**THE FLORIDA BAR CONSTRUCTION LAW COMMITTEE**
**Construction Law Cases - 2021-2022**
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## ARBITRATION

*BREA 3-2 v. Hagshama*, 46 Fla.L.Weekly D2138 (Fla. 3rd DCA September 29, 2021)

A developer sought funding from a lender. The funding agreements contained an arbitration provision that required "[a]ny dispute under this Agreement" to be submitted to arbitration. The real estate developments were not completed by a deadline, so Lender defaulted the Developer. Appellant responded by suing for attempting to collect on "criminally usurious debts." Lender moved to compel arbitration, citing *Buckeye Check Cashing v. Cardegna.* The trial court found that the underlying arbitration clause was broad (i.e., inclusive of Developer's claim) and that the United States Supreme Court's decision in *Buckeye Check Cashing v. Cardegna* required the Parties to arbitrate the dispute.

On appeal, the Third District noted that the first mistake of the trial court was the court's failure to consider whether the Parties agreed to arbitrate the dispute. The Third District reviewed *Buckeye* and *Buckeye*'s progeny (i.e., *Granite Rock v. International Brotherhood of Teamsters*) to conclude "that 1) pursuant to federal law, an arbitration provision is severable from the rest of the contract; 2) a challenge to the validity or enforceability of the contract as a whole (e.g., a usury claim) does not preclude arbitration of a dispute which is otherwise within the scope of the arbitration provision agreed to by the parties; and 3) an exception exists where the party opposing arbitration 'specifically challenges the enforceability of the arbitration clause itself, or claims that the agreement was never concluded.'"

Following that summary of *Buckeye* and *Buckeye*'s progeny, the Third District returned to the question of what the Parties agreed to arbitrate. The appellate court noted that a determination of what the Parties agreed to arbitrate would require the consideration of the scope of the arbitration provision at issue. Citing cases in which appellate courts (including the Florida Supreme Court) discussed the differences between claims or controversies "arising out of" and claims or controversies "arising out of or relating to," the Third District concluded that the arbitration provision in the instant case was narrow.

The appellate court's next task was to determine whether the usury claim arose under the Agreement and had a direct relationship to the narrow arbitration provision. The Third District, again citing various appellate opinions (including opinions from the Florida Supreme Court), concluded, "In the instant case, we have a narrow arbitration provision (requiring the parties the arbitrate '[a]ny dispute under this Agreement') and a usury claim premised upon a duty imposed by Florida statute. Even applying the less-rigorous 'significant relationship/contractual nexus' test

typically reserved for *broad* arbitration provisions, it is clear this usury claim is not arbitrable: it cannot be said that the usury claim arises 'under the Agreement' because 'the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties.'" The Third District, however, noted a usury claim could still be arbitrated, but that the language of the arbitration provision needed to be broader.

*Ramkelawan v. Morgan & Morgan, P.A.*, 46 Fla.L.Weekly D2224 (Fla. 3rd DCA October 20, 2021)

Appellants were represented by Appellee, a law firm, and in the agreement between Appellants and Appellee, there was a provision requiring arbitration of any disputes arising out of that agreement, including legal malpractice claims. The provision reflected (with only minor changes) a provision set forth in the Rules Regulating The Florida Bar. Appellants argued to the trial court that the language of the arbitration provision violated the Rules Regulating The Florida Bar. Appellee moved to compel arbitration, and that motion was granted.

On appeal, the Third District observed that the differences between the arbitration provision the agreement between Appellants and Appellees complied with the Rules Regulating The Florida Bar, and then concluded that the provision's language mandating arbitration of disputes (including legal malpractice claims) was clear and unambiguous.

*Osprey Health Care Center, LLC v. Pascazi*, 46 Fla.L.Weekly D2224 (Fla. 2nd DCA October 13, 2021)

A nursing home facility and some of its employees moved to compel arbitration against Appellee. The trial court determined that the arbitration agreement was unconscionable and denied Appellant's motion. On appeal, the issue before the court was whether a valid written agreement to arbitrate exists.

The appellate court started its analysis by noting that the party seeking to avoid the arbitration agreement bore the burden of proving the agreement's invalidity, and that any ambiguities in arbitration agreements generally should be resolved in favor of arbitration. The Second District then considered Appellee's unconscionability arguments but noted that Appellee's claims of procedural unconscionability were legally insufficient to establish procedural unconscionability.

Appellee argued (both to the trial court and on appeal) that the arbitration agreement was missing essential terms, including terms about governing law. The appellate court interpreted Appellee's "missing terms" argument as an argument about whether the parties reached an agreement to arbitrate (i.e., whether an agreement to arbitrate exists). Referencing various provisions of Section Chapter 682 (Florida Arbitration Code) and citing several cases, the Second District determined that although the arbitration agreement did not specify the law governing Appellee's potential claim, the undisputed fact was that Florida law, including Chapter 682, was applicable and, therefore, the governing law.

Appellee argued that the arbitration agreement did not contain essential terms concerning procedures and rules for arbitration. The appellate court recited the portions of the arbitration

agreement that were relevant to the arbitration's rules and procedures and determined that the agreement contained the essential terms containing procedures and rules for arbitration, but also held that even if the agreement did not contain the essential terms, the Florida Arbitration Code would apply to supply the terms.

