Court of Florida addressed the respective roles of the legislature and the courts in the face of a collective bargaining impasse between the union representing state employees and the governor in his role as public employer.³¹⁹ When the legislature scheduled a public hearing to resolve the impasse, the circuit court issued a temporary restraining order (TRO), barring it from holding the hearing.³²⁰ On appeal, the state supreme court, invoking separation of powers principles, quashed the TRO.³²¹

About 3100 unionized pharmacists and registered nurses at Jackson Memorial Hospital ratified a three year collective bargaining agreement that includes a nineteen percent to twenty seven percent pay increase over the life of the contract.³²² The agreement, approved by the union representing the public employees, must now be approved by the Public Health Trust's board of trustees and the Miami-Dade Commission.³²³ The contract will increase

315. *Id.*

316. Joan Fleischer Tamen, *Labor Tug-of-War Swells Throughout S. Florida*, SUN-SENTINEL (Ft. Lauderdale), Feb. 25, 2001, at 1F.

317. *Id.*

318. 784 So. 2d 404 (Fla. 2001).

319. *Id.* at 406.

320. *Id.*

321. *Id.* at 409. Impasse resolution mechanisms are outlined in section 447.403 of the *Florida Statutes*.

322. James McNair, *Union Ratifies Hospital Pact*, MIAMI HERALD, Apr. 25, 2001, at 1C.

323. *Id.*

nurses hourly wages by five dollars an hour.³²⁴ The hospital is struggling to recruit and retain nurses and pharmacists.³²⁵

Student performance, as a method of evaluating public school teachers, has been a key bone of contention between the Broward school district and its teachers union.³²⁶ Recently, the district's method of assessing its teachers was ruled out of compliance with state law, according to officials from the Florida Department of Education.³²⁷

C. Arbitration

The United States Supreme Court handed down a 5-4 decision that may have an impact on public employees. In *Circuit City Stores v. Adams*,³²⁸ the court ruled that employers can insist that employment disputes go to arbitration rather than to court.³²⁹ In response, dozens of members of Congress introduced the Preservation of Civil Rights Protection Act of 2001, aimed at prohibiting employers from forcing workers to give up their rights in courts, unless the employee freely opts for arbitration after the dispute arises. Arbitration clauses in employment contracts usually govern nonunion workers who agree to them as a condition of employment.

VI. CONCLUSION

Public sector employment and labor law ranges far and wide. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge raises its own set of issues at the federal, state and local levels. Post-retirement also covers such issues as public pensions, disability retirement, death benefits, set-offs from social security and workers' compensation. Unlike the private sector which commonly is left alone by the news media, public sector employment comes under exacting scrutiny by local news sources. From these sources, a wealth of information on public employment informs this area of the law.

324. *Id.*

325. *Id.*

326. Susan Ferrechio, *Broward Teacher Rating System Flunks*, MIAMI HERALD, Aug. 23, 2000, at 3B.

327. *Id.*

328. 532 U.S. 1302 (2001).

329. *Id.* at 235.

Tort Law: 2001 Review of Florida Law

William E. Adams, Jr.*

TABLE OF CONTENTS

I. INTRODUCTION	225
II. DANGEROUS INSTRUMENTALITY DOCTRINE (AUTOMOBILES).....	226
III. MEDICAL MALPRACTICE	227
IV. OTHER FORMS OF PROFESSIONAL MALPRACTICE.....	230
A. <i>Attorney Malpractice</i>	230
B. <i>Other Professions</i>	232
V. OTHER CASES INVOLVING DUTY.....	234
VI. NEGLIGENCE PRESUMPTIONS	237
VII. DAMAGES.....	239
VIII. FRAUD	247
IX. JURY INSTRUCTIONS	247
X. CONCLUSION.....	248

I. INTRODUCTION

As usual, the past year saw numerous appellate cases concerning tort law. This article will not attempt to review them all. Instead, it will look at cases from the Supreme Court of Florida and important cases from the district courts of appeal. The latter will include discussion of cases that considered novel questions, conflicted with other districts, involved questions certified as of great public importance, or raised interesting factual scenarios.

Last year the courts grappled with questions concerning the dangerous instrumentality doctrine as applied to automobiles, and those cases will be reviewed in Section II. The courts again considered the coverage and application of the Medical Malpractice Act to a variety of situations, which will be discussed in Section III. There are also some cases reviewed in Section IV that looked at other forms of professional malpractice. Section V will look at appellate cases that discussed how the element of duty applies to a variety of factual scenarios. Whether violations of statutes equal a

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presumption of negligence was also the subject of a number of decisions, which are covered in Section VI of this article. The always important question of how to calculate and apportion damages is the subject of cases included in Section VII. Section VIII will look at a fraud case involving a real estate transaction. Section IX includes new standard jury instructions, which include instructions for some types of tort cases.

II. DANGEROUS INSTRUMENTALITY DOCTRINE (AUTOMOBILES)

The Fourth District Court of Appeal considered the liability of the lessee of a car involved in an accident while driven by a person without the consent of the lessee in *Barnett v. State Farm Fire & Casualty Co.*¹ In *Barnett*, one of the friends of the teenage stepson of the lessee took the keys to the car and drove it without permission from the lessee or his stepson.² The court deemed that this was the equivalent of conversion or theft, which the Supreme Court of Florida had previously stated would relieve an owner of a car from liability for its use or misuse.³

The First District Court of Appeal also looked at the dangerous instrumentality doctrine in *Christenson-Sullins v. Raymer*.⁴ The trial court granted summary judgment to the defendant in this case, where the defendant loaned her car to a former roommate whose boyfriend took the car without permission and was involved in a collision with one of the plaintiffs.⁵ Because the roommate did not report that the car was missing when she discovered it, but rather went to a local bar to play darts, the appellate court felt that summary judgment was improper.⁶ The dissent argued that the affidavits refuting that the defendant knew or consented to the driver's use of the car warranted a summary judgment, and that an obligation of an owner or user to report a conversion or theft had not previously been imposed by Florida courts.⁷

The Fifth District Court of Appeal considered another dangerous instrumentality claim in *Toombs v. Alamo Rent-A-Car*.⁸ This wrongful death action involved an automobile accident in which the surviving minor

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1. 775 So. 2d 395 (Fla. 4th Dist. Ct. App. 2000).
 2. *Id.* at 396.
 3. *Id.* at 397 (citing *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959)).
 4. 765 So. 2d 955 (Fla. 1st Dist. Ct. App. 2000).
 5. *Id.* at 957.
 6. *Id.*
 7. *Id.* at 961–62.
 8. 762 So. 2d 1040 (Fla. 5th Dist. Ct. App. 2000).

children sued Alamo for an accident in which their mother was killed while their father was driving.⁹ The court certified a conflict with the Second District Court of Appeal in *Enterprise Leasing Co. v. Alley*,¹⁰ by holding that the dangerous instrumentality doctrine could not be applied to a situation where a co-bailee is killed by the negligence of the other co-bailee.¹¹ Therefore, it held that the children's cause of action did not survive.¹² The *Toombs* decision seems to be the better-reasoned one, in part because as the concurring opinion of Judge Harris notes, in this situation it was the deceased who entrusted the vehicle to a negligent driver, and therefore, she was in a better position than the rental car company to make the determination as to the condition and fitness of the driver.¹³

The Third District Court of Appeal reviewed the evidence necessary for a dangerous instrumentality claim in *Leal v. Nunez*.¹⁴ Under the dangerous instrumentality doctrine, "an owner who gives authority to another to operate the owner's vehicle, by either express or implied consent, has a nondelegable obligation to ensure that the vehicle is operated properly."¹⁵ In this case the defendant argued that her brother-in-law, who was also her employee, took her car without permission.¹⁶ The court held that the trial court's entry of summary judgment was error regarding the material fact of consent because of the familial and business relationship between the driver and owner as well as the behavior of both after the accident.¹⁷

III. MEDICAL MALPRACTICE

The application of the Medical Malpractice Act¹⁸ to a wrongful death suit under the Florida Nursing Home Act was considered by the Fourth District Court of Appeal in *Preston v. Health Care & Retirement Corp. of America*.¹⁹ In the case, defendant, Health Care and Retirement Corporation of America ("Health Care"), argued that the plaintiff's failure to follow the

9. *Id.* at 1041.

10. 728 So. 2d 272 (Fla. 2d Dist. Ct. App. 1999), *rev. denied*, 741 So. 2d 1135 (Fla. 1999).

11. *Toombs*, 726 So. 2d at 1042.

12. *Id.*

13. *Id.* at 1043.

14. 775 So. 2d 974 (Fla. 3d Dist. Ct. App. 2000).

15. *Id.* at 975. (citing *Hertz Corp. v. Jackson*, 617 So. 2d 1051 (Fla. 1993)).

16. *Id.*

17. *Id.* at 975.

18. FLA. STAT. § 766.106 (2001).

19. 785 So. 2d 570 (Fla. 4th Dist. Ct. App. 2001).

Malpractice Act's pre-suit requirements²⁰ required a dismissal of his wrongful death action.²¹ Although the Supreme Court of Florida stated in *Weinstock v. Groth*²² that a defendant is entitled to notice under the Act when it is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102 of the *Florida Statutes*, this court noted that chapter 400 of the *Florida Statutes* had been amended to include its own pre-suit investigatory requirement and to limit vicarious liability for the actions of health care providers.²³ It therefore concluded that the pre-suit requirements of the nursing home statute, which was a special, as opposed to a general statute, and which was passed subsequent to the Malpractice Act, controlled where the allegations concern the deprivation of a nursing home resident's statutory rights.²⁴

The Fifth District Court of Appeal was confronted with another case trying to decipher the application of the pre-suit filing requirements of the Medical Malpractice Act²⁵ in *Pavolini v. Bird*.²⁶ The claimants in this case filed a derivative loss of consortium claim in a medical malpractice action without filing a separate pre-suit notice.²⁷ The appellate court held that the spouse or minor child who sought loss of consortium damages was not the recipient of the medical care or treatment and therefore was not a claimant under the Act.²⁸ The dissent by Judge Pleuss argued that this interpretation placed defendants in the difficult situation of not knowing how to realistically calculate an appropriate settlement when not all of the plaintiffs had yet been identified.²⁹

In *Bell v. River Memorial*,³⁰ the parents of a stillborn baby asked that the body be returned to them after an autopsy, but the remains were disposed of in an unknown manner.³¹ The trial court granted a motion to dismiss on the ground that the action violated the pre-suit requirements of the medical

20. § 766.106.

21. *Preston*, 785 So. 2d at 571.

22. 629 So. 2d 835 (Fla. 1993).

23. *Preston*, 785 So. 2d at 572.

24. *Id.* The court also noted that the decision was consistent with a case decided by the Second District Court of Appeal, *Integrated Health Care Servs., Inc. v. Lang-Redway*, 783 So. 2d 1108 (Fla. 2d Dist. Ct. App. 2001). *Id.*

25. § 766.106.

26. 769 So. 2d 410 (Fla. 5th Dist. Ct. App. 2000).

27. *Id.* at 411.

28. *Id.* at 413.

29. *Id.* at 414.

30. 778 So. 2d 1030 (Fla. 4th Dist. Ct. App. 2001).

31. *Id.* at 1031.

malpractice statute³² and was beyond the statute of limitations for medical malpractice.³³ The court ruled that because the disposal of the child's remains did not involve diagnosis, treatment, or care nor involved medical skill or judgment, it was error to apply the medical malpractice statute of limitations.³⁴

The applicability of the medical malpractice statutes to a contribution suit was considered by the First District Court of Appeal in *Virginia Insurance Reciprocal v. Walker*.³⁵ In this case, the plaintiffs had been sued for medical malpractice for failure to diagnose hypothyroidism in an infant.³⁶ The defendant also treated the child without testing for the condition, but were not sued by the parents of the child.³⁷ The plaintiffs settled with the parents and brought this action for contribution from the defendant.³⁸ If the statute had not been tolled while the plaintiff conducted the pre-suit screening requirements of the Act, the statute of limitations had expired.³⁹ The appellate court ruled that this was a medical malpractice action subject to its pre-suit screening procedure because the underlying basis of the contribution action sounded in medical negligence.⁴⁰ The court noted that other jurisdictions have split over this issue and that its decision is in direct conflict with a decision from the Fourth District Court of Appeal.⁴¹ In considering the policy of the medical malpractice statute to encourage pre-suit resolution of medical malpractice claims, the First District Court of Appeal interpretation seems more logical in a suit where the contribution claim is based upon medical malpractice.

32. FLA. STAT. § 766.101 (2001).

33. *Bell*, 778 So. 2d at 1034; *see also* FLA. STAT. § 95.11(4)(b) (2001).

34. *Id.*

35. 765 So. 2d 229 (Fla. 1st Dist. Ct. App. 2000).

36. *Id.* at 230.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Walker*, 765 So. 2d at 232.

41. *Id.* at 234–35 (certifying conflict with *Wendell v. Hauser*, 726 So. 2d 378 (Fla. 4th Dist. Ct. App. 1999)).

IV. OTHER FORMS OF PROFESSIONAL MALPRACTICE

A. Attorney Malpractice

The Second District Court of Appeal considered the effect of attorney malpractice on a client in *Woodall v. Hillsborough Co. Hospital Authority*.⁴² Woodall's complaint was dismissed for her attorney's failure to comply with pre-suit discovery requests.⁴³ The appellate court agreed with the trial court that the attorney's actions amounted to gross negligence, but felt that the client should not be punished for the misdeeds of her attorney.⁴⁴ The court looked at the following factors in determining whether dismissal was an appropriate sanction:

- 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
- 2) whether the attorney has been previously sanctioned;
- 3) whether the client was personally involved in the act of disobedience;
- 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
- 5) whether the attorney offered reasonable justification for noncompliance; and
- 6) whether the delay created significant problems of judicial administration.⁴⁵

Only factor five supported the hospital's position in this case.⁴⁶ The court noted that sanctions against the attorney would be appropriate.⁴⁷

The Fourth District Court of Appeal considered the potential negligence of two separate law firms in *Kates v. Robinson & Spence, Payne, Masington & Needle, P.A.*⁴⁸ The first law firm in this case represented the Kates' in a

42. 778 So. 2d 320 (Fla. 2d Dist. Ct. App. 2000).

43. *Id.* at 321.

44. *Id.*

45. *Id.* at 322 (citing *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 2d Dist. Ct. App. 1992)).

46. *Id.*

47. *Woodall*, 778 So. 2d at 322.

48. 786 So. 2d 61 (Fla. 4th Dist. Ct. App. 2001).

personal injury action.⁴⁹ The plaintiffs entered into a consent judgment that did not include lessees who might have been liable, but were not joined in the litigation.⁵⁰ The Kates subsequently hired Scott Jay to collect on the judgment.⁵¹ The court held that the Kates had alleged a cause of action against the first firm for failure to file suit against all of the potentially liable parties, failure to advise the Kates of the existence of the lessees, and for advising the Kates that no other parties were liable.⁵² However, the court held that Jay could not be held liable for failure to discover additional potential defendants when he was hired to collect a judgment.⁵³

The Fifth District Court of Appeal considered the perplexing problem concerning conflicts of interest when an attorney prepares a will for a client that removes beneficiaries whom he has also represented in *Chase v. Bowen*.⁵⁴ In this case, Bowen prepared and revised a will for the plaintiff's mother.⁵⁵ At various times, he also represented the plaintiff and the beneficiaries of the second will who were business associates of the plaintiff's mother.⁵⁶ The district court held that a lawyer who prepares a will owes no duty to previous beneficiaries, even if he represents them in another matter, to oppose the changing of the will.⁵⁷

The dissenting opinion of Judge Sharp asserted that a remand was appropriate to permit the plaintiff to plead.⁵⁸ Judge Sharp noted that the plaintiff was disabled and lived with her mother, who supported and cared for her.⁵⁹ Therefore, her complete disinheritance in favor of the beneficiaries, who were friends of the attorney, at least raises the appearance of potential ethical conflicts.⁶⁰ Of course, even if the attorney committed an ethical violation, that does not mean that malpractice has occurred. However, Judge Sharp noted that Florida recently recognized the tort of intentional interference with inheritance, and enough facts were alleged in this case to

49. *Id.* at 62.

50. *Id.* at 63.

51. *Id.*

52. *Id.* at 64.

53. *Kates*, 786 So. 2d at 65.

54. 771 So. 2d 1181 (Fla. 5th Dist. Ct. App. 2000).

55. *Id.* at 1182.

56. *Id.*

57. *Id.*

58. *Id.* at 1183.

59. *Chase*, 771 So. 2d at 1183.

60. *Id.* at 1184.

raise the possibility that the plaintiff could have potentially stated a claim under this theory if given another opportunity.⁶¹

B. *Other Professions*

The Supreme Court of Florida had the occasion to look at accountant malpractice in *KPMG Peat Marwick v. National Union Fire Insurance Co.*⁶² In this case, National Union Fire Insurance Company was the fidelity bond insurer of Bank Atlantic, for whom KPMG Peat Marwick had conducted independent audits.⁶³ National Union filed a negligence suit against KPMG, but the trial court granted the latter's motion for judgment on the pleadings because National Union was not entitled to relief as an assignee, contractual subrogee, or equitable subrogee.⁶⁴ KPMG asserted that *Forgione v. Dennis Pirtle Agency Inc.*,⁶⁵ in which the court prohibited the assignment of a personal tort in an attorney malpractice case, supported its position.⁶⁶ The court disagreed, stating that legal malpractice claims were not assignable because of the personal nature of legal services that entailed a confidential, fiduciary relationship with undivided loyalty to the client.⁶⁷ The court argued that independent auditors have a public responsibility to the corporation's creditors and stockholders with a total independence from the client.⁶⁸ The court declined, however, to decide whether accountant malpractice claims other than those involving audits could be assigned.⁶⁹

The First District Court of Appeal looked at a claim of legal malpractice and illegal attorney's fees in *Olmsted v. Emmanuel*.⁷⁰ In this case, defendant attorneys represented the plaintiff in an employment discrimination case against Taco Bell under Title VII of the Civil Rights Act of 1964⁷¹ and title 42, section 1981 of the *United States Code*.⁷² Olmsted, a white male, argued that he was fired for complaining to superiors about

61. *Id.* at 1186.

62. 765 So. 2d 36 (Fla. 2000).

63. *Id.* at 37.

64. *Id.*

65. 701 So. 2d 557 (Fla. 1997).

66. *KPMG*, 765 So. 2d at 37–38.

67. *Id.* at 38.

68. *Id.*

69. *Id.* at 38–39.

70. 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001).

71. 42 U.S.C. § 2000e-3 (2000).

72. *Olmsted*, 783 So. 2d at 1124.

discriminatory practices against blacks at the restaurant.⁷³ After a jury verdict of damages in excess of \$3,000,000, Taco Bell was able to get a reduction to \$300,000 because of limits on Title VII claims found in title 42, section 1981a(3) of the *United States Code*.⁷⁴ The damages would not have been so limited under the section 1981 claim, but it was not invoked as a basis for relief in the pretrial stipulation.⁷⁵ The court ruled that the attorneys neglected a reasonable duty by failing to invoke the section 1981 claim in the stipulation.⁷⁶

The court looked at a judicial estoppel argument made by the plaintiff.⁷⁷ In appealing the reduction of damages to the United States Court of Appeals for the Eleventh Circuit,⁷⁸ the attorneys understandably argued that the plaintiff had a valid 1981 claim justifying the jury verdict.⁷⁹ In the malpractice case, the attorneys changed their position to argue that the plaintiff's claim that he would have been successful on the section 1981 claim, had it been preserved, was mere speculation.⁸⁰ The court noted that judicial estoppel requires that the parties and issues involved must be the same, which was not true here where the attorneys were not parties in the appeal of the underlying claim.⁸¹ It also upheld the trial court's dismissal of the malpractice claim.⁸²

What makes this a more difficult question is that arguably the Eleventh Circuit has not squarely addressed the issue of whether a white person can succeed on a section 1981 claim in a retaliation case. Although other federal courts have recognized such a claim,⁸³ the court concluded that the Eleventh Circuit would not, based upon its statements in similar cases.⁸⁴ The court also rejected the claim by plaintiff that contingent fee contracts are illegal in cases involving federal law in federal court.⁸⁵ The court concluded the *Rules*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1125–26.

77. *Olmsted*, 783 So. 2d at 1126.

78. *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457 (11th Cir. 1998).

79. *Olmsted*, 783 So. 2d at 1125.

80. *Id.* at 1126.

81. *Id.*

82. *Id.*

83. *Id.* at 1127.

84. *Olmsted*, 783 So. 2d at 1128.

85. *Id.*

*Regulating the Florida Bar*⁸⁶ did not bar contingent fee contracts in this type of case.⁸⁷

V. OTHER CASES INVOLVING DUTY

The Supreme Court of Florida examined the application of the Agrarian rule in relationship to landowner obligations in *Whitt v. Silverman*,⁸⁸ a case where the owners of a gas station were sued by pedestrians struck by a customer of the station whose view was obstructed because of a stand of foliage.⁸⁹ The Agrarian rule provides that “a landowner owes no duty to persons . . . not on [his] property and therefore . . . is not responsible for any harm caused . . . by natural conditions on the land.”⁹⁰ Despite its seemingly dated view of the rights of property owners, some courts continue to apply it in circumstances where conditions on property hinder the view of motorists. Such courts have argued that motorists are better positioned to prevent accidents.⁹¹ Even courts that have retained the rule in part, however, have disagreed about whether the protection should extend to both natural and artificial conditions or whether the rule should be applicable to property located in an urban setting.⁹² The *Restatement (Second) of Torts* excuses liability for rural land, but recognizes a duty for urban property owners where harm results from failure to exercise reasonable care to prevent unreasonable risks to persons using adjoining public roads.⁹³

After a long discussion in *Whitt* concerning the role of foreseeability in both the duty and proximate cause elements of negligence, the court rejected a blanket rule that immunized landowners from foreseeable consequences.⁹⁴ The court reaffirmed the principles that it announced in *McCain v. Florida Power Corp.*⁹⁵ It remanded the case for a determination as to whether the landowners’ conduct created a foreseeable zone of risk that posed a general threat of harm toward the patrons of the business and the pedestrians and motorists who used the abutting streets and sidewalks reasonably affected by

86. See R. REGULATING THE FLA. BAR 4-1.5(f).

87. *Olmsted*, 783 So. 2d at 1129.

88. 788 So. 2d 210 (Fla. 2001).

89. *Id.* at 213.

90. *Id.*

91. *Id.* at 215.

92. *Id.* at 215–16.

93. RESTATEMENT (SECOND) OF TORTS § 363(2) (1965).

94. *Whitt v. Silverman*, 788 So. 2d 210, 218 (Fla. 2001).

95. 593 So. 2d 500 (Fla. 1992).

the business' traffic.⁹⁶ Chief Justice Wells dissented, expressing concern that the change would result in extensive exposure of liability to property owners, including homeowners.⁹⁷

In *Sanderson v. Eckerd Corp.*,⁹⁸ the Fifth District Court of Appeal examined the duty of pharmacists in relation to providing warnings to customers.⁹⁹ There is Florida case law asserting that retail pharmacists have no duty to warn customers or their physicians of potential adverse drug reactions.¹⁰⁰ However, the court notes that three other states have applied the voluntary assumption of a duty doctrine to pharmacists and believes that it could also apply in Florida.¹⁰¹

The Fourth District Court of Appeal also considered the duty of a business that stores keys in a publicly accessible area in *Michael & Philip, Inc. v. Sierra*.¹⁰² The defendant in *Sierra* was a gym that had a key board located near the gym's entrance, directly across from the front desk.¹⁰³ A patron stole a set of keys from the board and rear-ended the plaintiff's vehicle, causing injuries.¹⁰⁴ The personnel on desk duty did not monitor the keyboard.¹⁰⁵ The court ruled that this circumstance did not call for an exception from the general rule that there is no duty to prevent the misconduct of third persons.¹⁰⁶ It compared the Supreme Court of Florida's rulings that held owners of vehicles liable for collisions by thieves who stole vehicles with keys left in the ignition¹⁰⁷ or in an open glove compartment.¹⁰⁸ The district court felt that the factual dissimilarity was dispositive where the keys were not left in the car and the gym did own the car.¹⁰⁹ Judge Klein dissented, noting that Florida courts have treated automobile negligence

96. *Whitt*, 788 So. 2d 222–23.

97. *Id.* at 223.

98. 780 So. 2d 930 (Fla. 5th Dist. Ct. App. 2001).

99. *Id.*

100. *Johnson v. Walgreen Co.*, 675 So. 2d 1036, 1038 (Fla. 1st Dist. Ct. App. 1996).

101. *Sanderson*, 780 So. 2d at 932 (citing *Frye v. Medicare-Glaser Corp.*, 605 N.E.2d 557 (Ill. 1992); *Kasin v. Osco Drug Inc.*, 728 N.E.2d 77 (Ill. App. 2000); *Baker v. Arbor Drugs*, 544 N.W.2d 727 (Mich. App. 1996); *Ferguson v. Williams*, 374 S.E.2d 438 (N.C. App. 1988), *appeal after remand*, 399 S.E.2d 389 (N.C. App. 1991)).

102. 776 So. 2d 294 (Fla. 4th Dist. Ct. App. 2000).

103. *Id.* at 295.

104. *Id.* at 295–96.

105. *Id.* at 297.

106. *Id.* at 298.

107. *Vining v. Avis Rent-A-Car Sys., Inc.*, 354 So. 2d 54, 55 (Fla. 1977).

108. *Schwartz v. American Home Assurance Co.*, 360 So. 2d 383, 384 (Fla. 1978).

109. *Sierra*, 776 So. 2d at 299.

differently, asserting that whether the theft was foreseeable was a question for the jury.¹¹⁰

The Fourth District Court of Appeal reversed a jury verdict in a slip and fall case in *Lester's Diner II, Inc. v. Gilliam*,¹¹¹ where the plaintiff presented no evidence as to how an alleged oily substance reached the floor or how long it had been there.¹¹² The court noted that "conjecture and pyramiding inferences" cannot be relied upon to establish the important facts necessary to show the actual or constructive notice needed by the property owner to establish negligence.¹¹³

The Fifth District Court of Appeal considered the duty of law enforcement officers pursuing fleeing felons in *Bryant v. Beary*.¹¹⁴ In this case, a sheriff's deputy pursued a teen without a license who was driving a car without permission of the owner and ran through a stop sign.¹¹⁵ Despite advising dispatch and his superior that he was terminating the chase, he continued to pursue the teen.¹¹⁶ The teen ran another stop sign, killing himself and a motorcyclist.¹¹⁷ Although recognizing a duty to bystanders, the court rejected the argument by the teen's estate that law enforcement owes a duty to a violator fleeing the law as a result of his criminal misconduct.¹¹⁸

Although not a case that establishes new law, one with curious facts is the case of *Jackson v. Sweat*,¹¹⁹ in which the First District Court of Appeal ruled that the plaintiff stated a cause of action where the owner of a store left it lit and unlocked, creating the appearance that it was open, although he set the silent burglar alarm.¹²⁰ The police responded and arrested the plaintiff.¹²¹

In *Tudor v. Florida Department of Law Enforcement*,¹²² the First District Court of Appeal found that a plaintiff did not have a cause of action

110. *Id.* at 300.

111. 788 So. 2d 283 (Fla. 4th Dist. Ct. App. 2000).

112. *Id.* at 285.

113. *Id.* at 286.

114. 766 So. 2d 1157 (Fla. 5th Dist. Ct. App. 2000).

115. *Id.*

116. *Id.* at 1158.

117. *Id.*

118. *Id.* at 1160.

119. 783 So. 2d 1207 (Fla. 1st Dist. Ct. App. 2001).

120. *Id.* at 1207-08.

121. *Id.* at 1208.

122. 768 So. 2d 1242 (Fla. 1st Dist. Ct. App. 2000).

against the Florida Department of Law Enforcement for failure to comply with a court order to expunge criminal records.¹²³

VI. NEGLIGENCE PRESUMPTIONS

The Supreme Court of Florida clarified the rebuttable presumption of negligence that attaches to a rear driver in a rear-end collision established in a case from the Second District Court of Appeal in *McNulty v. Cusack*,¹²⁴ which it endorsed in *Gulle v. Boggs*.¹²⁵ In *Clampitt v. D.J. Spencer Sales*,¹²⁶ it considered whether a sudden stop, standing alone, is sufficient to overcome the presumption.¹²⁷ The *Clampitt* case involved a three-vehicle collision in which the plaintiff was in the middle vehicle.¹²⁸ At trial, the plaintiff was granted summary judgment on the issue of fault.¹²⁹ The district court reversed, ruling that the evidence presented by the defendant was sufficient to overcome the presumption.¹³⁰ The court stated that the presumption is grounded in the belief that the rear driver is more likely to have the evidence of why he was unable to stop¹³¹ and the policy that such a driver is charged with being prepared to stop without hitting the vehicle in front because he is in control of the following distance.¹³² The court noted that it is well settled that an "abrupt stop" by the front vehicle is insufficient evidence on its own to overcome the presumption.¹³³ What is needed is a sudden stop at a time and place where it could not reasonably be expected by the rear driver.¹³⁴ Despite testimony by the defendant that he did not see the front vehicle activate its turn signal or illuminate its brake lights nor did he see the plaintiff's vehicle slow or activate her brake lights, the court held that the trial court properly granted the motion for summary judgment.¹³⁵

123. *Id.* at 1243.

124. 104 So. 2d 785 (Fla. 2d Dist. Ct. App. 1958).

125. 174 So. 2d 26 (Fla. 1965).

126. 786 So. 2d 570 (Fla. 2001).

127. *Id.*

128. *Id.* at 571.

129. *Id.* at 570.

130. *Id.* at 572.

131. *Clampitt*, 786 So. 2d at 573.

132. *Id.* at 576. The court also noted that section 316.0895(1) of the *Florida Statutes* requires that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent" *Id.* at 575.

133. *Id.* at 576.

134. *Id.*

135. *Clampitt*, 786 So. 2d at 575.

The court noted that the accident took place on a stretch of a two lane roadway bordered by several commercial establishments, residential complexes, and Central Florida Junior College.¹³⁶ Thus, it apparently believed that turns and stops should have been anticipated.

The Fourth District Court of Appeal analyzed the applicability of a statute regulating self-service gasoline stations in *Chevron U.S.A., Inc. v. Forbes*.¹³⁷ In this case, the plaintiff slipped and fell in a puddle of gas approximately six feet in circumference at a service station.¹³⁸ Section 526.141(3) of the *Florida Statutes* requires that self-service stations have at least one attendant on duty whose responsibilities include immediately handling accidental spills.¹³⁹ The court applied the Supreme Court of Florida case that outlines the doctrine of negligence per se in statutory violations in *deJesus v. Seaboard Coast Line Railroad Co.*¹⁴⁰ In looking at the statute as a whole, the court determined that it was meant to protect the general public, as opposed to a particular class of persons, from injury caused by fire.¹⁴¹ This seems to be a reasonable interpretation as evidenced by references in the statute to flammable and combustible liquids, sources of ignition, and fire extinguishers.¹⁴² Thus, the court ruled that a violation of the statute was not negligence per se because the plaintiff did not suffer the type of injury protected by the statute; and it was one meant to protect the general public. Therefore, violation was merely evidence of negligence.¹⁴³

The Second District Court of Appeal also considered the negligence per se rule in *Golden Shoreline Ltd. Partnership v. McGowan*.¹⁴⁴ In this case, the plaintiff was injured when an elevator malfunctioned.¹⁴⁵ Within three days preceding the incident, problems necessitated the service company being called six times, including three calls on the day of the accident.¹⁴⁶ Section 399.02(5)(b) of the *Florida Statutes* makes an elevator owner responsible for the safe operation and proper maintenance of its elevators. The court held that violation of this statute was negligence per se as long as

136. *Id.* at 573.

137. 783 So. 2d 1215 (Fla. 4th Dist. Ct. App. 2001).

138. *Id.* at 1217.

139. FLA. STAT. § 526.141(3) (2001).

140. 281 So. 2d 198 (Fla. 1973).

141. *Forbes*, 783 So. 2d at 1219.

142. FLA. STAT. § 526.141(1)–(4) (2001).

143. *Forbes*, 783 So. 2d at 1219–20.

144. 787 So. 2d 109 (Fla. 2d Dist. Ct. App. 2001).

145. *Id.* at 110.

146. *Id.*

plaintiff could demonstrate that the defendants violated their duty to properly maintain the elevator.¹⁴⁷

The Fifth District Court of Appeal considered the relevancy of the unattended motor vehicle statute to a car accident in which the thief is killed in *Graham v. Stephens*.¹⁴⁸ Section 316.1975(1) of the *Florida Statutes* makes it a noncriminal traffic violation to leave a motor vehicle without stopping the engine, locking the ignition, and removing the key. In this case, the deceased, a seventeen-year-old girl, took a car in which the key was left in the ignition and let a thirteen-year-old boy drive it.¹⁴⁹ The boy lost control of the vehicle, killing the girl and another passenger.¹⁵⁰ The court ruled that the person who stole the vehicle could not be considered part of the class protected by the statute.¹⁵¹ The court noted that the duty arising from this statute extends to members of the public who use the highways and are injured by these stolen vehicles.¹⁵²

VII. DAMAGES

The Supreme Court of Florida considered the noneconomic damages limit in the medical malpractice statute in *St. Mary's Hospital, Inc. v. Phillipe*.¹⁵³ This appeal involved a consolidation of two cases with similar legal issues.¹⁵⁴ In both cases, the claimants were awarded noneconomic damages that totaled more than \$250,000.¹⁵⁵ First, the court rejected the argument of appellants that section 766.212(2) of the Medical Malpractice Act's limitation on the ability to stay the execution of an arbitration award unconstitutionally encroached on the court's rule making authority, which provides for an automatic stay of a money judgment under rule 9.310(b) of the *Florida Rules of Appellate Procedure*.¹⁵⁶ The court held that the parties'

147. *Id.*

148. 779 So. 2d 649 (Fla. 5th Dist. Ct. App. 2001).

149. *Id.* at 650.

150. *Id.*

151. *Id.*

152. *Id.* at 651 (citing *Vining v. Avis Rent-A-Car Sys., Inc.*, 354 So. 2d 54 (Fla. 1977)).

153. 769 So. 2d 961 (Fla. 2000).

154. *St. Mary's Hosp., Inc. v. Phillipe*, 699 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1997); *Franzen v. Mogler*, 699 So. 2d 1026 (Fla. 4th Dist. Ct. App. 1997).

155. *Phillipe*, 769 So. 2d at 963-64.

156. *Phillipe*, 699 So. 2d at 1019.

voluntary participation in the arbitration process also entailed consent to the limited stay and review procedures of the Act.¹⁵⁷

Next the court considered the application of the Act's limit of \$250,000 in noneconomic damages per incident.¹⁵⁸ The court first noted that this provision was neither clear nor unambiguous.¹⁵⁹ It held that the cap was a limit on each individual claimant, but did not prevent the total noneconomic damages of all of the claimants in a particular case from exceeding \$250,000.¹⁶⁰ The majority concluded that the contrary interpretation would present equal protection problems.¹⁶¹ The court also rejected the argument that the economic damages available in medical negligence cases that result in death are limited by the Wrongful Death Act, which provides a narrower range of damages.¹⁶² Justice Anstead dissented, arguing that the plain language of the statute and the court's prior interpretation of the statute in *University of Miami v. Echarte*¹⁶³ required that the cap of \$250,000 be applied to each incident of medical malpractice.¹⁶⁴

The question of sovereign immunity was considered in *Cunningham v. City of Dania*,¹⁶⁵ by the Fourth District Court of Appeal.¹⁶⁶ This case involved the fatal shooting of a minor in a public park.¹⁶⁷ A wrongful death action was commenced against the City of Dania and the Broward County Sheriff.¹⁶⁸ The park in which the drive-by shooting occurred was the location of at least seven shootings over eight years as well as a "high incidence of gang related activity, assault, battery, sexual battery, robbery, illegal possession of various weapons, and drug-related offenses."¹⁶⁹

In determining the applicability of governmental tort liability, the court looked at the controlling Supreme Court of Florida precedent, *Trianon Park Condominium Ass'n v. City of Hialeah*,¹⁷⁰ which established that there must

157. *Phillipe*, 769 So. 2d at 967.

158. *Id.* Section 766.207(7)(b) of the *Florida Statutes* provides: "[n]oneconomic damages shall be limited to a maximum of \$250,000 per incident."

159. *Phillipe*, 769 So. 2d at 968.

160. *Id.* at 971.

161. *Id.*

162. *Id.* at 973.

163. 618 So. 2d 189 (Fla. 1993).

164. *Phillipe*, 769 So. 2d at 974.

165. 771 So. 2d 12 (Fla. 4th Dist. Ct. App. 2000).

166. *Id.*

167. *Id.* at 13.

168. *Id.*

169. *Id.*

170. 468 So. 2d 912 (Fla. 1985).

be “an underlying common law or statutory duty of care.”¹⁷¹ The district court held that the City had a duty to maintain and operate the park, which would include the duty to protect invitees from reasonably foreseeable criminal acts on the premises.¹⁷² Because of the history of violent criminal acts, the court felt that a duty of care could arise on behalf of the City, but not on behalf of the Sheriff because a law enforcement officer’s duty is to the public as a whole as opposed to an individual.¹⁷³

In *Value Rent-A-Car, Inc. v. Grace*,¹⁷⁴ the Second District Court of Appeal was asked to apply the parental immunity doctrine in an indemnity action by the plaintiff rental car company.¹⁷⁵ In this action, the wife and child of the driver of the rental car sued Value, which sought indemnity from Mr. Grace pursuant to contractual and common law theories.¹⁷⁶ Mr. Grace filed an affirmative defense arguing that the parental immunity doctrine prevented recovery by his minor child or persons claiming on his behalf.¹⁷⁷ The court noted that the Supreme Court of Florida has held that parents are immune from suits by their children except to the extent of applicable liability coverage.¹⁷⁸ The court rejected the argument by the defendant that the plaintiff was required to plead the existence of liability coverage in its complaint.¹⁷⁹ The court argued that plaintiffs are not generally required to plead facts negating every potential affirmative defense that may be raised.¹⁸⁰

Of perhaps more interest in this case is the concern raised by acting Chief Judge Altenbernd’s concurring opinion.¹⁸¹ In Altenbernd’s concurring opinion, the judge notes that it is an unresolved issue as to whether family immunity should bar an indemnity claim brought by a party who is only vicariously liable for the damages.¹⁸² As noted, the family immunity doctrine is often asserted as a protection of family resources, but a payment by a vicariously liable party in a case like this one would actually increase

171. *Id.* at 917.

172. *Cunningham*, 771 So. 2d at 14.

173. *Id.* at 16.

174. 26 Fla. L. Weekly D737 (2d Dist. Ct. App. Mar. 14, 2001).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (citing *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982); *Joseph v. Quest*, 414 So. 2d 1063 (Fla. 1982)).

179. *Grace*, 26 Fla. L. Weekly at D737.

180. *Id.*

181. *Id.*

182. *Id.*

family resources.¹⁸³ Thus, allowing family immunity in this type of case would arguably turn such defendants into insurers with no protection in family claims without advancing the major justification for parental immunity.¹⁸⁴ One hopes that this interesting policy question will be resolved in the future in this case or a similar one where the question is at issue.

The Fifth District Court of Appeal also considered an apportionment of damages issue in *Doig v. Chester*.¹⁸⁵ In *Doig*, the plaintiff sued Dr. Doig and Halifax Hospital for medical malpractice.¹⁸⁶ Halifax settled for \$150,000 during pre-suit proceedings, and the plaintiff recovered \$507,321 through arbitration with Doig, of which \$250,000 was for non economic damages.¹⁸⁷

The issue was “whether the Halifax recovery should be offset against the Doig award.”¹⁸⁸ The plaintiff did not want the per-incident limit on total noneconomic damages in the medical malpractice statute¹⁸⁹ to limit her total non economic damages from the two defendants.¹⁹⁰ The appellate court held that the plaintiff was entitled to only \$250,000 in total noneconomic damages.¹⁹¹ It did however certify the following question to the Supreme Court of Florida as one of great public importance: “IS IT APPROPRIATE TO SETOFF AGAINST THE NON ECONOMIC DAMAGES PORTION OF AN AWARD AGAINST ONE TORTFEASOR IN AN ARBITRATION OF A MEDICAL MALPRACTICE ACTION THE AMOUNT RECOVERED FROM SETTLEMENT FROM ANOTHER RESPONSIBLE FOR THE SAME INCIDENT CAUSING THE INJURY?”¹⁹²

In the case of *Letzter v. Cephas*,¹⁹³ the Fourth District Court of Appeal has certified two questions to the Supreme Court of Florida: 1) “Has the doctrine of *Stuart v. Hertz*¹⁹⁴ been abrogated by the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida?;” and 2) “Does *Stuart v. Hertz* apply when the initial cause of action is one in medical

183. *Id.* at D738.

184. *Grace*, 26 Fla. L. Weekly at D738.

185. 776 So. 2d 1043 (Fla. 5th Dist. Ct. App. 2001); *see also* FLA. STAT. § 766.207 (2001).

186. *Id.* at 1044.

187. *Id.*

188. *Id.*

189. FLA. STAT. § 766.207(7)(h) (2000).

190. *Doig*, 776 So. 2d at 1044.

191. *Id.* at 1045.

192. *Id.* at 1047.

193. *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th Dist. Ct. App. 2001).

194. 351 So. 2d 703 (Fla. 1977).

malpractice and both the initial and subsequent tortfeasors are sued in the same action?"¹⁹⁵

In *Letzter*, Mr. Cephas, a diabetic, consulted Dr. Letzter concerning a wound on the little toe of his right foot.¹⁹⁶ It was alleged that Letzter was negligent in not performing distal bypass surgery in a timely manner.¹⁹⁷ Because of continuing pain in his foot, the plaintiff sought treatment at an emergency room in a nearby hospital where Dr. Armand performed a fore-foot amputation and a femoral-to-popliteal artery bypass on Cephas' right leg.¹⁹⁸ Experts testified that Armand's actions also were negligent in some respects.¹⁹⁹ Eventually Cephas required a below the knee amputation.²⁰⁰ The trial court agreed to give the *Stuart v. Hertz* instruction. The instruction generally states that one who negligently causes another's personal injuries is also liable as a proximate cause of damages suffered when the injured party exercises reasonable care in securing the services of a competent physician or surgeon, but suffers aggravation or increased injury by the negligence, mistake, or lack of skill of the physician or surgeon.²⁰¹

Dr. Letzter argued that the instruction was erroneous because he and Dr. Armand were joint tortfeasors.²⁰² Although it would not have been appropriate to present such an instruction in that case, the court ruled that whether the doctors were joint tortfeasors was a jury question from which the evidence could support either conclusion.²⁰³ However, because the jury found that Dr. Armand was the legal cause of damage, but allocated fault between the two medical practitioners, the court ruled that the jury must have rejected joint liability, and therefore held that the trial judge's refusal to apportion non-economic damages was error under section 768.81 of the *Florida Statutes*.²⁰⁴ As noted in the concurring opinion of Judge Klein, chapter 86-160 of the Tort Reform and Insurance Act of 1986 provides that courts shall enter judgments against parties based upon each party's

195. *Letzter*, 792 So. 2d at 488.

