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2008-2009 Survey of Florida Law Affecting Business Owners

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2008–2009 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

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I. INTRODUCTION

This survey does not deal with every case decided in the past twelve months that might be said to be of interest to business owners, their advisors, and others who follow business law developments. Cases of first impression, decisions involving or identifying conflicts between the Florida District Courts of Appeal, and questions certified to the Supreme Court of Florida as being of great public importance are included. Cases that clarify or expand upon existing principles of law are also included. This year's survey also takes a look at a number of cases that, while procedural in nature, contain concise analyses of some equitable principles and some unusual or not often relied upon legal theories.

Many of these decisions address several areas of law. To the extent possible, cases have been placed in the category that plays the most prominent role in the court's discussion or decision.

II. ALTERNATIVE DISPUTE RESOLUTION

As usual, there were many arbitration cases decided over the course of the last year. Summaries of some of the more significant ones follow.

A. *Arbitration: Forum Selection Clause*

After litigation had been instituted in Florida, the defendant asked the trial court to compel arbitration in accordance with the consulting agreement between the defendant and the plaintiff, which "provided for arbitration in Arizona."¹ The trial court so ordered, but its order required that the arbitration be held in Florida instead of Arizona.² The defendant appealed the part of the trial court's ruling that ordered that the arbitration take place in Florida.³ The Fourth District Court of Appeal held that under the Federal Arbitration Act, which was the applicable law in this case, it was not proper for the trial judge to unilaterally modify part of the arbitration provision.⁴ The ap-

1. *Remington Fin. Group, Inc. v. Anchors Aweigh Marine, Inc.*, 12 So. 3d 1264, 1265 (Fla. 4th Dist. Ct. App. 2009).

2. *Id.*

3. *Id.*

4. *Id.* The appellate court noted that the plaintiff had "not move[d] to strike the venue provision," but the court did not discuss what impact, if any, such a motion by the plaintiff might have had on the outcome of the appeal under the Federal Arbitration Act. *Id.*; see 9 U.S.C. §§ 1-16 (2006).

pellate court relied on its decision in *BDO Seidman, LLP v. Bee*,⁵ where it held that if an arbitration clause is “not unconscionable as a whole,” it must be enforced as written.⁶

B. *Arbitration Agreement Enforced*

Dorothy Stern (Resident) executed an arbitration agreement with Life Care Center of New Port Richey (Life Care) upon her admission.⁷ The arbitration clause directed that the arbitrator be the American Arbitration Association (AAA) and the applicable AAA rules be used in any arbitration between the parties.⁸ Resident sued Life Care, and Life Care asked the trial court to order arbitration.⁹ It seems, however, that more than five years before the lawsuit—and several years before the arbitration agreement was executed—AAA had announced that it would no longer arbitrate nursing home disputes unless the parties agreed to AAA arbitration after the dispute arose.¹⁰ The parties had not so agreed.¹¹ Resident argued that AAA’s policy left the parties with no valid and enforceable agreement to arbitrate, and the trial court agreed.¹² Life Care appealed, and the Second District Court of Appeal reversed.¹³ Under the circumstances presented, section 682.04 of the *Florida Statutes* required that the trial court appoint an arbitrator.¹⁴

5. 970 So. 2d 869 (Fla. 4th Dist. Ct. App. 2007).

6. *Remington Fin. Group, Inc.*, 12 So. 3d at 1265 (citing *BDO Seidman, LLP v. Bee*, 970 So. 2d 869, 877 (Fla. 4th Dist. Ct. App. 2007)).

7. *New Port Richey Med. Investors, LLC v. Stern*, 14 So. 3d 1084, 1086 (Fla. 2d Dist. Ct. App. 2009).

8. *Id.*

9. *Id.* at 1085–86. Among other claims, Resident alleged that her rights as a resident of a nursing home had been violated. *Id.* at 1085.

10. *See id.* at 1085–86.

11. *See New Port Richey Med. Investors, LLC*, 14 So. 3d at 1086.

12. *Id.*

13. *Id.* at 1086–87.

14. *Id.* at 1087. The Second District Court of Appeal noted first that neither of the parties had offered any evidence regarding their intent with respect to choosing the AAA, despite Resident’s argument that this was a “material term” of the agreement, and that the trial court could not modify the agreement. *Id.* at 1086. The appellate court then commented that Resident failed to present evidence that the choice of arbitrator was an “integral part of the agreement to arbitrate.” *New Port Richey Med. Investors, LLC*, 14 So. 3d at 1087. It is not clear, however, that the result would have been different even if Resident had presented such evidence, in light of the appellate court’s statement immediately thereafter that “[w]e also observe that the parties’ arbitration agreement contains a severability clause.” *Id.*

C. Arbitration: Waiver of Right by Conduct

In the next two arbitration cases, the courts were asked to determine if participation in litigation resulted in a waiver of a party's right to arbitrate.¹⁵ In *Green Tree Servicing, LLC v. McLeod*, Mr. McLeod bought a home and entered into a Manufactured Home Retail Installment Contract and Security Agreement, to which Green Tree Servicing, LLC (Green Tree) subsequently became a party.¹⁶ The agreement contained a binding arbitration clause.¹⁷ Mr. McLeod died, and Ms. McLeod (Personal Representative), the surviving spouse of Mr. McLeod, in her capacity as personal representative of the estate of McLeod, became the plaintiff in a pending action that Mr. McLeod had instituted against Green Tree.¹⁸ The complaint alleged that Green Tree had violated the Florida Consumer Collection Practices Act,¹⁹ and after Mr. McLeod's death, Ms. McLeod added a wrongful death claim in what then became the second amended complaint.²⁰ Green Tree, which had previously sought an order to compel arbitration, renewed its motion to compel arbitration.²¹ Personal Representative then sought discovery in the lawsuit, and Green Tree moved for protective orders with respect to discovery.²² After much delay in the proceedings, the trial court ruled that Personal Representative could have ninety additional days of "arbitration related discovery."²³ Before the trial court ruled, however, counsel for both parties stipulated that discovery beyond that related to arbitration, more specifically, discovery going to the merits of the litigation, would constitute a waiver of Green Tree's claim to arbitration.²⁴ Green Tree then hired new counsel who promptly made multiple discovery requests that went to the merits of the action.²⁵ New counsel subsequently moved to compel that discovery and set a hearing on its motion.²⁶ However, Green Tree withdrew its requests for discovery and its motion to compel, and it cancelled the scheduled hearing

15. See *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d Dist. Ct. App. 2009); *DFC Homes of Fla. v. Lawrence*, 8 So. 3d 1281 (Fla. 4th Dist. Ct. App. 2009).

16. *Green Tree Servicing, LLC*, 15 So. 3d at 684.

17. *Id.*

18. *Id.*

19. *Id.*; see FLA. STAT. § 559.55 (2009).

20. *Green Tree Servicing, LLC*, 15 So. 3d at 684.

21. *Id.*

22. *Id.* at 685.

23. *Id.*

24. *Id.*

25. *Green Tree Servicing, LLC*, 15 So. 3d at 685.

26. *Id.*

on the discovery motion.²⁷ When Green Tree's motion to compel arbitration finally was heard, the trial court ruled that Green Tree had waived arbitration because of the merits-related discovery.²⁸ The Second District Court of Appeal affirmed the trial court, aligning itself with decisions of the Third and Fifth District Courts of Appeal.²⁹ In order to do so, however, the court concluded that it was necessary to "recede from" its decision in *Merrill Lynch Pierce Fenner & Smith, Inc. v. Adams*³⁰ "to the extent that it is inconsistent with the rule that we now adopt."³¹ In *Merrill Lynch*, the court had ruled that participation in discovery by the party seeking to compel arbitration did not constitute a waiver.³² The Second District Court of Appeal in *Green Tree* held:

[W]e now hold that a party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration. Such activity—considered under the totality of the circumstances—will generally be sufficient to support a finding of a waiver of a party's right to arbitration.³³

Even where a party has filed a timely motion to compel arbitration, the party can waive any right to arbitration that the party has because of actions that are inconsistent with the request for arbitration.³⁴ And once waived, the

27. *Id.*

28. *Id.* at 686.

29. *Id.* at 688. (citing *Olson Elec. Co. v. Winter Park Redevelopment Agency*, 987 So. 2d 178, 179 (Fla. 5th Dist. Ct. App. 2008); *Estate of Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812–13 (Fla. 3d Dist. Ct. App. 2007); *Coastal Sys. Dev., Inc. v. Bunnell Found., Inc.*, 963 So. 2d 722, 724 (Fla. 3d Dist. Ct. App. 2007)). The Second District Court of Appeal, after reviewing cases decided by the First and Fourth Districts, concluded that those courts have not ruled on whether engaging in merits-related discovery, in and of itself, without other conduct inconsistent with arbitration, is insufficient to waive arbitration. *Green Tree Servicing, LLC*, 15 So. 3d at 688. The Second District also noted that in one of its post *Merrill Lynch* opinions the court found a waiver of the right to arbitrate and held, without referring to *Merrill Lynch*, that engaging in discovery was one of the factors that led the court to find that there had been a waiver of the party's claim for arbitration. *Id.* at 693 (citing *Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So. 2d 32, 33 (Fla. 2d Dist. Ct. App. 2005); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Adams*, 791 So. 2d 25 (Fla. 2d Dist. App. 2001)).

30. 791 So. 2d 25 (Fla. 2d Dist. Ct. App. 2001).

31. *Green Tree Servicing, LLC*, 15 So. 3d at 694.

32. *Merrill Lynch*, 791 So. 2d at 26. The appellate court rejected the alternative of distinguishing the case before it from the facts in *Merrill Lynch*. See *Green Tree Servicing, LLC*, 15 So. 3d at 690.

33. *Green Tree Servicing, LLC*, 15 So. 3d at 694.

34. *Id.* at 687 (citing *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973)).

right to arbitration cannot be revived without the opposing party's consent.³⁵ Propounding discovery on the merits of the case results in a waiver of arbitration.³⁶ Green Tree's change of heart did not undo the actions previously taken that were inconsistent with its claim that arbitration was required.³⁷ Finally, the Second District Court of Appeal considered whether the disavowal of its *Merrill Lynch* decision was unfair to Green Tree and should have prospective application only.³⁸ The court decided that there was no unfairness because of Green Tree's earlier stipulation regarding discovery.³⁹

In the second waiver of arbitration by conduct case, the Fourth District Court of Appeal, in *DFC Homes of Florida v. Lawrence*,⁴⁰ found that the participation in litigation was limited and did not constitute a waiver of a party's right to compel arbitration.⁴¹ The contract between DFC Homes of Florida (DFC) and Lawrence contained an arbitration provision, and when a dispute arose between them, it was arbitrated.⁴² The arbitrator found in DFC's favor.⁴³ Lawrence then filed an action against DFC in the circuit court.⁴⁴ In response, DFC filed a motion to compel further arbitration.⁴⁵ The trial court denied the motion observing that nothing required a second arbitration.⁴⁶ The appellate court noted that Lawrence had claimed that by proceeding in the court system and making settlement offers DFC had waived its right to arbitrate.⁴⁷ The Fourth District Court of Appeal stated the general rule that a party waives the contractual "right to arbitration by active participation . . . before asserting that right."⁴⁸ However, to prove waiver, Lawrence had to show that DFC had knowledge of the right to arbitrate but nevertheless actively participated in litigation or took other action inconsistent with arbitration.⁴⁹ Under the facts of *DFC Homes*, any of the alleged impro-

35. *Id.* (citing *Williams v. Manor Care of Dunedin, Inc.*, 923 So. 2d 615, 617 (Fla. 2d Dist. Ct. App. 2006)).

36. *Id.* at 688.

37. *See id.* at 690.

38. *See Green Tree Servicing, LLC*, 15 So. 3d at 694–95.

39. *Id.*

40. 8 So. 3d 1281 (Fla. 4th Dist. Ct. App. 2009).

41. *Id.* at 1283–84.

42. *Id.* at 1282.

43. *Id.*

44. *Id.*

45. *DFC Homes*, 8 So. 3d at 1282.

46. *Id.*

47. *See id.* at 1283.

48. *Id.* (citing *Strominger v. AmSouth Bank*, 991 So. 2d 1030, 1034 (Fla. 2d Dist. Ct. App. 2008)).

49. *See id.* (citing *Marine Env'tl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th Dist. Ct. App. 2003)).

per participation took place after the arbitrator had rendered his decision against Lawrence.⁵⁰ It was then that Lawrence instituted the action against DFC.⁵¹ Lawrence alleged that DFC “actively engaged” in the action by participating in depositions, making settlement offers, filing a motion to dismiss the suit for lack of prosecution, answering interrogatories, and participating in mediation.⁵² The appellate court disagreed.⁵³ DFC’s participation in the litigation was limited and took place only after it had exercised its right to arbitrate.⁵⁴ It did not even file an answer or an affirmative defense to Lawrence’s complaint.⁵⁵ Attempting to settle a dispute cannot be characterized as other action inconsistent with the right to arbitrate.⁵⁶ The appellate court reversed the trial court’s denial of DFC’s motion to compel arbitration.⁵⁷

D. *Arbitration and Discharge of Contractor’s Claim of Lien*

*Brookshire v. GP Construction of Palm Beach, Inc.*⁵⁸ involved the enforcement of a statutory construction lien in the face of a binding arbitration clause in the parties’ agreement.⁵⁹ GP Construction of Palm Beach, Inc. (Contractor) recorded a lien on the real estate owned by the Brookshires (Owners).⁶⁰ Owners, pursuant to section 713.21(4) of the *Florida Statutes*, filed a complaint seeking to have the lien discharged.⁶¹ The clerk of the court issued a summons to Contractor at which point Contractor had “to show cause within 20 days why [its] lien should not be enforced by action or vacated and canceled.”⁶² Contractor filed a motion to compel arbitration under its agreement with Owners and set the motion for hearing, but it did not start an action to enforce the lien.⁶³ On appeal, Contractor said that it filed the motion to compel arbitration rather than starting an action during the twenty-day period so that there would not be any claim that it had waived its right to arbitration.⁶⁴ The trial court granted Contractor’s motion to com-

50. *DFC Homes*, 8 So. 3d at 1283.

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. *DFC Homes*, 8 So. 3d at 1283.

56. *Id.*

57. *Id.* at 1284.

58. 993 So. 2d 179 (Fla. 4th Dist. Ct. App. 2008).

59. *See id.* at 179–80.

60. *Id.*

61. *Id.* at 180.

62. *Id.*

63. *Brookshire*, 993 So. 2d at 180.

64. *See id.*

pel arbitration and did not discharge the lien.⁶⁵ The Fourth District Court of Appeal reversed, directing that the lien be discharged by the trial court.⁶⁶ The statutory twenty-day response period does not provide for extensions or other exceptions, and there is no discretion left to the courts.⁶⁷ If the lienor fails to take the statutorily required action within the required time, the court must discharge the lien.⁶⁸ Had Contractor filed a counterclaim to Owners' complaint during the statutory period, the lien could have been preserved.⁶⁹ The appellate court noted that "[t]he lien, however, and the dispute, are not one and the same, [and] disposition of the lien would not" have resolved the issue of liability on Contractor's claim.⁷⁰

Although the decision represents an interpretation of a party's obligation under one statutory lien statute, the strict rule enunciated here may be more far reaching than it appears. Will the principles set out here apply equally to other situations where judicial action may be the statutory mandate for enforcing a party's right or defending against the statutory right but the parties have agreed to arbitrate all disputes? The Fourth District Court of Appeal's ruling in this case and the cases cited therein should be carefully considered.⁷¹

Unlike the situation in *Brookshire*, where apparently there was no applicable exception to arbitration contained in the arbitration agreement,⁷² in *Greenberg v. Sellers*⁷³ there was an exception.⁷⁴ The arbitration clause of the operating agreement between the parties provided in part that "the aggrieved party shall be entitled to injunctive and/or equitable relief in a court of competent jurisdiction" notwithstanding the mandatory arbitration provision.⁷⁵

65. *Id.*

66. *Id.*

67. *Id.* (citing *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53, 55 (Fla. 3d Dist. Ct. App. 1994)).

68. *Brookshire*, 993 So. 2d at 180 (citing *Sturge v. LCS Dev. Corp.*, 643 So. 2d 53, 55 (Fla. 3d Dist. Ct. App. 1994)).

69. *See id.* (citing *Mainlands Constr. Co. v. Wen-Dic Constr. Co.*, 482 So. 2d 1369, 1370 (Fla. 1986)).

70. *Id.*

71. In *Brookshire*, Contractor took the position that its underlying claim for payment would have to be arbitrated. *Id.* However, had that not been the case, could Contractor, if it had chosen to do so, have successfully alleged that the Brookshires waived their right to arbitration by seeking relief from the court under section 713.21(4) of the *Florida Statutes*? Appropriate language in an arbitration agreement may eliminate some of the waiver concerns presented in *Brookshire*.

72. *See id.*

73. 2 So. 3d 381 (Fla. 4th Dist. Ct. App. 2008).

74. *See id.* at 383.

75. *Id.* at 382 (emphasis added).

The Fourth District Court of Appeal agreed with the trial court that four out of the five counts of the complaint were subject to arbitration.⁷⁶ These counts were for conversion, breach of contract and of fiduciary duty, and violations under the Florida Deceptive and Unfair Trade Practices Act.⁷⁷ However, the appellate court reversed with respect to the first count, which was for an accounting, since that was a request for equitable relief.⁷⁸

E. *Enforcement of Settlement Agreement*

Disputes arose in connection with gas station leases between Petroleum Realty I, LLC (Landlord) and Boca Petroco, Inc. (Tenant).⁷⁹ Landlord sued for payment of rent and certain other amounts.⁸⁰ The oral settlement reached just before trial addressed these issues, plus it required Tenant to file periodic environmental reports with Landlord in accordance with the requirements of the leases.⁸¹ Tenant failed to make required payments in accordance with the settlement agreement.⁸² Additional litigation ensued that included the following: the trial court enforced the settlement agreement; Tenant appealed; the Fourth District Court of Appeal affirmed; Landlord obtained a writ of possession with the trial court retaining jurisdiction to enforce the settlement agreement; Tenant again appealed; and the Fourth District Court of Appeal again affirmed.⁸³ Although the lease had expired prior to the appellate court's second decision, and Tenant had been ordered to pay more than \$14,000,000 in damages for failure to pay the amounts due in accordance with the settlement agreement, the matter did not end after the second trip to the appellate court.⁸⁴ Landlord subsequently sent notice to Tenant that Tenant was in default under the environmental provisions of the lease, and based on provisions in the lease that imposed on Tenant the obligation to undertake environmental clean-up efforts, and the alleged failure to file reports under the settlement agreement, Landlord asked the trial court to exercise its continuing enforcement jurisdiction, which the court did, awarding

76. *Id.* at 382–83.

77. *Id.* Presumably, only damages were sought on these claims.

78. *Greenberg*, 2 So. 3d at 383.

79. *Boca Petroco, Inc. v. Petroleum Realty I, LLC*, 993 So. 2d 1092, 1093 (Fla. 4th Dist. Ct. App. 2008).

80. *Id.*

81. *Id.* at 1094.

82. *Id.*

83. *Id.* at 1093.

84. *Boca Petroco, Inc.*, 993 So. 2d at 1093.

Landlord an additional \$1,901,000 as the environment clean-up cost.⁸⁵ Tenant again appealed, and the appellate court reversed as to the environmental clean-up damages.⁸⁶ The environmental report requirement was part of the settlement agreement,⁸⁷ but the award of clean-up damages was not.⁸⁸ Those damages resulted from the alleged breach of the original lease agreement.⁸⁹ The clean-up damage award was not an enforcement of the settlement agreement.⁹⁰ Therefore, the trial court did not have jurisdiction, and Landlord would have to file another lawsuit to claim clean-up damages.⁹¹

III. ATTORNEYS' FEES

A. *Prevailing Party: Construction Lien*

In *Trytek v. Gale Industries, Inc.*,⁹² the Supreme Court of Florida was called upon to determine what “prevailing party” means in construction lien litigation.⁹³ Gale Industries, Inc. (Gale) was hired by the Tryteks to install insulation in the home they were building.⁹⁴ There was no dispute that during the insulation installation by employees of Gale, the electrical system was inadvertently damaged.⁹⁵ Mr. Trytek and Gale agreed on the electrical company that would make repairs, which was a company owned by Mr. Trytek.⁹⁶ After the repairs were made, and the Tryteks had calculated the cost of the repairs at \$11,770, the Tryteks tried to offset that amount against the amount Gale claimed it was owed for its work.⁹⁷ Gale refused a check tendered by Mr. Trytek in the amount of \$736, which represented the net

85. *Id.* at 1094. This environment clean-up damage award was then included in a final judgment for unpaid rent and other charges due pursuant to the settlement agreement. *Id.* The balance of the trial court’s judgment was affirmed. *Id.* at 1095.

86. *Id.* at 1094. The Fourth District noted that the Supreme Court of Florida, in *Paulucci v. Gen. Dynamics Corp.*, explained that where a settlement agreement is incorporated into a final judgment and jurisdiction is retained to enforce the terms of the settlement agreement, the court can enforce terms included in the settlement agreement “even if the terms are outside the scope of the remedy” that was requested in the complaint. *Boca Petroco, Inc.*, 993 So. 2d at 1094 (quoting *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003)).

87. *Id.*

88. *Id.* at 1095.

89. *Id.* at 1094.

90. *Id.*

91. *Boca Petroco, Inc.*, 993 So. 2d at 1094–95 (citing *Paulucci*, 842 So. 2d at 803).

92. 3 So. 3d 1194 (Fla. 2009).

93. *Id.* at 1196.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Trytek*, 3 So. 3d at 1196–97.

amount the Tryteks determined was due to Gale.⁹⁸ Gale then recorded a \$12,725 construction lien—with no offset for any part of the cost of repair.⁹⁹ Based on the stipulations of the parties prior to trial, the only issue to be decided by the judge was the amount of the damages Gale owed to the Tryteks.¹⁰⁰ The judge found that the repair damages were \$11,200, and, in accordance with the parties' stipulations, offset this amount against the \$12,725 amount agreed by the parties to be due Gale.¹⁰¹ The result was a judgment for Gale in the amount of \$1525.¹⁰² Then the parties filed motions under the construction lien statute seeking attorneys' fees as well as costs, each party claiming "prevailing party" status for purposes of section 713.29 of the *Florida Statutes*.¹⁰³ The trial court determined that the test set forth by the Supreme Court of Florida in *Prosperi v. Code, Inc.*¹⁰⁴ was applicable.¹⁰⁵ The trial court concluded that under the "significant issue" test of *Prosperi*, the Tryteks had to be the prevailing party because the only "significant issues," in fact, "the only real issue" was the amount of the Tryteks' recovery on their set-off counterclaim, "and the Tryteks primarily prevailed on their counterclaim."¹⁰⁶ Gale appealed, and the Fifth District Court of Appeal reversed, concluding that the *Prosperi* "significant issues" determination is only applicable if a "contractor is *unsuccessful*" in its action to foreclose on the lien.¹⁰⁷ The Fifth District Court of Appeal found that Gale was successful since it recovered a net amount of \$1525 against the Tryteks, and therefore Gale was the prevailing party and the *Prosperi* test did not apply.¹⁰⁸ The appellate court reversed and remanded for a determination of the fees and costs for Gale, and certified the question to the Supreme Court of Florida.¹⁰⁹ The Court rephrased the certified question as follows:

Where a lienor obtains a judgment against a property owner in an action to enforce a construction lien brought pursuant to section 713.29, *Florida Statutes* (2005), are trial courts required to apply the "significant issues" test articulated in *Prosperi v. Code, Inc.*,

98. *Id.*

99. *Id.* at 1197.