Appellee also argue that the arbitration agreement violated public policy because the agreement contained a provision purporting to impose a one-year statute of limitations. The one-year statute of limitations violated public policy because the shortened statute of limitations was, according to the Second District, inconsistent with Section 429.296 (i.e., the statute imposing a two-year statute of limitations on claims against assisted living facilities). But the appellate court, after reviewing Florida law in which the severability of provisions of an arbitration agreement were analyzing, held that the provision purporting to impose a one-year statute of limitations did not go to the essence of the arbitration agreement and was, therefore severable.

*Florida Woman Care LLC v. Nguyen*, 46 Fla.L.Weekly D2243 (Fla. 2nd DCA October 13, 2021)

Appellee was an employee of an entity acquired by Appellants. Appellee had a five-year employment contract with that entity, but not with Appellants. Within a year of signing the employment contract, Appellee was terminated. Appellee filed a lawsuit against Appellants based on various issues related to Appellee's employment, and Appellants moved to compel arbitration, but because Appellants were not signatories to Appellee's employment contract, the trial court denied Appellants' motion to compel arbitration.

On appeal, the Second District noted that there were two instances in which a non-signatory could enforce an arbitration provision in a contract: 1) when the signatory to the agreement containing the arbitration provision must rely on the terms of the agreement in asserting its claims against the non-signatory; and 2) when the signatory to the agreement containing the arbitration provision raise allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. The appellate court concluded, "[S]ince each count of [Appellee]'s complaint against the non-signatories relies on the employment agreement and its terms to state the cases of action, they are substantially interdependent and allege concerted action between the non-signatories and the signatory (GOUA)."

Appellee went on to argue that Appellants' waived arbitration, but the appellate court disagreed, noting that Appellants did not waive the right to compel arbitration. Appellee also argued that the arbitration provision was invalid upon Appellants' termination of Appellee's employment because a clause in the contract containing the arbitration provision noted that certain provisions would survive the termination of Appellee's employment. That clause, however, did not reference arbitration. The Second District analogized the arbitration provision to a forum selection clause (a procedural, as opposed to substantive, right), and, reversing the trial court, opined, "Considering the contract as a whole, we conclude that the arbitration provision survives [Appellee]'s termination. Because arbitration is a favored dispute resolution method, unless the contract expressly states that the dispute resolution provisions do not survive the termination of the contract, the provision should be enforced. In fact, arbitration is most likely needed when disputes on termination or breach of contract occur."

*Mirro v. Freedom Boat Club, LLC*, 46 Fla.L.Weekly D2265 (Fla. 2nd DCA October 15, 2021)

Appellant filed lawsuit against Appellee for personal injuries sustained on a boat. Several months before Appellant filed her lawsuit, Appellee filed a lawsuit in federal court. asking the federal court to declare that Appellee was not liable for Appellant's injuries, or, in the alternative, to limit Appellant's liability to the value of Appellee's interest in the boat on which Appellant was injured. Appellee answered Appellant's complaint and raised affirmative defenses; Appellee filed a reply to Appellee's answer and affirmative defenses. Notably, Appellee did not raise its right to arbitrate. Despite those facts, and despite Appellant's contention that Appellee waived its right to arbitrate by filing a lawsuit against Appellant, Appellee's motion was granted.

On appeal, the Second District reversed the trial court, reciting caselaw in which various appellate courts noted that the initiation of a lawsuit without first seeking arbitration constitutes a waiver of arbitration.

*Dewees v. Johnson*, 46 Fla.L.Weekly D2356 (Fla. 4th DCA November 2, 2021)

Appellant was riding a bicycle on the streets of her private community, headed to Appellee's warranty office. The community's streets were still under construction and uneven, and when Appellant's front bicycle tire contacted the uneven surface, Appellant fell and sustained injuries. Appellant filed a lawsuit against Appellee (a real estate developer), alleging negligence and breach of duty. Appellant's contract for the purchase of Appellant's home included an arbitration provision that required the arbitration of disputes, including post-closing disputes. Appellee moved to compel Appellant to arbitrate, and Appellant's motion was granted.

The Fourth District noted that there were three elements to consider when ruling on a motion to compel arbitration, including a determination of whether an arbitrable issue exists. The appellate court recognized the breadth of the arbitration provision at issue, as well as the fact that contracts with arbitration provisions create a presumption of arbitrability. The appellate court cited *King Motor Co. v. Jones* for the following proposition: "'Deciding whether a particular claim is covered by a broad arbitration provision requires a determination of whether a significant relationship exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute.'" The Fourth District then explained, "[B]ecause the Purchase Contract includes an arbitration provision containing broad arbitration language, the claims subject to arbitration are not only those that arise out of the Purchase Contract, but also those with a significant relationship to the Purchase Contract. [Appellant]'s argument that her claims do not have a significant relationship with the Purchase Contract primarily relies on *Seifert*."

