Florida Bar Construction Law Committee
Construction Transactions Subcommittee
2023 Annual Case Law Report[1]

Recent cases reported in this annual review are indexed according to relevant legal issue as noted. Case summaries from the Construction Litigation Subcommittee are included in Appendix A:

ARBITRATION UNDER CHAPTER 44, *FLORIDA STATUTES*

- *Beyond Billing Inc. v Spine & Orthopedic Center,* 2nd District. Case No. 2D22-3228. May 3, 2023.

Beyond Billing, Inc. filed a petition for writ of mandamus to compel the circuit court to enter final judgment on the arbitration award issued under Section 44.103, *Florida Statutes*. The petition was denied because within twenty days of the arbitration award, the parties indicated a mutual intention to proceed to trial by executing a joint stipulated motion to amend the case management order. The parties' joint motion acknowledged that arbitration had occurred and stipulated that the parties required additional time to conduct discovery and to add new claims to the case. The execution of the joint motion sufficiently indicated the parties mutual desire and intent to proceed with trial.

PRACTICE TIP: Clearly state that the parties intend to proceed to trial if, after a Chapter 44 arbitration, that is a party's desire. If you prevail at an arbitration and intend to enforce the arbitration award, then petition for a writ of mandamus to compel the circuit court to enter a final judgment on the arbitration award.

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- *Vitesse, Inc. v. Mapl Associates LLC*, 4th DCA No. 4D21-2966

Appellants appealed a final judgment enforcing an arbitration award entered after completion of a nonbinding arbitration proceeding. The trial court found that due to a scrivener's error in their motion, appellants did not appropriately request trial de novo pursuant to section 44.103(5), Florida Statutes (2020), and Fla. R. Civ. P. 1.820(h).

The appellate court reversed and remanded, finding that the purpose of 44.103 is fulfilled when a party is placed on reasonable notice of the opposing side's intention to proceed to trial, and that intention is conveyed within rule 1.820(h)'s 20-day timeframe. Further, nothing in 1.820 requires strict compliance regarding the form of the notice. In this case, appellants timely and unambiguously gave notice of their intention to proceed to trial.

PRACTICE TIP: Clarity is a legal issue. Follow the language of the statute or rule to draft a clearly expressed intention to proceed to trial.

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[1] Special thanks to Ryan Sullivan, Esquire, of Hill, Ward, Henderson and Lucien Johnson, Esquire, of Foley and Lardner, for their generosity in sharing their case summaries and, as always, for their valued collaboration. Also noteworthy, Becker and Poliakoff Attorneys David Milton, Kaylin Martinelli, and Jake Herrel contributed to many of the case notes set forth in the body of this report.

ARBITRATION CLAUSES- ENFORCEMENT

- *1906 Collins LLC v. Romero*, 47 Fla.L.Weekly D1731 (Fla. 3rd DCA August 17, 2022)

Appellant entered into a contract with various persons and entities, including Appellee. The contract's plain language required the arbitration of some claims but precluded the arbitration of claims identified in Paragraph 6F. Paragraph 6F:

> [Appellee] acknowledges and agrees that the covenants and restrictions contained in Sections 6A through 6E hereof are necessary, fundamental and required for the protection of the goodwill of the Business and [Appellant], and that such covenants and restrictions relate to matters which are of a special, unique and extraordinary character that gives each of such covenants and restrictions a special, unique and extraordinary value. For these reasons, and because a breach of the covenants and restrictions contained in Sections 6A through 6E hereof will result in irreparable harm and damages to [Appellant] that cannot be adequately compensated by a monetary award, it is expressly agreed that in addition to all other remedies available at law or equity, [Appellant] shall be entitled to the immediate remedy of a temporary restraining order, preliminary injunction, or other form of injunctive or equitable relief as may be used by any court of competent jurisdiction to restrain or enjoin [Appellee] from breaching any such covenant or restriction, or to specifically enforce the provisions of these Sections, without posing [sic] bond.

When a multitude of issues arose, Appellee moved to compel arbitration of all claims against him. The trial court granted Appellee's motion to compel arbitration of all claims against Appellee, including claims related to enforcement/breach of covenants/restrictions in the contract (i.e., claims related to Paragraph 6F).

Reversing the trial court, the Third District noted that the clear and unambiguous language of the contract precluded arbitration of claims related to enforcement/breach of covenants/restrictions in the contract.