100. *Id.*

101. *Id.*

102. *Trytek*, 3 So. 3d at 1197.

103. *Id.*

104. 626 So. 2d 1360 (Fla. 1993).

105. *Trytek*, 3 So. 3d at 1197.

106. *Id.*

107. *Id.* at 1198.

108. *Id.*

109. *Id.* at 1196, 1198.

626 So. 2d 1360 (Fla. 1993), in determining which party, *if any*, is the “prevailing party” for the purpose of awarding attorneys’ fees?¹¹⁰

The Court summarized “the main issue” as a question of “what factors enter into a determination of ‘prevailing party’ pursuant to section 713.29.”¹¹¹ The Court stated “the specific issue” as:

whether the trial court is vested with discretion, or is even required to consider, which party prevailed on the significant issues; or whether the trial court is bound by an inflexible bright-line rule that a prevailing party must be determined and that the contractor must be considered the prevailing party if it obtains a judgment on its lien in any amount in excess of an asserted set-off or counterclaim.¹¹²

The Court referred to its decision in *Prosperi* for the proposition that when a trial court is called upon to determine the “prevailing party” in a construction lien litigation, it should look to which party prevailed on the “significant issues” before the court.¹¹³ The Court held that the “significant issues test” applies even if a contractor prevails in its lien action.¹¹⁴ Just because a contractor obtains a judgment on its lien in excess of a claimed set-off or counterclaim does not automatically make it the prevailing party.¹¹⁵ Thus, the fact that a contractor obtains a “net judgment” is not necessarily a controlling factor in determining the prevailing party, even though it may be “a significant factor.”¹¹⁶ The Court remanded the matter to the trial court.¹¹⁷ However, the Court, relying on its decision in *C.U. Associates, Inc. v. R.B. Grove, Inc.*,¹¹⁸ made it clear that there does not have to be a prevailing party in a construction lien case.¹¹⁹ In substance, the Court gave trial judges considerable discretion to determine if there is a prevailing party in section 713.29 cases and, if so, which party prevailed on the significant issue or issues.¹²⁰

110. *Trytek*, 3 So. 3d at 1196 (alteration in original).

111. *Id.* at 1198.

112. *Id.*

113. *See id.* at 1201.

114. *Id.* at 1202.

115. *Trytek*, 3 So. 3d at 1202.

116. *Id.*

117. *Id.* at 1204.

118. 472 So. 2d 1177 (Fla. 1985).

119. *Trytek*, 3 So. 3d at 1203–04.

120. *See id.* While many issues raised by, and the potential problems identified in, the cases in this survey may be resolved contractually, the issues presented by the Court’s deci-

B. *Prevailing Party: Breach of Lease Agreement Dispute*

In *Civix Sunrise, GC, LLC v. Sunrise Road Maintenance Ass'n*,¹²¹ Civix Sunrise, GC, LLC (Lessee) bought real estate subject to a ninety-nine year lease made in 1972.¹²² The lease required Lessee to operate a golf course on the property.¹²³ Lessee was to also sell golf or country club memberships to people residing on property adjoining the Civix property.¹²⁴ After making the purchase, Civix stopped operating the golf course and announced it was planning to develop the property.¹²⁵ Various associations (Associations) representing adjacent property owners successfully sued Lessee and prevented it from developing the property.¹²⁶ Specifically, Associations persuaded the trial court to declare “that the lease had not been extinguished by merger and [remained as] an encumbrance on the property.”¹²⁷ Associations were the intended beneficiaries of parts of the lease, including that part mandating the operation of a golf course.¹²⁸ Associations then asked for attorney’s fees pursuant to paragraph twenty of the lease, which so provided to the prevailing party.¹²⁹ The trial court awarded fees to Associations as intended third-party beneficiaries of the lease.¹³⁰ The Second District Court of Appeal reversed.¹³¹ An agreement as to attorney’s fees in a contract must be “clear and specific” to be enforceable.¹³² Applying this test, the appellate court found that the term “party” in the lease’s fee clause referred only to the signatory parties to the lease.¹³³ In other words, the Second District Court of Appeal refused to read into the lease that these third-party beneficiaries of a

sion in *Trytek* do not appear to readily lend themselves to that solution. See Barbara Landau, *2007–2008 Survey of Florida Law Affecting Business Owners*, 33 NOVA L. REV. 81, 98–99 (2008) [hereinafter Landau, *2007–2008 Survey*] for a discussion of the Fourth District Court of Appeal’s decision in *Port-A-Weld, Inc. v. Padula & Wadsworth Constr., Inc.*, 984 So. 2d 564 (Fla. 4th Dist. Ct. App. 2008), where the Fourth District Court of Appeal held that the “significant issue” test set forth by the Supreme Court of Florida in *Prosperi* may not be changed by contract. See *Port-A-Weld, Inc.*, 984 So. 2d at 570.

121. 997 So. 2d 433 (Fla. 2d Dist. Ct. App. 2008).

122. *Id.* at 434.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Civix Sunrise, GC, LLC*, 997 So. 2d at 434.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Civix Sunrise, GC, LLC*, 997 So. 2d. at 435.

132. *Id.* (citing *Sholkoff v. Boca Raton Cmty. Hosp., Inc.*, 693 So. 2d 1114, 1118 (Fla. 4th Dist. Ct. App. 1997)).

133. *Id.*

portion of the lease agreement were also beneficiaries of the attorney's fee clause.¹³⁴

IV. BUSINESS ARRANGEMENTS, ENTITIES, AND AGREEMENTS

A. Corporations: Special Law

The question presented to the Supreme Court of Florida in *Lawnwood Medical Center, Inc. v. Seeger*,¹³⁵ was whether the St. Lucie County Hospital Governance Law (HGL)¹³⁶ violated Florida's constitutional prohibition against passing a law that includes the "grant of [a] privilege to a private corporation" by special law or by a "general law of local application."¹³⁷ Lawnwood Medical Center, Inc. (Lawnwood), a for-profit corporation, owns Lawnwood Regional Medical Center and Heart Institute in St. Lucie County.¹³⁸ In 1993, Lawnwood's medical staff adopted Medical Staff Bylaws (Bylaws).¹³⁹ The Bylaws were approved by Lawnwood's Board of Directors.¹⁴⁰ Lawnwood needed to have the Bylaws to remain in good standing with the Joint Commission for the Accreditation of Healthcare Organizations.¹⁴¹ There was no requirement that the Bylaws contain specific terms.¹⁴²

After the Bylaws were adopted, lawsuits were instituted as the result of disputes that developed between the Lawnwood administration and the medical staff.¹⁴³ Lawnwood turned to the legislature for help, which resulted in the 2003 enactment of the HGL.¹⁴⁴ The effect of the new law was to allow Lawnwood's Board to trump virtually every decision made by the medical staff pursuant to the Bylaws.¹⁴⁵ Lawnwood instituted suit to have the HGL declared constitutional, but the trial court found the law to be unconstitutional.¹⁴⁶ The First District Court of Appeal agreed that the law was unconstitu-

134. *Id.*

135. 990 So. 2d 503 (Fla. 2008).

136. *Id.* at 506.

137. *Id.* at 509 (quoting FLA. CONST. art. III, § 11(a)(12)). Article III, section 11(a) of the Florida Constitution provides that "[t]here shall be no special law or general law of local application pertaining to: . . . (12) private incorporation or grant of privilege to a private corporation." FLA. CONST. art. III, § 11(a)(12).

138. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 506.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 507.

144. *Id.* at 507-08.

145. *See id.* at 508.

146. *Id.*

tional.¹⁴⁷ Lawnwood appealed, and the Supreme Court of Florida concluded that the law was a special law, as it was expressly “intended to affect only those privately operated hospitals located in St. Lucie County.”¹⁴⁸ In this case of first impression, the Court’s decision turned on the meaning of the word “privilege,” as used in article III, section 11(a)(12) of the Florida Constitution, a phrase not previously construed by the Court.¹⁴⁹ The Court cited *City of Plattsmouth v. Nebraska Telephone Co.*,¹⁵⁰ where the Supreme Court of Nebraska defined “special privilege,” as used in its constitution, as “a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right.”¹⁵¹ The Supreme Court of Florida, applying principles of statutory construction, concluded that “privilege” is not limited to an economic advantage and that a broad reading of the word “privilege” is consistent with the 1968 addition of this provision to the Florida Constitution.¹⁵² After so concluding, the Court found that the HGL is a special law granting to a corporation prohibited rights, benefits, and advantages amounting to a privilege.¹⁵³ This special law “alter[ed] the balance of power” between Lawnwood and its medical staff.¹⁵⁴

B. *Ultra Vires Doctrine*

Cambridge Credit Counseling Corporation (Guarantor), a Massachusetts corporation, guaranteed the leasehold obligations of Brighton Credit Corporation (Tenant) to 7100 Fairway, LLC (Landlord).¹⁵⁵ The guaranty was made in connection with the assignment of the lease to Tenant by a third party.¹⁵⁶ The assignment and the guaranty were both signed by John Puccio, as president of Guarantor, and the guaranty provided that Guarantor was the parent and owner of all of the shares of Tenant.¹⁵⁷ After Tenant defaulted on

147. *Id.*

148. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 510. It was undisputed that the new law “affected only the two private hospitals in St. Lucie County,” both owned by the same parent corporation. *Id.* at 508.

149. *Id.* at 510.

150. 114 N.W. 588 (Neb. 1908).

151. *Lawnwood Med. Ctr., Inc.*, 990 So. 2d at 511–12 (quoting *City of Plattsmouth*, 114 N.W. at 590).

152. *Id.* at 513–14.

153. *Id.* at 518.

154. *Id.*

155. *Cambridge Credit Counseling Corp. v. 7100 Fairway, LLC*, 993 So. 2d 86, 88 (Fla. 4th Dist. Ct. App. 2008).

156. *Id.*

157. *Id.*

the lease during the fifth year, Landlord sued Tenant under the lease and Guarantor under the guaranty agreement.¹⁵⁸ Tenant defaulted in the action and judgment was entered against it, but Guarantor filed an answer with affirmative defenses.¹⁵⁹ Landlord's motion for summary judgment as to the defenses raised by Guarantor was granted, and Guarantor appealed.¹⁶⁰ Guarantor had alleged as an affirmative defense that its guaranty was ultra vires under the law of Massachusetts, the state in which it was incorporated.¹⁶¹ Guarantor argued that Massachusetts law should be applied, and that under the law of Massachusetts, a public charity is prohibited from guaranteeing the obligations of another.¹⁶² Guarantor claimed that it was a public charity under Massachusetts law.¹⁶³ Although Guarantor apparently qualified as a charity under section 501(c)(3) of the Internal Revenue Code,¹⁶⁴ the appellate court was not convinced of Guarantor's status as a public charity under Massachusetts law.¹⁶⁵ However, Guarantor's status under Massachusetts law did not matter since Florida law applied.¹⁶⁶ Not only was performance under the lease and guaranty to be in Florida, but both instruments had "Florida choice of law" provisions.¹⁶⁷ Under section 617.0304(2) of the *Florida Statutes*, the claim of ultra vires is available only to corporate shareholders in derivative actions or to the attorney general.¹⁶⁸ A corporation cannot rely on the ultra vires doctrine as a defense to an agreement with a third party voluntarily entered into by the corporation, and the trial court was affirmed.¹⁶⁹ Guarantor also had alleged that Mr. Puccio, as its president, did not have the actual or apparent authority to execute the guaranty.¹⁷⁰ The Fourth District likewise did not disturb the trial court's finding that Mr. Puccio had apparent authority to sign the guaranty.¹⁷¹ The appellate court, quoting *Lensa Corp. v. Poincia-*

158. *Id.*

159. *Id.*

160. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 88.

161. *Id.*

162. *Id.*

163. *Id.*

164. See I.R.C. § 501(c)(3) (2006).

165. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 89.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 90–91. The court distinguished *Chatlos Found., Inc. v. D'Arata*, a case relied on by Guarantor, because that case involved organizational or internal matters governed by the state of incorporation, whereas this case involved transactions between the Guarantor and third parties. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90 (citing *Chatlos Found., Inc. v. D'Arata*, 882 So. 2d 1021 (Fla. 5th Dist. Ct. App. 2004)).

170. *Id.* at 90.

171. *Id.*

na Gardens Ass'n,¹⁷² listed the three elements necessary for there to be a finding of apparent agency as follows: “(1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance [on the] representation.”¹⁷³ Finding that the execution of the lease guaranty was an act done “in the ordinary course of business,” the Fourth District applied “the presumption of authority” that has been “consistently recognized” by the courts with respect to the acts of corporate presidents, finding that the first requirement was met.¹⁷⁴ The reliance requirement was met because the guaranty itself said that Landlord would not have agreed to the lease assignment without the guaranty.¹⁷⁵ The change of position requirement was met because Landlord released the original tenant.¹⁷⁶ The appellate court concluded that there was no remaining material question of fact.¹⁷⁷ But just in case there was still an issue of fact regarding apparent authority, the Fourth District observed that Guarantor was estopped from denying the validity of the guaranty five years after signing it.¹⁷⁸ Therefore, the trial court correctly entered summary judgment in favor of Landlord on this issue as well.¹⁷⁹

C. *Piercing the Corporate Veil*

IAT Group, Inc. (IAT) was the successful bidder for the purchase of stock in two subsidiaries that were wholly owned by Grupo Empresarial Agrícola Mexicano, S.A. de C.V. (GEAM), a Mexican corporation, and Mr. Abu-Ghazaleh was IAT’s chairman.¹⁸⁰ Mr. Bours was then the chairman of GEAM.¹⁸¹ The GEAM subsidiary involved in this appeal was Fresh Del Monte Produce, NV (FDMP NV).¹⁸² IAT formed a subsidiary, Fresh Del Monte Produce, Inc. (FDMP Inc.) for the acquisition of the FDMP NV stock.¹⁸³ Owners of a minority interest in GEAM, “identif[y]ing themselves as de facto shareholders of” FDMP NV (Plaintiffs), claimed that the pur-

172. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).

173. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90 (quoting *Lensa Corp.*, 765 So. 2d at 298).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Cambridge Credit Counseling Corp.*, 993 So. 2d at 90.

179. *See id.* at 91.

180. *Chaul v. Abu-Ghazaleh*, 994 So. 2d 465, 467 (Fla. 3d Dist. Ct. App. 2008).

181. *Id.*

182. *Id.*

183. *Id.*

chase and sale of the FDMP NV stock was tainted by dishonesty and sued to recover damages for the alleged fraud.¹⁸⁴ They sued IAT, Mr. Abu-Ghazaleh, GEAM, Mr. Bours, and FDMP Inc. (collectively referred to as Defendants), alleging that GEAM “received inadequate consideration” for the sale of FDMP NV as a result of GEAM’s then chairman’s breach of his fiduciary duty.¹⁸⁵ Defendants alleged that Plaintiffs lacked standing, but Defendants’ summary judgment motion based on this argument was denied.¹⁸⁶ The case went to trial, and the jury found for Defendants.¹⁸⁷ Plaintiffs appealed, and Defendants filed a cross-appeal from the trial court’s denial of their motion for summary judgment.¹⁸⁸ The Third District Court of Appeal reversed, finding that the trial court should have granted Defendants’ motion for summary judgment.¹⁸⁹ Plaintiffs’ claims were derivative of their ownership of stock in GEAM.¹⁹⁰ They should have instituted “a shareholder derivative action.”¹⁹¹ In addition, Plaintiffs could not get around the fact that their claim was derivative by “invoking the alter ego doctrine.”¹⁹² They could “not pierce their own corporate veil” to claim standing with respect to the corporation’s assets.¹⁹³ A direct action by Plaintiffs would only have been appropriate if the right Plaintiffs sought to enforce existed in them as stockholders of FDMP NV, which it did not.¹⁹⁴ Plaintiffs also argued that the sale of FDMP was a “de facto merger,” but the appellate court did not agree.¹⁹⁵

D. *Minority Shareholder Appraisal Rights*

Foreclosure Freesearch, Inc. v. Sullivan,¹⁹⁶ while nominally about the elements necessary to support injunctive relief, is instructive as to a minority shareholder’s stock appraisal rights under section 607.1302(1)(d) of the *Florida Statutes*.¹⁹⁷ In *Foreclosure Freesearch*, Mr. Geisen (Majority Shareholder) was the founder and majority shareholder of Foreclosure Freesearch, Inc.

184. *Id.* at 466–67. These shareholders held a total of direct and indirect ownership of 6.3 percent of the shares of GEAM. *Chaul*, 994 So. 2d at 467.

185. *Id.* at 466–67.

186. *Id.* at 466.

187. *Id.* at 467.

188. *Id.* at 466.

189. *Chaul*, 994 So. 2d at 466.

190. *Id.*

191. *Id.*

192. *Id.* at 467.

193. *Id.*

194. *Chaul*, 994 So. 2d at 467.

195. *Id.* at 467–68.

196. 12 So. 3d 771 (Fla. 4th Dist. Ct. App. 2009).

197. *Id.* at 773.

(Corporation), which in turn, was the defendant in an action instituted by the minority shareholders, Mr. Sullivan and Mr. Mutillo (Minority Shareholders) over various corporate matters including whether Minority Shareholders were in fact shareholders of Corporation.¹⁹⁸ Claims and counterclaims were made.¹⁹⁹ Seeking to bring the litigation to a close, Majority Shareholder caused Corporation to initiate a reverse stock split.²⁰⁰ In this instance, a reverse stock split meant that Minority Shareholders would each end up with less than one share—a fractional share—of Corporation, and the fractional share of each of them would be purchased by Corporation.²⁰¹ The reverse stock split invoked Minority Shareholders' statutory appraisal rights under section 607.1302(1)(d) of the *Florida Statutes*.²⁰² Minority Shareholders asked the trial judge to temporarily enjoin the appraisal process, claiming that once their corporate interests were purchased, they would no longer have standing to pursue their counterclaims.²⁰³ The judge agreed and enjoined the appraisal process.²⁰⁴ The concern was that Majority Shareholder may be liable for improper actions that reduced the value of Corporation.²⁰⁵ If so, ending the litigation in this manner, that is by virtue of having the appraisal proceed, would prevent the ascertainment of the "true" value of Corporation and the minority shares.²⁰⁶

The Fourth District Court of Appeal reversed,²⁰⁷ concluding that injunctive relief is an equitable remedy, and Minority Shareholders had an adequate remedy at law.²⁰⁸ The appellate court held that "the appraisal process provides an adequate remedy at law" noting that "[s]tatutory proceedings are regarded as law action."²⁰⁹ In reaching its decision that the appraisal process was to proceed, the Fourth District Court of Appeal relied on *Wil-*

198. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 773.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 774. This was the reason given by the minority shareholder in *Williams* for what they called a "conditional election of appraisal rights" which election was considered by the trial court to be "a nullity." *Williams v. Stanford*, 977 So. 2d 722, 725 (Fla. 1st Dist. Ct. App. 2008). Hence the minority shareholders in *Williams* were deemed by the trial court to have waived their appraisal rights, and they did not appeal that ruling. *Id.*

204. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 774.

205. *See id.*

206. *See id.*

207. *Id.* at 778.

208. *Id.*

209. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 775–76 (quoting *Adams v. Dade County*, 202 So. 2d 585, 586 (Fla. 3d Dist. Ct. App. 1967)).

liams v. Stanford,²¹⁰ a 2008 decision of the First District Court of Appeal involving shareholder appraisal rights under section 607.1302(1).²¹¹ The First District there held that if certain requirements were met, minority shareholders could make a claim under section 607.1302(4)(b) of the *Florida Statutes* that wrongful acts by a majority shareholder adversely affected value.²¹² The Fourth District Court of Appeal in *Foreclosure Freesearch* stated that if Minority Shareholders could support the claims, then, as held in *Williams*, they ““may be entitled to equitable remedies beyond an appraisal proceeding if the alleged acts have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder.””²¹³ Minority Shareholders’ counterclaim included a count for breach of fiduciary duty by Majority Shareholder for misappropriation of corporate funds and a count against Corporation for wrongfully withheld distributions of profits.²¹⁴ Thus, although Majority Shareholder can invoke the appraisal process to eliminate the rights of Minority Shareholders,²¹⁵ Minority Shareholders can challenge appraised value and, under the *Williams* analysis, go beyond the appraisal pursuant to the fraud exception of section 607.1302(4)(b) of the *Florida Statutes*, provided they meet the requirements set forth in *Williams*.²¹⁶ The Fourth District Court of Appeal said that “[b]ecause [Minority Shareholders] are not deprived of their ability to seek relief beyond the appraisal if they satisfy the *Williams* analysis, they have an adequate remedy at law.”²¹⁷

E. Shareholders’ Agreements: Arbitrability

In *Breakstone v. Breakstone Homes, Inc.*,²¹⁸ the Shareholders’ Agreement between Breakstone Homes, Inc. (Corporation) and its shareholders provided in part that “[a]ny controversy or claim arising out of or relating to

210. 977 So. 2d 722 (Fla. 1st Dist. Ct. App. 2008).

211. See *id.* at 726–27; Landau, 2007–2008 Survey, *supra* note 120, at 86–87. The appraisal rights in *Williams* derived from subsection (c) rather than subsection (d) of section 607.1302(1).

212. *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st Dist. Ct. App. 2008).

213. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 777 (citing *Williams*, 977 So. 2d at 730).

214. *Id.* at 773, 778.

215. *Id.* at 778. The appellate court extended the time within which Minority Shareholders could exercise their appraisal rights to seven days after the date of the issuance of the court’s “mandate to exercise their rights in the appraisal process.” *Id.*

216. *Id.* at 777.

217. *Foreclosure Freesearch, Inc.*, 12 So. 3d at 778.

218. 999 So. 2d 731 (Fla. 3d Dist. Ct. App. 2009).

this Agreement or a breach hereof shall be finally settled by arbitration.”²¹⁹ Corporation brought an action against Mr. Breakstone (Director), who was one of three directors (and a shareholder), alleging breaches of fiduciary duties as a director of Corporation.²²⁰ Director sought an order compelling arbitration, and in response, Corporation relied on *Seifert v. U.S. Home Corp.*,²²¹ where the Supreme Court of Florida set forth the three-pronged test that a court must apply before it compels arbitration.²²² Under the second prong of the *Seifert* test, there must be “an arbitrable issue.”²²³ Corporation argued that its claim was not arbitrable because it was “a tort claim ‘unrelated to the rights and obligations’” under the Shareholders’ Agreement.²²⁴ The trial court denied Director’s motion to compel arbitration, and he appealed.²²⁵ The Third District Court of Appeal reversed.²²⁶ The Shareholders’ Agreement here contemplated breach of fiduciary duty by a director and provided a remedy.²²⁷ Corporation’s claim was “significantly related to the rights and obligations in the Agreement” and arbitration was required.²²⁸

F. Joint Venture

North Broward Hospital District (NBHD), having become a Trauma Level II hospital, needed general surgeons for its emergency room.²²⁹ NBHD sought the services of several surgeons, asking them to form a corporation that NBHD would deal with, rather than dealing with the surgeons individually.²³⁰ Several surgeons, including Dr. Triana, decided that they would, individually, through their own practices, as independent contractors, provide surgical services to NBHD through contracts between NBHD and Fort Lauderdale Surgery Associates, P.A. (FLSA), a corporation newly formed for

219. *Id.* at 732 (emphasis omitted).

220. *Id.*

221. 750 So. 2d 633 (Fla. 1999).

222. *Breakstone*, 999 So. 2d at 732. Under *Seifert*, the court must determine: (1) if there is “a valid written agreement to arbitrate;” (2) if there is an arbitrable issue; and (3) if there has been a waiver of the right to arbitrate. *Seifert*, 750 So. 2d at 636.