In *Siefert*, an individual was killed when he parked his vehicle in the garage of his under-construction house. The vehicle continued to run while in the garage, and the air conditioning system blew carbon monoxide into the rest of the house, resulting in the individual's death. The appellate court in *Siefert* held that the decedent's personal representative's claim was arbitrable, but the Florida Supreme Court reversed, disagreeing "that an arbitration provision in a purchase and sale agreement necessarily requires 'arbitration of a subsequent and independent tort action based upon common law duties.'" The Florida Supreme Court, in reaching its conclusion, adopted an opinion from the Fourth District in which the Fourth District observed, "If, on the other hand,

the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach arising from the contract, but sounds in tort."

After reviewing those opinions, the Fourth District opined, [W]e agree with [Appellant] that there is no significant relationship between her claims against the developer and the Purchase Contract."

*Palm Court NH, LLC v. Rickiee Dowe*, 47 Fla.L.Weekly D108 (Fla. 4th DCA January 5, 2022)

Appellant, a nursing home, moved to compel Appellee, the personal representative of a decedent's estate, to arbitrate Appellee's claim. Appellee argue that because the arbitration agreement waived Appellant's right to a jury trial and required the application of the Federal Arbitration Act (instead of the Florida Arbitration Act) despite the absence of interstate commerce, the agreement was unenforceable. The trial court denied Appellant's motion to compel, relying on cases in which the appellate courts invalidated arbitration agreements when those agreements limited the relief provided by remedial statutes.

On appeal, the Fourth District identified the factors courts must consider when ruling on motion to compel arbitration (i.e., 1) the existence of a valid written agreement to arbitrate; 2) arbitrable issues; and 3) waiver) and noted that neither waiving access to courts nor limiting judicial review, standing alone, would invalidate a written arbitration agreement. Having concluded that Appellant's waiver of the right to a jury trial did not render the arbitration invalid, the Fourth District went on to explain, "The Florida Supreme Court has stated courts 'must look to whether the transaction in fact involved intestate commerce, even if the parties did not contemplate an interstate commerce connection.'" Acknowledging that Appellee's decedent's care was paid for, at least in part, by Medicare, the Fourth District concluded that the Federal Arbitration Act was applicable, and reversed and remanded with instructions to grant Appellant's motion to compel arbitration.

*Hayslip v. U.S. Home Corporation*, 47 Fla.L.Weekly S19 (Fla. January 27, 2022)

Petitioners purchased a home from the home's original purchaser; the original purchaser purchased the home from Respondent. The deed given by Respondent to the original purchaser contained an arbitration provision. When Petitioners sued Respondent for construction defects, Respondent moved to compel arbitration. The trial court granted Respondent's motion, the Second District affirmed the trial court's ruling but certified the question as a question of great public importance.

Affirming the Second District's opinion, the Florida Supreme Court held that the arbitration provision contained in the original purchaser's deed was a covenant running with the land (as opposed to a personal covenant) and would bind subsequent purchasers, including Petitioners. Petitioner argued that because they did not sign the original purchaser's deed, they were not bound by the deed's arbitration provision. The Court, however, rejected Petitioners' contention, noting that "a deed covenant may be enforced against a successor grantee so long as the successor grantee had notice of the covenant, and under section 695.11, Florida Statutes (2016), if an instrument is recorded in the official county records, such recording 'shall be notice to all persons.'"

*Ridard v. Massa Investment Group, LLC*, 47 Fla.L.Weekly D419 (Fla. 3rd DCA February 16, 2022)

Appellant was employed by an entity related to Appellee, and in the employment agreement, there was an arbitration provision. When Appellant was terminated from his employment, Appellee filed suit against an entity related to Appellant. Based on the arbitration provision in the employment agreement between Appellant and the entity related to Appellee, Appellant moved to compel arbitration of Appellee's claim against the entity related to Appellant. The trial court held an evidentiary hearing (based on a previous mandate from the appellate court) and then denied Appellant's motion to compel arbitration.

On appeal, the Third District recognized the existence of the arbitration provision in the employment agreement between Appellant and the entity related to Appellee but affirmed the trial court's ruling, declaring, "[T]here is no valid agreement to arbitrate between the parties to this appeal." Although the appellate court acknowledged various theories that would permit a non-signatory to be bound by an arbitration provision, the court found that there was no evidence to support any of those theories.

*Airbnb, Inc. v. John Doe*, 47 Fla.L.Weekly S100 (Fla. March 31, 2022)

Respondents were a couple who rented a condominium unit using Petitioner's online service. The owner of the condominium unit installed hidden cameras throughout the unit. When Respondents discovered the existence of the hidden cameras, Respondents sued various parties, including Petitioner, the owner of the online service. The agreement between Respondent and Petitioner included an arbitration provision. The arbitration provision noted that the rules of the arbitration services provider (i.e., AAA) would be applied. One of AAA's rules (although not quoted in the agreement between Respondent and Petitioner) explained, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Petitioner moved to compel arbitration, and the trial court granted Petitioner's motion. The Second District reversed the trial court's ruling, and Petitioner file its petition with the Florida Supreme Court.

Quashing the Second District's opinion, the Court reviewed federal cases interpreting the Federal Arbitration Act and held that the reference to AAA's rules – including the reference to an arbitrator's authority to decide questions of arbitrability – in the agreement between Respondent and Petitioner constituted clear and unmistakable evidence of the parties' intent to empower an arbitrator to resolve questions of arbitrability.