PRACTICE TIP: This provision is a model for how to state what claims are and are not included in arbitration. Arbitration provisions routinely include an exception for equitable relief such as injunctions.

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- *Erb v. Chubb National Insurance Company*, 47 Fla.L.Weekly D2635 (Fla. 3rd DCA December 14, 2022)

Appellant obtained an insurance policy with Appellee. A provision in the insurance contract required a demand for arbitration to be filed within one year of the date of loss or damage. Appellant suffered damage and filed suit, but (apparently) the lawsuit was filed more than one year after the date of loss or damage. Appellee moved to compel arbitration, and that motion was granted.

On appeal, the court held that appellee attempted to circumvent the one-year deadline by pointing to another provision in the insurance contract in which the contract stated that any controversy or claim arising out of the policy "shall be referred to and settled by arbitration." Reversing the trial court, the Third District reiterated standards governing both interpretation of contracts and arbitration (e.g., contract strictly construed, no party may be forced to submit a dispute to arbitration that the party did not intend/agree to

arbitrate) and concluded, "Here, the trial court's interpretation fails to harmonize the two sentences of the same contractual provision. The better reading, indeed, the only reading that gives to both relevant portions, required arbitration of any conflict between the parties, but only if invoked by the insurer within one year from the date of loss."

PRACTICE TIP: If it appears that two provisions in an agreement can be used to support the argument to arbitrate, read the arbitration provision together with the second provision to reach the conclusion as to whether to arbitrate or not.

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➢ *Lennar Homes, LLC v. Matthew Wilkinsky*, 48 Fla. L. Weekly D94 (Fla. 4th DCA January 4, 2023)

Injured homeowner was required to arbitrate his personal injuries sustained on a bicycle ride in the community, allegedly due to improper construction of a manhole. The homeowner's Purchase and Sale Agreement contained an arbitration clause which in part stated: "The parties to this Agreement specifically agree that…any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration…and not by or in a court of law or equity." Disputes were cleared defined to include "…(3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community…"

The trial court denied the motion based on *Dewees v. Johnson*, 329 So. 3d 765 (Fla. 4th DCA 2021). In *Dewees*, the homeowner sued a developer under nearly identical bicycle-accident circumstances. However, the *Dewees* court applied the "significant relationship" test finding that the arbitration clause "contains broad arbitration language" and, therefore, the claims subject to arbitration are those stated but also those "with a significant relationship to the Purchase Contract. The tort claims were not found to be subject to arbitration. It read in part:

> This [Purchase and Sale contract provides that all post-closing claims, disputes, and controversies (hereinafter collectively "claims") between purchaser and seller will be resolved by binding arbitration . . . .
> [P]urchaser and seller hereby mutually, knowingly and voluntarily agree that . . . any and all claims by or between purchaser and seller which occur post-closing, even those based upon a theory not recognized at the time this agreement is executed, shall be submitted to binding arbitration for resolution, such claims include, without limitation, claims that arise from or in connection with, or relate to: . . . (C) the home, its design, or its construction; (D) the real property on which the home is situated . . . . This provision shall apply to all post-closing claims . . . regardless of the legal theory alleged (including, without limitation, breach of contract, tort, violation of statute, code, rule or regulation, or breach of any implied covenant or duty), the type of injury alleged (including, without limitation, monetary, property damage, personal injury. . . .

PRACTICE TIP: Keep it simple and direct in drafting the arbitration provision to make sure specific claims you intend to include are stated (in simple, concrete words). Here, the arbitration clause clearly stated that personal injury claims were covered under the arbitration clause, specifically "in the community."

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➢ *Navarro v. Varela*, 345 So. 3d 365 (Fla. 3rd DCA July 20, 2022)

Attorney Varela and Attorney Navarro became partners in a law firm. The firm's operating agreement contained an arbitration clause requiring arbitration of "any dispute regarding the interpretation of this Agreement or the rights and obligations of Shareholders and Partners with respect to this Agreement."

Varela experienced a high-risk pregnancy and required accommodation but instead she was terminated and filed suit for breach of contract, accounting, intentional infliction of emotional distress, fraudulent misrepresentation, violation of the Florida Civil Rights Act-Discrimination based on Gender/Pregnancy, and Violation of the Florida Civil Rights Act-Discrimination based on Handicap. Navarro moved to compel arbitration of all claims, but the trial court denied arbitration of the causes of action based on the Florida Civil Rights Act.