223. *Seifert*, 750 So. 2d at 636.

224. *Breakstone*, 999 So. 2d at 732.

225. *Id.*

226. *Id.* at 733.

227. *Id.*

228. *Id.*

229. *Sheridan Healthcorp, Inc. v. Amko*, 993 So. 2d 167, 168 (Fla. 4th Dist. Ct. App. 2008).

230. *Id.* The services were to be provided to persons who were indigent and did not have insurance. *Id.*

this purpose.²³¹ The surgeons' interests in FLSA would be based on the degree of each surgeon's participation.²³² When the corporation was formed, the only stock issued was to Dr. O'Rourke.²³³ Four of the doctors other than Dr. Triana were named the officers of FLSA.²³⁴ NBHD and FLSA then executed a written agreement that detailed the surgical services FLSA would provide, specified standards to be met, and required Dr. O'Rourke to "oversee" the other surgeons, including Dr. Triana.²³⁵ Dr. Triana and the other surgeons signed agreements with FLSA that confirmed FLSA's arrangement with NBHD and the surgeons' status as independent contractors for FLSA.²³⁶ Although these agreements were not signed by FLSA, the terms of the independent contractor agreements were followed.²³⁷ The surgeons subsequently adopted "by-laws" which required that any decisions be by unanimous vote of the surgeons.²³⁸ During the term of the various agreements, the other surgeons voted to fire Dr. Triana.²³⁹ Dr. Triana sued FLSA and the three doctors who were then the officers of FLSA.²⁴⁰ Dr. Triana alleged that a breach of fiduciary duty owed to him under their joint venture had occurred, arising out of the absence of adherence to corporate formalities and by virtue of firing him.²⁴¹ The trial court entered a summary judgment in favor of the defendants, reasoning that even if there had been a joint venture, it terminated when FLSA was formed, the purpose of the joint venture's creation having been realized.²⁴² The trial court ruled that under corporate law, the decision to fire Dr. Triana was reasonable, and thus proper under "the business judgment rule."²⁴³ The Fourth District Court of Appeal reviewed the law as to when there is a termination of a joint venture.²⁴⁴ The formation of a corporation may not be the end of a joint venture if forming the corporation

231. *Id.* at 168–69.

232. *Id.* at 169.

233. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 169.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 169.

239. *Id.* Dr. Triana objected to the firing based on the absence of unanimous consent. *Id.* He then learned that no FLSA stock had been issued to him. *Id.*

240. *Id.* One of the officers died before Dr. Triana was fired. *Sheridan Healthcorp, Inc.*, 993 So. 2d at 168 n.1.

241. *Id.* at 169–70.

242. *Id.* at 170. With respect to another count that was based upon the unsigned agreement with FLSA, the appellate court found that there were material factual issues and summary judgment should not have been granted to FLSA on this count. *Id.* at 171.

243. *Id.* at 170.

244. *See Sheridan Healthcorp, Inc.*, 993 So. 2d at 170.

was not the purpose of the joint venture, but rather was a means to an end.²⁴⁵ Here, there were material issues of fact remaining as to whether there was a continuing joint venture.²⁴⁶ Joint venturers owe each other a fiduciary duty.²⁴⁷ By failing to decide the factual issue of whether a joint venture existed and its proper purpose, the trial court's application of the business judgment rule was error.²⁴⁸

V. CONSUMER RIGHTS

*Ocana v. Ford Motor Co.*²⁴⁹ sets forth some important principles with respect to the Magnuson-Moss Warranty Act (MMWA)²⁵⁰ and its interaction with state law.²⁵¹ Mr. Ocana leased a Land Rover from Warren Henry Automobiles, Inc. (Dealership).²⁵² The Land Rover was new and came with a "New Vehicle Limited Warranty" from Ford Motor Company (Ford).²⁵³ Dealership assigned to Mr. Ocana all of Dealership's rights under the "standard manufacturer's new vehicle warranty."²⁵⁴ The lease agreement stated that Mr. Ocana was taking the Land Rover "AS IS" and the provision continued, also in capital letters, with the statement that "NO WARRANTIES OR REPRESENTATIONS, EITHER EXPRESS OR IMPLIED" with respect to any part of the Land Rover were being made.²⁵⁵ The provision included a statement, still in capital letters, that there was "NO WARRANTY OF MERCHANTABILITY OR FITNESS . . . FOR ANY PARTICULAR PURPOSE."²⁵⁶ Mr. Ocana then sued Ford and Dealership for breach of "express and implied warranties [under the MMWA]."²⁵⁷ He alleged that the vehicle had been taken back to Dealership at least four times for repairs in the first year of the lease.²⁵⁸ The complaint was dismissed with prejudice,

245. *Id.* (citing *Donahue v. Davis*, 68 So. 2d 163, 171 (Fla. 1953)).

246. *Id.* at 171.

247. *Id.*

248. *Id.*

249. 992 So. 2d 319 (Fla. 3d Dist. Ct. App. 2008).

250. *See id.* at 322; Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–12 (2006).

251. *See Ocana*, 992 So. 2d at 322–23; *see, e.g.*, FLA. STAT. § 672.313 (2009).

252. *Ocana*, 992 So. 2d at 322.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Ocana*, 992 So. 2d at 322. Mr. Ocana alleged that Ford and Dealership "fail[ed] to repair the vehicle within a reasonable amount of time or reasonable number of repair attempts" under the MMWA. *Id.* at 322–23.

258. *Id.* at 322.

and Mr. Ocana appealed.²⁵⁹ The appellate court noted that Mr. Ocana was trying to utilize a portion of the MMWA that applies only to full warranties,²⁶⁰ and which allows a consumer to choose between taking a refund for the defective product or a replacement free of charge if “a defect or malfunction” has not been remedied by the warrantor “after a reasonable number of attempts.”²⁶¹ Mr. Ocana’s problem, according to the appellate court, was that this option under the MMWA applies only to full warranties and not to limited warranties.²⁶² Ford had given a limited warranty.²⁶³ This meant that Mr. Ocana was required to prove breach of Ford’s limited warranty.²⁶⁴ This in turn required proof “that Ford refused or failed to adequately repair a covered item.”²⁶⁵ Mr. Ocana only proved the car was taken in four times.²⁶⁶ Although the MMWA authorizes a federal cause of action for breach of implied warranty, such a claim must be based on state law principles.²⁶⁷ In Florida, privity of contract is required to support a claim of implied warranty, and Mr. Ocana did not have privity of contract with Ford.²⁶⁸ He failed to prove that Dealership was acting as Ford’s agent in the lease transaction, which was necessary to establish privity.²⁶⁹ As to Mr. Ocana’s claim against Dealership, the Third District Court of Appeal first noted that in an “as is” contract, “causation is generally negated as a matter of law.”²⁷⁰ The consumer assumes the risk.²⁷¹ Dealership also clearly and conspicuously disclaimed any and all warranties and representations.²⁷² The court acknowledged that Mr. Ocana relied on *Gates v. Chrysler Corp.*,²⁷³ where the Fourth District applied the Magnuson-Moss refund/replacement consumer option to

259. *Id.* at 323.

260. *Id.*; see Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2303(a)(1), 2304(a) (2006).

261. *Ocana*, 992 So. 2d at 323 (quoting 15 U.S.C. § 2304(a)(4)).

262. *See id.* at 325.

263. *Id.* at 323.

264. *Id.* at 324.

265. *Id.*

266. *Ocana*, 992 So. 2d at 324.

267. *See id.* at 323–24.

268. *Id.* at 325–26.

269. *Id.* at 326.

270. *Id.* at 327 (quoting *Owens v. Mercedes-Benz USA, LLC*, 541 F. Supp. 2d 869, 871 (N.D. Tex. 2008)).

271. *Ocana*, 992 So. 2d at 327.

272. *Id.*

273. 397 So. 2d 1187 (Fla. 4th Dist. Ct. App. 1981).

limited warranties.²⁷⁴ The Third District described *Gates* as an “outlier,” but did not certify conflict with it to the Supreme Court of Florida.²⁷⁵

VI. CONTRACTS

A. *Contract Reformation*

The litigation in *Goodall v. Whispering Woods Center LLC*²⁷⁶ arose out of a real estate purchase agreement that followed a deposit agreement.²⁷⁷ Buyer alleged that the deposit agreement required Seller, who was also the developer, to raise the ceiling height of the purchased suites to twelve feet, and that the purchase price as stated in the deposit agreement included the price for the change in the height of the ceilings.²⁷⁸ Buyer also alleged that Seller promised that the purchase agreement would be drafted with terms identical to those in the deposit agreement.²⁷⁹ However, the purchase agreement provided for a ceiling height of ten feet, not twelve feet.²⁸⁰ The purchase agreement also contained a boilerplate clause, in capital letters, with language to the effect that Buyer had read each and every provision, that the purchase agreement constituted the entire agreement, and prior written or oral agreements, representations, or statements not reflected or included in the purchase agreement were without effect.²⁸¹ Seller refused to build out the ceilings to twelve feet, and Buyer sued Seller.²⁸² Buyer sought reformation of the contract, alleged that Seller breached the reformed contract, sought rescission, and also claimed unjust enrichment.²⁸³ The trial court found that Buyer had not stated any cause of action and dismissed Buyer’s complaint with prejudice.²⁸⁴ Buyer appealed, and the Fourth District Court of Appeal affirmed the trial court’s dismissal of the rescission and unjust enrichment claims, but reversed the dismissal of the reformation and breach of the re-

274. *Ocana*, 992 So. 2d at 324.

275. *Id.* at 325.

276. 990 So. 2d 695 (Fla. 4th Dist. Ct. App. 2008).

277. *Id.* at 697.

278. *Id.*

279. *Id.* at 697–98.

280. *Id.* at 698.

281. *Goodall*, 990 So. 2d at 698.

282. *Id.* at 697.

283. *Id.* at 698–99.

284. *Id.* at 699.

formed contract claims.²⁸⁵ The appellate court reviewed the rules regarding reformation.²⁸⁶

First addressed was the rule allowing the equitable remedy of reformation of a written instrument that does not accurately express the parties' intent because of a mutual mistake.²⁸⁷ In such a case, the defective agreement or instrument "is not altered;" it is just reformed so that it reflects the parties' actual intent.²⁸⁸

Second, a mutual mistake may be the result of "scrivener's error or inadvertence" so that what the parties agreed to is not what gets expressed in the agreement when reduced to writing.²⁸⁹ Third, reformation is also available in the case of a mistake by only one of the parties where the other party has engaged in inequitable conduct.²⁹⁰ The appellate court held that Buyer's allegations were sufficient to withstand a motion to dismiss.²⁹¹ Buyer had sufficiently pled a claim for reformation on the ground of mutual mistake.²⁹² Buyer had also sufficiently pled inequitable conduct on the part of Seller.²⁹³ Seller's argument that the boilerplate "merger and integration clause" in the purchase agreement prevented Buyer from seeking reformation—an equitable remedy—was rejected by the court.²⁹⁴ Also of no help to Seller was its argument that the complaint should be dismissed because Buyer "was negligent in failing to read the Agreement carefully" before signing it.²⁹⁵ According to the appellate court, signing an agreement "without reading it with care" normally results in the signer being bound.²⁹⁶ However, the appellate court found that the exception under section 157, comment b, of the Restatement (Second) of Contracts was applicable since the parties had agreed on the terms that were supposed to be included in the purchase agreement.²⁹⁷ Thus, mere "negligence in failing to read the writing does not" prevent an action for reformation of the agreement.²⁹⁸ Gross negligence would need to be shown, and the question of whether there was gross negligence on the part

285. *Id.* at 697.

286. *See Goodall*, 990 So. 2d at 699.

287. *Id.* (quoting *Tobin v. Mich. Mut. Ins. Co.*, 948 So. 2d 692, 696 (Fla. 2006) (per curiam)).

288. *Id.*

289. *Id.* (citing *Providence Square Ass'n v. Biancardi*, 507 So. 2d 1366, 1372 (Fla. 1987)).

290. *Id.* (citing *Providence Square Ass'n*, 507 So. 2d at 1372 n.3).

291. *See Goodall*, 990 So. 2d at 697, 699.

292. *Id.* at 699.

293. *Id.*

294. *Id.* at 700.

295. *Id.*

296. *Goodall*, 990 So. 2d at 700.

297. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b (1981)).

298. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b).

of Buyer was a question of fact not properly decided on a motion to dismiss.²⁹⁹

B. *Specific Performance*

Landlord, as seller, and Tenant, as buyer, signed an instrument styled "Affidavit."³⁰⁰ The instrument provided for sale and purchase of commercial real estate described in the affidavit by street address and property folio number.³⁰¹ The purchase price was stated as \$200,000 with an initial \$59,000 deposit and an additional \$25,000 to be paid prior to closing.³⁰² Closing was not to be after December 31, 2004.³⁰³ Tenant alleged that the parties verbally agreed to postpone the closing for almost a year and that Landlord ultimately refused to proceed to closing.³⁰⁴ Tenant sued Landlord seeking specific performance and damages for breach of contract.³⁰⁵ The trial court dismissed Tenant's complaint, and Tenant appealed.³⁰⁶ The Third District Court of Appeal, relying on *Rundel v. Gordon*,³⁰⁷ agreed with the trial court that the affidavit was not sufficiently definite to warrant specific performance.³⁰⁸ However, the trial court should not have dismissed the damages claim.³⁰⁹ Landlord's argument that if the terms of the affidavit were not specific enough to justify specific performance, then they were not specific enough to warrant a damage award was rejected.³¹⁰ The Third District Court held that less certainty as to the terms of a contract is required in a suit for damages than is required to obtain specific performance.³¹¹

299. *Id.* at 701 (citing *Cont'l Cas. Co. v. City of Ocala*, 149 So. 381, 386 (Fla. 1933)).

300. *Alzate v. Lazaro*, 992 So. 2d 424, 425 (Fla. 3d Dist. Ct. App. 2008).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Alzate*, 992 So. 2d at 425. The trial court, in dismissing the second amended complaint, granted leave to Tenant to again amend so as to seek a refund of the deposit. *Id.* at 425–26.

306. *Id.*

307. 111 So. 386 (Fla. 1927).

308. *Alzate*, 992 So. 2d at 426 (citing *Fox v. Sails at Laguna Club Dev. Corp.*, 403 So. 2d 456, 458 (Fla. 3d Dist. Ct. App. 1981); *Socarras v. Claughton Hotels, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d Dist. Ct. App. 1979)).

309. *See id.*

310. *Id.*

311. *Id.* The trial court also had dismissed plaintiff's fraud claim, and the appellate court concurred. *Alzate*, 992 So. 2d at 427.

C. Statute of Frauds

In *Brace v. Comfort*,³¹² Mr. and Mrs. Brace (Plaintiffs) sued Ms. Comfort (Comfort), as well as Steven King (King) and Stirling V. Realty, a Florida Limited Partnership owned by King (King/Stirling), and Roy D. Boone (Boone) (collectively referred to as the Other Defendants), in connection with a business deal that involved real estate.³¹³ There were some complicated transactions between and among the parties, but the result was that King/Stirling ultimately transferred the subject real property to Boone, who was Comfort's father.³¹⁴ Plaintiffs alleged that the property should have been transferred to them by virtue of their written agreement with Comfort, which agreement they further alleged had been ratified by King/Stirling.³¹⁵ Plaintiffs filed a complaint against Comfort and the Other Defendants.³¹⁶ There were counts that sought declaratory relief and specific performance.³¹⁷ Other counts alleged civil conspiracy, tortious interference with a contract, unjust enrichment, and promissory estoppel.³¹⁸ Citing Florida's statute of frauds, section 725.01 of the *Florida Statutes*, the trial court dismissed most of the counts against the Other Defendants, and Plaintiffs appealed.³¹⁹ With respect to the claim for declaratory relief, the Second District Court of Appeal reversed, ruling that the statute of frauds was not a bar.³²⁰ That claim was actually based on two written agreements and sought a declaration of Plaintiffs' and Boone's respective rights under those agreements.³²¹ Therefore, because the request for a declaratory judgment was based on written agreements, the trial court should not have dismissed that count.³²² The appellate court also held that the statute of frauds was not a bar to the unjust enrichment and promissory estoppel claims, and the appellate court reversed the trial court with respect to these claims.³²³ However, with respect to the specific performance claim, since there was no contract between Plaintiffs and Boone, the party against whom Plaintiffs sought specific performance, the trial court

312. 2 So. 3d 1007 (Fla. 2d Dist. Ct. App. 2008).

313. *Id.* at 1008–09.

314. *See id.* at 1009.

315. *See id.* at 1009, 1011–12.

316. *Id.* at 1009–10.

317. *Brace*, 2 So. 3d at 1009–12.

318. *Id.* at 1010.

319. *Id.*

320. *Id.* at 1011.

321. *Id.* at 1010.

322. *Brace*, 2 So. 3d at 1011.

323. *Id.* at 1011, 1013.

was affirmed on its dismissal of that claim.³²⁴ On the other hand, the claims for civil conspiracy and for tortious interference with contract were not barred by the statute of frauds.³²⁵ These claims were improperly dismissed by the trial court because the claims were based on improper actions rather than the contracts themselves.³²⁶

D. *Third Party Beneficiary Contract and the Undertaker Doctrine*

In *Travelers Insurance Co. v. Securitylink from Ameritech, Inc.*,³²⁷ Securitylink from Ameritech, Inc. (Alarm Company) installed an alarm system for Original Worldwide, Ltd. (Owner) pursuant to their agreement, which also provided that Alarm Company was to monitor the alarm in Owner's warehouse.³²⁸ Alarm Company then hired Vanguard Security, Inc. (Security Company) to inspect and investigate alarm signals from the warehouse when notified by Alarm Company that the alarm had sounded.³²⁹ On the occasion in question, the warehouse alarm sounded four times and Security Company sent a guard to investigate the first three times, finding nothing suspicious.³³⁰ When the alarm sounded for the fourth time, Alarm Company asked Owner to have someone go to the warehouse, and it was only then, on the fourth trip, that a theft was discovered.³³¹ Travelers Insurance Company (Insurer) paid Owner's claim and then, as subrogee, sued Alarm Company and Security Company.³³² Insurer alleged that Alarm Company and Security Company (referred to collectively as Companies) were negligent, and Insurer included a claim for gross negligence.³³³ There were also allegations of breach of contract against both Companies.³³⁴ The trial court determined, as a matter of law, that there was no duty owed by Security Company to Owner, and all of Insurer's claims against Security Company were dismissed.³³⁵ Insurer appealed, and the Third District Court of Appeal reversed.³³⁶ In addition to

324. *Id.* at 1012. The appellate court's affirmance on this claim was based on different reasoning than that of the trial court. *Id.*

325. *Id.* at 1011.

326. *Brace*, 2 So. 3d at 1011.

327. 995 So. 2d 1175 (Fla. 3d Dist. Ct. App. 2008).

328. *Id.* at 1176.

329. *Id.*

330. *Id.*

331. *Id.* There was a ladder that descended from a skylight that was broken, and merchandise was determined to be missing. *Travelers Ins. Co.*, 995 So. 2d at 1176.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Travelers Ins. Co.*, 995 So. 2d at 1176.

relying on “well-settled” Florida law that a non-contracting, but intended beneficiary, may sue for breach of contract, the Third District also relied on *Clay Electric Cooperative, Inc. v. Johnson*,³³⁷ where the Supreme Court of Florida adopted the “undertaker doctrine” of section 324A of the Restatement (Second) of Torts.³³⁸ Under the doctrine, liability may be found for physical harm that results to a third party if the actor undertakes to provide services, even without compensation, which the actor should know are necessary to protect the third party, including the possessions of the third party, and the actor does not act with reasonable care.³³⁹ In order for the doctrine to apply, the lack of reasonable care must have “increase[d] the risk of harm,” the actor must have undertaken the performance of a duty that another owes to the third party, and the harm is the result of the reliance by the other party or the third party on the actor’s undertaking.³⁴⁰ The appellate court found that Insurer’s allegations were sufficient under this doctrine.³⁴¹

E. Forum Selection Provision

AT&T Corp. sued Travel Express Investment, Inc. (Travel Express) in Seminole County, Florida.³⁴² Travel Express sought dismissal of the breach of contract action, alleging improper venue.³⁴³ Travel Express relied on a clause in the parties’ contract which provided that “[t]he parties consent to the exclusive jurisdiction of the courts located in New York City, USA.”³⁴⁴ The trial court denied Travel Express’s motion to dismiss, and Travel Ex-

337. 873 So. 2d 1182 (Fla. 2003).

338. *Travelers Ins. Co.*, 995 So. 2d at 1177; see RESTATEMENT (SECOND) OF TORTS § 324A (1965).

339. *Travelers Ins. Co.*, 995 So. 2d at 1177 (quoting RESTATEMENT (SECOND) OF TORTS § 324A).

340. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 324A).

341. *Id.* at 1177–78. Security Company also argued that the dismissal of the complaint was proper because it was found that that there had been full performance of its contractual obligation, that is, that Alarm Company had exercised reasonable care. *Id.* at 1178. The appellate court said this determination should not have been made on a motion to dismiss. *Id.*

342. *Travel Express Inv., Inc. v. AT&T Corp.*, 14 So. 3d 1224, 1225 (Fla. 5th Dist. Ct. App. 2009).

343. *Id.*

344. *Id.* The appellate court pointed out that the contract was “prepared by AT&T for its customer.” *Id.* But this was not a case of the court finding an ambiguity and resolving it against the party that drafted the contract. The court said that “[t]his exclusivity provision clearly makes this clause unambiguous and mandatory.” *Travel Express Inv., Inc.*, 14 So. 3d at 1227 (relying on *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 331 (Fla. 3d Dist. Ct. App. 2007)); see also *TECO Barge Line, Inc. v. Hagan*, 15 So. 3d 863, 864 (Fla. 2d Dist. Ct. App. 2009). Thus, the exclusive forum was New York. *Travel Express Inv., Inc.*, 14 So. 3d at 1227.

press appealed.³⁴⁵ The Fifth District noted that forum selection clauses “fall into two categories: mandatory and permissive.”³⁴⁶ Although the distinction to be made is generally between a clause by which the parties “consent” to, but do not require a particular jurisdiction, on the one hand, and a clause where filing of a suit in a specified forum is “required,” on the other hand, the issue in this case was different.³⁴⁷ The question presented was the effect of the word “exclusive” in the applicable provision of the parties’ contract.³⁴⁸ The Fifth District, relying on its decision in *Sonus-USA, Inc. v. Thomas W. Lyons, Inc.*,³⁴⁹ and agreeing with the Third District in *Weisser v. PNC Bank, N.A.*,³⁵⁰ which involved “[a]n almost identical clause,” concluded that the provision was of the mandatory variety.³⁵¹ What made it mandatory was the use of the word “exclusive.”³⁵² Had the parties merely consented to the jurisdiction of the courts located in New York City, the clause would have been permissive and venue in Seminole County would likely not have been disturbed.³⁵³ Having found that the clause was “unambiguous and mandatory,” the appellate court ruled that the clause would only be set aside upon a showing that it would be unfair, unreasonable, or unjust to enforce the provision.³⁵⁴ There having been no such showing, the decision of the trial court was reversed.³⁵⁵

F. *Liability Disclaimers*

The Roses purchased a fire alarm system from ADT Security Services, Inc. (ADT).³⁵⁶ Shortly after the service agreement was signed by the Roses and the alarms were installed, there was a fire in their house.³⁵⁷ The alarms did not send a fire signal and the house was completely destroyed.³⁵⁸ State Farm Insurance Company (State Farm), the Roses’ homeowners insurer, paid

345. *See Travel Express Inv., Inc.*, 14 So. 3d at 1225.