*Addit, LLC v. Hengesbach*, 47 Fla.L.Weekly D943 (Fla. 2nd DCA April 27, 2022)

Appellant, a nursing home, moved to compel Appellee, the personal representative of a decedent's estate, to arbitrate Appellee's claim. The arbitration agreement at issue contained: 1) a waiver of attorney fees and costs; 2) the lack of a right to appeal; 3) limitations on discovery; 4) a one-sided arbitration obligation; and 5) a confidentiality provision. The arbitration agreement also contained

a severability clause. The trial court denied Appellant's motion to compel arbitration, concluding that the arbitration agreement was both procedurally and substantively unconscionable.

On appeal, the Second District, at the outset of its opinion, explained that procedural and substantive unconscionability had to exist for an arbitration agreement to be unconscionable, but that the degrees of procedural and substantive unconscionability was required to be considered on a sliding scale (e.g., if a large degree of procedural unconscionability was established, an agreement could be unconscionable as a matter of law, even if a lesser degree of substantive unconscionability were present).

The appellate court then evaluated Appellee's claims of procedural unconscionability, and concluded, based on several factors (e.g., adhesion contract/absence of negotiation, location on page fifteen of a twenty-three-page document (neither set off nor conspicuous)), that Appellee had proven the existence of some procedural unconscionability. Moving onto an analysis of the arbitration agreement's substantive unconscionability, the Second District noted that arbitration agreement's provisions regarding the waiver of attorney fees, the waiver of appellate rights, and the one-sidedness of the arbitration obligation were substantively unconscionable, but reversed the trial court's denial of Appellant's motion, holding, "[B]ecause the offending provisions of the Arbitration Agreement may be severed without disrupting the parties' intent to resolve their claims through arbitration, we reverse the trial court's order denying each of the motions to compel arbitration and remand for the trial court to strike the offending provisions, consistent with this opinion, and to enter orders compelling the parties to arbitration."

*Phillips v. Lyons Heritage Tampa*, LLC., 47 Fla.L.Weekly D1343 (Fla. 2nd DCA June 17, 2022)

Appellants purchased a home from Appellee. The agreement governing the purchase of the home contained an arbitration provision. Appellee took more than 3.5 years to complete Appellants' home. Appellants attributed the delay to Appellee's racial discrimination and sued Appellee, alleging Appellant's violation of various federal civil rights statutes. Appellee moved to dismiss Appellants' complaint, and when that motion was denied, Appellee moved for additional time to respond to Appellants' complaint. But instead of filing an answer, Appellee moved to compel arbitration, and that motion was granted.

On appeal, Appellants attacked the existence of a valid written arbitration agreement, arguing that arbitration would prevent Appellants from pursuing punitive damages or attorney fees costs, but the Second District rejected that argument because the arbitration provision did not prohibit that relief. Appellants also claimed that the requirement that each party bear its own attorney fees and costs contradicted Appellants' statutory right to prevailing party fees and costs. In response, Appellee noted that the fee provision was severable, and the appellate court agreed.

Appellants claimed that arbitrable issues did not exist because Appellants' claims for violations of Appellants' civil rights was not within the scope of the arbitration provision. The Second District rejected that argument, noting that Appellants' allegations of unreasonable delay of the completion of Appellants' home – allegations based on civil rights violations – were related to Appellants' purchase of a home and would require reference to the purchase agreement.

Appellants also argued that Appellee's motion for additional time to respond to Appellants' complaint constituted a waiver of Appellee's right to arbitrate, but because a motion for an extension of time was not a substantive attack on the merits of Appellants' complaint, the Second District concluded that the motion did not constitute waiver.

## CONTRACT AND CLAIMS IN EQUITY

*Universal Medical Investment Corporation v. Mike Rollison Fence*, LLC, 46 Fla.L.Weekly D2492 (Fla. 1st DCA November 17, 2021)

Appellant contracted with Appellee to have Appellee construct a fence around Appellant's property. Appellee, by failing to complete the fence according to schedule, defaulted under the contract; as a result, the Parties entered into a "Letter of Understanding" which granted Appellee additional time to construct the fence. Appellee failed to construct the fence by the new deadline, and Appellant filed suit for breach of contract. Trial proceeded on damages only, and the trial court entered a final judgment in favor of Appellant for a sum that was considerably less than the sum Appellant claimed Appellant proved under the terms of the contract and Letter of Understanding. Appellant filed a motion for hearing, but the trial court denied that motion, holding that the relevant terms of the Letter of Understanding were ambiguous.

On appeal, the First District outlined the undisputed facts, including Appellant's payment of $69k to Appellee. The appellate court also highlighted language in the Letter of Understanding that entitled Appellee to "NO PAYMENT WHATSOEVER, regardless of the status of the project." The First District then reviewed several Florida cases in which ambiguities in contracts were construed against the drafter, as well as cases in which interpretations of contractual language were not permitted when the contract's language was clear, and opined, "The agreement embodied in the Letter of Understanding suffers from no such uncertainty." The appellate court concluded, "Unquestionably, the Letter of Understanding drove a harsh bargain, but it was not within the power of the trial court to create an equitable remedy when none was permitted under the terms of the contract."