On appeal, the Third District explained that submitting the claim to arbitration depended on whether a significant relationship between the contract and the claim was present. If the claim presented circumstances in which the resolution of the disputed issue required either reference to, or construction of, a portion of the contract, that claim was subject to arbitration.

Affirming the trial court's ruling, the Third District Court of Appeal concluded that the tort claim of intentional infliction of emotional distress and the Florida Civil Rights Act do not depend upon the contractimposed legal duties on an employer regardless of the existence of a contract, and that causes of action based on the Florida Civil Rights Act did not require reference to or construction of the contract.

PRACTICE TIP: Draft the arbitration agreement so that all claims to be decided in arbitration are clearly made subject to arbitration. Although it should go without saying that tort claims or those arising under specific anti-discrimination acts may not be subject to arbitration, one may want to say that they are expressly excluded or, as in *Wilkinsky*, are specifically included if desirable.

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ASSIGNMENT OF BENEFITS

- *Air Quality Assessors of Florida v. Southern-Owners Insurance Company*, 47 Fla.L.Weekly D2171 (Fla. 1st DCA October 26, 2022)

Appellant, a remediation company, performed services for and received an assignment of benefits from a homeowner for services required to remediate water damage from rain. Remediation contractor sued the insurer, claiming compensation for property damaged by water. The insurance policy excluded coverage for water damage defined as flood, surface water, waves, tidal water or overflow of a body of water and other source at ground or below but not water damage from rain. The trial court dismissed the contractor's complaint.

On appeal, the First District interpreted the policy against the insurer who drafted it, reversing the trial court's dismissal. "The insurance policy does not clearly and unambiguously define the kinds of water damage subject to the exclusion to encompass rain. The policy does not exclude all water damage, only specified water damage such as that occurring from rising or tidal water or spray off those waters. Even if we were to find the policy to be ambiguous as to whether rain damage is excluded, applying the *noscitur a sociis* canon of construction, rain is not like the listed hazards, which are excluded."

The appeals court addressed the other facts to be determined, *i.e.*, whether other exclusions would be available and whether the policy restricted the right of assignment. The case was remanded for trial on the facts noting that Section 627.7153, Fla. Stat. (2019) expressly permits an insurer to restrict the right of

assignment based upon certain conditions, but that fact would have to be determined at trial based upon when the policy was issued [after July 1, 2019].

PRACTICE TIP: Ambiguity is construed against the drafter and this is particularly the case in a contract of adhesion (such as insurance agreements, software licenses, and bank signature cards).

- *People's Trust Ins. Co. v. Kidwell Grp*., LLC, 2023 WL 4217247 (Fla. 4th DCA June 28, 2023) - *See* Appendix A.

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- *Salyer v. Tower Hill Select Insurance Co. and Mason Dixon Contracting, Inc.*

(Fla. 5th DCA 2023) 5th DCA No. 5D22-345 Case No. 2019-CA-200, 2020-CA-1141, June 2, 2023

Appellant entered into an assignment of benefits with Mason Dixon Contracting, Inc. ("Mason Dixon") wherein Mason Dixon would receive "all insurance rights, benefits, proceeds, and any causes of action under any applicable insurance policies to Mason Dixon Contracting, Inc. for services rendered or to be rendered by Mason Dixon." Mason Dixon did not undertake any work.

After issuing an estimate which far exceeded the insurer's calculation of insured costs, Mason Dixon sued the insurer for breach of contract. While that case was pending, Appellant brought her own suit for breach of contract. The insurer moved to consolidate both cases. Insurer moved for summary judgment arguing standing based on Appellant's assignment of benefits to Mason Dixon. Appellant opposed summary judgment on the basis that the assignment was limited to work actually performed by Mason Dixon and, further, argued that Mason Dixon failed to perform any work.

The trial court ruled in favor of insurer and found that Appellant lacked standing due to the assignment. On appeal, the Court reversed. An assignment of benefits does not foreclose a homeowner's standing to sue when the assignment is limited to work the contractor performs.

PRACTICE TIP: Be sure that the assignment is limited to the work the contractor performs so that the assignee's right to sue is clear.

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- *SFR Services, LLC a/a/o Marston v. Tower Hill Ins. Co*., 2023 WL 4280884 (Fla. 6th DCA June 30, 2023) – *See* Appendix A.