346. *Id.* at 1226.

347. *See id.*

348. *Id.* at 1226.

349. 966 So. 2d 992 (Fla. 5th Dist. Ct. App. 2007).

350. 967 So. 2d 327 (Fla. 3d Dist. Ct. App. 2007).

351. *Travel Express Inv., Inc.*, 14 So. 3d at 1226–27.

352. *Id.* at 1227.

353. *See id.*

354. *Id.* at 1226–27 (quoting *Aqua Sun Mgmt. v. Divi Time Ltd.*, 797 So. 2d 24, 24–25 (Fla. 5th Dist. Ct. App. 2001)).

355. *Id.* at 1227.

356. *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1246 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

357. *Id.*

358. *Id.* The facts stated that the house was presumably struck by lightning. *Id.*

the Roses' policy claim, and State Farm then sued ADT on various theories.³⁵⁹ The trial court granted ADT's motion for summary judgment, concluding that none of the theories stated a cause of action, and the Roses and State Farm appealed.³⁶⁰ The first theory addressed by the First District was the "fraud in the inducement" claim based on a representation of the salesman.³⁶¹ It was undisputed that when the salesman from ADT met with the Roses, he "represented that the Roses would never lose their house to a fire and that the alarm and fire detection system would save the lives of the Roses' dogs and family members in the event of a fire."³⁶² The written service contract entered into between the Roses and ADT several weeks later, which agreement required ADT to install the fire alarm system and "provide security and fire detection services," had numerous liability and warranty limitations and disclaimers.³⁶³ The district court acknowledged that the rule in Florida is that summary judgment generally should not be granted with respect to a fraud claim, but said that there are situations where summary judgment on a fraud claim is proper.³⁶⁴ The court concluded that summary judgment was proper in this case because there could not have been justifiable reliance by the Roses on what the salesman said.³⁶⁵ According to the First District, there could be no justifiable reliance because the agreement provided in capitalized print that:

NO ALARM SYSTEM CAN GUARANTEE PREVENTION OF LOSS, THAT HUMAN ERROR ON THE PART OF ADT OR THE MUNICIPAL AUTHORITIES IS ALWAYS POSSIBLE, AND THAT SIGNALS MAY NOT BE RECEIVED IF THE TRANSMISSION MODE IS CUT, INTERFERED WITH, OR OTHERWISE DAMAGED. . . . CUSTOMER AGREES THAT ANY REPRESENTATION, PROMISE, CONDITION, INDUCEMENT OR WARRANTY, EXPRESS OR IMPLIED, NOT

359. *Id.* State Farm, proceeding under the policy's subrogation provision, alleged "breach of express warranty, breach of implied warranty of fitness, breach of implied warranty of merchantability, fraud in the inducement and deceptive trade practices under section 501.211, *Florida Statutes*" by ADT. *Rose*, 989 So. 2d at 1246. Summary judgment was conceded by the Roses and State Farm to be warranted with respect to the deceptive trade practices claim. *Id.* at 1246 n.1.

360. *Id.* at 1246.

361. *Id.* at 1247.

362. *Id.* at 1246.

363. *Rose*, 989 So. 2d at 1246.

364. *Id.* at 1247.

365. *Id.* at 1248.

INCLUDED IN WRITING IN THIS AGREEMENT SHALL
NOT BE BINDING UPON ANY PARTY³⁶⁶

The agreement also contained language in boldface capital letters that the Roses had read and understood the agreement.³⁶⁷

With respect to product liability based on theories of strict liability and warranty, the First District ruled that the case “sounded in contract” because of the contract between ADT and the Roses.³⁶⁸ Therefore, this was a contract claim, not a tort claim, and the Florida Uniform Commercial Code (UCC) applied.³⁶⁹ It was permissible under the UCC for ADT to disclaim warranties including “implied warranties of merchantability and fitness”—provided the written disclaimer was conspicuous, expressly referred to merchantability and the Roses understood what was being done.³⁷⁰ Here, the warranty disclaimers met those requirements.³⁷¹

In the agreement, ADT also prominently disclaimed incidental and consequential damages based on negligence.³⁷² The First District upheld the negligence disclaimer, observing that while negligence disclaimers are not favored in the law, they will be upheld if they are “so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away.”³⁷³ The First District decided that the negligence liability disclaimers were sufficiently “clear and unequivocal.”³⁷⁴ Also, there was no showing that ADT violated a statute under which it had “a positive statutory duty to protect the well-being of” another.³⁷⁵

Waivers of liability for negligence are also covered in the Torts section of this survey.³⁷⁶ Of particular importance is the Supreme Court of Florida’s

366. *Id.*

367. *Id.* at 1247–48.

368. *Rose*, 989 So. 2d at 1248.

369. *Id.*

370. *Id.* at 1248–49.

371. *Id.* at 1248.

372. *Id.* at 1249.

373. *Rose*, 989 So. 2d at 1249 (quoting *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st Dist. Ct. App. 1991)).

374. *Id.*

375. *Id.* *Contra* *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 761 (Fla. 5th Dist. Ct. App. 2008) (holding that Florida law places a duty on building contractors to remain liable “for personal injury caused by their negligent acts”). See Landau, 2007–2008 Survey, *supra* note 120, at 127.

376. See *infra* Part XV.

decision regarding the validity of pre-injury waivers of liability by parents of minors in the context of commercial activities.³⁷⁷

G. *Exclusive Real Estate Listing*

The owner of real estate (Owner) signed a real estate listing agreement with a real estate broker (Listing Agent) that stated in part:

Exclusive Brokerage Listing. The exclusive agent for all Units . . . shall be . . . (“Listing Agent”) for a term of ten (10) years Listing Agent shall be the sole listing broker for all Units within the Condominium, and be entitled to payment of a commission on all sales and leases of Units within the Condominium.³⁷⁸

Owner entered into a lease with respect to a building that was part of the condominium project but no broker was used.³⁷⁹ Listing Agent sued for a commission.³⁸⁰ Both parties relied on definitions in *Florida Real Estate Principles, Practices & Law* by Linda L. Crawford.³⁸¹ In this treatise, a distinction is made between an “exclusive-agency listing” and an “exclusive-right-of-sale listing.”³⁸² In the former, an owner may sell the subject property without owing a commission, provided the buyer did not learn about the property from the broker or someone acting on behalf of the broker.³⁸³ In the latter, it does not matter who sells the property during the term of the listing.³⁸⁴ The broker is entitled to a commission, even if the owner is the seller.³⁸⁵ Thus, applying the distinction between the “exclusive right to sell” where the broker is entitled to a commission regardless of whether a broker is involved in the sale, and an “exclusive agency” where the owner still has the right to sell without having to pay a commission, the court determined that the listing agreement in this case was of the exclusive-agency type.³⁸⁶

377. See *Kirton v. Fields (Fields II)*, 997 So. 2d 349, 350 (Fla. 2008); see also *infra* notes 820–47 and accompanying text.

378. *Fischer-Gaeta-Cromwell, Inc. v. Oakwood St. Enters., LLC*, 997 So. 2d 1271, 1272 (Fla. 4th Dist. Ct. App. 2009).

379. *Id.* at 1271–72.

380. *Id.* at 1271.

381. *Id.* at 1272.

382. *Id.*

383. *Fischer-Gaeta-Cromwell, Inc.*, 997 So. 2d at 1272.

384. *Id.*

385. *Id.*

386. See *id.*

Thus, under the facts presented, Listing Agent was not entitled to a commission.³⁸⁷

VII. DEEDS AND TAX SALES, MORTGAGES, LIS PENDENS, AND PARTITION

A. *Lis Pendens Damages*

This appeal arose out of a lis pendens, notice of which was filed by Buyer in connection with its suit against Sellers for specific performance of a contract for sale of a commercial building.³⁸⁸ The trial judge required that Buyer post a lis pendens bond.³⁸⁹ Sellers ultimately prevailed on the merits in the specific performance action.³⁹⁰ Sellers then sought damages against the bond, including damages for lost rent and other expenses.³⁹¹ The trial court refused to award damages to Sellers because the value of the property had increased substantially during the period that the lis pendens was in effect.³⁹² The Third District Court of Appeal affirmed.³⁹³ Damages would be appropriate only if the property had declined in value by the time the lis pendens was lifted.³⁹⁴ With respect to the lost rent claim, the appellate court noted that when the lis pendens bond was ordered to be posted, the court ruled, without objection by Sellers, that Sellers would not be entitled to damages for lost rent given the lamentable condition of the building on the property—it was un-rentable.³⁹⁵ Thus, it was not necessary to address what the measure of damages might have been for lost rent.³⁹⁶ The appellate court found no other damages.³⁹⁷

387. *Id.*

388. *Levin v. Lang*, 994 So. 2d 445, 445–46 (Fla. 3d Dist. Ct. App. 2008), *reh'g denied*, 13 So. 3d 468 (Fla. 2009) (unpublished table decision).

389. *Id.* at 446. The title search showed a substantial lien on the property which sellers did not pay. *Id.* at 445. Since the lis pendens was not based on a recorded instrument, the trial court had the discretion under section 48.23(3) of the *Florida Statutes* to require a lis pendens bond. *See* FLA. STAT. § 48.23(3) (2009); *Levin*, 994 So. 2d. at 446.

390. *Levin*, 994 So 2d. at 447. The trial court ruled in favor of Buyer in the underlying action, and Sellers appealed. *Id.* at 445–46. The Third District Court of Appeal reversed the trial court and directed that judgment be entered for Sellers. *Id.* at 447.

391. *Id.* at 446.

392. *Id.*

393. *Levin*, 994 So. 2d at 447.

394. *See id.* at 446–47.

395. *Id.* at 446.

396. *See id.*

397. *Levin*, 994 So. 2d at 447.

B. *Wrongful Discharge of Lis Pendens Bond*

The Haven Center (Seller) and Mr. Meruelo (Buyer) entered into an agreement for the sale to Buyer of twenty-one acres of the Seller's real estate for \$10,500,000.³⁹⁸ Disputes arose between the parties, and Buyer sued Seller in 2005, recording a lis pendens when he filed the complaint.³⁹⁹ The trial court required that Buyer post a lis pendens bond in the amount of \$1,000,000 to cover any damages that might result from a wrongful filing of the lis pendens.⁴⁰⁰ In 2008, Buyer asked the trial court for permission to "relinquish" the lis pendens, and if so permitted, that the lis pendens bond be discharged.⁴⁰¹ Buyer's motion was heard the day after notice of it was given.⁴⁰² No evidence was considered by the trial court, although the court did consider memoranda and legal argument by the parties.⁴⁰³ The trial court granted Buyer's motion and directed the clerk of the circuit court to release the bond.⁴⁰⁴ Seller successfully petitioned the Third District Court of Appeal for a writ of certiorari to quash the trial court's order.⁴⁰⁵ The lis pendens was a cloud on Seller's title for almost three years.⁴⁰⁶ The lis pendens bond not only protects the public, it also serves to protect the owner of property from damages that result from the filing and recording of a lis pendens by a party who then fails to prevail in the underlying action.⁴⁰⁷ Voluntarily withdrawing the lis pendens does not automatically result in the discharge of the bond, especially when the conditions stated in the bond for its discharge have not been met.⁴⁰⁸ Seller was entitled to a ruling by the court as to whether the recording of the lis pendens was proper, that is, that Buyer had prevailed regarding his alleged interests in the property.⁴⁰⁹ If Buyer had not prevailed, then Seller was entitled to an opportunity to prove its damages that may be recovered under the bond.⁴¹⁰ The bond did not contain any provision that

398. *Haven Ctr., Inc. v. Meruelo*, 995 So. 2d 1166, 1166 (Fla. 3d Dist. Ct. App. 2008) (per curiam).

399. *Id.* at 1166–67.

400. *Id.* at 1167. Seller sought discharge of the lis pendens, or alternatively, that a bond be required in the amount of \$1,000,000. *Id.*

401. *Id.*

402. *Haven Ctr., Inc.*, 995 So. 2d at 1167.

403. *Id.*

404. *Id.*

405. *Id.* at 1166.

406. *Id.* at 1167.

407. *See Haven Ctr., Inc.*, 995 So. 2d at 1167.

408. *Id.*

409. *Id.* at 1167–68.

410. *Id.* at 1168. The Third District Court, in dicta, briefly discussed what is ordinarily necessary to prove such damages. *Id.* The court said that "appraisal testimony or other evi-

made it conditional on the continued term of the lis pendens.⁴¹¹ Furthermore, there is nothing in the applicable statute, section 48.23 of the *Florida Statutes*, or in the case law, that provides any such condition.⁴¹²

C. *Unrecorded Mortgage Assignment*

In *JP Morgan Chase v. New Millennial, L.C.*,⁴¹³ Mr. Jahren purchased real estate in Pinellas County and financed the transaction with money from two mortgage loans made to him by AmSouth.⁴¹⁴ The AmSouth mortgages were recorded in Pinellas County.⁴¹⁵ In 2004, AmSouth assigned the mortgages to JP Morgan Chase (JP Morgan).⁴¹⁶ JP Morgan did not record the assignment.⁴¹⁷ In 2006, Mr. Jahren and New Millennial entered into a sale and purchase agreement for the Pinellas County real estate, with Branch Banking & Trust Company financing New Millennial's purchase.⁴¹⁸ The title search performed on behalf of New Millennial disclosed the two recorded AmSouth mortgages but no satisfactions of them.⁴¹⁹ Chicago Title excepted the two mortgages from coverage, pending receipt of the cancelled mortgage notes and satisfactions.⁴²⁰ New Millennial's closing agent telephoned AmSouth and was told by an unidentified employee that the two mortgages had been paid off and written confirmation would follow.⁴²¹ The "written confirmation" was a faxed form from AmSouth titled "Installment Loan Account Profile" which showed a loan "close date" of June 30, 2004 and a zero balance.⁴²² The Installment Loan Profile also stated "PD OFF."⁴²³ The sale

dence" of a decline in market value between the time of the recording of the lis pendens and the lifting of the lis pendens is required. *Haven Ctr., Inc.*, 995 So. 2d at 1167 (citing *Haisfield v. ACP Fla. Holdings, Inc.*, 629 So. 2d 963, 965–66 (Fla. 4th Dist. Ct. App. 1993)). The Third District, relying on *Haisfield*, also referred to "lost opportunities for a sale above a later market value." *Id.* This was not mentioned as a ground for recovering damages against a lis pendens bond in *Levin*, where the Third District Court of Appeal also relied on *Haisfield*. See *supra* text accompanying note 388.

411. *Haven Ctr., Inc.*, 995 So. 2d at 1167.

412. *Id.* Since this real property litigation was not based on a "duly recorded instrument," nor was "a statutory mechanics lien" involved, the lis pendens here was governed by the law governing injunctions. *Id.* (citing FLA. STAT. § 48.23(3) (2005)).

413. 6 So. 3d 681 (Fla. 2d Dist. Ct. App. 2009).

414. *Id.* at 683.

415. *Id.*

416. *Id.*

417. *Id.*

418. *JP Morgan Chase*, 6 So. 3d at 683.

419. *Id.*

420. *Id.* (alteration in original).

421. *Id.*

422. *Id.*

was completed, and JP Morgan, as the assignee of the mortgages, began foreclosure proceedings.⁴²⁴ New Millennial and Branch Banking & Trust argued that the mortgages held by JP Morgan were unenforceable because JP Morgan had failed to record the assignments to them pursuant to section 701.02 of the *Florida Statutes*.⁴²⁵ The trial court agreed and granted summary judgment in favor of New Millennial and Branch Banking & Trust.⁴²⁶ The trial court also found that New Millennial was a subsequent purchaser for value without notice of the assignments of the mortgages to JP Morgan, and that Branch Banking & Trust was a subsequent creditor for value without notice of the assignments of the mortgages.⁴²⁷ The Second District Court of Appeal reversed.⁴²⁸ Noting that this was an issue of first impression, the Second District held that section 701.02 of the *Florida Statutes* was misapplied by the trial court.⁴²⁹ This section does not operate to invalidate a mortgage.⁴³⁰ Rather, it establishes the rights of competing mortgage assignees and purchasers.⁴³¹ In the example given by the court, “if the original mortgagee assign[ed] the mortgage to Entity A and Entity A fails to record that assignment, Entity A cannot claim priority over a latter assignee of the same mortgage (Entity B).”⁴³² The Second District determined that New Millennial and Branch Banking & Trust could not be without notice of the mortgages because the mortgages were a matter of public record.⁴³³ The Second District also noted that the closing agent could have made written demand on AmSouth for a mortgage estoppel letter pursuant to section 701.04 of the *Florida Statutes*.⁴³⁴ This would have uncovered the fact that the mortgages were outstanding.⁴³⁵ Mr. Jahren did not claim otherwise.⁴³⁶ The Installment Loan Profile sent in response to the closing agent’s oral inquiry is not an estoppel letter.⁴³⁷ In addition, New Millennial could not be a purchaser in good faith because someone claiming under the mortgagor is not intended to be covered

423. *JP Morgan Chase*, 6 So. 3d at 683.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 682–83.

428. *JP Morgan Chase*, 6 So. 3d at 688.

429. *Id.* at 684–85.

430. *See id.* at 685.

431. *Id.* (citing *Kapila v. Atl. Mortgage & Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1338 (11th Cir. 1999)).

432. *Id.*

433. *JP Morgan Chase*, 6 So. 3d at 686.

434. *Id.* at 687.

435. *See id.*

436. *See id.*

437. *Id.* at 687–88.

by section 701.02.⁴³⁸ The Second District Court of Appeal said that “[w]e agree with . . . *In re Halabi* because its interpretation of the statute makes sense.”⁴³⁹

VIII. EMINENT DOMAIN

A. Computation of Business Damages

The Supreme Court of Florida, in *System Components Corp. v. Florida Department of Transportation*,⁴⁴⁰ affirmed the decision of the Fifth District Court of Appeal,⁴⁴¹ thereby resolving a conflict between the Fifth District Court of Appeal in this case and the Fourth District Court of Appeal in *Department of Transportation v. Tire Centers, LLC*.⁴⁴² In *System Components Corp.*, the Florida Department of Transportation took by eminent domain, a part of the property owned by System Components Corporation (Corporation) that ran right through the middle of the property in order to widen a road.⁴⁴³ Corporation relocated and continued its business.⁴⁴⁴ Corporation was entitled to business damages resulting from the taking, and the jury, using an income valuation approach, determined gross business damages in the amount of \$2,394,964.⁴⁴⁵ The jury calculated net business damages at \$1,347,911 which was the amount of the award to Corporation.⁴⁴⁶ In reaching the \$1,347,911 figure, the jury took into consideration the fact that Corporation continued its business.⁴⁴⁷ Corporation appealed the verdict, relying on the *Department of Transportation v. Tire Centers, LLC* decision.⁴⁴⁸ The Fourth District Court of Appeal there determined that business damages called for by section 73.071(3)(b) of the *Florida Statutes* must be determined without reduction or mitigation by reason of the property owner’s relocation

438. *JP Morgan Chase*, 6 So. 3d at 685–86 (citing *Kapila v. Atl. Mortgage & Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1338 (11th Cir. 1999)).

439. *Id.* at 685.

440. 14 So. 3d 967 (Fla. 2009).

441. *Id.* at 985; *Sys. Components Corp. v. Dep’t of Transp. (Sys. Components Corp. I)*, 985 So. 2d 687, 693 (Fla. 5th Dist. Ct. App. 2008), *reh’g granted*, 990 So. 2d 1060 (Fla. 2008).

442. 895 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2005); *see Landau, 2007–2008 Survey, supra* note 120, at 109–10.

443. *Sys. Components Corp. II*, 14 So. 3d at 971.

444. *Id.* at 972–73.

445. *Id.* at 974.

446. *Id.*

447. *Id.*

448. *Sys. Components Corp. II*, 14 So. 3d at 974.

and continuation of the business being valued.⁴⁴⁹ That is, business damages would be determined as though the business ceased to exist on the date of the eminent domain taking.⁴⁵⁰ The Fifth District Court of Appeal disagreed with the Fourth District, and certified conflict to the Supreme Court of Florida.⁴⁵¹ The Supreme Court provided a brief history of eminent domain proceedings in Florida pointedly noting that compensating a property owner for the taking of real estate is constitutionally required, but that is not so with respect to providing compensation to the owner for lost business profits.⁴⁵² The Court also noted that while severance damages reimburse the property owner for the reduction in value that the eminent domain taking causes to any remaining land of the property owner, business damages compensate the owner for probable reductions in business value, business losses, and increased business expenses caused by the taking.⁴⁵³ Lost profits and business opportunities are intangible assets, not real property.⁴⁵⁴ Business damage awards are “a matter of legislative grace,”⁴⁵⁵ unless the government takes the business itself in which case compensation is required.⁴⁵⁶ Business damage provisions are to be narrowly construed and are available only if:

a partial taking occurs; the condemnor is a state or local “public body;” the land is taken to construct . . . a right-of-way; the taking damages or destroys an established business, which has existed on the parent tract for [five years]; the business owner owns the condemned and adjoining land . . . ; business was conducted on the condemned land and the adjoining remainder; and the [property owner] specifically pleads and proves [all of the foregoing elements].⁴⁵⁷

The Court concluded that adopting the Fourth District’s reasoning would provide an undeserved windfall to the business owner who relocates

449. *See id.*

450. *Id.* at 975.

451. *See id.*

452. *Id.* at 975–76.

453. *Sys. Components Corp. II*, 14 So. 3d at 976–77.

454. *Id.* at 976 (quoting *Jamesson v. Downtown Dev. Auth. of Fort Lauderdale*, 322 So. 2d 510, 511 (Fla. 1975)).

455. *Id.* (quoting *Jamesson*, 322 So. 2d at 511).

456. *Id.*

457. *Id.* at 978 (citing FLA. STAT. § 73.071(3)(b)(2009)). The five year requirement applies for takings on or after January 1, 2005. FLA. STAT. § 73.071(3)(b). For takings before January 1, 2005, the required period was four years. *Id.*

and continues in business.⁴⁵⁸ However, the Court refused to impose an affirmative duty on a property owner to reduce damages by relocating and continuing business.⁴⁵⁹ That, it said, was the province of the legislature.⁴⁶⁰

B. *Public Purpose and Reasonable Necessity*

The City of Lakeland (the City), located in Polk County (the County), took property by eminent domain for a right-of-way that would allow for a road extension.⁴⁶¹ The property that was subject to the trial court's orders of taking was County—not City—property, and the property was not “contiguous to the City's boundaries.”⁴⁶² The road project, however, was only a short distance east of an area undergoing development that was within the City's boundaries.⁴⁶³ The property owners appealed, and the Second District Court of Appeal affirmed, noting that the eminent domain power of the State of Florida was delegated to the City not only in the City's charter, but also by section 166.411(3) of the *Florida Statutes*.⁴⁶⁴ The Second District concluded that the delegation was broad enough to allow a taking outside the City boundary.⁴⁶⁵ The appellate court noted that in *Prosser v. Polk County*,⁴⁶⁶ where Hillsborough County did not object, Polk County was allowed to take land in adjacent Hillsborough County.⁴⁶⁷ Similarly, here, there was no objection by the County to the City's taking of County land.⁴⁶⁸ The appellate court observed that the City also relied on a 2003 interlocal agreement with the County that recognized the need for the road project, and the County had agreed to finance part of the project.⁴⁶⁹ In light of this agreement, the appellate court found that the City had met its burden of demonstrating “a public purpose and a reasonable necessity,” and it was not necessary that the City

458. *Sys. Components Corp. II*, 14 So. 3d at 981 (citing *Sys. Components Corp. v. Dep't of Transp. (Sys. Components Corp. I)*, 985 So. 2d 687, 690 (Fla. 5th Dist. Ct. App. 2008), *reh'g granted*, 990 So. 2d 1060 (Fla. 2008)).