## CONTRACT - FRAUD

*NM Residential, LLC v. Prospect Park Development, LLC*, 47 Fla.L.Weekly D724 (Fla. 2nd March 25, 2022)

Appellants purchased from Appellee a mixed-use development. During the due diligence period permitted by the parties' contract, Appellant discovered several issues. Appellant provided Appellee with a list of those issues, and after the due diligence had expired but before the parties closed on the purchase, at least one of Appellee's agents told Appellant that all the issues that had been listed had been addressed. After the parties closed on the purchase, Appellant discovered issues that had been listed but not addressed. Appellant sued Appellee for misrepresentation. Appellee moved to dismiss Appellant's complaint; the trial court granted Appellee's motion.

On appeal, the Second District explained, "In order to 'make [a] contract incontestable because of fraud,' the parties must 'stipulate that the [contract] may not be rescinded for fraud.'" Elaborating

on that explanation, the appellate court stated, ""[W]hile an express waiver of the right to maintain a fraud claim is all that is required to avoid liability for fraud,' more than a mere disclaiming of the making of fraudulent representations or a reliance thereon is required to effectuate such a waiver; rather, the parties must agree that 'even if a fraud may have been committed, such a claim may not be asserted.'"

Reviewing the contract, the appellate court noted that the contract contained provisions disclaiming the making of any representations by Appellee and reliance thereon by Appellant, an as-is clause, a release, and an integration clause. The Second District, after a lengthy analysis, concluded, "The language in this contract does not clear the hurdle established by *Oceanic Villas*, which requires an explicit waiver of liability for fraudulent representations that might have been made – an acknowledgement of the parties 'that fraud may have been committed' and a 'stipulat[ion] that such fraud, if found to have been committed, should not vitiate the contract.'"

## CONTRACT – LIQUIDATED DAMAGES

*Sarasota County v. Southern Underground Industries, Inc.*, 47 Fla.L.Weekly D226 (Fla. 2nd DCA January 19, 2022)

Appellee, a contractor, contracted with Appellant for underground work. A homeowner adjacent to the area in which Appellee was working contacted Appellant, claiming that Appellee's work was causing damage to homeowner's home. Appellant stopped Appellee's work while Appellant attempted to resolve the issue with the homeowner. During the work stoppage, Appellee took several steps to address the homeowner's concerns, but Appellee's offers did not alleviate the homeowner's concern. The homeowner then pursued a claim against Appellee's insurance policy.

Despite Appellee's efforts, Appellant refused to permit Appellee to continue work under its contract for approximately two months. Appellee demanded compensation for expenses incurred during those two months, but Appellant rejected Appellee's demand. Appellee filed suit. The trial court concluded that Appellee was entitled to pursue an increase in the contract price and time and that Appellant's efforts to mollify the homeowner amounted to bad faith and active interference. Appellant was ordered Appellant to pay more than $600,000 for expenses incurred during the two-month delay. Although the trial court found for Appellee on the issue of Appellant's work stoppage, the trial court ordered Appellee to pay Appellant approximately $170,000 in liquidated damages ($250/day for approximately two years) because the issue with the homeowner was not settled by the date set in the contract for final acceptance.

On appeal, Appellant argued that the trial court's ruling was erroneous because the contract between Appellant and Appellee contained a clause that preluded damages for Appellant's delay. The Second District, however noted that clauses in governmental contracts that precluded damages for delay were unenforceable when the government acted fraudulent, in bad faith, or engaged in active interference. Appellant also insisted that an award to a contract for damages outside the terms of the contract was barred by sovereign immunity, but as the appellate court explained, the trial court's award did not constitute compensation for extra contractual work but was payment for work performed to achieve the contract result.

Appellee also contested the trial court's ruling on Appellant's claim for liquidated damages, arguing that Appellee did not cause the delay giving rise to the liquidated damages. The Second District confirmed the permissibility of liquidated damages clause in contracts, but reversing the trial court, the appellate court explained, "[Appellant] failed to show that it suffered from any loss from the delay of final acceptance of [the work]." The Second District reversed the award of liquidated damages to Appellant, concluding, "[B]ecause [Appellant] had full use of the completed construction project for over two years before final acceptance, 'the sum stipulated to be forfeited' was 'grossly disproportionate to any damages that might reasonably [have been] expected to follow from a breach.'"

*Phillips v. Lyons Heritage Tampa, LLC*, 47 Fla.L.Weekly D1343 (Fla. 2nd DCA June 17, 2022)

Appellants purchased a home from Appellee. The agreement governing the purchase of the home contained an arbitration provision. Appellee took more than 3.5 years to complete Appellants' home. Appellants attributed the delay to Appellee's racial discrimination and sued Appellee, alleging Appellant's violation of various federal civil rights statutes. Appellee moved to dismiss Appellants' complaint, and when that motion was denied, Appellee moved for additional time to respond to Appellants' complaint. But instead of filing an answer, Appellee moved to compel arbitration, and that motion was granted.

On appeal, Appellants attacked the existence of a valid written arbitration agreement, arguing that arbitration would prevent Appellants from pursuing punitive damages or attorney fees costs, but the Second District rejected that argument because the arbitration provision did not prohibit that relief. Appellants also claimed that the requirement that each party bear its own attorney fees and costs contradicted Appellants' statutory right to prevailing party fees and costs. In response, Appellee noted that the fee provision was severable, and the appellate court agreed.

