Florida Bar Construction Law Committee
Construction Litigation Subcommittee
Annual Case Law Update

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I. CONSTRUCTION LICENSING ISSUES

***Bodiford v. DBPR, Construction Industry Licensing Board*, 352 So. 3d 441 (Fla. 1st DCA 2022).**

Homeowners contracted with a licensed contractor to build a home for $594,000; Contractor abandoned the project after being paid $154,888. Homeowner sued, and contractor consented to a $419,973 judgment. Homeowners then filed a claim with the Licensing Board to attempt to receive maximum $50,000 from Construction Recovery Fund (CRF).

The homeowners submitted the stipulated lump-sum judgment, the contract, and information on additional costs to complete the pared-down plans, showing a total loss of about $82,000. However, the homeowners also acknowledged that they were paid a $275,000 settlement from an undisclosed source. While the homeowners claimed that they applied the $275,000 to amounts that were not permitted to be recovered from the Fund, and the settlement should therefore not be applied to reduce their damages, the Board disagreed, and the claim was denied.

On a re-review by the Board, the homeowners submitted additional materials and a recalculated amount of damages, arguing that because most of the $275,000 was applied to losses not cognizable in the Board's calculations for Fund eligibility. The claim was denied again, and the Board appeared to not take all of the newly submitted materials into consideration. On appeal to the 1st DCA, the Homeowners asserted two basic arguments: (1) the Board has to accept at face value, and controlling to the exclusion of all other evidence, the amount of damages to which the Contractor stipulated in support of the court's final judgment; and (2) they were entitled to prevent all or part of the $275,000 settlement payment from reducing their damages, by unilaterally allocating the settlement funds to damages not otherwise recoverable from the Fund.

The court rejected both arguments, holding that the Board is entitled to obtain its own evidence and preform its own calculations to determine "actual damages," particularly on the facts presented, because the underlying judgment did not distinguish what elements of damages were included in the stipulated lump-sum amount. The Board and Court also could not determine whether evidence supported the amount of any sub-categories of damages as argued by the homeowners. The Board was also correct in ignoring the newly-created affidavits, because alleged developments occurring after the Contractor's breach were irrelevant to the issue of damages. Additionally, the statute requires that as a condition to recovery, any amounts recovered by the claimant from the judgment debtor or licensee, or from any other source, have been applied to the damages awarded by the court or the amount of restitution ordered by the Board. Specifically, Section 489.143(2) provides that "actual damages" excludes "other costs related to or pursuant to civil proceedings such as post-judgment interest, attorney fees, court costs, medical damages, and punitive damages."

***DeMaria v. Construction Industry Licensing Board,* 48 Fla. L. Weekly D629 (Fla. 1st DCA March 22, 2023).**

In 2004, Appellant DeMaria contracted with homeowners to build a home and pool in Crystal River. After disputes arose regarding supposedly improper change order work, the homeowners filed suit against DeMaria's company Blue Stone. The company soon after declared bankruptcy and the civil suit was automatically stayed.

The homeowners never attempted to lift the automatic stay of the civil case. In 2014, the circuit court administratively closed the civil case due to the stay, and in 2015 a final decree was entered in the bankruptcy

proceedings, effectively discharging any liability of Blue Stone in the homeowners' civil case. The homeowners received no disbursement from the bankruptcy estate. The homeowners applied to the Recovery Fund and were eventually awarded the capped amount of $25,000.

Florida Statute 489.1401(2) provides the basis for the Recovery Fund, and states the purpose of the Fund is to "compensate an aggrieved claimant who contracted for [work] **AND** who has obtained a final judgment . . . against a licensee" on the grounds of financial mismanagement, misconduct, abandonment, etc.

DeMaria appealed the final order issued by the Construction Industry Licensing Board awarding funds. Citing heavily to Section 489.1401(2), the Court found that a claimant has to "put in the legwork" before coming to the Recovery Fund for compensation. The Court found that a claimant cannot use the Recovery Fund as a substitute for adjudication of facts by a court, arbitration panel, or licensing board, and that other sources of possible payment must be exhausted prior to coming to the Recovery Fund.

The statute contains carve out language allowing a claimant to proceed to the Recovery Fund if "the claimant has sought to have assets involving the transaction . . . removed from the bankruptcy proceedings" but is unsuccessful and therefore prevented from securing a final judgment. However, the Court found that the homeowners "did nothing at all while the bankruptcy proceeding continued" and therefore were not entitled to take advantage of the carve-out provision.

The Court held that the Board's award to the homeowners was awarded without statutory authorization and must be set aside.

***Guevara v. Lamothe*, 358 So. 3d 468 (Fla. 3d DCA 2023).**

Appellee Lamothe, a homeowner allegedly hired her neighbor, Guevara, to perform certain home renovation services. Guevara was not a licensed contractor. Over the course of several months, LaMothe paid Guevara $32,500. A dispute arose between the parties regarding the value of the work and amounts already paid to the neighbor. Homeowner filed suit and eventually prevailed on a motion for summary judgment, where the trial court relied on the neighbor's status as an unlicensed contractor in determining the contract was unenforceable.

The neighbor answered with a general denial and asserted in an affidavit that he did not enter into a contract with the homeowner for house repair. He instead stated that he agreed "to provide the labor for her home remodeling because she was acting as her own contractor and would pull her own permits."

On appeal, the court determined that there was never any dispute that the neighbor did not hold himself out to be a licensed contractor, but there was a factual dispute as to whether the homeowner was acting as her own contractor, thus implicating the exemption in Section 489.105(7)(a), which provides no contractor license is required when an owner provides direct, onsite supervision of all work not performed by licensed contractors when building one-family or two-family homes which are not offered for sale or lease.

The court reversed the summary judgment below in part because there remained a dispute of fact as to the relationship between the parties and because there appeared to be a disagreement between the two parties as to what services the neighbor agreed to perform, what services he actually performed, and what the homeowner expected or demanded that he perform.

***Dubois v. State*, 363 So. 3d 246 (Fla. 6th DCA 2023).**

Appellant Christine Dubois ("Dubois") was convicted by a jury of contracting without a license in violation of § 489.127(1)(f), Fla. Stat., for allegedly entering into a contract with a homeowner to install an electrical generator.

Section 489.127(1)(f), Florida Statutes, provides that "[n]o person shall . . . [e]ngage in the business or act in the capacity of a contractor . . . without being duly registered or certified." § 489.127(1)(f), Fla. Stat. (2013). A first-time violation of section 489.127(1)(f) is a first-degree misdemeanor. § 489.127(2)(a), Fla. Stat. (2013).

After some discussion on the definition of a "contractor" under § 489.105(3), the appellate court outlined three requirements that must be satisfied for a person to be a "contractor" under § 489.127(1)(f):

> First, the individual must "construct, repair, alter, remodel, add to, demolish, subtract from or improve" a building or structure for others or for resale to others, or undertake or submit a bid to do so. Second, the individual must engage in such conduct "for compensation." Third, the individual who engages in such conduct must have a job scope that is "substantially similar" to one of the job scopes described in the paragraphs of section 489.105(3). The job scopes that were included in the jury instructions in this case are the job scopes for a general contractor, mechanical contractor, underground utility and excavation contractor, and specialty contractor. § 489.105(3)(a), (i), (n), (q), Fla. Stat. (2018).

The appellate court held that the State failed to introduce evidence that Dubois constructed, repaired, altered, remodeled, added to, demolished, subtracted from or improved a building or structure, or that she undertook or submitted a bid to do any of these things. Because the State failed to meet its burden, the trial court should have granted Dubois' motion for judgment of acquittal. The court's reasoning was that while installing a generator at a person's home could constitute altering and/or adding to a building or structure, and therefore could satisfy the first element of section 489.127(1)(f), the State did not introduce evidence that Dubois contracted to install the generator at the home or that she contracted to install the generator in such a manner that it would have "altered or added" to the home.

The court noted that the State did not introduce a written contract into evidence, and instead called the homeowner as a witness. The homeowner did not testify as to the terms of the contract and did not testify that the contract required Dubois to "install" the generator at his home. The closest the homeowner came to stating the terms of the contract was his testimony that a neighbor had a generator "done for him" and that Dubois "said she could do that." The homeowner never stated what was "done" with respect to the generator, or even that what was "done" was the installation of the generator. He did not testify that whatever was "done" with respect to the generator involved adding to or altering a building or structure. The court held that without testimony or evidence from which a jury could conclude that Dubois agreed to install the generator in a manner that added to or altered a building or structure, the State did not meet its burden to introduce competent, substantial evidence that Dubois entered into a contract to add to or alter a building or structure.