459. *Id.* at 985.

460. *Id.*

461. *Kirkland v. City of Lakeland*, 3 So. 3d 398, 399 (Fla. 2d Dist. Ct. App. 2009).

462. *Id.*

463. *Id.*

464. *Id.* at 400.

465. *Id.*

466. 545 So. 2d 934 (Fla. 2d Dist. Ct. App. 1989) (*per curiam*).

467. *Kirkland*, 3 So. 3d at 400 (citing *Prosser*, 545 So. 2d at 934).

468. *Id.*

469. *Id.* Part of the funding was provided by the Florida Department of Transportation, with the City and the County agreeing to split the balance of the cost. *Id.*

demonstrate “a public purpose that was exclusively or even primarily a municipal purpose of the City” rather than both entities.⁴⁷⁰

C. *Inverse Condemnation*

In *Drake v. Walton County*,⁴⁷¹ the property owners bought their Walton County (the County) property in 1992.⁴⁷² Before then, the upper part of the property had been subjected to an overflow of water from Oyster Lake.⁴⁷³ The outflow was stabilized in 1988 with assistance from the State.⁴⁷⁴ There was no overflow of water across this part of the property after the stabilization, at least not until 1995.⁴⁷⁵ Thus, after the stabilization, this part of the property could be developed, and it was during this period that the property owners purchased the property.⁴⁷⁶ However, in 1995, following a hurricane, the County diverted lake water across the property.⁴⁷⁷ Between 1996 and 1999, the County tried unsuccessfully to assist in directing the lake water overflow away from the property.⁴⁷⁸ The overflow was stopped in 2004, but in 2005, under emergency conditions, the County again diverted overflow water across the upper section of the property.⁴⁷⁹ This was done “to protect a neighbor’s home and property.”⁴⁸⁰ The property owner brought an action against the County for inverse condemnation.⁴⁸¹ The trial court found that the County had merely restored the natural drainage pattern and was responding to emergency conditions pursuant to section 252.43(6) of the *Florida Statutes*.⁴⁸² The First District Court of Appeal reversed.⁴⁸³ In ruling for the property owners, the First District found that the “critical undisputed fact” was that four years before the 1992 purchase of the property by property owners, overflow had been stabilized—with the help of the State of Flori-

470. *Id.*

471. 6 So. 3d 717 (Fla. 1st Dist. Ct. App. 2009).

472. *Id.* at 719.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Drake*, 6 So. 3d at 719.

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. *Drake*, 6 So. 3d at 719. There were claims for trespass and negligence as well. *Id.* at 719 n.1. The property owners appealed the trial court’s ruling in favor of the County on these claims, and the First District affirmed the trial court. *Id.* at 719, 722.

482. *Id.* at 719–20.

483. *Id.* at 722.

da—and was no longer crossing the property.⁴⁸⁴ The overflow drainage onto the property resulted from the County's actions in 1995 and 2005.⁴⁸⁵ The hurricane and other emergencies did not flood the property.⁴⁸⁶ It was "the County's action in response to the hurricane that caused the flooding" on the property.⁴⁸⁷ The property owners "could reasonably rely on the drainage pattern" set in 1988.⁴⁸⁸ When the pattern was changed by the County, there was a taking.⁴⁸⁹ Even if the County acted in the face of an emergency pursuant to section 252.43(6) of the *Florida Statutes*, that does not prevent the successful prosecution of an inverse condemnation proceeding.⁴⁹⁰ Judge Barfield dissented.⁴⁹¹ According to the dissent, the facts were distinguishable from the cases cited by the majority, and the majority never explained how the County's actions "somehow resulted in a 'taking' of the subject property."⁴⁹² Judge Barfield said that "[t]o allow the plaintiff to recover" from the County based on the facts presented "is, in my opinion, a travesty of justice and a clear departure from well-settled law."⁴⁹³

IX. EMPLOYMENT LAW

A. *Non-Compete Agreements*

In *Fiberglass Coatings, Inc. v. Interstate Chemical, Inc.*,⁴⁹⁴ the employment contract between Robert Hutchens (Former Employee) and Fiberglass Coatings, Inc. (Former Employer) contained a non-compete clause.⁴⁹⁵ Former Employee, a salesperson for Former Employer, was prohibited by the non-compete clause from working in Florida for a competitor of Former Employer during the one year following the end of his employment, which employment ended in March 2002.⁴⁹⁶ Within weeks after leaving the employ of

484. *Drake*, 6 So. 3d at 720.

485. *See id.* at 719.

486. *Id.* at 720.

487. *Id.*

488. *Id.*

489. *Drake*, 6 So. 3d at 720 (citing *Schick v. Fla. Dep't of Agric.*, 504 So. 2d 1318, 1320 (Fla. 1st Dist. Ct. App. 1987)); *see also* *Martin v. City of Monticello*, 632 So. 2d 236, 237 (Fla. 1st Dist. Ct. App. 1994); *Leon County v. Smith*, 397 So. 2d 362, 364 (Fla. 1st Dist. Ct. App. 1981).

490. *Drake*, 6 So. 3d at 721–22.

491. *Id.* at 722 (Barfield, J., dissenting).

492. *Id.* at 725.

493. *Id.*

494. 16 So. 3d 836 (Fla. 2d Dist. Ct. App. 2009).

495. *Id.* at 837.

496. *Id.*

Former Employer, Former Employee went to work for a short time for Polymeric, a fiberglass competitor.⁴⁹⁷ Then, in September 2002, Former Employee went to work as a salesperson for Interstate Chemical, Inc. (New Employer), another competitor of Former Employer.⁴⁹⁸ In January 2004, Former Employer sued New Employer alleging that New Employer had “tortiously interfered with the restrictive covenant.”⁴⁹⁹ Former Employer asserted two theories for the interference: “a ‘solicitation of customers’ theory and an ‘employment’ theory.”⁵⁰⁰ The trial court granted New Employer’s motion for summary judgment, agreeing with New Employer’s argument that, as a matter of law, New Employer could not be liable for inducing or causing Former Employee’s breach because Former Employee “was predisposed to breach” the non-compete clause, as demonstrated by Former Employee’s previous employment for Polymeric.⁵⁰¹ Former Employer appealed.⁵⁰² The Second District affirmed on the “employment” theory.⁵⁰³ In order to establish liability for tortious interference on this theory, it is necessary to establish causation.⁵⁰⁴ In order to establish causation, Former Employer would have had to show that New Employer “intended to procure a breach of the contract.”⁵⁰⁵ Relying on the Restatement (Second) of Torts, as quoted by the Fourth District Court of Appeal in *Martin Petroleum Corp. v. Amerada Hess Corp.*,⁵⁰⁶ the Second District concluded that the mere hiring of Former Employee during the non-compete period did not amount to tortious interference.⁵⁰⁷ This would have been so even if the new employment agreement was entered into with New Employer’s knowledge that Former Employee could not work for New Employer and, at the same time, honor his promise not to compete with Former Employer.⁵⁰⁸ However, it was not appropriate to grant summary judgment in favor of New Employer on the “solicitation of customers” theory of tortious interference.⁵⁰⁹ There was “direct and circumstantial evidence” in the record that could result in findings of fact by which

497. *Id.*

498. *Id.* at 837–38.

499. *Fiberglass Coatings, Inc.*, 16 So. 3d at 838.

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.*

504. *Fiberglass Coatings, Inc.*, 16 So. 3d at 838.

505. *Id.* (quoting *Chi. Title Ins. Co. v. Alday-Donalson Title Co. of Fla.*, 832 So. 2d 810, 814 (Fla. 2d Dist. Ct. App. 2002)).

506. 769 So. 2d 1105 (Fla. 4th Dist. Ct. App. 2000).

507. See *Fiberglass Coatings, Inc.*, 16 So. 3d at 838 (citing *Martin Petroleum Corp.*, 769 So. 2d at 1107).

508. *Id.*

509. *Id.* at 839.

New Employer could be held liable for tortious interference on the “solicitation of customers” theory.⁵¹⁰

B. *Enjoining Violation of Non-Compete Agreement: Ex Parte Order*

Mr. Bookall (Former Employee), who had signed a covenant not to compete with Sunbelt Rentals, Inc. (Former Employer), resigned and went to work for a competitor (New Employer).⁵¹¹ After finding out about Former Employee’s new job, Former Employer advised Former Employee that it considered his actions a breach of the agreement.⁵¹² Former Employee did not terminate his new employment, despite written assurances from Former Employee’s lawyer that there would be compliance with the non-competes agreement.⁵¹³ Former Employer proceeded ex parte to obtain a temporary injunction against Former Employee and New Employer.⁵¹⁴ The Fourth District Court of Appeal reversed the trial court’s order that granted the request for an injunction.⁵¹⁵ The trial court’s order was insufficient because it did not comply with all the requirements of rule 1.610(a) of the *Florida Rules of Civil Procedure*.⁵¹⁶ Before an ex parte temporary injunction may be issued, the rule requires that the moving party allege specific facts showing irreparable and immediate injury absent the injunction, and that the movant’s attorney provide a written certification as to the reasons for not requiring notice.⁵¹⁷ The trial court’s order granting the injunction must state what the injury would be, explain why it “may be irreparable,” and list the reasons for not having required notice.⁵¹⁸ The trial court’s order was defective in failing to state those reasons.⁵¹⁹ The Fourth District Court of Appeal cited the Second District Court of Appeal’s decision in *Lewis v. Sunbelt Rentals, Inc.*⁵²⁰ and the First District Court of Appeal’s decision in *Soud v. Kendale, Inc.*⁵²¹ when it stated that this omission would not have invalidated the order

510. *Id.*

511. *Bookall v. Sunbelt Rentals, Inc.*, 995 So. 2d 1116, 1116 (Fla. 4th Dist. Ct. App. 2008).

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.* at 1118.

516. *Bookall*, 995 So. 2d at 1117.

517. *Id.* (citing FLA. R. CIV. P. 1.610(a)(1)–(2)). If notice was attempted, the attorney must certify what the efforts were to give notice. *Id.*

518. *Id.* (citing FLA. R. CIV. P. 1.610(a)(2)).

519. *Id.*; see FLA. R. CIV. P. 1.610(a)(2).

520. 949 So. 2d 1114 (Fla. 2d Dist. Ct. App. 2007).

521. 788 So. 2d 1051 (Fla. 1st Dist. Ct. App. 2001).

had the complaint or motion explained why the order should be entered without notice, as this would have substituted for the statement in the order.⁵²² Former Employer did not do so.⁵²³

C. *Employment Discrimination*

Ms. Carsillo (Employee) was a firefighter/paramedic employed by the City of Lake Worth (City).⁵²⁴ When Employee became pregnant, she requested a light duty assignment.⁵²⁵ Although she requested to be assigned to the fire department, she was assigned elsewhere.⁵²⁶ She objected, but ultimately she proceeded with the light duty assignments in those other departments.⁵²⁷ Employee sued the City under the Florida Civil Rights Act (FCRA), sections 760.01–.10 of the *Florida Statutes*, claiming discrimination.⁵²⁸ Her allegation of discrimination was based on light duty assignments at the fire department for other employees who had “physical restrictions.”⁵²⁹ The trial court entered summary judgment in favor of the City concluding that the FCRA does not address “discrimination based on pregnancy,” although it covers discrimination based on sex.⁵³⁰ The Fourth District Court of Appeal reversed, holding that discrimination based on pregnancy is sex discrimination.⁵³¹ The appellate court said that “if a Florida statute is patterned after a federal law, the Florida statute will be given the same construction as the federal courts give the federal act.”⁵³² The court then noted that the provision at issue in the FCRA was “identical to the Civil Rights Act of 1964, as amended.”⁵³³ The pertinent “identical” provision of the federal Civil Rights Act of 1964, as quoted by the appellate court, does not, as Florida does not, list pregnancy.⁵³⁴ However, that provision of the Civil Rights Act of 1964

522. *Bookall*, 995 So. 2d at 1118; see *Lewis*, 949 So. 2d at 1115; *Soud*, 788 So. 2d at 1053.

523. *Bookall*, 995 So. 2d at 1118.

524. *Carsillo v. City of Lake Worth*, 995 So. 2d 1118, 1119 (Fla. 4th Dist. Ct. App. 2008).

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Carsillo*, 995 So. 2d at 1119.

530. *Id.*

531. *Id.* at 1119, 1121.

532. *Id.* at 1119 (citing *State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995)).

533. *Id.*

534. *Carsillo*, 995 So. 2d at 1119. The Pregnancy Discrimination Act of 1978 was said to have been a legislative response to the five-four decision of the United States Supreme Court in *General Electric Co. v. Gilbert*, 429, U.S. 125, 125–126 (1976), where the Court held that an employer did not violate the federal Civil Rights Act even though its disability insurance

was amended by the enactment of the Pregnancy Discrimination Act of 1978 to include employment discrimination based on pregnancy as prohibited discrimination based on sex.⁵³⁵ The FCRA, however, has not been amended.⁵³⁶ The Fourth District Court of Appeal, after reviewing the federal pre-emption analysis as applied by the First District Court of Appeal in *O'Loughlin v. Pinchback*,⁵³⁷ as well as federal court decisions where relief has been sought—and denied—under the FCRA, concluded that the appellate court was required to consider the later amendment of the federal law.⁵³⁸ The Fourth District Court of Appeal “‘had the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation,’” and held that under the FCRA, sex discrimination includes discrimination based on pregnancy.⁵³⁹

X. INJUNCTIVE RELIEF

The next case, *Attorney's Title Insurance Fund, Inc. v. M. I. Industries USA, Inc. (M.I. Industries USA, Inc. II)*,⁵⁴⁰ is a case to watch, as the Supreme Court of Florida has accepted jurisdiction to review the decision of the Fourth District Court of Appeal in *M.I. Industries U.S.A, Inc. v. Attorneys' Title Insurance Fund, Inc. (M.I. Industries USA, Inc. I)*.⁵⁴¹ Attorneys' Title Insurance Fund, Inc. (the Fund) obtained an *ex parte* order enjoining M.I. Industries USA, Inc. (M.I. Industries) from transferring or withdrawing funds from its bank accounts and from disposing of other assets.⁵⁴² The underlying allegations were that M.I. Industries was involved in illegal real estate schemes, and that profits from these land schemes were moved through a

did not provide coverage for disability that arose from pregnancy. *Id.* at 125. (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (overruling *Gilbert*)).

535. *Carsillo*, 995 So. 2d at 1119.

536. *Id.* at 1120.

537. 579 So. 2d 788 (Fla. 1st Dist. Ct. App. 1991). In *O'Loughlin*, a pregnancy discrimination suit seeking back pay, the First District Court of Appeal held that where Florida law provides “less protection to its citizens than does the corresponding federal law,” so that Florida law is “‘an obstacle to the accomplishment’” of the objectives of the U.S. Congress, the Florida statute will be deemed pre-empted by the federal statute to that extent. *Id.* at 792 (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)).

538. *Carsillo*, 995 So. 2d at 1120–21.

539. *Id.* (quoting *Gay v. Canada Dry Bottling Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952)).

540. 10 So. 3d 1100 (Fla. 2009) (unpublished table decision).

541. 6 So. 3d 627 (Fla. 4th Dist. Ct. App. 2009), *cert. granted*, 10 So. 3d 1100 (Fla. 2009) (unpublished table decision).

542. *Id.* at 628.

member-agent's attorney trust fund to the M.I. accounts.⁵⁴³ The trial judge denied the request of M.I. Industries for dissolution of the injunction, although some assets were released from the injunction.⁵⁴⁴ M.I. Industries appealed and the Fund cross-appealed as to the release of those assets and an increase of the injunction bond amount.⁵⁴⁵ The Fourth District Court of Appeal held that the general rule is that, in an action for damages, it is improper to issue an injunction freezing a bank account since damages will suffice, even if the money in the account is lost.⁵⁴⁶ The appellate court noted that the fact that money damages may be uncollectible does not change the result.⁵⁴⁷ However, the appellate court acknowledged that there is an exception when the injunction serves "to protect the res of a trust" while litigation is pending.⁵⁴⁸ Thus, had the alleged profits from the scheme "remained specifically identifiable in the member-agent's attorney's trust account, then the injunction may have been proper."⁵⁴⁹ The Fourth District Court of Appeal said that because "the Fund expressly sought damages in its complaint . . . for unjust enrichment," money damages would be sufficient to compensate the Fund.⁵⁵⁰ The Fourth District concluded that it was "improper to enter an injunction preventing a party from using or disposing of its assets prior to the conclusion of a *legal* action."⁵⁵¹

While the appellate court did not, in its original opinion, specifically state that the Fund's unjust enrichment claim was not an equitable action, it did appear to conclude that the Fund's action was a legal action for which there was an adequate remedy at law.⁵⁵² On the Fund's motion for rehearing, which the Fourth District Court denied, the Fund asserted that the Fourth District Court of Appeal had previously recognized the claim of unjust enrichment "in causes of action based in law and equity."⁵⁵³ The Fourth District disagreed stating, "[t]o the contrary, this court has squarely held that an

543. *Id.*

544. *Id.*

545. *Id.*

546. *M.I. Indus. USA, Inc. I*, 6 So. 3d at 628–29 (citing *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1986)).

547. *Id.* at 629 (citing *Weinstein v. Aisenberg*, 758 So. 2d 705, 706 (Fla. 4th Dist. Ct. App. 2000) (per curiam)).

548. *Id.*

549. *Id.*

550. *Id.*

551. *M.I. Indus. USA, Inc. I*, 6 So. 3d at 629 (emphasis added) (citing *Briceño v. Bryden Invs., Ltd.*, 973 So. 2d 614, 616 (Fla. 3d Dist. Ct. App. 2008)).

552. *See id.*

553. *Id.*

action for unjust enrichment is an action at law.”⁵⁵⁴ The court, however, recognized that this position, including “the current definition of ‘no adequate remedy at law,’ can result in an injustice in a case such as this one,”⁵⁵⁵ citing the concurring opinion in the decision of another panel of the Fourth District Court of Appeal in *Weinstein v. Aisenberg*.⁵⁵⁶

The court then went on to certify the following question to the Supreme Court of Florida as one of great public importance,

INCIDENT TO AN ACTION AT LAW, MAY A TRIAL COURT ISSUE AN INJUNCTION TO FREEZE ASSETS OF A DEFENDANT, WHERE THE PLAINTIFF HAS DEMONSTRATED: (1) [THAT] DEFENDANT WILL TRANSFER, DISSIPATE, OR HIDE HIS/HER ASSETS SO AS TO RENDER A TRIAL JUDGMENT UNENFORCEABLE; (2) A CLEAR LEGAL RIGHT TO THE RELIEF REQUESTED; (3) A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS; AND (4) A TEMPORARY INJUNCTION WILL SERVE THE PUBLIC INTEREST?⁵⁵⁷

Although not expressly asked to do so, perhaps the Court will take this opportunity to clarify the nature of an action alleging unjust enrichment⁵⁵⁸ as there appears to be some difference of opinion.⁵⁵⁹ For example, in *Brace v. Comfort*, discussed earlier in this article,⁵⁶⁰ the Second District Court of Appeal characterized a claim of unjust enrichment as an equitable claim.⁵⁶¹

554. *Id.* (citing *Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co.*, 695 So. 2d 383, 386–87 (Fla. 4th Dist. Ct. App. 1997)).

555. *Id.* (citing *Weinstein v. Aisenberg*, 758 So. 2d 705, 711–12 (Fla. 4th Dist. Ct. App. 2000) (Gross, J., concurring)).

556. 758 So. 2d 705 (Fla. 4th Dist. Ct. App. 2000) (per curiam).

557. *M.I. Indus. USA, Inc.*, 6 So. 3d at 629.

558. See, for example, *Jews for Jesus, Inc. v. Rapp* where the Court was asked to determine whether Florida recognized the tort of false light invasion of privacy. 997 So. 2d 1098, 1100 (Fla. 2008). After answering no to the certified question, the Court went on to address the defamation rule under section 559 of the Restatement (Second) of Torts. *Id.*; see also Landau, *2007–2008 Survey*, *supra* note 120, at 129–30.

559. See *Brace v. Comfort*, 2 So. 3d 1007, 1011 (Fla. 2d Dist. Ct. App. 2008).

560. See *supra* text accompanying notes 312–26.

561. *Brace*, 2 So. 3d at 1011.

XI. JURISDICTION, VENUE, FORUM NON CONVENIENS, AND STANDING

A. *Personal Jurisdiction: Conferred by Contract*

In *Jetbroadband WV, LLC v. MasTec North America, Inc.*,⁵⁶² the Third District Court of Appeal was called upon to determine, as “an issue of first impression,” if the parties’ consent to a contract provision could, in and of itself, confer jurisdiction on a Florida court over two Delaware limited liability companies under sections 685.101 and 685.102 of the *Florida Statutes*.⁵⁶³ MasTec North America, Inc. (Florida Corporation) contracted with Jetbroadband WV, LLC and Jetbroadband VA, LLC (Delaware LLCs) to perform certain services for Delaware LLCs in Virginia.⁵⁶⁴ Delaware LLCs had their principal places of business in New York.⁵⁶⁵ The contract clause at issue provided that the parties “irrevocably agree and submit to the exclusive jurisdiction of the Circuit Court, Eleventh Judicial Circuit, Miami.”⁵⁶⁶ The clause also contained a choice of law provision, choosing Florida law as the governing law.⁵⁶⁷ A disagreement between the parties led Florida Corporation to sue Delaware LLCs in Miami-Dade County.⁵⁶⁸ Delaware LLCs took the position that the trial court did not have personal jurisdiction over them, but the trial court disagreed, and their motion to dismiss was denied.⁵⁶⁹ The Third District Court of Appeal affirmed the trial court.⁵⁷⁰ The appellate court acknowledged that the Supreme Court of Florida, in *McRae v. J.D./M.D., Inc.*,⁵⁷¹ held that an agreement alone is not enough to “confer personal jurisdiction on Florida courts.”⁵⁷² However, the Supreme Court of Florida’s *McRae* decision in 1987 was rendered in the context of section 48.193 of the *Florida Statutes*, Florida’s traditional basis for long-arm statute jurisdiction.⁵⁷³ Two years later, however, sections 685.101 and 685.102 of the *Florida Statutes* were enacted.⁵⁷⁴ These provisions of the Contract Enforcement Chapter of the Commercial Relations Title are entitled “Choice of Law” and

562. 13 So. 3d 159 (Fla. 3d Dist. Ct. App. 2009).

563. *Id.* at 160.

564. *Id.* at 160–61.

565. *Id.* at 161 n.1.

566. *Id.* at 161.

567. *Jetbroadband WV, LLC*, 13 So. 3d at 161.

568. *Id.*

569. *Id.*

570. *Id.* at 163.

571. 511 So. 2d 540 (Fla. 1987).

572. *Jetbroadband WV, LLC*, 13 So. 3d at 161 (citing *McRae*, 511 So. 2d at 542).

573. *Id.* (quoting *McRae*, 511 So. 2d at 543); see FLA. STAT. § 48.193 (2009).

574. *Jetbroadband WV, LLC*, 13 So. 3d at 161.