Appellants claimed that arbitrable issues did not exist because Appellants' claims for violations of Appellants' civil rights was not within the scope of the arbitration provision. The Second District rejected that argument, noting that Appellants' allegations of unreasonable delay of the completion of Appellants' home – allegations based on civil rights violations – were related to Appellants' purchase of a home and would require reference to the purchase agreement. The arbitration provision provided that claims "arising out of, from or relating to this Agreement including claims under the Limited Warranty shall be settled by binding arbitration" conducted under the American Arbitration Association rules and the Federal Arbitration Act.

Appellants also argued that Appellee's motion for additional time to respond to Appellants' complaint constituted a waiver of Appellee's right to arbitrate, but because a motion for an extension of time was not a substantive attack on the merits of Appellants' complaint, the Second District concluded that the motion did not constitute waiver.

*Massage Envy Franchising, LLC v. Jane Doe*, 47 Fla.L.Weekly D1151 (Fla. 5th DCA May 27, 2022)

Appellee was a patron at Appellant's massage therapy facility. Before Appellee received her massage, she was given an iPad to sign various intake forms. The forms contained a section entitled

"General Consent," and at the end of that section was a checkbox next to the following statement: "I agree and assent to the Terms of Use Agreement." The iPad enabled, but did not require, Appellee to read the Terms of Use Agreement – an agreement containing an arbitration provision. Appellee did not review the Terms of Use Agreement, but Appellee clicked on the checkbox next to the statement which indicated her agreement and assent to the Terms of use Agreement.

The trial court concluded that no valid agreement to arbitrate existed, but the Fifth District, noting the difference between browsewrap and clickwrap agreements (i.e., a browsewrap agreement does not required a user to check a box acknowledging that the user has read the terms and conditions of an agreement, while a clickwrap agreement requires a user to check a box acknowledging that the user has read the terms and conditions of an agreement), reversed and remanded, concluding, "[S]he manifested her assent to those terms and conditions by affirmatively clicking on the box where indicated, thus creating a valid agreement."

## FORUM SELECTION CLAUSE

*The Solomon Law Group, P.A. v. Dovenmuehle Mortgage, Inc.*, 46 Fla.L.Weekly D2601 (Fla. 2nd DCA December 8, 2021)

Appellee, an insurance carrier, sued Appellant, a law firm, for professional negligence and breach of fiduciary duty. Appellant counterclaimed, alleging breach of contract. The trial court exercised jurisdiction over Appellee's claim, but refused to exercise jurisdiction over Appellant's counterclaim, finding that a forum selection clause in the Parties' retainer agreement divested the trial court of jurisdiction over Appellant's counterclaim. The forum selection clause at issue noted that Illinois law would govern the retainer agreement, and that jurisdiction was limited to federal and state courts in Cook County (i.e., Chicago). Accordingly, the trial court granted Appellee's motion to dismiss Appellant's counterclaim.

The Second District noted that the enforceability of forum selection clauses was a function of contract law and not of subject matter jurisdiction. The appellate court cited numerous cases for the proposition that "a contracting party can waive the ability to enforce a forum selection clause." The Second District concluded, "Initiating a lawsuit based on a contract in a jurisdiction other than the one provided under the contract would constitute a waiver of that party's right to enforce that clause."

*Buck v. Global Fidelity Bank Ltd.*, 46 Fla.L.Weekly D2650 (Fla. 3rd DCA December 15, 2021)

An individual signed a contract to purchase unrefined gold from Appellee. The contract contained a forum selection clause, including a provision that prohibited any non-signatories from enforcing the terms of the contract. Appellee sued the individual who signed the contract, as well as several other non-signatories (collectively "Appellants"), but Appellee sued in a forum other than the forum referenced in the contract's forum selection clause. Appellants moved to enforce the forum selection clause, but the trial court denied that motion, concluding that 1) the forum selection clause was permissible, not mandatory; 2) the clause's reference to jurisdiction related to the court's authority to act, not to the forum where claims had to be filed; and 3) only the contract's signatories were entitled to enforce the forum selection clause.

On appeal, the Third District cited precedent to conclude that the forum selection clause was mandatory. The appellate court dismissed Appellants' arguments about the definition of jurisdiction, noting that the use of the term in the context of the contract and under Florida law meant that only the forum referenced in the forum selection clause could exercise jurisdiction over Appellee's claim. The Third District also explained that in light of the forum selection clause's express denial of a non-signatory's attempt to enforce the clause, only signatories could enforce the clause.

*Buck et al v. Global Fidelity Bank Ltd.*, 47 Fla.L.Weekly D1226 (Fla. 3rd DCA June 8, 2022)

One of Appellants signed an agreement with Appellee to purchase unrefined gold. The agreement contained a forum-selection clause that required any disputes involving the agreement to be resolved in courts in the Cayman Islands. Appellee sued Appellants in Florida. Appellants move to dismiss Appellee's lawsuit, arguing that the forum-selection clause was mandatory, while Appellee countered by arguing that the clause was permissive. The trial court denied Appellants' motion to dismiss.

On appeal, the Third District reversed the trial court's ruling, citing several cases in which clauses in an agreement to a court's territorial jurisdiction were considered mandatory forum-selection clauses.