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- *Total Care Restoration, LLC, a/a/o Yoel Bernal v. Citizens Property Insurance Corporation*, 48 Fla. L. Weekly D540 (Fla. 3rd DCA March 15, 2023)

Total Care Restoration, LLC (as assignee of Yoel Bernal) appealed the trial court's order dismissing its breach of contract complaint with prejudice. The trial court dismissed the complaint based on Total Care's failure to comply with section 627.7152(2)(a)4, *Florida Statutes* (2021), which provides that an assignment of benefits agreement must "[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." (Emphasis added).

The assignment of benefits agreement in this case contained only a generic list of available services, together with their unit cost, which the trial court concluded was insufficient to satisfy the statute's requirement, rendering the assignment agreement statutorily invalid and unenforceable. 3rd DCA affirmed.

PRACTICE TIP: Compliance with statutory requirements governing assignments of benefits required clear, precise language of the work to be performed and the cost of the work. Give notice to the insurer who is expected to pay before work is performed.

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Attorney's fees under Section 57.105, Florida Statutes

- *Shapiro v. WPLG, LLC,* 3rd DCA, Nos. 3D21-1733, 3D21-1782. L.T. Case No. 17-13336.

In the underlying litigation, WPLG submitted two motions seeking sanctions against plaintiff Readon and his attorney, Kassier. The motions were based on the allegation that Readon and his legal representative pursued a defamation claim against WPLG without adequate factual or legal grounds. Following the trial court's final judgment in favor of WPLG, the company proceeded to file a motion requesting attorney's fees, as per section 57.105 of the Florida Statutes (2020). WPLG sought to have the fees assessed at 50 percent against Readon and the other 50 percent divided equally among his three attorneys: Kassier, Shapiro, and Brumfield. All three attorneys were appropriately served with the motion.

Shapiro argued that his name was not on the complaint, his signature was not on any pleadings, he represented Readon in a limited capacity, and he was not served with either of the initial motions for sanctions because he was not in the case at that time.

The appellate court found Shapiro to be responsible for his share of attorney's fees in this case because he was on notice of the motion for sanctions and was later named and served with the motion for attorneys' fees.

PRACTICE TIP: Even limited participation in a case can expose you to sanctions.

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DISPUTE RESOLUTION

- *Seminole Cnty. V. APM Constr. Corp*. 360 So. 3d 1234 (Fla. 5th DCA 2023) -*See* Appendix A.

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CONSTRUCTION LIEN

- *WB's Septic & Sitework, Inc. v Tucker*, 2023 WL 4341271 (Fla. 1st DCA July 5, 2023)

CONTRACT ENFORCEABILITY

All Year Cooling and Heating, Inc. v. Burkett Properties, Inc., 48 Fla. L. Weekly D346 (Fla. 4th DCA February 15, 2023)

An air conditioning contractor (the "Contractor") appeals a judgment in favor of a property manager (the "Manager") for breach of contract.

Paragraph 3 of the contract's addendum described the scope of work as including "a fully turnkey installation of all brand-new York air-conditioning systems." Paragraph 3 elaborated that the installation would include "six all new split system air-conditioning systems." However, paragraph 3 further specified that in addition to the six proposed systems, "there are two split systems that are currently existing,

working perfectly and are not to be replaced as part of this contract." This was the contract's only specific reference to the existing split systems.

A later provision in the contract's addendum states that, "notwithstanding anything to the contrary herein," the Contractor "will certify and shall ensure that all split systems in the building, upon completion of all the work, will be fully compliant with all codes and regulations and shall be responsible for any costs related to the implementation and/or remediation of same."

Conclusion: The trial court agreed with the property manager and ruled that the Contractor should have brought the existing systems up to code, based on the language of the contract. The appellate court reversed and held that the contract required the Contractor to ensure that the six split systems it installed were code compliant, and nothing more. The appellate court stated that "the contract did not require the Contractor to ensure that units which it did not install complied with all applicable building codes."

PRACTICE TIP: Be specific when drafting. If the property manager here wanted the existing systems to be brought up to code, then a specific and unequivocal provision stating as much should have been included in the contract.