II. CONSTRUCTION DEFECT LITIGATION

***Mattamy Florida, LLC v. Reserve at Loch Lake Homeowners Ass'n, Inc.*, 341 So. 3d 372 (Fla. 5th DCA 2022).**

Reserve at Loch Lake Homeowners Association (the "Association") filed a complaint against Mattamy Florida, LLC ("Mattamy") alleging that Mattamy and its subcontractors failed to reasonably and adequately plan, develop, design, and/or construct the Reserve at Loch Lake Community. The Association did not reference or attach any express warranties to its complaint, nor did it attach any purchase agreements between Mattamy and any homeowners.

Mattamy responded with a motion to dismiss and compel arbitration, alleging that it sold the townhomes pursuant to purchase agreements which contained arbitration provisions, attaching one such agreement as an "exemplary copy" to its motion, as well as a single copy of a "limited warranty" which it alleged was provided for each home. Mattamy did not specify to which homeowners the purchase agreement applied, did not allege whether all homeowners were original purchasers, and did not attempt to explain how any non-signatories would be bound by the arbitration provisions. The Association's response pointed out these gaps, and included an affidavit from

its president attesting to the Association's lack of knowledge regarding how many, if any, of its homeowners entered into such agreements or limited warranties.

A hearing on Mattamy's motion was set to take place on March 4, 2021, but the trial court entered an order denying Mattamy's motion to arbitrate on February 1, 2021. After the court entered its order, Mattamy filed a request for judicial notice and filed 98 of the purchase agreements and a motion for reconsideration (which did not present argument challenging the court's decision to dispose of its motion without a hearing).

The District Court concluded that it did not need to rule on the issue of whether the Association was required to arbitrate its claim due to the underlying purchase agreements and limited warranties, because Mattamy failed to meet its burden on the threshold issue of whether any of the Association's members were bound by the arbitration clauses either as signatories or non-signatories. Mattamy's motion was supported only by a single purchase agreement and a single copy of the limited warranty, and while it attempted to submit supplemental evidence after its motion was denied, the trial court was not required to consider this evidence.

Although it found Mattamy's filing's insufficient, the District Court concluded its opinion with a caveat that it "should not be read to suggest that an affidavit and/or supporting documentation is always required for a party seeking to compel arbitration to satisfy its burden[.]"

***Grande Oaks at Heathrow Ass'n, Inc. v. Kolter Signature Homes, LLC*, et al. Eighteenth Circuit Court in and for Seminole County, Florida, Case No. 2020-CA-003188.**

Trial Court Order Granting Summary Judgment

General Contractor Kolter's agents submitted permit applications confirming all aspects of Florida law would be followed, whether specified in the permit or not, which impliedly includes the Florida Building Code. The trial court determined a general contractor has a non-delegable duty to supervise, direct, manage, and control work performed by its subcontractors, and further has a non-delegable duty to ensure the Florida Building Code was complied with.

***Westpark Pres. Homeowners Ass'n, Inc. v. Pulte Home Corp*., 48 Fla. L. Weekly D952 (Fla. 2d DCA May 10, 2023).**

Pulte Home Corporation ("Pulte") owned land and then constructed a series of townhomes in a development now known as Westpark Preserve. Pulte was the owner of each individual townhome when each certificate of occupancy was issued, and the last certificate of occupancy was issued on January 9, 2009. The Westpark Preserve Homeowners Association, Inc. (the "HOA") sued Pulte for construction defects related to Pulte's construction of the townhomes. The HOA's complaint was filed on February 12, 2019.

Pulte moved for summary judgment, arguing that the HOA failed to file its lawsuit within ten years of the issuance of the ***last*** certificate of occupancy and therefore the HOA's lawsuit was barred by the then-applicable statute of repose. The trial court agreed and granted summary judgment in Pulte's favor.

Here, the sole issue on appeal was when the statute of repose began to run based on the 2018 version of Section 95.11(3)(c), *Florida Statutes*. The HOA argued that the repose period ran from the *latest* of several trigger events, including "the date of actual possession by the owner." The HOA argued that the "owner" was the party who purchased the townhome from Pulte and therefore the repose period did not begin to run until Pulte had sold the units.

The Florida Second District Court of Appeal rejected HOA's argument, reasoning that Pulte was the owner of the vacant land on which the townhomes were built, was the owner of the townhomes after construction, and took

possession of each townhome as each certificate of occupancy was issued. The Court further reasoned that under the HOA's interpretation, the repose period could be "reset" after each sale of a townhome.

This case is a prime example of how recent changes in the law will significantly impact construction litigation and application of the statute of limitations and statute of repose. Under the newly-effective version of Section 95.11(3)(c), the statute of repose has been reduced from ten to seven years, the repose period runs from the *earliest* of various trigger events, and each individual building in a project is considered its own improvement with its own limitations period.

***SICIS North America, Inc. v. Sadie's Hideaway, LLC*, 2023 WL 5089631 (Fla. 1st DCA August 9, 2023).**

Owner Sadie's Hideway hired Galvas Construction to build a new pool, hot tub, and pool deck at Sadie's property. Galvas purchased pool tiles from SICIS. After construction was complete, Sadie's sued Galvas, SICIS, and others for claims arising from alleged construction defects. Sadie's based its claims against SICIS on warranties contained in its "Terms and Conditions of Sale documentation," including that the tile products would be free from defects. Galvas filed a crossclaim for indemnification against SICIS, alleging that any liability is had for Sadie's claims arose solely from defective tile sold by SICIS. The Terms and Conditions contained a provision contained a provision stating that all purchasers of tile from SICIS "and to those persons who, under applicable state law, are entitled to rely hereon as third party beneficiaries." SICIS moved to compel arbitration of both Sadie's direct claims against it as well as Galvas's indemnity claims, contending they all fell within the broad scope of the arbitration provision in the warranty documentation. The trial court denied the motion as to Sadie's claims, reasoning that Sadie's was not a signatory to the Terms and Conditions signed by Galvas and therefore not bound by the arbitration provision.

On appeal, the First District Court of Appeal reviewed the three-prong test for ruling on a motion to compel arbitration: "Under the Federal Arbitration Act as well as the Florida Arbitration Code, the three elements for courts to consider in ruling on a motion to compel arbitration are: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived." The first prong was the only one at issue on appeal.

The First DCA reversed the denial of SICIS's motion to compel arbitration for two reasons. First, even though Sadie's was not a signatory to the agreement containing the arbitration provision that was the agreement Sadie's was attempting to enforce. "[W]hen a plaintiff sues under a contract to which the plaintiff is not a party ... we will ordinarily enforce an arbitration clause contained in that contract, absent some other valid defense...." *Mendez v. Hampton Court Nursing Ctr., LLC*, 203 So. 3d 146, 149 (Fla. 2016). Second, because Sadie's had authorized Galvas to act as its general contractor and act as its purchasing agent as to tile manufacturer SICIS, an agency relationship existed between Sadie's and Galvas, and Galvas's signing of the Terms and Conditions bound Sadie's as the principal

III. CONSTRUCTION CONTRACT AND LIEN LITIGATION

***Johnson Bros. Corp. v. Volusia County*, 2022 WL 2703840 (M.D. Fla. July 12, 2022).**

In 2016, Johnson Bros. Corp. ("Johnson") entered into a construction contract with Volusia County (the "County") for the replacement of the Veterans Memorial Bridge over the Halifax River. Johnson began work and submitted monthly applications to the County for progress payments. The contract included provisions describing a procedure for Johnson to submit claims for extra work and delay. While working on the project, Johnson submitted multiple "Notices of Intent to File Claim" ("NOIs") and certified claims corresponding to those NOIs.

In its 38-count complaint, Johnson asserted numerous claims for breach of contract, many of which arise from the claims that it submitted for extra work and delay. Johnson also brought a claim for quantum meruit. The County moved to dismiss three counts in the complaint – two which alleged a breach of contract, and the quantum meruit claim – under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The County also contended that the quantum meruit claim was barred by sovereign immunity.