196. *Id.* at 484.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Letzter*, 792 So. 2d at 485.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 486.

percentage of fault and not on the basis of joint and several liability.²⁰⁵ Thus, the court questions whether *Stuart* is still good law.²⁰⁶

The Fourth District Court of Appeal considered the applicability of drunk driving by a nonparty in a comparative negligence context in *Hyundai Motor Co. v. Ferayorni*.²⁰⁷ In this case, the deceased was killed in a car accident in which she was improperly wearing her shoulder harness under her arm.²⁰⁸ Her death was due to internal injuries caused by the underarm use of the seatbelt.²⁰⁹ Two trials ensued in which, in addition to other claims, the plaintiff argued that Hyundai provided inadequate warnings about improperly using the seatbelt in this manner.²¹⁰ The court ruled that the negligence of the drunk driver who caused the accident should have been considered in apportioning fault even though the drunk driver was not a defendant in this action.²¹¹ This decision puts the court in conflict with the Third District Court of Appeal, which in *Nash v. General Motors Corp.*²¹² held that drunk driving was an intentional tort and thus, should not be considered.²¹³

The First District Court of Appeal considered the effects of a release signed pursuant to a settlement in a damages action against a jointly liable defendant in *Schnepel v. Gouty*.²¹⁴ In *Schnepel*, plaintiff Gouty was injured by a bullet fired from Schnepel's gun.²¹⁵ Gout sued Schnepel and the gun manufacturer, Glock, with whom he settled for \$137,500 before trial.²¹⁶ At trial, the jury found that the plaintiff suffered \$250,000 damages, of which half were economic, and that Schnepel, but not Glock, was at fault.²¹⁷ The court noted that the jurisdictions are split as to whether a release of one person from liability in tort is affected by the fact that the person was not in

205. *Letzter*, 792 So. 2d at 488.

206. *Id.* Judge Klein notes some courts have held the Act only applies to joint tortfeasors and is therefore not applicable to cases where there are sequential, but not joint, tortfeasors. See, e.g., *Beverly Enters. Fla., Inc. v. McVey*, 739 So. 2d 646 (Fla. 2d Dist. Ct. App. 1999); *Ass'n for Retarded Citizens-Volusia, Inc. v. Fletcher*, 741 So. 2d 520 (Fla. 5th Dist. Ct. App. 1999).

207. 26 Fla. L. Weekly D1983 (4th Dist. Ct. App. Aug. 15, 2001).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at D1985.

212. 734 So. 2d 437, 440-41 (Fla. 3d Dist. Ct. App. 1999).

213. *Id.*

214. 766 So. 2d 418 (Fla. 1st Dist. Ct. App. 2000).

215. *Id.* at 419.

216. *Id.*

217. *Id.* at 420.

fact liable.²¹⁸ The court decided that Florida's setoff statutes²¹⁹ required a setoff in this case.²²⁰ However, the court certified the following question as one of great public importance:

Where the plaintiff has delivered a written release or covenant not to sue to a settling defendant allegedly jointly and severally liable for economic damages, should the settlement proceeds apportionable to economic damages be set off against any award for economic damages even if the settling defendant is not found liable?²²¹

Judge Van Nortwick dissented on the interpretation of the setoff statutes by the majority.²²² Judge Nortwick reasoned that the statutes do apply to economic damages where the parties are jointly and severally liable, but that they were not applicable here, where Schnepel was found to be 100% at fault.²²³ On policy grounds, the dissent argues that if a party is to benefit from such a settlement, it should be the injured party as opposed to the tortfeasor, and that the majority's construction of the statute discourages settlements with less than all of the defendants with potential joint and several liability.²²⁴

In *Somberg v. Florida Convalescent Centers, Inc.*,²²⁵ the Third District Court of Appeal reviewed the issue of survival of pre-death pain and suffering in a nursing home statutory violation case.²²⁶ The *Florida Statutes* require that nursing home residents "receive adequate and appropriate health care"²²⁷ and creates a private right of action for deprivation of the statutory rights of nursing home residents.²²⁸ The nursing home was granted summary judgment pursuant to its argument that the Wrongful Death Act excludes claims for personal injuries that result in death.²²⁹ In an area in which the

218. *Id.* at 420–23 (citing *Goldsen v. Simpson*, 783 So. 2d 46 (Ala. Civ. App. 2000)).

219. FLA. STAT. §§ 46.015(2), 768.041(2) (2000).

220. *Schnepel*, 766 So. 2d at 423.

221. *Id.* at 419.

222. *Id.* at 424.

223. *Id.* at 425.

224. *Id.*

225. 779 So. 2d 667 (Fla. 3d Dist. Ct. App. 2001).

226. *Id.* at 668.

227. FLA. STAT. § 400.022(1)(l) (2001).

228. § 400.023(1).

229. § 768.20.

districts are divided, the court concluded that the claim survives²³⁰ because the nursing home statute provides that suits claiming infringements or deprivations of rights survive the death of the resident.²³¹

The Third District Court of Appeal considered the application of the offer of judgment statute to personal injury protection (PIP) actions in *U.S. Security Insurance Co. v. Cahuasqui*.²³² The plaintiff refused an offer of judgment from U.S. Security Insurance.²³³ The jury found that the plaintiff was not entitled to recovery.²³⁴ Subsequently, U.S. Security filed for attorneys' fees under the offer of judgment statute, section 768.79 of the *Florida Statutes*.²³⁵ The plaintiff argued that this was not permissible because of the attorney's fees section of the PIP statute,²³⁶ which only provides for attorneys' fees for insureds or beneficiaries.²³⁷ The appellate court held that the offer of judgment statute applied to all civil actions and did not conflict with the PIP statute.²³⁸ It would appear from looking at the language of the latter statute, that the dissent by Judge Fletcher provides the better interpretation of that statute under normal statutory construction of specific statutes governing over more general ones.²³⁹

The Fifth District Court of Appeal considered the relationship of the dangerous instrumentality doctrine and indemnity theory in *Hertz Corp. v. Rhode Island Hospital*.²⁴⁰ Both doctrines establish vicarious liability. In this case, the former creates vicarious liability for automobile lessors and the latter under the doctrine of respondeat superior.²⁴¹ Citing *Hertz Corp. v. Ralph M. Parsons, Co.*,²⁴² the court argued that the negligence of the driver and its employer is primary as compared to the secondary negligence of the owner, and therefore an indemnification action by the latter is allowed

230. *Somberg*, 779 So. 2d at 668; *accord* *Beverly Enters. Fla., Inc. v. Spilman*, 661 So. 2d 867 (Fla. 5th Dist. Ct. App. 1995); *contra* *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th Dist. Ct. App. 1999).

231. FLA. STAT. § 400.023(1) (2001).

232. 760 So. 2d 1101 (Fla. 3d Dist. Ct. App. 2000).

233. *Id.* at 1103-04.

234. *Id.*

235. *Id.* at 1104.

236. FLA. STAT. § 627.428 (2001).

237. *Cahuasqui*, 760 So. 2d at 1104.

238. *Id.*

239. *Id.* at 1108.

240. 784 So. 2d 506 (Fla. 5th Dist. Ct. App. 2001).

241. *Id.* at 507.

242. 419 F.2d 783 (5th Cir. 1969).

against an employer of an employee driving a rental car in the course and scope of employment.²⁴³

VII. FRAUD

A fraud claim was considered by the Fourth District Court of Appeal in *Azam v. M/I Schottenstein Homes, Inc.*²⁴⁴ The *Azam* case dealt with a claim by the plaintiff that defendant developer falsely claimed that a site where a school was to be built was going to be a permanent natural preserve.²⁴⁵ The defendant claimed that an action for fraud in inducement or negligence cannot exist in the sale of a home where the information relied upon is a matter of public record.²⁴⁶ The *Azam* court disagreed with the defendant, holding that the statements concerning public records could form the basis of a fraud action as a question of fact.²⁴⁷

. IX. JURY INSTRUCTIONS

The Supreme Court of Florida also published new standard jury instructions, some of which relate to tort cases.²⁴⁸ These include new instructions concerning parental loss of filial consortium.²⁴⁹ Included in the new instructions are explanations of expenses for care and treatment, loss of services and earnings, as well as loss of companionship, society, love, affection, and solace.²⁵⁰ In addition, the instructions include amendments to the instructions on negligent misrepresentation claims.²⁵¹ These include instructions concerning comparative negligence²⁵² as recognized by the Supreme Court of Florida in *Gilchrist Timber Co. v. ITT Rayonier, Inc.*²⁵³

243. *Hertz*, 784 So. 2d at 507–08.

244. 761 So. 2d 1195 (Fla. 4th Dist. Ct. App. 2000).

245. *Id.* at 1195–96.

246. *Id.* at 1196 (citing *Pressman v. Wolf*, 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999)).

247. *Id.*

248. Standard Jury Instructions—Civil Cases, 777 So. 2d 378 (Fla. 2000).

249. *Id.* at 379.

250. *Id.* at 380.

251. *Id.* at 380–82.

252. *Id.* at 383.

253. 696 So. 2d 334 (Fla. 1997).

X. CONCLUSION

As can be seen, Florida appellate courts have again been busy during the past year in clarifying the constantly evolving area of tort law. Courts have attempted to clarify the breadth of the dangerous instrumentality doctrine as applied to automobiles and the coverage of the Medical Malpractice Act. They have also revisited the persistent problems of the existence of legal duties, the application of the negligence per se doctrine, and the calculation of damages. Although some points have been clarified, new questions have been raised in other areas. Perhaps some of these new questions will be answered in the next year.

Bifurcation in Personal Injury Cases: Should Judges Be Allowed To Use the “B” Word?

Dan Cytryn *

TABLE OF CONTENTS

I. INTRODUCTION	249
II. REVIEW OF CASE LAW	251
A. <i>Florida Case Law</i>	251
B. <i>Case Law of Other States</i>	253
III. EXAMINING THE POTENTIAL IMPACT OF BIFURCATION	
BY TYPE OF CASE	254
A. <i>Automobile Accident Cases</i>	255
B. <i>Non-Vehicular Accidents</i>	256
C. <i>Products Liability Cases</i>	257
D. <i>Medical Malpractice Cases</i>	257
E. <i>Intentional Tort Claims</i>	258
F. <i>Cases with a Punitive Damage Claim</i>	258
G. <i>Death Cases</i>	259
IV. BIAS AND PREJUDICE	259
A. <i>Causation of Injury and Damages</i>	260
B. <i>Same Jury Trying Both Issues</i>	261
C. <i>Different Juries for Same Case</i>	261
V. THE RECENT ARTICLE ON BIFURCATION	262
VI. STATISTICAL DATA	263
VII. THE APPROPRIATE USE OF BIFURCATION IN LIMITED	
CIRCUMSTANCES	265
VIII. CONCLUSION	266

I. INTRODUCTION

The bifurcation of personal injury cases is becoming more prevalent since the article by Judge David L. Tobin, *To B . . . or Not to B . . . “B . . .”*

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*Means Bifurcation.*¹ The debate regarding the bifurcation of personal injury cases has drawn both supporters and critics. Retired Judge Tobin appears to support the bifurcation of personal injury cases on the issues of liability and damages in automobile, slip and fall, products liability, and general negligence cases.² The purpose of this article is to provide an opposing viewpoint regarding whether bifurcation is appropriate in these types of cases, and to consider the impact that bifurcation has upon a plaintiff's success at trial. Unlike other law review articles on the issue of bifurcation, this article delineates, in part, the positive and negative impact of bifurcation by type of personal injury case.³

The legal term bifurcation is sometimes used interchangeably with the term severance in case law.⁴ However, the difference is that bifurcation ultimately results in one enforceable judgment, whereas severance "divides the lawsuit into two or more independent causes."⁵ Instead of one judgment, severance results in separate and enforceable judgments.⁶ Rule 1.270 of the *Florida Rules of Civil Procedure* states in relevant part: "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross claim, counter claim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counter-claims, third-party claims, or issues."⁷ Importantly, the comment to the rule contains language not present in its federal counterpart: "Generally, justice requires that an action not be handled piecemeal when it reasonably can be avoided"⁸

In the following sections, some of the concerns that support this comment will be discussed. Part II provides a brief overview of Florida case law and decisions of other states. Part III discusses the potential impact of bifurcation on different types of negligence cases. Part IV considers the potential bias and prejudice to the plaintiff. Part V refutes some of the assertions Judge Tobin made in his article and Part VI provides a statistical analysis of the success rate of plaintiffs in bifurcated versus non-bifurcated

1. David L. Tobin, *To B . . . or Not to B . . . "B . . ." Means Bifurcation*, FLA. B.J., Nov. 2000, at 14.

2. *See id.*

3. *See, e.g.*, Miering de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153 (2000); Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000).

4. *See, e.g.*, *Hardee Mfg. Co. v. Josey*, 535 So. 2d 655 (Fla. 3d Dist. Ct. App. 1988).

5. BLACK'S LAW DICTIONARY 148 (5th ed. 1979).

6. *Id.*

7. FLA. R. CIV. P. 1.270(b).

8. Author's Comments, FLA. R. CIV. P. 1.270 (1967).

trials. Finally, this article concludes that bifurcation of liability and damages in personal injury cases should be the exception rather than the rule, and should be permitted only when the benefit of bifurcation clearly outweighs the detriment and prejudice to any party opposing the bifurcation of a case.⁹

II. REVIEW OF CASE LAW

A. Florida Case Law

There have not been many Florida appellate decisions that address bifurcation of the liability and damage issues in personal injury cases. Before the adoption of rule 1.270 of the *Florida Rules of Civil Procedure*, the first Florida case that squarely discussed the issue stated that the bifurcation of personal injury cases on the issues of liability and damages was ordinarily not permitted.¹⁰ The court held that the bifurcation of issues in a cause “should be the exception rather than the usual procedure.”¹¹

Vander Car v. Pitts,¹² pointed out that the authority for the trial court to bifurcate was then-existing rule 1.20(b) of the *Florida Rules of Civil Procedure*, effective July 1, 1962, which essentially mimicked 42(b) of the *Federal Rules of Civil Procedure*. Although the bifurcation of liability and damages was upheld, the appellate court noted: “a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that separate trials should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice.”¹³

In *Watts v. Mantooth*,¹⁴ the appellate court held, upon plaintiff’s motion, that it was not an abuse of discretion to bifurcate the trial on liability and damages for determination by separate juries where the judge’s trial docket ended on Monday, the trial was beginning on Friday, and unless the case was bifurcated, the jury would have had to sit through the trial on Saturday and possibly Sunday.¹⁵ In addition, both of the plaintiff’s medical

9. This article is not intended to discuss the bifurcation of the determination of the amount of punitive damages from the main portion of the trial, which procedure was approved by the Supreme Court of Florida in *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

10. *Bowen v. Manuel*, 144 So. 2d 341, 343 (Fla. 2d Dist. Ct. App. 1962).

11. *Id.* at 343.

12. 166 So. 2d 837 (Fla. 2d Dist. Ct. App. 1964).

13. *Id.* at 839.

14. 196 So. 2d 230 (Fla. 2d Dist. Ct. App. 1967).

15. *Id.* at 232.

doctors resided in Tennessee, and they would have had to come to Florida to testify.¹⁶ The trial court granted plaintiff's request to determine liability first so that the jurors, the court, and the parties would not have to try the case over the weekend, and so that the plaintiff could potentially avoid the cost of bringing these two medical doctors to Florida from Tennessee.¹⁷

In *Marley v. Saunders*,¹⁸ the Supreme Court of Florida, in dicta, discussed the issue of bifurcation in a case where bifurcation had apparently been agreed to by both parties.¹⁹ The court never addressed the issue of prejudice or the application of bifurcation to different types of personal injury lawsuits. The issue in the case was whether the Third District Court of Appeal erred in dismissing the plaintiff's appeal after the trial court ordered a new trial for the defendant on the issue of liability alone.²⁰ The court held that the trial court did not err in granting a new trial for the defendant on the issue of liability only.²¹

There does not appear to be another Florida appellate decision pertaining to the issue of bifurcation of liability and damages in personal injury trials for the next seventeen years. Then, in 1988, the court in *Hardee Manufacturing Co. v. Josey*²² held that the trial judge did not abuse his discretion in denying a motion to bifurcate the issues of liability and damages in a rear-end collision where the injuries were severe and the issues of liability were close.²³ The appellate court upheld the trial court's refusal to bifurcate because factors pertaining to the cause and nature of the injuries would have had to have been introduced into evidence if the trial had been bifurcated and the liability aspect tried first.²⁴

Several years later, in *Scandinavian World Cruises (Bahamas) Ltd. v. Barone*,²⁵ a slip and fall case, the appellate court affirmed a trial court's order granting a new trial where the "trial court's bifurcation of the issues of liability and damages prejudiced the plaintiff . . ." since the plaintiff had suffered a brain injury, and medical testimony was required to explain the confusing and inconsistent testimony of the plaintiff.²⁶ The next decision

16. *Id.*

17. *Id.*

18. 249 So. 2d 30 (Fla. 1971).

19. *Id.* at 32.

20. *Id.* at 33.

21. *Id.* at 35.

22. 535 So. 2d 655 (Fla. 3d Dist. Ct. App. 1988).

23. *Id.* at 656.

24. *Id.*

25. 573 So. 2d 1036 (Fla. 3d Dist. Ct. App. 1991).

26. *Id.* at 1037.

that mentioned the bifurcation of liability and damages in a personal injury case was *Dade County School Board v. Garcia*.²⁷ There, the appellate court, without any explanation as to how they arrived at their decision, held, *inter alia*, that the trial court abused its discretion in bifurcating an automobile accident case.²⁸

At the time of the writing of this article, the Fourth District Court of Appeal rendered its decision in *Roseman v. Town Square Ass'n*.²⁹ The case involved a claim for personal injuries sustained when a front door of a condominium complex allegedly closed quickly on the plaintiff.³⁰ The trial court granted the defendant's motion to bifurcate the trial on liability and damages, holding that the issue the jury would decide in the liability phase was as follows. "[W]as there negligence on the part of Town Square Association which was a legal cause of the door striking Mindy Roseman?"³¹

In holding that it was not an abuse of discretion for the trial judge to allow bifurcation of the case, the court found, "[t]here was no dispute as to where on Roseman's body she was struck or how hard the blow was."³² The court also pointed out that "[t]here was no dispute at trial regarding whether the incident actually occurred."³³ Further, the court stated that any claim that medical care and treatment rendered immediately after the incident would buttress plaintiff's claim was "immaterial to the liability issues of negligent maintenance or failure to warn of the dangerous condition."³⁴

There have been a total of eight decisions in Florida since the first one thirty-nine years ago, discussing the issue of bifurcation of the liability and damage aspects of personal injury cases. None of these decisions provides any meaningful standard for trial courts in determining whether bifurcation is appropriate.

B. Case Law of Other States

A review of the case law of other states provides mixed results. For instance, Illinois and Texas do not allow the bifurcation of liability and

27. 723 So. 2d 377 (Fla. 3d Dist. Ct. App. 1998).

28. *Id.*

29. 26 Fla. L. Weekly D1833 (Fla. 4th Dist. Ct. App. July 25, 2001). At the time this article went to publication, plaintiff's motion for re-hearing and for clarification had not been decided, and the decision was not final.

30. *Id.* at D1833.

31. *Id.*

32. *Id.* at D1834.

33. *Id.*

34. *Roseman*, 26 Fla. L. Weekly at D1834.

damages in personal injury cases under any circumstances.³⁵ In contrast, New York mandates bifurcation in most personal injury cases.³⁶ It appears that thirteen states, Alaska, Hawaii, Idaho, Kentucky, Mississippi, Missouri, Montana, New Hampshire, Rhode Island, Utah, Vermont, Wisconsin, and Wyoming, have not taken a position on the issue. Ten states allow bifurcation of the liability and damage aspects of personal injury cases only in extraordinary or exceptional situations.³⁷ The remaining twenty-four states appear to allow bifurcation on a discretionary basis. In addition, the federal courts generally appear to favor the bifurcation of personal injury cases.

III. EXAMINING THE POTENTIAL IMPACT OF BIFURCATION BY TYPE OF CASE

It is important to remember that “[t]he decision to separate the trial of liability from damages . . . is not merely a matter of trial management [but] involves a decision that could very well impact and influence the outcome of the trial.”³⁸ Trying a personal injury case on the issue of liability alone is like trying a case in a vacuum, or in a laboratory setting. The jury doesn’t hear the whole story, but only part of the story. It is analogous to telling a story without an ending, or telling a joke without a punch line. For an injured plaintiff, the potential impact on her case is certainly no joke. The “laboratory” or “sterile” effect and its impact on a negligence action has been described as follows:

35. See *Mason v. Dunn*, 285 N.E.2d 191 (Ill. App. 1972); *Iley v. Hughes*, 311 S.W.2d 648 (Tex. 1958).

36. See, e.g., *Fetterman v. Evans* 612 N.Y.S. 2d 479 (N.Y. App. Div. 1994).

37. See *Coburn v. Am. Liberty Ins. Co.*, 341 So. 2d 717, 719 (Ala. 1977) (holding bifurcation should be ordered “sparingly” and in “exceptional cases”); *Randolph v. Scott*, 338 A.2d 135, 137 (Del. 1975) (calling the bifurcation procedure in personal injury cases “extraordinary”); *Brake v. Central Serv. Co.*, 7 N.W.2d 184, 185 (Iowa 1942); *Detloff v. Taubman Co.*, 315 N.W.2d 582, 583 (Mich. Ct. App. 1982) (holding bifurcation permitted “only upon the most persuasive showing”); *Grosfield v. Clearwater Clinic*, 417 N.W.2d 640, 642 (Minn. 1988) (calling the use of bifurcation on personal injury cases an “extraordinary remedy”); *Griffin v. Werner Enters. Inc.*, 1999 WL 419900 (Neb. Ct. App. 1999) (calling bifurcation an “extraordinary measure”); *Wertz v. Kephart*, 542 A.2d 1019, 1022 (Pa. 1988) (stating bifurcation should be “cautiously applied”); *Burks v. Harris*, 1992 WL 322375 (Tenn. Ct. App. 1993) (holding bifurcation allowed “in only the most exceptional cases and upon a strong showing of necessity”); *Brown v. Gen. Motors Corp.*, 407 P.2d 461, 464 (Wash. 1965) (stating bifurcation should be “cautiously applied”); *Andrews v. Reynolds Mem’l Hosp., Inc.*, 499 S.E.2d 846, 856 (W.Va. 1997) (stating “bifurcation should be granted only when clearly necessary”).

38. *Cavender v. McCarty*, 479 S.E.2d 887, 893 (W. Va. 1996).

According to the sterile-trial theory, bifurcation obscures the magnitude of the case itself and the significance of the jury's decision. In other words, juries that do not hear evidence regarding the plaintiff's injuries and damages will not feel sympathy, and therefore are less likely to care about what they are doing. This concern may be valid because sympathy does appear to be an emotional trigger for taking matters more seriously. In this respect, sympathy enhances legal decision making by acting as a natural emotional signpost that points out: (1) the existence of a "justice-related matter," (2) relevant facts that might be overlooked in a non-sympathetic environment, or (3) the path towards the "just" outcome. Hence, sympathy can help juries decide cases within the law by grabbing their attention and highlighting the fact that someone has been hurt and may deserve the juries help. By putting aside evidence that might invoke sympathy, bifurcation presents a risk that the jurors will lack the natural stimulus to give the issues serious consideration [W]here the circumstances require a greater impression, the trial court might allow the plaintiff to present a limited amount of injury evidence during the separated liability stage so the jury can "begin to comprehend the significance of the claims to the plaintiffs. Trial judges and litigants can and will think of other means to ensure that the jury appreciates the significance of the issues and takes its role seriously."³⁹

In light of these concerns and the following issues, it will become apparent why the whole story is generally necessary for a fair trial of a personal injury case.

A. *Automobile Accident Cases*

Certainly, in automobile accident cases, the jury can determine the percentage of fault of each party to an accident in the liability aspect of a bifurcated proceeding, but what if there is a seat belt issue? For instance, medical testimony regarding the injuries suffered by the plaintiff has to be elicited in order for the jury to determine the issues of the comparative negligence of the plaintiff who did not wear a seatbelt or shoulder harness. The seatbelt issue necessitates both liability and damages testimony because medical testimony is required to determine the extent of comparative

39. Gensler, *supra* note 3, at 767-69.

negligence of the plaintiff. Therefore, bifurcation of such a case would never be appropriate.

Bifurcation may also be inappropriate in other automobile accident cases not entailing a seatbelt issue. Even if liability is admitted by the defendant in a personal injury trial, testimony and evidence as to the extent of the impact is relevant to prove or disprove damages.⁴⁰ Further, speed and force of impact testimony may also be relevant for the jury to consider in the damages phase in determining whether a particular collision could cause the injury claimed.⁴¹ In an auto collision case, it may be necessary to present testimony of police officers, witnesses to the accident, accident reconstructionists, and biomechanical engineers in both the liability and damage aspects of a bifurcated personal injury trial, because that testimony may be relevant to both liability and damages. The potential need to call the same witnesses in both aspects of the trial mitigates against bifurcation because there may not be any cost, or time-savings if the same witnesses have to be called in both phases of the trial.⁴²

Bifurcation of liability and damages in vehicular collision cases can actually increase the time and expense of litigating a case. The increased cost and time can occur in cases where a defendant would otherwise have admitted liability and simply chosen to try the case on causation, or on causation and damages alone. Where bifurcation is allowed, a defendant may have an increased desire to contest liability. That is because without bifurcation, a defendant fears that its decision to contest liability may adversely affect it on damages, particularly if the liability defense is somewhat tenuous. With the trial bifurcated, the fear dissipates, especially if separate juries will be used for each phase.

B. Non-Vehicular Accidents

Bifurcation of the liability and damage portions of non-vehicular accidents presents additional problems. For example, in a trip or slip and fall case, where the plaintiff's injuries are not visible at the time of trial, or

40. See *Allstate Ins. Co. v. Kidwell*, 746 So. 2d 1129 (Fla. 4th Dist. Ct. App. 1999); *Traud v. Waller*, 272 So. 2d 19 (Fla. 3d Dist. Ct. App. 1973) (holding that photographs of property damage to vehicles may be admissible as tending to prove the extent of the forces or lack thereof in the collision).

41. See *Bryant v. Buerman*, 739 So. 2d 710 (Fla. 4th Dist. Ct. App. 1999).

42. This assumes the use of two different juries to try the liability and damage aspects of the trial. The use of different juries for each aspect of the trial is discussed *infra* in section IV.B.

do not visibly appear serious, jurors will be likely scratching their heads trying to figure out why the plaintiff is even bringing a claim, especially if they have no idea what injuries the plaintiff suffered. Jurors are unlikely to care about what caused the plaintiff to fall if they are not told about the extent of the injuries sustained.

C. *Products Liability Cases*

In a products liability case with a strict liability count, the main liability issue usually is whether the product is unreasonably dangerous to the user or consumer.⁴³ How can jurors in a bifurcated trial on liability determine whether the product is unreasonably dangerous to users or consumers, if they do not know the extent of the damage that the product caused to the injured plaintiff? For example, the jurors might determine that a product that can cause a cut to a finger is not unreasonably dangerous, but that a product that causes a finger to be cut off is unreasonably dangerous. In a products liability case, jurors should know what damages and what injuries a product can cause, and have caused in a particular case, in order to be able to determine liability. For example, whether the product is defective and unreasonably dangerous to the user or consumer. If the case is bifurcated, the jurors will likely be precluded from learning that important information in the liability phase. Bifurcation is therefore generally inappropriate in products liability cases.

D. *Medical Malpractice Cases*

Bifurcation of liability and damages is inappropriate in medical malpractice cases as well. A medical malpractice case requires medical testimony in the liability, causation, and damage aspects of the trial. In most cases, the treating physician's testimony will be required to establish both liability and damages. It is impractical to bifurcate the trial because it is difficult to separate at what point the medical testimony on liability ends, and the medical testimony on causation and damages begins. If the plaintiff prevails on liability, not only will there not be a time savings, but the same treating physicians who were called to testify in the liability aspect of the case may well have to be called again for the damages aspect of the case.⁴⁴

43. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

44. *See Dobress v. N. Shore Univ. Hosp.*, 678 N.Y.S.2d 870, 872 (N.Y. Sup. Ct. 1998) In medical malpractice cases, because liability and damages invariably requires the

Where the plaintiff prevails in a bifurcated case, the case will have taken longer because there are two jury selections, two openings, two closings, etc. Therefore, there is no time savings, as the case may take more time than a unified trial. Further, there may be extra costs involved in having to call witnesses in both aspects of a bifurcated trial. Even in New York, where bifurcation is the general rule in personal injury cases, the bifurcation of the issues of liability and damages has been recognized as inappropriate in most medical malpractice actions.⁴⁵

E. *Intentional Tort Claims*

Intentional tort claims are also generally inappropriate for bifurcation. For example, in an assault and battery or false arrest case, the conduct of the defendant leading to the determination of liability is relevant to a determination of the amount of actual damages suffered by the plaintiff. In a false arrest case, how the plaintiff was treated by the defendant is relevant to determine the extent of the mental anguish suffered by the plaintiff. Further, for example, the jury may have to assess the extent of the conduct in determining whether future psychiatric care is reasonably required, based upon the circumstances surrounding the incident. Bifurcation is inappropriate in these types of intentional tort claims.

F. *Cases with a Punitive Damage Claim*

Personal injury cases with a punitive damage claim should not be bifurcated for trial on liability and damages with different juries, because the same jury that hears liability and damages must also hear the punitive damage phase in order to have any semblance of judicial economy. Otherwise, the entire trial will have to be repeated for the new jury in the punitive damage phase. To avoid that, the only part of the personal injury claim that should be bifurcated is the determination of the amount of punitive damages.⁴⁶

testimony of the same medical expert witnesses, "there is no real saving in terms of time or court facilities." *Id.* at 872.

45. *Id.* But see *Barracca v. St. Francis Hosp.*, 634 N.Y.S.2d 941 (N.Y. Sup. Ct. 1995).

46. See *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994).

G. Death Cases

In any case involving a death where a person has a claim for their mental pain and suffering resulting from the death, bifurcation is inappropriate. This is because the circumstances surrounding how the person died, “the liability aspect,” very likely will be relevant to the claim for mental pain and suffering. That is because the more horrific or elongated the circumstances surrounding the death of a loved one was, the more credible is the claim for a larger mental pain and suffering award.

IV. BIAS AND PREJUDICE

If jurors are not told of the extent of the damages suffered by the plaintiff, the bias factor against the plaintiff will increase.⁴⁷ That is the case because many jurors verbally express in jury selection that they are not interested in cases where the damages are small or not obvious.⁴⁸ That being the case, why should jurors be interested in a case where there is no visible injury to the plaintiff and the injuries have not been explained to the jury? Having personally selected at least eighty juries in personal injury trials, I as well as any experienced trial lawyer or judge, can tell you that it is commonplace that many jurors do not want to be there in the first place. Further, many jurors have biases and prejudices against many different types of personal injury cases.⁴⁹

Judge Tobin’s proposal to “instruct the jury that the plaintiff has injuries, and in some cases it would be appropriate for the court to state that the plaintiff has either serious or significant injuries,”⁵⁰ doesn’t resolve the problem, and may actually create a new problem. For instance, instructing the jury that the plaintiff has serious or significant injuries prejudices the defense. A competent defense attorney should only agree to allow the court to say that the plaintiff “alleges” she has sustained injuries as a result of the incident, not that the plaintiff “has sustained” serious or significant injuries.

47. See generally *Fazzolari v. City of W. Palm Beach*, 608 So. 2d 927 (Fla. 4th Dist. Ct. App. 1992). During jury selection, half of the jury panel in this non-bifurcated personal injury trial stated that they had negative feelings about personal injury lawsuits. *Id.*

48. See, e.g., *Goldenberg v. Reg’l Imp. & Exp. Trucking Co.*, 674 So. 2d 761 (Fla. 4th Dist. Ct. App. 1996) (discussing a juror expressing the opinion that if there is not a substantial injury, she feels the person making the claim is dishonest).

49. See generally *Sisto v. Aetna Cas. & Sur. Co.*, 689 So. 2d 438 (Fla. 4th Dist. Ct. App. 1997) (holding that it is reversible error to fail to allow attorney in jury selection to inquire of opinions, feelings, or beliefs of jurors concerning personal injury lawsuits).

50. Tobin, *supra* note 1, at 16.

On the other hand, using the word “alleges” does nothing for the plaintiff except raise the level of suspicion of the jurors as to the legitimacy of the case as a whole, particularly when they are not going to hear anything about the plaintiff’s injuries in the bifurcated trial on liability. There is potentially an insurmountable array of problems that go into the discussion concerning whether jurors should be told of the extent or existence of injuries in the liability portion of a bifurcated trial, and there is no satisfactory resolution.

A. *Causation of Injury and Damages*

Causation of injury is a significant problem area when personal injury cases are bifurcated for separate trials on liability and damages. Simply because an incident occurred (for example, a slip or trip and fall), does not necessarily mean that a person was injured as a result of the incident. If the jurors are not told details about causation and the extent of the injury, and if the plaintiff’s injuries are not visibly apparent, jurors may have difficulty conceptualizing why they are in the courtroom. Further, in many cases, the medical evidence may “be important to both the liability issue as well as to the damages issue.”⁵¹ That is why evidence pertaining to causation and the extent of damages in most cases is a relevant part of the equation that a jury must have in order to render a fair verdict.

The issues of causation and damages are especially important to the liability issue in non-vehicular collision cases where there might be unusual liability situations. Unfortunately, it is these types of unusual cases where trial judges have the greatest tendency to bifurcate the case. The more unusual the liability situation, the more difficult it will be for the plaintiff to win the liability aspect of a bifurcated trial.⁵² That is because the jurors may very well have difficulty perceiving how the incident caused the damages. Even though causation of injury and damages are not issues that the jurors are supposed to consider in the liability phase, their inability to understand how the incident caused damages will play a role in their deliberations in the liability phase. To eliminate the prospect of that occurring, bifurcation should be avoided in unusual or atypical liability situations.

New York is the only state in the United States where bifurcation in personal injury cases is the general rule. However, even in New York, bifurcation in a personal injury trial is not permitted where it is necessary for

51. *See, e.g., Griffin v. Werner Enters., Inc.*, 1999 WL 419900 (Neb. Ct. App. 1999).

52. *See, e.g., Randolph v. Scott*, 338 A.2d 135, 137 (Del. 1975) (holding “nebulosity surrounding the exact circumstances of the accident” is a factor mitigating against bifurcation).

a plaintiff, in order to establish liability, to offer medical evidence of the injuries and of the force necessary to cause such injuries.⁵³ Further, medical proof of the plaintiff's injuries may be necessary to determine the actual force of the impact.⁵⁴

B. *Same Jury Trying Both Issues*

The use of the same jury to try both liability and damages in a bifurcated trial is extremely prejudicial to the plaintiff because the jurors are more likely to render a defense verdict. Jurors will know that they will be required to return to try the damages phase if they find for the plaintiff on liability. If the judge intends from the beginning that the trial is to continue on damages with the same jury, the jury will have to be told the approximate length of the trial and asked how long they can stay. Therefore, when it is time for them to deliberate on the liability aspect of the trial, considering how long the trial has already taken, the jurors will figure out that if they find for the plaintiff they will have to return and decide damages.⁵⁵

Unless the jurors are incensed over the conduct of the defendant, the natural tendency of the majority of the jurors will be to get on with their lives and go back to their work, school, and families. Even though we know that jurors generally tend to do the right thing, subconsciously, at best, and consciously, at worst, the jurors will want to leave as soon as possible in order to avoid spending several extra days or even weeks in the courtroom. It is simply human nature to try to accomplish a result in the quickest possible time frame. The only way for the jurors to get out of jury service quicker is for the jury to render a defense verdict on liability.

C. *Different Juries for Same Case*

Separate juries for liability and damages pose at least three additional problems that mitigate against bifurcation. First, an additional session of jury selection is required, so that the time savings hoped to be gained by the

53. *Cybulski v. Bethlehem Steel Corp.*, 68 N.Y.S.2d 212 (N.Y. App. Div. 1999); *Roman v. McNulty*, 471 N.Y.S.2d 625 (N.Y. App. Div. 1984); *Tate v. Stevens*, 713 N.Y.S.2d 598 (N.Y. App. Div. 2000).

54. *Aldous v. Honda Motor Co.*, 1996 WL 312189 (N.D.N.Y.) (holding where evidence of plaintiff's injuries is necessary to establish liability, bifurcation should be denied).

55. Jurors may know this from any of the following sources: 1) having previously served on a personal injury case; 2) having family members who have gone through a personal injury trial; 3) having attorney friends or people involved in the personal injury field; or 4) their own common sense and life experiences.

bifurcation is reduced. Second, the plaintiff is prejudiced because if the plaintiff wins, the trial on the damages aspect most likely will be scheduled months away, because the trial judge will be inclined to let the case sit, hoping that the parties will settle after the first part of the trial. Additionally, different juries for each phase of trial may pose constitutional problems or be held to violate statutory provisions regarding how a jury is to be comprised.

V. THE RECENT ARTICLE ON BIFURCATION

The article on bifurcation by Judge Tobin overlooks several other significant problems. First, two of the three cases mentioned in the article as alleged authority for bifurcation are not personal injury cases. For instance, *Microclimate Sales Co. v. Dougherty*⁵⁶ involved a cause of action for infringement upon patent license rights.⁵⁷ Another case cited in the article was a cause of action for specific performance of a contract.⁵⁸

Second, the article overlooks the unfairness to the parties. Under the method proposed in *To B . . . or Not to B . . . "B . . ." Means Bifurcation*,⁵⁹ if the plaintiff prevails on liability, the case is then delayed with the hope that the case will settle.⁶⁰ If the case does not settle, both the plaintiff and the defendant will have to attend two trials. A trial causes upheaval in a person's life. It affects their work schedule and their personal lives. A trial is a traumatic experience to the majority of litigants and to the average person, and with bifurcation, both parties may have to go through two trials instead of one.

Third, the main benefactor of the bifurcation is the defendant and/or her insurance carrier, whose money is earning interest while the plaintiff waits additional time for the damages phase of the trial to be concluded. Certainly, bifurcation may induce settlement in some situations.⁶¹ On the other hand, an argument can be made that bifurcation could actually discourage settlement. For instance, bifurcation gives the defense two separate shots at the plaintiff's case. With separate juries, the threat that the jury will punish the defendant for frivolously contesting liability is eliminated. If the trial on

56. 731 So. 2d 856 (Fla. 5th Dist. Ct. App. 1999).

57. *Id.* See generally *Randolph*, 338 A.2d at 136. (stating that bifurcation hypothetically makes "it more difficult for a party to obtain a legal remedy").

58. *Hernandez v. Leiva*, 391 So. 2d 292 (Fla. 3d Dist. Ct. App. 1980).

59. Tobin, *supra* note 1, at 14.

60. *Id.* at 16.

61. *Id.*

damages is deferred, defendants may be more willing to contest liability because the potential time period when the plaintiff will be eligible to collect is further deferred.

Most cases that are separated into two phases, with damages to be tried after a break, will likely discourage settlement because a significant factor that encourages the defendant to settle a case is the imminent threat of a final judgment. Cases settle on the "courthouse steps" because there is the imminent threat of a final judgment. The deferral of the ultimate outcome, i.e., a potential final judgment, almost never operates as an inducement for the defendant to offer an early settlement. In such cases, bifurcation promotes none of the purposes for which it was intended.

Additionally, no plaintiff wants to wait, who knows how long, to go through two trials. Bifurcated cases may settle at a higher rate than non-bifurcated cases, but only because most plaintiffs would rather take less than have to go through two trials and a much longer delay to get full compensation. Any experienced trial lawyer knows that very few individual plaintiffs or defendants are enamored by the concept of sitting through *any* type of trial. Surely, the concept of having to potentially sit through *two* separate trials is even less appealing to most litigants.

VI. STATISTICAL DATA

Circuit Judge David L. Tobin's statistical data is relevant only to prove that more bifurcated cases in his division settled than non-bifurcated cases.⁶² What the article does not address is how unfairly the bifurcation process affects the plaintiffs whose cases are bifurcated. Additionally, his statistics regarding jury verdicts are unclear.⁶³ He states that since 1997, there were forty-two cases on his trial calendar that were bifurcated, but he is unclear regarding how many of those trials resulted in defense or plaintiff verdicts.⁶⁴

This writer performed a study using Westlaw's Florida Jury Verdict Reporter database (FL-JV).⁶⁵ The research, as of February 2001, reflected a

62. *Id.* at 18.

63. *Id.*

64. Tobin, *supra* note 1, at 18.

65. This study was accomplished by performing several Westlaw searches on the *Florida Jury Verdict* database (FL-JV). For example, to ascertain the number of verdicts for the plaintiff in bifurcation trip or slip and fall cases, the search performed was "verdict /3 defendant and slip! or trip!" and "liability only" or "bifurcate!" (The author maintains a copy of all searches performed and the specific data, as it is too cumbersome to be included in this article).

database of 8769 personal injury cases, of which 102 were bifurcated.⁶⁶ The difference in the success rate of plaintiffs whose cases were bifurcated, versus those whose cases were not, was stunning. Although plaintiffs won (received any verdict) in 59.5% of all personal injury cases that were not bifurcated, plaintiffs prevailed only 23.5% of the time when the cases were bifurcated.⁶⁷

In slip or trip and fall cases, although plaintiffs received a verdict in 47.3% of cases that were not bifurcated, plaintiffs only prevailed in 12.1% of those cases that were bifurcated.⁶⁸ In motor vehicle collisions, although

66. A telephone call to the *Florida Jury Verdict Reporter*, a publication of Florida Legal Periodicals, Inc., at 1-800-446-2998, on July 16, 2001, revealed that 60% of cases published are through contracted employees of Florida Legal Periodicals, Inc., and the research performed by them. The other 40% of cases are submitted by attorneys. On the inside cover of the latest edition of the *Florida Jury Verdict Reporter*, it is stated that:

[t]he information contained in this publication is derived from trial court records and from submissions by attorneys. Post-trial alteration or modification by appellate courts is not generally reflected. Cause and nature of injury are generally those alleged by counsel for Plaintiff. The Florida Jury Verdict Reporter (FJVR) is directed primarily to tort cases and publishes both Plaintiff's and Defendant's verdicts as well as settlements.... This publication is designed solely to provide information concerning the subject matter covered. It is not disseminated for the purpose rendering legal or other professional advice. While we strive for utmost accuracy in our reporting, no warranties are made regarding the accuracy of information contained in the case reports. Verification should be sought in court documents and/or with attorneys of record. Any and all liability for inaccuracies in our published reports is hereby disclaimed.

67. BIFURCATION OF PERSONAL INJURY CASES: Disposition of Cases Without Bifurcation

TYPE OF CASE	VERDICT FOR PLAINTIFF Number / Percentage	VERDICT FOR DEFENDANT Number / Percentage
All Cases	5155 / 59.5%	3512 / 40.5%
Trip or Slip and Fall	562 / 47.3%	626 / 52.7%
Motor Vehicle Accidents	2613 / 72%	1016 / 28%
Product or Strict Liability	224 / 46.5%	258 / 53.5%
Medical Malpractice	262 / 36.1 %	463 / 63.9%

plaintiffs received a verdict of any sort in 72% of those cases that were not bifurcated, plaintiffs only received a verdict in 27.8% of those cases that were bifurcated.⁶⁹

These statistics are alarming and are remarkably similar to a study conducted forty years ago.⁷⁰ The forty-year-old study demonstrated that while plaintiffs won 58% of the time when personal injury trials were not bifurcated, plaintiffs only won 21% of the time in bifurcated cases.⁷¹ One author states, "these statistics, if still valid, would suggest that defendants can substantially alter the nature of the proceedings as to time employed and result obtained by merely implementing the procedural mechanisms afforded by the rule."⁷² Furthermore, as was stated by Jennifer M. Granholm and William J. Richards in *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*:⁷³ "[b]ifurcation thus appears to tilt the scales of justice in favor of defendants,"⁷⁴ and "threaten[s] the ultimate goal of the legal system—the fair resolution of disputes."⁷⁵

VII. THE APPROPRIATE USE OF BIFURCATION IN LIMITED CIRCUMSTANCES

Bifurcation may be appropriate and beneficial to the plaintiff in one instance. For instance, in cases where the plaintiff has failed to be candid

BIFURCATION OF PERSONAL INJURY CASES: Disposition of Cases with Bifurcation

TYPE OF CASE	VERDICT FOR PLAINTIFF Number / Percentage	VERDICT FOR DEFENDANT Number / Percentage
All Cases	24 / 23.5%	78 / 76.5%
Trip or Slip and Fall	4 / 12.1%	29 / 87.9%
Motor Vehicle Accidents	10 / 27.8%	26 / 72.2%
Product or Strict Liability	1 / 20%	4 / 80%
Medical Malpractice	N/A	1 / N/A
Other Negligence	9 / 33.3%	18 / 66.7%

Statistics from the *Florida Jury Verdict Reporter* and Westlaw since 1987.