*West Bay Plaza Condominium Association, Inc. v. Sika Corporation*, 47 Fla.L.Weekly D586 (Fla. 3rd DCA March 9, 2022)

Appellant, a condominium association, contracted with several contractors, including Appellee, for a remediation project. Appellee executed a warranty (Appellant was not a signatory) for products Appellee used for its part of the remediation project. The warranty contained a forum selection clause requiring suit to be filed in New Jersey. When the remediation project went sideways, Appellant sued Appellee in Miami-Dade County for breach of warranty. The trial court ruled in favor of Appellee, finding that the parties were required to litigate in New Jersey.

On appeal, the Third District observed that forum selection clauses were usually valid, and that even non-signatories were bound by forum selection clauses when a non-signatory's claim arose directly out of the agreement containing the forum selection clause. Affirming the trial court's ruling, the appellate court found that there were no compelling reasons to preclude the enforcement of the forum selection clause.

*AquaChile, Inc. v. Williams*, 47 Fla.L.Weekly D30 (Fla. 4th DCA December 22, 2021)

Appellant was a seafood provider. Appellant's product was sold to at least one intermediary, and, ultimately, to a cruise ship corporation. Appellee, a passenger on one of the cruise ship corporation's ships, consumed some of Appellant's product and got sick. Appellee sued Appellant in Broward County, but a provision in Appellee's cruise ship ticket contained a forum selection clause. The forum selection clause contained a provision – called a Himalaya clause – that extended the application of the clause to the cruise ship corporation's agents, independent

contractors, concessionaries and suppliers. Appellant moved to enforce the forum selection clause, but the trial court denied Appellant's motion, finding that the forum selection clause was not reasonably communicated to Appellee and that Appellant's conduct was not the kind of activity that would be expected to be covered by Appellee's cruise ship ticket.

On appeal, the Fourth District explained that Himalaya clauses were to be interpreted according to fundamental principles of contract law. The appellate court also noted that when considering whether a party qualifies for protection under a Himalaya clause, two factors were important: "1) the nature of the relationship between the party seeking protection and the contracting party, and 2) the nature of the services provided by the party seeking protection compared to the contracting party's responsibilities under the contract." Because Appellant was not a direct supplier of product to the cruise ship corporation, the Fourth District opined, "We do not hold that the Himalaya clause applies only to direct suppliers, but it cannot be reasonably read to extend protection to an indefinite chain of indirect suppliers, like [Appellant], that have little to no relationship with [the cruise ship provider]." The appellate court also noted that Appellant's conduct was not the kind of activity that would be expected to be covered by Appellee's cruise ship ticket.

Turning to the issue of whether the Himalaya clause was reasonable communicated to Appellee, the Fourth District, citing cases from the federal courts, acknowledged a two-part test of "'reasonable communicativeness,' evaluating 1) the physical characteristics of the clause at issue, and 2) whether the passenger had the ability to become meaningfully informed of the clause and reject its terms." After analyzing the form and substance of the Himalaya clause, the appellate court affirmed the trial court's denial of Appellant's motion.

## INSURANCE – PLEADING VICARIOUS LIABILITY

*Amerisure Ins. Co. v. Seneca Specialty Ins. Co.*, 2020 WL 3317035 (S.D. Fla. June 8, 2020)

An injured customer sued Walmart for damages caused by a Walmart subcontractor pouring concrete at a project on Walmart's premises. The injured plaintiff sued Walmart for negligence in failing to maintain the premises and for failure to warn of the risks but did not include a count for Walmart's vicarious liability of its contractors working on the site that caused the loss.

The prime contractor's insurer, Amerisure Insurance Company ("Amerisure"), defended Walmart, paid the injured customer's personal injury judgment against Walmart, and took an assignment of rights (in subrogation) against the negligent subcontractor. The negligent subcontractor's insurer, Seneca Specialty Insurance Company ("Seneca"), refused to reimburse Amerisure even though the subcontract indemnified Walmart and the prime contractor and the subcontract also required the subcontractor to endorse the prime contractor and Walmart as additional insureds under the Seneca policy.

Amerisure then sued Seneca in US District Court for the Southern District of Florida for breach of its insurance contract. The Court dismissed Amerisure's complaint reasoning that the original action only established Walmart's direct negligence and not its vicarious negligence for the negligent actions of its contractors working on the premises.

The language of the policy supports the Court's dismissal.[1] The additional insured endorsement amends the policy as follows:

> ***A. Section II – Who Is An Insured*** *is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:*
>
> *1. Your acts or omissions; or*
>
> *2. The acts or omissions of those acting on your behalf;*
>
> *in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.*
>
> *However:*
>
> *1. The insurance afforded to such additional insured only applies to the extent permitted by law; and*
>
> *2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured*
>
> *will not be broader than that which you are required by the contract or agreement to provide for such additional insured.*

Seneca's policy obligated Seneca to provide coverage for the negligent acts of its insured, the negligent subcontractor. However, because the original complaint failed to allege that Walmart was vicariously liable for the negligent acts of its contractors, the judgment did not implicate Walmart to the extent that the loss was "caused in whole or in party" by or "because of" a Walmart contractor performing work on the premises. The indemnity agreements under the contract and subcontractor properly indemnified Walmart and the insuring agreements properly endorsed coverage in favor of Walmart. The fact that the injured plaintiff did not allege vicariously liability against Walmart was the fatal pleading error.