The County argued that the two breach of contract claims should have been dismissed on the basis that Johnson failed to comply with notice requirements set forth in the contract, and that the exhibits attached to the complaint established that Johnson did not timely submit required documentation to the County. However, the court ultimately denied the County's motion as to the breach of contract claims because the question of whether Johnson complied with the contractual requirements for submitting claims or was excused from doing so by actions of the County required factual findings that could not be resolved at the motion-to-dismiss stage.

As to the quantum meruit claim, the County argued that Johnson failed to state a claim for which relief can be granted because an express contract existed between the parties. Additionally, the County contended that sovereign immunity barred this claim. The court agreed that the quantum meruit claim was barred by sovereign immunity, concluding that while the doctrine of sovereign immunity does not protect the state of Florida or its subdivisions from breach-of-contract claims, it does bar quantum meruit and similar claims against state entities that are based on an implied contract.

***Construction Consulting, Inc. v. District Bd. of Trustees of Broward College*, 347 So. 3d 14 (Fla. 4th DCA 2022).**

Construction Consulting Inc. ("CCI") and Broward College (the "College") entered into a master construction contract in May 2012 (the "Master Contract"). Between 2012 and 2014, the College hired CCI to work on numerous construction projects in accordance with the Master Contract. This case implicated three of those projects: (1) North Campus Building 49 Site Drainage; (2) ADA Hardware Project; and (3) Central Campus Building 6 Sound Booth Project (the "Sound Booth Project").

The purchase order for the Sound Booth Project was executed on July 29, 2013. On April 25, 2014, however, the College terminated CCI "due to lack of a response." The next day, CCI notified the College that it had "stopped all work" and was "preparing a final invoice." The parties met in September, at which point CCI sent the College summaries of open and recently completed projects. These summaries listed the payment draws for each project, whether the draw was paid or unpaid, and the number of days the draw was unpaid.

On June 1, 2015, the College mailed CCI a "Reconciliation Report" and three checks. The Reconciliation Report stated that it was a "summary of the final agreement between [CCI] and Broward College to reconcile *final payment* due to CCI for outstanding invoices." (Emphasis added.) The Reconciliation Report identified "final payments" for the three projects: $73,341.92 for the North Campus Building 49 Site Drainage project; $83,053.00 for the ADA Hardware project; and $8,846.59 for the incomplete Sound Booth Project, based on the architect's recommendation and assessment of the completed contract amount. The total amount of the checks was $165,241.34. The Reconciliation Report also included a "Final Payment" chart that listed "Construction Consulting Inc" at the top. The chart set forth the "TOTAL PAID" for each project, the "Amount on check" applicable to each invoice, and the "Check Number" and "Check Date" applicable to each invoice. The bottom of the chart stated "FINAL PAYMENT TO CCI" of $165,241.34. The checks themselves did not contain any "Payment in Full" language.

CCI received the Reconciliation Report and the checks on June 6, 2015. Two days later, CCI deposited the checks. Nevertheless, CCI then sent a letter to the College disputing the Architect's adjusted amount for the Sound Booth Project, and also complained that it was entitled to statutory interest due to the College's failure to make prompt payments. After the College refused to pay any additional funds, CCI filed suit, asserting claims for

violation of Chapter 218 (Count I), violation of Chapter 255 (Count II), declaratory judgment (Count III), writ of mandamus (Count IV), class action for interest owed (Count V), and breach of contract on the Sound Booth project (Count VI). Counts I, III, IV, and V were dismissed by the trial court for various reasons.

The College later moved for final summary judgment on the remaining counts, arguing that CCI waived and released all claims by accepting "Final Payment." The trial court granted the motion, concluding that the "undisputed facts mandate that summary judgment be entered for Broward College based on accord and satisfaction per the terms of the Master Contract, under which acceptance of Final Payment [constituted] an unconditional waiver and release of all claims by [CCI] for additional compensation beyond that provided in the Final Payment." CCI appealed.

The District Court affirmed, pointing to the *multiple* unambiguous indications in the Reconciliation Report that the checks were being tendered as "final payment" and "Final Resolution" and as a "final agreement" between CCI and the College "to reconcile final payment due to CCI for outstanding invoices." Ultimately, the court held that "[i]n sum, the College made an offer of Final Payment to CCI intended as a 'final agreement' between the parties 'to reconcile final payment due to CCI for outstanding invoices.' CCI accepted the offer of Final Payment by depositing the checks, thereby barring CCI's claims under the doctrine of accord and satisfaction or alternatively under the unconditional waiver clause of the Master Contract."

***JD Dev. I, LLC v. ICS Contractors, LLC*, 351 So. 3d 57 (Fla. 2d DCA 2022).**

ICS Contractors initially brought suit against developer JD Development for breach of contract, alleging that the developer had failed to pay several invoices. The contract was in the form of a bid for site development work. ICS Contractors performed work on the project for several months when JD Development terminated ICS Contractors. ICS Contractors provided an account statement reflecting several unpaid or partially paid invoices. After JD Development refused to pay the disputed invoices, ICS Contractors filed suit.

At trial, the president of ICS Contractors testified that the bid contract was based on a 2014 site plan and two subsequent 2015 revisions, but that no amended bid was ever executed to address subsequent revisions to the site plan—and work to be performed. Evidence showed that JD Development had paid most or all invoices which fell within the signed bid contract, and that all disputed, unpaid invoices were for work not reflected in the bid. No part of the bid provided for post-bid negotiations for additional work excluded from the bid.

After ICS Contractors' case in chief, JD Development argued on a motion for directed verdict that ICS Contractors had failed to present any evidence establishing that the disputed invoices correlated to any of the work called for in the bid. The motion was denied, and ICS Contractors prevailed on its breach of contract claim.

On appeal, the Second District Court of Appeal agreed with JD Development that ICS Contractors had failed to establish that JD Development had indeed breached the bid contract by failing to present any evidence that the disputed invoices were related to work in the bid. Specifically, the District Court reasoned that "the bid did not require ICS Contractors to perform those work activities and in turn it did not require JD Development to compensate ICS Contractors for performing those work activities." Despite evidence that the parties may have orally agreed for the additional work to be performed, the District Court specifically noted that ICS Contractors only brought suit for breach of the written bid contract and not for any oral agreement. Finding that no reasonable view of the evidence could have supported ICS Contractor's breach of contract claim, the District Court reversed the trial court's denial of the motion for directed verdict and remanded the case for entry of final judgment in favor of JD Development.

***Avant Design Group, Inc. v. Aquastar Holdings LLC*, 351 So. 3d 62 (Fla. 3d DCA 2022).**

Aquastar Holdings purchased a condo building in South Florida in 2016 and hired Avant Design Group to administer the build-out of the unit. The parties entered into a series of "Proposals"— contracts—detailing all

aspects of the project. Each Proposal contained language requiring Aquastar to pay for the cost of the goods and services of the vendors and contractors, plus a "20% Interior Design & Administrative Fee" to Avant. The Proposals were otherwise silent on the amount, calculation, or method of payment. After approximately 18 months and nearing completion of the build-out work, Aquastar requested that Avant provide copies of its vendor and contractor invoices, to which Avant refused. Aquastar then terminated its relationship with Avant due to concerns over the integrity of Avant's billing practices. Both parties subsequently brought suit against the other and Avant recorded a construction lien against Aquastar's property. Avant sued to recover balances allegedly due to it from Aquastar, and Aquastar brought claims against Avant and its three owners individually including breach of contract, conversion, fraudulent lien, and violation of Florida's Deceptive and Unfair Trade Practices Act.

At the nonjury trial, Avant's vice president testified that Avant would charge Aquastar the 20% fee *and* a profit mark-up for certain materials and services and that the decision whether to add the profit mark-up was based on the "complexity" involved in Avant's ability to deliver certain specific custom orders.

The trial court's principal issue for adjudication was whether the parties' Proposals were either cost-plus contracts (as argued by Aquastar) or fixed-price (as argued by Avant, asserting that the invoice for each Proposal was a "fixed price"). Testimony by Aquastar's accounting expert that Avant had "(i) fabricated documents; (ii) backdated checks; (iii) greatly overcharged for the purchase of the unit's tile, then received money back from the tile supplier; (iv) billed Aquastar for a purchase of goods intended for a different Avant customer; and (v) entered charges into QuickBooks for which there were no corresponding purchase orders" ultimately led to the trial court's final judgment primarily in favor of Aquastar. The trial court determined that the Proposals were in fact cost-plus, that Avant had breached the contracts and had acted fraudulently, and that the Avant's construction lien was fraudulent. Although it determined that Avant had violated FDUTPA, it did not detail any separate and distinct damages arising from such violation. An amended final judgment found no personal liability for Avant's three owners.