68. *Id.*

69. *Id.*

70. Bruce J. Berman, *FLORIDA CIVIL PROCEDURE* 282 n.43 (1998 ed.) (quoting from *Vander Car v. Pitts*, 166 So. 2d 837 (Fla. 2d Dist. Ct. App. 1964)).

71. *Id.*

72. *Id.*

73. 26 U. TOL. L. REV. 505 (1995).

74. *Id.* at 513.

75. *Id.* at 506.

with regard to prior medical history or prior injuries, and that evidence will be presented at a unitary trial, a jury will have the tendency to punish the plaintiff for the false statements or omissions. These false statements or omissions regarding prior medical history or prior injuries are legally irrelevant to the liability phase in a bifurcated trial. Thus, in an appropriate case, the bifurcation of the issues of liability and damages can preclude a jury from hearing irrelevant evidence, which in all likelihood, would tend to prejudice them against the plaintiff. However, a plaintiff should not seek bifurcation of a trial simply because the plaintiff has made misrepresentations. Before a plaintiff seeks bifurcation, the plaintiff must be certain that the problems previously delineated in this article do not outweigh the potential benefits of precluding the jury from hearing about the false statements or omissions during the liability phase of a bifurcated trial.

VIII. CONCLUSION

Although the bifurcation of liability and damages may be appropriate in very limited circumstances in personal injury cases, it should be the exception rather than the rule. The appellate courts should adopt a standard for the trial court to apply in determining whether bifurcation is appropriate. Although several states have adopted standards such as: bifurcation should be cautiously applied; allowed only in extraordinary circumstances; or sparingly applied; these standards really provide no guidance to trial courts.⁷⁶

The standard that should be adopted is that bifurcation of liability and damages is permitted only when the benefits of bifurcating the proceedings clearly outweigh the detriment and prejudice to any party opposing the bifurcation. The abuse of discretion standard can then be applied by the appellate court to ascertain whether the trial court abused its discretion in applying this standard. Further, bifurcation should always be permitted when all of the parties agree.

The test for the trial court to consider in determining whether bifurcation is appropriate should include consideration of the following factors:

1. Are the benefits of bifurcation outweighed by the prejudice to any party opposing the bifurcation order?

⁷⁶ See *id.* at 514 n.37.

2. Will many of the same witnesses determining liability be required to testify in the damages phase of the trial?
3. Have the defendants admitted causation of injury?
4. Is a significant cost and time savings reasonably likely to occur as a result of the bifurcation?
5. Will causation and/or damage issues and testimony be required for the jury to have a thorough understanding of the liability aspect of the case?
6. Is the factual scenario a commonplace occurrence that the jury will easily comprehend, or are the facts unusual and a scenario that the jurors may not comprehend how the injury was caused without hearing the evidence of causation and damages?

These factors are self-explanatory, except perhaps number three, which deals with causation. Whether the defendant has admitted causation is important, because if not, medical testimony may be required in the liability phase to prove that the incident in fact occurred. In other words, if the defendant is contesting whether the incident actually occurred, or whether it occurred in the manner alleged by the plaintiff, then causation and perhaps even damage testimony will be required to corroborate the plaintiff's claim.

As stated previously, the standard of appellate review would be abuse of discretion, with the paramount consideration being the avoidance of prejudice to any party. In other words, a trial court abuses its discretion when the trial court orders bifurcation and the benefits of bifurcation are outweighed by the prejudice to any party opposing the bifurcation order.

Bifurcation in personal injury cases is a procedure that is highly favorable to the defense. Although there may be some overall time-savings in the bifurcation of some personal injury cases, the constitutional rights of all litigants to a fair trial are more important than a potentially small time-savings. Bifurcation of liability and damages in personal injury cases should be reserved for the limited circumstances set forth in this article.

Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded* Can No Longer Be Tolerated?

TABLE OF CONTENTS

I.	INTRODUCTION	270
II.	FLORIDA STATUTE § 921.137: IMPOSITION OF THE DEATH SENTENCE UPON A MENTALLY RETARDED DEFENDANT PROHIBITED	273
	A. <i>Statutory Requirements</i>	273
	B. <i>The Importance of Florida's Legislation</i>	276
III.	DIFFERENCES BETWEEN MENTAL RETARDATION AND MENTAL ILLNESS.....	278
IV.	MENTAL RETARDATION: CHARACTERISTICS OF PEOPLE WITH MENTAL RETARDATION	279
V.	RATIONALES FOR SENTENCING A MENTALLY RETARDED PERSON TO DEATH: ARE LEGITIMATE PENOLOGICAL GOALS FURTHERED?	282
	A. <i>The Eighth Amendment's Prohibition Against Cruel and Unusual Punishment</i>	282
	B. <i>The Mentally Retarded Defendant's Capacity to Satisfy the Culpable Mens Rea</i>	283
	1. Elements of Capital Homicide.....	283
	2. Deterrence and Mentally Retarded Offenders: Inefficiency of Capital Punishment as a Deterrent.....	285
	3. Means of Retribution When Applied to Mentally Retarded Defendants	287
VI.	SIGNIFICANT PRIOR CASE LAW.....	290
VII.	SUPREME COURT'S POSITION IN <i>PENRY V. LYNAUGH</i> : ALLOWING THE IMPOSITION OF THE DEATH PENALTY ON THE MENTALLY RETARDED	293

* "I will be using the terms *mentally retarded* or *mental retardation* to refer to this group throughout the Article. The use of these words follows the American Association of Mental Retardation's determination after much deliberation of acceptable terms." Jonathan L. Bing, Comment, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 63 n.22 (1996).

VIII. A NATIONAL CONSENSUS: A SIGNIFICANT CHANGE IN SOCIETY'S STANDARDS OF DECENCY REGARDING THE MENTALLY RETARDED SINCE <i>PENRY V. LYNAUGH</i>	298
IX. CONCLUSION	302

I. INTRODUCTION

“Should a civilized society levy its most extreme punishment against someone who cannot fully understand it? Against someone who could not help his own lawyers defend him? Against someone who may have confessed to ‘help out’ the police, not realizing he’s just helped himself to the death chamber?”¹ Today, on death rows across the United States, sit a number of men and women with the minds of children awaiting execution. These people are mentally retarded. Typical of these individuals is Ernest P. McCarver, who is currently on death row in North Carolina.² McCarver was convicted of first-degree murder and robbery with a dangerous weapon, and he was sentenced to death.³ Although McCarver is now forty-one years old, he has the mental capacity of a ten-year, five-month-old child,⁴ and an IQ⁵ of sixty-seven.⁶ “[His] impairments [are] such that he could not perform typical daily activities. For example, he [is] unable to use the telephone book to find a place where he could order pizza.”⁷ “In other words, his capacity to perform these activities satisfactorily without assistance is more like that of a preadolescent youth than an adult.”⁸

McCarver is to be executed despite the fact that he is mentally retarded and has the mind of a ten-year-old. In challenging his sentence, McCarver’s

1. Rosa Enrenreich & Jaimie Fellner, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, 13 HUM. RTS. WATCH No. 1(G), at 2 (2001), available at <http://www.hrw.org/reports98/pbsjanjun2k1.htm>.

2. Death Penalty Information Center, *Mental Retardation and the Death Penalty*, (1997), at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited July 23, 2001).

3. *State v. McCarver*, 402 S.E.2d 25, 31 (N.C. 1995).

4. *Id.*

5. “An intelligence test that generates an IQ score measures the intellectual functioning of mentally retarded people and any impairments in their adaptive behavior.” Mary D. Bicknell, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 360 (1990).

6. *McCarver*, 402 S.E.2d at 25; see also Raymond Bonner, *Ban on Execution of the Retarded is Vetoed in Texas*, N.Y. TIMES, June 18, 2001, at A1 (stating Ernest McCarver’s IQ).

7. Pet. for Writ of Cert. at 7–8, *State v. McCarver*, 402 S.E.2d 25 (1995) (No. 00-8727) [hereinafter Pet. For Writ. Of Cert.].

8. *Id.* at 7.

basis for prohibiting such executions is that his “execution would violate the Eighth and Fourteenth Amendments to the United States Constitution because [he] is retarded and there is now a national consensus against executing the mentally retarded.”⁹ In McCarver’s case, the United States Supreme Court considers whether attitudes have changed over the past twelve years to the point where executing people with mental retardation violates society’s ideas of what is decent.¹⁰ Ernest McCarver is not a rarity among death row inmates. Although it is unknown how many of the 3700 people on death row in the United States are mentally retarded, experts say “between 200–300 inmates”¹¹ suffer from mental retardation.

On June 12, 2001, Florida Governor Jeb Bush signed into law a bill banning the execution of mentally retarded persons.¹² The United States Supreme Court, in its term beginning in October, will consider the question of whether executing those with mental retardation offends society’s “evolving standards of decency” and thus violates the Eighth Amendment’s ban on cruel and unusual punishment.¹³ Whether executing the mentally retarded offends society’s “evolving standards of decency” and hence a violation of the Eighth Amendment, is a question that has plagued the criminal justice system and state legislatures since the Supreme Court decided *Penry v. Lynaugh*¹⁴ twelve years ago. Justice Sandra Day O’Connor, on behalf of the majority, wrote “[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today”¹⁵ to conclude that it is “categorically prohibited by the Eighth Amendment.”¹⁶

9. *Id.* at 6; see also *Mental Retardation and the Death Penalty*, *supra* note 2.

10. See *Mental Retardation and the Death Penalty*, *supra* note 2.

11. Chris Adams, *Executing the Mentally Retarded Cruel and Unusual?*, CHAMPION, May 2001, at 10; see Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, (stating that of the 3600 people on death row, approximately ten percent of the inmates are mentally retarded).

12. FLA. STAT. § 921.137 (2001).

13. Pet. for Writ of Cert., *supra* note 7, at 9–14; see also Bonner, *supra* note 6, at A1 (discussing the Court’s consideration of whether executing mentally retarded defendants offends society’s evolving standards of decency); *Mental Retardation and the Death Penalty*, *supra* note 2 (discussing the Court’s consideration of whether executing mentally retarded persons offends society’s evolving standards of decency).

14. 492 U.S. 302 (1989) (holding that executing persons with mental retardation was not a violation of the Eighth Amendment).

15. *Id.* at 340.

16. See generally Jonathan L. Bing, Comment, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future*,

At the time of the decision in *Penry*, in which the Supreme Court held that the Eighth Amendment did not prohibit the execution of the mentally retarded, only one state with the death penalty, Georgia, and the federal government barred execution of the mentally retarded.¹⁷ Since *Penry*, fifteen more states have enacted laws prohibiting the execution of mentally retarded capital offenders.¹⁸

Florida, however, is the first state well-known for its frequent use of the death penalty to pass a law banning such executions.¹⁹ Therefore, the Supreme Court may finally determine that sufficient evidence exists to establish a national consensus indicating that society no longer approves of nor wishes to sanction the execution of the mentally retarded. Accordingly, Florida's new law is important to our scheme of justice and is indicative of a national trend among states with the death penalty to pass such legislation outlawing the execution of the mentally retarded.

This article begins by explaining in detail Florida Senate Bill 238, which created section 921.137 of the *Florida Statutes*, titled, "Imposition of the death sentence upon a mentally retarded defendant prohibited."²⁰ Part II discusses the importance of Florida's legislation. Part III explains the difference between mental retardation and mental illness. Part IV examines common attributes shared among individuals who suffer from mental retardation. Part V analyzes the rationales for executing the mentally retarded, and whether penological goals are furthered, focusing specifically on the elements of capital homicide, the inefficiency of capital punishment as a deterrent, and means of retribution when applied to mentally retarded defendants. Additionally, it examines the relevant Eighth Amendment principles and the mentally retarded defendant's capacity to satisfy the culpable mens rea. Parts VI and VII give a brief overview of significant prior case law, and examine the United States Supreme Court's position in *Penry v. Lynaugh*. Finally, Part VIII highlights the potential impact Florida

22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996) (discussing the emerging national consensus argument); Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 925-29 (2001) (discussing Justice O'Connor's considerations in reaching the Court's decision in *Penry*); *Mental Retardation and the Death Penalty*, *supra* note 2.

17. *Mental Retardation and the Death Penalty*, *supra* note 2; Bing, *supra* note 16, at 105.

18. *Mental Retardation and the Death Penalty*, *supra* note 2.

19. Bing, *supra* note 16, at 105 (stating that Florida is well-known for its use of the death penalty).

20. FLA. STAT. § 921.137.

Senate Bill 238, banning the execution of mentally retarded persons, will have on future United States Supreme Court decisions and the emerging trend to ban such executions among states that have the death penalty.

This article addresses the issue of whether the application of the death penalty upon persons with mental retardation should be prohibited, because such a penalty is contrary to society's ideas of what is decent. In addition, this article explains the reason the death penalty is not necessary to accomplish the legitimate legislative purposes in punishment, since a less severe penalty, such as life imprisonment, would adequately serve the same purpose. Finally, this article discusses the impact Florida Senate Bill 238 will have on future death penalty cases and the emerging trend banning such executions among those states that have the death penalty.

This article ultimately concludes that the use of capital punishment against people who suffer from mental retardation is cruelly inhumane and without justification. Furthermore, Florida is indicative of both a growing national movement to end such executions, and American standards of decency that have evolved to the point where capital punishment inflicted upon the mentally retarded can no longer be tolerated.

II. FLORIDA STATUTE § 921.137: IMPOSITION OF THE DEATH SENTENCE UPON A MENTALLY RETARDED DEFENDANT PROHIBITED

A. *Statutory Requirements*

Florida Senate Bill 238²¹ was enacted to ban the imposition of the death penalty on a defendant who suffers from mental retardation. Under section 921.137(1), mental retardation refers to "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age [eighteen]." ²² Under section 921.137(1), the term "significantly subaverage general intellectual functioning . . . means performance that is two or more standard deviations from the mean score on a standardized intelligence

21. *Id.*

22. FLA. STAT. § 921.137(1) (2001); *see generally* Jamie Marie Billotte, *Is It Justified?—The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 338 n.23 (1994). "The American Association on Mental Retardation defines mental retardation as 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'" *Id.*

test.”²³ Florida Senate Bill 238 does not stipulate how low a defendant’s IQ level must reach to be considered retarded, but uses a definition that considers defendants “retarded if they have below-normal intellectual functions and behavior.”²⁴ “Legislative employees[,] however[,] found that the bill would likely spare any inmate with an IQ of 70 or less.”²⁵

A diagnosis of mental retardation requires the presence of impairments in adaptive behavior in addition to the deficit in intellectual functioning.²⁶ Adaptive behavior is defined as an individual’s effectiveness or degree in meeting the “standards of personal independence and social responsibility expected of his or her age, cultural group, and community.”²⁷ Individuals’ adaptive behavior refers to how effectively individuals cope with the demands and ordinary challenges of everyday life, such as cognition, communication, and impulse control.²⁸

Under section 921.137(4), a defendant who has already been convicted and sentenced to death may file a motion with the trial judge to determine whether the defendant has mental retardation.²⁹ Accordingly, two court appointed independent experts examine the defendant to determine whether he or she is retarded.³⁰ In addition, defense attorneys and the state can present evidence from their own experts on whether the defendant suffers from

23. § 921.137(1); *see generally* James W. Ellis and Ruth A. Luckasson, *Symposium on the ABA Criminal Justice Mental Health Standards: Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985). “The AAMD’s definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations from the mean score of 100.” *Id.*

24. *Fla. Law Bans Execution for Retarded* (June 13, 2001), available at http://news.findlaw.com/ap_stories/other/111016-13-2001/20010613003744530.html (last visited June 13, 2001).

25. *Id.* *See generally* Enrenreich, *supra* note 1.

The vast majority of people in the United States have IQs between 80 and 120, with an IQ of 100 considered average. To be diagnosed as having mental retardation, a person must have an IQ below 70–75, i.e. *significantly* below average. If a person scores below 70 on a properly administered scored IQ test, he or she is in the bottom 2 percent of the American population and the first condition necessary to be defined as having mental retardation.

Id.

26. Ellis, *supra* note 23, at 422.

27. § 921.137(1).

28. Billotte, *supra* note 22, at 338; *see generally* Entzeroth, *supra* note 16, at 913–14 (discussing definitions of mental retardation); Enrenreich, *supra* note 1 (analyzing limitations in adaptive skills, “e.g., communication, self-control, home living, social skills, community use, self-direction, health and safety . . . leisure, and work.”).

29. § 921.137(4).

30. *Id.*

mental retardation.³¹ If the trial court concludes by clear and convincing evidence that the criminal defendant suffers from mental retardation, he or she is exempt from the death penalty.³² The criminal defendant, however, remains subject to the other penalties that may be inflicted on a person convicted of a capital offense, such as life imprisonment.³³

Florida's bill banning the execution of the mentally retarded is fairly weak. It does not contain a set IQ level, but does use a definition that considers intellectual functioning and adaptive behavior.³⁴ Contributing to the weak nature of Florida Bill 238 is the fact that Florida does not do what most states practice, which is making the determination of mental retardation before trial.³⁵ In Florida, the determination of mental retardation will go to the jury while deliberating the sentence.³⁶ This means that the defendant has already been convicted and sentenced to death. Thus, the defendant must petition the trial judge to appoint mental health experts to make the determination after the jury has returned a recommended sentence of death.³⁷ Since the jury considers mental retardation during the sentencing phase of trial, after already hearing the evidence of guilt, the jury is somewhat tainted.

Section 921.137 of the *Florida Statutes* is not retroactive. Thus, it does not apply to any of the 387 people now on Florida's death row,³⁸ all of whom were sentenced prior to June 12, 2001.³⁹

31. *Id.*

32. *Id.*

33. See § 921.137(6). Other penalties that may be imposed on a mentally retarded person convicted of a capital offense are quite severe and include: "1) life imprisonment without the possibility of parole, 2) life imprisonment without the benefit of probation or parole until the defendant has served a minimum of twenty-five years, 3) life imprisonment, or 4) a term of imprisonment of not less than twenty years or more than fifty years." Entzeroth, *supra* note 16, at 931.

34. S. 238.

35. Telephone Interview with Paula Bernstein, Information Specialist, Death Penalty Information Center, Washington, D.C. (July 23, 2001); *e.g.*, ARK. CODE ANN. § 5-4-618 (Michie 1993) (Prior to trial, the court will determine whether the defendant is mentally retarded. The jury will not be "death qualified" if it is found that defendant is mentally retarded. However, if defendant is convicted, the jury will sentence the defendant to life imprisonment without the possibility of parole.).

36. Telephone Interview with Paula Bernstein, Information Specialist, Death Penalty Information Center, Washington, D.C. (July 23, 2001); S. 238.

37. S. 238.

38. *Mental Retardation and the Death Penalty*, *supra* note 2.

39. § 921.137(8).

B. *The Importance of Florida's Legislation*

Florida's legislation is important to discuss, because it is the first state well-known for its frequent use of the death penalty⁴⁰ to pass legislation banning the execution of mentally retarded capital offenders. As noted above, on June 12, 2001 Governor Jeb Bush, a Republican who is a strong supporter of the death penalty, signed Senate Bill 238 into law. The bill "unanimously passed the Florida Senate in March and was only one vote short of passing the House unanimously in May."⁴¹ According to Governor Bush, "people with clear mental retardation should not be executed."⁴² Bush also said "[t]his legislation will provide much-needed protection for the mentally retarded in the judicial process."⁴³

Over the last twenty-four years since the death penalty was reinstated in 1976, at least thirty-five offenders with mental retardation have been executed in the United States.⁴⁴ Florida has executed four mentally retarded inmates⁴⁵ since 1976.⁴⁶ Of the 3700 inmates currently on death row it is estimated "between 200-300 inmates are mentally retarded."⁴⁷ Executing offenders who have retardation is unconscionable and inhumane. The Eighth Amendment prohibits cruel and unusual punishment, which "has

40. Bing, *supra* note 16, at 105 (mentioning that other states well-known for their frequent use of the death penalty are Texas, California, and Louisiana).

41. *Mental Retardation and the Death Penalty*, *supra* note 2; see also Bonner, *supra* note 6, at A1 (discussing Florida's new legislation banning the execution of the mentally retarded).

42. Bonner, *supra* note 11, at A1.

43. *Fla. Law Bans Execution for Retarded*, *supra* note 22.

44. *Mental Retardation and the Death Penalty*, *supra* note 2 (listing defendants with mental retardation executed in the United States since 1976, as updated by The Death Penalty Information Center). "William Ed, attorney with the Office of the Capital Collateral Counsel in Florida and an expert in death penalty and people with developmental disabilities, has identified at least nine persons to add to the list." Telephone Interview by Human Rights Watch with William Ed, Attorney, Office of the Capital Collateral Counsel in Florida (Feb. 6, 2001) (Human Rights Watch can be found at www.hrw.org/reports).

45. Arthur F. Goode, III, a white male with an IQ between sixty and sixty-three, was executed April 5, 1974, James Dupree Henry, a black male with an IQ in the low seventies, was executed on July 12, 1974, Mollie Lee Martin, a white male with a dual diagnosis/mentally insane, was executed on May 12, 1992, and John Earl Bush, a black male with borderline mental retardation and organic brain damage, was executed on October 21, 1996. Death Penalty Information Center, *Executions of Those with Mental Retardation*, at <http://www.deathpenaltyinfo.org/dpicmrexecs.html> (last visited June 15, 2001).

46. *Mental Retardation and the Death Penalty*, *supra* note 2.

47. Adams, *supra* note 11, at 10; see also Entzeroth, *supra* note 16, at 911 (stating "[b]etween twelve and twenty percent of current death row inmates are mentally retarded").

been interpreted to include punishment that is disproportionate to the gravity of the offense and the defendant's moral culpability, and imposes purposeless pain and suffering."⁴⁸

The Florida law banning the execution of mentally retarded persons protects people who do not have the capacity to understand the nature of the crime they have committed. In addition, when combined with the other sixteen states⁴⁹ and the federal government that explicitly prohibit sanctioning the mentally retarded to death, these legislative enactments send out a stronger message of a national consensus.⁵⁰

Moreover, public opinion polling data also reflects society's consensus that the death penalty should not be imposed upon the mentally retarded.⁵¹ For example, in Florida, a 1986 statewide survey revealed Floridians oppose the use of the death penalty for mentally retarded defendants by seventy-one percent to twelve percent.⁵² This figure is noteworthy, because Florida is a death penalty state where eighty-four percent of residents favored capital punishment, while only thirteen percent opposed it.⁵³

Whether a national consensus has developed against executing those with mental retardation is the question the Supreme Court will consider this fall. This question is very important, as will be set forth in detail, because Justice O'Connor found that the Eighth Amendment's Cruel and Unusual Punishment Clause must be viewed in light of American conceptions of

48. Enrenreich, *supra* note 1.

49. Currently fifteen states forbid execution of the mentally retarded: Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington. The governors of Connecticut and Missouri have similar legislation sitting on their desks awaiting approval. *Mental Retardation and the Death Penalty*, *supra* note 2.

50. In *Penry*, Justice O'Connor, writing for the majority, said that presently there was no emerging national consensus against executing those with mental retardation convicted of capital offenses to conclude that it is "categorically prohibited by the Eighth Amendment." 492 U.S. 302, 335 (1989). See generally *Mental Retardation and the Death Penalty*, *supra* note 2; Bing, *supra* note 16, at 105 (discussing the emerging national consensus argument); Entzeroth, *supra* note 16, at 921-22 (discussing Justice O'Connor's considerations in reaching the Court's decision in *Penry*).

51. John Blume & David Bruck, *Sentencing The Mentally Retarded To Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 759 (1988).

52. *Id.*

53. *Id.* (quoting Cambridge Survey Research, Inc., *Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey* 7, 61 (1986)). See also Bicknell, *supra* note 5, at 369 (discussing the Cambridge Survey).

decency.⁵⁴ Although “the Supreme Court has not set a minimum number of states needed to represent a [national] consensus,”⁵⁵ the Florida law could strongly evince society’s newly evolved consensus against executing the mentally retarded.

III. DIFFERENCES BETWEEN MENTAL RETARDATION AND MENTAL ILLNESS

It is critical for courts to understand the distinct differences between mental retardation and mental illness, rather than lump the two together as courts often do.⁵⁶ This has serious and unfortunate consequences in the criminal justice system. It is imperative to recognize that mental retardation is not the same thing as mental illness.⁵⁷ The most significant difference is that “mental retardation is not an illness.”⁵⁸ This is not to say that mental retardation and mental illness are mutually exclusive; some mentally retarded individuals might also suffer from mental illness.⁵⁹ “Indeed, between twenty to thirty-five percent of all non-institutionalized mentally retarded persons also have been diagnosed with some form of mental illness.”⁶⁰

Mental retardation is a developmental or functional disorder that is permanent, affecting a person’s abilities to learn.⁶¹ The mentally ill, by contrast, encounter disturbances in their thought processes that may be episodic, temporary, or cyclical.⁶² Some forms of mental illnesses have the

54. Entzeroth, *supra* note 16, 925–26 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989)).

55. Bing, *supra* note 16, at 105.

56. *Id.* at 71.

57. Ellis, *supra* note 23, at 423–25; *see also* Bing, *supra* note 16, at 71–72 (stating mental retardation and mental illness are not the same thing, although the courts have lumped them together); Entzeroth, *supra* note 16, at 915–16 (stating “[i]t is important to recognize that mental retardation is not a form of mental illness.”).

58. Ellis, *supra* note 23, at 423; *see also* Entzeroth, *supra* note 16, at 915–16 (stating mental retardation is not the same as mental illness).

59. Entzeroth, *supra* note 16, at 915; *see also* Ellis, *supra* note 23, at 425 (stating “some mentally retarded people are also mentally ill”).

60. Entzeroth, *supra* note 16, at 915.

61. Ellis, *supra* note 23, at 424; *see also* Entzeroth, *supra* note 16, at 915–16 (stating “mental retardation . . . is a permanent developmental or functional disorder”).

62. Ellis, *supra* note 23, at 423.

The American Psychiatric Association defines ‘mental disorder’ as ‘an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance. The disorder

prospect of being cured through appropriate psychiatric treatment or medication.⁶³ In contrast, psychotherapy or medication will do nothing to help a mentally retarded individual, although the mentally retarded individual may be taught how to cope and function with day-to-day challenges in order to improve self-sufficiency and adaptive behavior.⁶⁴ Thus, it is not possible to restore a mentally retarded individual's competency, unlike that of a mentally ill individual.⁶⁵ In order to restore one's competency, one must be competent to begin with.⁶⁶ Often, mental retardation manifests itself either at birth or early childhood; therefore, restoration of competence to stand trial is inappropriate and meaningless.⁶⁷ In contrast, "[o]ften mental illness does not emerge until after the individual is eighteen years old."⁶⁸

IV. MENTAL RETARDATION: CHARACTERISTICS OF PEOPLE WITH MENTAL RETARDATION

To simply define mental retardation as "a condition in which there are limits in conceptual, practical, and social intelligence"⁶⁹ does not necessarily help one understand what it means to be a person with mental retardation. Moreover, it is imperative to understand the problems that the mentally retarded individual faces in everyday life that a non-retarded individual does not. Thus, it is essential to examine characteristics of mentally retarded

is not limited to relations between the person and society. The illness is characterized by symptoms and/or impairment in functioning.'

Id. at 423; *see also* Entzeroth, *supra* note 16, at 915-16 (stating "the mentally ill experience disturbances in their thoughts . . . [while] mental retardation is not a psychological or medical disorder").

63. Ellis, *supra* note 23, at 424; *see also* Entzeroth, *supra* note 16, at 916 (stating "certain forms of mental illness can be treated with medication or psychotherapy").

64. Entzeroth, *supra* note 16, at 916; *see also* Bing, *supra* note 16, at 71 (stating "the mentally retarded person can never be stripped of his retardation, though his abilities can be improved").

65. Ellis, *supra* note 23, at 424.

66. *Id.*

67. *Id.* *See also* Entzeroth, *supra* note 16, at 916 (stating "mental retardation manifests itself by the time the mentally retarded individual is eighteen").

68. Entzeroth, *supra* note 16, at 916.

69. Bing, *supra* note 16, at 72 (quoting AAMR).

individuals, especially since several of those character traits have important implications for the criminal justice system.⁷⁰

Many mentally retarded people have limited communication skills, poor impulse control,⁷¹ an underdeveloped concept of moral blameworthiness and causation, a denial of their disability, a lack of knowledge of basic facts, and increased susceptibility to the influence of authority figures.⁷² People with mental retardation will have limitations in cognitive functioning.⁷³ A mentally retarded person will have limited abilities to learn in areas such as reading, writing, and arithmetic.⁷⁴ Furthermore, he or she will have limited abilities to reason, plan, understand, judge, and discriminate.⁷⁵ Moreover, a person with mental retardation will have grave problems in logical reasoning, strategic thinking, and foresight.⁷⁶

As a result of a retarded individual's limited cognitive abilities, most people with mental retardation will know less than most people without

70. Many of the following descriptions are borrowed from James Ellis' and Ruth Luckasson's symposium article, *Mentally Retarded Criminal Defendants*, *supra* note 23, at 427-32. Although any attempt to describe individuals who suffer from mental retardation as a group risks false stereotyping, "[s]ome characteristics occur with sufficient frequency to warrant certain limited generalizations." *Id.* at 427; *e.g.*, Blume, *supra* note 51, at 732.

71. "This characteristic is related to deficits in attention and involves attention span, focus, and selectivity in the attention process. Thus, a mentally retarded person may have difficulty, or under some circumstances, totally fail to weigh the consequences of the act." Blume, *supra* note 51, at 733.

72. Ellis, *supra* note 23, at 428-32 (listing characteristics of people with mental retardation); *see also* Blume, *supra* note 51, at 732 (recapitulating Ellis and Luckasson).

73. Enrenreich, *supra* note 1; *see* Bing, *supra* note 16, at 72.

74. *See also* Enrenreich, *supra* note 1 (discussing limitations in cognitive functioning).

75. *Id.*

[One expert has summarized the attributes of mental retardation as follows:] Almost uniformly, individuals with mental retardation have grave difficulties in language and communication. They have problems with attention, memory, intellectual rigidity, and in moral development or moral understanding. They are susceptible to suggestion and readily acquiesce to other adults or authority figures People with mental retardation have limited knowledge because their impaired intelligence has prevented them from learning very much. They also have grave problems in logic, foresight, planning, strategic thinking, and understanding consequences.

Id. (quoting Ruth Luckasson, *The Death Penalty and the Mentally Retarded*, 22 AM. J. CRIM. L. 276 (1994)).

76. Bing, *supra* note 16, at 72; *see* Blume, *supra* note 51, at 732-34; Ellis, *supra* note 23, at 427-32; *see also* Enrenreich, *supra* note 1 (explaining the characteristics and significance of mental retardation).

mental retardation, even concerning the most basic aspects of life.⁷⁷ Furthermore, mental retardation limits the person's ability to understand abstract concepts, including moral concepts. Often, the mentally retarded are unable to comprehend the relationship between cause and effect,⁷⁸ and cannot understand certain results or consequences of their actions.⁷⁹ While many mentally retarded defendants who have committed a crime know they have done something wrong, they often cannot explain, or are unable to understand, why the act was wrong.⁸⁰ For example,

At the trial of a man with mental retardation convicted of raping and murdering an 87-year-old woman, a clinical psychologist testified that while the defendant could acknowledge that rape was "wrong," he was nonetheless not able to offer any explanation for why. "Pressed for an answer, [the defendant] admitted not receiving 'permission' for the rape Pressed further, in desperation, he blurted out, 'Maybe it's against her religion!' The jury gasped at such an explanation."⁸¹

As a result of the inability to comprehend abstract concepts, a mentally retarded person may be incapable of fully understanding the meaning of death or murder.⁸² For example, "Morris Mason, whose IQ was between sixty-two to sixty-six, was executed in 1985 in Virginia after being convicted of rape and murder. Before his execution, Mason asked one of his legal advisors for advice on what to wear to his funeral."⁸³

Overall, people who suffer from mental retardation have problems with attention, memory, intellectual rigidity, and moral development and understanding.⁸⁴ "The entirety of these characteristics may result in some

77. Ellis, *supra* note 23, at 431; Blume, *supra* note 51, at 734 (stating that people with mental retardation know less than most people without mental retardation).

78. Bing, *supra* note 16, at 72.

79. Blume, *supra* note 51, at 733. "[A] mentally retarded individual frequently has incomplete or immature concepts of moral blameworthiness and causation." *Id.* See also Bing, *supra* note 16, at 72 (stating that many mentally retarded persons have an underdeveloped conception of blameworthiness); Ellis, *supra* note 23, at 431.

80. Enrenreich, *supra* note 1 (explaining limitations concerning the ability to understand abstract concepts, including moral concepts).

81. *Id.*

82. *Id.*

83. *Id.*

84. Bing, *supra* note 16, at 72.

mentally retarded individuals becoming dangerous without malice intended.”⁸⁵

V. RATIONALES FOR SENTENCING A MENTALLY RETARDED PERSON TO DEATH: ARE LEGITIMATE PENOLOGICAL GOALS FURTHERED?

A. *The Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment*

As noted above, the Eighth Amendment’s prohibition against cruel and unusual punishment has been interpreted to include punishment that is disproportionate to the severity of the crime and the defendant’s moral culpability, imposes purposeless pain and suffering, or does not measurably further the penological goals of either retribution or deterrence.⁸⁶ The Eighth Amendment has not been interpreted as a static concept.⁸⁷ The amendment is interpreted in a “flexible and dynamic manner that reflects society’s evolving standards of decency.”⁸⁸ The Supreme Court has consistently said that in interpreting the meaning of the amendment, they look to the “evolving standards of decency that mark the progress of a maturing society.”⁸⁹ Thus, an assessment of how contemporary society views the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.⁹⁰ If the punishment is found to be contrary to society’s standards of decency, then the punishment is prohibited by the Eighth Amendment.⁹¹

When these Eighth Amendment principles are applied to a mentally retarded defendant who has impaired reasoning abilities, inability to control

85. *Id.*

86. See generally Blume, *supra* note 51, at 737–38 (discussing relevant Eighth Amendment principles); Entzeroth, *supra* note 16, at 922–26 (analyzing the Eighth Amendment’s prohibition on cruel and unusual punishment); Enrenreich, *supra* note 1 (discussing summary and recommendations and United States law).

87. *Gregg v. Georgia*, 428 U.S. 153, 172–73 (1976).

88. *Id.* at 171.

89. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); accord *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (Powell, J., concurring); *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982); see also Blume, *supra* note 51, at 738 (stating punishment is constitutionally impermissible if it offends the “evolving standards of decency that mark the progress of a maturing society”); Entzeroth, *supra* note 16, at 935 (analyzing the Court’s decision in *Penry*).

90. *Gregg*, 428 U.S. at 173.

91. *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989).

impulsive behavior, and lack of moral blameworthiness, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness, and hence unconstitutional serving no legitimate penological goal.⁹² Additionally, sentencing a mentally retarded person to death offends contemporary standards of decency; inherent in mental retardation is the person's diminished ability to make responsible decisions, to appreciate the full consequences of his or her acts, and to relate competently and independently to the world around him or her.⁹³ "At a minimum, 'the Eighth Amendment forbids the execution . . . of those who are unaware of the punishment they are about to suffer and why they are to suffer it.'"⁹⁴

B. The Mentally Retarded Defendant's Capacity to Satisfy the Culpable Mens Rea

1. Elements of Capital Homicide

Given the reduced ability found in every dimension of the retarded individual's functioning, the question is whether a mentally retarded defendant has the capacity to satisfy the mens rea ("guilty mind")⁹⁵ requirement to be sufficiently culpable of murder.⁹⁶ In the thirty-eight states that presently authorize the death penalty, "the trier of fact must determine

92. *Id.* at 346.

[Quoting from documents prepared by the American Association of Mental Retardation, Justice Brennan reasoned that] all [mentally retarded individuals] share the common attributes of low intelligence and inadequacies of adaptive behavior [as well as] 'a substantial disability in cognitive ability and adaptive behavior.' The impairment of mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development . . . limits [their] culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to [their] blameworthiness and hence is unconstitutional.

Id. at 344-46 (Brennan, J., dissenting). See also Blume, *supra* note 51, at 738 (stating death is constitutionally excessive punishment serving no legitimate penological goals when applied to a mentally retarded individual); Enrenreich, *supra* note 1 (quoting Justice Brennan's dissent in *Penry v. Lynaugh*, 492 U.S. 302, 344-46, 1989)).

93. Blume, *supra* note 51, at 738-39.

94. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986).

95. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01, at 101 (2d ed. 1995).

96. William K. Wettonis, *Capital Punishment for Mentally Retarded Defendants: A Boundary for the Eighth Amendment Is Drawn*, 34 HOW. L.J. 651, 656 (1991).

whether the elements of capital homicide have been met.”⁹⁷ For purposes of imposing the death penalty on mentally retarded capital offenders, the trier of fact may consider evidence of mental retardation as a mitigating factor.⁹⁸ In general, mental retardation is offered in mitigation of punishment.⁹⁹ It is also offered to “prove the existence of one or more statutory mitigating factors, [for example,] ‘the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired,’ or that the defendant suffered from a mental disease or defect.”¹⁰⁰

The death penalty is reserved for the most culpable capital offenders who commit the most heinous crimes.¹⁰¹ A defendant may be sentenced to death if the defendant acted deliberately and unreasonably and would continue to be a threat to society.¹⁰² Acting deliberately, however, is not the only culpable mental state sufficient for a defendant to be sentenced to death.¹⁰³ In *Tison v. Arizona*,¹⁰⁴ the Supreme Court held that reckless indifference for human life is a highly culpable mental state sufficient to deserve death.¹⁰⁵ In sum, for a defendant to be sentenced to death, the sentencer, at a minimum, must conclude that either the defendant intended to kill the victim and knew that there was a possibility that the victim could die, or was reckless and acted without excuse, justification, or in the heat of passion.¹⁰⁶ Since a mentally retarded person is of lower intelligence and has

97. Billotte, *supra* note 22, at 337.

98. Blume, *supra* note 51, at 741.

99. *Id.*

100. *Id.*

101. See also *Beyond Reason*, *supra* note 1 (stating that mentally retarded offenders should never be placed in the category for the most culpable offenders for whom the death penalty is reserved).

102. *Penry v. Lynaugh*, 492 U.S. 302, 310 (1989); see also *infra* text accompanying note 197; see also Billotte, *supra* note 22, at 337–38 (stating that if a defendant acted deliberately and unreasonably and would continue to be a threat to society, then the defendant may be sentenced to death).

103. Billotte, *supra* note 22, at 338.

104. 481 U.S. 137 (1987).

105. *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987).

In *Tison*, the defendant, after helping his father escape from prison, watched his father murder a family of four. The defendant did not participate in the murder but also did not help the victims. The defendant drove away from the scene of the crime with his father in the victims' car. Although the defendant did not kill anyone, he was convicted of felony-murder due to his reckless disregard for the victims' lives.

Billotte, *supra* note 22, at 338.

106. Billotte, *supra* note 22, at 338. “Under the Model Penal Code, a defendant is guilty of murder when: ‘(a) it is committed purposely or knowingly; or (b) it is committed

reduced ability in language, ability to control impulsivity, self-concept, self-perception, moral development, knowledge of basic facts, and motivation, it is unlikely that such an individual could possess the requisite mens rea to be found guilty of murder.¹⁰⁷

2. Deterrence and Mentally Retarded Offenders: Inefficiency of Capital Punishment as a Deterrent

General deterrence is one of the purposes that can justify capital punishment.¹⁰⁸ It focuses on a punishment's effect on society, and whether the rest of society will be deterred from committing criminal acts.¹⁰⁹ General deterrence occurs when the punishment of one person discourages others from criminality, because of one's desire to avoid the punishment that a particular wrongdoer has suffered.¹¹⁰ That is, "[the defendant] is punished in order to convince the general community to forego criminal conduct in the future."¹¹¹ The driving force behind general deterrent justification is the fear that one's action, if convicted, will result in punishment.¹¹²

[Thus, the defendant's] punishment serves as an object lesson to the rest of the community; [the defendant] is used as a means to a desired end, namely, a net reduction in crime. [The defendant's] punishment teaches us what conduct is impermissible; it instills fear of punishment in would-be violators of the law; and, at least to a limited extent, it habituates us to act lawfully, even in the absence of fear of punishment.¹¹³

The penological goal of deterrence is not advanced when applied to mentally retarded defendants. The threat of execution cannot deter a mentally retarded individual. Deterrence is premised upon the assumption

recklessly under circumstances manifesting extreme indifference to the value of human life." Wetzonis, *supra* note 95, at 656.

107. Wetzonis, *supra* note 96, at 656–57.

108. Billotte, *supra* note 22, at 336, 356; *e.g.*, Enrenreich, *supra* note 1.

109. Billotte, *supra* note 22, at 356.

110. *Id.* at 356.

111. DRESSLER, *supra* note 95, § 2.03[B], at 10.

112. Billotte, *supra* note 22, at 357. While general deterrence is concerned with deterring others from committing a criminal act by punishing a particular wrongdoer, "[s]pecific deterrence focuses on the criminal actor and whether *he* will commit his criminal act again." *Id.* at 356.

113. DRESSLER, *supra* note 95, § 2.03[B], at 10 (alteration in original).

that an individual is both capable of considering and understanding the consequences of his or her actions and capable of controlling his or her impulses.¹¹⁴ In *Gregg v. Georgia*,¹¹⁵ the court stated that whether the death penalty is a deterrent depends on whether the possibility of the penalty of death will enter “into the cold calculus that precedes the decision to act.”¹¹⁶ Accordingly, one must premeditate in order to be deterred.¹¹⁷

When the deterrence rationale is applied to mentally retarded defendants, it is highly difficult to convincingly maintain that a mentally retarded defendant has the capacity to premeditate a crime, and process and act upon the likelihood of death as a penalty for certain proscribed actions.¹¹⁸ As previously noted, mentally retarded people have limited impulse control. “[A] deterrent that depends on rational decision-making will fail to control these impulsive acts.”¹¹⁹ A mentally retarded person may commit crimes on impulse¹²⁰ that he or she does not realize will result in death. In addition, limitations in cognitive functioning lessen a retarded person’s capability to plan and calculate a crime, to understand and weigh its consequences, or assess their options, as do persons of average intelligence or better.¹²¹ According to Justice Brennan:

[T]he goal of deterrence would not be advanced, as ‘[I]t is highly unlikely that the exclusion of the mentally retarded from the class of those eligible to be sentenced to death will lessen any deterrent effect the death penalty may have for non-retarded potential offenders’ Moreover, because of the impairments in the ability of a mentally retarded person to understand the consequences of his or her actions and to control his or impulses, it is unlikely that the

114. Billotte, *supra* note 22, at 361; *e.g.*, Blume, *supra* note 51, at 742.

115. 428 U.S. 153 (1976) (plurality opinion) (holding that the death penalty is not per se cruel and unusual punishment).

116. *Id.* at 185–86; *see also* Billotte, *supra* note 22, at 361 (stating the death penalty as a deterrent depends on “whether the possibility of execution will enter ‘into the cold calculus that precedes the decision to act’”); *e.g.*, Blume, *supra* note 51, at 742 n.67.

117. Blume, *supra* note 51, at 742.

118. *Id.* *E.g.*, Billotte, *supra* note 22, at 361.

119. Bing, *supra* note 16, at 80.

120. Ellis, *supra* note 23, at 429; *see* Blume, *supra* note 51, at 729–30 (“[M]ental retardation is a significant and devastating mental impairment which reduces a mentally retarded person’s moral blameworthiness to a level different in kind from other non-retarded persons accused of murder.”).