“Jurisdiction,” respectively.⁵⁷⁵ Under these sections, personal jurisdiction can be conferred on Florida courts by a contract provision, provided several requirements are satisfied.⁵⁷⁶ The agreement at issue must contain both a Florida choice of law clause, pursuant to section 685.101 of the *Florida Statutes*, and a clause by which the non-resident agrees to submit to the Florida court’s jurisdiction.⁵⁷⁷ In addition, the agreement must involve consideration in the aggregate amount of at least \$250,000; and then, if bringing the action in Florida is not in violation of the United States Constitution and “‘bears a substantial or reasonable relation to Florida, or . . . at least one of the parties is either a resident or citizen of Florida . . . or is incorporated or organized under the laws of Florida’” the parties can, by the provision, confer jurisdiction on the Florida court.⁵⁷⁸ The facts of this case satisfied the five part test.⁵⁷⁹ The Third District Court of Appeal also observed that while the due process minimum contacts with the forum state test—the “not in violation of the United States Constitution” part of the test—must be met “in the commercial context,” the choice of law clause itself satisfies the due process minimum contacts requirement, provided it “is ‘freely negotiated’ and is not ‘unreasonable and unjust.’”⁵⁸⁰

B. *Personal Jurisdiction: Contracts Cases and Burden of Proof*

Club & Community Corporation (Florida Corporation) sued Hampton Island Preservation, LLC (Georgia LLC) in the Palm Beach County Circuit Court for breach of contract.⁵⁸¹ After Georgia LLC’s motions to dismiss Florida Corporation’s complaint and first amended complaint for lack of personal jurisdiction under Florida’s long-arm statute were granted by the

575. *Id.* at 161–62; see FLA. STAT. §§ 685.101–.102 (2009).

576. *Jetbroadband WV, LLC*, 13 So. 3d at 161–62. The court broke these down into five requirements and numbered them accordingly. *Id.* at 162.

577. *Id.*

578. *Id.* at 161–62 (quoting Edward M. Mullins & Douglas J. Giuliano, *Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute’s Little-Known Cousin*, 80 FLA. B.J. 36, 36–37 (May 2006)).

579. *Id.* at 163.

580. *Jetbroadband WV, LLC*, 13 So. 3d at 163 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)); see also *Desai Patel Sharma, Ltd. v. Don Bell Indus., Inc.*, 729 So. 2d 453, 454 (Fla. 5th Dist. Ct. App. 1999).

581. *Hampton Island Pres., LLC v. Club & Cmty. Corp.*, 998 So. 2d 665, 666–67 (Fla. 4th Dist. Ct. App. 2009). There was also a claim based on quantum meruit, a claim alleging unjust enrichment, and a claim of gross negligence. *Id.* at 667. The portion of the Florida long-arm statute that is based on tortious conduct occurring in the state, section 48.193 of the *Florida Statutes*, was not mentioned in the court’s opinion.

trial court, Florida Corporation filed a second amended complaint.⁵⁸² Georgia LLC again filed a motion to dismiss, but this time the trial court denied the motion.⁵⁸³ Georgia LLC appealed, and the Fourth District Court of Appeal reversed.⁵⁸⁴ Although the appellate court discussed the two-part test of *Venetian Salami Co. v. Parthenais*,⁵⁸⁵ its decision focused on burden of proof.⁵⁸⁶ A defendant must file affidavits in support of its motion to dismiss for lack of jurisdiction.⁵⁸⁷ The burden then shifts back to the plaintiff who must file “opposing affidavits or other evidence.”⁵⁸⁸ With respect to the first statutory prong of the *Venetian Salami Co.* test, the Fourth District noted that Florida Corporation alleged in its second amended complaint that under the parties’ agreement, “all payments were required to be made and were made in Palm Beach County.”⁵⁸⁹ Florida, as the place of payment with respect to a contract with a Florida resident, has previously been recognized by the Fourth District Court of Appeal as a sufficient jurisdictional fact.⁵⁹⁰ There was no opposing affidavit filed by Georgia LLC to contest this allegation.⁵⁹¹ However, as to minimum contacts, the second prong of the *Venetian Salami Co.* test, Florida Corporation relied on an unsigned copy of an “Agreement for Professional Services”, which contained a forum selection clause stating that the Agreement was governed by the laws of Florida.⁵⁹² Georgia LLC filed an affidavit of its manager, who stated that he had no knowledge of the Agreement for Professional Services ever having been signed by “any authorized representative” of Georgia LLC.⁵⁹³ No opposing affidavit was filed by Florida Corporation.⁵⁹⁴ Thus, the defendant submitted an affidavit contesting

582. *Id.* at 666.

583. *Id.* at 667.

584. *Hampton Island Pres., LLC*, 998 So. 2d at 668.

585. 554 So. 2d 499 (Fla. 1989). The two part test includes the question of whether first, there are sufficient jurisdictional facts alleged for purposes of section 48.193(1)(g) of the *Florida Statutes*. See *id.* at 502. If the answer is yes, the second part examines the due process requirement that the defendant have sufficient minimum contacts with Florida. *Id.*

586. *Hampton Island Pres., LLC*, 998 So. 2d at 667.

587. *Id.*

588. *Id.* (citing *Becker v. Hooshmand*, 841 So. 2d 561, 562 (Fla. 4th Dist. Ct. App. 2003)).

589. *Id.*

590. *Id.* at 668 (quoting *Woodard Chevrolet, Inc. v. Taylor Corp.*, 949 So. 2d 268, 270 (Fla. 4th Dist. Ct. App. 2007)). The Fourth District Court of Appeal in *Woodard* concluded that under the second prong of the *Venetian* test, there were not sufficient minimum contacts to justify *Woodard* being haled into the Florida courts. *Woodard*, 949 So. 2d at 270; see Barbara Landau, *2006-2007 Survey of Florida Law Affecting Business Owners*, 32 NOVA L. REV. 21, 86–87 (2007) [hereinafter Landau, *2006–2007 Survey*].

591. *Hampton Island Pres., LLC*, 998 So. 2d at 668.

592. *Id.* at 667.

593. *Id.* at 668.

594. *Id.*

minimum contacts, but the plaintiff did not submit the required opposing affidavit to establish minimum contacts.⁵⁹⁵ The appellate court did note, in dicta, that under *McRae*, even if the Agreement for Professional Services had been signed, ““a forum selection clause, designating Florida as the forum, cannot operate as the sole basis for Florida to exercise personal jurisdiction over an objecting non-resident defendant.””⁵⁹⁶

In light of the Third District Court of Appeal’s ruling on the minimum contacts issue in its *Jetbroadband* decision, albeit a decision under sections 685.101 and 685.102, rather than section 48.193 of the *Florida Statutes*, and the Fifth District Court of Appeal’s decision in *Desai Patel Sharma, Ltd. v. Don Bell Industries, Inc.*,⁵⁹⁷ cited in *Jetbroadband*, it appears that there is a question as to whether, in the context of section 48.193, a signed jurisdiction agreement can ever meet the minimum contacts constitutional prong under *Venetian Salami Co.*, or whether it only did so under section 685.102 when considered together with the other requirements of that section.⁵⁹⁸

C. *Personal Jurisdiction: Corporate Shield Doctrine*

Mr. Rensin (Nonresident) was the CEO of a Maryland and a Virginia limited liability company (LLCs).⁵⁹⁹ The LLCs and Nonresident, individually, were sued by the Attorney General, on behalf of the State of Florida (State) for alleged violations of Florida’s Deceptive and Unfair Trade Practices Act and its Retail Installment Sales Act.⁶⁰⁰ These claims arose out of the sale of electronics, including computers, to Florida customers.⁶⁰¹ The State claimed personal jurisdiction over Mr. Rensin, individually, under Florida’s long-arm statute, section 48.193 of the *Florida Statutes*, and the trial

595. *See id.*

596. *Hampton Island Pres., LLC*, 998 So. 2d at 668 (quoting *McRae v. J.D./M.D., Inc.*, 511 So. 2d 540, 542 (Fla. 1987)).

597. 729 So. 2d 453 (Fla. 5th Dist. Ct. App. 1999).

598. *See Jetbroadband WV, LLC v. MasTec N. Am., Inc.*, 13 So. 3d 159, 162 n.3 (Fla. 3d Dist. Ct. App. 2009). The exact language of the forum selection clause is not set forth in the appellate court’s decision in *Hampton Island*, which may very well have been because the clause was contained in a copy of an unsigned agreement. *See Hampton Island Pres., LLC*, 998 So. 2d at 667. However, if the agreement had been signed, then the determination of what type of clause it was may have been crucial. *See id.* Was it a forum selection clause, a choice of law provision, or both, and did the provision include an agreement to submit to Florida’s jurisdiction?

599. *Rensin v. State*, 34 Fla. L. Weekly D402, D402 (1st Dist. Ct. App. Feb. 19, 2009).

600. *Id.* The corporations were also defendants, but this appeal only addressed Nonresident’s motion to dismiss. *See id.*

601. *Id.*

court agreed.⁶⁰² Nonresident appealed, and the First District Court of Appeal reversed.⁶⁰³ Florida adopted the corporate shield doctrine in *Doe v. Thompson*,⁶⁰⁴ which says that the “acts of [a] corporate employee performed in [his] corporate capacity do not form the basis for jurisdiction over [the] corporate employee in his individual capacity.”⁶⁰⁵ At this point in its opinion, in a footnote, the First District Court of Appeal confirmed that this doctrine applies in the context of limited liability companies.⁶⁰⁶ Further, the appellate court held that “it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer.”⁶⁰⁷ An exception to the corporate shield doctrine exists in cases where the employee is accused of “fraud or other intentional misconduct” directed to Florida residents.⁶⁰⁸ The First District Court of Appeal reversed because the State had not met its burden of proof as set forth in *Venetian Salami Co. v. Parthenais*.⁶⁰⁹ Nonresident filed an affidavit to the effect “that he, personally, had no Florida contacts and was not a primary participant in any intentional tortious contacts expressly aimed at Florida.”⁶¹⁰ It was then up to the State to file counter-affidavits to establish personal jurisdiction, but the State failed to do so.⁶¹¹ In addition, on Nonresident’s motion for clarification, the First District Court of Appeal said that the State could not now hold an evidentiary hearing in the trial court, since no affidavit was submitted by the State, and the appellate court clarified its earlier order to direct that the trial court dismiss the action as to Nonresident.⁶¹²

D. Personal Jurisdiction: Tort Case

The next case is another long-arm statute case, but this one is a tort action.⁶¹³ Beta (Florida LLCs) hired Mintz & Fraade, P.C., a New York pro-

602. *See id.*

603. *Rensin*, 34 Fla. L. Weekly at D402.

604. 620 So. 2d 1004 (Fla. 1993).

605. *Rensin*, 34 Fla. L. Weekly at D402 (quoting *Thompson*, 620 So. 2d at 1006) (alteration in original).

606. *See id.* at D403 n.1 (citing *Stomar, Inc. v. Lucky Seven Riverboat Co., LLC*, 821 So. 2d 1183, 1187 (Fla. 4th Dist. Ct. App. 2002)).

607. *Id.* at D402 (quoting *Estabrook v. Wetmore*, 529 A.2d 956, 959 (N.H. 1987)).

608. *Id.* (quoting *Thompson*, 620 So. 2d at 1006 n.1).

609. 554 So. 2d 499 (Fla. 1989); *see Rensin*, 34 Fla. L. Weekly. at D403.

610. *Rensin*, 34 Fla. L. Weekly at D402.

611. *See id.* at D403.

612. *See id.*

613. *See Beta Drywall Acquisition, LLC v. Mintz & Fraade, P.C.*, 9 So. 3d 651 (Fla. 4th Dist. Ct. App. 2009).

fessional corporation (NY Firm), to handle legal work involving the acquisition of the assets of Beta Drywall, a Florida corporation.⁶¹⁴ The legal work was all done in New York, except for the closing.⁶¹⁵ Florida LLCs sued NY Firm for malpractice, alleging failure to prepare certain documents for the newly created Florida LLCs, which resulted in disputes among the members and a derivative action.⁶¹⁶ The trial court dismissed the suit for lack of personal jurisdiction over NY Firm.⁶¹⁷ On appeal, the Fourth District Court of Appeal discussed the two-part test under *Wendt v. Horowitz*,⁶¹⁸ as interpreted by the Fourth District Court of Appeal in *Renaissance Health Publishing, LLC v. Resveratrol Partners, LLC*.⁶¹⁹ With respect to the first prong of the test, which requires that the court find the commission of a tort in Florida, the court needs to consider the following rules in applying section 48.193(1)(b) of the *Florida Statutes*.⁶²⁰ “[A] cause of action for tort accrues wherever plaintiff suffers damage to his property.”⁶²¹ The defendant does not have to be physically in Florida to commit a tort in Florida, nor does there have to be “a physical tort” committed in Florida to be within the reach of the long-arm statute.⁶²² “[A] foreign defendant can commit a tort within Florida via its electronic, telephonic, or written communications into” Florida provided the cause of action for tort results from those communications.⁶²³ As alleged, the tort of malpractice involved the claimed faulty formation of and filing of faulty documents in Florida for the two Florida LLCs.⁶²⁴ The entities could only have been formed by NY Firm sending communications into Florida, that is, the filing of the documents in Florida.⁶²⁵ As to the second prong of the *Wendt* test, the appellate court found that NY Firm’s activities also satisfied the due process minimum contacts requirement, concluding that “[a] reasonable person having conducted the activities conducted

614. *Id.* at 652.

615. *Id.* The opinion does not state where the closing was held or who attended.

616. *See id.*

617. *Beta*, 9 So. 3d at 652.

618. 822 So. 2d 1252 (Fla. 2002); *see Beta*, 9 So. 3d at 652.

619. 982 So. 2d 739, 741 (Fla. 4th Dist. Ct. App. 2008); *see Beta*, 9 So. 3d at 652; *see also Landau, 2007–2008 Survey, supra* note 120, at 117 (discussing the *Renaissance Health* decision).

620. *Beta*, 9 So. 3d at 653 (citing *Becker v. Hooshmand*, 841 So. 2d 561, 562–63 (Fla. 4th Dist. Ct. App. 2003)).

621. *Id.* (citing *Becker*, 841 So. 2d at 562).

622. *See id.*

623. *Id.*

624. *See id.* at 652.

625. *See Beta*, 9 So. 3d at 653.

by [NY Firm] would reasonably foresee being haled into court in Florida should an issue regarding the very formation of [Florida LLCs] arise.”⁶²⁶

E. *Forum Non Conveniens*

Lisa, S.A. (Plaintiff), a Panamanian corporation that owned shares in Avicola, a Guatemalan corporation, sued other shareholders of Avicola (Defendants) in connection with Plaintiff’s interests in the Guatemalan corporation.⁶²⁷ The trial court dismissed the second amended complaint, concluding that Plaintiff had an “adequate alternative forum” in the Guatemalan courts.⁶²⁸ With respect to Plaintiff’s allegations that defendant shareholders “stole” Plaintiff’s “one-third share of [Avicola’s] assets and profits” and converted them to Florida situs assets, the Third District Court of Appeal noted that there have been cases where jurisdiction has properly been retained over a defendant’s assets here for satisfaction of a final judgment that might be obtained in a foreign jurisdiction.⁶²⁹ However, since Plaintiff was not able to adequately trace the conversion of Guatemalan assets to Florida assets, or demonstrate a connection between the Defendants’ Florida assets and the alleged wrongdoing of the Defendants, there was no justification for the trial court in Florida to retain even limited local jurisdiction over Defendants’ Florida assets.⁶³⁰ However, that would not preclude future proceedings in Florida under the rules of comity to satisfy a Guatemalan judgment from Defendants’ Florida property.⁶³¹

F. *Venue*

In *Koslow v. Sanders*,⁶³² Sanders sued Koslow for breach of contract, instituting the action in Collier County where Sanders resided.⁶³³ Koslow’s motion to change venue to Broward County, where he resided, was denied by the court.⁶³⁴ Sanders claimed “that venue was proper in Collier County where he resided because that is where any payments owed to him under the contract would be due.”⁶³⁵ The Second District Court of Appeal reversed and

626. *Id.* at 653.

627. *Lisa, S.A. v. Gutierrez*, 992 So. 2d 413, 413 (Fla. 3d Dist. Ct. App. 2008).

628. *Id.* at 414.

629. *Id.* at 413–14.

630. *See id.* at 415.

631. *Id.*

632. 4 So. 3d 37 (Fla. 2d Dist. Ct. App. 2009).

633. *Id.* at 38.

634. *Id.*

635. *Id.*

ordered the transfer of the action to Broward County.⁶³⁶ The Second District acknowledged that venue is proper in the county where the creditor resides when the contract does not state the place where payment is to be made, but only if the amount of the payment is specified in the context of a “debtor-creditor relationship” and the lawsuit is over an amount specified in the contract.⁶³⁷ Sanders and Koslow were not in a debtor-creditor relationship.⁶³⁸ This was an accounting and declaratory judgment action arising out of an alleged breach of contract, and the amount Koslow owed Sanders, if any, had yet to be determined.⁶³⁹ Therefore, the general breach of contract venue rule applicable to performance contracts applied, that is, the place where the defaulting party fails to perform.⁶⁴⁰ Koslow’s breach of the contract, if it occurred, would have been failure to perform administrative duties, and that would have taken place in Broward County, where Koslow resided.⁶⁴¹

G. *Standing*

In *Save the Homosassa River Alliance, Inc. v. Citrus County, Florida*,⁶⁴² the Citrus County Board of County Commissioners passed an ordinance that amended its land development code allowing the Homosassa River Resort, LLC to develop property it owned along the Homosassa River.⁶⁴³ The County was sued by Save the Homosassa River Alliance, Inc. (the Alliance), Mr. Bitter, Ms. Rendueles and Ms. Watkins (collectively referred to as Plaintiffs), who claimed that the ordinance violated the land development code.⁶⁴⁴ The “Alliance is a not-for-profit corporation ‘committed to the preservation and conservation of environmentally sensitive lands and the wildlife in and around the Homosassa River and in Old Homosassa, Florida.’”⁶⁴⁵ All of the individual plaintiffs lived on property they owned in Citrus County, but none owned property that was adjacent to the development site.⁶⁴⁶ And all of the

636. *Id.* at 39.

637. *Koslow*, 4 So. 3d at 38 (citing *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So. 2d 487, 487–89 (Fla. 2d Dist. Ct. App. 1970)).

638. *See id.*

639. *Id.*

640. *Id.* at 38–39 (quoting *Speedling, Inc. v. Krig*, 378 So. 2d 57, 58 (Fla. 2d Dist. Ct. App. 1979)).

641. *Id.* at 39.

642. 2 So. 3d 329 (Fla. 5th Dist. Ct. App. 2008), *reh’g denied*, 16 So. 3d 132 (Fla. 2009) (unpublished table decision).

643. *Id.* at 331.

644. *Id.*

645. *Id.*

646. *See id.* at 331, 339.

individual plaintiffs expressed a general concern with and an interest in preserving the environment so that they could continue to enjoy it in various ways—for example, boating, fishing, bicycling, and walking.⁶⁴⁷ Plaintiffs also cited increased demands on public services, such as water and roadways, which would result from a larger population attracted by the development.⁶⁴⁸ The trial court found that Plaintiffs’ assertions about the development were not sufficient allegations that they were adversely affected “in a way not experienced by the general population.”⁶⁴⁹ Plaintiffs’ second amended complaint was dismissed with prejudice by the trial court on the ground that Plaintiffs lacked standing to sue.⁶⁵⁰ The Fifth District Court of Appeal reversed and remanded.⁶⁵¹ The appellate court began its analysis on standing by stating the common law rule applicable before 1985, “that, in order to have standing to challenge a land use decision, a party had to possess a legally recognized right that would be adversely affected by the decision or suffer special damages different in kind from that suffered by the community as a whole.”⁶⁵² In 1985, the legislature passed section 163.3215 of the *Florida Statutes*, and according to the Fifth District Court of Appeal, “[t]here is no doubt that the purpose of the adoption of section 163.3215 was to liberalize standing in [the] context” of challenging land use decisions.⁶⁵³ The new and more liberal standing rule only requires that the person complaining “must allege that they have an interest that is something more than a ‘general interest in community well being.’”⁶⁵⁴ The Fifth District Court of Appeal stated that “the case law assumes that an organization has an interest that is greater than ‘the general interest in community well being’ when the organization’s primary purpose includes protecting the particular interest that they allege will be adversely affected by the comprehensive plan violation.”⁶⁵⁵ Plaintiffs’ allegations satisfied the new, more liberal standing requirements.⁶⁵⁶ Judge Pleus dissented, saying that the majority’s opinion regarding standing

647. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 332–33.

648. *Id.* at 334.

649. *Id.* at 332.

650. *Id.*

651. *Id.* at 340. The appellate court also held that “Plaintiffs had not abused the privilege to amend,” and it, therefore, was error for the trial court to have dismissed Plaintiffs’ second amended complaint with prejudice. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 340 n.11.

652. *Id.* at 336.

653. *Id.*

654. *Id.* at 337.

655. *Id.*

656. *Save the Homosassa River Alliance, Inc.*, 2 So. 3d at 340.

is squarely opposed to the weight of authority.⁶⁵⁷ Judge Pleus found it especially troubling that the individual plaintiffs' Citrus County property was not adjacent to the development site.⁶⁵⁸ Judge Pleus observed that "[e]very gadfly with some amorphous environmental agenda, and enough money to pay a filing fee, will be anointed with status simply because the gadfly wants to 'protect the planet.'"⁶⁵⁹ and he concluded his dissent by saying, "[f]or those who respect property rights, look out!"⁶⁶⁰

H. *Domestication of Out-of-Country Foreign Money Judgment*

In *Israel v. Flick Mortgage Investors*,⁶⁶¹ Purchasers, who were Israeli citizens, bought homes at a Florida golf resort, and Flick held mortgages on the properties.⁶⁶² As it turned out, Purchasers paid substantially more for the properties than the properties were worth, and they sued Flick and others, in Israel, to "unwind" the sales.⁶⁶³ Purchasers, as plaintiffs in the Israeli action, served Flick in Florida with their complaint and did so using registered mail.⁶⁶⁴ Flick moved to dismiss the suit in Israel on the grounds of lack of personal jurisdiction over him, and he filed a supporting affidavit.⁶⁶⁵ Flick's attorney appeared in connection with the motion, but the Israeli court struck the affidavit because Flick failed to appear.⁶⁶⁶ Ultimately, the motion to dismiss was denied.⁶⁶⁷ Flick did not challenge the sufficiency of service of process, and he did not subsequently participate in the action in Israel.⁶⁶⁸ After Purchasers obtained a judgment against Flick for almost \$1,500,000, Purchasers sought to domesticate the Israeli money judgment in Florida under Florida's Uniform Out-of-Country Foreign Money-Judgment Act (the Act), sections 55.601-.607 of the *Florida Statutes*.⁶⁶⁹ Flick successfully moved for summary judgment in the Florida trial court on the ground of "insufficiency of service of process in the Israeli action."⁶⁷⁰ Purchasers ap-

657. *Id.* at 340-41 (Pleus, J., dissenting).

658. *See id.*

659. *Id.* at 346.

660. *Id.*

661. 33 Fla. L. Weekly D2732 (3d Dist. Ct. App. Nov. 26, 2008).

662. *Id.* at D2732.

663. *Id.*

664. *Id.*

665. *Id.*

666. *Israel*, 33 Fla. L. Weekly at D2732.