Both parties appealed various portions of the amended final judgment. The Third District Court of Appeal upheld the trial court's determination that the parties had entered into a cost-plus contract and further upheld the trial court's damages calculations. However, citing a lack of evidence presented by Aquastar of damages arising from fraud separate and distinct from Avant's breach of contract, the District Court reversed a the trial court's award of damages for fraud against Avant. The District Court reversed the trial court's finding that Avant had committed a FDUTPA violation, finding that the trial court did not determine that Aquastar suffered damages as a result of the violation.

Of interest here, the District Court also reversed the finding that Avant had breached the implied covenant of good faith and fair dealing in the Proposals; the District Court recognized that the implied covenant "comes into play when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." Because the trial court had determined Aquastar was only liable to Avant for vendor costs plus 20% as provided by the Proposals, Avant has no discretion to charge Aquastar in excess of the 20% fee and therefore Avant's discretion was too limited to invoke the implied covenant of good faith and fair dealing.

In upholding the determination that Avant's claim of lien was fraudulent, the District Court specifically noted that the trial court's amended final judgment contained no factual findings about Avant's good-faith belief it was entitled to the amounts claimed in the lien and that rather Avant willfully overcharged Aquastar. Notably the District Court recognized that a construction lien cannot be considered fraudulent in the event of a factual finding by the trial court that the amount claimed in the lien is based on a good-faith contractual dispute.

***Woolems, Inc. v. Catalina Caststone Creations, Inc.*, 358 So. 3d 1265 (Fla. 3d DCA 2023).**

Stone House 1, LLC ("Stone House") owned real property in Key largo and contracted with Woolems, Inc. ("Woolems"), a general contractor, to renovate said property. Woolems then subcontracted with Catalina Caststone Creations, Inc. ("Catalina") to do the exterior stonework. At the conclusion of Catalina's work, Woolems advised Catalina that it had allegedly failed to complete its work on time, has performed defective and incomplete work, and caused unnecessary expenses to Woolems. Catalina recorded a lien against Stone House's property on **April 30, 2021**.

Woolems later filed a complaint against Catalina for discharge of the lien pursuant to § 713.21(4), Fla. Stat. On **June 10 2021**, Catalina filed an answer and affirmative defenses, a counterclaim against Woolems, and moved for leave to assert a third-party complaint against Stone House to foreclose the lien. On **June 22, 2021**, Woolems posted a cash deposit as security, and filed a § 713.24 lien transfer bond with the Monroe County Clerk of Court. Woolems did not notify the court or Catalina's counsel that it had posted the deposit, but the Clerk of Court mailed a copy of the certificate of Transfer to Stone House and Catalina.

On **June 29, 2021**, Stone House recorded a notice of contest of lien, giving Catalina 60 days within which to file suit to enforce the lien. The Clerk of Court, however, did not send the notice of contest to Catalina until **October 19, 2021**. The trial court granted Catalina's request to add Stone House as a Third-Party Defendant on **October 26, 2021**. In the third-party complaint, Catalina asserted a count against Stone House to foreclose the lien, rather than against Woolems and the lien transfer bond.

On **December 23, 2021**, Woolems filed a motion for release of its cash deposit, arguing that Catalina was required to file suit against Woolems within 60 days of service of Stone House's notice of contest of lien. Woolems contended that under section 713.22, Stone House's notice of contest of lien, which was served on Catalina by the Clerk of Court in October 2021, gave Catalina sixty days after the October certification of service of such notice to file suit against Woolems. Woolems contended that, as applied, section 713.22 indicates that, because the lienor (Catalina) did not file suit to enforce its claim of lien as against Woolems within sixty days, the lien was automatically extinguished.

On the same day Woolems filed its motion, Catalina filed a first amended third-party complaint, alleging a claim against the lien transfer bond . . . against Stone House (the owner), and not against Woolems as the party that actually posted the cash deposit. Stone House then filed a motion to dismiss the third-party complaint, correctly arguing that Woolems was the proper party against whom to seek a claim against the lien transfer bond. Stone House also joined in Woolems's argument that Catalina's claim of lien was automatically extinguished because it failed to timely make a claim against the lien transfer bond within 60 days of the service of the notice of contest.

On **February 24, 2022**, Catalina filed a motion for leave to amend its counterclaim against Woolems, seeking to enforce its lien against the bond. The trial court granted Catalina's motion. On **March 4, 2022**, the court heard Woolems' previously filed motion for release of its cash deposit, and bifurcated the arguments into two issues: (1) the timing issue related to Catalina's alleged failure to sue Woolems on the Cost Deposit security within sixty days of service of Woolems' notice of contest, and (2) whether Catalina sued the wrong party, Stone House, and if that was fatal to its claim. After hearing arguments from the parties, the trial court found Catalina's amended counterclaim timely filed as it related back to Catalina's original filing against Stone House. The trial court granted Stone House's unopposed motion to dismiss Catalina's claim against it for lien foreclosure and denied Woolems' motion to release the cost deposit. Woolems then appealed.

The appellate court held that the trial court correctly applied the relation-back doctrine to find that Catalina's amended counterclaim against Woolems was timely filed. The appellate court noted that that Catalina's amended counterclaim, although it was filed outside the limitations period, did not introduce a new party; the real parties,

interests, and essential elements of controversy remained the same as when Stone House was named as defendant in Catalina's original complaint and in its amended third-party complaint.

***Seminole Cnty. v. APM Constr. Corp.*, 360 So. 3d 1234 (Fla. 5th DCA 2023).**

General contractor APM Construction Corporation ("APM") entered into a contract with Seminole County, Florida ("Seminole County") to construct Seminole County Fire Station Number 11. Due to various issues with APM's work, Seminole County terminated the contract for cause.

Shortly after being terminated APM filed suit against Seminole County asserting causes of action for breach of contract, violation of the Local Government Prompt Payment Act, violation of Florida's Sunshine Law, and violation of Florida's Public Records Act.

Seminole County moved to dismiss APM's claims, arguing that the contract documents (which included General Conditions as well as the Seminole County Administrative Code) required APM to exhaust all administrative remedies prior to filing suit but APM failed to do so. There was no dispute APM did not attempt to pursue any administrative remedies prior to filing suit against Seminole County, but the trial court nevertheless denied Seminole County's motion to dismiss "by unelaborated order" without a hearing. Seminole County appealed the nonfinal order.

First, the Florida Fifth District Court of Appeal reached the issue of whether Seminole County could obtain certiorari relief on the nonfinal order denying its motion to dismiss. Recognizing first that a party usually cannot obtain certiorari relief on a motion to dismiss, the Court found that Seminole County had shown the requisite irreparable harm warranting jurisdiction because a contractual or legal obligation to first exhaust administrative remedies is designed to prevent litigation in the first place, and therefore Seminole County would be irreparably harmed by being forced to litigate and then appeal the issue post-judgment.

Second, the Court held that the denial of Seminole County's motion to dismiss was a departure from the essential requirements of law because the APM willingly signed a contract requiring presuit administrative proceedings and the termination of the contract did not void any provision in the contract. In fact, the contract specifically stated that termination "shall not affect any rights that Seminole County may have against APM." The Court also noted that nothing in the contract excluded post-termination disputes from the requirement to pursue presuit administrative relief.

***SFR Services, LLC a/a/o Marston v. Tower Hill Ins. Co.*, 48 Fla. L. Weekly D131 (Fla. 6th DCA June 30, 2023).**

Insureds (Donald and Jane Marston) suffered damage to their home in 2017 due to Hurricane Irma. Insureds contracted with SFR Services, LLC ("SFR") to replace their roof and executed an assignment of benefits. After Tower Hill denied SFR's claim for benefits, SFR sued for breach of contract. Tower Hill raised several affirmative defenses, including that coverage was voided under the policy because SFR made "material misrepresentations as to the purported value of the repairs reflected in SFR's estimate" in violation of the policy's concealment or fraud provision. The jury ultimately returned a verdict for Tower Hill, finding that they had proven this defense. The trial court subsequently denied SFR's motion for directed verdict and for new trial. SFR appealed.