121. Ellis, *supra* note 23, at 429; *see also* Billotte, *supra* note 22, at 361 (discussing a mentally retarded person’s difficulty to weigh consequences); Blume, *supra* note 51, at 733 (discussing impaired impulse control).

execution of the mentally retarded would deter other mentally retarded criminal defendants from committing capital offenses.¹²²

Furthermore, mentally retarded individuals often cannot adequately understand the correlation between the imposition of a punishment on another wrongdoer and the result that would occur if they committed a similar crime.¹²³ Thus, because the death penalty serves as a deterrent only when the criminal offense is a result of at least some premeditation and deliberation, “the execution of the mentally retarded cannot be justified under the deterrence rationale.”¹²⁴

3. Means of Retribution When Applied to Mentally Retarded Defendants

Retribution is the second justified purpose of the death penalty. Some believe that punishment is justified if and only if the criminal defendant deserves it.¹²⁵ “It is deserved when the wrongdoer freely chooses to violate society’s rules.”¹²⁶ Retribution looks backward and focuses on the past behavior of the criminal defendant.¹²⁷ Punishment is justified solely on the

122. Entzeroth, *supra* note 16, at 928 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 348 (1989)).

123. Bing, *supra* note 16, at 80. In *Penry*,

Justice Brennan argued . . . that the execution of mentally retarded offenders violates the Eighth Amendment because such executions do not measurably further the goals of either retribution or deterrence. He reasoned that . . . deterrence cannot be furthered because the intellectual impairments of persons with mental retardation preclude their ability to weigh the possibility of the death penalty and calculating different courses of action. As a result, “the execution of mentally retarded individuals is ‘nothing more than the purposeless and needless imposition of pain and suffering.’”

Enrenreich, *supra* note 1.

124. Bing, *supra* note 16, at 80; *see* Blume, *supra* note 51, at 742. Justice Brennan found, the “very factors that make [capital punishment] disproportionate and unjust to execute the mentally retarded also make the death penalty the most minimal deterrent effect so far as retarded potential offenders are concerned.” *Penry v. Lynaugh*, 492 U.S. 302, 348 (1989) (Brennan, J., dissenting).

125. *See generally* DRESSLER, *supra* note 95, § 2.03[C], at 11 (stating “[r]etributivists believe . . . punishment is justified when it is deserved”); Billotte, *supra* note 22, at 362 (stating “punishment is ‘just’ if and only if the criminal deserves it”).

126. DRESSLER, *supra* note 95, § 2.03[C], at 11. The rationale of retribution is based on the “view that humans possess free will and, therefore, may justly be blamed when they choose to violate society’s mores.” *Id.*

127. *See id.* *See also* Billotte, *supra* note 22, at 363 (stating “[r]etribution . . . focuses on the past behavior of the criminal rather than the future effect of his punishment”).

basis of the voluntary commission of the crime.¹²⁸ Thus, the defendant is punished based on what crime he committed and what he deserves.¹²⁹

The Supreme Court has consistently recognized, for purposes of imposing the death penalty, that it is essential that a defendant's punishment be limited to one's "personal responsibility and moral guilt."¹³⁰ Critical in "determining personal responsibility and moral guilt, is the mental state of the defendant."¹³¹ The Supreme Court has recognized further that, "it is undeniable . . . that those who are mentally retarded have a reduced ability to cope and function in the everyday world."¹³²

Retribution is premised on the assumption that the defendant punished had full culpability of his own actions.¹³³ Culpability is a crucial aspect to retributive thought.¹³⁴ With retribution, the result of a defendant's criminal actions does not determine the punishment; culpability must be factored in as well.¹³⁵ Factors that influence moral development include intelligence, chronological age, mental age, living in an enriching environment, and opportunity for interaction with others.¹³⁶ As noted above, the common attributes shared among mentally retarded individuals are low intelligence and inadequacies of adaptive behavior. In addition, they suffer from a reduced ability in areas of functioning such as the ability to control impulsivity, to communicate, remember, and understand.¹³⁷ The severity of mental retardation diminishes the retarded person's ability to both manage with and perform in the world.¹³⁸ It is this diminished ability to function and the impaired mental state which limit the retarded defendant's moral

128. DRESSLER, *supra* note 95, § 2.03[C], at 11.

129. *Id.* See also Billotte, *supra* note 22, at 363 (stating "[a] criminal is punished based on what he did and what he deserves").

130. *Enmund v. Florida*, 458 U.S. 782, 801 (1982); see also Billotte, *supra* note 22, at 365 (stating "the appropriateness of the death penalty is a question of 'personal responsibility and moral guilt'"); Blume, *supra* note 51, at 743 (stating "the appropriateness of the death penalty is essentially a question of 'personal responsibility and moral guilt'").

131. *Tison v. Arizona*, 481 U.S. 137, 156 (1987); see Blume, *supra* note 51, at 743-44.

132. Blume, *supra* note 51, at 744 (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).

133. Bing, *supra* note 16, at 80.

134. Billotte, *supra* note 22, at 362.

135. *Id.* at 363.

136. *Id.* at 365; accord Ellis, *supra* note 23, at 429 n.78.

137. Blume, *supra* note 51, at 744.

138. *Id.*

culpability.¹³⁹ In fact, due to the severe deficits from which the mentally retarded person suffers, such an individual cannot be said to be sufficiently blameworthy to justify the infliction of the sentence of death, because the defendant's culpability is reduced.¹⁴⁰ For these reasons, the mentally retarded "lack[] sufficient moral culpability to advance the goal of retribution, which requires that a criminal sentence be directly related to the defendant's personal culpability."¹⁴¹

Moreover, retribution "depends on the defendant's awareness of the penalty's existence and purpose."¹⁴² Reduced abilities in cognitive functioning may limit the mentally retarded individual's ability to understand the nature and effects of the death penalty, and the reason for imposing it.¹⁴³ Thus, executions of mentally retarded persons impose a uniquely cruel penalty and are generally inconsistent with one of the principal purposes of executions.¹⁴⁴ At a minimum, "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."¹⁴⁵

In *Ford v. Wainwright*,¹⁴⁶ the Court stated:

[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life . . . Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that

139. See generally Blume, *supra* note 51, at 744 (stating that "this reduced ability to function and the impaired mental state which changes in kind, not degree, the mentally retarded person's moral culpability").

140. Blume, *supra* note 51, at 744.

141. Entzeroth, *supra* note 16, at 928; see V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 467 (1991).

142. *Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring).

143. See *id.* at 421-22.

144. See *id.* at 421.

145. *Id.* at 422 (Powell, J., concurring). "[S]tates have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it." *Id.*

146. 477 U.S. 399 (1986).

such an execution simply offends humanity is evidently shared across this Nation.¹⁴⁷

Putting a mentally retarded individual to death does not further the punishment goals of deterrence nor of retribution, because it does not ensure that the criminal gets his just desserts.¹⁴⁸ Only when murder is the result of premeditation and deliberation, can the death penalty serve as a deterrent.¹⁴⁹ Since mentally retarded offenders lack the necessary culpability “that is a prerequisite to the proportionate imposition of the death penalty, it follows that execution can never be the ‘just deserts’ of a retarded offender.”¹⁵⁰

In summary, because a mentally retarded defendant’s degree of culpability is qualitatively less than that of a non-retarded capital murderer, the legitimate penological goal in deterrence and retribution is neither furthered nor served by executing a mentally retarded offender. Thus, the death penalty when imposed upon the mentally retarded is cruel and unusual punishment, and hence unconstitutional, because it is excessive.¹⁵¹

VI. SIGNIFICANT PRIOR CASE LAW

In 1972, the Supreme Court held in *Furman v. Georgia*,¹⁵² that the states cannot impose the death penalty on a selected group of offenders in an

147. *Id.* at 409; see also Blume, *supra* note 51, at 744 n.74 (quoting Ford v. Wainwright, 477 U.S. 399, 409 (1986)).

148. *Penry v. Lynaugh*, 492 U.S. 302, 348 (1989) (Brennan, J., dissenting).

149. *Enmund v. Florida*, 458 U.S. 782, 799 (1982).

150. *Penry*, 492 U.S. at 348.

Even if mental retardation alone were not invariably associated with a lack of the degree of culpability upon which death as a proportionate punishment is predicated, [Justice Brennan argued that he] would still hold the execution of the mentally retarded to be unconstitutional . . . [since there is] no assurance that an adequate individualized determination of whether the death penalty is a proportionate punishment will be made at the conclusion of each capital trial. . . . Lack of culpability as a result of mental retardation is simply not isolated . . . as a factor that determinatively bars a death sentence.

Id. at 346–47 (Brennan, J., dissenting).

151.

In *Gregg v. Georgia* . . . the Court defined “excessive” as consisting of two elements. First, “the punishment must not involve the unnecessary and wanton infliction of pain[.]” which means that the death penalty as imposed must advance the penological goals of retribution and deterrence. Second “the punishment must not be grossly out of proportion to the severity of the crime.”

Entzeroth, *supra* note 16, at 925.

152. 408 U.S. 238 (1972).

arbitrary, capricious, or discriminatory manner based solely on the offense committed.¹⁵³ In 1976, the Supreme Court reexamined the death penalty issue in the context of the Eighth Amendment. In *Gregg v. Georgia*,¹⁵⁴ the plurality of the Court declared that the Eighth Amendment must be “interpreted in a flexible and dynamic manner” that reflects society’s evolving standards of decency,¹⁵⁵ which is the standard used by the Court to test the validity of a punishment under the Eighth Amendment.¹⁵⁶ The Court made clear, “so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.”¹⁵⁷ The decision in *Gregg* further narrowed the class of people upon which the death penalty may be imposed.¹⁵⁸

Later, in *Ford v. Wainwright*,¹⁵⁹ the Supreme Court held that the Eighth Amendment prohibits execution of the insane.¹⁶⁰ In reaching its decision, the Court considered that common law prohibited executing the insane.¹⁶¹ In addition, the Court found that a national consensus existed, since no state permitted the execution of the insane, and twenty-six states had statutes expressly requiring stay of the execution of a capital murderer who became

153. *Id.* at 255–57; *see generally* Cohen, *supra* note 141, at 463.

154. *Id.* at 171 (plurality opinion).

155. *Id.* at 171.

156. *See id.* at 173; *see also* Cohen, *supra* note 141, at 463–64 (discussing the holding of *Gregg v. Georgia*). The Court looks primarily to existing state legislation to define these ‘evolving standards’ and the decision in *Gregg* emphasizes that, when considering capital punishment, great deference will be given to state legislatures. *Id.* at 464.

The Court stated: In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 464 n.71 (quoting *Gregg v. Georgia*, 428 U.S. at 186–87 (1976)).

157. *Penry*, 492 U.S. at 327.

158. *See* Cohen, *supra* note 141, at 464; Bicknell, *supra* note 5, at 363 (discussing the significance of *Gregg v. Georgia*).

159. 477 U.S. 399 (1986).

160. *Ford*, 477 U.S. at 409–10; *see also* Bicknell, *supra* note 5, at 363 (discussing the death penalty and significant cases).

161. *Ford*, 477 U.S. at 406–07 (1986); *see also* Bicknell, *supra* note 5, at 363–64 (discussing the death penalty and the significance of *Ford v. Wainwright*); Cohen, *supra* note 141, at 466 (discussing the holding in *Ford v. Wainwright*).

insane.¹⁶² Moreover, the Court noted the insane should not be executed, because such an execution has questionable retributive value, no deterrent effect on people who cannot understand the reason for their execution and the full implication of the penalty,¹⁶³ nor are they able to assist in their own defense.¹⁶⁴ Finally, the Court declared that executing insane defendants offends humanity.¹⁶⁵

More recently, the Supreme Court's 1988 decision in *Thompson v. Oklahoma*¹⁶⁶ held that executing a criminal defendant who was under the age of sixteen years old at the time of their offense constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁶⁷ In examining the objective evidence of American conceptions of decency, the plurality found that eighteen states explicitly established in their death penalty statutes that the defendant has attained the minimum age of sixteen at the time of the offense.¹⁶⁸

In 1989, the Supreme Court's decision addressing the death penalty in *Penry v. Lynaugh*, did not continue its narrowing of the class of murderers eligible for the death penalty.¹⁶⁹ The Court refused to find that executing a mentally retarded person was a per se violation of the cruel and unusual punishment clause of the Eighth Amendment.¹⁷⁰ Instead, the Court held that the Eighth Amendment did not necessarily preclude the execution of all mentally retarded persons simply by virtue of their disability alone.¹⁷¹ The Court did hold, however, that the accused is entitled to instructions as to the

162. *Ford*, 477 U.S. at 408–09 n.2; *see, e.g., Penry v. Lynaugh*, 492 U.S. 302, 334 (1989); *see also* Cohen, *supra* note 141, at 466 (stating the common law prohibition against execution of the insane and that most state legislatures exempt the insane from capital punishment).

163. Bicknell, *supra* note 5, at 363–64.

164. Cohen, *supra* note 141, at 466.

165. *Id.* *See also* Bicknell, *supra* note 5, at 363–64 (discussing the death penalty and the significance of *Ford v. Wainwright*).

166. 487 U.S. 815 (1988).

167. *Id.* at 838; *see* Bicknell, *supra* note 5, at 364 (discussing the Court's decision in *Thompson v. Oklahoma*); *see also* Cohen, *supra* note 141, at 465. "In reaching its conclusion, the Court looked to society's evolving standards of decency, the diminished culpability of minors, and the recognized goals of capital punishment." *Id.*

168. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989).

169. *Id.* at 338–39; *see also* Bicknell, *supra* note 5, at 364 (discussing the Court's decision in *Penry*).

170. *Penry*, 492 U.S. at 340. *See also* Bicknell, *supra* note 5, at 364 (discussing the Court's decision in *Penry*).

171. *Penry*, 492 U.S. at 340.

mitigating effect of mental retardation.¹⁷² The Court reasoned, so long as mitigating circumstances are considered by the sentencer, “an individualized determination whether ‘death is the appropriate punishment’ can be made in each particular case.”¹⁷³

In examining objective evidence of the public’s attitude toward executing the mentally retarded, the Court found that only one state banned the execution of retarded persons who have been found guilty of a capital offense, and that one state was insufficient to constitute a national consensus.¹⁷⁴ In addition, the Court noted that Maryland had enacted similar legislation, but the statute would not take effect until the following week.¹⁷⁵

VII. SUPREME COURT’S POSITION IN *PENRY V. LYNAUGH*: ALLOWING THE IMPOSITION OF THE DEATH PENALTY ON THE MENTALLY RETARDED

In *Penry v. Lynaugh*, the Supreme Court, in a five to four vote, held the Eighth Amendment did not categorically prohibit the imposition of the death penalty on mentally retarded defendants.¹⁷⁶ This was the first time the Supreme Court explicitly sanctioned the execution of a mentally retarded person.¹⁷⁷ In the Court’s decision, Justice O’Connor wrote, “there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.”¹⁷⁸ Penry was convicted in Texas of brutally stabbing Pamela Carpenter with a pair of scissors after

172. *Id.*

173. *Id.*

174. *Id.* at 334.

175. *Id.*

176. *Penry*, 492 U.S. at 340.

On the other hand, the Court has ruled that a person who is insane at the time of his execution may not be executed. Nonetheless, on January 24, 1992, Rickey Ray Rector, a man with obvious and profound mental defects, was killed by lethal injection in Arkansas. Rector shot and killed a police officer, then shot himself in the forehead; he underwent brain surgery that required removal of three inches of frontal brain tissue. There was no question that Rector’s mental abilities were significantly impaired. In the days leading up to his execution, Rector’s behavior included such bizarre acts as barking like a dog, stamping his feet, snapping his fingers, repeatedly calling out the nickname of an old friend, and laughing. When his last meal was served, Rector devoured his dinner, but saved his dessert to be eaten later—after his execution.

Entzeroth, *supra* note 16, at 918 n.72 (citations omitted).

177. Entzeroth, *supra* note 16, at 918.

178. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

he raped and beat her in her home.¹⁷⁹ Pamela died a few hours later while receiving emergency treatment.¹⁸⁰ Before dying, however, she was able to identify Penry as her attacker.¹⁸¹ Subsequently, Penry confessed twice to the murder.¹⁸² He was charged with capital murder.¹⁸³

At a competency hearing before Penry's trial, expert testimony was presented showing he was mentally retarded.¹⁸⁴ Evidence showed that previous testing indicated that his IQ fell between fifty and sixty-three, indicating mild to moderate mental retardation.¹⁸⁵ The effect of mild to moderate retardation is, "mildly retarded individuals may learn skills up to the sixth grade level, and persons with moderate mental retardation are unlikely to achieve academic skills beyond the second grade level."¹⁸⁶

179. *Id.* at 307.

180. *Id.*

181. *Id.*

182. *Id.*

[E]vidence suggests mentally retarded persons accused of crimes confess much more readily than do other defendants. This in all likelihood due to the fact that mentally retarded persons react readily to both friendly suggestions and intimidation, and thus are particularly susceptible to coercive police techniques. Any confession given by a mentally retarded individual also presents especially difficult questions concerning whether he had the mental capacity to understand and validly waive his constitutional rights under Miranda and the fifth and sixth amendments. Many mentally retarded people simply cannot understand the Miranda warnings, especially in the form and in the manner that they are likely to be given by police or prosecutors. This determination involves inquiry of not only whether the individual understands the concepts contained in the warnings, what a "right" is, but also whether he understands the language used to convey the concepts. Even a defendant functioning in the mildly retarded range will often be unable to understand the concept of legal terms such as "waiver" or even the elements of the offense with which he is charged unless special efforts are made to explain them.

Blume, *supra* note 51, at 736-37.

183. *Penry*, 492 U.S. at 307.

184. *Id.*

185. *Id.* at 307-08.

In addition to his mental retardation, Penry grew up in a home where horrible abuse was regularly inflicted upon him. Shortly after his birth, Penry's mother suffered a nervous breakdown and was committed to a mental hospital for ten months. When she returned to her young son, she subjected him to severe beatings, including blows to his head and cigarette burns on his body. Penry dropped out of school in the first grade and was in and out of state institutions until he was twelve years old, after which he went to live with an aunt. It took his aunt a year to teach Penry the simple task of printing his name.

Entzerroth, *supra* note 16, at 919.

186. Entzerroth, *supra* note 16, at 919.

Before the competency trial, IQ testing indicated that Penry had an IQ of fifty-four.¹⁸⁷ Additionally, the evaluation revealed that Penry, who was twenty-two years old at the time of the murder, had the mental age of a six and one-half year old child, “which mean[t] that ‘he ha[d] the ability to learn and the learning or the knowledge of the average 6½ year old kid.’”¹⁸⁸ Penry’s social maturity, his ability to function in the world, was that of a nine- or ten-year-old child.¹⁸⁹ “[H]e could not read or write, name the days of the week or months of the year, or name the president of the United States.”¹⁹⁰ The psychiatrist who tested Penry testified that, “‘there’s a point at which anyone with [Penry’s] IQ is always incompetent, but, you know, this man is more in the borderline range.’”¹⁹¹ The jury found Penry competent to stand trial.¹⁹²

During the guilt/innocence phase of Penry’s trial, the trial court found Penry’s two confessions to be voluntary and were admitted into evidence.¹⁹³

Penry raised an insanity defense, presenting testimony that his moderate mental retardation and organic brain damage,¹⁹⁴ “resulted in poor impulse control and an inability to learn from [his] experience[s].”¹⁹⁵ Additionally, the psychiatrist testified that the brain damage, which Penry was suffering from at the time of the offense, resulted in the inability “for him to appreciate the wrongfulness of his [action and] conform his conduct to the law.”¹⁹⁶ In rebuttal, the state put two psychiatrists on the stand that testified Penry was sane at the time of the crime.¹⁹⁷ They conceded, however, that Penry had a limited mental ability, an inability to learn from his experiences, and a tendency to be impulsive and to violate society’s norms.¹⁹⁸

187. *Penry v. Lynaugh*, 492 U.S. 302, 308 (1989).

188. *Id.*

189. *Id.*

190. Jamie Fellner, *U.S. Execution of Mentally Retarded Condemned* (Mar. 20, 2001), at <http://www.hrw.org/press/2001/03/mrex0320.htm>.

191. *Penry*, 492 U.S. at 308.

192. *Id.*

193. *Id.* at 308–09.

194. The organic brain damage was “probably caused by trauma to the brain at birth.” *Id.* at 307.

195. *Id.* at 308.

196. *Penry*, 492 U.S. at 309.

197. *Id.*

198. *Id.* At the close of the penalty hearing, the jury was instructed, pursuant to the Texas death penalty statutory scheme, to answer three “special issues” to determine Penry’s sentence. *Id.* at 310. Under § 19.03 of the *Texas Penal Code*, the jury had to answer:

Although Penry was sentenced to death, the Supreme Court overturned his sentence, because the trial court failed to instruct the jury “that it could consider and give effect to the mitigating evidence of Penry’s mental retardation and abused background by declining to impose the death penalty.”¹⁹⁹

The Court concluded that, by failing to provide the proper instruction, the trial court did not provide the jury with a “vehicle for expressing its ‘reasoned moral response’” to Penry’s evidence of mental retardation in handing down its sentence.²⁰⁰

After Penry was sentenced to death, he sought, and was denied, habeas corpus relief in the United States District Court.²⁰¹ Penry appealed to the Court of Appeals for the Fifth Circuit, which affirmed the District Court’s decision, and the United States Supreme Court granted certiorari.²⁰² Justice O’Connor acknowledged the common law prohibition against punishing “idiots” with the sentence of death, and that such a prohibition suggests that the execution of a severely retarded person may indeed be “cruel and unusual” under the Eighth Amendment.²⁰³

The majority opinion strongly expressed that the insanity defense and their decision in *Ford v. Wainwright*²⁰⁴ afforded severely mentally retarded

- 1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- 2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- 3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 310; *e.g.*, Entzeroth, *supra* note 16, at 920–21. “If the jury answered “yes” to all three questions, the penalty of death would be imposed. The jury answered “yes” to all three questions, and accordingly, the trial court sentenced Penry to death.” Entzeroth, *supra* note 16, at 921.

199. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

200. *Id.*

201. Bicknell, *supra* note 5, at 365.

202. *Penry*, 492 U.S. at 312; *see also* Bicknell, *supra* note 5, at 365.

203. *Penry*, 492 U.S. at 331–33; *see also* Bicknell, *supra* note 5, at 365 (discussing Justice O’Connor’s majority opinion).

204. In *Ford*, the Court held that the Eighth Amendment prohibits the execution of people who cannot understand the full implication of the punishment they are about to suffer and the reason for suffering it. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989) (citing *Ford v. Wainwright*, 477 U.S. 399, 422 (1986)); *see also* Bicknell, *supra* note 5, at 365 (stating the holding in *Ford*).

defendants protection in the criminal justice system.²⁰⁵ Since Penry did not classify as profoundly or severely retarded, the Court reasoned that he could not qualify for the defense of being unaware of his punishment or its consequences.²⁰⁶

Unfortunately, the Court failed to recognize the differences between mental illness and mental retardation, so they lumped the two together. As noted above, it is imperative to recognize that mental retardation is not the same as mental illness.²⁰⁷ The most significant difference between the two is that mental retardation is not an illness.²⁰⁸ While some forms of mental illness can be treated with medication or psychotherapy, the same does not hold true for mental retardation.²⁰⁹ Medication or psychotherapy treatment will do nothing to minimize or cure a mentally retarded individual who is not mentally ill.²¹⁰ Thus, the Court's conclusion was flawed when it decided that a mentally retarded defendant is afforded adequate protection under the insanity defense when the mentally retarded are not insane, and under *Ford v. Wainwright*, where the Court held that the Eighth Amendment prohibits execution of the insane.²¹¹

Although the Court declared that mental retardation alone does not forbid execution, *Penry* explicitly states that courts must specifically instruct

205. *Penry*, 492 U.S. at 333; *see also* Bicknell, *supra* note 5, at 365 (discussing the Court's rationale).

206. *Penry*, 492 U.S. at 333; *see also* Bicknell, *supra* note 5, at 365 (stating the "Court reasoned that only severely or profoundly retarded persons could qualify for the defense of being unaware of their punishment or its consequences").

[T]he Court held that Penry did not classify as severely retarded. The Court reached this decision based on evidence that Penry, as a "borderline" mentally retarded person, had the ability to consult with his lawyer, and could rationally and factually understand the proceedings. From this information, the Court held that mental retardation alone cannot exempt retarded persons of Penry's abilities from the death penalty.

Bicknell, *supra* note 5, at 365.

207. Ellis, *supra* note 23, at 423-25; *see also* Bing, *supra* note 16, at 71-72 (stating mental retardation and mental illness are not the same thing, although the courts have lumped them together); Entzeroth, *supra* note 16, at 915-16 (stating "it is important to recognize that mental retardation is not a form of mental illness").

208. Ellis, *supra* note 23, at 423; *see also* Entzeroth, *supra* note 16, at 915-16 (stating mental retardation is not the same as mental illness).

209. Ellis, *supra* note 23, at 424; *see also* Entzeroth, *supra* note 16, at 915 (stating "certain forms of mental illness can be treated with medication or psychotherapy").

210. Ellis, *supra* note 23, at 424; *see also* Bing, *supra* note 16, at 71 (stating "the mentally retarded can never be stripped of his retardation, though his abilities can be improved"); Entzeroth, *supra* note 16, at 915 (stating "mental retardation cannot be ameliorated by drugs or psychotherapy").

211. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

the jury to consider and give effect to all mitigating evidence of mental retardation and history of abuse.²¹² The Court reasoned that this instruction was necessary because any punishment imposed must be directly related to the defendant's personal culpability.²¹³

VIII. A NATIONAL CONSENSUS: A SIGNIFICANT CHANGE IN SOCIETY'S STANDARDS OF DECENCY REGARDING THE MENTALLY RETARDED SINCE
PENRY V. LYNAUGH

In Ernest P. McCarver's case this October, the Supreme Court will be revisiting the issue of whether attitudes have changed over the past twelve years to the point where executing people with mental retardation violates society's ideas of what is decent.²¹⁴ One of the reasons the Supreme Court refused to exclude all mentally retarded defendants from the death penalty in *Penry* was that the defendant did not present any legislation showing that the states were narrowing their sentencing procedures to exclude the retarded.²¹⁵ In order for the *Penry* decision to be changed and for the execution of the mentally retarded to end, the Supreme Court must look to "objective evidence, [such as actions of state legislatures,] to determine how our society views [this] particular punishment today."²¹⁶ Therefore, the Court must assess whether this punishment offends American concepts of decency.²¹⁷

In the twelve years that have passed since *Penry*, there has been a pivotal change in the public's perceptions of standards of decency with respect to sanctioning a mentally retarded person to death.²¹⁸ At the time of the decision in *Penry*, in which the Supreme Court held that the Eighth Amendment did not categorically prohibit the execution of the mentally retarded, only one state, Georgia, and the federal government banned

212. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989); see also Bicknell, *supra* note 5, at 366 (stating that the decision in *Penry* clearly requires that courts "give specific jury instructions that allow the consideration of all mitigating evidence of mental retardation").

213. *Penry*, 492 U.S. at 327-28; see also Bicknell, *supra* note 5, at 366 (stating the Court held the instruction necessary, "because any punishment inflicted must be directly related to the personal culpability of the defendant").

214. See *Mental Retardation and the Death Penalty*, *supra* note 2.

215. *Penry*, 492 U.S. at 333-34.

216. *Id.* at 331. Pet. for Writ of Cert., *supra* note 7, at 12 (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

217. Pet. for Writ of Cert., *supra* note 7, at 10.

218. *Id.*

executions of people with mental retardation.²¹⁹ Maryland had enacted legislation prohibiting the execution of the mentally retarded, but it did not go into effect until one week after the Court decided *Penry*.²²⁰ In her opinion, Justice O'Connor wrote that even when the Georgia and Maryland statutes prohibiting the execution of mentally retarded individuals were "added to the [fourteen] States that have rejected capital punishment completely, [such legislation did] not provide sufficient evidence at present of a national consensus"²²¹ to exempt the mentally retarded from the punishment of death.

Since the decision in *Penry*, fifteen more states: Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington have recognized that sentencing the mentally retarded to death is cruelly inhumane and therefore have outlawed such executions.²²² Today, half of the states ban executing the mentally retarded—seventeen of the thirty-eight death penalty states prohibit executing the mentally retarded and twelve states and the District of Columbia do not have the death penalty at all. Also, the federal government does not allow for the mentally retarded to be executed. When combined, the majority of jurisdictions in this country prohibit the execution of the mentally retarded.²²³

219. *Id.* at 11; *see also* Entzeroth, *supra* note 16, at 926 (stating at the time the Court decided *Penry*, only Georgia and the federal government prohibited executing the mentally retarded); *Mental Retardation and the Death Penalty*, *supra* note 2, at 1 (stating that Maryland and Georgia prohibited executing the mentally retarded).

220. *See* Pet. for Writ of Cert., *supra* note 7, at 11; *see also* Entzeroth, *supra* note 16, at 926 (stating that Maryland's legislation prohibiting the execution of the mentally retarded went into effect a week after *Penry* was handed down).

221. *Penry*, 492 U.S. at 334.

222. Pet. for Writ of Cert., *supra* note 7, at 11; *see also* Bonner, *supra* note 7, at A1 (stating that "the federal government bars such executions, as do [fifteen] states"); *Mental Retardation and the Death Penalty*, *supra* note 2 (naming the states that currently forbid execution of the mentally retarded).

223. Pet. for Writ of Cert., *supra* note 7, at 11–12. It is important to note, however, that the Court has held:

[N]either the jurisdictions which do not impose capital punishment, nor the criminal law practices of the federal government, should be taken into account the figuring of a national consensus. The jury also discounted the use of jury determinations as a factor in consensus determination. The fact that sentencing juries were reluctant to impose capital punishment on the retarded was irrelevant to the question of a national consensus.

Bing, *supra* note 16, at 103.

The standard for determining the unconstitutionality of this challenged sanction is whether the selected penalty, here death, is cruelly inhumane and disproportionate to the crime committed.²²⁴ In addition, this constitutional test is intertwined with actions of state legislatures and an assessment of American contemporary standards.²²⁵ As noted above, the primary and most reliable indication of a consensus is the pattern of legislative enactment reflecting public attitude toward sanctioning mentally retarded individuals to death.²²⁶

The fact that seventeen states now specifically prohibit death sentences for the mentally retarded sends out a stronger message of national consensus than existed when *Penry* was decided. However, it is unknown how many states are needed to represent a consensus, since the Supreme Court has not set a requisite number. In 1994, when eleven states banned the execution of mentally retarded individuals, these states accounted for only thirteen percent of total executions since the reinstatement of the death penalty.²²⁷ Most likely, the Supreme Court would have found that these eleven states did not represent a national consensus.

Today, however, there is plenty of objective evidence of a strong national consensus against executing retarded persons. So far, this year alone, four states, Florida, Missouri, Arizona, and Connecticut passed legislation outlawing the execution of mentally retarded individuals.²²⁸ Since the death penalty was reinstated in 1976, Florida has executed fifty-one inmates, four who were mentally retarded, Arizona has executed twenty-two inmates, one who was mentally retarded, and Missouri has executed fifty-one inmates, two of which were mentally retarded.²²⁹ Connecticut has not executed any inmates since 1976.²³⁰ Overall, as of 2001, these four states account for 17.71% of total executions in the United States.²³¹ When combined with the other thirteen states banning the execution of the mentally retarded, they account for twenty-three percent of the total number of inmates executed.²³² This percentage may not seem like a major representation of the national consensus in the United States, but this is only due to the

224. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

225. *Id.*

226. *Penry*, 492 U.S. at 330–31.

227. Bing, *supra* note 16, at 105.

228. *Mental Retardation and the Death Penalty*, *supra* note 2; *see also* Bonner, *supra* note 7, at A1 (discussing states that bar the execution of mentally retarded individuals).

229. *Mental Retardation and the Death Penalty*, *supra* note 2.

230. *Id.*

231. *See id.*

232. *See id.*

fact that Texas accounts for such a high number of executions.²³³ Texas, by itself, accounts for 34.58% of total executions to date.²³⁴

Florida's legislation is indicative of a national trend towards abolishing the execution of mentally retarded individuals. As previously noted, on June 12, 2001, Florida became the fifteenth state to ban such executions. In the post-*Furman* era, one of the leading states for executions is Florida.²³⁵ Florida accounts for 7.29% of total executions.²³⁶ It is the country's third largest death penalty state, currently tied with Missouri.²³⁷ Missouri became the sixteenth state, on July 2, 2001, to outlaw the execution of mentally retarded inmates.²³⁸ When combined, Florida and Missouri account for 14.17% of nationwide executions. Because Florida is well-known for its frequent use of the death penalty, it could influence other states to follow the national trend banning the execution of the retarded.²³⁹

In contrast, one week after Florida's Governor Jeb Bush signed Senate Bill 238, Texas Governor, Rick Perry, vetoed similar legislation that would have banned the execution of those with mental retardation.²⁴⁰ Although Governor Perry chose to veto this bill, the legislature passed it.²⁴¹ Texas's own representatives voted to ban executing the retarded, but unlike Governor Bush, Governor Perry himself did not stand behind the legislation. Texas, the country's number one death penalty state, has executed ten people this year, and 249 since 1982.²⁴²

Because it accounts for such a large number of executions, Texas could have a negative influence on the Supreme Court when it assesses the public's attitude towards inflicting the death penalty on the mentally

233. Virginia is the country's second leading death penalty state accounting for 11.39% of total executions. Together, Texas and Virginia alone carried out 300 of the 720 executions, accounting for 45.97% of total executions. *Id.*

234. *Mental Retardation and the Death Penalty*, *supra* note 2.

235. It is important to note, however, that in 2000, Florida executed six inmates, and in 2001, executed one. *Id.* Compare to Texas, which executed forty inmates in 2000 and ten inmates in 2001. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *See* Bing, *supra* note 16, at 105.

240. Bonner, *supra* note 6, at A1; *see also* *Mental Retardation and the Death Penalty*, *supra* note 2 (stating that Texas Governor vetoed legislation that would have prohibited the execution of the mentally retarded).

241. Telephone Interview with Paula Bernstein, Information Specialist, Death Penalty Information Center, Washington, D.C. (July 23, 2001).

242. *Mental Retardation and the Death Penalty*, *supra* note 2 (these estimates are current through July 17, 2001).

retarded. Perhaps until a state like Texas passes such legislation, the Supreme Court may continue to find that there is insufficient evidence of a national consensus against executing mentally retarded individuals. On the other hand, the Supreme Court looks to the public's perceptions of decency, which is ultimately reflected in legislation. Most likely, the Texas Legislature passed the bill according to how Texans view this particular type of sanction. The fact that Governor Perry vetoed the bill does not necessarily mean that the people of the state of Texas support his decision.

Governor Perry vetoed the bill, reasoning that Texas did not execute mentally retarded offenders, and that there are existing judicial safeguards implemented to protect the mentally retarded.²⁴³ While Governor Perry claimed that Texas has never executed anyone who was mentally retarded, supporters of the legislation and the Death Penalty Information Center both say six inmates with IQs of seventy or below have been executed since 1982, two of them while President Bush was governor.²⁴⁴

While the majority of Americans support the death penalty, opinion polls show that the majority of those people oppose the execution of the mentally retarded, "even in the fiercely pro-death penalty state of Texas."²⁴⁵ Governor Perry's decision to veto, "runs counter to a trend among states that have the death penalty."²⁴⁶ Whether the movement to end the execution of the mentally retarded has reached the numbers necessary to reach a national consensus in the eyes of the Supreme Court is unknown. But one thing is for sure—if leading death penalty states like Florida continue to enact legislation banning such executions, there is a greater chance the Supreme Court will find there is an emerging national consensus against executing the mentally retarded, and that society no longer wishes to or agrees with sanctioning the mentally retarded to death.

IX. CONCLUSION

The use of capital punishment against people suffering from mental retardation is a penalty that is cruelly inhumane and without justification. Imposing society's most severe punishment on individuals who possess significant impairments in intellectual functioning and adaptive skills, and who cannot understand the nature of the crime they have committed or

243. Bonner, *supra* note 6, at A1. *But see* Cohen, *supra* note 141, at 460.

244. Bonner, *supra* note 6, at A1; *see Mental Retardation and the Death Penalty, supra* note 2.

245. Bonner, *supra* note 11.

246. Bonner, *supra* note 6, at A1.

punishment imposed, do not deserve this ultimate penalty. Sanctioning one of the most vulnerable and disadvantaged groups to death is nothing short of barbaric.

The Supreme Court has made clear that it is up to the state legislatures to protect, and hence exclude, the mentally retarded from execution by passing legislation.²⁴⁷ The only way the Supreme Court will find a national consensus exists against executing this particular group of people, is if states, particularly large death penalty states like Florida, continue to enact legislation banning execution of the retarded.

American standards of decency have evolved to the point where capital punishment inflicted upon the mentally retarded can no longer be tolerated. Executing those who may not even understand what death is or why they are being executed is a practice that must be ended. It is time for our state legislatures, whom we elect, to take a strong stance on this issue by outlawing the execution of the mentally retarded. Exempting the mentally retarded from the death penalty is not an issue of crime, but an issue of humanity.

Florida and the other sixteen states that oppose the execution of the mentally retarded do not argue that they should not be severely punished or held accountable for their crimes. They simply argue that the ultimate punishment of death, which is reserved for the most culpable criminals who commit the most heinous crimes, should not be sanctioned upon those individuals who are less morally culpable.²⁴⁸ The legislation clearly recognizes that it is excessively harsh to execute a mentally retarded person with limited intelligence and culpability instead of applying other punishments that will both punish the guilty and protect society.²⁴⁹

Lindsay Raphael

247. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

248. *Id.*

249. *See supra* text accompanying note 33.

In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida's Public Records Law under the Hot Lights

TABLE OF CONTENTS

I. INTRODUCTION	305
II. OVERVIEW OF FLORIDA'S PUBLIC RECORDS LAW	308
III. THE EARNHARDT FAMILY PROTECTION ACT	312
IV. CONSTITUTIONAL ISSUES BEHIND THE ACT	314
A. <i>Right of Privacy</i>	314
B. <i>Narrowly Tailored</i>	323
C. <i>Retroactivity of the Exemption</i>	324
V. THE MEDIA AND THE EARNHARDT EXEMPTION	326
VI. THE FUTURE OF THE EARNHARDT EXEMPTION AND PUBLIC RECORDS	328
VII. CONCLUSION	329

I. INTRODUCTION

On February 18, 2001, “[i]n a sudden, shocking instant, on the last turn of the last lap in stock car racing’s greatest spectacle, the Daytona 500, Dale Earnhardt was called into the pits by a power even greater than he.”¹ Dale Earnhardt was considered by most racing fans to be the greatest stock car driver in history and NASCAR’s² greatest superstar.³ The speculation over Dale Earnhardt’s exact cause of death left several news organizations scrambling to obtain Dale Earnhardt’s autopsy photos for an independent medical evaluation.⁴ Dale Earnhardt’s widow managed to have a Volusia

1. Richard Prince, *Dale and the Vette*, SPORTS CAR INT’L, July 2001, at 60.

2. National Association for Stock Car Auto Racing [hereinafter NASCAR].

3. Mark Bechtel, *Crushing*, SPORTS ILLUSTRATED, Feb. 26, 2001, at 38.

4. See Jim Leusner et al., *Earnhardt Head Injury Detailed in Report: Medical Expert Rules Out Seat-Belt Failure as Direct Cause of Racer’s Death*, SUN-SENTINEL (Ft. Lauderdale), Apr. 10, 2001, at 1A (discussing the *Orlando Sentinel’s* settlement agreement with Dale Earnhardt’s wife, which allowed the news organization to have a court appointed medical expert study the autopsy photos). The expert “reject[ed] NASCAR’s theory” of Dale Earnhardt’s death, in that Earnhardt died when his “head whipped violently forward” which would have happened regardless of whether Earnhardt’s seatbelt had torn or not, giving credence to the alleged cover up by NASCAR. *Id.*

County judge seal the autopsy photos before they were requested by the *Orlando Sentinel* and other news organizations.⁵ These news organizations had the constitutional right in Florida to view and copy Dale Earnhardt's autopsy photos.⁶ However, Florida's Legislature came to the rescue of the Earnhardt family, allowing them the right to mourn in privacy without Dale Earnhardt's autopsy photos on the cover of every newspaper in the nation. The Florida Legislature responded in quick fashion with the Earnhardt Family Protection Act. Governor Jeb Bush, accompanied by Dale Earnhardt's widow,⁷ signed the Act into law March 29, 2001, with "wide public support."⁸ However, a round of legal challenges awaiting the Act were unleashed, and they are a long way from being exhausted.

The Earnhardt Family Protection Act exempts "a photograph or video or audio recording of an autopsy" from Florida's public records law found in section 119.07(1) of the *Florida Statutes*, and Article I, Section 24(a) of the Florida Constitution.⁹ In making autopsy photographs, video, and audio, confidential and exempt, the Florida Legislature has raised some constitutional issues. A Volusia circuit judge in the Earnhardt case has upheld the new exemption under claims of its unconstitutionality, however, the exemption has yet to work its way through the appellate process.¹⁰ The *Independent Florida Alligator*¹¹ and *Websitcity*¹² are the news organizations leading the charge, and they are ignoring the pleas from Earnhardt's family and supporters to end the pursuit for Earnhardt's autopsy photos and to "[l]et

5. *Id.* at 6A; see also Pat Dunnigan, *Off Track?*, FLA. TREND, June 2001, at 76.

6. FLA. CONST. art. I, § 24(a).

7. Dunnigan, *supra* note 5, at 79.

8. Patrik Jonsson, *Can 'Sunshine Laws' Sometimes Shed Too Much Light?*, CHRISTIAN SCIENCE MONITOR (Boston) May 22, 2001, at 2 (discussing the "trend is toward limiting [media] access," in favor of protecting privacy, which in turn has worried public access advocates who say the "public benefits mightily when reporters use sunshine laws to uncover stories").

9. FLA. STAT. § 406.135 (2001) (discussing various people in the deceased's family, and various agencies who still have access to a photograph, video, or audio recording of an autopsy).

10. Mike Branom, *Autopsy Photo Review Denied*, SUN-SENTINEL (Ft. Lauderdale), June 14, 2001, at 10B (discussing how the release of the autopsy pictures would cause the Earnhardt family pain and would constitute an "invasion of privacy to the highest degree"); see also Dunnigan, *supra* note 5, at 79.

11. This is a University of Florida student run news organization, available at <http://www.alligator.org>.

12. This is a Deland, Florida-based Web site, available at <http://www.websitcity.com>.

Dale Earnhardt rest in peace!!”¹³ An appellate challenge to the Earnhardt exemption will determine if the constitutional right of privacy has watered down “the most liberal public records access laws in the nation.”¹⁴

With the proliferation of websites on the World Wide Web, and “go-for-the-throat reporting,” the public has demanded more and more protection for their privacy.¹⁵ The Florida Legislature has responded to this request by consistently adding to the list of exemptions found in the public records law, however, these exemptions conflict with the age-old policy behind the public records law. The Earnhardt Family Protection Act is a perfect exemption to scrutinize in light of the two competing constitutional rights, those of privacy and the right to inspect public records. No other exemption to the public records law has brought about as much debate, especially from media organizations. Rightfully so, since the media organizations are the ones who suffer the most from these exemptions, since they are the predominant users and requestors of public records.¹⁶ The small news organizations and websites that exploit all types of graphic autopsy photos are the real groups to blame for the exemption. However, media organizations are the public’s main source for finding out what the government is doing, since very few people are investigating public records themselves to uncover dishonest government actions.

This article will examine the Earnhardt Family Protection Act and the effect that it has had on the public’s right of access to records in Florida. Part II will provide an overview of the Florida public records law before the recent exemption was enacted in the aftermath of the Earnhardt tragedy. Part III will look at the Earnhardt Family Protection Act and examine the Florida Legislature’s intent in creating the exemption. Part IV will then examine the constitutionality of the exemption, specifically, the right of privacy, the retroactive application to Dale Earnhardt’s autopsy photos, and how narrowly tailored it is to the public necessity of the exemption. Part V

13. *Paper Reports Threats Over Earnhardt Autopsy Photos: Publication Pursuing its Right of Access*, SUN-SENTINEL (Ft. Lauderdale), June 18, 2001, at 6B (discussing hostile flyers and messages that the University of Florida student newspaper has received since they have been trying to gain access to Dale Earnhardt’s autopsy photographs).

14. Chris Jenkins, *Autopsy Photos of Drivers Raise More Issues in Florida*, USA TODAY, Apr. 3, 2001, at 2C.

15. Jonsson, *supra* note 8, at 2. The article explains that the current mood of the nation’s legislatures is for more privacy and that over 200 bills dealing with public access are in consideration. *Id.* at 1.