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

pealed, and the Third District Court of Appeal reversed and remanded.⁶⁷¹ In the Florida trial court, Flick failed to raise any defense to domestication that was authorized by the Act.⁶⁷² The manner of how service of process is effected is not “one of the ten grounds for nonrecognition or nonenforceability that may be asserted under the Act.”⁶⁷³ Further, Flick waived the defense of insufficient service of process by not raising it in the Israeli court when he challenged personal jurisdiction there.⁶⁷⁴

XII. LANDLORD AND TENANT RELATIONSHIP

A. Execution Requirements

In *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*,⁶⁷⁵ NMB Plaza (Landlord LLC) was constructing an office building when it entered into a lease agreement with Skylake Insurance Agency, Inc. (Tenant).⁶⁷⁶ The lease was signed by a member of Landlord LLC and by the president and a vice-president of Tenant, on behalf of their respective entities.⁶⁷⁷ The lease term was for ten years to begin about three months after the building was completed.⁶⁷⁸ None of these signatures were witnessed.⁶⁷⁹ Prior to completion of the building, Landlord LLC claimed that the lease was unenforceable against it under the Florida Statute of Frauds, section 689.01 of the *Florida Statutes*, because of the absence of witnesses.⁶⁸⁰ Tenant sued Landlord LLC for specific performance.⁶⁸¹ The trial court granted summary judgment to Landlord LLC.⁶⁸² Tenant appealed and the Third District Court of Appeal reversed, identifying and relying on sections 608.425(3) and 608.4235(3) of the *Flori-*

671. *Israel*, 33 Fla. L. Weekly at D2732.

672. *Id.*

673. *Id.*

674. *Id.*

675. 33 Fla. L. Weekly D2215 (3d Dist. Ct. App. Sept. 17, 2008), *rev'd*, No. 3D07-454, 2009 WL 3446494 (Fla. 3d Dist. Ct. App. Oct. 28, 2009).

676. *Id.* at D2215.

677. *Id.*

678. *Id.*

679. *Id.*

680. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215. Tenant relied on the corporate exception at the end of section 689.01 of the *Florida Statutes*. *Id.* The appellate court held that the corporate exception does not apply to a limited liability company. *Id.*

681. *Id.* Tenant also sought damages for fraud, and the trial court granted summary judgment in favor of Landlord LLC on this claim as well. *Id.*

682. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

da Statues.⁶⁸³ Section 608.425(3) validates the “disposition” of property by a limited liability company if the documents are executed as provided in chapter 608 of the *Florida Statutes*.⁶⁸⁴ Notably, the Third District held that a lease is a “disposition of property.”⁶⁸⁵ The appellate court concluded that since section 608.4235(3) grants limited liability company members, or managers as the case may be, the authority to deal with the limited liability company’s real estate by merely signing and delivering the appropriate instruments, no witnesses were required.⁶⁸⁶

B. *Landlord’s Right to Writ of Possession*

*Kosoy Kendall Associates, LLC v. Los Latinos Restaurant, Inc.*⁶⁸⁷ is a short opinion that illustrates the draconian remedies available to a landlord whose tenant is in default.⁶⁸⁸ The trial court held an adversarial hearing on the default and refused to issue the landlord a writ of possession.⁶⁸⁹ The Third District Court of Appeal said that the adversarial hearing was unauthorized, and “[u]pon the lessee’s failure to timely deposit a monthly rental payment into the registry as required by court order under section 83.232, *Florida Statute*[s], the petitioner-landlord was absolutely entitled to an ex parte, immediate default for a writ of possession of the premises.”⁶⁹⁰ Tenant’s payment, due February 1, 2009 and tendered February 5, 2009, was too late.⁶⁹¹ Landlord’s application for mandamus was granted.⁶⁹²

683. *Id.* In the absence of a provision to the contrary in an LLC’s articles of organization or in its operating agreement, a member can sign on behalf of a member-managed company, and a manager is authorized to sign on behalf of a manager-managed LLC. *See* FLA. STAT. § 608.4235(3) (2009). There was no discussion in the opinion as to whether Landlord LLC was member-managed or manager-managed or as to what the company’s organization documents may have provided, but the appellate court noted that the Landlord had admitted that it signed the lease, and Landlord “raise[d] no claim that the . . . signature was unauthorized.” *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

684. FLA. STAT. § 608.425(3).

685. *Skylake Ins. Agency, Inc.*, 33 Fla. L. Weekly at D2215.

686. *See id.*

687. 10 So. 3d 1168 (Fla. 3d Dist. Ct. App. 2009).

688. *See id.* at 1168.

689. *Id.*

690. *Id.* (footnote omitted).

691. *Id.* at 1168 n.1.

692. *Kosoy Kendall Assocs., LLC*, 10 So. 3d at 1169.

XIII. PRINCIPAL AND AGENT

In *Jaylene, Inc. v. Moots*,⁶⁹³ Ms. Crisson (Principal) had given her power of attorney to Ms. Moots (Agent).⁶⁹⁴ Agent's authority included entering "into binding contracts on [Principal's] behalf," and taking "any and all legal steps necessary to collect any . . . debt owed to [Principal], or to settle any claim."⁶⁹⁵ The general power of attorney also granted to the agent "full power and authority to act" on behalf of the principal.⁶⁹⁶ The general power of attorney went on to say that "[t]he listing of specific powers is not intended to limit or restrict the general powers granted in this Power of Attorney in any manner."⁶⁹⁷ Acting under this power, Agent arranged for Principal to live in a nursing home.⁶⁹⁸ The agreement with the nursing home, signed by Agent, contained an optional arbitration clause.⁶⁹⁹ The arbitration clause could be eliminated by marking an "X" through it.⁷⁰⁰ This was not done by Agent.⁷⁰¹ The arbitration clause provided that the Florida Arbitration Code would apply to any claim or controversy arising from the agreement.⁷⁰² After Principal died, Agent, as personal representative of Principal's estate, brought a nursing home resident's rights lawsuit against the nursing home and others.⁷⁰³ The nursing home's motion to compel arbitration under the terms of the agreement was denied by the circuit court.⁷⁰⁴ The Second District Court of Appeal reversed.⁷⁰⁵ The appellate court acknowledged that the general power of attorney did not give the agent specific authority to consent to arbitration.⁷⁰⁶ Nevertheless, the appellate court found that the power of attorney was "extremely broad and unambiguous," and Agent's authority was virtually all-inclusive.⁷⁰⁷ The Second District went on to say that, "[w]e are not prepared to state that a grant of the authority to settle claims includes the authority to consent to arbitration."⁷⁰⁸ The Second District Court of Ap-

693. 995 So. 2d 566 (Fla. 2d Dist. Ct. App. 2008).

694. *Id.* at 567.

695. *Id.* at 568.

696. *Id.*

697. *Id.*

698. *See Jaylene, Inc.*, 995 So. 2d at 567.

699. *Id.* at 567-68.

700. *Id.* at 568.

701. *Id.*

702. *Id.*

703. *Jaylene, Inc.*, 995 So. 2d at 567.

704. *Id.*

705. *Id.*

706. *Id.* at 568.

707. *Id.*

708. *Jaylene Inc.*, 995 So. 2d at 569.

peal found, however, that “the specific grant of authority to settle claims in the document under review in this case is consistent with the view that the [power of attorney’s] broad grant of authority includes the power to consent to arbitration.”⁷⁰⁹ Agent relied on *In re Estate of McKibbin v. Alterra Health Care Corp.*⁷¹⁰ The *In re Estate of McKibbin* court—also the Second District—held in that case that the power of attorney there did not contain anything that authorized the agent to enter into, on behalf of his principal, an agreement to arbitrate.⁷¹¹ The Second District Court of Appeal concluded that *In re Estate of McKibbin* was not controlling.⁷¹² The *In re Estate of McKibbin* opinion did “not set forth the language of the power of attorney” considered by the court to be deficient.⁷¹³

About five weeks after the Second District Court of Appeal rendered its opinion in *Jaylene, Inc.*, the court decided *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*.⁷¹⁴ Ms. Huerta’s daughter-in-law (Agent), under the power of attorney given to her by Ms. Huerta, arranged for Ms. Huerta’s admission to a nursing home owned by Sovereign Healthcare of Tampa, LLC (Sovereign).⁷¹⁵ The general power did not grant Agent specific authority to agree on Ms. Huerta’s behalf to arbitration.⁷¹⁶ Ms. Huerta died, and Agent, as personal representative, sued Sovereign.⁷¹⁷ Sovereign moved to compel Agent to arbitrate these issues, but the trial court denied the motion, relying on *In re Estate of McKibbin*.⁷¹⁸ The Second District Court reversed, stating that the trial court incorrectly relied on *In re Estate of McKibbin* in denying Sovereign’s motion.⁷¹⁹ Noting that it had addressed the limitations of the *In re Estate of McKibbin* decision in *Jaylene, Inc.*, the Second District Court of Appeal found in this case that the general catch-all provision’s grant of authority contained in the power of attorney was sufficiently broad and unambiguous enough to permit the agent’s consent to arbitration on behalf of the principal.⁷²⁰ This provision, when considered with several other provisions of the power of attorney that granted the right to sign consents and re-

709. *Id.*

710. *Id.* (relying on 977 So. 2d 612 (Fla. 2d Dist. Ct. App. 2008 (per curiam))).

711. *In re Estate of McKibbin*, 977 So. 2d at 613.

712. *Jaylene, Inc.*, 995 So. 2d at 570.

713. *Id.* (citing *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st Dist. Ct. App. 2005)).

714. 14 So. 3d 1033 (Fla. 2d Dist. Ct. App. 2009).

715. *Id.* at 1034.

716. *Id.*

717. *Id.* The complaint alleged negligence, wrongful death, and breach of fiduciary duty.

718. *Sovereign Healthcare of Tampa, LLC*, 14 So. 3d at 1034.

719. *Id.*

720. *Id.* at 1035.

leases, was sufficient to find that the agent had the authority to consent to arbitration.⁷²¹ The court relied on its March 2009 decision in *Carrington Place of St. Pete, LLC v. Estate of Milo*,⁷²² and held that, “[w]hether a [power of attorney] contains a provision that constitutes a sufficiently broad and unambiguous grant of general authority . . . requires examination of the language of any catch-all provision contained in [the power of attorney], as well as of the relationship of that language to the type” of authority specifically granted.⁷²³

XIV. TAXES

A. Documentary Stamp Tax

*Department of Revenue v. Pinellas VP, LLC*⁷²⁴ involved two distinct sets of transfers.⁷²⁵ With respect to the first transaction, Mr. Pridgen was the sole member of Pinellas VP, LLC (Pinellas) and the sole shareholder and director of Tarpon Ridge, Inc.⁷²⁶ Pinellas received twenty acres of land from Tarpon Ridge, Inc. by warranty deed.⁷²⁷ Thus, Mr. Pridgen’s solely owned corporation transferred real estate to his solely owned LLC.⁷²⁸ Although Pinellas paid no money for the conveyance, it took the land subject to a mortgage.⁷²⁹ Pinellas “paid a \$19,250 documentary stamp tax based on the outstanding [mortgage] balance.”⁷³⁰ The second transaction involved the transfer of real estate from an LLC to its members.⁷³¹ Tarpon Ridge, Inc. was the managing and sole member of TPA Investments, LLC (TPA).⁷³² TPA and Lindell-Gandy LLC,⁷³³ in turn, were the members of Imperial, LLC⁷³⁴ Imperial, LLC transferred real estate by warranty deed to its members, TPA and Lindell-

721. *Id.*

722. 34 Fla. L. Weekly D640 (2d Dist. Ct. App. Mar. 25, 2009).

723. *Sovereign Healthcare of Tampa, LLC*, 14 So. 3d at 1034.

724. 3 So. 3d 361 (Fla. 2d Dist. Ct. App. 2009); *see also* Dep’t of Revenue v. Pilgrim Hall, LLC, 34 Fla. L. Weekly D456 (2d Dist. Ct. App. Feb. 27, 2009) (per curiam).

725. *Pinellas VP, LLC*, 3 So. 3d at 362.

726. *Id.*

727. *Id.*

728. *See id.*

729. *Id.*

730. *Pinellas VP, LLC*, 3 So. 3d at 362.

731. *Id.*

732. *Id.*

733. *Id.* The opinion does not disclose who the members of Lindell-Gandy LLC are, but it does say that Mr. Pridgen was not a member. *See id.*

734. *Pinellas VP, LLC*, 3 So. 3d at 362.

Gandy, as tenants in common.⁷³⁵ TPA and Lindell-Gandy paid no money for the real estate, but took it subject to a mortgage.⁷³⁶ Imperial, LLC had given a promissory note securing the mortgage, and Mr. Pridgen guaranteed one-half of Imperial's note.⁷³⁷ TPA recorded the deed and paid a documentary stamp tax of \$161,546.70 based on the principal amount of the mortgage.⁷³⁸ Pinellas and TPA then sued for refunds of the documentary stamp tax paid.⁷³⁹ The trial court granted their motions for summary judgment.⁷⁴⁰ The Second District Court of Appeal reversed, distinguishing the facts of *Crescent Miami Center, LLC v. Florida Department of Revenue*⁷⁴¹ from the two situations before it.⁷⁴² In *Crescent Miami Center*, no money changed hands upon a direct real estate transfer from a parent corporation and its wholly-owned subsidiary.⁷⁴³ In addition, there was no mortgage involved.⁷⁴⁴ The Supreme Court of Florida in *Crescent Miami Center* held that there was no taxable event, no change of beneficial ownership, only a change in the form of ownership.⁷⁴⁵ In this case, there was consideration in the form of mortgages encumbering the transferred property.⁷⁴⁶ Section 201.02(1) of the *Florida Statutes* specifically refers to mortgages as consideration upon which calculation of the seventy cents per one hundred dollars of consideration is applied.⁷⁴⁷ The fact that Mr. Pridgen would bear the economic burden of the mortgages was irrelevant.⁷⁴⁸ There was a transfer between different legal entities for consideration.⁷⁴⁹

735. *Id.*

736. *Id.*

737. *Id.*

738. *Id.*

739. *Pinellas VP, LLC*, 3 So. 3d at 362.

740. *Id.* at 362–63.

741. 903 So. 2d 913 (Fla. 2005).

742. *Pinellas VP, LLC*, 3 So. 3d at 364; *see also* Dep't of Revenue v. Pilgrim Hall, LLC, 34 Fla. L. Weekly D456, D456 (2d Dist. Ct. App. Feb. 27, 2009) (per curiam) (a case heard with the *Pinellas* and *TPA Investment* cases).

743. *Pinellas VP, LLC*, 3 So. 3d at 364 (citing *Crescent Miami Ctr., LLC*, 903 So. 3d at 914).

744. *Id.* (citing *Crescent Miami Ctr., LLC*, 903 So. 3d at 914).

745. *Crescent Miami Ctr., LLC*, 903 So. 3d at 918–19.

746. *Pinellas VP, LLC*, 3 So. 3d at 364.

747. FLA. STAT. § 201.02(1) (2009); *see also* S.B. 2430, 2009 Leg., (Fla. 2009) (signed by Gov. Crist on June 10, 2009, amending section 201.02(1) of the *Florida Statutes*, for statutory limitations on the Supreme Court of Florida's decision in *Miami Crescent Ctr., LLC*).

748. *See Pinellas VP, LLC*, 3 So. 3d at 364.

749. *See id.* at 361.

B. Florida Tax on Real Estate Rental Payments

Section 212.031(1)(c) of the *Florida Statutes* imposes a six percent privilege tax on total rent charged for leasing real estate.⁷⁵⁰ Under this section, total rent specifically includes “base rent.”⁷⁵¹ The section goes on to say that where there are required contractual payments taxable as total rent and those that are not, reasonable allocation must be made between taxable and non-taxable payments.⁷⁵² In *USCardio Vascular, Inc. v. Florida Department of Revenue*,⁷⁵³ USCardio Vascular (Landlord) made a lease agreement with a physician group (Tenant).⁷⁵⁴ The lease agreement called for the payment of “base rent.”⁷⁵⁵ The agreement also referred to center expenses and the rental fee.⁷⁵⁶ The latter two items were synonymous with base rent.⁷⁵⁷ Included in the definition of center expenses, and thus a part of base rent, were items “such as salaries, benefits and insurance for the employees leased by the [Landlord] to the [Tenant].”⁷⁵⁸ Standing alone, the payments of these expenses are not subject to the six percent tax.⁷⁵⁹ Landlord paid the excise tax on the amount of lease payments it deemed subject to the tax but not on the entire base rent.⁷⁶⁰ The Florida Department of Revenue assessed a deficiency calculated on the entire base rent.⁷⁶¹ Its motion for summary judgment was granted by the trial court.⁷⁶² Landlord appealed, and the First District Court of Appeal reversed.⁷⁶³ The First District Court of Appeal held that, regardless of how the payments were characterized, that is, as base rent, some of the center expenses are not subject to the six percent tax.⁷⁶⁴ The case was remanded for the trial court’s determination of taxable and non-taxable payments under the lease agreement.⁷⁶⁵ Judge Benton dissented.⁷⁶⁶ He would have held that the Landlord was bound by its use of “base rent” in the

750. FLA. STAT. § 212.031(1)(c) (2009).

751. *Id.*

752. *Id.*

753. 993 So. 2d 81 (Fla. 1st Dist. Ct. App. 2008), *reh’g denied*, 8 So. 3d 1133 (Fla. 2009).

754. *Id.* at 82.

755. *Id.*

756. *Id.* at 82–83.

757. *Id.* at 82–84.

758. *USCardio Vascular, Inc.*, 993 So. 2d at 84–85 (footnote omitted).

759. *Id.* at 85.

760. *See id.* at 84.

761. *Id.*

762. *Id.*

763. *USCardio Vascular, Inc.*, 993 So. 2d at 82.

764. *Id.* at 85.

765. *Id.*

766. *Id.* at 85 (Benton, J., dissenting).

agreement,⁷⁶⁷ which was described by the majority as “undoubtedly a poor choice of words.”⁷⁶⁸

XV. TORTS

A. *Negligence: Limitation of Liability of Professional*

*Witt v. La Gorce Country Club, Inc.*⁷⁶⁹ involved a professional’s—a licensed geologist’s—attempt, by contractual provision, to limit his malpractice liability.⁷⁷⁰ Mr. Witt (Geologist) was employed by Gerhardt M. Witt and Associates, Inc. (Geologist’s Corporation).⁷⁷¹ Geologist’s Corporation was hired by La Gorce Country Club (Club) to consult on the design and installment of a “reverse osmosis water treatment” project.⁷⁷² The contract between Club and Geologist’s Corporation contained a limit of liability provision.⁷⁷³ Despite numerous problems with the system, the project was eventually completed, but after fourteen months of continued deterioration, “the system failed completely.”⁷⁷⁴ Club sued Geologist and Geologist’s Corporation for, among other things, professional malpractice.⁷⁷⁵ The trial judge ruled that the contractual liability limitation was enforceable with respect to Geologist’s Corporation, but not with respect to Geologist personally, as a professional.⁷⁷⁶ The Third District Court of Appeal affirmed.⁷⁷⁷ The limitation of liability as to Geologist was unenforceable as a matter of law under section 492.111(4) of the *Florida Statutes*—professional geologist’s personal liability.⁷⁷⁸ As a matter of public policy, “[a] cause of action in negligence against an individual professional exists irrespective, and essentially, independent of a professional services agreement.”⁷⁷⁹

767. *Id.*

768. *USCardio Vascular, Inc.*, 993 So. 2d at 85 (majority opinion).

769. 34 Fla. L. Weekly D1161 (Fla. 3d Dist. Ct. App. June 10, 2009).

770. *Id.* at D1161. The court also had before it issues involving arbitrability, “fraud in the inducement and violation of the Florida Deceptive and Unfair Trade Practices Act.” *Id.*

771. *Id.*

772. *Id.*

773. *Witt*, 34 Fla. L. Weekly at D1161.

774. *Id.* at D1161–62.

775. *Id.* at D1162.

776. *Id.*

777. *Id.* at D1163.

778. *Witt*, 34 Fla. L. Weekly at D1162 (citing FLA. STAT. § 492.111 (2009)); see *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999).

779. *Witt*, 34 Fla. L. Weekly at D1163.

B. *Tortious Interference with Business or Contractual Relationship*

The Palm Beach County Health Care District (District) was created by Florida statute.⁷⁸⁰ Its purpose was “to maximize the health and well-being of Palm Beach County residents by providing comprehensive planning, funding, and coordination of health care service delivery.”⁷⁸¹ It could “sue and be sued” and was also vested “with all sovereign immunity and limitations provided by the State Constitution or general law.”⁷⁸² The District employed Dr. Davis (Director) as its Trauma Agency director.⁷⁸³ Professional Medical Education, Inc. (PME) provided training to Palm Beach County emergency medical services employees.⁷⁸⁴ The District would pay for the training upon completion of the program.⁷⁸⁵ Basic Trauma Life Support of Florida, Inc. (BTLS) was an organization that certified the providers of medical personnel training.⁷⁸⁶ Director wrote to BTLS after there had been some disagreement between Director and the owner of PME regarding “necessary documentation for reimbursement.”⁷⁸⁷ After the letter was sent, the contents of which are not disclosed in the opinion, BTLS suspended PME’s certification.⁷⁸⁸ In the meantime, PME had contracted to provide instruction to Palm Beach County Fire Rescue personnel, but the training was placed on “hold” when told by Director that the District would not be paying for the training.⁷⁸⁹ PME sued the District and Director for defamation and the District for tortious interference and conspiracy.⁷⁹⁰ The trial court directed a verdict for Director on the defamation count ruling that, under *McNayr v. Kelly*,⁷⁹¹ Director had absolute immunity as an “executive official of government” who “was acting within the scope of his employment.”⁷⁹² However, the trial court let the jury’s verdict of over \$690,000 against the District on all counts

780. *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1092 (Fla. 4th Dist. Ct. App. 2009).

781. *Id.* (quoting *Palm Beach County Health Care Act*, ch. 2003–326, § 3(2), 2003 Fla. Laws 101, 102).

782. *Id.* (quoting *Palm Beach County Health Care Act* §6(6)).

783. *Id.* at 1093.

784. *Id.*

785. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093.

786. *Id.*

787. *Id.*

788. *Id.*

789. *Id.*

790. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093.

791. 184 So. 2d 428 (Fla. 1966).

792. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1093, 1095 (quoting *McNayr*, 184 So. 2d at 433).

stand.⁷⁹³ The Fourth District Court of Appeal reversed the trial court's order against the District.⁷⁹⁴ In order to sustain a tortious interference claim, the defendant must be a "stranger to the business relationship"⁷⁹⁵ at issue and can have no "beneficial or economic interest in, or control over, that [business] relationship."⁷⁹⁶ The District was an interested third party.⁷⁹⁷ It was paying the bills, including those submitted by PME.⁷⁹⁸ Furthermore, the defamation count against the District was grounded on the action of Director, the District's employee.⁷⁹⁹ The appellate court concluded that the trial court's directed verdict in favor of Director was proper and therefore, Director's immunity from the defamation claim had to exonerate the District.⁸⁰⁰ As no wrongful acts were committed by the District and Director against PME, there was no basis for a civil conspiracy action.⁸⁰¹

C. *Investment Advice: Fraudulent Inducement*

When Plaintiffs sold their company to Winstar Communications, Inc. (Winstar) in 1998, they were paid eighty percent of the purchase price in Winstar stock.⁸⁰² They also were named as vice presidents of Winstar.⁸⁰³ Winstar entered into an "investment banking relationship" with Salomon Smith Barney, Inc. (SSB) in 1999, and some "transactions generated substantial fees for SSB."⁸⁰⁴ The appellate court noted that the relationship between Winstar and SSB "created incentives for SSB" to encourage potential and current owners of Winstar stock, respectively, to buy and to hold Winstar stock.⁸⁰⁵ The evidence showed that the Winstar stock investment quality was overstated by SSB analysts "through a series of communications with the general public and with Winstar employees."⁸⁰⁶ In addition, starting in Janu-

793. *See id.* at 1093.

794. *Id.* at 1096.

795. *Id.* at 1094 (quoting *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 386 (Fla. 4th Dist. Ct. App. 1999)).