SFR's argument on appeal was that based on the language of the provision (quoted in the case), it was not subject to the conditions set forth in the provision as an assignee of the insureds. In support, SFR cited to *Shaw v. State Farm Fire & Casualty Co.,* 37 So. 3d 329, 332 (Fla. 5th DCA 2010), which recognized that "the assignment of a contract right does not entail the transfer of any duty to the assignee, unless the assignee assents to assume the duty."

The 6th DCA disagreed, holding that *Shaw* does not support the conclusion that the Concealment or Fraud provision should not apply to an assignee of the insured, because the insured's duties of the contract are distinguishable from conditions of the contract, the latter of which are not eliminated by the assignment of a right to payment.

***WB's Septic & Sitework, Inc. v. Tucker*, 48 Fla. L. Weekly D1337 (Fla. 1st DCA July 5, 2023).**

WB's Septic & Sitework, Inc. ("WBS") signed a contract with Eddie Tucker to perform work on his mother, Cybil Tucker's, property. WBS claimed that the Tuckers failed to pay for the services provided, and sued both Tuckers for lien foreclosure, breach of contract, and quantum meruit. The crux of WBS's argument against the mother was that Eddie contracted with WBS as Cybil's agent. The Tuckers admitted that Eddie entered into a contract with WBS, but denied that he did so as an agent for Cybil.

The owner of WBS testified that he signed a contract with Eddie for installation of the septic system, and that the contract also listed Cybil. He testified that Eddie advised he was acting as Cybil's agent and representative, and that, although he did not speak with Cybil, she was aware of WBS's performing work on the property.

Eddie Tucker testified that he had permission from his mother to enter into contracts to facilitate placing a mobile home on her property, but denied discussing site prep with Cybil or what contractors would be used for the work. He testified that his copy of the contract did not include his mother's name, and that although he saw he was incorrectly listed as the property owner, did not bother to correct it. He also testified that he never discussed his mother with the owner of WBS.

Cybil Tucker testified that Eddie installed a mobile home and septic system on her property with her permission. She denied having any knowledge as to the contractors working on her property.

Ultimately the trial court found Eddie Tucker liable for damages under both breach of Contract and Quantum Meruit, but found that a lien could not attach to the property owned by Cybil. Specifically, the trial court held that the lien claim failed because there was no contract between WBS and Cybil. It also denied the breach of contract and quantum meruit claims against Cybil without explanation. WBS appealed.

The First District Court affirmed. Although the court agreed that "the owner of land may be held liable and a statutory lien attached to the land under section 713.10 based on contracts entered by an agent of the owner, agency requires satisfaction of an onerous burden of proof. The fact that an owner was present or aware of an improvement being made is not enough to subject her interest to a lien or put her in privity with a plaintiff."

WBS argued that the trial court should have, at a minimum, found quantum meruit against Cybil even if there was no express contract between her and WBS. In addressing this, the court stated that the doctrine of quantum meruit will not apply when a valid, written contract exists, even where the defendant against whom the plaintiff seeks recovery is not a party to the contract, because the existence of a valid legal remedy against one party will bar recovery in equity against another party.

***Oelrich Construction, Inc. v. PRC Precast, LLC*, 2023 WL 4534129 (11th Cir. July 13, 2023).**

Oelrich was a subcontractor in a federal boiler-plant project in Gainesville, Florida, hired by the general contractor to construct a portion of the project. Oelrich in turn hired sub-subcontractor PRC to manufacture and install precast concrete slabs. A dispute arose regarding the timeliness of PRC's work, and Oelrich eventually terminated PRC and hired a substitute to complete PRC's work. PRC filed suit against Oelrich, alleging that Oelrich had failed to pay three of PRC's invoices and that such failure to pay excused PRC's lack of performance. Evidence at the bench trial showed that PRC had waived any breach by Oelrich by accepting late payments, by failing to

inform Oelrich it planned to suspend work because of late payment, and because PRC had continued to participate in new, delayed installation scheduling. The Eleventh Circuit found that the district court's determinations were supported by the record and were not "clearly erroneous" as would be required to overturn the district court. Furthermore, the district court awarded over $200k in damages to Oelrich, which PRC appealed on the basis that damages were not proven with reasonable certainty and in particular that delay damages were not supported by substantial evidence. Reasoning that "[a]ll that is required is that 'the evidence affords a sufficient basis for estimating an amount in money with reasonable certainty" and that "[w]here damages cannot be precisely determined, the trial judge is vested with reasonable discretion in making the award of damages," the Eleventh Circuit held that the district court calculated damages within the bounds of its discretion.

***Age of Empire, Inc. v. Ocean Two Condo. Ass'n, Inc.*, 2023 WL 4917089 (Fla. 3d DCA August 2, 2023).**

In February 2020, Empire and the Association entered into a contract where Empire provided restoration and improvement services to the Association's condo building. Empire performed in accordance with the contract, and then two years later in February 2022 filed a complaint in county court alleging the Association breached the contract for failure to make final payment to Empire. The contract provided that "final payment shall not be due until the Contractor has delivered to the Association . . . a final contractor's affidavit pursuant to Section 713.06(2), *Florida Statutes*." Empire soon later filed an amended complaint attaching a final contractor's affidavit as proof it complied with the condition precedent. The Association moved to dismiss the amended complaint arguing that the attaching of the final contractor's affidavit to the amended complaint was definitive proof Empire had failed to comply with the condition precedent, and the trial court agreed. Sitting in an appellate capacity, the Miami-Dade Circuit Court upheld the trial court's order.

***Rhythm & Hues, LLC v. Nature's Lawn Care, Inc.*, 2023 WL 4919514 (Fla. 4th DCA August 2, 2023).**

Rhythm and Hues, LLC hired a general contractor to perform unspecified work at its property. The general contractor hired Natures' Lawn Care, Inc. as a subcontractor to perform a portion of the work. Nature's Lawn brought claims against Rhythm for nonpayment based on a contract implied in fact based on work performed for Rhythm outside the scope of Rhythm's contract with the general contractor. At a nonjury trial, evidence was presented that Rhythm directly engaged Nature's Lawn concerning additional landscaping and agreed to pay Nature's Lawn directly for additional materials and labor. The county court determined that a contract implied in fact arose between Rhythm and Nature's Lawn, and awarded damages to Nature's Lawn.

On appeal, Rhythm asserted that 1) the existence of a direct contract between Rhythm and the general contractor barred Nature's Lawn's claims for a contract implied in fact, and 2) that Nature's Lawn had failed to establish the elements for an implied contract, i.e. that Nature's Lawn had failed to exhaust all remedies against the general contractor, and that Rhythm had given consideration to another party for the work performed.

The Fourth DCA rejected both of Rhythm's arguments. First, the court held that while it is usually the case that there can be no implied contract when a written contract exists and the owner has paid the general contractor in full, an implied-in-fact contract is formed when an owner directly engages a subcontractor for "extras" outside the scope of the main contract. Second, the court noted that Rhythm had confused the concepts of "contracts implied in law" which are meant to prevent an unjust enrichment, and those implied "in fact" which are formed through the direct contacts between two parties.

IV. CONSTRUCTION-RELATED INSURANCE LITIGATION

***Heritage Property & Cas. Ins. Co. v. Forest Mere Townhouse Community Ass'n, Inc.*, 342 So. 3d 777 (Fla. 2d DCA 2022).**

Forest Mere Townhouse Community Association, Inc. ("Forest Mere") initially submitted two claims under its policy with Heritage Property & Cas. Ins. Co. ("Heritage") for roof damages sustained by seven buildings due to Hurricane Irma. Heritage determined the roof damages were covered by the insurance policy, and issued two payments to Forest Mere. Almost nineteen months later, Heritage received a letter from Forest Mere's public adjuster containing a supplemental claim for replacement of all windows and doors on the condominium buildings due to alleged Hurricane Irma damage. Heritage investigated the claim but ultimately denied coverage for the supplemental claim in its entirety.

Forest Mere then brought action against Heritage for breach of contract for denying coverage, and sought an appraisal of the damage as set forth in the insurance policy. Heritage argued that an appraisal was inappropriate because it had never acknowledged coverage for the supplemental claim in the first place. Forest Mere filed a motion to stay the litigation and to compel appraisal, arguing that the claim should not be considered supplemental because it had not been previously adjusted as part of the original claim. The trial court ultimately agreed with Forest Mere and entered an order compelling the appraisal. Heritage appealed.