16. See generally Jenkins, *supra* note 14, at 2 (“The *Orlando Sentinel’s* request to view photos from Dale Earnhardt’s autopsy reignited a common journalism controversy, pitting the public’s right to know against a family’s right to privacy.”).

of the article will look at the media's role in spurring the Florida Legislature to pass the Earnhardt Family Protection Act. Finally, part VI of this article will look at the future of the Earnhardt Family Protection Act and the likely effects that the new exemption may have on Florida's public records law and an individual's right of privacy. Lastly, Part VII will include final thoughts about the Earnhardt tragedy.

II. OVERVIEW OF FLORIDA'S PUBLIC RECORDS LAW

Florida's public records law provides that "all state, county, and municipal records shall be open" for inspection to anyone,¹⁷ and are considered the nation's "'toughest of the tough' sunshine laws."¹⁸ This policy is to ensure that governmental actions are brought out into the public arena where they can be under the watchful eye of Florida's citizens.¹⁹ Florida has validated this policy for open access to public records by enacting an amendment to the Florida Constitution in 1992.²⁰ Article 1, Section 24, of the Florida Constitution also grants everyone the right to "inspect or copy any public record" of any legislative, executive, and judicial branch of Florida's government.²¹ If an agency unlawfully refuses to permit

17. FLA. STAT. § 119.01(1) (2001).

18. Jonsson, *supra* note 8, at 3.

19. *See, e.g.*, Michel v. Douglas, 464 So. 2d 545, 546 (Fla. 1985) ("[T]he right of access to personnel records as public records is not the right to rummage freely through public employees' personal lives."); Forsberg v. Hous. Auth. of Miami Beach, 455 So. 2d 373, 378 (Fla. 1984) ("The purpose of the Public Records Act is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people."); Christy v. Palm Beach Sheriff's Office, 698 So. 2d 1365, 1366 (Fla. 4th Dist. Ct. App. 1997) (citing City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th Dist. Ct. App. 1994)); Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d Dist. Ct. App. 1985); Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775, 779 (Fla. 4th Dist. Ct. App. 1985) ("[T]he underlying policy of the Public Records Act—open government to the extent possible in order to preserve our basic freedom, without undermining significant government functions."); *cf.* Jonsson, *supra* note 8, at 3 (discussing some disadvantages that reporters have encountered with having everything open in the public forum, such as fewer "opinions and debate" since people are more careful in their comments for fear that they may become public).

20. Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine in*, 18 NOVA L. REV. 973, 974 (1994) (discussing the history of open public records and the constitutional amendments that have been enacted to support the policy for open access to public records).

21. FLA. CONST. art. I, § 24(a). The full text of Article I, Section 24(a) of the Florida Constitution provides:

inspection or copying of a public record, a court shall assess reasonable attorney's fees against the agency.²²

The legislature has been delegated the power to exempt records from being open for inspection by the public.²³ All exemptions from disclosure, however, must be narrowly construed and limited to the specific purpose for the exemption.²⁴ If the custodian of a record claims it to be exempt from inspection, that custodian must state the statutory citation of the particular

- (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Id.

22. FLA. STAT. § 119.12(1) (2001); *see also* FLA. STAT. § 119.11(1) (2001) (granting an "immediate hearing [with] priority over [all] other pending cases" when a public records action is filed).

23. FLA. CONST. art. I, § 24(c). Section 24(c) provides:

- (b) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Id. See also Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979). It is the legislature who enacts exemptions to the Public Records Act, and the judiciary is the one who interprets the exemptions based on their legislative intent. *Id. See generally* Cynthia A. Cloud & Howard R. Brennan, *Disclosural Privacy and the Florida Public Records Act: Open Government or Sanctioned Snooping?*, 12 STETSON L. REV. 420 (1982).

24. *Id.* § 24(c); *see also* Mem'l Hosp.-W. Volusia, Inc., v. News-Journal Corp., 729 So. 2d 373, 380 (Fla. 1999) ("[A]n exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution."); Tribune Co. v. Pub. Records, 493 So. 2d 480, 483 (Fla. 2d Dist. Ct. App. 1986) (discussing the limitation on exemptions to their "stated purposes").

exemption.²⁵ When a court is doubtful about an exemption, “the courts should find in favor of disclosure rather than secrecy.”²⁶ Over the years the number of exemptions to the public records law have varied in range, from estimates as high as 800 to as low as 200.²⁷ However, many of these exemptions are created at the urging of certain groups and fail to fulfill any public necessity.²⁸

All new and substantially amended exemptions to the public records law are subject to the “Open Government Sunset Review Act of 1995.”²⁹ This Act automatically repeals exemptions on October 2, the fifth year after enactment of the exemption, unless the legislature reenacts the exemption.³⁰ The legislature will maintain an exemption, if the exempted record is sensitive and personal in nature and concerns an individual.³¹ The legislature also has to determine if the exemption is important enough to override “the strong public policy of open government.”³²

The *Florida Statutes* have defined what records shall be public as all material “regardless of the physical form . . . made or received . . . in connection with the transaction of official business by any agency.”³³ An

25. FLA. STAT. § 119.07(2)(a) (2001); *see also* Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U. L. REV. 705, 720–21 (1985) (discussing in detail the process of requesting records and the procedure when a custodian claims an exemption to the public records law). “In most cases the purpose of the exemption is not to further the public interest, but rather, to accommodate the needs of the exemption’s proponent.” *Id.*

26. *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 780 n.1 (Fla. 4th Dist. Ct. App. 1985).

27. Richard, *supra* note 25, at 706 n.11; *see generally* FLA. STAT. § 119.07(3)(a)–(c) (2001) (describing numerous statutory exemptions to the open public records law); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979) (“If the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute.”); Robert Rivas, *Access to “Private” Documents Under the Public Records Act*, 16 NOVA L. REV. 1229, 1232 (1992) (“Scores of other exemptions are scattered throughout Florida Statutes.”).

28. Richard, *supra* note 25, at 720–21.

29. FLA. STAT. § 119.15(1), (3)(a) (2001).

30. § 119.15(3)(a).

31. § 119.15(2)(a). There are two other criteria that the legislature shall consider during legislative review in the maintenance or creation of an exemption. § 119.15(2)(b), (c). The exemption is needed for a governmental program to run efficiently or to keep certain information of an entity confidential. *Id.*

32. § 119.15(2)(c) (“[T]he legislature shall consider the criteria in this section before enacting future exemptions.”).

33. FLA. STAT. § 119.011(1) (2001). The full text of section 119.011(1) provides:

“agency” is “any state, county, district . . . public or private agency . . . or business entity acting on behalf of any public agency.”³⁴ The language of the statute makes a private company or even an individual subject to provide access to certain records if they are working with or for a public agency.³⁵ Article I, Section 24(a) of the Florida Constitution is similar, stating that an agency includes all “legislative, executive, and judicial branches of government, and each agency or department created thereunder”³⁶

Further interpretation of what exactly is and is not a public record is found in *Shevin v. Byron, Harless, Schaffer, Reid & Associates*.³⁷ The Supreme Court of Florida defined a “public record” as “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”³⁸ Further, “public records” do not include rough drafts or notes that are to be used in preparing “some other documentary material” or “precursors of governmental ‘records.’”³⁹ Material that is “midway on the spectrum” of being public records have to be “determined on a case-by-case basis.”⁴⁰ Public records very often contain information about private citizens, and those

“Public record” means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Id.

34. § 119.011(2). The full text of section 119.011(2) provides:

“Agency” means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Id.

35. An analysis of the relevant case law on private entities subject to the public records law is beyond the scope of this article. See Rivas, *supra* note 27, at 1234–47, for a thorough examination of when private entities may be subject to the public records law.

36. FLA. CONST. art. I, § 24(a).

37. 379 So. 2d 633 (Fla. 1980). This case is considered the “Seminal Case” on defining public records and determining when a private entity is subject to the public records law. Rivas, *supra* note 27, at 1234.

38. *Shevin v. Byron, Harless, Schaffer Reid & Assocs.*, 379 So. 2d 633, 640 (Fla. 1980).

39. *Id.*

40. *Id.*

records are still open to inspection or copying by every person who desires to do so as provided in Article I, Section 24(a) of the Florida Constitution.⁴¹

An example of a public agency would be the district medical examiner's office, since it has been established by law.⁴² A medical examiner in the district where a death occurs shall perform investigations and autopsies when any person therein dies by accident.⁴³ The records that a medical examiner creates in their examinations and autopsies of a person killed by accident, would be open to the public to inspect and copy under section 119.01(1) of the *Florida Statutes* and Article I, Section 24(a) of the Florida Constitution.⁴⁴ Autopsy photographs created by a district medical examiner's office would also fit the definition of "public record" found in the *Shevin* case.⁴⁵ However, autopsy photographs of the medical examiner are no longer a "public record" open to the public, compliments of the Earnhardt Family Protection Act.⁴⁶

III. THE EARNHARDT FAMILY PROTECTION ACT

With the presence of the World Wide Web and other vast media outlets, autopsy photos can be viewed by millions of people, even by the deceased's immediate family members.⁴⁷ The Earnhardt Family Protection Act was

41. FLA. CONST. art. I, § 24(a).

42. FLA. STAT. § 119.011(2) (2001).

43. FLA. STAT. § 406.11(1)(a)(2) (2000) the full text of § 406.11(1) provides:

- (1) In any of the following circumstances involving the death of a human being, the medical examiner of the district in which the death occurred or the body was found shall determine the cause of death and shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.

Id.

44. FLA. CONST. art. I, § 24(a); § 119.01(1).

45. See *Shevin*, 379 So. 2d at 640.

46. FLA. CONST. art. I, § 24(a); § 119.01(1).

47. Earnhardt Family Protection Act, ch. 2001-1 § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)). Section 2 provides:

The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are

created by the legislature to stop this proliferation of autopsy documents, ceasing any further “injury to the memory of the deceased.”⁴⁸ The legislature also responded to the immediate family’s need to grieve over their loved one in peace without additional “trauma, sorrow, humiliation, or emotional injury.”⁴⁹ This additional trauma to the immediate family could occur because the photographs, video and audio of the deceased’s autopsy “may depict or describe the deceased nude, bruised, bloodied . . . dismembered, or decapitated.”⁵⁰ With this statutory language, the legislature has clearly stated the public necessity justifying the exemption required by Article I, Section 24(c) of the Florida Constitution.⁵¹ Whether any family members have ever been confronted with their deceased relative’s autopsy photos on newspapers or on the Internet remains to be seen. It is obvious that family members would suffer more sorrow if they were to see their deceased family member’s autopsy photos on those forms of media.

The Earnhardt Family Protection Act exempts “[a] photograph or video or audio recording of an autopsy in the custody of a medical examiner” from being inspected or copied under the Florida Constitution and section 119.07(1) of the *Florida Statutes*.⁵² The legislature found this autopsy material to be “highly sensitive depictions or descriptions of the deceased.”⁵³ The deceased’s spouse still has access to view and copy the entire autopsy photographs, video, and audio that the medical examiner prepared during the

highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Id.

48. *Id.*

49. *Id.*

50. *Id.*

51. FLA. CONST. art. I, § 24(c).

52. Earnhardt Family Protection Act, ch. 2001-1, § 1(1), 2001 Fla. Sess. Law Serv. 1, 2 (West) (to be codified tentatively at FLA. STAT. § 406.135 (2001)).

53. Earnhardt Family Protection Act, § 2.

investigation.⁵⁴ Otherwise, anyone else requesting access to view or copy the autopsy materials must provide a court order allowing such access.⁵⁵ A court order will only be issued if it is shown that there is “good cause” to view or copy records of an individual’s autopsy.⁵⁶ If a court grants a court order, handling of the autopsy photos, video, or audio must be done under the custodian’s direct supervision.⁵⁷ The surviving spouse shall be given notice and an opportunity to be heard, if there is a petition to view the deceased’s records.⁵⁸

The Earnhardt Family Protection Act also provides a stiff penalty for a custodian or anyone who violates a court order regarding the exempted autopsy photos, video, and audio.⁵⁹ It is a third degree felony for “willfully and knowingly” allowing an unauthorized person to view or copy autopsy photos, video or audio.⁶⁰ This leaves the possibility that private citizens could risk a felony charge for viewing unauthorized autopsy material that has been illegally copied and placed on the World Wide Web. The legislature seems to be expressing their dissatisfaction with those record custodians who take advantage of their positions and help in the trafficking of graphic and disturbing autopsy material.

IV. CONSTITUTIONAL ISSUES BEHIND THE ACT

A. *Right of Privacy*

To show “good cause” and obtain disclosure of the sensitive autopsy material, the court shall balance the public’s need to evaluate governmental performance against the intrusion into the family’s right of privacy.⁶¹ This balancing of the right of privacy against the public’s right of access to public records is a major collision between Article I, Section 23 of the Florida

54. Earnhardt Family Protection Act, § 1(1) (stating that “If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records.”).

55. *Id.*

56. Earnhardt Family Protection Act, § 1(2)(a).

57. Earnhardt Family Protection Act, ch. 2001-1, § 1(2)(a).

58. Earnhardt Family Protection Act, § 1(2)(b). Notice shall be given to the deceased parents if no surviving spouse and then to the children if there are no living parents. *Id.*

59. Earnhardt Family Protection Act, § 1(3)(a).

60. Earnhardt Family Protection Act, § 1(3)(a), (b).

61. Earnhardt Family Protection Act, § 1(2)(a) (discussing how the court must also determine if disclosure of the requested records is the least intrusive means available and the whether other similar information is available in other public records, regardless of form).

Constitution and Florida's Public Records Act.⁶² Article I, section 23 provides: "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."⁶³ This right of privacy in Florida "is expressly subservient to the Public Records Act."⁶⁴ This leaves the never-ending question of which is more important and which takes precedent, the public's strong right of access to public records or the right of privacy in the deceased family member's memory. The Florida Legislature would say the latter is more important when it comes to autopsy photos, since the Earnhardt Family Protection Act gives a deceased's family the right of privacy in such photos.⁶⁵ However, the Supreme Court of Florida does not always see eye to eye with the Florida Legislature, especially in the area of an individual's right of privacy.

The family's right of privacy was examined in *Williams v. City of Minneola*,⁶⁶ when videotape and photos of the deceased were displayed to police officers and others who were not custodians of those records.⁶⁷ The family sued the officers for invasion of privacy, among other causes of action, and the officers claimed that the autopsy photos and video were public record; therefore, they could not be liable for displaying the photos and video.⁶⁸ The court stated the Public Records Act "does not impose a secrecy requirement which bars a custodian from displaying a public record entirely of his own volition."⁶⁹ The court also concurs that a person who is

62. See John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775, 780 (1994) ("As case law on section 23 has developed, it has become evident that it is on a collision course with Florida's Public Records Act.").

63. FLA. CONST. art. I, § 23.

64. *Bd. of County Com'rs. v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th Dist. Ct. App. 2001) (finding that an adult entertainer does not have a reasonable expectation of privacy in the personal information required to obtain a worker identification card, which was needed to work as an adult entertainer in the county).

65. Earnhardt Family Protection Act, § 1(2)(a).

66. 575 So. 2d 683 (Fla. 5th Dist. Ct. App. 1991).

67. *Id.* at 686. The video was shown at a police officer's house since police headquarters did not have the needed equipment, and it was shown to an officer who was not in the same police force investigating the death of the individual. *Id.* at 686 n.1.

68. *Id.*

69. *Id.* at 687. The court stated,

Article I, section 23 of the Florida Constitution appears to guarantee the absolute right to inspection and examination of public records . . . there is no indication that the section was intended to give . . . agency personnel or members of the public

the subject of a record cannot “claim a constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency.”⁷⁰ However, the law will not protect a custodian of public records from any civil liability when they unnecessarily reveal such records to persons outside of that agency.⁷¹ The court did not reverse the officers’ summary judgment on the invasion of privacy cause of action.⁷² The family’s privacy was not invaded, only the deceased’s was, and only where there are unusual circumstances, which are sufficiently egregious, shall the members of decedent’s immediate family have a invasion of privacy action.⁷³

The *Williams* court finds itself in the majority of courts that have held the close relatives of a victim do not acquire a derivative right to privacy.⁷⁴ The Florida Legislature in the Earnhardt Family Protection Act does not follow the reasoning for denying a right of privacy like in the *Williams* case. The legislature reaches the opposite conclusion, finding that a deceased’s family has the right of privacy regarding the deceased’s autopsy photos, video and audio.⁷⁵ A logical byproduct of the family’s right of privacy in the Earnhardt exemption, would be an action for invasion of privacy if a records custodian’s behavior was similar to that of the defendants in the *Williams*

... immunity from all the safeguards for individual rights which the common law has painstakingly developed over the centuries.

Id.

70. *Williams*, 575 So. 2d at 687. See, e.g., *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985) (discussing Article I, Section 23 of the Florida Constitution, in that the right of privacy does not apply to public records and that there is not a state or federal right of disclosural privacy that exists); *Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 374 (Fla. 1984); *Shevin v. Byron, Harless, Schaffer, Reid and Assocs.*, 379 So. 2d 633, 638 (Fla. 1980).

71. *Williams*, 575 So. 2d at 687. The court found that the Public Records Act and the Florida Constitution do not grant a custodian of public records immunity from tort liability when communicating a public record to someone outside the agency unless the person inspecting the public records has made a bona fide request to examine them, or the agency’s official business requires it to reveal the public records to someone who has not requested to see them. *Id.*

72. *Id.* at 690.

73. *Id.* at 689–90. See also *Loft v. Fuller*, 408 So. 2d 619, 621 (Fla. 4th Dist. Ct. App. 1981) (“[A] cause of action for invasion of the common law right of privacy is strictly personal. . . . Relatives of a deceased person have no right of action for invasion of privacy . . . regardless of how close such personal relationship was with the deceased.”).

74. *State v. Rolling*, No. 91-3832 CFA., 1994 WL 722891, at *3 (Fla. Cir. Ct. July 27, 1994).

75. Earnhardt Family Protection Act, ch. 2001-1 § 1(1).

case. The *Williams* court did not allow such an invasion of privacy action on behalf of the deceased's family against a custodian of autopsy records since only the deceased's privacy was violated and only the deceased had a right of privacy in the autopsy video and photos.⁷⁶ The Supreme Court of Florida may wonder how the Florida Legislature justified the family's right of privacy, is it derivative from the deceased or in the family's own right based on Article I, Section 23 of the Florida Constitution.

The "good cause" balancing test in the Earnhardt Family Protection Act is identical to the balancing test in *State v. Rolling*.⁷⁷ In that case, members of the murder victim's family had requested nondisclosure of photographs and video of the murder scene and autopsies.⁷⁸ The media had initially demanded to copy the photos and video, but they eventually compromised to just view the photos and video in the presence of the clerk.⁷⁹ The court found that the photographs and video were public record based on their creation by public agencies.⁸⁰ However, the court also concluded the deceased's relatives might acquire a privacy interest that was "either derivative from the victims themselves or in their own right."⁸¹ The court goes on to find that substantial injury would occur to the deceased's relatives if "confronted in the media with images of their slain and mutilated loved ones."⁸² In addition, the court applied a test, which balanced the public's right to know and hold public officials accountable versus the privacy interest of the victim's relatives.⁸³ The photographs and video at issue were

76. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th Dist. Ct. App. 1991).

77. *Rolling*, 1994 WL 722891 at *1.

78. *Id.* The family members of the murder victims stated how they would suffer future emotional harm if the graphic material from the autopsies and murder scene were disclosed. *Id.*

79. *Id.* (stating that the media did not intend to print or publish the photographs, they just wanted to "place themselves in the position of the jurors" to evaluate the impact of the photographs).

80. *Id.* at *2 (discussing how the photographs and video were taken in the course of the police officer's official business to become public records).

81. *Rolling*, 1994 WL 722891, at *3.

82. *Id.* at *4 ("[A]t least one federal court concluded that a relatives' right of privacy does exist . . . sufficient to prohibit disclosure of materials which would be subject to a right of privacy were the victim alive.") (citing *N.Y. Times v. NASA*, 782 F. Supp. 628 (D.D.C. 1991)).

83. *Id.* at *5 ("[T]he court cannot substitute its judgment on the publication value of the materials for that of the members of the media, but can decide whether the information has significant relevance . . . and whether the same information is available from other, less intrusive, sources.").

declared not open for any type of copying, but the court did allow reasonable inspection of them in the presence of the records custodian.⁸⁴

The *Rolling* court's balancing test for public records disclosure is identical to the "good cause" test for disclosure found in the Earnhardt exemption.⁸⁵ The *Rolling* court and the Florida Legislature both agree that substantial injury would occur to the deceased's family if autopsy photographs or video is freely copied and disseminated in global forms of media.⁸⁶ However, it took the death of a legend for the Florida Legislature to take heed and enact a public records exemption that included a right of privacy for a deceased's family.⁸⁷ The Earnhardt exemption is long overdue according to the *Rolling* court's holding and rationale.⁸⁸ The Florida Legislature went further than the *Rolling* court, which allowed reasonable viewing of photos and video, by not allowing any viewing of autopsy photos and video.⁸⁹ Neither the Florida Legislature nor the *Rolling* court explains the history indicating that the family has a right of privacy in the deceased.⁹⁰ They both just grant a family the right of privacy, justifying it on the possibility of substantial injury to the deceased's family, which they feel is more important than open government. Had the *Rolling* case been appealed, an exemption for graphic autopsy material may have been brought to the attention of the Florida Legislature many years earlier, and an appellate court may have cleared up the basis for a family's right of privacy in a deceased relative.

In *Forsberg v. Housing Authority of Miami Beach*,⁹¹ tenants in public housing sought to enjoin the public's access to information provided by public housing tenants.⁹² The tenants had to submit personal and confidential information, such as family status and relationship, income, assets, medical history, and employment.⁹³ The tenants claimed that the release of that personal information would cause them to suffer humiliation and embarrassment.⁹⁴ The Supreme Court of Florida affirmed the motion to

84. *Id.* at *7.

85. Earnhardt Family Protection Act § 1(2)(a); *Rolling*, 1994 WL 722891, at *5.

86. *Rolling*, 1994 WL 722891 at *4; *see also* FLA. STAT. § 119.15 (2)(c).

87. Earnhardt Family Protection Act, § 2.

88. *See Rolling*, 1994 WL 722891, at *5.

89. Earnhardt Family Protection Act § 2.

90. *Id.* *See also Rolling*, 1994 WL 722891, at *5.

91. 455 So. 2d 373 (Fla. 1984).

92. *Id.*

93. *Id.* at 374.

94. *Id.* at 375.

dismiss⁹⁵ since there is no constitutional right of privacy that would prevent the inspection of the housing authority's public records.⁹⁶ The court did not find relief in the privacy amendment of Article I, Section 23 of the Florida Constitution, since it "specifically does not apply to public records."⁹⁷

The *Forsberg* court reiterates the proposition that individuals have no right of privacy in the records that are created by public agencies, contrary to the Earnhardt exemption.⁹⁸ The *Forsberg* court interprets the right of privacy in the Florida Constitution to mean, clearly and unequivocally, that the right does not extend to situations involving public records.⁹⁹ However, the *Forsberg* case did not include public records that were of a highly graphic and sensitive nature as did the *Rolling* court and the Florida Legislature in the Earnhardt case. *Forsberg* only dealt with an individual's personal information, which is less likely to cause substantial injury if it were to be disclosed through access to public records.¹⁰⁰ The Earnhardt exemption strays from the *Forsberg* court's finding that the right of privacy in article I, section 23 does not apply to public records.¹⁰¹

In a very similar tragedy to that of Dale Earnhardt's, the NASA Challenger explosion brought out the same issues underlying the Earnhardt exemption. In *New York Times Co. v. NASA*,¹⁰² a news organization requested copies of the audiotapes that were recorded in the cabin of the Challenger up to the time of the explosion in which the astronauts were killed.¹⁰³ The news organization was denied the request and brought suit under the Freedom of Information Act to obtain such audiotapes.¹⁰⁴ The court found that an exemption to the Act provides the family of the astronauts with a privacy interest in those records relating to the deceased astronauts.¹⁰⁵ The Challenger families have a substantial privacy interest since the disclosure of the audiotapes would be a "disruption of their peace

95. *Id.* at 374.

96. *Forsberg*, 455 So. 2d at 374.

97. *Id.* The court also finds no general right of disclosural privacy provided in the state constitution (citing *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980)).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Fosberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 384 (Fla. 1984).

102. 782 F. Supp. 628 (D.D.C. 1991).

103. *Id.* at 630.

104. *Id.*

105. *Id.* at 630-31.

of mind" every time the tapes are played in their proximity.¹⁰⁶ The court also determined that the strong public interest in disclosure of the audiotapes would not be served in any way.¹⁰⁷ The fact that NASA provided a transcript of the audiotape was sufficient to allow the strong public interest to be served.¹⁰⁸ In determining whether to disclose the audiotapes, the court balanced the privacy interest versus the public interest.¹⁰⁹ The privacy interest was substantial in this case and outweighed the public interest, which was uncertain and served through the transcripts of the audiotapes.¹¹⁰

While the *NASA* case was examined under the federal right of privacy and the Freedom of Information Act, it gives credibility to the Florida Legislature's intent in creation of the Earnhardt exemption.¹¹¹ The Freedom of Information Act is similar to Florida's Public Records Act, in that they both provide access to government records in the name of public interest.¹¹² However, the right of privacy in the Florida Constitution is much broader than that of the Federal Constitution.¹¹³ Florida has shown this broad right of privacy in the addition of Article I, Section 23 to the Florida Constitution.¹¹⁴ The Florida Legislature has been asleep at the wheel for not interpreting the right of privacy in a manner similar to that of the *NASA* court sooner. The Florida Legislature could find numerous areas where the right

106. *Id.* at 632; *see also* *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476, 484 (D.D.C. 1994) (discussing how the Kennedy family had been traumatized by publication of unauthorized records concerning John F. Kennedy's assassination.) The same district court found that the family would suffer continuous anguish if those unauthorized records were to be further published. *Id.*

107. *NASA*, 782 F. Supp. at 632. The court agreed with the news organization that the public has a legitimate interest in completely understanding the actions surrounding the Challenger explosion and the conduct of all the agencies involved with the tragedy. *Id.*

108. *Id.* at 633. The actual texture of the Challenger astronauts' voices and background noises of the cabin that are on the audiotapes does not shed any additional light on the public's interest in determining the conduct of all agencies involved in the explosion. *Id.*

109. *Id.*

110. *Id.*

111. For an in-depth discussion on the federal right to disclosural privacy and Florida's Public Records Act. *See* Cloud, *supra* note 23, at 420.

112. *See* FLA. STAT. § 119.01; 5 U.S.C. § 552 (1988).

113. *See, e.g.,* *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995); *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (stating the Florida Constitution expressly provides for a strong right of privacy not found in the United States Constitution); *Fla. Bd. of Bar Exam'rs Re Applicant*, 443 So. 2d 71 (Fla. 1983).

114. FLA. CONST. art. I, § 23.

of privacy in graphic sensitive public records out weighs the public interest in open government.¹¹⁵

The NASA court found that the public interest was satisfactorily served through the transcripts of the audiotapes.¹¹⁶ The Florida Legislature also comes to the same conclusion in the Earnhardt exemption by finding that the autopsy report is sufficient to serve the public's interest in open government.¹¹⁷ What is also interesting about the Challenger, Earnhardt, and Rolling tragedies, was the enormous publicity surrounding them, which may have motivated the protection of the family's right of privacy.¹¹⁸ Had there not been as much publicity and debate in these tragedies, the public interest in access to the records may have been found to be more important than a family's right of privacy.

The NASA case also raises the question of what is a legitimate public interest in obtaining disclosure of sensitive and graphic records. The NASA court found that the public interest in understanding the Challenger explosion was not served in any additional way by the release of the audiotapes.¹¹⁹ Florida's public interest in determining what happened to Dale Earnhardt in the Daytona 500 can easily be served by the release and examination of Earnhardt's autopsy report. The release of Dale Earnhardt's autopsy photographs do not seem to serve any other legitimate public interest, which has not already been satisfied by the autopsy report. The NASCAR cover-up theory, which challenges the medical examiner's findings, seems little more than a wild goose chase on the part of the media and not a legitimate public interest.

The balance between the intent of the Public Records Law and the privacy interest of a deceased's family, regarding graphic material, seems to sway toward the family's privacy, except in the *Williams* case.¹²⁰ The

115. *N.Y. Times v. NASA*, 782 F. Supp 628, 633 (D.D.C. 1991).

116. *Id.* at 632.

117. Earnhardt Family Protection Act, ch. 2001-1, § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)) ("The Legislature further notes that there continue to be other types of available information, such as the autopsy report, . . . which continues to provide for public oversight.").

118. John F. Kennedy's family also received a right of privacy from the same district court when John F. Kennedy's autopsy photographs were requested under The Freedom of Information Act. The assassination of John F. Kennedy has probably received the most debate and publicity in the twentieth century, which may have been a leading cause in the court choosing to protect such high profile families with the substantial right of privacy. *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994).

119. *NASA*, 782 F. Supp. at 632.

120. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th Dist. Ct. App. 1991).

Williams case may have been different if the deceased's family had requested that the video be undisclosed and if there was more publicity surrounding the death of the family member like in the *Earnhardt* case. However, the *Rolling* case and the *Earnhardt* exemption clearly show that when graphic public records are at issue in the right of privacy, the policy of open access to public records is less important.¹²¹ A deceased's autopsy photographs do not provide Florida's citizens with necessary or valuable insight into their government's actions. Most individuals would be disgusted even at the thought of an autopsy, let alone viewing such photographs. The examination or copying of autopsy photographs and the like only facilitate purveyors of the dark and abnormal that enjoy viewing such gruesome material. Therefore, when it comes to sensitive and graphic material that is not necessary information to the public, the right of privacy should prevail against public interest.

A majority of the cases discussed in this article incorporate a balancing test, which is essentially the "good cause" test, found in the *Earnhardt* exemption.¹²² The judiciary will have the task of determining on a case-by-case basis, which is more important, the release of autopsy photos in the public interest or the substantial injury that may befall the deceased's family. The *Rolling* court bases its use of a balancing test from an examination of the *NASA* case that, although a federal case, provides a right of privacy to the deceased's family members.¹²³

The language of Article I, Section 23 of the Florida Constitution is still problematic for the Florida Legislature which has established a right of privacy in public records. The language of that section states that a person will be free from "governmental intrusion" into their private lives, not public intrusion.¹²⁴ The government does not intrude into the private lives of individuals when another private individual is allowed to inspect public records. The "privacy provision applies only to government action,"¹²⁵ which does not come into play when autopsy photographs, video, and audio are used by private individuals or the media.

121. See *State v. Rolling*, No. 91-3832 CFA., 1994 WL 722891, at *3 (Fla. Cir. Ct. July 27, 1994).

122. *Earnhardt Family Protection Act*, ch. 2001-1, § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).

123. *NASA*, 782 F. Supp at 628.

124. FLA. CONST. art. I, § 23.

125. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995).

B. *Narrowly Tailored*

The Earnhardt exemption must be construed narrowly and limited to the exemption's stated purposes.¹²⁶ This could be the reason the Florida Legislature puts on the brakes before exempting all autopsy records from disclosure as required under Florida's Public Records Law. The legislature makes it very clear that "there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family" while still providing "public oversight."¹²⁷ This, most likely, is to be sure that the Earnhardt exemption is "no broader than necessary to accomplish the stated purpose of the law,"¹²⁸ to pass any constitutional challenge. The Florida Legislature was probably well aware that creating such an exemption, with as much publicity as it has received, would eventually be reviewed by the Supreme Court of Florida.

The *Rolling* court found that allowing only inspection of the graphic photographs and video was sufficient enough to keep those from being exploited and causing any further injury to the deceased's family.¹²⁹ The Florida Legislature may have gone one step too far by not allowing the same reasonable inspection of autopsy photographs, video and audio. The purpose of the Earnhardt exemption, similar to the *Rolling* court's reasoning, was to stop the dissemination of graphic material, which in turn causes the deceased's family injury. Ending the dissemination of autopsy photos, video, and audio can be accomplished by doing just what the *Rolling* court did, allowing only inspection of the graphic material. If people cannot copy autopsy photos, video, and audio, then they cannot publish such material in a form that would cause injury to the deceased's relatives. The only downfall with inspection of autopsy photographs, video and audio, is that people may attempt to steal the material and publish it. However, the custodians who are in charge of the records are also known for stealing such material, hence the reason for the third degree felony that the legislature placed in the Earnhardt exemption.¹³⁰

126. See, e.g., FLA. CONST. art. I, § 24(c); *Christy v. Palm Beach Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th Dist. Ct. App. 1997); *Tribune Co. v. Pub. Records*, 493 So. 2d 480, 483 (Fla. 2d Dist. Ct. App. 1986); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th Dist. Ct. App. 1994).

127. Earnhardt Family Protection Act, ch. 2001-1 § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).

128. FLA. CONST. art. I, § 24(c).

129. *State v. Rolling*, No. 91-3832 CFA, 1994 WL 722891, at *4 (Fla Cir. Ct. July 27, 1994).

130. Earnhardt Family Protection Act, § 1(3).

While the autopsy report would cause less injury to the immediate family, since it is less graphic if published, it would not facilitate a true independent medical examination. Allowing reasonable inspection and no copying of autopsy photographs, video, and audio, would satisfy the public necessity that the legislature has intended and allow public evaluation of government. In the Earnhardt accident, the *Orlando Sentinel* requested an independent medical examination of the autopsy photos to determine the true cause of Earnhardt's death. The newspaper, among others, believed the autopsy photos would show that Earnhardt's death was caused by different injuries than the Volusia County medical examiner had concluded in the autopsy report.¹³¹ A medical examiner could make mistakes in his autopsy report, and only the autopsy photographs and video would be useful to discover such mistakes. However, there is no great public importance to uncover mistakes and alleged conspiracies in the county medical examiner's office.

C. *Retroactivity of the Exemption*

The Earnhardt Family Protection Act "should be given retroactive application because it is remedial in nature."¹³² The Florida Constitution and the United States Constitution do not forbid the state legislature from enacting laws with retroactive results.¹³³ A retroactive law looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect.¹³⁴ A retrospective statute may be disadvantageous to someone, as long as the person is not deprived of any substantial right or protection.¹³⁵ The critical date in determining whether a public record is subject to examination is the date the request for examination is made.¹³⁶ However, if the legislature adopts an exemption to the Public Records Law that is remedial in nature, after the request and before it is complied with, thereby being retroactive, the date the request is made is meaningless.¹³⁷

131. Leusner, *supra* note 4, at A1.

132. Earnhardt Family Protection Act, § 2.

133. *Yellow Cab Co. v. Dade County*, 412 So. 2d 395, 397 (Fla. 3d Dist. Ct. App. 1982).

134. BLACK'S LAW DICTIONARY 1318 (7th ed. 1999).

135. *Blankenship v. Dugger*, 521 So. 2d 1097, 1099 (Fla. 1988).

136. *News-Press Publ'g Co. v. Kaune*, 511 So. 2d 1023, 1026 (Fla. 2d Dist. Ct. App. 1987) (finding that the documents in question came into existence in June 1986, and request for examination was made on July 2, 1986. The law became effective July 1, 1986, therefore, the court does not have to determine if the law is remedial and thereby retroactive).

137. *Id.*

There is the presumption that a law is not retroactive unless there is “an express manifestation of legislative intent to the contrary.”¹³⁸

In *City of Orlando v. Desjardins*,¹³⁹ a statutory exemption to Florida’s Public Records Act was not enforced by the lower court since the cause of action accrued prior to the effective date of the exemption.¹⁴⁰ The Supreme Court of Florida reversed,¹⁴¹ finding that the statute is remedial in nature and should be applied retroactively to serve its “intended purposes.”¹⁴² Protecting substantive rights, even by remedial acts, is allowed retroactive application especially in this case where there is the potential disclosure of sensitive documents.¹⁴³ Therefore, a new exemption to section 119 of the *Florida Statutes* is applicable to public records that were already in existence before the exemption was enacted.¹⁴⁴

In a more recent case, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*,¹⁴⁵ the Supreme Court of Florida held that an amended statute should not apply retroactively because it was not expressly stated by the legislature that they intended such a result.¹⁴⁶ The amended statute exempted private hospitals, which were providing public hospital services, from the requirements of Article I, Section 24(a) of the Florida Constitution.¹⁴⁷ This exemption was created by the legislature in response to the Fifth District Court of Appeal ruling, which held the private hospital was subject to the obligations of the Public Records Act.¹⁴⁸ The legislature did state in the statute that the exemption would apply to “all existing leases” that corporations have with public health care facilities.¹⁴⁹ That language was not express enough to find that the legislature intended the statute to apply retroactively to the public records action, which was commenced

138. *Seddon v. Harpster*, 403 So. 2d 409, 411 (Fla. 1981) (citing *Foley v. Morris*, 339 So. 2d 215 (Fla. 1976)).

139. 493 So. 2d 1027 (Fla. 1986).

140. *Id.* at 1028.

141. *Id.* at 1029.

142. *Id.* at 1028 (discussing the “intended purpose” of the statute, which was to exempt a governmental agency attorney from providing documents that otherwise would be public records and open to inspection or copying by the other party to a particular lawsuit the agency attorney was involved).

143. *Id.*

144. *Desjardins*, 493 So. 2d at 1029.

145. 729 So. 2d 373 (Fla. 1999).

146. *Id.* at 383–84.

147. *Id.* at 375–76.

148. *Id.* at 388.

149. *Id.*

before the creation of the exemption.¹⁵⁰ The Supreme Court of Florida passed on deciding whether the statute is constitutional since the challenge should start with an initial proceeding in the circuit court.¹⁵¹

Since the Earnhardt exemption is expressly remedial in nature and thereby retroactive, it can be applied to exempt Dale Earnhardt's autopsy photos from being released to those news organizations that requested the photos before the exemption was enacted. The *Orlando Sentinel* was first to request Dale Earnhardt's autopsy photos; however, the request was never complied with due to a Volusia County judge that ordered them sealed.¹⁵² Had the *Orlando Sentinel's* request been complied with, and the paper given copies of Dale Earnhardt's autopsy photos, the Earnhardt exemption would have failed to protect one of its intended benefactors, the Earnhardt family. That would have been a similar outcome to the *News-Journal Corp.* holding, the difference being that the legislative language in the Earnhardt exemption was clearer on the issue of retroactive status.

V. THE MEDIA AND THE EARNHARDT EXEMPTION

Media organizations cannot blame anyone else but themselves for the legislature exempting autopsy records from public disclosure. The Florida Legislature specifically names the World Wide Web as the main culprit in the publishing and dissemination of autopsy photos.¹⁵³ However, even well known organizations, such as the *Orlando Sentinel*, have acted with some degree of disregard for the well being of Dale Earnhardt's family "for 'selfish, business-driven purposes.'"¹⁵⁴ While established news organizations shy away from publishing graphic material, such as autopsy photographs, they often glorify the cause of death in a method that causes some injury to a deceased's family. Usually those media organizations that directly exploit graphic material, like autopsy records and photos, are small and based on the World Wide Web.

Websitcity is one small web based news organization that has taken an active role in obtaining Dale Earnhardt's autopsy photographs, almost certainly to exploit them. The website has already published Dale Earnhardt's

150. *News Journal Corp.*, 729 So. 2d at 384.

151. *Id.*

152. Leusner, *supra*, note 4, at 6A.

153. Earnhardt Family Protection Act, ch. 2001-1 § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).

154. Dunnigan, *supra* note 5, at 78.

autopsy report from the Volusia County medical examiner's office.¹⁵⁵ *Websitcity* has also published graphic autopsy photographs of two other NASCAR drivers who died at Daytona back in 1994.¹⁵⁶ The memory of Dale Earnhardt, in the eyes of his family and fans, would surely have been injured had his autopsy photos been available to the media organizations like those other NASCAR drivers that have been exploited on *Websitcity*. It would be no surprise to see Dale Earnhardt's autopsy photos posted on *Websitcity* had the Florida Legislature failed to enact the Earnhardt Family Protection Act and Dale Earnhardt's widow failed to get an injunction. Even with the protection afforded to Dale Earnhardt's autopsy photographs, they will eventually end up on the Internet, as does everything else that is supposedly confidential.

Various media organizations claim that the Earnhardt Family Protection Act is an example of a public records exemption initiated for "business interests."¹⁵⁷ Legal counsel for the *Independent Florida Alligator* has claimed that NASCAR is scared of a lawsuit for not requiring drivers to use head and neck support.¹⁵⁸ In addition, the Earnhardt family has partly pursued the injunction of the autopsy photographs to protect the commercial interests that Dale Earnhardt had created during his NASCAR career.¹⁵⁹ The injury to Dale Earnhardt's memory by release of the autopsy photographs may come in the form of a ripple effect on Earnhardt's business ventures. Therefore, the competing interests may go deeper than privacy rights versus public records access, it may come down to the almighty dollar.

There are countless websites that exhibit graphic autopsy material to all those individuals who have the stomach and curiosity to view them. This dissemination of information through the Internet has been going on ever since the dawn of the Internet age, there is nothing new about this fact. Legislators may be taking this opportunity to simply "exploit fear"¹⁶⁰ in favor of a strong right of privacy at the expense of the public's interest in open and honest government. If this is the case, then the legislature and the courts need to revisit the strong public policy for open government, and the

155. See http://www.websitcity.com/earnhardt/Documents/me_docs/20010219_0001/ (last visited July 25, 2001).

156. See <http://www.websitcity.com/earnhardt/Gallery/> (last visited July 25, 2001).

157. Dunningan, *supra* note 5, at 80.

158. *Id.*

159. *Id.* at 78.

160. Jonsson, *supra* note 8, at 2.

language in Article 1, Section 23 of the Florida Constitution, which grants public records a superior position over the right of privacy.¹⁶¹

VI. THE FUTURE OF THE EARNHARDT EXEMPTION AND PUBLIC RECORDS

According to the cases discussed thus far, the Supreme Court of Florida has consistently found in favor of open access to public records even when confronted with the compelling argument for the right of privacy. The Florida Legislature has implemented judicial intervention to insure the accomplishment of the Public Records Act, so that the right of disclosure is not defeated by an unjust statutory exemption to the Act.¹⁶² When the Earnhardt exemption is eventually challenged to the Supreme Court of Florida, the judiciary will insure that the statutory exemption does not unjustly defeat the strong public policy for open access to governmental records. The Supreme Court of Florida will likely find the Earnhardt exemption meets the requirements for public records exemptions under Article I, Section 24 of the Florida Constitution. The exemption expressly states the public necessity and is limited to one subject. Media organizations that have challenged the exemption will have a difficult time showing that there is a compelling reason to see the Dale Earnhardt autopsy photographs, but could argue that the exemption is broader than necessary to achieve the stated purpose. The purpose in protecting a deceased person's family from additional grief can be accomplished by allowing reasonable inspection of the autopsy photographs, video, and audio, without copying. The Earnhardt exemption may be broader than necessary in not allowing reasonable inspection by the public.

The Earnhardt exemption will automatically be repealed on October 2, 2006, unless reenacted by the legislature, which is almost certain.¹⁶³ The legislature will likely maintain the exemption against the strong public policy for open government, since autopsy photos, video, and audio are sensitive and personal in nature as required by the "Open Government Sunset Review Act of 1995."¹⁶⁴ The exemption will also be found to override the strong policy of open government, since the public interest can still be preserved by examination and copying of the autopsy report. However, the real test for the Earnhardt exemption will not come in the form

161. See FLA. CONST. art. I, § 23.

162. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d Dist. Ct. App. 1985).

163. Earnhardt Family Protection Act, ch. 2001-1, § 1(5), 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).

164. FLA. STAT. § 119.15 (1), (2) (2001).

of sunset review, but in the Supreme Court of Florida and maybe the United States Supreme Court.