*Cincinnati Specialty Underwriters Insurance Co. v. KNS Group, LLC,* ___ F. Supp.3rd___, (S.D. Fla., 2021) 2021 WL 4726459

The Court granted an insurer's summary judgment asserting it did not have a duty to defend or indemnify the owner for negligence of the subcontractor on a construction defects case. The Court first extensively examined certain exclusions to coverage and found that the exclusions did not excuse the insurer from its obligation to defend its insured. However, the allegations in the underlying tort action did not allege vicarious liability on the part of its insured, the sub-subcontractor, and, therefore, it did not have a duty to defend the subcontractor.

*Safeway, Inc. v. James River Ins. Co.,* 2022 WL 1152797 (M.D. Fla. 2022)

An injured plaintiff sued the property owner for trip and fall damages but did not allege the property owner was vicariously liable for the negligence of its contractor, who had created the condition that caused the fall. The contract between the property owner and its contractor

[1] Notably, the *Seneca* Court analyzed Florida principles of policy interpretation and pleading requirements.

appropriately required indemnity and additional insured endorsements to the contractor's insurance policy. The Court dismissed without prejudice as the parties intended to amend the complaint to add a count for vicarious liability but that amendment had not been granted in the underlying state court action.

*Old Republic Gen. Ins. Corp. v Liberty Ins. Corp.,* 2022 WL 1203007 (S.D. Fla. 2022)

The injured plaintiff sued the owner and its prime contractor for trip and fall damages at SkyRise Miami but did not allege vicarious liability of the owner or its contractor. The contractor's insurer subrogated against a non-party and the coverage litigation against the non-party's insured ensued for its failure to defend.

The Court dismissed the insurer finding no coverage because the underlying personal injury suit did not allege the owner's vicarious liability. Coverage would be afforded but "only to the extent of the additional insured's liability caused by the negligence of the named insured."

## JURISDICTION

*Tribeca Asset Management, Inc. v. Ancla International, S.A.*, 47 Fla.L.Weekly S93 (Fla. March 23, 2022)

Petitioner and Respondent were international parties to an agreement containing a clause that the agreement would "be governed by the laws of the State of Florida of the United States of America, a jurisdiction accepted by the parties irrespective of the fact that the principal activity of the beer project will be conducted in Colombia." Respondent filed a petition in Florida to compel arbitration; Petitioner argued against the petition, arguing that the Florida court did not have personal jurisdiction. The trial court dismissed Respondent's petition, but the Third District reversed, relying in part on the Florida Arbitration Code to conclude that the language in the agreement conferred jurisdiction on Florida's courts to enforce the agreement.

The Florida Supreme Court quashed the Third District's opinion, noting that the Third District improperly applied the Florida Arbitration Code as the basis for jurisdiction over Petitioner. Reciting caselaw governing the enforcement of choice-of-law provisions in contracts, the Court concluded that the provision at issue in the agreement only determined the substantive law to be applied but was not a forum selection clause and did not confer jurisdiction on Florida's courts. The Court also addressed the application of the Florida Arbitration Code as the basis for jurisdiction and noted, "Among other requirements, section 682.18(1) only applies where an agreement 'provid[es] for arbitration in [Florida].' Here, the agreement does not provide for arbitration in Florida. Accordingly, section 682.18(1) does not apply according to its express language, and we need not reach the due process issue raised."

## LICENSING

*ABA Interior, Inc. v. The Owen Group Corporation*, 47 Fla.L.Weekly D367 (Fla. 4th DCA February 9, 2022)

Subcontractor sued its general contractor ("Contractor") for non-payment. The contract the Subcontractor to comply with all federal, state, and local laws and ordinances related to construction. The Contractor stopped paying Subcontractor once Contractor discovered that Subcontractor did not have a license required by a local ordinance.

Contractor moved for summary judgment on two issues: (1) Subcontractor was unlicensed under the local ordinance and, therefore, was prohibited from suing; and (2) the fact that the Subcontractor was unlicensed was a material breach of the Subcontract. The trial court granted Contractor's motion for summary judgment on both issues.

The Fourth District reversed the trial court's entry of summary judgment, noting that the trial court's order precluded Subcontractor from litigating all claims, including claims that did not require licensure. The appellate court also based its reversal on the unresolved issue of whether Subcontractor's failure to obtain the local license would allow the Contractor to withhold payment even for work performed that did not require licensure.

## PUBLIC BONDS

*JD's Asphalt Engineering Corp. v. Arch Insurance Company*, 46 Fla.L.Weekly D2195 (Fla. 3rd DCA October 6, 2021)

Subcontractor filed its bond claim against the 255.05 surety, claiming $30k in retainage payments and change orders owed by the general contractor. The contract between the Subcontractor and the general contractor required change orders to be in writing and signed, which they were not. The trial court granted summary judgment against the Subcontractor on its claim. The claim was also filed late. Section 255.05(10), *Fla. Stat*., requires that an action against the bond be filed within one (1) year of last furnishing labor, materials, or services, the Subcontractor's claim was filed more than one (1) year.

The Third District affirmed the trial court's rulings, noting that the trial court's findings of fact were supported by competent, substantial evidence.