The Second DCA referred to its previous decisions in *Heritage Prop. & Cas. Ins. Co. v. Veranda I at Heritage Links Ass'n*, 334 So. 3d 373 (Fla. 2d DCA 2022) and *American Coastal Insurance Co. v. Ironwood*, 330 So. 3d 570 (Fla. 2d DCA 2021) when it concluded that the supplemental claim for the damages to the windows and doors was not part of the original roof-damage claim, but was instead a supplemental claim as defined by the policy. As a result, the windows and doors claim had to be considered separately from the initial roof claim that had been fully adjusted, and the trial court was precluded from referring that claim to appraisal.

***Kidwell Group, LLC v. American Integrity Ins. Co.*, 347 So. 3d 501 (Fla. 2d DCA 2022).**

American Integrity Insurance Company ("AIIC") insured the home of Robert and Maureen Mucciaccio. In 2019, the Mucciacios assigned postloss benefits in an AOB to the Kidwell Group, LLC d/b/a Air Quality Assessors of Florida ("Air Quality"). In exchange, Air Quality agreed to "perform a non-emergency indoor environmental assessment and/or forensic engineering study . . . to determine repairability, scope and/ or categorization of water damage, testing for contamination including bacteria and/or mold in order to prepare a forensic engineering report and/or remediation protocol report that may be used to prescribe or confirm proper remediation procedures for the damaged property." The AOB further provided that the assessment "in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property."

After providing its services, Air Quality submitted its invoices to AIIC, who refused to pay, prompting Air Quality to sue. In its complaint, Air Quality alleged that the homeowners "suffered a loss due to water and/or mold, covered perils under the [AIIC] Policy," and Air Quality agreed to provide "reasonable and necessary assessment services to the [homeowners] relating to the loss" in exchange for the assignment of postloss insurance benefits. While Air Quality attached the AOB to the complaint, it did not provide the insurance policy.

AIIC moved to dismiss the complaint, arguing that Air Quality lacked standing to sue because the AOB was an "assignment agreement" subject to § 627.7152, Fla. Stat., and that (1) the AOB did not include required provisions under § 627.7152(2)(a), Fla. Stat. and (2) Air Quality failed to comply with pre-suit notice requirements under § 627.7152(9)(a), Fla. Stat.

Air Quality countered that the AOB was not an "assignment agreement" as defined by the statute, because the report "does not specifically protect, repair, restore, or replace property or . . . mitigate against further damage to the property." Air Quality also argued that § 627.7152 could not apply to an AOB relating to an insurance policy in effect before enactment of the statute. The trial court dismissed the complaint, concluding that the AOB was an "assignment agreement" that did not comply with section 627.7152(2)(a) and that section 627.7152 applied because the AOB "was executed after the enactment of the statute." Air Quality appealed.

The District Court affirmed the trial court's dismissal of the complaint. Despite Air Quality's efforts to carve itself out of § 627.7152 by disclaiming services "to protect, repair, restore, or replace damaged property or to mitigate against further damage to property," the court found that "if it looks like duck, and quacks like a duck, then it is a duck," and that the AOB was an "assignment agreement" subject to the requirements of the statute.

The court further found that the statute applies to AOBs executed on or after July 1, 2019, regardless of when the insurance policy was issued, because the statute affects rights under the AOB, not substantive rights under the insurance policy. Accordingly, the court held that the law in effect at the time the parties executed the AOB controls.

***Cole v. Universal Prop. & Cas. Ins. Co.*, 363 So. 3d 1089 (Fla. 4th DCA 2023).**

Homeowner Cole brought suit against his homeowner's insurance company Universal Property & Casualty Insurance Company ("Universal"), arising from Universal's alleged breach of contract for disputes related to Cole's claim for insurance proceeds for property damage suffered in November 2020.

Cole filed suit in August 2021. However, effective July 1, 2021, the Florida Legislature enacted Section 627.70152, *Florida Statutes* which created mandatory presuit procedures—including the requirement to serve a notice of intent to initiate litigation—prior to filing suit against a claimant's insurance carrier. The trial court dismissed Cole's claims due to Cole's failure to comply with the new presuit requirements.

On appeal, Cole argued that the new presuit requirements should not be applied retroactively because it limited Cole's substantive rights.

The Florida Fourth District Court of Appeal rejected Cole's arguments, first examining the difference between substantive and procedural/remedial statutes: The "general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively." The Court determined that the presuit notice requirements were procedural in nature and could therefore be applied retroactively.

Next, the Court applied a two-part test to determine whether the new procedural requirements could be applied retroactively to insurance policies already in existence prior to the July 1, 2021 effective date of the statute: first, whether the Legislature intended the statute to apply retroactively, and second, if such intent is clearly expressed, whether retroactive application would violate any constitutional principles. For the second prong, courts are also to determine "whether retroactive application of the statute 'attaches new legal consequences to events completed before its enactment.'"

Here, the Court found that the Legislature did clearly express the intent to apply the statute retroactively by including a preamble stating the statute applies to "*all* suits" arising under a residential or commercial property insurance policy.

The Court further rejected Cole's arguments that the new requirements in Section 627.70152 were substantive as akin to the statutory framework for PIP benefits under Section 627.736(11) and therefore could not be applied

retroactively as determined in *Menendez v. Progressive Express Insurance Co.*, 35 So. 3d 873 (Fla. 2010). While applying the two-part test set forth in *Menendez*, the Court here distinguished *Menendez* to the extent the PIP statute created and altered substantive rights including the imposition of penalties, awarding attorneys' fees, granting insurers additional time to pay benefits, and delaying an insured's right to institute a case of action. None of the "problematic" substantive changes in the PIP statute are included in the presuit notice requirements of Section 627.70152.

***Southern-Owners Ins. Co. v. Waterhouse Corp.*, 2023 WL 4234180 (11th Cir. June 28, 2023).**

This case answers the age-old question of whether a cooling tower is a building or structure, or more appropriately understood as machinery or equipment.

Nursery Supplies, Inc. manufactures products for the horticulture industry, and hired Waterhouse to perform water treatment services for the cooling tower located on its property. Nursery Supplies also hired nonparty Del-Air Heating and Air Conditioning to perform certain work on the cooling tower. In 2019, an employee of Del-Air performed work in and around the cooling tower, and about two weeks later, was admitted to the hospital and diagnosed with legionnaire's disease. Water samples from the cooling tower confirmed the presence of legionella bacteria. The employee sued Nursery supplies and Waterhouse for negligence.

Waterhouse was covered under a CGL policy and an umbrella policy issued by Southern-Owners. Both policies included an exclusion for fungi or bacteria "**within a structure or building**." Despite this, Southern-Owners agreed to defend Waterhouse pursuant to a reservation of rights. In March 2021, it the filed suit in the Middle District of Florida, seeking declaratory relief that the employee's claims were not covered in the underlying action, arguing that the claims fell within the exclusions because the cooling tower was a "structure." Nursery Supplies and the employee, conversely, argued that the tower was not a building or structure, but rather constituted "large-scale machinery." The district court agreed, and declared that the exclusions did not apply. Southern-Owners appealed.

The Eleventh Circuit agreed that a cooling tower does not constitute a building or structure and is more properly considered machinery. The court found the policy language ambiguous, reasoning that "[o]ne could reasonably interpret 'structure' to include a cooling tower, but it would be equally reasonable to interpret 'structure' to mean something more akin to a building." Neither policy defined "building" or "structure," so the court relied upon Mirriam-Webster's dictionary for definitions of the terms. Unfortunately for the insurer, the court wrote that "[w]hile a cooling tower may indeed qualify as a 'structure' under a broad definition of the term, Florida law clearly instructs that ambiguous provisions in insurance policies must be interpreted strictly against the drafter" and "[e]xclusionary provisions are to be construed 'even more strictly against the insurer than coverage clauses.'"

Southern-Owners also argued that the cooling tower constituted a "building like" structure, even under a narrow definition of the term, because it "is two stories tall, has four sides, a bottom, and a door." The court also rejected this argument because, in its view, "a cooling tower is not similar to a building." Instead, the court held that given the cooling tower's purpose and function (heating, ventilation, and air conditioning and industrial purposes), a cooling tower constituted large-scale machinery rather than a "building-like" structure.