The policy of open government as dictated in the *Florida Statutes* and the Florida Constitution will continue to be one of the nations strongest, even with the hard hit of the Earnhardt exemption. The Earnhardt exemption only impacts one type of record out of thousands that are open to the public, and still allows the autopsy report to be inspected and copied by anyone. The public still has access to an enormous amount of records relating to the legislative, executive, and judicial branches of Florida's Government. Inspecting those branches of government is why the Public Records Act was created. It was not created to allow the media and individuals to snoop around into the personal lives of private citizens who have lost a loved one. However, there may be situations where the inspection of autopsy photographs, video or audio is necessary to uncover government actions, which are compelling in the name of public interest.

VII. CONCLUSION

All families suffer tremendous grief and sorrow when they lose someone they love and treasure. The Earnhardt family was not any different when they "lost a son, a father, a grandfather, a husband and a brother."¹⁶⁵ The Florida Legislature recognized the Earnhardt family's need to mourn in peace at a time when the media was in a whirlwind over the cause of Dale Earnhardt's death. In doing so, the legislature created an exemption to the Public Records Law that will protect countless other families from the possibility of undergoing additional grief at the hands of the media and the World Wide Web. The media organizations are the main group affected by the Earnhardt Family Protection Act, and will continue to pursue their rights for disclosure. For the time being, the Florida Legislature has sent a message that the public interest is not served by having access to graphic autopsy photographs, video and audio. However, Florida's appellate courts have not assured that the Earnhardt Family Protection Act is a just statutory exemption to the Public Records Act.

Regardless of the legislature's true motivation in creating an exemption that has caused so much debate with public records advocates, the exemption does not signal the end of Florida's policy of open government. The "good cause" balancing test in the Earnhardt Family Protection Act assures that the strong policy for public evaluation of government will continue to breathe

165. Prince, *supra* note 1, at 60.

life. When a situation arises where the public interest is substantial in viewing autopsy records, a court should order such viewing over the right of privacy. The Earnhardt exemption is a victory for the majority of Florida who hunger for a right of privacy that is not second to the Public's Records Act as expressed in Article I, Section 23 of the Florida Constitution. The Earnhardt exemption is also a victory for the Earnhardt family and the memory of the "Intimidator."

Patrick N. Bailey

Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations

TABLE OF CONTENTS

I.	INTRODUCTION	332
A.	<i>Medical Malpractice in Florida</i>	332
B.	<i>Rise in Complex, Scientific Based Litigation in the United States</i>	334
1.	Complexity of Litigation	335
2.	Science v. Law	336
3.	“Junk Science”	338
II.	EXAMINATION OF FEDERAL AND STATE LAW PERTAINING TO COMPLEX LITIGATION	339
A.	<i>Frye v. United States</i>	339
B.	<i>Daubert v. Merrell Dow Pharmaceuticals, Inc</i>	340
III.	PROBLEMS WITH COMPLEX MEDICAL MALPRACTICE LITIGATION.....	342
A.	<i>Juror Incompetence</i>	342
1.	Lay Juror Comprehension	343
2.	Exclusion of Highly Educated or Skilled Jurors	347
3.	Juror Sacrifice.....	348
4.	Cross-Section of the Community?.....	348
5.	The Decline of Personal Responsibility	350
B.	<i>Judicial Incompetence</i>	351
1.	Retired Judges.....	351
2.	Judicial Instructions	352
3.	Appellate Courts	353
C.	<i>Attorney Greed</i>	353
D.	<i>Expert Witnesses</i>	355
1.	“Mystic Infallibility”	355
2.	Physician Critiquing	356
3.	Commercialization of the Expert Witness Industry.....	357
4.	Attacking Expert Witnesses.....	358

IV. RECOMMENDATIONS FOR REFORM.....	359
A. <i>Reform of the Jury System in Complex Scientific/Medical Cases</i>	359
1. Jury Selection.....	360
2. Special "Blue Ribbon" Juries	361
3. Abolishing the Lay Jury in Complex Civil Litigation	362
4. Specialization of Judges, Juries, and Courts	363
5. Complexity Exception	364
6. Miscellaneous Recommendations for Change.....	365
B. <i>Stricter Standards for Expert Witnesses in Complex Scientific/Medical Cases</i>	366
1. Stricter Standards for Admission of Scientific Evidence	366
2. Judicial Awareness of Expert Biases.....	367
3. Court-Appointed Expert Witnesses	367
V. CONCLUSION.....	368

I. INTRODUCTION

A. *Medical Malpractice in Florida*

The State of Florida is a hotbed for medical malpractice litigation. Several factors come into play that confirm this contention, such as overall state population, percentage of healthcare consuming population, and the rise of tort litigation in general throughout the United States. Perhaps one of the largest contributors to the rise in medical malpractice litigation is due to the modern achievements in medicine. Indeed, physicians may have become the victims of their own success. Physicians can heal people today in a way that was not even imaginable as early as ten years ago. Certainly the medical advancements that we observe today will be outdated in a matter of years.

Florida currently ranks third in the nation with respect to frequency of medical malpractice litigation.¹ The rise in Florida medical malpractice

1. See Best's Rev. - Prop.-Casualty Ins. Ed. 78 Medical Malpractice, 1999 WL 10020781 (Aug. 9, 1999); see also F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295, 301 (1989) (discussing other factors contributing to the rise in medical malpractice: population growth, increased use of medical care, inflation, changes in physician-patient relationships, changes in attitude of jurors toward physicians, improved skills on the part of plaintiff attorneys, and a greater expectation of healing in

litigation has not occurred overnight by any account. In fact, the most noticeable rise came in the middle half of the 1980s during the “medical malpractice crisis” in Florida, a name most commonly tabbed by the insurance industry due to the astronomical rise in medical malpractice insurance premiums. The rise of medical malpractice litigation has created numerous problems and caused extreme frustration within the legal and medical communities.²

The State of Florida adopted legislation in an attempt to curtail the medical malpractice crisis of the 1980s. Chapter 766 of the *Florida Statutes*³ was adopted in an attempt to control and limit the increasingly popular tort.⁴

One of the most unique aspects of Florida’s medical malpractice statute is the mandatory ninety-day pre-suit period for prospective plaintiffs seeking to file a medical malpractice lawsuit.⁵ According to this pre-suit requirement, a prospective plaintiff alleging medical negligence against a physician, hospital or other health care provider must wait ninety days before filing a lawsuit against these prospective defendants.⁶ During those ninety days, informal discovery, including unsworn statements from perspective parties and witnesses, takes place and the prospective defendants are required to conduct investigations with respect to the prospective plaintiff’s claims.⁷ Early settlement or binding arbitration is encouraged for claims of highly probable liability.⁸

modern society) (citing David Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1183 (1975)).

2. Hubbard, *supra* note 1, at 313 (suggesting that many physicians are so frustrated over, or in fear of, medical malpractice that they avoid specialties and medical procedures that are considered high risk for claims. *Id.* Hubbard also notes that many physicians practice “defensive medicine” including ordering several tests and procedures that are unnecessary, but used solely to avoid a risk of liability). Also, physicians tend to practice more detailed record keeping because of fear over lawsuits. *Id.* at n.69.

3. FLA. STAT. § 766 (2000).

4. *Id.* See also Hubbard, *supra* note 1, at 309–12 (describing increases in medical malpractice litigation as caused by too many lawsuits filed, plaintiffs prevailing too often, and damage awards being too high). Hubbard presents an argument summarized in six categories: “1) recent rule changes that unfairly favor plaintiffs; 2) problems resulting from statutes of limitations that are too lengthy; 3) inadequacy of common-law rules concerning compensatory damages; 4) injustice of rules governing punitive damages; 5) the cost and unfairness involved in administering the system; and 6) inadequate mechanisms to prevent ‘frivolous’ claims.” *Id.* at 310.

5. § 766.106(3)(a).

6. *Id.*

7. *Id.*

8. *Id.*

The primary motivation behind states having a pre-suit period prior to the filing of a formal lawsuit is to reduce the overall number of lawsuits either by preventing the filing of frivolous lawsuits or providing an opportunity to settle meritorious claims.⁹ In addition to the mandatory pre-suit screening period, the prospective plaintiff must enclose a corroborating opinion from a qualified medical expert with the notice of intent to initiate medical malpractice litigation on the prospective defendants.¹⁰ This opinion must detail the alleged deviations from the prevailing standards of care or other assertions of medical negligence on the part of the prospective defendants.¹¹

In an attempt to monitor and curb medical malpractice litigation, the notice of intent to initiate medical malpractice litigation and the accompanying corroborating expert opinion are filed with the Department of Health, Agency for Health Care Administration (“AHCA”).¹² AHCA may decide to conduct an independent investigation and take additional action against the licensed health care provider depending upon the seriousness of the allegations and the probability of liability. To date, there have been no conclusive observations regarding whether or not Chapter 766 of the *Florida Statutes* has had any of the intended results.

B. Rise in Complex, Scientific Based Litigation in the United States

Florida is not unique with respect to experiencing a rise in complex, medical malpractice litigation. All in all, the United States has experienced an alarming rise in the frequency of complex, scientific, and technological litigation.¹³ Courts and juries are increasingly called upon to absorb large doses of scientific theory in cases involving toxic torts, medical malpractice, criminal charges based upon scientific evidence, products liability and most types of personal injury cases.¹⁴ In fact, one study showed that ninety-seven

9. Jody Weisberg Menon, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform*, 21 AM. J.L. & MED. 281, 288 (1995); see also Hubbard, *supra* note 1, at 324–26 (discussing that pre-suit notices of intent to initiate medical malpractice litigation may facilitate more voluntary settlements prior to the filing of a formal lawsuit).

10. § 766.203(2)(b).

11. *Id.*

12. § 766.106(2). In addition, Professor Hubbard discusses other “internal” physician deterrents such as ethics, physicians’ concerns for healing their patients, and peer review. See Hubbard, *supra* note 1, at 315 n.75.

13. See Menon, *supra* note 9, at 281–82.

14. *Id.*

percent of all medical malpractice lawsuits required the use of medical experts to assist jurors in understanding the material presented in the case.¹⁵

A study of all California civil jury trials from 1985 to 1986 revealed that expert witnesses testified in eighty-six percent of all civil trials and the cases, on average, involved nearly four different expert witnesses.¹⁶ Due to increases in technology, science, medicine, and, subsequently, litigation, expert witnesses have become a “mainstay” in the courtroom.¹⁷ More specifically, the significant majority of expert witnesses in trials are medical doctors.¹⁸

1. Complexity of Litigation

With increases in complexity of litigation and technological advancements, particularly in medicine, medical issues are often far beyond the comprehension of the normal citizen.¹⁹ Because of these increases, it is argued that most complex lawsuits “may be properly outside of the province of the current jury system when they involve very complex issues . . . [such as] medical testimony.”²⁰ Add the adversarial manner in which this complex information is presented and it even further perplexes the layperson.²¹ The complexity and scientific nature of litigation has increased so much that one

15. See *id.* at 289. Menon also discusses a quote from *Connors v. Univ. Assocs. in Obstetrics & Gynecology*, in which the court states: “in this era of constantly developing medical science, cases in which injuries bespeak negligence to the average person occur less and less and complex cases predominate.” 769 F. Supp. 578, 585 (D. Vt. 1991).

16. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1120 (1991).

17. Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 358 (1998).

18. *Id.*

19. See Menon, *supra* note 9, at 296. Menon argues that because of this fact, juries composed of “laypersons are no longer suitable for cases involving complex medical evidence.” *Id.*

20. *Id.* at 299.

21. Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 715 (1996) (quoting B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*,” *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1244 (1993) (comparing the courtroom to the classroom and concluding that the principle discrepancy between the two is that classrooms encourage interaction and the exchange of information to effectuate learning and understanding whereas, in the courtroom, jurors are “acted upon” and expected to remain passive yet render judgment based on what they supposedly should comprehend).

author was prompted to comment that “jurisprudence” has now been circumvented by “juriscience.”²²

What constitutes a “complex case” has been defined using four elements.²³ These four most prominent elements are: multiple party litigation, complex issues and case facts, cases involving “highly technical evidence,” and difficulties associated with providing the proper remedy.²⁴ Some of the difficulties associated with complex litigation exist because these cases typically involve several parties, several issues, technical evidence, and difficult questions of law.²⁵ These types of cases commonly turn on the believability of the respective parties’ expert witnesses. Unfortunately, with the high dollar stakes of modern complex litigation, expert witnesses are often called upon to stretch the truth, deviate from generally accepted scientific concepts within their respective professions, or present fraudulent evidence or theories. The testimony these experts provide is commonly referred to as “junk science.”²⁶

2. Science v. Law

One of the most prominent quandaries between science and law rests in the fact that law demands absolute truths and science cannot indisputably provide them.²⁷ The lack of absolute certainty in science is the basis for much of the debate in complex litigation. The legal community seems devoid of the understanding that science is the search for truth, not the determination of the truth.²⁸ Unfortunately, the influence of the courtroom

22. See Howard T. Markey, *Jurisprudence or “Juriscience?”* 25 WM. & MARY L. REV. 525, 532 (1984).

23. See Broyles, *supra* note 21, at 720; see also *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084–86 (1980) (identifying litigation complexity as encompassing three common elements: the size of the lawsuit, the difficulty of the issues of the case, and the difficulty of separating the different aspects of the case).

24. *Id.* (quoting Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1711 (1992)).

25. *Id.* at 737.

26. See PETER W. HUBER, *GALILEO’S REVENGE* 2–3 (1991). Huber describes junk science as trial testimony provided by an expert that is unsupported by any scientific method, valid data, and standard scientific thinking. *Id.*

27. Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror “Incompetence” and Scientific “Objectivity,”* 25 CONN. L. REV. 1083, 1098 (1993) (discussing the beliefs that scientists are fair and objective in their search for “truth” and the erroneous assumption that for every difficult scientific question, there is always some definite answer).

28. See Markey, *supra* note 22, at 526–27.

dollar may lead scientists to insist upon “justice-friendly” absolute certainties despite the fact that few to none actually exist.

With the rise in complex litigation, junk science has invaded the courtroom, allowing juries to determine causation when causation does not, in fact, exist.²⁹ One dated, yet classic, example of a court’s reliance on junk science stems from a 1964 Pennsylvania case in which the Supreme Court of Pennsylvania upheld a trial court’s decision despite the fact that the jury erroneously relied upon evidence that suggested a rear end vehicle collision caused lung cancer.³⁰ In another startling case, a woman successfully sued for damages after she purportedly developed breast cancer from a slip and fall.³¹ While these “trauma induced cancer” cases were later refuted by the medical community, they provide an ample illustration of how a jury can be persuaded to rely upon inaccurate medical theories.

Law requires absolute truths on an immediate basis. When faced with litigation involving complex scientific questions, law demands that there be an answer to a question, and unfortunately, the courts are not patient in their demands. Science, on the other hand, has a more patient, thorough nature. Science, to be considered generally accepted such that law would not question its veracity, needs to be continually tested, debated, practiced, and proven to progress beyond initial uncertainty.³² What is certain, however, is that we are becoming a more complex, scientific and technologically advanced community as a matter of societal progress. Due to this progress, science, in one way or another, is now an everyday part of litigation.³³ This overwhelming influence of science is without a doubt beyond that which was contemplated by the framers of the Constitution³⁴ or even early appellate courts who handed down decisions regarding complex litigation.

29. See HUBER, *supra* note 26.

30. See *Baker v. DeRosa*, 196 A.2d 387 (Pa. 1964). Interestingly, the Chief Justice dissented, stating that:

Plaintiff's case is so farfetched and so filled with contradictions by the decedent and conjectures by his doctors, while the testimony of defendant's doctors is so positive and strong, I believe that the verdict was clearly against the weight of the evidence and that a new trial should be granted in the interest of justice.

Id. at 392.

31. See *Daly v. Bergstedt*, 126 N.W.2d 242 (Minn. 1964).

32. Renee A. Forinash, *Analyzing Scientific Evidence: From Validity to Reliability with a Two-step Approach*, 24 ST. MARY'S L.J. 223 (1992).

33. Franklin Strier, *The Educated Jury: A Proposal For Complex Litigation*, 47 DEPAUL L. REV. 49, 66 (1997).

34. *Id.* at 65.

Scientific cases often involve evidence so complex that only attorneys, physicians and other scientists can appreciate it.³⁵ The American legal system is grossly unprepared to tackle the beast of scientific litigation. Discrepancies exist between law and science that often result in less than accurate scientific theory being presented and admitted in a courtroom.³⁶ Issues as to the admissibility of “junk science” are vital to litigation reform efforts for several reasons. Problems with scientific evidence are important because science is often outcome-determinative in trials. The influx of science also affects the volume of dockets and often seriously impairs lay jurors’ ability to decipher the issues of the cases.³⁷ The courts are charged with barring immature, untested, or inaccurate scientific data, yet questions exist as to the court’s ability, as with the ability of lay jurors, to assess the veracity of scientific evidence.³⁸ As a result of the courts’ gatekeeper role, it is vital that the judge’s ability to adequately test scientific theories be improved, either by adoption of reform measures or improved guidelines established by higher court rulings.

3. “Junk Science”

Junk science, as it is named, comes in many forms.³⁹ Junk science includes scientific theories that are novel, inaccurate, experimental, and immature.⁴⁰ Experts may attempt to establish causation based upon a scientific theory which is inaccurate or which is improper for the purposes presented by the expert witness. For example, an expert medical physician may attempt to give an exact date in time when a specific cancer metastasized, which, by modern medical standards, is impossible to determine to that degree of specificity. Examples of junk science are endless; however, they often involve assertive “pinpoint” predictions of controversial events to a specific degree, which are scientifically unfounded.

35. *Id.* at 75.

36. Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 PSYCH. PUB. POL. & L. 1226, 1234 (1998).

37. Kaushal B. Majmudar, *Daubert v. Merrell Dow: A Flexible Approach to the Admissibility of Novel Scientific Evidence*, 7 HARV. J.L. & TECH. 187, 194 (1993).

38. *See* Shuman, *supra* note 36, at 1235.

39. *See* HUBER, *supra* note 26. The term “junk science” refers to the concept of scientific evidence that is presented in a lawsuit, either for purposes of causation or damages, which is inaccurate, unfounded, controversial, untested or otherwise invalid in the scientific community. *Id.*

40. *Id.*

II. EXAMINATION OF FEDERAL AND STATE LAW PERTAINING TO COMPLEX LITIGATION

Due to the fact that most complex cases turn on scientific evidence, the parties often dispute the accuracy of their adversaries' scientific evidence or opinions. These disputes can take place in a number of ways, either by pre-trial motion, objection during trial, or hearings as to the admissibility of evidentiary testimony or opinion as well as at the appellate level. The judicial system's attempts at preventing the admissibility of junk science are challenged by the ambiguity between just when a scientific principle or discovery crosses the line between "experimental" and "accepted" status in the particular scientific communities.⁴¹

A. *Frye v. United States*

The courts since the early twentieth century have had admissibility standards for scientific evidence.⁴² In *Frye v. United States*,⁴³ the Federal Court of Appeals for the District of Columbia was called upon to assess the accuracy of a polygraph test in a criminal trial.⁴⁴ The Court held that only scientific evidence that was "generally accepted" by a substantial portion of the scientific community would be entered into evidence.⁴⁵ The *Frye* test, as it became known, was the standard that courts applied to cases where scientific evidence was challenged with respect to admissibility. For scientific evidence to be admitted for a jury to consider, it must have been generally accepted by a substantial portion of the respective scientific community involved in that particular field of practice.⁴⁶ For half of a century, *Frye* was the standard for militating against the presentation of scientific evidence that was novel, experimental, or immature. With little exception, *Frye* remains the admission standard by which scientific evidence must pass in Florida.⁴⁷

41. See Majmudar, *supra* note 37, at 187.

42. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

43. 293 Fed. 1013 (D.C. Cir. 1923).

44. *Id.*

45. *Id.* at 1014 (emphasis added).

46. *Id.*

47. See Poulin v. Fleming, 782 So. 2d 452 (Fla. 5th Dist. Ct. App. 2001).

B. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

In 1993, the Supreme Court of the United States set aside the Frye test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁸ The Supreme Court ruled that Frye had been superseded by the Federal Rules of Evidence, specifically Rule 702.⁴⁹ Under the Federal Rules of Evidence, the admission of scientific evidence in a trial must be permitted if it will assist the jury in determining factual issues of the controversy before them.⁵⁰ The rule simply required that the particular evidentiary position must be based upon sufficient facts or data, a product of reliable methods, and the expert's position was applied to the facts before the court.⁵¹ In addition, the Supreme Court in *Daubert* charged the trial judge with being the "gatekeeper" with respect to the admissibility of scientific evidence.⁵² Justice Blackmun, who authored the *Daubert* opinion, even further pronounced the majority's opinion that the Frye test was too stringent a test to determine admissibility of scientific evidence.⁵³ Justice Blackmun blasted Frye as going against the liberal thrust of the rules of evidence which attempt to admit opinion testimony.⁵⁴

The "general acceptance" test, however, was not totally discarded by the *Daubert* decision. Under *Daubert*, "general acceptance" only remains as one of the many elements that aid a court when faced with an admissibility

48. 509 U.S. 579 (1993).

49. *Id.* (citing to FED. R. EVID. 702). FED. R. EVID. 702 holds that:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

50. FED. R. EVID. 702.

51. *Id.* See also Majmudar, *supra* note 37, at 188 (discussing *Daubert* as setting aside the general acceptance test of *Frye* making general acceptance no longer a requirement to admissibility of scientific evidence).

52. *Daubert*, 509 U.S. at 580; see also Majmudar, *supra* note 37, at 190 (discussing that the trial judge must ensure that any and all scientific testimony or evidence admitted during the trial is "not only relevant, but also reliable").

53. *Daubert*, 509 U.S. at 580.

54. *Id.* at 579.

decision.⁵⁵ The much-broadened framework of *Daubert* permit the courts, specifically the trial court judge, a wider, more liberal range of discretion that was not afforded by the *Frye* standard.⁵⁶ The majority in *Daubert* have attempted to broaden access to the courts for novel scientific evidence while permitting the trial court more discretion with the hope of keeping junk science out of the courtroom and thwarting a scientific “free-for-all.”⁵⁷ The *Daubert* analysis has now become the norm for federal courts when assessing the admissibility of scientific evidence.

Florida, unlike most of her sister states, still relies on *Frye* with respect to scientific evidence in the courtroom. From 1953 to present day, Florida courts, including the Supreme Court of Florida, have upheld the use of *Frye*.⁵⁸ By its refusal to follow the path of most jurisdictions in the United States, Florida has shown a commitment to combating junk science by maintaining the stricter, objective standards set forth in *Frye*, wherein a scientific concept must conform with the “general acceptance” test.⁵⁹ In Florida, the burden for establishing the particular scientific concept is generally accepted within the scientific community lies with the party wishing to introduce the evidence and/or testimony.⁶⁰ This gives opposing parties better opportunity to ensure that the evidence used against them will be the more trusted, viable scientific truth rather than junk science motivated by a party’s attempts to pull a judicial “fast one.”

55. *Id.* at 580–81; *see also* Majmudar, *supra* note 37, at 190. Majmudar illustrates the four principal elements cited by the Court for determining the relevance and reliability of scientific evidence. *Id.* These four elements are:

1) whether the theory or technique had been tested in order to check for falsifiability, refutability, and repeatability, 2) whether or not the evidence had been subjected to peer review, 3) the rate of error of the technique and the standards used to control it and, 4) the level of acceptance of the technique within the relevant scientific community.

Id.

56. *See* Majmudar, *supra* note 37, at 203.

57. *Daubert*, 509 U.S. at 595.

58. *See, e.g.*, *Kaminski v. State*, 63 So. 2d 339 (Fla. 1953); *Delap v. State*, 440 So. 2d 1242 (Fla. 1983); *Andrews v. State*, 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988); *Poulin v. Fleming*, 782 So. 2d 452 (Fla. 5th Dist. Ct. App. 2001).

59. *Frye*, 293 Fed. 1013; *see also* Shuman, *supra* note 36, at 1236 (commenting that perhaps the most significant aspect of *Frye* is that it helped shape judicial scrutiny to a level beyond consideration of only the expert’s reputation, qualification and credentials when making a decision regarding the admissibility of evidence).

60. *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995).

III. PROBLEMS WITH COMPLEX MEDICAL MALPRACTICE LITIGATION

Despite maintaining the stricter *Frye* standard, medical malpractice litigation in Florida is riddled with problems. These litigation-based problems in Florida, as with other states, develop in a myriad of judicial areas, some of which are the most fundamental to the American system of justice. Given the rise of complex scientific litigation, the two areas that most commonly come under attack are the jury system and the expert witness industry.

A. *Juror Incompetence*

To challenge the American jury system is without question a very bold, ominous undertaking. The American system of justice is grounded upon the notion of having a jury of lay persons that is representative of the community and capable of reaching a fair, unbiased decision decide the fate of their neighbor.⁶¹ The American jury system gives jurors a level of sovereign authority that is seldom assigned to the average citizen.⁶² In fact, the United States is now the only country in the world where the jury continues to play such a powerful and central role in case adjudication.⁶³ The modern controversy rests in the glaring problems associated with selecting a lay jury that is capable of reaching fair, unbiased decisions in lengthy cases involving scores of highly technical, confusing evidence.⁶⁴

Modern lay juries are criticized for lacking the wherewithal to understand the legal system, the evidence presented, technical or scientific theory, and the court's instructions on deliberation and reaching a verdict.⁶⁵ Juries are called upon in complex medical malpractice cases to hear seemingly endless amounts of medical testimony and evidence, most of which is innovative and subject to debate amongst the medical profession. Medical malpractice cases involving numerous defendants often last for several weeks, which charges a jury with remembering very complex evidence and testimony presented to them by the litigants. Moreover, this complex evidence is often presented weeks before they begin deliberation and, in most courts, jurors are without the luxury of even taking notes to

61. Shuman, *supra* note 36, at 1227.

62. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001).

63. *Id.* at 59.

64. *Id.* See also Menon, *supra* note 9, at 284–85.

65. Strier, *supra* note 33, at 50.

record the information presented to them.⁶⁶ As one author aptly explained, “[t]he law seeks the benefit of the common person’s judgment but asks that individual to apply legal rules often beyond the comprehension of one not trained in the law.”⁶⁷ This allegation is perhaps even further accredited when difficult medical theories are added to the jurors’ confusion in medical malpractice trials. To the most trained medical expert, this would be a difficult, frustrating, and trying task. The question has been posed and, in fact, has been the subject of much debate: do lay juries possess the level of competency to adequately and accurately render judgment in complex scientific/medical cases?⁶⁸ An equal amount of debate persists as to what reform measures to take now that it is becoming readily apparent that lay juries cannot possibly be counted on to adequately and accurately render judgment in complex scientific cases.⁶⁹

1. Lay Juror Comprehension

By simple logic, it seems somewhat archaic to hold a jury to render judgment based upon facts and evidence that took the litigants months or even years to assimilate.⁷⁰ This problem is even more compounded when you insert complex medical or scientific evidence into the fray as professionals, such as physicians or scientists, seemingly spend their entire careers attempting to master an understanding of these concepts.⁷¹ For instance, can a lay juror honestly be expected to fully comprehend the

66. Dann, *supra* note 21, at 1250–52 (advocating the permission of juries to take notes during trial with a cautionary instruction that taking notes is not required and should not be given greater weight than jurors’ memories).

67. Strier, *supra* note 33, at 52.

68. See Menon, *supra* note 9, at 284–85.

69. *Id.*

70. *Id.* at 283–84.

71. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 263 (1993). In addition, Professor Vidmar notes that:

[S]ome legal professionals have questioned how a group of laypersons can make intelligent and unbiased judgments in tasks to which professionals devote years of education and their entire careers. At the same time, doctors and their professional organizations have questioned whether any group of persons other than physicians can make judgments about medical negligence because of the difficulty and complex technical medical questions that they allege are involved in malpractice disputes.

Id. See also HUBER, *supra* note 26, at 33 (claiming that nonscientists are “unequipped to differentiate good science from bad”).

prevailing professional standard of care⁷² with respect to an issue as complex and ill-defined as cancer staging? Not only are they charged with understanding standards of care in medical malpractice cases, they are also called upon to determine whether or not that ill-defined, vague standard of care has, in fact, been breached.⁷³

One author conducted a study involving eleven anesthesiologists from Harvard Medical School in which these physicians were given the facts of twelve medical malpractice cases where juries brought back verdicts against other anesthesiologists.⁷⁴ The surveyed anesthesiologists were asked to review the facts of these twelve cases and determine whether or not the standard of care had, in fact, been violated as found by the juries in the actual trials.⁷⁵ Physician agreement with the jury verdicts was less than sixty percent.⁷⁶ It may be argued that the surveyed anesthesiologists were biased in favor of their peers; however, it should also be noted that those physicians surveyed had no stake in these lawsuits and their judgment, favorable or unfavorable, had no bearing on the cases. The fact that less than sixty percent of the verdicts were agreed with by physicians skilled in the field of anesthesiology suggests that at least some errors were made by these juries.⁷⁷

For the most part, the less educated a juror is, the less likely they will be able to comprehend this type of evidence.⁷⁸ On the other hand, the more education, skills, or related life experience a juror has, the more comfortable they will be with complex cases.⁷⁹ The more educated types of jurors tend to dominate those with less education, skills or experience.⁸⁰ Education, training, and experience play a far less crucial role in civil and criminal trials involving shorter presentations of more simple, everyday-life evidentiary issues.⁸¹ Jurors in these roles can call upon their everyday-life experiences

72. "Prevailing professional standard of care" in medical malpractice cases in Florida is defined as: "[t]hat level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar health care providers." FLA. STAT. § 766.102 (2000).

73. See Menon, *supra* note 9, at 284. Menon notes that because of this difficult responsibility, juries are quite often "guessing when they render a verdict." *Id.*

74. Bryan A. Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 CORNELL J.L. & PUB. POL'Y. 121 (1997).

75. *Id.*

76. *Id.* at 129.

77. Sanders, *supra* note 17, at 361.

78. See Broyles, *supra* note 21, at 720.

79. *Id.* at 720-23.

80. *Id.* at 720.

81. *Id.* at 723.

to plug in gaps in evidence or issues.⁸² This ability to plug in holes is widely absent when it comes to complex cases.⁸³ In several surveys of judges and jurors involved in complex cases, the common theme of difficulty or frustration was centered on technical, medical and/or scientific evidence.⁸⁴ One author noted that “an uncomprehending jury could frustrate a complete remedy and could be an instrument of injustice.”⁸⁵

With the yearly advances in medical science and technology, medical malpractice cases and medical standards of care are, for the most part, far beyond the comprehension of the average citizen.⁸⁶ These advances in medicine require practicing physicians to constantly study and update their knowledge with respect to the changes in their respective specialties. Lay jurors who are confronted with complex scientific issues tend to be frustrated by the difficulty of the evidence presented to them.⁸⁷ As a result, studies have shown that these jurors focused more on the appearances of witnesses, the credentials of the expert witnesses, and the demeanor of the attorneys trying the cases.⁸⁸ Jury attention span decreases in long trials, especially when concerning technical medical evidence.⁸⁹ These difficulties are even further progressed by the adversarial nature with which they are presented in trials.⁹⁰ Arguably, opposing attorneys and their retained expert witnesses may even further confuse jurors when they attack the evidence presented by their adversaries with equally complex and completely different evidence. Lay jurors are simply not qualified to accurately assess the credibility of the evidence and the witnesses.

82. *Id.*

83. *See* Broyles, *supra* note 21, at 723.

84. *Id.*

85. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1637 (1983) (discussing the controversial theory that a jury not represented by educated persons could be deemed unconstitutional); *see also* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (suggesting that the “practical abilities and limitations of juries” may be a limit on the Seventh Amendment right to a jury trial); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (finding that lay jurors lacked the capacity to decide complex litigation case involving antitrust issues).

86. *See* Menon, *supra* note 9, at 296.

87. *See* Broyles, *supra* note 21, at 722.

88. *Id.* (discussing case study by the American Bar Association).

89. Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS., 269, 280 (1989).

90. *See* Broyles, *supra* note 21, at 722.

Former Chief Justice Warren Burger has been quoted on occasion discussing the problems with jurors, particularly in complex cases.⁹¹ In one of his most noted comments concerning this issue, Justice Burger stated that, "civil juries waste time and are often incapable of understanding the issues presented to them."⁹² Some appellate courts have also noted the limitations of lay juries.⁹³ In one appellate case, the court commented that "while the jury can contribute nothing of value so far as the law is concerned, it has an infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour."⁹⁴

Questions exist as to whether lay jurors even attentively consider the evidence when it stretches beyond their realm of understanding. In Florida, prospective jurors are often questioned during voir dire regarding jury instructions with respect to their capabilities of harboring no sympathy considerations for plaintiffs.⁹⁵ This is done in an attempt to set an early mindset to jurors that they will not only be able to render a verdict not based on sympathy but this instruction will remain in their collective minds throughout the trial.⁹⁶

Studies suggest that the more complicated the case and evidence, the less attentive the lay jury will be.⁹⁷ Jurors in one particular study involving

91. *Id.* at 723.

92. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process – The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 17 (1990). Interestingly, Justice Burger is not the only Supreme Court Justice who has voiced disapproval for the modern jury system. Justice Sandra Day O'Connor has commented:

It is unfortunate that, in high-profile cases in this country, which sometimes are high-profile precisely because they are very important, courts are forced to look high and low for jurors who never read newspapers, never watch the news, and never give much thought to issues of public importance. I'm not saying that those jurors are incapable of deciding cases properly. But I am saying that those jurors probably are unrepresentative of their community, because they probably are on average considerably less well-informed citizens than a random cross-section would provide.

See Lilly, supra note 62, at 65 n.39 (quoting Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW 20, 23 (June, 1997)).

93. *See Ross v. Bernhard*, 396 U.S. 531 (1970); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980); *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir. 1948).

94. *See Skidmore*, 167 F.2d at 60.

95. FLA. STD. JURY INST. 7.1.

96. *Id.*

97. *See Broyles, supra* note 21, at 722 (citing a study conducted by Molly Selvin and Larry Picus of The Rand Corporation. *The Debate over Jury Performance: Observations from a Recent Asbestos Case*, 24–25 (Rand Inst. For Civil Justice 1987)). Selvin and Picus

asbestos commented that when the evidence fell outside of their level of competency, they focused more on the appearance and demeanor of the attorney and the expert witnesses rather than the substantive testimony being given.⁹⁸ Collectively, the jurors in the asbestos case study had difficulty with understanding the chemical reaction and its nature, the progression of the chemical with respect to the human physiology, and the long-term effects of exposure.⁹⁹ Understanding these types of concepts in all complex litigation cases is absolutely crucial to determining causation and damages as well as adequately reaching a verdict.

2. Exclusion of Highly Educated or Skilled Jurors

One of the most common problems with modern lay juries is the exclusion of highly trained, educated, and skilled citizens from panels.¹⁰⁰ There are many reasons why college educated or other highly skilled jurors do not make it on to panels. Attorneys, particularly on the plaintiff side, fear that more educated jurors would be capable of seeing through weak points in their cases and serve as leaders on jury panels who are able to sway less educated, "follower" jurors to better understand what has been presented at trial.¹⁰¹ Jury consultants are often retained in one way or another to develop a profile of the specific attributes that the attorney should look for in a juror which appear favorable toward their case. Persons that appear to be well educated, perceptive, and independent-minded tend to be the antithesis of what attorneys, particularly plaintiff attorneys, want on a panel.¹⁰² The more educated and sophisticated the juror is, the more he or she tends to dominate the less educated jurors.¹⁰³ Also, the less educated jurors are commonly preferred by plaintiff attorneys because they tend to be swayed by sympathy

illustrated that jurors involved in a class action lawsuit concerning asbestos were confused by the adversarial presentation of scientific and medical evidence. See Broyles, *supra* note 21, at 722.

98. *Id.* See also Sanders, *supra* note 17, at 362 (discussing that jurors in this study misunderstood the development of medical problems associated with asbestos exposure).

99. Broyles, *supra* note 21, at 722; see also Lilly, *supra* note 62, at 59–60 (commenting that doubts about juries, unfamiliar with the subject case material, contribute to doubts about the fairness and efficiency of the American jury system).

100. See Strier, *supra* note 33, at 72–73.

101. *Id.*

102. See Lilly, *supra* note 62, at 64.

103. See Broyles, *supra* note 21, at 722.

and to question the claims of the plaintiff far less than those jurors with more education.¹⁰⁴

3. Juror Sacrifice

Jurors such as doctors, lawyers, accountants, engineers, and other professionals are often stricken because of the obvious financial difficulties they would incur from serving on jury panels during complex, lengthy trials.¹⁰⁵ Not only can these individuals not afford the financial sacrifice of serving on a jury panel, their professional practices typically would suffer gravely from their absence.¹⁰⁶ Imagine the problems associated with a pediatrician, or any other physician for that matter, being suddenly taken away from their patients because of jury duty or, even worse, a four-week jury trial. Yet, converse to that empathy, that physician may be precisely what the jury panel is lacking when faced with a need for an educated professional who is capable of understanding and appreciating the complex evidence which will be proffered at trial. It has been suggested that long, complex trials have a built-in bias, favoring jurors who are ill-informed, less skilled and less educated than the average citizen.¹⁰⁷ Likewise, it is difficult to contradict the theory that a decline in the capacity and qualifications of jurors would result in a decline in the accuracy and fairness of jury verdicts.¹⁰⁸ In addition, regardless of where a person fits into society, it cannot be argued that the burdens associated with jury duty are not far heavier in modern day America than were ever contemplated in the past.¹⁰⁹

4. Cross-Section of the Community?

Questions exist as to whether or not a jury comprised of no college-educated individuals is, in fact, a representative cross-section of the community.¹¹⁰ Moreover, is a jury comprised of no college-educated jurors or other professionals really a jury of a defendant-physician's peers in a medical malpractice trial?¹¹¹ If roughly forty percent of American citizens

104. *Id.*

105. Strier, *supra* note 33, at 72-73.

106. *Id.*

107. *See* Lilly, *supra* note 62, at 65.

108. *Id.*

109. *Id.* at 61.

110. Strier, *supra* note 33, at 76.

111. *Id.*

have at least some college education,¹¹² a jury comprised of six or twelve individuals below that educational level does not represent a cross-section.

One of the major advantages to using, or even requiring, a certain number of college educated jurors on a complex litigation panel is that college tends to train an individual in the art of analyzing data and various theories to better formulate an educated understanding of what has actually been presented to them.¹¹³ It is suggested that a college-educated individual gets less frustrated when faced with mountains of difficult information because they have experienced at least some degree of similar challenges at some point in college.¹¹⁴ In addition, college educated jurors tend to better understand and follow standard jury instructions which are one of the most difficult tasks faced by juries.¹¹⁵ Unfortunately, with the rise in the college-educated population, there has been a resulting rise in these more capable individuals having the highest level of motivation to avoid jury service.¹¹⁶

With education on the rise in society, it could be argued that a jury containing few educated members is not a cross-section of the community.¹¹⁷ Arguments are made that we must find a way to make avoiding jury duty more difficult for these higher educated jurors or begin requiring full or partial "blue ribbon" juries comprised of certain percentage of highly educated individuals.¹¹⁸ A higher court ruling requiring a certain percentage of educated jurors would significantly aid in the establishment of "blue ribbon" juries.¹¹⁹ Opponents argue that requiring a mandatory percentage of higher educated jurors is an elitist ideology.¹²⁰ Proponents claim that requiring juries to contain an adequate cross-section of the community

112. *Id.* at 63 n.68; *see also* Lilly, *supra* note 62, at 62–64.

113. *See* Lilly, *supra* note 62, at 62–65 (referencing studies regarding changes in percentages of college-educated citizens as well as changes in the national workforce); *see also* Strier, *supra* note 33, at 59–60.

114. *See* Strier, *supra* note 33, at 59–60.

115. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1320 (1979).

116. *See* Lilly, *supra* note 62, at 63. Lilly points out that "the persons apt to be the most capable jurors are also the individuals with the greatest incentives to avoid jury duty . . . the proportion of the population that has both enhanced ability and a heightened motivation to escape jury service has significantly increased." *Id.*

117. *Id.* at 65.

118. *See* Strier, *supra* note 33, at 60. Professor Strier discusses the likelihood that jury decision-making would be enhanced by using specially qualified jurors. *Id.* at 58.

119. *Id.* at 76.

120. *Id.* at 59.

which, by all accounts encompasses a sizable percentage of college-educated citizens, is not elitism; rather, it is simply functionalism or fairness.¹²¹

5. The Decline of Personal Responsibility

Another area of concern that rests with juries comes from alarm over society's growing disregard for personal responsibility as well as a general increase in the litigiousness of the American people. One author noted the American ideology that "those who suffer injuries are quick to place blame upon others."¹²² Americans have quite positively embraced the notion that someone else is always at fault.¹²³ One of the most often cited examples of over zealous litigation and the unpredictability of juries is the case involving a New Mexico woman who was awarded over two million dollars for spilling hot coffee on her lap from a McDonald's fast food restaurant.¹²⁴

The rise in dollar amounts of jury verdicts in medical malpractice lawsuits, as well as other complex tort litigation, suggests that jurors are often sympathetic to allegedly injured plaintiffs and, as such, will often render verdicts in favor of these plaintiffs when faced with discrepancies over understanding complex case issues or evidence.¹²⁵ It appears the jurors often give plaintiffs the benefit of the doubt.¹²⁶ Trials involving lay juries require as much strategy to bring out the emotions and even biases of jurors than strategies attacking the opposing party's case on its principles.¹²⁷

121. *Id.*

122. *See* Forinash, *supra* note 32, at 251.

123. *Id.* at 253.

124. *See* Liebeck v. McDonalds Restaurant's, Inc., 1995 WL 360309 (D.N.M. 1994); *see also* Lilly, *supra* note 62, at 56 n.12. Professor Lilly also cites the example of an Alabama jury that awarded four million dollars in punitive damages to a car buyer after the dealer failed to disclose that the car he purchased had been repainted after being slightly damaged prior to delivery. *Id.* The Supreme Court of Alabama reduced the verdict to two million dollars. *See* BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994). This jury verdict was eventually reversed and the case was remanded to the Alabama trial court by the Supreme Court of United States, but this example is an astonishing example of how far some juries will go with excessive verdicts. *Id.* The Court noted that the Alabama jury's award was grossly excessive in light of the low level of reprehensibility of the distributor's conduct. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

125. *See* Hubbard, *supra* note 1, at 312 (commentating that "juries are likely to be sympathetic to the plight of victims and, therefore, may tend to resolve doubts in favor of plaintiffs regardless of what they are instructed to do by the judge").

126. *Id.*

127. Lilly, *supra* note 62, at 57 (pointing out that cases are far too often decided on juror sympathy and emotion rather than substance).

B. *Judicial Incompetence*

Another area for examination is the role of judges in the problems associated with complex litigation. Unfortunately, judges may very well suffer from many of the same problems associated with lay jurors.¹²⁸ Judges, it seems, may be only slightly more capable of sorting through complex scientific evidence as the common lay juror.¹²⁹ Judges are not given the training or the tools they need to understand and control the flow of scientific data that goes through their courtrooms. It is crucial that judges must have some degree of a grasp of the facts, issues and evidence presented in all cases including those involving complex scientific or medical controversies.¹³⁰ If trial court judges are incapable of deciding highly technical cases, than these decisions surely should not be placed in the hands of lay juries.¹³¹

1. Retired Judges

In Florida, judicial competency is an even greater concern because of the continuous assignment of retired judges to preside over trials that promise to span for longer periods of time.¹³² These trials typically all involve complex litigation cases and are assigned to a retired judge docket because of the docket backlog that would be created if the assigned judge presided over a lengthy trial.¹³³ Due to these reassignments, the very cases that demand the highest level of judicial competency are commonly removed from the assigned judge and tried before a retired judge who is unfamiliar with the issues involved in the cases as well as unfamiliar with modern science and technology involved in complex litigation. It should be noted that the concept of retired judges presiding over cases was designed in Florida to permit retired judges to relieve docket backlog, fill in for judges who are off sick or vacationing, or to preside over simple, shorter trials.¹³⁴

128. See Shuman, *supra* note 36, at 1244 n.90.

129. See Menon, *supra* note 9, at 286.

130. *Id.* at 295.

131. See Jacobs, *supra* note 27, at 1088 n.20.

132. See Sue Reisinger, *Lawyer challenges constitutionality of outside judges in Broward*, MIAMI HERALD, Aug. 12, 2000, at B3.