796. *Id.* (quoting *Nimbus Techs., Inc. v. SunnData Prods., Inc.*, 484 F.3d 1305, 1309 (11th Cir. 2007)).

797. *Palm Beach County Health Care Dist.*, 13 So. 3d at 1094.

798. *Id.*

799. *Id.* at 1095.

800. *Id.*

801. *Id.* at 1096.

802. *Goldin v. Salomon Smith Barney, Inc.*, 994 So. 2d 517, 518–19 (Fla. 3d Dist. Ct. App. 2008).

803. *Id.* at 519.

804. *Id.*

805. *Id.*

806. *Id.*

ary 2000, there were conference calls on a quarterly basis with an SSB analyst “who consistently reiterated the positive outlook [about] Winstar stock,” and Plaintiffs were on the phone during these calls.⁸⁰⁷ However, beginning early in 2001, the analysts “were privately rating [the] stock at more negative levels.”⁸⁰⁸ In April 2001, Winstar filed for bankruptcy protection and the value of Winstar stock owned by Plaintiffs collapsed.⁸⁰⁹ Plaintiffs sued SSB alleging that SSB had fraudulently induced them to buy and hold Winstar stock.⁸¹⁰ Plaintiffs alleged that they “justifiably relied on affirmative misrepresentations” of SSB and its analysts in these quarterly calls, quarterly reports, and the news, in their decision to purchase and retain Winstar stock.⁸¹¹ The parties agreed that New York law applied.⁸¹² The trial court dismissed Plaintiffs’ second amended complaint with prejudice “for failure to allege a sufficiently direct communication” to them by SSB, and for their “failure to demonstrate that SSB had a duty to disclose any material information it may have withheld.”⁸¹³ Plaintiffs appealed, and the Third District Court of Appeal acknowledged that New York recognizes a claim of fraudulent inducement “to retain securities in reliance on a defendant’s affirmative misrepresentations.”⁸¹⁴ However, a plaintiff must allege facts that would prove justifiable reliance, which here would have required that they allege delivery of the misrepresentation from SSB to them, that they were induced by the misrepresentation to retain their stock, and that their reliance on alleged misrepresentation and their decision to hold the stock were both reasonable.⁸¹⁵ Plaintiffs failed to allege, nor could they “in good faith” have alleged, that they ever asked the SSB representative any questions during the conference calls, or that the SSB analyst even knew that Plaintiffs were on the line.⁸¹⁶ Under New York law, the alleged affirmative misrepresentation must be directly communicated to a plaintiff.⁸¹⁷ Plaintiffs here were in the same posi-

807. *Goldin*, 994 So. 2d at 519. Plaintiffs alleged that they “participated” in the calls, but the court noted that they could not “in good faith” allege that SSB or the analyst was aware of the presence of Plaintiffs or of Plaintiffs’ participation, or that Plaintiffs had asked any questions during the calls. *Id.* at 520.

808. *Id.* at 519.

809. *Id.*

810. *Id.*

811. *Goldin*, 994 So. 2d at 520.

812. *Id.* at 519.

813. *Id.*

814. *Id.*

815. *Id.* at 519–20.

816. *Goldin*, 994 So. 2d at 520.

817. *Id.*

tion as any other stockholder.⁸¹⁸ New York law does not recognize reliance on publicly disseminated forecasts as justifiable.⁸¹⁹

D. *Pre-injury Liability Release on Behalf of Minor Child*

Several cases decided in the past year and a half have addressed the issue of whether a parent's execution of a release absolving a commercial activity from liability to a minor for injury—prior to the injury—is binding on the minor child or the child's estate.⁸²⁰ Before discussing the Supreme Court of Florida's answer to this important question in *Kirton v. Fields (Fields II)*,⁸²¹ a little procedural history will help set the stage.⁸²² In *Fields v. Kirton (Fields I)*,⁸²³ the Fourth District Court of Appeal held that such a waiver was ineffective.⁸²⁴ In reaching its conclusion, the Fourth District Court of Appeal certified an implicit conflict with a Fifth District Court of Appeal case, *Lantz v. Iron Horse Saloon, Inc.*,⁸²⁵ where such a waiver was found effective.⁸²⁶ In *Fields I*, the Fourth District Court of Appeal also certified the case as one of great public importance.⁸²⁷ However, subsequent to the Fourth District Court's decision in *Fields I*, and its certification of conflict with *Lantz*, the Fifth District Court of Appeal decided *Applegate v. Cable Water Ski, L.C. (Applegate I)*,⁸²⁸ where it agreed with the Fourth District in *Fields I*.⁸²⁹ The Fifth District Court of Appeal in *Applegate I*, however, did not recede from *Lantz*.⁸³⁰ Instead it distinguished *Lantz*, finding that the issue there was whether the trial court had correctly determined that the exculpatory provision involved was unambiguous.⁸³¹ In addition, the Fifth District Court of

818. *Id.*

819. *See id.*

820. *See Kirton v. Fields (Fields II)*, 997 So. 2d 349, 350 (Fla. 2008); *Applegate v. Cable Water Ski, L.C. (Applegate I)*, 974 So. 2d 1112, 1113 (Fla. 5th Dist. Ct. App. 2008); *see also Landau, 2007–2008 Survey, supra* note 120, at 95 (discussing *Applegate I*).

821. 997 So. 2d 349 (Fla. 2008).

822. *Id.* at 351–52.

823. 961 So. 2d 1127 (Fla. 4th Dist. Ct. App. 2007), *reh'g granted*, 973 So. 2d 1121 (Fla. 2007).

824. *Id.* at 1130.

825. 717 So. 2d 590 (Fla. 5th Dist. Ct. App. 1998), *overruled by*, 997 So. 2d 349 (Fla. 2008).

826. *Fields I*, 961 So. 2d at 1130.

827. *Id.*

828. 974 So. 2d 1112 (Fla. 5th Dist. Ct. App. 2008).

829. *See id.* at 1113 & n.1.

830. *Id.* at 1116.

831. *Id.* It is not disclosed in *Lantz* whether the issue of the effectiveness of such a release was ever raised by the parties, and it apparently was not raised on appeal. *See Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590, 591–92 (Fla. 5th Dist. Ct. App. 1998), *overruled by*, 997

Appeal in *Applegate I* certified the question to the Supreme Court of Florida as one of great public importance.⁸³² Thus, there was then pending in the Supreme Court of Florida the certification of conflict with *Lantz* by the Fourth District, in *Fields I*, and the certification by the Fifth District in *Applegate I*.⁸³³ On December 11, 2008, the Supreme Court of Florida, in *Fields II*, enunciated, as a matter of first impression, a public policy exception to the general rule that pre-injury releases are enforceable if they are not ambiguous and not equivocal.⁸³⁴ The facts of the *Fields II* were that fourteen-year-old Christopher Jones was fatally injured at Thunder Cross Motor Sports Park (Park) after he was ejected from the all terrain vehicle he was driving when he lost control of it.⁸³⁵ His father, “Bobby Jones, as Christopher’s natural guardian, [had earlier] signed a release and waiver of liability, assumption of risk, and indemnity agreement” with the attraction’s operator.⁸³⁶ Fields, as personal representative (Personal Representative) of Christopher’s estate, sued the owners and the operators of Park (Park Owner) for wrongful death.⁸³⁷ Park Owner argued that the claim was barred because of the execution of the release.⁸³⁸ The trial court agreed and granted Park Owner’s summary judgment motion.⁸³⁹ Personal Representative appealed, and the Fourth District Court of Appeal reversed, certifying the case to the Supreme Court of Florida.⁸⁴⁰ In reaching its decision in *Fields II*, the Supreme Court balanced the well-recognized right of parents to make decisions for their minor children—said by the Court to “derive[] from the liberty interest . . . in the Fourteenth Amendment to the United States Constitution and the guarantee of privacy in article I, section 23 of the Florida Constitution”—against the State’s *parens patriae* authority.⁸⁴¹ After reviewing the case law from Florida and other jurisdictions, the Court decided that the State’s *parens patriae* authority prevailed in this case, and that as a matter of public policy, a “pre-injury release executed by a parent on behalf of their minor child is unenfor-

So. 2d 349 (Fla. 2008). The Fifth Circuit did not address this issue when it reached the conclusion that the language there was sufficiently “clear and unequivocal.” *Id.* In any event, the decision in *Lantz* has now been disapproved by the Supreme Court of Florida. See Kirton v. Fields (*Fields II*), 997 So. 2d 349, 358 (Fla. 2008).

832. *Applegate I*, 974 So. 2d at 1116.

833. *Id.*; Fields v. Kirton (*Fields I*), 961 So. 2d 1127, 1130 (Fla. 4th Dist. Ct. App. 2007).

834. *Fields II*, 997 So. 2d at 358; *Lantz*, 717 So. 2d at 591–92 (citing Greater Orlando Aviation Auth. v. Bulldog Airlines, Inc., 705 So. 2d 120, 121 (Fla. 5th Dist. Ct. App. 1998)).

835. *Fields II*, 997 So. 2d at 351 (quoting *Fields I*, 961 So. 2d at 1128).

836. *Id.* (quoting *Fields I*, 961 So. 2d at 1128).

837. *Id.*

838. *Id.*

839. *Id.*

840. *Fields II*, 997 So. 2d at 351–52.

841. *Fields II*, 997 So. 2d at 352–53 (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

ceable” by commercial enterprises.⁸⁴² However, the Court was careful to note that even in the case of commercial enterprises, a parent could bind a minor child to arbitrate, rather than litigate, personal injury claims.⁸⁴³ The Court did not decide if such releases will be upheld in the case of non-commercial activities, nor did it set forth a test to determine what is classified as non-commercial activity as opposed to commercial activity, although there was an in-depth discussion of decisions involving non-commercial activities.⁸⁴⁴ In a concurring opinion, Justice Pariente made it clear that she did not hold the view “that all releases from liability for non-commercial activities are automatically valid,” and that there is still room to hold a non-commercial activity liable for negligence in the face of a release.⁸⁴⁵ Justice Wells dissented on the ground that it will often prove very difficult to draw a bright line distinction between commercial and non-commercial activities.⁸⁴⁶ According to Justice Wells, it is the legislature’s duty to take up the issue of the enforceability of pre-injury releases executed by parents on behalf of their minor children.⁸⁴⁷

With respect to *Applegate II*, after the Court’s decision in *Fields II*, it declined to review *Applegate I*.⁸⁴⁸

842. *Id.* at 358.

843. *See id.* at 355 (quoting *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 404 (Fla. 2005)).

844. *See id.* at 356–57.

845. *Id.* at 361–62 (Pariente, J., concurring).

846. *Fields II*, 997 So. 2d at 363 (Wells, J., dissenting). An example discussed in the case questions whether “a Boy Scout or Girl Scout, YMCA, or church camp [is] a commercial establishment or a community-based activity.” *Id.*

847. *Id.* Pertinent legislation introduced in the Florida House of Representatives and the Senate after *Fields II* was not passed. *See* Florida House of Representatives, Legislative Tracking: Fla. HB 363 (2009), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=40275&BillText=363&HouseChamber=H&SessionId=61&>. HB 363 was introduced on January 14, 2009 but “[d]ied on [Unfinished Business] Calendar” on May 2, 2009. *Id.* The bill

[a]uthorize[d] natural guardians to waive [and] release, in advance, any claim or cause of action that would accrue to any of their minor children to the same extent that any adult may do so on his or her own behalf; provid[ed] that such waivers [and] releases are disfavored [and] must be strictly construed against party claiming to be relieved of liability; provide[d] readability requirements for wording of such waivers [and] releases, etc.

Id. A related bill, SB 886, was also withdrawn. *See* Florida Senate, Legislative Tracking: Fla. SB 886 (2009), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=40472&BillText=363&HouseChamber=H&SessionId=61&>.

848. *Cable Water Ski, LLC v. Applegate (Applegate II)*, 5 So. 3d 668, 668 (Fla. 2009).

XVI. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

A. *Statute of Limitations on Debt Deficiency Collection*

Ms. Arvelo (Borrower) bought a car and obtained auto financing from Park Finance of Broward, Inc. (Lender) in 1999.⁸⁴⁹ The finance agreement provided that if Borrower missed a payment to Lender, the balance of her debt would be immediately accelerated and due in full.⁸⁵⁰ Borrower failed to make her March 2002 payment.⁸⁵¹ The auto was repossessed and sold by Lender on August 7, 2002.⁸⁵² After the debt was reduced by the amount of net sale proceeds,⁸⁵³ Borrower still owed Lender more than \$6000 under the finance agreement.⁸⁵⁴ On May 29, 2007, Lender sued Borrower in county court “for the deficiency amount plus accumulated interest.”⁸⁵⁵ Borrower raised the five-year statute of limitations under section 95.11(2)(b) of the *Florida Statutes* and claimed that the limitations period commenced in March 2002 when she missed a payment.⁸⁵⁶ If she was correct, then the May 29, 2007 lawsuit against Borrower was filed too late.⁸⁵⁷ Lender argued that the agreement to pay the deficiency amount was tantamount to a separate debt under the deficiency provision of the agreement—whereby Borrower agreed to the deficiency if permitted by law—and the deficiency was not determined until August 2002.⁸⁵⁸ Therefore, according to Lender, the lawsuit, started in May 2007, was within the five-year statute of limitations.⁸⁵⁹ The county court agreed with Lender.⁸⁶⁰ The appellate division of the circuit court affirmed, and Borrower petitioned the Third District Court of Appeal for a writ of certiorari which was granted.⁸⁶¹ The Court of Appeal reversed,

849. See *Arvelo v. Park Fin. of Broward, Inc.*, 15 So. 3d 660, 662 (Fla. 3d Dist. Ct. App. 2009).

850. *Id.*

851. *Id.*

852. *Id.*

853. *Id.* Lender subtracted \$464 from the sale proceeds for expenses of repossession and sale. *Arvelo*, 15 So. 3d at 662.

854. *Id.*

855. *Id.*

856. *See id.*

857. *Id.*

858. *Arvelo*, 15 So. 3d at 662. The appellate court distinguished this situation from the rules that apply with respect to accrual of an action to foreclose on real estate. *Id.* at 663 n.4 (relying on *Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343, 345 n.2 (Fla. 4th Dist. Ct. App. 2005) (citing FLA. STAT. § 702.06 (2009))).

859. *Id.* at 662.

860. *Id.*

861. *Id.*

finding that there was one debt owed by Borrower.⁸⁶² The deficiency amount was part of that debt.⁸⁶³ Borrower's "post-repossession failure or refusal to pay the deficiency [did not] 'reset the clock.'"⁸⁶⁴ Had Borrower voluntarily made a payment on the delinquent debt, that would have tolled the statute under section 95.05(1)(f) of the *Florida Statutes*.⁸⁶⁵ The only post-default payments made resulted from repossession and sale, and that does not toll the statute of limitations.⁸⁶⁶

B. *Vendor's Lien on Real Estate*

In *Golden v. Woodward*,⁸⁶⁷ Mr. Woodward Sr. (Transferor) and Mr. and Mrs. Golden (Transferees) entered into an "Agreement to Sell Personal Real Estate Property" in 2003 for \$109,000.⁸⁶⁸ Transferees were to pay Transferor \$550 a month for seven years (\$46,200), and at the end of seven years, make a balloon payment of \$62,800.⁸⁶⁹ Transferor did not take back a mortgage or other security for payment.⁸⁷⁰ In 2004, Transferor gave Transferees a warranty deed for the property.⁸⁷¹ Transferor died in 2006, and Transferees stopped making payments.⁸⁷² The personal representative of Transferor's estate sought to have a vendor's—equitable—lien placed on the property to secure payment of the \$89,000 purchase price balance.⁸⁷³ The basis of the claim for a vendor's lien was to prevent unjust enrichment.⁸⁷⁴ The trial court granted the lien, and the First District Court of Appeal affirmed.⁸⁷⁵ A vendor's lien "is 'a creature of equity, a lien implied to belong to a vendor for the unpaid purchase price of land, where he has not taken any other lien or security beyond the personal obligation of the purchaser.'"⁸⁷⁶ Equitable liens

862. *Arvelo*, 15 So. 3d at 662.

863. *Id.*

864. *Id.* at 663.

865. *See id.*

866. *Id.*

867. 15 So. 3d 664 (Fla. 1st Dist. Ct. App. 2009).

868. *See id.* at 666.

869. *Id.*

870. *See id.*

871. *Golden*, 15 So. 3d at 667.

872. *See id.*

873. *Id.* at 666.

874. *See id.* at 667.

875. *Id.* at 668, 671.

876. *Golden*, 15 So. 3d at 669 (quoting *Special Tax Sch. Dist. No. 1 of Orange County v. Hillman*, 179 So. 805, 809 (Fla. 1938)).

may be granted on the basis of estoppel or unjust enrichment.⁸⁷⁷ The 2003 agreement between Transferor and Transferees did not disappear by merger with the 2004 warranty deed.⁸⁷⁸ Although merger of the sales contract into the later deed is the general rule, it is not absolute and did not apply under the facts of this case since that was not the intention of the parties.⁸⁷⁹

C. *Jurisdiction over Loan Guarantors*

Whitney National Bank (Bank) sued three individuals (Guarantors) who resided in Tennessee, seeking to enforce their loan guarantees.⁸⁸⁰ The borrower was a Florida corporation that allegedly was in default on the loan.⁸⁸¹ Guarantors claimed that Bank could not obtain personal jurisdiction over them under Florida's long-arm statute, section 48.193 of the *Florida Statutes*, because they were not residents of Florida, had "never engaged in business in Florida," and did not, individually, own Florida real estate.⁸⁸² Furthermore, they all signed the guaranty in Tennessee, and there was nothing in the guaranty that called for any performance or action by them in Florida.⁸⁸³ Guarantors had provided financial statements to Bank.⁸⁸⁴ The trial court determined that the long-arm statute was satisfied.⁸⁸⁵ The First District Court of Appeal reversed.⁸⁸⁶ The plaintiff must prove the defendant's "minimum contacts" with Florida to comply with due process requirements.⁸⁸⁷ Simply signing a loan guaranty in favor of a Florida bank is not sufficient "minimum contacts."⁸⁸⁸ The appellate court noted that there was no forum selection clause in the guaranty, but even if there had been, it was still necessary to establish minimum contacts with the forum state absent a waiver of personal

877. *Id.* (quoting *Plotch v. Gregory*, 463 So. 2d 432, 436 n.1 (Fla. 4th Dist. Ct. App. 1985)).

878. *See id.* at 671.

879. *Id.*; *see Polk Bond & Mortgage Co. v. Dwiggin*, 147 So. 855, 857 (Fla. 1933); *Milu, Inc. v. Duke*, 204 So. 2d 31, 33 (Fla. 3d Dist. Ct. App. 1967).

880. *See Labry v. Whitney Nat'l Bank, AB9G, LLC*, 8 So. 3d 1239, 1239 (Fla. 1st Dist. Ct. App. 2009).

881. *Id.*

882. *Id.* at 1240–41.

883. *Id.* at 1241.

884. *Id.*

885. *See Labry*, 8 So. 3d at 1239.

886. *Id.* at 1242.

887. *Id.* at 1240.

888. *Id.* at 1241 (citing *Holton v. Prosperity Bank of St. Augustine*, 602 So. 2d 659, 662–63 (Fla. 5th Dist. Ct. App. 1992)). *Contra Kane v. Am. Bank of Merritt Island*, 449 So. 2d 974, 975–76 (Fla. 5th Dist. Ct. App. 1984).

jurisdiction.⁸⁸⁹ The fact that financial statements were furnished by the guarantors to the Florida creditor made no significant difference.⁸⁹⁰

D. *Enforcement of Foreign Judgment*

Creditor sought recognition, in the Miami-Dade Circuit Court, of Creditor's judgment for \$236,900 against Debtor obtained from a court in Argentina.⁸⁹¹ The trial court entered judgment for the amount of the foreign judgment, and Debtor filed an appeal with the Third District.⁸⁹² Debtor also persuaded the trial judge to stay enforcement of the judgment during the appeal.⁸⁹³ The Third District Court of Appeal reversed.⁸⁹⁴ While the trial court may consider a stay pursuant to rule 9.310 of the *Florida Rules of Appellate Procedure*, under section 55.607 of the *Florida Statutes*, a stay here would only have been proper if the debtor had "satisfie[d] the [trial] court that an appeal is pending," or that the debtor "intend[ed] to appeal"—but only if a stay has been issued by the foreign court.⁸⁹⁵ The trial judge should have followed the Florida Uniform Out-of-Country Foreign Money-Judgment Recognition Act.⁸⁹⁶ The Uniform Act requires that domesticated foreign judgments be enforced in the same way as a judgment rendered by a court in Florida.⁸⁹⁷

XVII. WILLS, TRUSTS, AND ESTATES

The following is an update on two homestead cases mentioned in the 2006–2007 Survey.⁸⁹⁸ On rehearing en banc in *Cutler v. Cutler*,⁸⁹⁹ the Third District Court of Appeal again affirmed the trial court's decision that the decedent's residence, which she had conveyed to a land trust not long before her death and that was to be distributed on her death to her estate for further

889. *Labry*, 8 So. 3d at 1241–42 (citing *Hamilton v. Bus. Assistance Consortium, Inc.*, 602 So. 2d 619, 621 (Fla. 3d Dist. Ct. App. 1992)).

890. *Id.* at 1242.

891. *See Tettamanti v. Opcion Sociedad Anonima*, 34 Fla. L. Weekly D917, D917 (3d Dist. Ct. App. May 6, 2009) (per curiam).

892. *Id.*

893. *Id.*

894. *Id.*

895. *Id.* (quoting FLA. STAT. § 55.607 (2009)).

896. *See* FLA. STAT. §§ 55.601–.607; *Tettamanti*, 34 Fla. L. Weekly at D917.

897. *See Tettamanti*, 34 Fla. L. Weekly at D917. The appellate court noted that it would then be necessary that a bond be posted by Debtors under rule 9.310 of the *Florida Rules of Appellate Procedure*. *Id.*

898. Landau, *2006-2007 Survey*, *supra* note 590, at 119 n.1272, 121 n.1294.

899. 994 So. 2d 341 (Fla. 3d Dist. Ct. App. 2008).

distribution under the terms of her will to her daughter, did not, merely by being held in the trust, lose its status as protected homestead.⁹⁰⁰ The residence, however, did lose its protected homestead status by virtue of a provision in the decedent's will that provided that the property could be used to pay claims against her estate in the event that her residuary estate was insufficient.⁹⁰¹ The appellate court noted that the specific direction in her will, that the home be used to satisfy debts if the residuary was insufficient, "was the equivalent of ordering [the home] sold and the proceeds distributed to pay debts."⁹⁰² Thus, under Florida law, the property lost its status as protected homestead.⁹⁰³ Judge Shepherd dissented.⁹⁰⁴

In another case decided at about the same time as *Cutler, Phillips v. Hirshon*,⁹⁰⁵ the Third District Court of Appeal held that for purposes of limitations on and rules regarding devise and descent, a cooperative apartment is not homestead, but certified the conflict to the Supreme Court of Florida.⁹⁰⁶ The Supreme Court initially accepted jurisdiction, but then reversed its decision to review the matter.⁹⁰⁷

900. *See id.* at 342.

901. *Id.* at 345.

902. *Id.*

903. *Id.* at 346–47.

904. *See Cutler*, 994 So. 2d at 347 (Shepherd, J., dissenting).

905. 958 So. 2d 425 (Fla. 3d Dist. Ct. App. 2007).

906. *Id.* at 430–31.

907. *Levine v. Hirshon*, 980 So. 2d 1053, 1053 (Fla. 2008) (per curiam).