***People's Trust Ins. Co. v. Kidwell Group., LLC*, 363 So. 3d 1108 (Fla. 4th DCA 2023).**

A homeowner who had purchased the insurer's policy sustained damage in a hurricane. The policy's loss settlement provision states that the insurer will pay "the cost to repair or replace" the damaged property.

The homeowner hired a public adjuster, who filed a claim with the insurer, including costs for a full roof replacement. Through the public adjuster, the homeowner then hired the Kidwell Group d/b/a Air Quality

Assessors of Florida ("AQA") to prepare an "engineering report" opining on the cause and extent of the damages to send to the insurer. The homeowner assigned his benefits under the insurance policy to AQA.

The insurer admitted a covered loss had occurred and settled the claim with the homeowner for $30,000, which was greater than the cost for a new roof. The homeowner then hired a roofing company which completed his roof replacement without using AQA's report. AQA sent the insurer an invoice for $3,500 for its report, and the insurer refused to pay, contending that it was not covered under the policy because it "is not a physical loss to the property and is akin to a consulting fee that is not covered under the policy" and "it is not a cost to repair or replace covered property." AQA sued the insurer for breach of contract seeking $3,500 in damages.

Prior to trial, the trial court denied the insurer's motion for summary judgment on the basis that "there remains a genuine dispute of material fact as to whether the Plaintiff['s] services constituted a cost of repair or replacement under the loss settlement provision of the subject policy of insurance."

The matter proceeded to trial. In openings, the insurer specifically conceded that the homeowner's roof damage was a covered loss and that no policy exclusions applied, but argued that the engineering report's cost was not covered by the policy because the report was not used in any capacity for the repair or replacement of the roof. After AQA presented its case-in-chief, the insurer moved for a directed verdict, and again did so after presenting its own evidence, each time arguing that AQA failed to present evidence that its report was used for the repair or replacement of the roof. The trial court denied both motions, the jury found for AQA, and the insurer appealed.

The appellate court reversed and remanded, finding that the trial court erred by denying the motion for a directed verdict because AQA failed to prove that its engineering report was a "cost to repair or replace" under the policy, since it was undisputed from the onset of trial that AQA's report was not used in the roof replacement. The court found that none of the evidence demonstrated that the report was a cost to repair or replace the roof, and that the evidence actually proved the opposite. Therefore, the court concluded that the trial court should have granted the insurer's motion for directed verdict.

The court also found that both the verdict form and jury instructions were deficient, and that they led the jury astray. Specifically, the verdict form did not ask the jury whether the engineering report's cost was a "cost to repair or replace" the property, despite the trial court's previous ruling that this was the very factual question that precluded summary judgment. Additionally, there were no jury instructions on this issue. The verdict form only asked the jury to determine (1) whether the damage occurred during the coverage period, and (2) whether an exclusion applied – two points the insurer conceded prior to trial and again expressly during openings. In other words, the jury was not given the opportunity to determine if AQA's evidence sufficiently established that the engineering report's cost was a "cost to repair or replace" the property.

V. GENERAL LITIGATION PRACTICE

***Electric Boar Corp. v. Fallen* 343 So. 3d 1218 (Fla. 5th DCA 2022).**

Sylvia Fallen, a construction worker, fell while exiting door of trailer on construction site. She received workers' compensation benefits for her injuries, but then brought a gross negligence action against Electric Boat Corp., a subcontractor whose employees had moved stairs away from door. The parties agreed that Electric Boat Corp. was immune from liability for simple negligence due to Fallen's workers' compensation claim; the issue was whether Electric Boat Corp. was grossly negligent, as a subcontractor is not immune from liability when the "major contributing cause" of the accident is the subcontractor's own gross negligence. The trial court entered partial summary judgment against Electric Boat Corp. on its affirmative defense of horizontal immunity, and denied Electric Boat Corp.'s motion for summary judgment on the same issue. Electric Boat Corp. appealed.

On appeal, the District Court discussed the three elements to prove gross negligence: (1) circumstances constituting an imminent or clear and present danger amounting to a more than normal or usual peril, (2)

knowledge or awareness of the imminent danger on the part of the tortfeasor, and (3) an act or omission that evinces a conscious disregard of the consequences. After its analysis, the District Court concluded that Electric Boat did not "evince the conscious disregard" required to establish gross negligence when it forgot to return the stairs, and that while Electric Boat Corp. might have been negligent, it was not grossly negligent. Therefore, Electric Boat Corp. was entitled to summary judgment on its defense of horizontal immunity.

***Columbus Apartments, LLC v. MJM Structural Corp.*, 346 So. 3d 1248 (Fla. 3d DCA 2022).**

In June 2019, subcontractor MJM Structural Corp. ("MJM") brought an action to enforce a construction lien against Columbus Apartments, LLC ("Columbus") and Suncoast Construction Group, Inc. ("Suncoast"). The trial court entered a final default judgment awarding damages and a final judgment of foreclosure in favor of MJM in January 2021. In May 2021, the court entered an amended final judgment, which ordered a foreclosure sale on July 12, 2021. Columbus and Suncoast appealed both the final judgment and the amended final judgment.

On July 9, 2021, Columbus and Suncoast filed an emergency motion in the appellate court to stay the lower court proceedings, which was granted, but then lifted eleven days later on July 20, 2021. In the interim, the foreclosure sale occurred and the property was sold on July 12, 2021.

On July 25, 2021, Columbus and Suncoast filed a motion in the trial court seeking to declare the foreclosure sale void because it occurred while the appellate court's temporary stay was in place. The trial court denied the motion on August 23, 2021. The next day, Columbus and Suncoast appealed the denial of their motion to declare the foreclosure sale void, and on September 21, 2021, Columbus filed a **second** motion to vacate the foreclosure sale, this time pursuant to Fla. R. Civ. P. 1.540, again arguing that the sale was void because it occurred during this Court's temporary stay. Columbus also argued inadequacy of the sale price. At a hearing on the second motion on October 5, 2021, Columbus explained it was not challenging the foreclosure judgment, and it focused almost entirely on inadequacy of the sale price. The trial court ultimately denied the second motion, finding that the sale price was not inadequate.

Following the hearing and entry of the order denying the second motion to vacate, Columbus and Suncoast voluntarily dismissed all their prior pending appeals, including their appeals from the final and amended judgment and their appeal from the first motion to vacate. Columbus and Suncoast then focused their efforts on appealing the order denying the **second** motion to vacate, contending that the order denying their second motion to vacate is an appealable, nonfinal order pursuant to Florida Rule of Appellate Procedure 9.130(5).

The appellate court ultimately dismissed the appeal for lack of jurisdiction, concluding that (1) the second motion to vacate was not directed at a final order or a proceeding that resulted in a final order; it was directed solely at the post-judgment foreclosure sale; (2) Columbus and Suncoast were not challenging the underlying final judgment; and (3) the second motion to vacate was not an authorized motion pursuant to Rule 1.540.

***Parkland Condo. Ass'n v. Henderson*, 350 So. 3d 484 (Fla. 2d DCA 2022):** Fla. R. Civ. P. 1.730(b) requires that a mediated settlement agreement be signed by all parties to be enforceable.

***Von Dyck v. Gavin*, 350 So. 3d 842 (Fla. 1st DCA 2022):** When the terms of a document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss, even if that document was not attached to the complaint itself.

***Assurance Group of America, Inc. v. Security Premium Finance, Inc.*, 352 So. 3d 436 (Fla. 3d DCA 2022):** A motion for protective order is properly granted when a party attempts to set a second deposition of a corporate rep when there is "not a situation in which newly discovered evidence or new developments necessitate a second deposition" and the corporate rep had already provided testimony in initial deposition concerning areas of inquiry listed for second deposition.

***Hogg v. Villages of Bloomingdale Homeowners Ass'n, Inc.* 357 So. 3d 1271 (Fla. 2d DCA 2023).**

Appellants Hogg and Browne-Cason owned homes in the Villages of Bloomingdale, a deed-restricted community. Construction on the Villages of Bloomingdale neighborhood began in 2004 and was meant to be completed in three phases. In 2005, the developer recorded a declaration of covenants for the deed-restricted community, which included a plat map as an exhibit showing which properties would be subject to the declaration. The map only included properties in phase one of the construction. Appellants purchased properties located in phases two and three.