133. *Id.*

134. See *In re Certification of Add'l Judges*, 755 So. 2d 79 (Fla. 2000).

The Constitution of the State of Florida requires judges to be elected by voters within the jurisdiction of the courts over which they will preside.¹³⁵ Retired judges who are appointed to preside over trials are not elected officials and, therefore, are arguably not responsive to the electorate. The right of the citizens of Florida to select their own officials is a sovereign right.¹³⁶ Unreasonable or unnecessary restrictions on citizen's elective rights are unconstitutional.¹³⁷ The constitutional argument that exists with respect to the appointment of retired judges to preside over complex medical malpractice cases is that these retired judges are no responsive to any voting body and, therefore, have no means of being held accountable should the citizens of the particular jurisdiction be displeased with their service.

2. Judicial Instructions

Other problems with trial court judges are predominately centered on the judge's instructions to the jury or judicial assistance provided to juries. The instructions that judges give to juries at the end of the presentation of cases are filled with legal jargon and difficult for jurors to understand. Preformatted jury instructions, which are now used in most states, are unclear and they lack the simplicity and comprehensibility needed by lay jurors.¹³⁸ One author went as far as describing jury instructions as "complex and grammatically constructed in the most confounding way, rife with subordinate clauses and double negatives."¹³⁹ Juries tend to comprehend judicial instructions at an appallingly low level.¹⁴⁰ One court has gone so far as to state that the presumption that jurors understand and follow the court's instructions seems highly artificial.¹⁴¹

Trial court judges, it is argued, should make as much effort as possible to implement strategies for improving jury competence.¹⁴² Unfortunately, trial court judges are either unwilling or lack the authority to further expand their role by making these efforts to assist juror understanding. Additionally, the administrating judges of our nations trial courts should pay careful attention to assigning complex cases to judges who have exhibited some

135. FLA. CONST. art. V, § 10(b).

136. *See* Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977).

137. *Id.*

138. *See* Strier, *supra* note 33, at 53.

139. *Id.*

140. *Id.*

141. *See* Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).

142. *See* Menon, *supra* note 9, at 295.

specialization or understanding of the respective specialized fields whenever possible. For instance, a solution may be assigning medical malpractice cases to judges who used to practice in this field or that have exhibited a command for the subject matter during medical malpractice trials.

3. Appellate Courts

The principal observation with respect to appellate court problems is the untouchable sanctity of which they hold jury verdicts.¹⁴³ Appellate courts are free to exercise a very broad range of power with respect to the rulings and procedures of a trial court judge, up to and including completely overturning a trial court's decision.¹⁴⁴ Yet the appellate courts, when faced with questions as to the jury's decision-making, largely stay far and away from tampering with jury activity.¹⁴⁵ Cases where it is abundantly clear that the jury returned an incorrect, unconscionable, or clearly unjust verdict for either side, should be subject to a more liberal attack by appellate courts.

C. Attorney Greed

Attorneys pose equal problems to the field of complex litigation. The American tort system is criticized for being motivated by plaintiff and attorney greed.¹⁴⁶ Some even argue that the greed associated with attorneys and plaintiffs coupled with the sympathies found in lay jurors have disrupted the American tort system and prevented it from properly functioning.¹⁴⁷ For attorneys, science often will make or break their case. The law demands absolute truths and attorneys tend to believe, or they would like to believe, that the scientific theories that support their cases are completely objective and reliable. Attorneys shop for expert witnesses who will support even the most questionable of scientific causation theories.¹⁴⁸ Together with their retained experts, attorneys present scientific evidence so far beyond the

143. Lilly, *supra* note 62, at 74–75.

144. *Id.* at 74.

145. *Id.* at 74–75. Lilly notes that our legal “system elevates a jury verdict to such an impregnable point that often the only way to reverse a ‘bad’ jury verdict is to find fault with the legal decisions of the judge that may have had little actual effect on the outcome.” *Id.* If the jury's verdict has at least some evidentiary support, it is usually upheld. *Id.*

146. See Hubbard, *supra* note 1, at 302.

147. See *id.* See also Menon, *supra* note 9, at 286 (accusing lawyers of manipulating and abusing the adversarial system and capitalizing on the inexperience and relative ignorance of jurors).

148. See Forinash, *supra* note 32, at 247.

comprehension of average jurors that jurors often accept what is being said as true and give plaintiffs the “benefit of the doubt.”¹⁴⁹

Trial attorneys can choose from a number of publications and services that provide tips and techniques on influencing jurors as well as winning “the battle of the experts.”¹⁵⁰ Attorneys with this “win-at-all-cost” mentality seem to select experts from the “extremes of scientific belief” with the hope that jurors, so overwhelmed with complicated evidence, will guess with respect to their verdicts.¹⁵¹ As a result, jurors rarely hear “cautious, but accurate scientific testimony.”¹⁵² Rather, they are stuffed with a “steady diet of partisan exaggeration” which hinders “good science” from actually making it into the courtroom.¹⁵³ This environment has unfortunately created a system overshadowed by the personalities and egos of attorneys and expert witnesses rather than one focused on educating the jury and obtaining a fair verdict.¹⁵⁴

Attorneys, too, need to be specially trained to understand and deal with complex litigation. This is particularly true in medical malpractice cases. The rise in the complexity of litigation has created a need for attorneys practicing in these fields to become very familiar with medicine, science, technology, and other complex disciplines. Some attorneys have so eagerly approached a scientific practice that they are believed, or would like you to believe, that they know more about the field than some professionals working in the respective fields. With the rise in complex, scientific litigation, attorneys must commit to understanding the specialized concepts of their fields.

Another concern involving attorneys is the contingency fee system. It is argued that the contingency fee gives attorneys far too much of a stake in the outcome of a case.¹⁵⁵ The contingency fee system is criticized by Professor Frank Hubbard for several reasons, two of which are that contingency fees excessively reduce the victim’s recovery and they give attorney’s too great of an incentive to bring questionable cases.¹⁵⁶ These questionable cases are

149. *Id.* at 230 n.39; *see also* Hubbard, *supra* note 1, at 312.

150. *See* Menon, *supra* note 9, at 286 (citing studies and articles attempting to assist attorneys with expert presentation and juror persuasion).

151. *See* Jacobs, *supra* note 27, at 1088.

152. *Id.*

153. *Id.*

154. *See* Broyles, *supra* note 21, at 739.

155. *See* Hubbard, *supra* note 1, at 325.

156. *Id.*

brought forth with the hope of capturing a “lucky verdict” or a large “nuisance value” settlement.¹⁵⁷

D. Expert Witnesses

The expert witness industry has become a thriving industry in the United States. Because of the rise in complex, scientific litigation, often several expert witnesses are needed in each case to testify as to the complicated concepts presented to the jury.¹⁵⁸ Unfortunately, the alarming rise in commercialized expert witness work has resulted in the creation of a industry of experts who will compromise accurate scientific theory to guarantee their retention and, thus, aid in proliferation of the claim of the respective party, many times by selling “junk science.”¹⁵⁹

1. “Mystic Infallibility”

Due to the problems associated with lay juries as discussed in this article, expert witnesses commonly present evidence that is far too complex for a lay jury to realistically determine whether or not it is valid scientific theory or junk science. Critics of juries and adversarial expert witnesses charge that jurors, for the most part, hold these experts infallible because of the expert’s seemingly impeccable credentials and achievements and they lack the training, education and competency to assess the quality of expert witnesses.¹⁶⁰ Lay jurors have a tendency to give an incredibly high amount

157. *Id.*

158. Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, YALE L. & POL’Y REV. 480, 483 (1988) (discussing how the expert witness industry has become big business and, as a result, experts can be found to testify to almost any factual theory, no matter how unrealistic or frivolous). Some experts advertise their intellectual wares in legal magazines. *Id.* at 483 n.5. Others are affiliated with expert witness brokers with whom lawyers can shop for the expert of their choice through the use of such services. *Id.* at 483. An attorney who wants to file a medical malpractice claim, for example, can usually find an expert to back any causation theory through a medical-legal consulting firm. See Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 597–98 (1988). One such firm boldly promises: “[i]f the first doctor we refer doesn’t agree with your legal theory, we will provide you with the name of a second prospective expert.” See Menon, *supra* note 9, at 285 n.36.

159. See Black, *supra* note 158, at 595.

160. See Shuman, *supra* note 36, at 1244.

of credence to expert witnesses' explanations of complex processes, particularly in the school of medicine and surgery.¹⁶¹

2. Physician Critiquing

Prior to the explosion of medical malpractice litigation, it used to be quite difficult to find a physician who would testify against a peer.¹⁶² The liberalization of the locality rule¹⁶³ has created a field of national experts who travel to the jurisdictions of the attorneys who have retained them to testify against local health care providers. The rise in medical malpractice litigation has also caused physicians to become more critical of one another.¹⁶⁴

Academic expert witnesses are criticized by practicing professionals because the lack an appreciation of the unique circumstances surrounding the proper standards of care in a clinical setting within the communities where they are called to testify.¹⁶⁵ Additionally, arguments are made that academic medical physicians should, perhaps, not be considered "average physicians" with respect to their versions of the standards of care. Academic physicians may have higher standards beyond those that an "average physician" should be judged by.¹⁶⁶ These academic physicians may practice in a unique setting surrounded by some of the best, most decorated physicians in their respective fields.¹⁶⁷

There is often a difference between the medicine practiced in the community and medicine taught in a university. Nowhere is this difference more proliferated than in a hospital emergency room. Physicians working in the emergency department of a large hospital face stressful situations with critically ill or injured patients and they often must act with desperation in

161. *Id.* at 1243.

162. *See* Hubbard, *supra* note 1, at 311.

163. *See* Schwab v. Tolley, 345 So. 2d 747, 753–54 (Fla. 4th Dist. Ct. App. 1977); Couch v. Hutchinson, 135 So. 2d 18, 21 (Fla. 2d Dist. Ct. App. 1961). In the past, standards of care commonly required that the health care provider be judged based on the standard of care that a similar health care provider would normally employ in that particular community. This rule has been changed to abolish the "locality" aspects of the standard of care and now involves only the standard of care that a similar health care provider would employ when rendering the subject treatment. *Id.*

164. *See* Hubbard, *supra* note 1, at 346.

165. *Id.* at 310 n.63.

166. *Id.*

167. *Id.*

the quickest possible manner with a patient's life on the line.¹⁶⁸ Expert academic physicians may review the medical chart of a patient in the emergency room and cite numerous ways in which an emergency room physician fell below the best possible treatment standards. However, that same expert commonly fails to appreciate the anxiety and stress experienced by that physician during that moment in the emergency room.

3. Commercialization of the Expert Witness Industry

The sheer numbers of expert witnesses have increased dramatically over the past twenty years.¹⁶⁹ Some expert witnesses even attend seminars designed toward educating them regarding the legal system, depositions, and trial testimony.¹⁷⁰ These seminars, as described by one author, are "where scruffy academics and disheveled doctors learn how to speak, act, and handle themselves on the stand."¹⁷¹ Expert witnesses often advertise their services in bar journals and legal periodicals.¹⁷² Expert witness brokerage firms have emerged offering attorneys services in expert location and guaranteeing they can locate experts to support their case theories.¹⁷³ The American Trial Lawyer's Association advertises the names of winning plaintiff attorneys and their expert witnesses which gains notoriety for both, but especially the expert witnesses.¹⁷⁴ Experts have also invaded the internet, developing web-sites advertising their services, case experiences and directing prospective clients to victorious case references.¹⁷⁵

Several case opinions have identified problems with expert witnesses.¹⁷⁶ Experts are commonly described as being "hired guns" who will sacrifice

168. *Id.* (citing Feinstein, *Medical Negligence and the Tort System: What are the Opinions?*, 74 J. FLA. MED. A. 774, 777 (1987)).

169. *See* Forinash, *supra* note 32, at 251.

170. *Id.*

171. *See* Huber, *supra* note 26, at 19.

172. *See* Forinash, *supra* note 32, at 251; *see also* Lee, *supra* note 153, at 483.

173. *See* Sanders, *supra* note 17, at 358 n.23 (discussing expert witness brokerage firms such as Technical Advisory Service For Attorneys (TASA) which locate experts for attorneys for a fee).

174. *Id.*

175. *See* Findlaw expert witness databank, available at http://marketcenter.findlaw.com/experts_consultants.html.

176. *See* Virginia Tech. Found. v. Family Group, Ltd., 666 F. Supp. 856, 858 (W.D. Va. 1987) (describing how expert witnesses can play the role of a "hired gun"); Lander v. Higgins, Inc., 71 So. 2d 242, 244 (La. App. 1954) (noticing that witness' testimony would change if witness had been hired by the opposing party).

true scientific methodology to present opinions that favor causation theories for cases in which they are employed. Some experts, such as medical physicians, may even derive the majority of their income from serving as expert witnesses.¹⁷⁷ As one appellate judge stated in an opinion, “the only review the plaintiffs’ experts’ work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters.”¹⁷⁸

4. Attacking Expert Witnesses

As stated, juries often give a level of infallibility to expert witnesses and even go so far as being awed by experts.¹⁷⁹ It is very difficult for judges and jurors to move beyond the credentials of these experts and critically assess the scientific reliability and validity of their opinions.¹⁸⁰ Judges and jurors both have their chances to disregard junk science. Judges are faced with making a decision regarding admissibility of the scientific evidence.¹⁸¹ Jurors are faced with making a decision as to the credibility regarding the scientific evidence.¹⁸² Based on the facts that expert witnesses are testifying in courtrooms today using unverified, untruthful, and, in some cases, fraudulent science, neither judges nor juries are appropriately performing these decision-making duties. It is argued that the judicial system in place today, offers no real assistance to judges and juries in “sorting the scientific sheep from the unscientific goats.”¹⁸³ Attorneys often attack these “hired gun” experts by bringing forth their experience in serving as an expert witness and illustrating a usually lop-sided percentage of cases that they testify for the plaintiff or for the defendant. Expert witnesses commonly testify for one side, plaintiff or defendant, on an almost exclusive basis. This type of testimony is brought out to illustrate the possibility for bias and partisanship by the expert, particularly due to who is paying the expert for their opinions.

177. See Jacobs, *supra* note 27, at 1089 (discussing the fact that our adversary system has spawned a large and highly specialized industry of full-time expert witnesses, many of whom are arcane pseudo-scientists who are willing, if not eager, to testify to whatever is necessary to assure the success of their clients).

178. See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).

179. See Sanders, *supra* note 17, at 364.

180. See Shuman, *supra* note 36, at 1227.

181. *Id.* at 1233.

182. *Id.*

183. See Jacobs, *supra* note 27, at 1084.

IV. RECOMMENDATIONS FOR REFORM

Reform of the complex litigation system is necessary. Just what steps are necessary depends heavily upon whom you are asking. Medical malpractice reform movements have two sides. On one side you have medical malpractice insurance companies and physicians who want tort reform to be a quashing movement limiting plaintiffs' access to the courts.¹⁸⁴ On the other side, plaintiffs' attorneys and consumer organizations fight for more liberal access to the courts for "victims" of torts.¹⁸⁵ For the purposes of this discussion, two principle areas of reform measures will be illustrated, jury reform and expert witness reform.

A. *Reform of the Jury System in Complex Scientific/Medical Cases*

The jury system in the United States was founded on the basis that juries are the most capable fact-finders and the best-suited tribunal for arriving at the most accurate and just outcomes.¹⁸⁶ This is not the case with respect to juries in most medical malpractice cases and other types of complex litigation. The need for significant change of the jury system has come, yet there remain questions as to how extreme the changes need to be. Recommendations for reform of the jury system range from the extreme step of abolishing the use of the civil lay jury in complex cases involving highly technical or scientific evidence, to taking simple steps such as allowing jurors to take notes during trial, in an attempt to help juries better understand and memorialize the evidence presented to them.¹⁸⁷ Other recommendations include requiring a certain number of college educated members to be placed on a jury, educating the jurors on the law and the subject matter, and using special juries of professionals in the respective fields of practice involved in the lawsuit.¹⁸⁸ Changes need to be made, whether minimal or extreme, to make the ancient jury system an "efficient instrument in the administration of justice" particularly with respect to complex litigation.¹⁸⁹

184. See Hubbard, *supra* note 1, at 298.

185. *Id.*

186. Menon, *supra* note 9, at 281 (citing U.S. CONST. amend. VII).

187. Broyles, *supra* note 21, at 738.

188. *Id.*

189. *Id.* at 735.

1. Jury Selection

One of these changes concerns the way we, as a society, select juries. A jury is supposed to be a “cross-section” of the community.¹⁹⁰ As a means of achieving this cross-section, many states select jurors at random through use of the driver’s licensing registration.¹⁹¹ Jurors used to be predominately selected from those who had registered to vote in their communities.¹⁹² It can be argued that juror selection through registered voters, albeit a smaller portion of society, gives the court system a sampling of citizens who are more prone to recognize and appreciate their civic duty. Jury service is a civic duty. Driving an automobile, on the other hand, is a privilege widely used by most Americans. While it is not fair to “punish” those who exercise their right to vote with exclusively selecting them to serve as jurors, it may possibly be that these citizens have more compassion for the civic duty of serving as jurors and will take this role more seriously.¹⁹³

Compensation for jurors is another serious problem. Compensation is pathetically low for jurors who are called out of their jobs and away from their families, often for several days or weeks.¹⁹⁴ On average, a worker making a meager \$15,000 per year would require \$60 per day just to be compensated for his or her lost wages for serving on a jury panel.¹⁹⁵ Increasing the financial compensation for jury duty would relieve one of, if not the highest, hardships associated with jury duty.¹⁹⁶ It has been suggested that the increase in juror compensation could come from three sources: the state, the juror’s employer, or the litigants.¹⁹⁷ Currently, Massachusetts,

190. See The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (2000); see also *Duren v. Missouri*, 439 U.S. 357 (1979).

191. 28 U.S.C. § 1861.

192. *Id.*

193. See Lilly, *supra* note 62, at 61 n.24 (discussing a poll from the L.A. TIMES where fifty-seven percent of respondents thought of jury duty as a personal choice rather than a civic duty. *Id.* Only one-third of respondents were amenable to being called for jury duty. *Id.* Almost fifty percent of the respondents thought that jury duty should be optional, not mandatory; see also Maura Dolan, *The Times Poll: Jury System is Held in Low Regard by Most*, L.A. TIMES, Sept. 27, 1994, at A1).

194. See Strier, *supra* note 33, at 73.

195. *Id.*

196. See Lilly, *supra* note 62, at 62 n.27 (quoting Joe Sharkey, *Primary Seats at Democracy Still Only \$5*, N.Y. TIMES, Sept. 21, 1997, 13NJ, at 1 who described how a New York juror questioned the judge’s “no-excuses” policy, noting that jurors only were paid five dollars per day. *Id.* The juror commented that if the trial he was assigned to lasted more than one week, he could not afford to pay his rent). *Id.*

197. See Strier, *supra* note 33, at 73.

Colorado, and Connecticut require employers to pay their employee's wages for the first three days of jury service and then each state begins paying thereafter at a considerably higher rate than most states.¹⁹⁸ One possible solution might be to provide tax incentives or other financial benefits for employers who continue to compensate their employees when they are called to serve as jurors.

As discussed, the jurors who are normally the most qualified to serve on complex litigation panels are commonly stricken from the panel for the reasons previously described. The reasons these jurors are not empanelled, range from extreme financial hardship to the fact that many plaintiff attorneys do not want highly qualified, highly educated people serving on panels.¹⁹⁹ The fact that these individuals are commonly excluded from jury panels throws into question the constitutionality of having a jury panel with little to no representation of a large portion of society, the educated citizenry. Is it a fair cross section of a neurosurgeon's or an oncologist's community if he or she is being sued by a plaintiff, and there is not one person on the jury panel with an education above that of a high school diploma? It would seem that the Constitution is interpreted to answer this question in the negative.²⁰⁰ Equally unconstitutional, seemingly, is the fact that a jury's make-up may be significantly affected when incentives to evade jury duty are strong and there are permissible reasons for jury avoidance that are disproportionately available to only a select portion of society.²⁰¹

2. Special "Blue Ribbon" Juries

Another suggestion with respect to jury selection concerns developing a jury profile system.²⁰² Jurors are normally asked to fill out questionnaires when they are first called to service. Why not include a question regarding the juror's life experiences, educational level, interests, hobbies, work experience, and professions?²⁰³ With even the most basic of profiling formats, the courts would be able to steer jurors to cases where they most likely would be able to ascertain the subject matter more than a juror who has never been exposed to such material. Matching the strengths of jurors with

198. *Id.*

199. *Id.* at 72-73.

200. *See Taylor v. La.*, 419 U.S. 522, 530 (1975) (mandating that a litigant has a right to an impartial and rational jury drawn from a cross-section of the community).

201. *See Lilly*, *supra* note 62, at 61.

202. *Id.* at 78.

203. *Id.*

cases that are scheduled for trial would enhance the performance of the jury during trial.²⁰⁴

The next major reform area involves mandatory participation of college educated jurors on civil panels. If the courts are faced with a case that is obviously going to contain complex scientific or technological information, it would be preferable, as well as constitutionally sound, to require a certain level of highly educated, experienced, and/or trained jurors consistent with the subject matter of the case.²⁰⁵ While finding jurors that are familiar with the subject matter of the case through work experience or education may be a stretch, requiring a modest percentage of jurors with at least some level of advanced education is not. These "special juries" would presumably be better equipped to deal with the complex subject matter involved in these types of cases and accurately apply the judge's instructions to render a more just verdict.²⁰⁶ While the law absolutely does not permit exclusion of jurors because of race or sex, it does appear that exclusions based on educational level or expertise with the subject matter are permissible.²⁰⁷ Furthermore, exclusion of jurors based upon educational attainment is not specifically prohibited by the plain language of the Jury Selection and Services Act of 1968, therefore, the act could be interpreted to permit this exclusion by the courts.²⁰⁸

3. Abolishing the Lay Jury in Complex Civil Litigation

The most extreme reform discussion concerns abolishment of the civil jury in complex litigation. It is argued that, because of the frustrations, difficulties, and the lack of understanding associated with complex litigation, juries should not be permitted to hear such cases.²⁰⁹ The first possible way to accomplish this extreme step is to have the cases heard before special

204. *Id.* at 83.

205. *Id.*

206. *See Lilly, supra* note 62, at 84.

207. *See Carmical v. Craven*, 547 F.2d 1380 (9th Cir. 1977) (holding that states may remain free to confine the selection of jurors to citizens meeting specified qualifications such as educational attainment).

208. 28 U.S.C. § 1861; *see also Lilly, supra* note 62, at 89; *accord Strier, supra* note 33, at 63 (commenting that "the college-educated juror should not run afoul of the cross-section requirement [of the 1968 Jury Selection and Service Act]"); *Broyles, supra* note 21, at 718 (discussing ambiguities in the Seventh Amendment right to a jury trial which fail to determine whether or not the framer's intended the courts to be able to adapt the jury system to changes in society).

209. *See Lilly, supra* note 62, at 79.

judges or expert panels. Allowing judges to preside over complex trials will save time and money.²¹⁰ Additionally, it is argued that professional decision makers can do a much better job than lay jurors because their legal education and training makes them less susceptible to legally irrelevant emotional factors.²¹¹ Furthermore, a trial court judge's knowledge and experience with presiding over cases on a daily basis makes him or her approach the controversy at hand with a much more realistic perspective.²¹² Judges who are specialized in specific areas of the law would make an even better suited decision maker for complex cases. Courts are, in fact, authorized to appoint judges with special expertise or "special masters" when a case involves complex subject matter.²¹³

4. Specialization of Judges, Juries, and Courts

Another use for a special master could be to serve as an advisor to the judge and jury involved in a complex trial should the court choose not to appoint a presiding special master. In Florida, special masters can be any members of the Florida Bar.²¹⁴ These members could be selected because of their expertise in a specific field of litigation, for instance medical malpractice or products liability. The special master could review complex medical malpractice testimony and provide confused jurors with a specialized analysis to assist them with decision-making.²¹⁵ Of course, difficult issues such as who should serve on a special master committee and the manner in which the special master would address the judge and jury would need to be decided upon.²¹⁶

Another radical yet promising specialization of the courts would be the division of the civil courts by area of practice. For instance, specific courts for medical malpractice, products liability, patent law, toxic torts, or environmental law could be developed using expert judges to preside over areas of law in which they exhibit a command for that area's subject matter.²¹⁷ This would ensure that the judge involved in the court would have at least some command, education, and experience in dealing with the

210. See Menon, *supra* note 9, at 289.

211. *Id.* at 289 n.73.

212. *Id.*

213. See FED. R. CIV. P. 53; see also FLA. R. CIV. P. 1.490(b).

214. See FLA. R. CIV. P. 1.490.

215. See Menon, *supra* note 9, at 293.

216. *Id.*

217. *Id.*

specific complex subject matter. Furthermore, he or she would be better equipped to rule on a case or instruct a jury on how to better do so.

Also, “special juries” may be a solution to the problems associated with complex litigation.²¹⁸ Professionals who work in the fields, such as the health care industry, are certainly familiar with most of the issues, terminology and concepts that they are confronted with in their professions. This familiarity with the health care industry would make them better-suited jurors to be empanelled for a case involving medical malpractice. Another example would be empanelling a group of scientists or technicians with backgrounds identical, or at least similar, to a defendant within their professions.²¹⁹ One author argued that empanelling an “expert jury” would best represent a balance between the litigants’ right to a jury trial and their equally important right to a fair trial.²²⁰

5. Complexity Exception

The complexity exception recognized by a few of the federal district courts, allows especially complex cases to be removed from the jury and tried by a judge or special panel of judges.²²¹ Unusually complex subject matter confuses jurors to a point where they often guess on verdicts and, as a result, there should be an exception permitting courts to take such cases away from jurors in the interest of justice.²²² The controversy present with respect to whether or not a “complexity exception” does, in fact, exist requires further direction from the United States Supreme Court. The further development of the complexity exception, of course, begins with and depends upon the trial court’s use of it. The balance between just when a case is too complex for a lay jury and when the issues set forth are well within the confines of the jury, must also be preferably established by judicial precedent. This balance will lie somewhere between the type of case where the situation at hand is so easily decipherable that a person with

218. See Lilly, *supra* note 62, at 84.

219. *Id.*

220. *Id.*

221. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084–86 (1980) (noting that when a jury is unable to perform its decision-making task with a reasonable understanding of the evidence and legal rules, it undermines the ability of a district court to render basic justice. The loss of the right to a jury trial in a suit found too complex for a jury does not implicate the same fundamental concerns); see also *Ross v. Bernard*, 396 U.S. 531, 538 n.10 (1970); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978).

222. See Jacobs, *supra* note 27, at 1087.

even a meager amount education would understand whether or not the defendant was, in fact, negligent.²²³ For example, a number of less complicated medical malpractice cases, such as lawsuits over retained surgical equipment, are well within the lay juries' decision making ability.²²⁴

6. Miscellaneous Recommendations for Change

Other less radical changes recommended for the jury system are aimed at giving juries more tools to better assist them in understanding the evidence presented. Central to these recommendations is permitting jurors to take notes during trial.²²⁵ It is argued that taking notes during trial, particularly long trials, may enhance a juror's ability to recall certain critical information.²²⁶ Along the lines of notebooks, other recommendations include: providing the jury a list of witness names, photographs, copies of relevant documents, a glossary of legal and case-specific terms, and a copy of the jury instructions.²²⁷

Lastly, if copies of the jury instructions are not provided to the jury, they need to be simplified down to a level where the average juror can comprehend what exactly they mean.²²⁸ The jury instructions are, perhaps, the most fundamental element of the trial with respect to the jury. Criticism of complicated jury instructions is widespread.²²⁹ All the wisdom of the law is to no avail if the jury cannot understand the court's instructions and how to apply to them.²³⁰ The easy solution to this problem is to simplify the jury instructions for better understanding by the average person.

The ancient concept that juries are the best fact finder is no longer acceptable faced with the complexity so common in modern litigation. The judicial system's faith and insistence upon the jury system still relies upon the notion that jurors understand the subject matter that they are empanelled to render judgment upon.²³¹ The ability to apply this principle rests largely in the hands of the United States Supreme Court. Some definitive ruling,

223. See Menon, *supra* note 9, at 297.

224. *Id.*

225. See Broyles, *supra* note 21, at 732-33.

226. *Id.*

227. *Id.* at 733.

228. See Lilly, *supra* note 62, at 60 n.23; see also *id.* at 721 n.48 (citing studies that indicate jurors understand less than fifty-percent of the judge's instructions).

229. *Id.* at 68; accord Strier, *supra* note 33, at 51-52.

230. See Strier, *supra* note 33, at 52.

231. See Broyles, *supra* note 21, at 721.

other than a footnote,²³² is needed to assist litigants in obtaining accurate, fair trials in complex litigation.

B. *Stricter Standards for Expert Witnesses in Complex Scientific/Medical Cases*

The other major area of reform is focused on the expert witness industry. The expert witness industry is arguably motivated by partisan greed. Reform efforts with respect to science in the courtrooms are diverse.²³³ Similar to the reform measures discussed for the jury system, scientific reform measures range from minimal changes to radical reconstruction of the way complex litigation operates in America's courts.²³⁴ Those measures that are considered minimal include enhancing judicial authority to keep junk science out of the courtroom and scientific education for judges.²³⁵ More drastic reform measures include mandating the use of court-appointed, non-partisan expert witnesses and dividing courts into specialty courts with judges who are particularly specialized in the related areas of law such as medical malpractice or toxic torts.²³⁶

1. Stricter Standards for Admission of Scientific Evidence

The federal court system has liberalized the use of professional expert witnesses and junk science by abolishing the *Frye* general acceptance test in the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²³⁷ The State of Florida still relies upon the *Frye* ruling with respect to the admissibility of scientific evidence.²³⁸ Florida courts confirm their reliance on the more stringent admissibility standards set forth in *Frye* because, as the Supreme Court of Florida asserts, "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use."²³⁹

232. See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

233. See *Sanders*, *supra* note 17, at 355.

234. *Id.*

235. *Id.* at 366.

236. *Id.*

237. 509 U.S. 579 (1993).

238. See *Poulin v. Fleming*, 782 So. 2d 452 (Fla. 5th Dist. Ct. App 2001).

239. *Id.* (citing *Stokes v. State*, 548 So. 2d 188, 193-94 (Fla. 1989)).

2. Judicial Awareness of Expert Biases

The use of expert witnesses and science have two principle problems in the legal system. First, the expert witness industry, it is argued, is motivated by the courtroom dollar and is often eagerly willing to sacrifice true science for partisan-biased scientific theories.²⁴⁰ The courts must develop a standard by which the reliability and validity of the parties' scientific evidence are the product of sound scientific theory.²⁴¹ The courts must also develop a greater awareness and distaste for the fact that scientific evidence can be manipulated by an expert witness and misconstrued by the trier of fact.²⁴² The goal of the courts should be to ensure that the expert witnesses are behaving the same in the courtroom as they would if they were in professional their environments.²⁴³

One suggestion for improving the veracity of an expert may be to subject the expert to peer review for their sworn testimony should it be established that they presented fraudulent scientific testimony to the court. For medical doctors, these disciplinary measures could then be reported to the National Practitioner Data Bank ("NPDB") which reports a physician's entire educational, work and disciplinary histories to a number of entities.²⁴⁴ Physicians take seriously the information comprised on their NPDB reports and reporting fraudulent testimony may serve as a deterrent to stretching the truth on the witness stand.

3. Court-Appointed Expert Witnesses

Another extreme, yet plausible, reform measure would be to mandate court-appointed expert witnesses.²⁴⁵ As noted, partisan experts tend to confuse jurors.²⁴⁶ Considering the amount of time and expense that is spent attempting to discredit expert witnesses by opposing parties, this radical change may be a welcome one.²⁴⁷ Expert witnesses, less tainted by partisan biases, may identify areas of common ground between the parties and would be subjected to less scrutiny with respect to how often they testify, how

240. See Lee, *supra* note 158, at 483.

241. See Black *supra* note 158, at 599.

242. See Forinash, *supra* note 32, at 256.

243. See Sanders, *supra* note 17, at 376.

244. National Practitioner Data Bank, at <http://www.npbd.com>.

245. See Sanders, *supra* note 17, at 378.

246. See Menon, *supra* note 9, at 285.

247. See Sanders, *supra* note 17, at 378.

much they are paid, and how one-sided their history of retention is.²⁴⁸ The cost of neutral, court-appointed expert witnesses could be borne by both sides who normally shell out a great deal of money on retaining their own experts and deposing their adversary's expert witnesses.²⁴⁹ Neutral experts could also cut down on the amount of time spent discussing and confirming various theories in the fields of study.²⁵⁰

Selecting a neutral expert witness could be done in a manner similar to the selection of mediators or arbitrators by the opposing parties. Courts could qualify expert witnesses in specialty areas such as hematology, oncology, emergency medicine, or obstetrics and then submit the names of these experts to the parties requesting the use of an expert witness in those particular fields. By most accounts, court-appointed experts would at least cut down on juror confusion and likely be more impartial than partisan expert witnesses.²⁵¹ It is also important to note that the *Federal Rules of Evidence* and United States Supreme Court support the use of court-appointed expert witnesses.²⁵²

V. CONCLUSION

Medical malpractice litigation is surging in the State of Florida as well as the rest of the United States. The blame for this social problem rests with the attorneys, the scientists and the general public.²⁵³ A general decline in personal responsibility and the improvements in medical technology have added fuel to the fire by creating a mentality amongst the American people that if they do not have miraculous cures from, even terminal, medical maladies, the first reaction is to sue the health care provider. Efforts to reduce the admission of junk science into the courtroom that can unjustly change the outcome of these cases, for the most part, have been inadequate or have completely failed.

The ancient institution of the lay jury is ill-equipped and unqualified to render judgment in most complex medical malpractice cases. Members of the both sides of the bar, appellate courts, trial judges, academics, and the legislature need to recognize the erosion of the jury system with respect to

248. *Id.*

249. *Id.* See also Menon, *supra* note 9, at 292–93.

250. See Sanders, *supra* note 17, at 378.

251. See Lilly, *supra* note 62, at 90.

252. See FED. R. EVID. 706; see also *Gen. Elec. v. Joiner*, 522 U.S. 136, 149–50 (1997).

253. See Forinash, *supra* note 32, at 248.

its performance in complex civil litigation.²⁵⁴ Not only recognition of this erosion is needed, but also efforts to change the jury system need to be examined, tested, and employed. However, keeping in mind the importance of the jury system as a foundation in our society, any changes need to be limited to those no greater than are absolutely necessary to protect the rights of both litigants.²⁵⁵

Partisan expert witnesses motivated by financial benefits manipulate scientific theory to sometimes inaccurately influence lay jurors who are commonly mesmerized by the complex, technical language spoken by expert witnesses. Recognition of the glaring differences between scientific truth and the level of truth required by the courts must occur. Courts are responsible for making sure that expert witnesses are adhering to the same standards and scrutiny of intellectual rigor that they face in their professional practices.²⁵⁶

The ideologies for changes are plentiful; however, the courage to effectuate them is minute. The United States Supreme Court would be the most ideal of the legal participants to take the raging bull, that is complex litigation, by the horns and implement measures to better reflect justice. Even a few of the subtle reform measures to the expert witness industry and the American jury system may serve to improve these two major problem areas presently hindering the field of medical malpractice litigation in Florida as well as the United States in general.

Edward L. Holloran, III

254. See Lilly, *supra* note 62, at 54.

255. See Strier, *supra* note 33, at 78.

256. See Sanders, *supra* note 17, at 376.

**Troubled Waters: Florida’s Isolated Wetlands in the
Aftermath of *Solid Waste Agency of Northern Cook County
v. U.S. Army Corps of Engineers***

TABLE OF CONTENTS

I. INTRODUCTION371

II. UNDERMINING THE CLEAN WATER ACT: THE SWANCC
DECISION374

 A. *Watershed Legislation: The Clean Water Act*374

 B. *Narrowing the Scope: SWANCC*.....377

 C. *Uncharted Waters: The Impact of the Decision*379

III. FLORIDA IN THE AFTERMATH OF SWANCC.....382

 A. *Shallow Waters: Florida Wetlands*.....382

 B. *Charting a Course: Florida Wetlands Law*383

 C. *The Ripples of SWANCC: The Impact on Florida*387

 D. *Bridging the Gap: Florida’s Options*388

 E. *Making Waves: The Court’s “Isolated” Decision*392

IV. CONCLUSION.....394

I. INTRODUCTION

The United States Supreme Court’s controversial decision in *Solid Waste Agency of Northern Cook County* (“SWANCC”) *v. United States Army Corps of Engineers*¹ has limited the ability of the Clean Water Act² to protect our nation’s water supply.³ In *SWANCC*, a narrowly divided Supreme Court held that the United States Army Corps of Engineers (“Corps”) lacked jurisdiction over intrastate isolated waters that were not navigable within the meaning of the Clean Water Act (“Act”).⁴ Moreover, the Court’s dicta asserts that Congressional authority to regulate nonnaviga-

1. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

2. 33 U.S.C. §§ 1251–1387 (1994).

3. *SWANCC*, 531 U.S. at 175 (Stevens, J., dissenting); see Brief of Amici Curiae Environmental Defense et al. at 9, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178), 2000 WL 1369436 (claiming such a holding “would roll back the scope of federal water pollution control” to a pre-Clean Water Act level, removing “millions of acres of ‘isolated’ surface waters . . . from federal protection”) [hereinafter ED Brief].

4. *SWANCC*, 531 U.S. at 174 (rendering 5-4 decision).

ble intrastate isolated waters poses “significant constitutional and federalism questions.”⁵ Taking a functional approach, the dissent delivers a strong, systematic attack on the Court’s reasoning and establishes that there “is no principled reason” to limit the Corps’ jurisdiction on the basis of navigability.⁶ Since Congress intended the Clean Water Act to afford “comprehensive long-range” protection for our nation’s waters,⁷ the dissent concludes that waters need not be actually or potentially navigable to fall within the scope of the Act.⁸

By limiting the scope of the federal regulatory permitting program under section 404 of the Clean Water Act,⁹ the Court has taken “an unfortunate step that needlessly weakens our principle safeguard against toxic water.”¹⁰ The ruling impacts federal protection for more than twenty percent of our nation’s remaining wetlands, including cypress domes in the Everglades.¹¹ In the absence of federal protection, the preservation of the vital functions provided by isolated wetlands is left to the states.¹² The majority of states, including some with significant wetland acreages currently provide little protection.¹³ The Court has created a gap in the protection of isolated wetlands,¹⁴ yet the broader ecosystem cannot be protected unless their important functions are preserved.¹⁵

5. *Id.*

6. *Id.* at 176 (Stevens, J., dissenting).

7. *Id.* at 179.

8. *Id.* at 175.

9. *SWANCC*, 531 U.S. at 167.

10. *Id.* at 175 (Stevens, J., dissenting); see William Funk, *The Court, the Clean Water Act and the Constitution: SWANCC and Beyond*, 31 ELR 10741, 10741 (2001) (taking the impact in light of the present political climate in which “legislative amendment is virtually impossible,” the author argues that the *SWANCC* decision may be the most devastating judicial opinion affecting the environment ever).

11. *Supreme Court Deals Devastating Blow to Wetlands*, INT’L WILDLIFE, May–June 2001, at 8–9. One percent of the total land in the contiguous forty-eight states received federal protection prior to *SWANCC*. Brief of Amici Curiae Gene Likens et al. at 24, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1179), 2000 WL 1369410 [hereinafter Likens Brief]. Total wetlands are estimated to occupy ninety-five million acres, or four percent of the nation’s total land. *Id.*

12. Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands* (Ass’n of State Wetland Managers, Berne, N.Y.), (May 31, 2001), at <http://www.aswm.org/swancc/index.htm> [hereinafter Kusler].

13. See *id.* at 9.

14. *Id.* at 15.

15. Likens Brief, *supra* note 11, at 9; see also Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. 10669 (June, 2001), WL 31 ELR 10669 (claiming the decision is especially disheartening since it was announced just

“Isolated” wetlands are only isolated in the sense that they lack a surface connection to downstream waters.¹⁶ They serve critical hydrologic and biological functions that have downstream effects, significantly impacting the broader environment.¹⁷ The basic hydrologic function of isolated wetlands is to store and filter water.¹⁸ Their preservation is vital to the functions of flood control, water quality filtration, and streambank erosion.¹⁹ When they are developed and drained, water quality is affected by the hastened release of long trapped pollutants that move downstream and ultimately cause harm to animals and humans.²⁰ The rapid influx of water can likewise result in flooding and erosion.²¹

The biological integrity of the nation’s waters is also dependent upon the preservation of isolated wetlands.²² They provide distinct habitats and breeding grounds for waterfowl, migratory birds, and amphibians that are not served by other water bodies.²³ Destruction of isolated wetlands can result in severe consequences for biodiversity; if local species become endangered or extinct, the food chain is disturbed.²⁴

Florida is one of only fifteen states that presently afford considerable protection for isolated waters and wetlands.²⁵ Even so, the Court’s decision adversely affects the state’s environment, water supply, and economy.²⁶ This article discusses the Supreme Court decision’s impact on Florida, exposing that the Court’s holding undermines the ability of the Clean Water Act to protect our nation’s waters. Part II introduces section 404 of the Clean Water Act and explores the case, the holding, and its potential impact. It demonstrates that the *SWANCC* decision has created a gap in the preservation of isolated wetlands, which if not bridged, has severe consequences for the nation’s environment and water supply.²⁷ Part III evaluates Florida’s

after a U.S. Fish and Wildlife Service report indicated that the annual rate of wetlands loss has been declining steadily).

16. There is no scientific or regulatory definition for “isolated” wetlands. Likens Brief, *supra* note 11, at 11.

17. *Id.* at 8.

18. *Id.* at 9.

19. *Id.* at 11.

20. *Id.* at 16.

21. Likens Brief, *supra* note 11, at 12.

22. *Id.* at 22.

23. *Id.* at 18.

24. *Id.* at 22–23.

25. Kusler, *supra* note 12, at 9.

26. See discussion *infra* Part III.C.–D.

27. Kusler, *supra* note 12, at 15.

isolated wetlands law, *SWANCC*'s practical implications for the state, and the state's options in the aftermath of the decision. Since Florida wetlands law is not uniform throughout the state, Florida's experience demonstrates the state's ability to bridge the *SWANCC* gap as well as the political and economic realities it confronts in doing so.²⁸ The fragmentation in Florida law also renders the state a microcosm of the nation as a whole. Florida's inability to completely bridge the *SWANCC* gap confirms the dissent's contention that comprehensive national regulation of intrastate isolated wetlands is essential to accomplishing the goals of the Clean Water Act.²⁹

II. UNDERMINING THE CLEAN WATER ACT: THE *SWANCC* DECISION

A. Watershed Legislation: *The Clean Water Act*

The Clean Water Act's mandate is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³⁰ Designed to "establish a comprehensive, long range policy for the elimination of water pollution,"³¹ the Act fundamentally changed both the scope and purpose of federal regulation of the nation's waters.³² It extended the scope of federal jurisdiction to all of "the waters of the United States, including the territorial seas."³³ The Act also broadened the United States Army Corps of Engineers' mission to include protecting the nation's waters for "esthetic, health, recreational, and environmental uses."³⁴

To control water pollution, the Clean Water Act established nationwide standards and federal permitting and enforcement measures.³⁵ Section 404(a) of the Act affords the Secretary of the Army, acting through the United States Army Corps of Engineers, authority to regulate the discharge of dredge or fill material into "navigable waters."³⁶ Upon determining that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding

28. See discussion *infra* Part III.C.–D.

29. See discussion *infra* Part III.E.

30. 33 U.S.C. § 1251(a).

31. *SWANCC*, 531 U.S. 159, 179 (2001) (Stevens, J., dissenting).

32. *Id.* at 175.

33. 33 U.S.C. § 1362(7) (1994).

34. *SWANCC*, 531 U.S. at 175.