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- ***Grove Harbour Marina and Caribbean Marketplace, LLC v. Grove Bay Investment Group, LLC***, 3rd DCA No. 3D21-0806, Case No. 19-31658

Grove Harbour and Grove Bay occupy adjacent properties abutting Biscayne Bay in Coconut Grove. Grove Harbour is lessee of a marina and boat launch. Grove Bay is lessee of the adjacent property. The Grove Bay and Grove Harbour properties are divided by Charthouse Drive, a public roadway in the City of Miami. The City began soliciting proposals for a public-private partnership wherein the waterfront area would be redeveloped to operate various attractions including a marina and boat lunch. After discussions, Grove Bay and Grove Harbour entered into a series of agreements whereby visitors to Grove Bay's Property would be allowed to transport and launch boats stored on Grove Bay's Property through Grove Harbour's Marina. Additionally, the parties entered into an agreement whereby Grove Bay was to construct improvements upon Grove Harbour's property.

After the relationship deteriorated and suits were filed, the trial court was left to decide whether the contractual agreements were enforceable, with the primary issue being whether an agreement was ambiguous if it failed to provide the requisite clarity as to the exact nature of improvements to be made on Grove Harbour's property. On cross motions for summary judgment, the trial court ruled in favor of Grove Bay, finding that the parties' agreement unambiguously allowed Grove Bay to construct improvements on Grove Harbour's property. The appellate court reversed, finding that the agreement at issue failed to provide the requisite clarity as to the exact nature of the improvements to be made upon Grove Harbour's property. As part of its findings, the Court noted how many alternative plans were proposed and the grainy, illegible nature of the exhibits to the contract.

PRACTICE TIP: Drafting the scope of work and project descriptions is fundamental to describing the project in case the drawings and specifications drafted by the designer create any doubt, void, or ambiguity as to the project's components.

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Forum selection clause

- *EcoVirux v. BioPledge*, 47 Fla.L.Weekly D2339 (Fla. 3rd DCA November 16, 2022)

Appellant purchased disinfecting products from Appellee. In the venue clause of the final draft of the contract between the parties, it read,

> This Agreement shall be governed by and interpreted in accordance with the laws of Texas. The exclusive venues for any dispute(s) arising under this Agreement (including but not limited to breach, validity, and enforceability of the Agreement) ~~shall~~ may be brought in the state and federal courts for Denton County, Texas. The parties' consent to the personal jurisdiction of and venue in such courts for all of such cases and controversies, which include any action at law or in equity.[2]

Disputes arose. Appellant filed suit in Miami-Dade County. Appellee moved to dismiss.

Appellant argued that the changes to the venue clause rendered the clause permissive. The trial court rejected Appellant's contention and dismissed Appellant's complaint.

The Third District explained the law outlining the difference between permissive and mandatory forum selection clauses. The appellate court acknowledged that the phrase "may be brought" could be interpreted as permissive when read in isolation, but went on to note that clause, when read in its entirety, "clearly provides that the parties selected the state and federal courts of Denton County, Texas, to litigate any disputes. In designating these courts as the exclusive fora, the parties necessarily eschewed all other venues." Addressing the problem presented by the phrase "may be brought," the Third District explained, "The phrase 'may be brought' does not detract from this expressed intention. Instead, the clause simply states the obvious. No aggrieved party is compelled to file suit to resolve a given dispute. If the party elects to do so, however, suit is proper only in either the state or federal courts of Denton County, Texas."

PRACTICE TIP: "The exclusive venue for any dispute is_____ County, Florida. Litigation may be brought in state or federal court in and for _____ County, Florida."

INSURANCE

- *People's Trust Insurance Company v. Lillian Lamolli*, 48 Fla. L. Weekly D10 (Fla. 4th DCA December 21, 2022)

Appellant, an insurance company, appealed the final judgment for the amount of an appraisal award to a homeowner. People's Trust insured the home of the appellee insured. The insurance policy included a preferred contractor endorsement ("PCE"). The PCE provided that in exchange for a credit of $179 per year on the insured's policy, People's Trust would have the option to use its preferred licensed Florida Contractor, Rapid Response Team, LLC ("RRT") to make claimed repairs in lieu of a loss payment that People's Trust would otherwise owe the insured for the claims.

Section J.6 of the general policy required that "[the insured] must execute all work authorizations to allow *contractors and related parties* entry to the property." (Emphasis supplied.)

The insured's underlying claim was for property damage to her home caused by Hurricane Irma in 2017. In an email, People's Trust accepted coverage of the claim, but stated that the damages did not exceed the insured's deductible. People's Trust also notified the insured, pursuant to the PCE, that it was electing to exercise its right to use RRT to repair any covered losses that exceeded the deductible amount.

[2] The word "shall" was stricken, and the words "may" and "brought" were added.

The insured filed suit for breach of contract, alleging that People's Trust was refusing to provide full coverage under the insurance policy for the damages to her home. The damage was appraised at $59,170.03. The insured filed a motion to compel payment of the appraisal award, contending that RRT using subcontractors to perform the work on the home was a breach of the insurance policy. The insured claimed that she had agreed under the policy terms for only RRT to perform repairs. Because RRT could not perform the repairs to her roof and screen, she argued that she was entitled to a judgment for the amount of the appraisal.

Because RRT could not perform the repairs without a roofing subcontractor, the trial court ultimately entered judgment for the insured in the amount of the appraisal award. People's Trust then filed this appeal.

The 4th DCA reversed and remanded, concluding that the insurance policy allows RRT to use subcontractors in completing repairs on an insured's covered property both by its terms as well as by existing law.

The appellate court reasoned: "As to the policy language itself, the policy requires the insured to 'execute all work authorizations to allow *contractors and related parties* entry to the property.' (Emphasis supplied.) If RRT were the only entity authorized by the insurance policy to work on the property, the policy would not use the plural of contractor or related party. Thus, the policy contemplates that entities or persons other than RRT may perform work on the property."

Further, by law, a general contractor must subcontract roofing repairs where it does not have a license for such trade, but the general contractor remains responsible for any roofing construction or alteration. Thus, even if a subcontractor was used to repair the insured's roof, RRT would remain ultimately responsible for the subcontractor's work. Pursuant to the insurance policy, the insured agreed to People's Trust's use of RRT as the general contractor. And in order to comply with the statute, RRT must use a licensed subcontractor to complete the roofing repairs.

Conclusion: The trial court erred in determining that the insurance policy did not authorize the use of subcontractors to make repairs. The policy allows People's Trust to use RRT as its preferred contractor. Because RRT is a general contractor, it must use a licensed subcontractor to complete roof repairs. Both the policy language and existing law authorize the use of subcontractors to effectuate repairs. Reversed and remanded for vacation of the final judgment and for further proceedings.

PRACTICE TIP: Although subcontractors were not specifically authorized to complete work in the policy, the term "*related parties*" and existing law regarding general contractors defeated the insured's technicality argument. This serves as a reminder that appellate courts may "take the blinders off" when analyzing contract language to avoid absurd, hyper-technical results. A more specifically drafted policy/contract might have avoided this litigation.

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➢ *Southern-Owners Ins. Co. Waterhouse Corp*., 203 WL 4234180 (11th Cir. June 28, 2023)- *See* Appendix A.

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LIQUIDATED DAMAGES

- Daniel's Tree Service v. National Core Services, 48 Fla.L.Weekly D1693 (Fla. 4th DCA August 23, 2023)

Buyer and Seller entered into a contract for the purchase of an air incinerator at $175,000.00. The contract contained the following provision:

> If, for any reason, [Appellant] does not accept the debris, [Appellant] will reimburse [Appellee] for the disposal of the remaining debris at a rate of $35.00 per yard.

Seller sued Buyer for damages Appellant did not clear the debris; Appellee filed suit. The trial court entered summary judgment for the Seller on the breach of contract and entered judgment after trial for damages for $210,000.00 finding that the provision was breached and that it was not a liquidated damages provision.

On appeal, the Fourth District cited caselaw explaining that "'[i]n a contractual setting, liquidated damages exist when a specific sum of money has been expressly stipulated or agreed to by the parties for recovery by either party following a breach of the contract by the other.' Applying that definition here, the contract contained a classic liquidated damages clause: 'If, for any reason, [Appellant] does not accept the debris, [Appellant] will reimburse [Appellee] for the disposal of the remaining debris at a rate of $35.00 per yard.'" The Fourth District also outlined the reasons the provision at issue was not part of the consideration, and concluded by reversing and remanding, with instructions for the trial court to consider whether the liquidated damages clause was enforceable.

PRACTICE TIP: When liquidating damages based upon a future condition, the liquidated damages provision must still be based upon damages that are not ascertainable at the time of contracting and also don't require the breaching party to pay a grossly disproportionate amount over actual damages.

Respectfully submitted,
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9/11/2023