35. ED Brief, *supra* note 3, at 11.

36. 33 U.S.C. § 1344(a). "Dredging" is excavation in wetlands or other surface waters and "filling" is deposition of any material in wetlands or other surface waters. FLA. STAT. § 373.403 (13)–(14) (2001).

areas), wildlife, or recreational areas," the Act authorizes the Corps to refuse a permit.³⁷

The Act defines "navigable waters" as "waters of the United States."³⁸ Since 1977, the Corps has defined the term "waters of the United States" for purposes of section 404 jurisdiction to mean:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands)³⁹ identified in paragraphs (a)(1) through (6) of this section.

The Corps originally construed the scope of jurisdiction under section 404(a) to cover only waters that were navigable in fact, but largely in reaction to judicial interpretation and congressional reaction, the Corps asserted broader authority.⁴⁰

37. § 1344(c).

38. § 1362(7).

39. 33 C.F.R. § 328.3(a) (2000).

40. *SWANCC*, 531 U.S. at 183–84 (Stevens, J., dissenting) (indicating judicial decisions encouraging the Corps to assert broader authority included *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.C. 1975) and *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974)); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) [hereinafter *Riverside Bayview*].

The Supreme Court first addressed the scope of section 404(a)'s jurisdiction in *United States v. Riverside Bayview Homes*⁴¹ where it upheld the Corps' authority over adjacent wetlands.⁴² Reviewing legislative history, the Court concluded that Congress intended the term "navigable waters" to be construed broadly in order to achieve the goals of the Clean Water Act.⁴³ Since "[w]ater moves in hydrologic cycles and the pollution . . . will affect the quality of other waters within that aquatic system," the Court reasoned that the regulation of adjacent wetlands was essential to maintaining the integrity of the nation's waters.⁴⁴ Thus, in construing the breadth of the Corps' authority under section 404(a), the Court afforded deference to the Corps' 1977 regulations and limited the importance of the term "navigable."⁴⁵

In 1986, the year following the *Riverside Bayview* decision, the Corps issued a regulation clarifying that section 404(a) authority extends to intrastate waters:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.⁴⁶

This promulgation, known as the "Migratory Bird Rule," falls under subsection three of the Corps' definition of "waters of the United States" that ties jurisdiction of intrastate waters to interstate commerce.⁴⁷ The Migratory Bird Rule is at the core of SWANCC controversy.

41. 474 U.S. 121 (1985).

42. *Id.* at 139.

43. *Id.* at 133.

44. *Id.* at 134 (quoting 42 Fed. Reg. 37128 (1977)). The Court recognized that wetlands "serve to filter and purify water," "slow the flow of surface runoff . . . prevent[ing] flooding and erosion," and provide significant biological functions. *Id.*

45. *Riverside Bayview*, 474 U.S. at 134.

46. SWANCC, 531 U.S. 159, 164 (2001).

47. 33 C.F.R. § 328.3(a)(3) (2000).

B. *Narrowing the Scope: SWANCC*

The legal issue decided in *SWANCC* was whether the U.S. Army Corps of Engineers had authority under section 404(a) of the Clean Water Act of 1977 to regulate the discharge of nonhazardous fill material by a consortium of local municipalities into “isolated” waters in Illinois that were home to migratory birds.⁴⁸ The Solid Waste Agency of Northern Cook County (“Agency”) sought to develop a 533-acre abandoned mining site that had evolved into a sprinkling of permanent and seasonal ponds for disposal of their baled nonhazardous solid waste.⁴⁹ After receiving the requisite county and state permits, the Agency contacted the Corps to determine whether a federal permit was required under section 404(a) of the Clean Water Act; the Agency plans involved filling roughly seventeen acres of the site that included seasonal ponds that had developed a natural character.⁵⁰

Though initially concluding it lacked authority, the Corps asserted jurisdiction under section 404(a)(3) of the Clean Water Act after the Illinois Nature Preserves Commission exposed the fact that a number of migratory bird species inhabited the site.⁵¹ Employing subpart (b) of the Migratory Bird Rule, the Corps found that the isolated ponds, though not wetlands, qualified as “waters of the United States.”⁵² The Corps determined that the Agency’s plan presented an “unacceptable risk to the public’s drinking water supply” and that its impact on the area-sensitive species could not be mitigated.⁵³ Finding that the Agency’s plan posed significant environmental risks, the Corps denied the permit.⁵⁴

The Agency filed suit in federal district court claiming that the Corps lacked jurisdiction under the Clean Water Act and challenging the merits of the denial.⁵⁵ The District Court granted summary judgment to the Corps on

48. *SWANCC*, 531 U.S. at 162.

49. *Id.* at 163.

50. *Id.* Excavation trenches, created by thirty years of gravel pit mining that continued until 1960, developed into ponds ranging in size from under one-tenth acre to several acres and in depth from several inches to several feet. *Id.*

51. *Id.* at 164. The ponds were home to a great blue heron rookery and approximately 121 bird species. *Id.* at 164–65. In addition to providing herons the second-largest breeding site in northeastern Illinois, the ponds were inhabited by several protected species of waterfowl. *Id.* at 194 n.16.

52. *SWANCC*, 531 U.S. at 164.

53. *Id.* at 165.

54. *Id.*

55. *Id.*

the jurisdictional issue.⁵⁶ Abandoning its challenge to the justification of the Corps' denial, the Agency appealed on statutory and constitutional grounds.⁵⁷ The Seventh Circuit Court of Appeals held that the Clean Water Act reaches as far as the Commerce Clause allows and given the aggregate effect of the destruction of natural habitat of migratory birds on interstate commerce, the Migratory Bird Rule was reasonable.⁵⁸ The Supreme Court granted certiorari and reversed.⁵⁹

Rather than deciding the constitutional issue, the Supreme Court based its holding on statutory grounds; the decision turns on the importance of the term "navigable waters" in section 404(a) of the Clean Water Act.⁶⁰ Since the Court held that the term "navigable" was of "limited import" in *United States v. Riverside Bayview Homes*, the Court distinguishes that case.⁶¹ In *Riverside Bayview*, the Court found "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with 'the waters' of the United States'" and held that the Act applied to adjacent wetlands, waters not navigable in the traditional sense.⁶² In *SWANCC*, the Court explains that "[i]t was the significant nexus between the wetlands and the 'navigable waters'" that brought the adjacent wetlands at issue in *Riverside Bayview* within the scope of the Clean Water Act and refuses to extend that jurisdiction to "ponds that are *not* adjacent to open water."⁶³ Reasoning "it is one thing to give a word limited effect and quite another to give it no effect whatever,"⁶⁴ the Court deems the term "navigable" important to the extent that it indicates Congressional authority for enacting the Clean Water Act.⁶⁵

Although the Court does not hold the Migratory Bird Rule unconstitutional, it asserts that Congressional authority to regulate non-navigable, intrastate waters poses "significant constitutional and federalism ques-

56. *Id.*

57. *SWANCC*, 531 U.S. at 165.

58. The Court of Appeals found the effect on interstate commerce substantial since interstate tourists spend over a billion dollars per year in migratory bird related pursuits. *Id.* See ED Brief, *supra* note 3, at 13 (noting migratory bird watching is a \$1.3 billion dollar per year industry and precipitates 14.3 million trips each year, many across state lines).

59. *SWANCC*, 531 U.S. at 166.

60. *Id.* at 172.

61. *Id.* at 167.

62. *Id.*

63. *Id.* at 167-68.

64. *SWANCC*, 531 U.S. at 172.

65. *Id.* The dissent reads the term "navigable water" to mean "those waters over which federal authority may be properly asserted." *Id.* at 162.

tions.”⁶⁶ The Court refuses to afford deference to the Corps’ regulation since it “invokes the outer limits of Congress’ power,”⁶⁷ particularly where traditional state powers over land and water use could be impinged.⁶⁸ Emphasizing recent Supreme Court holdings limiting Congressional power under the Commerce Clause,⁶⁹ the Court explains that to determine the requisite interstate connection “we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.”⁷⁰ The Court then indicates it is not clearly convinced that migratory bird-related travel sufficiently satisfies the interstate connection.⁷¹

C. *Uncharted Waters: The Impact of the Decision*

It is clear that the Migratory Bird Rule can no longer provide the sole basis for jurisdiction over isolated waters under the Clean Water Act, but the impact of the decision potentially reaches much further.⁷² The Supreme Court did not clearly chart the waters that fall within the scope of section 404(a)(3) permitting authority.⁷³ In theory, virtually all wetlands were subject to federal regulation prior to *SWANCC*.⁷⁴ In the aftermath of

66. *SWANCC*, 531 U.S. at 174.

67. The Court refused to extend the same deference to the Corps’ regulations that it did in *Riverside Bayview* absent a clear indication from Congress that it intended to reach intrastate isolated water. *Id.* at 170. The dissent argues that the Court’s refusal to extend deference is inconsistent with the *Riverside Bayview* decision. *Id.* at 185 (Stevens, J., dissenting). The dissent explains that in *Riverside Bayview*, the Court interpreted the same section of the Clean Water Act and found that Congress was aware of the Corps’ 1977 regulations, Congress declined to narrow their scope in its 1977 Amendments, and thus implicitly acquiesced to the Corps’ interpretation. *Id.* at 184. The Court finds this indication of Congressional intent “unpersuasive.” *Id.* at 168.

68. *SWANCC*, 531 U.S. at 168. The dissent contests the Court’s federalism concerns, pointing to section 404(g) of the Act which allows state assumption of the federal permitting program, and stresses that the Act regulates the environment, not land use. *Id.* at 188.

69. *Id.* at 173 (citing *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995) as indicative of the limits on Congressional power under the Commerce Clause).

70. *Id.*

71. The court of appeals held that a rational relationship exists between recreational pursuits relating to migratory birds and the Migratory Bird Rule and thus found authority under the Commerce Clause. *Id.* The dissent concurs with the lower court’s interpretation and finds the connection between “the filling of wetlands and the decline of commercial activities associated with migratory birds” direct and concrete. *Id.* at 195.

72. Johnson, *supra* note 15, at 10669.

73. Kusler, *supra* note 12, at 4.

74. *Id.* at 7 (noting that some are concurrently subject to state and local regulation).

SWANCC, it is unclear whether the courts will uphold the Act's jurisdiction over any intrastate isolated waters unless a clear and direct impact on interstate commerce can be shown.⁷⁵ Since the Court neglected to explain how the connection could be legally satisfied, the holding has caused uncertainty and confusion.⁷⁶

Following the decision, the General Counsel^o of the Environmental Protection Agency ("EPA") and the Chief Counsel of the Corps issued a joint memorandum providing their interpretation of the SWANCC decision.⁷⁷ The memorandum stated jurisdiction over "[a]ll other waters such as intrastate lakes, rivers, streams . . . wetlands . . . or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce" are "potentially affected by SWANCC."⁷⁸ The Corps and the EPA stressed that the Court's opinion did not specifically address what would constitute a sufficient connection with interstate commerce to support Clean Water Act jurisdiction over these waters and indicated that legal advice should be sought on a case by case basis.⁷⁹

It is difficult to gage the full impact of the decision since it is largely dependent upon administrative and judicial interpretation.⁸⁰ If the holding is interpreted narrowly to mean that the Court only invalidated the Migratory Bird Rule, not federal regulation of all intrastate isolated wetlands, the decision potentially removes federal protection under the Clean Water Act from thirty percent of the nation's wetlands.⁸¹ But, the dissenting opinion interpreted the Court's holding more broadly to mean that the Corps no longer has jurisdiction over any intrastate isolated waters unless they are or could be made navigable.⁸² If the Corps and courts interpret the holding broadly, the decision may remove federal protection for up to sixty percent

75. Funk, *supra* note 10, at 54.

76. Kusler, *supra* note 12, at 15.

77. Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency & Robert M. Anderson, Chief Counsel, U.S. Army Corps of Engineers, to U.S. Army Corps of Engineers Administrators, Commanders, and Counsels, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, 1 (Jan. 19, 2001) [hereinafter Memo].

78. *Id.* at 2-3

79. *Id.* at 3.

80. Kusler, *supra* note 12, at 7.

81. *Id.* at 1.

82. SWANCC, 531 U.S. at 176-77. (2001) (Stevens, J., dissenting) (claiming the "Court draws a new jurisdictional line . . . that invalidates the 1986 migratory bird regulation as well as the Corps' assertion over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each").

of the nation's wetlands.⁸³ Within these two interpretations, the extent of SWANCC's impact is also dependent upon how key terms including "adjacent" and "significant nexus" are defined.⁸⁴

Regardless of the interpretation, the environmental impacts will be significant.⁸⁵ The Association of State Wetland Managers estimates "[e]ven if SWANCC results in only a one percent loss of America's wetlands, the decision would cause more wetlands to be destroyed than were lost in the past decade."⁸⁶ In the absence of federal protection, regulation of isolated wetlands is devised to the states.⁸⁷ Only fifteen states currently have regulations that substantially close the gap.⁸⁸ The rest, including some with significant wetland acreages, provide little protection.⁸⁹ Many states have relied on the federal permitting program to protect their water quality.⁹⁰

The resulting lack of regulation will likely occasion the destruction of many wetlands and in turn adversely impact their water filtration, flood protection, erosion, and habitat functions.⁹¹ Regulations over isolated wetlands will differ among and within states as they attempt to bridge the SWANCC gap.⁹² At the very least, the decision creates "serious new vulnerabilities in water and wetland resource protection" that require federal, state, and local adaptation in the regulation of isolated wetlands if their critical functions are to be preserved.⁹³

83. Kusler, *supra* note 12, at 7.

84. If the terms "adjacent" and "significant nexus" to navigable waters are interpreted broadly, some isolated wetlands may be recategorized, mitigating the impact of the decision. *Id.* at 8.

85. *Id.*

86. *Id.* at 8.

87. *Id.*

88. Kusler, *supra* note 12, at 9 (including Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia).

89. *Id.* at 8–9 (identifying Alaska, Georgia, Kansas, Louisiana, Mississippi, North Carolina, Nebraska, South Carolina, South Dakota, and Texas as states with large isolated wetlands acreage and limited protection).

90. Funk, *supra* note 10, at 8.

91. Kusler, *supra* note 12, at 15.

92. *Id.*

93. *Id.* at 16.

III. FLORIDA IN THE AFTERMATH OF SWANCC

A. *Shallow Waters: Florida Wetlands*

Florida has a strong economic incentive to protect its wetlands; home to the Everglades National Park, Florida's economy is dependent upon the health and vitality of its natural system.⁹⁴ Florida's wetlands, though, provide more than aesthetic beauty attracting visitors from around the nation and world; they perform important hydrologic functions including water filtration and flood control.⁹⁵ They also serve to moderate temperatures and maintain precipitation.⁹⁶ Florida's wetlands provide distinct habitats for migratory birds, recreational hunting fowl, and for nearly half of the state's endangered species, and serve as spawning grounds for "two-thirds of the commercial fish and shellfish harvested along the Atlantic Coast and in the Gulf of Mexico"⁹⁷

The state is "on a collision course with itself, dependent both on its unique natural resources and the . . . growth that is strangling those resources."⁹⁸ Florida's wetlands are threatened by the consequences of population growth and development.⁹⁹ Not only have millions of acres of wetlands been destroyed, but the development of roads and canals has "isolated" many wetlands by cutting them off on the surface from broader ecosystems.¹⁰⁰ In the aftermath of SWANCC, these artificially isolated

94. See John J. Fumero, *Environmental Law: 1994 Survey of Florida Law—At a Crossroads in Natural Resource Protection and Management in Florida*, 19 NOVA L. REV. 77, 79 (1994).

95. *Id.* at 79–80.

96. They moderate temperatures because water warms and cools more slowly than land and maintain precipitation through envirotranspiration, a loss of water from soil by evaporation. *Id.* at 80.

97. *Id.* at 79–80 (citing RALPH W. TINER, JR., U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., *WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS* 13 (1984)).

98. *Id.* at 78 (quoting Lieutenant Governor Buddy McKay, Remarks at the Inaugural Meeting of the Governor's Commission for a Sustainable South Florida (Apr. 27, 1994)).

99. See Fumero, *supra* note 94, at 79 (exposing that since Florida's population is expected to increase, effective natural resource protection and management is especially crucial).

100. Jan Hollingsworth, *Ruling Affects Florida Wetlands*, TAMPA TRIB., Jan. 10, 2001, 12001 WL 5490527 TAMPA TRIB 2.

wetlands, along with other isolated Florida waters, may lose their federal protection.¹⁰¹

B. Charting a Course: Florida Wetlands Law

Since the preservation of wetlands is crucial to Florida's economy and ecology, the state has enacted substantial legislation to ensure their protection.¹⁰² Florida's current wetlands law is rooted in the Florida Environmental Reorganization Act of 1993.¹⁰³ Prior to the Reorganization Act, Florida lacked a uniform system of regulation because the entities responsible for permitting adopted independent definitions of "wetlands."¹⁰⁴ Codified in 1994 in part IV of chapter 373 of the *Florida Statutes*, the Reorganization Act fundamentally changed Florida's wetlands law.¹⁰⁵ First, it streamlined the regulatory process by consolidating permitting "into a single regulatory approval referred to as an 'environmental resource permit' ("ERP")."¹⁰⁶ Second, it established a uniform system for defining and delineating Florida's wetlands that all agencies and water management districts, with the

101. *Court Opens Door to Isolated Wetlands Development in Panhandle*, AP NEWSWIRES, Feb. 5, 2001, 1 WL APWIRES 14:36:00 [hereinafter *Panhandle*]; see Jan Crawford Greenburg, *Top Court Puts Limit on Clean Water Act*, SUN SENT. (Ft. Lauderdale), Jan. 10, 2001, at 12A, (claiming lands in the Eastern portions of the Everglades may lose their federal protection).

102. Florida has regulated wetland development on a statewide basis since the early 1970's. FLA. DEP'T OF STATE, OVERVIEW OF FLORIDA'S ENVIRONMENTAL RESOURCE PERMIT PROGRAM (2001), at <http://www.myflorida.com/environment/learn/waterprograms/wetlands/erp/overview.html> [hereinafter OVERVIEW]. The Florida Water Resources Act of 1972 established a fundamental water policy for the state and authorized Florida's five water management districts to regulate alterations to the landscape that affected surface water flows. *Id.* The management and storage of surface waters permitting program applied to uplands, wetlands, and isolated wetlands. *Id.* The wetland resources permitting program, originally implemented in 1975 and incorporated into the Warren S. Henderson Wetlands Protection Act of 1984, provided the Department of Environmental Regulation (now the Department of Environmental Protection) the authority to regulate dredging and filling in all waters of the state that were connected to "named waters." *Id.* It did not regulate activities in isolated wetlands unless such isolated wetlands were to be connected either naturally or artificially to the "named waters." *Id.*

103. Fumero, *supra* note 94, at 98 (citing Ch. 93-213, 1993 Fla. Laws 2149 (codified at FLA. STAT. § 373 (1994))).

104. *Id.*

105. OVERVIEW, *supra* note 102.

106. Fumero, *supra* note 94, at 83.

exception of the Northwest Florida Water Management District and certain grandfathered activities, are now required to employ.¹⁰⁷

Throughout most of the state, Florida affords considerable protection to its isolated wetlands under section 373.414 of the *Florida Statutes*.¹⁰⁸ Section 373.414, incorporating rule 62.340.200 of the *Florida Administrative Code*, defines wetlands beginning with the same operational sentence as the Corps' definition:¹⁰⁹ "those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils."¹¹⁰ Florida's rule further defines wetlands:

Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps, and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by straw palmetto.¹¹¹

The statutory definition employed under section 373.414 is thus unique to Florida's local characteristics and inclusive of isolated wetlands.¹¹²

Rule 62.340.300 of the *Florida Administrative Code* provides the methodology that must be used by all levels of government in the state to

107. FLA. STAT. §§ 373.4145, .414.

108. *Id.* § 373.414.

109. U.S. ARMY CORPS OF ENGINEERS, CORPS OF ENGINEERS WETLAND DELINEATION MANUAL 13 (1987), at [www.say.usace.army.mil/permit/87 manual.pdf](http://www.say.usace.army.mil/permit/87%20manual.pdf) [hereinafter MANUAL].

110. FLA. ADMIN. CODE ANN. r. 62.340.200(19) (2000) (codified at FLA. STAT. § 373.421 (2000)).

111. FLA. ADMIN. CODE ANN. r. 62.340.200(19) (codified at FLA. STAT. § 373.019(17) (2000)).

112. *Id.*

delineate the landward extent of an area that meets the statutory definition.¹¹³ It mandates that the regulating agency use “reasonable scientific judgment” to delineate the area first “visually by on site inspection, or aerial photo-interpretation in combination with ground truthing” in accordance with the statutory definition.¹¹⁴ If this is impossible, four other methods are presented that base delineation on factors including the type of plants present, the characteristics of the soil, and/or hydrologic indicators.¹¹⁵ Structurally, Florida’s methodology considerably differs from the federal methodology, particularly in terms of hydric soil indicators and plant classifications.¹¹⁶ Though the federal delineation methodology encompasses a broader area than Florida’s, there are other provisions within the state methodology to compensate and the scope is accordingly similar in practice.¹¹⁷

Once wetlands are defined and delineated under section 373.414, the Florida Department of Environmental Protection in cooperation with four of the five state water management districts is authorized to administer the ERP program.¹¹⁸ The ERP program provides a consistent permitting approach throughout most of the state, and allows a single application to be filed when requesting state and federal permits.¹¹⁹ ERPs are only granted when there are reasonable assurances that state water quality standards will not be violated and that the activity is not “contrary to the public interest.”¹²⁰

In determining whether an activity is contrary to the public interest, the statute directs the Department of Environmental Protection and the water management districts to consider the impact on public health, safety, or welfare, whether it will adversely affect the conservation of fish and wildlife, including threatened or endangered species and their habitats,

113. FLA. ADMIN. CODE ANN. r. 62.340.300 (codified at FLA. STAT. § 373.421(1) (2000)). Changes cannot be made to the wetlands delineation rule without legislative approval. FLA. STAT. § 373.421.

114. FLA. ADMIN. CODE ANN. r. 62.340.300(1).

115. FLA. ADMIN. CODE ANN. r. 62.340.300 (2)-(4).

116. Memorandum from the Wetlands Delineation Section, Florida Department of Environmental Protection, to the Florida Department of Environmental Protection, *Resolution of Differences Between the Florida and Federal Wetland Delineation Methodologies*, 1 (1997) [hereinafter *Resolution*].

117. *Id.* at 2.

118. OVERVIEW, *supra* note 102. Responsibilities are divided based on the type of activity being regulated. Fumero, *supra* note 94, at 93. The Department is responsible for permitting most industrial activities and the water management districts are responsible for most residential, agricultural, and commercial projects. *Id.* at 93-95.

119. FLA. STAT. § 373.4211(1) (2000).

120. § 373.414(1).

navigation, fishing, recreational values or marine productivity in the vicinity.¹²¹ The statute specifically requires the responsible entities to consider the “cumulative impacts upon surface waters and wetlands,” thereby allowing consideration of additional projects that may be reasonably anticipated to follow.¹²² Upon determining that an activity is contrary to the public interest, the Department or district must consider and assess mitigation measures based on the “quality of the wetland to be impacted and the type of mitigation proposed.”¹²³ If measures designed to restore, create, or enhance the wetlands are unable to compensate for the adverse affects, the permit will be denied.¹²⁴

Section 373.414 of the *Florida Statutes* allows the governing board of a water management district or the Department of Environmental Protection to establish by rule additional permitting criteria for isolated wetlands in two instances.¹²⁵ First, the size threshold to be considered for permitting may be limited “based on biological and hydrological evidence that shows the fish and wildlife values of such areas to be minimal.”¹²⁶ Second, criteria may be established for the “protection of threatened and endangered species in isolated wetlands regardless of size and land use.”¹²⁷

The ERP plan does not extend to certain activities grandfathered under section 373.414 of the *Florida Statutes*,¹²⁸ or to lands within the geographical jurisdiction of the Northwest Florida Water Management District.¹²⁹ Section 373.4145 exempts these lands from the ERP program and regulates them under separate, looser guidelines that do not protect isolated wetlands.¹³⁰ In these lands, the Florida Department of Environmental Protection is authorized under rule 62.312.010 of the *Florida Administrative Code* to issue permits for “dredging and filling conducted in, on, or over the surface waters of the state” as defined in rule 62.312.030 of the code.¹³¹ Rule 62.312.030 defines “surface waters of the state” as those “which connect

121. § 373.414(1)(a)(1)–(4).

122. § 373.414(8)(a).

123. § 373.414(6)(d)2.

124. § 373.414.

125. § 373.414(2).

126. § 373.414(2)(a).

127. § 373.414(2)(b).

128. § 373.414(11)–(16).

129. § 373.4145.

130. § 373.4145. The exemption results from financial constraints placed on the Northwest Florida Water Management District under the Florida Constitution. FLA. CONST. art VII, § 9(b). See discussion *infra* Part III.D.

131. *Id.* § 373.4145(1)(b).

directly or via an excavated water body or series of water bodies” to waters specifically named.¹³² Wetlands are thus only protected if they are connected to a “named” water.¹³³ “Isolated” wetlands are excluded because by definition they lack a surface water connection.

C. *The Ripples of SWANCC: The Impact on Florida*

Though Florida generally affords isolated wetlands substantial protection, the state will still feel the environmental and economic impact of the SWANCC decision. Florida law is fragmented; strong throughout most of the state, yet virtually nonexistent in the Panhandle.¹³⁴ Throughout most of Florida, the critical functions provided by isolated wetlands are well preserved under section 373.414 of the *Florida Statutes*.¹³⁵ Though the ERP program operates independently of the Corps and employs a different delineation methodology, it is very comparable in scope to the federal program.¹³⁶ The gap is not completely filled; the statute provides exemptions for grandfathered activities and allows the water management districts to determine the size of isolated wetlands that will not be subject to permitting.¹³⁷ But the SWANCC decision ought to have limited economic and environmental impact where the ERP program exists.

In contrast, the SWANCC decision will certainly impact the preservation of isolated wetlands in Northwestern Florida. Prior to SWANCC, the state relied on the Corps’ authority under section 404(a)(3) of the Clean Water Act to protect isolated wetlands located within the jurisdiction of the Northwest Florida Water Management District.¹³⁸ In the aftermath of SWANCC, thousands of acres of Florida wetlands have become open to development in the Panhandle.¹³⁹ The implications are already being felt as developers are discarding mitigation proposals and redrafting plans to include isolated wetlands.¹⁴⁰ In the long run, this will impair the vital water

132. The “named waters” include the Atlantic Ocean, the Gulf of Mexico, bays, and natural channels and tributaries thereto. FLA. ADMIN. CODE ANN. r. 62.312.030(2).

133. *Id.*

134. *Panhandle*, *supra* note 101, at 1.

135. FLA. STAT. § 373.414.

136. *Resolution*, *supra* note 116, at 2; *OVERVIEW*, *supra* note 102, at 4.

137. § 373.414(11)–(17); *see Fumero*, *supra* note 94, at 87 n.52 (providing a detailed explanation of exempted activities).

138. *Panhandle*, *supra* note 101, at 1.

139. *Id.*

140. *Id.*

quality protection, flood control, and habitat functions isolated wetlands provide.¹⁴¹

The Corps will retain jurisdiction over some of Florida's isolated wetlands on a case by case basis if a clear and direct connection to interstate commerce can be found; the Corps is currently exploring the connection of beavers trapped in isolated wetlands to beaver pelt trading across state lines.¹⁴² But uncertain whether the courts will uphold such interstate connections, the Corps is proceeding with caution.¹⁴³ The legal questions left unanswered in the *SWANCC* decision have resulted in confusion and uncertainty throughout the state.¹⁴⁴

Florida's experience confirms that the Court's decision has created a gap in the protection of isolated wetlands. The *SWANCC* decision not only adversely affects Florida's environment, but impacts the state's economy as well. In order to regulate isolated wetlands once under federal jurisdiction, the state must assume financial and administrative responsibility.¹⁴⁵ It could also open Florida to more court judgments since the state, rather than the Corps would be the primary permitting authority.¹⁴⁶ In the absence of state action, some of Florida's isolated waters may be completely unprotected following the decision.¹⁴⁷

D. Bridging the Gap: Florida's Options

Florida law illustrates that the state is capable of protecting its wetlands. Florida's experience in the aftermath of the Supreme Court's decision exposes the obstacles the state confronts in attempting to bridge the *SWANCC* gap. Although Florida has numerous options in the aftermath of the decision, the state is constrained by political and economic realities.

At one extreme, Florida can do nothing at the state level. This would leave the regulation of isolated wetlands to county and local entities. Officials in Escambia County are already exploring whether to tighten their

141. Kusler, *supra* note 12, at 15.

142. *Panhandle*, *supra* note 101, at 2.

143. *Id.*

144. In Florida, Army Corps engineers have assigned the term "SWANCCing it" to cases that are being re-evaluated as a result of the Court's decision. Telephone Interview with Bryce McCoy, West Palm Beach Office, U.S. Army Corps of Engineers (July 8, 2001). The Corps is proceeding with caution in Florida. *Id.* The *SWANCC* decision has complicated the Corps' mission; now additional research is needed to prove jurisdiction. *Id.*

145. See Kusler, *supra* note 12, at 15.

146. See *id.*

147. See *id.*

own regulations to exert some control over their formerly protected lands.¹⁴⁸ Northwest Florida's local governments might begin to bridge the SWANCC gap, but regulations will likely differ throughout the Panhandle.¹⁴⁹ This, in turn, will create complexity in the state's regulation of isolated wetlands and uncertainty for developers.¹⁵⁰

At the other extreme, Florida can enact substantial legislation to bridge the judicially created gap. In theory, this could be accomplished by the inclusion of the Northwest Florida Water Management District in the ERP program. In practice, the economic and political obstacles may be insurmountable. The Northwest Florida Water Management District was exempted from the ERP program for financial reasons and extending the ERP program to the Panhandle would cost an estimated three million dollars annually.¹⁵¹ The water management districts fund the ERP program through property taxes.¹⁵² Tax caps for the districts, though, are constitutionally mandated.¹⁵³ The four other districts can assess taxes at a rate of up to one dollar per \$1000 of taxable property value.¹⁵⁴ The Northwest Florida Water Management District is limited under the Florida Constitution to a property tax rate of five cents per \$1000 of taxable property.¹⁵⁵ Last year, the Florida Legislature refused to put a proposed amendment on the ballot that would have increased the Northwest Florida Water Management District's cap.¹⁵⁶ At least in the short term, extension of the ERP program is not a realistic option.

Florida can also chart middle ground and regulate development of isolated wetlands under the Northwest Florida Water Management District's jurisdiction, but to a lesser extent than the ERP program would. This might be possible by revising water policy, flood control, or land use statutes.¹⁵⁷ Even if the required expenditures are lower than would be needed to extend the ERP program to the Panhandle, Florida would still have to enact new

148. *Panhandle*, *supra* note 101, at 1.

149. *See* Kusler, *supra* note 12, at 15 (discussing the implications for states generally).

150. *Id.*

151. *Panhandle*, *supra* note 101, at 1. *See* discussion *infra* Part III.A.

152. *Id.* at 2.

153. FLA. CONST. art. VII, § 9(b).

154. *Id.*

155. *Id.*

156. *Panhandle*, *supra* note 101, at 2.

157. Jon Kusler, *Model State Wetland Statute to Close the Gap Created by SWANCC*, (Ass'n of State Wetland Managers, Berne, N.Y.), Feb. 22, 2001, at <http://www.aswm.org/index.htm>.

legislation and commit funds to administer the new policy.¹⁵⁸ Moreover, charting middle ground would not completely fill the *SWANCC* gap.

Florida can also pursue state assumption of the federal permitting program under the Clean Water Act.¹⁵⁹ Section 404(g) of the Act allows the governor of a state to apply for assumption of the permitting program for the discharge of dredged or fill materials into navigable waters, other than traditionally navigable waters and their adjacent wetlands.¹⁶⁰ Upon acceptance by the Environmental Protection Agency, the state plan replaces the Corp's permitting program, rather than supplementing it.¹⁶¹ State assumption would allow Florida to administer the federal permitting program over intrastate isolated wetlands that have a substantial connection to interstate commerce.¹⁶² The benefit is in the interpretation; the Corp's Wetland Delineation states "determination that a water body or wetland is subject to interstate commerce and is therefore a water of the United States shall be made independently of procedures described in this manual."¹⁶³ Florida could choose to interpret and administer the Court's decision narrowly.¹⁶⁴

Florida's prospects for assumption, however, are diminished by past experience. The state attempted to assume administration under section 404(g) in 1997, and the request was denied because Florida's delineation methodology differs from the Corps.¹⁶⁵ The designation of slash pine as an upland plant, rather than a facultative one, posed the most significant problem.¹⁶⁶ Recognizing that slash pine is in fact a facultative plant, Florida's methodology provides mechanisms to identify areas as wetlands even when dominated by slash pine, but the designation still precluded assumption.¹⁶⁷ Since Florida cannot change its methodology without legisla-

158. *Id.* at 2.

159. 33 U.S.C. § 1344(g)(1).

160. § 1344(g)(1). Only two states, Michigan and New Jersey, have assumed federal permitting under 404(g). Brief for the Federal Respondents at 19, *SWANCC*, 121 S. Ct. 675 (2001) (No. 99-1178), 2000 WL 1369439.

161. § 1344(g)(1).

162. *Id.*

163. *MANUAL*, *supra* note 109, at 13.

164. See Funk, *supra* note 10, at 50 (suggesting the interstate commerce link with fishing is less attenuated than with migratory birds); see discussion *infra* Part II.B.

165. Letter from the Florida Department of Environmental Protection to Carol Browner, Administrator, Environmental Protection Agency (Sept. 17, 1997) [hereinafter Letter].

166. *Id.*

167. *Id.*

tive approval¹⁶⁸ and the designation of slash pine as upland was due to timber industry lobbying, effectuating change will likely prove difficult.¹⁶⁹ There is also the risk that opening the methodology to legislative debate results in looser regulation, especially in light of the state's conservative government.¹⁷⁰

Finally, Florida may be able to partially bridge the gap by urging the Corps to chart new legal ground. The *SWANCC* decision fails to distinguish the reasons why intrastate isolated waters are in fact isolated.¹⁷¹ The Court finds that Congress never intended the Clean Water Act to reach isolated ponds in Illinois that were created as a result of mining, yet fails to consider that not all isolated waters were created where waters did not originally and naturally exist.¹⁷² Unlike the ponds in Illinois that eventually developed a natural character,¹⁷³ many of Florida's isolated wetlands were isolated by development, not created by it.¹⁷⁴ Florida could argue that this is a distinction with a significant difference; artificially isolated wetlands may have once been navigable in fact. The state could encourage the Corps to assert broader jurisdiction under section 404(a)(1). Charting new ground, though, takes time and its success is ultimately dependent upon administrative and judicial interpretation.

Economic and political realities make it difficult for Florida to completely bridge the isolated wetlands gap created by the *SWANCC* decision. Since Florida's current government is unlikely to extend itself to protect the environment, the gap is likely to remain unfilled in the short term.¹⁷⁵ In the interim, many of Florida's isolated wetlands have become open to development.¹⁷⁶ Only time will reveal the *SWANCC* decision's full impact on Florida's environment and water supply.

168. FLA. ADMIN. CODE ANN. r. 62.340.300 (2000).

169. Telephone Interview with John Toby, Wetlands Delineation Section, Florida Department of Environmental Protection (July 8, 2001).

170. *Id.*

171. *SWANCC*, 531 U.S. 159, 179 (2001).

172. *Id.* at 171.

173. *Id.* at 163.

174. *Panhandle*, *supra* note 101, at 2.

175. Telephone Interview with John Toby, Wetlands Delineation Section, Florida Department of Environmental Protection (July 8, 2001).

176. *See Panhandle*, *supra* note 101, at 1.

E. Making Waves: The Court's "Isolated" Decision

The fragmentation in Florida law renders *SWANCC*'s impact on the state a microcosm of the decision's impact on the nation as a whole. Florida's experience suggests that states will not completely bridge the *SWANCC* gap, leaving the vital functions of isolated wetlands unprotected. Since the Court's holding has created a gap that has severe consequences for the nation's water supply and environment, the decision is itself "isolated" from the goals of the Clean Water Act.¹⁷⁷

Florida law demonstrates that a state will only afford strong protection to the functions of its isolated wetlands where it is in the state's individual interest to do so.¹⁷⁸ Where Florida has a strong economic incentive to protect its isolated waters, the state has generally enacted strong and comprehensive legislation to protect its wetlands.¹⁷⁹ But in the Panhandle, where the Everglades are distant and the economic incentive is lacking, Florida neglects to protect its isolated wetlands from development on a statewide basis.

Florida's experience thereby exposes the need for comprehensive, federal regulation in order to effectuate the goals of the Clean Water Act. Florida has a particularly strong incentive to protect its isolated wetlands. But the state's interest may be as unique as the Everglades.¹⁸⁰ Absent such interest, most states are faced with the economic and political realities that Florida confronts in the Panhandle. If a state determines that the benefits of development outweigh the associated environmental costs, Florida's experience suggests that the functions of isolated wetlands are unlikely to receive strong protection under state law.

While the benefits of dredging and filling in isolated wetlands are local, the burdens do not respect state boundaries.¹⁸¹

The harm from wetland development is cumulative, not individual. . . . [A] state's perspective . . . might differ from that of other states, or the national interest Nearly every contested federal wetlands permit decision—and they are numerous—is one that, by federal regulation, already received all necessary state approvals. If

177. See Likens Brief, *supra* note 11, at 9–10.

178. See discussion *infra* Part III.A–C.

179. *Id.*

180. See Fumero, *supra* note 94, at 78 (noting the uniqueness of Florida's natural resources).

181. *SWANCC*, 531 U.S. at 195; ED Brief, *supra* note 3, at 15.

the interests of receiving states—of downstream and downflight Americans—are going to be represented, those interests must be protected by more than an agency of a state¹⁸²

Since water moves in hydrologic cycles, pollution must be controlled at the source.¹⁸³ Florida's experience implies that many states will lack the incentive to control water pollution at the source. Since the impacts of development on the hydrologic and biological functions of "isolated" wetlands reach beyond state lines, water quality, flooding, erosion, and habitats in other states may be adversely affected.¹⁸⁴ Water pollution is a national problem that has "substantial, cumulative impacts on interstate commerce . . . requir[ing] a uniform, nationwide solution."¹⁸⁵ Unless the critical functions of isolated wetlands are protected at the national level, the Clean Water Act's ability to protect the nation's waters is undermined.¹⁸⁶

Finally, the decision's impact on Florida illustrates that the Court's federalism concerns are unwarranted.¹⁸⁷ Though in theory the Court's decision supports state rights,¹⁸⁸ in practice it has complicated Florida's ability to protect its wetlands and water quality.¹⁸⁹ Florida has economically and environmentally benefited from the Corp's authority over its intrastate isolated wetlands.¹⁹⁰ In Northwest Florida, the state has relied on the Corps

182. ED Brief, *supra* note 3, at 19.

183. *Id.* at 15; Likens Brief, *supra* note 11, at 10.

184. ED Brief, *supra* note 3, at 15.

185. *Id.* at 12.

186. *SWANCC*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting); Brief of Amici Curiae Cal. et al. at 12, *SWANCC*, 121 S. Ct. 675 (2001) (No. 99-1178), 2000 WL 1369438 [hereinafter Cal. Brief].

187. The dissent counters the Court's federalism concerns by arguing that the Clean Water Act regulates the environment, not zoning and land use. *SWANCC*, 531 U.S. at 191. Environmental regulation "does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* (quoting Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)). Furthermore, federal jurisdiction under the Clean Water Act is not limitless; exceptions are provided in the Act itself and states can assume administration of the federal program. ED Brief, *supra* note 3, at 27.

188. *SWANCC*, 531 U.S. at 174.

189. *Environmental Defense Criticizes Supreme Court Ruling*, NEWS RELEASE (Env'tl. Defense, Wash., D.C.), Jan. 9, 2001, at http://www.environmentaldefense.org/pubs/NewReleases/2001/Jan/c_courtuling.html.

190. The states of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington submitted a joint brief on behalf of the respondents arguing that states benefit from the national approach. Cal. Brief, *supra* note 186, at 12. These states do not believe that section 404 interferes with traditional state powers over zoning and land use. *Id.* at 14.

to protect the functions of its isolated wetlands that would otherwise be adversely impacted by dredging and filling. Now Florida must commit funds and enact legislation to fill the *SWANCC* gap or risk the environmental consequences. Since Florida law does substantially close the *SWANCC* gap, the economic and environmental consequences of the decision will be even more severe for the majority of states that currently have looser regulations.¹⁹¹ Florida's experience demonstrates that the Court's decision is "isolated" from the actual functioning of the Clean Water Act.¹⁹²

IV. CONCLUSION

Florida's experience in the aftermath of *SWANCC* echoes the dissent's pronouncement that the Court's reasoning "does violence to the scheme Congress chose to put in place."¹⁹³ Congress intended the Clean Water Act to "be given the broadest possible constitutional interpretation" in order to protect the nation's water quality and environment.¹⁹⁴ The *SWANCC* decision has created a gap in the protection of isolated wetlands that Florida's experience intimates many states will be unable to fill, leaving the water filtration, flood control, and habitat functions served by isolated wetlands unprotected. The fragmentation in Florida wetlands law exposes the need for uniform, federal regulation of the nation's waters if the goals of the Clean Water Act are to be accomplished.

In a well-reasoned dissent, Justice Stevens demonstrates that Congress intended to afford comprehensive, long-range protection for our nation's waters.¹⁹⁵ Thoroughly examining the Clean Water Act's mandate, legislative intent, and the Court's rationale in *Riverside Bayview*, the dissent concludes that waters need not be actually or potentially navigable to fall within the scope of the Act.¹⁹⁶ Florida's experience illuminates the practical wisdom of the dissent's reasoning.

191. *Id.* See discussion *supra* Part III.B.

192. See Cal. Brief, *supra* note 186, at 12.

193. *SWANCC*, 531 U.S. at 191.

194. *Id.* at 181 (citing S. Conf. Rep. No 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327).

195. Justice Stevens was joined by Justice Souter, Justice Ginsberg, and Justice Breyer in the dissent. *Id.* at 174.

196. The dissent makes three interrelated arguments: First, the Clean Water Act is designed to control water pollution, not navigability. *Id.* at 174-83. Second, isolated wetlands provide the same functions as adjacent wetlands and thus fall within the scope of the *Riverside Bayview* decision. *Id.* at 183-86. Third, there is a need for national regulation and

The Clean Water Act's stated purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁹⁷ By definition, the Act extends its reach to all "waters of the United States."¹⁹⁸ Since the impact of water pollution does not depend upon whether the waters affected are navigable, the goals of the Act cannot be achieved if its scope is based solely on navigability.¹⁹⁹ "Navigable waters" in the statute must mean those "waters over which federal authority may properly be asserted" in order to achieve the Act's goals.²⁰⁰

By voicing its constitutional concerns and suggesting that the interstate connection in *SWANCC* is insufficient, the Court has unnecessarily created uncertainty in Florida and around the nation over the scope of federal permitting authority under section 404(a). There is independent authority under the Commerce Clause, apart from navigability, to regulate intrastate isolated waters that have a substantial effect on interstate commerce; the power to regulate commerce includes the power to protect the natural resources that generate the commerce.²⁰¹ It remains to be seen whether Congress or the states will be able to formulate an improved plan to protect the nation's waters.²⁰²

Debra Alise Spungin

authority under the Commerce Clause for such regulation independent of navigability. *SWANCC*, 121 S. Ct. at 186–88.

197. 33 U.S.C. § 1251(a).

198. § 1362(7).

199. *SWANCC*, 531 U.S. at 188.

200. *Id.* at 182, 189.

201. *Id.* at 196 (citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (holding water to be an "article of commerce")). The dissent argues that the Clean Water Act regulates dredging and filling, almost always an economic activity, and finds the "causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds" is direct enough to render the Migratory Bird Rule within the Court's Commerce Clause jurisprudence. *Id.*

202. In his final words at oral argument, the Agency's counsel suggested that if the court decides the case on statutory grounds, it ought to consider whether Congress could come back with another plan to protect the nation's waters. Petitioner's Rebuttal at Oral Argument at 23, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178), 2000 WL 169870.