In 2019, the Association discovered Phases 2 and 3 were not subject to the declaration, and asked homeowners in those phases to consent to retroactive application of the declaration and its covenants and restrictions. Some owners agreed, but Appellants did not.

The Association brought a reformation action to bring Phases 2 and 3 into the declaration, to which Appellants asserted affirmative defenses in part asserting the action was barred by the statute of limitations under Fla. Stat. 95.11(2). Fla. Stat. 95.11(2) requires an action based on a contract, obligation, or liability founded on a written instrument to be brought within five years of accrual. On a motion for summary judgment, the court found in the Association's favor, making a distinction between an action to "enforce" a written instrument and one to "reform" an instrument.

On appeal, the Second District Court of Appeal determined that Section 95.11(2) applies to a reformation action. The Court reasoned that a reformation action is one sounding in equity, which falls within the text of the statute, and that obligations to pay association dues or otherwise comply with covenants and restrictions fall under the statute as well.

***Saad v. Abud*, 359 So. 3d 855 (Fla. 3d DCA 2023).**

In the context of a breach of contract case, Abud filed a motion for sanctions pursuant to § 57.105(4), Fla. Stat. seeking fees to be paid by the appellants for the unnecessary time spent preparing and litigating the appellants' affirmative defense that asserted that the contract at issue was unenforceable. The trial court, having previously held the contract was enforceable, determined that appellants knew or should have known that the affirmative defense was not supported by the material facts or was not supported by the application of then existing law to those material facts, and granted the motion for sanctions.

After an evidentiary hearing to determine the amount of fees, the trial court entered the final judgment on the motion for sanctions. In the order, the trial court noted the testimony of Abud's attorneys and fee expert "that establishing an enforceable contract, being the central issue in this case, was so inextricably intertwined with the other issues that allocation of the fees expended solely in establishing an enforceable contract is not possible, practical or feasible." The trial court summarily concluded that "the record evidence presented during this hearing, a review of the docket entries, and the testimony of [Abud's attorneys and expert]" satisfied the trial court that the issues were indeed inextricably intertwined.

The appellate court held that the trial court committed reversible error by failing to include in the final judgment on the motion for sanctions specific factual findings to support its legal conclusion that the issues are so inextricably intertwined that allocation of time spent solely on establish an enforceable contract was not possible. The appellate court reversed and remanded the final judgment on the motion for sanctions with instructions for the trial court to make factual findings to support its legal conclusion that the issues are so inextricably intertwined that allocation of time spent solely on establishing an enforceable contract was not practical, feasible, or possible.

***Spanakos v. Hawk Systems, Inc.*, 362 So. 3d 226 (Fla. 4th DCA 2023).**

Spanakos was a shareholder and former director of Hawk Systems, Inc., a defunct Delaware corporation. Between 2010 and 2012, Spanakos filed multiple derivative lawsuits against Hawk Systems and over 60 other defendants, including Greenberg Traurig – which had been retained by Hawk Systems shortly before it went public – and two Greenberg Traurig attorneys (collectively, the "GT Defendants").

In early 2016, the GT Defendants filed two motions for summary judgment. Six days after serving the motions, the GT Defendants served a proposal for settlement on Spakanos pursuant to § 768.79, Fla. Stat. and Fla. R. Civ. P. 1.442, offering $500,000.00 to resolve, among other things "all claims for damages brought against them in this Action" and "any claims that could have been brought in this Action." The non-monetary conditions of the proposal were: (1) delivery of the attached release signed by Spanakos in his capacity as a putative derivative plaintiff on behalf of Hawk Systems; and (2) delivery of a stipulation of voluntary dismissal with prejudice, which would be "approved by the Court to the extent required by law." Spanakos did not accept the proposal for settlement.

In 2020, following the resolution of other issues in the Delaware Chancery Court, the trial court granted one of the GT Defendants' motions for summary judgment, based on Spanakos's failure to satisfy the prerequisites for bringing a derivative action. The court denied the GT Defendants' other motion for summary judgment as moot.

In November 2020, the GT Defendants moved to determine their entitlement to attorney's fees and costs pursuant to their offer of judgment, arguing that their offer was made in good faith and in compliance with the applicable statute and rule. The GT Defendants also moved for taxable costs. At a hearing in February 2021, the trial court ruled that the GT Defendants were entitled to reasonable attorney's fees based on the proposal for settlement. Spanakos had argued that (1) the proposal for settlement was ambiguous because it was made to him as a derivative plaintiff and it failed to make the offer to the remaining shareholders; and (2) the proposal for settlement was made in bad faith because it represented only 2% of the $22 million in alleged damages.

Following the affirmance of the summary judgment, the GT Defendants filed a memorandum of law in the circuit court in support of their requested award of $1,183,744 in attorney's fees and $74,119.53 in costs. Spanakos argued that the amount sought was excessive because it included (1) time spent for duplicated work, (2) block billing, (3) time spent for secretarial tasks, (4) time allocated as redactions, (5) time spent communicating with the client, and (6) unnecessary expert fees. At the evidentiary hearing, the GT Defendants submitted invoices, time entries, and other exhibits, and called two fee expert witnesses in support of their motion. Spanakos, conversely, called no witnesses and did not challenge the hourly rates charged by the defense attorneys.

The trial court entered an order awarding Greenberg the entirety of its requested attorney's fees and costs, finding that: (1) the case involved novel and difficult questions; (2) the fees charged were customary in the locality for similar legal services; (3) Spanakos sought millions in damages and the results obtained for the GT Defendants were "outstanding"; and (4) the experience, reputation, and ability of the lawyers were "outstanding. The court also awarded Greenberg its taxable costs in full, determining that the expert fees it sought were "appropriate."

The trial court entered a final judgment in favor of Greenberg for attorney's fees and costs totaling $1,259,470.86, plus post-judgment interest. Spanakos appealed.

Spanakos first contended that the proposal for settlement failed to comply with Florida law. As an initial matter, the appellate court held that the proposal for settlement complied with Section 768.79 and Rule 1.442, noting that "[t]he rule does not demand the impossible. It merely requires that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006). The court noted that while settlements in derivative shareholder actions require court approval, see § 607.0745(1), Fla. Stat. (2022), court approval is a post-agreement ratification of the settlement, not a condition of settlement. Additionally, the court held that the proposal was

appropriately directed to Spanakos in his capacity as a derivative plaintiff on behalf of the company, and that a proposal for settlement need not allocate funds between nonparticipating shareholders or carve out funds for the derivative plaintiff.

Spanakos also objected to the amount of fees and costs awarded to the GT Defendants. First, Spankos contended that the fee award included duplicative time billed and time spent for internal conferences. While duplicative time billed is generally not compensable, the mere fact that multiple lawyers collaborated on a particular task does not necessarily mean the work was duplicative. The appellate court found that the trial court did not abuse it discretion in finding that, due to the nature and complexity of the case, the billing entries objected to as duplicative "were appropriate under the circumstances."

Second, Spanakos complained that the lawyers for the GT Defendants "engaged in significant block billing." The court, however, found that there was competent, substantial evidence to support the trial court's findings that "[t]he invoices here were sufficiently detailed to apprise the Court . . . as to what the time was billed for" and that the time spent "was reasonable for the work that was being performed."

Third, Spanakos objected that the trial court awarded time for secretarial tasks. The appellate court again rejected this argument, finding that the trial court did not abuse its discretion in concluding that attorney time spent on scheduling and exhibit preparation was compensable. One of the GT Defendants' experts testified that tasks like setting up depositions would have required lawyer involvement and discussions with opposing counsel, given the "degree of friction" and "lack of cooperation" on both sides, and that this was not a case where one secretary could simply "call the other secretary to see whether there was a time available." Additionally, the GT Defendants presented testimony that "most scheduling issues required the attention of an attorney because of the sheer number of parties involved and the substance of objections that were often lodged by the Plaintiff to various hearings or depositions proceeding."

Fourth, Spanakos complained that a proper analysis of the billing records was "thwarted" because the GT Defendants "redacted significant records without explanation." The appellate court again disagreed, finding that the trial court did not abuse its discretion by including the partially-redacted time entries in the fee award. The GT Defendants redacted only limited portions of 16 time entries. The redactions were made because the descriptions "included the attorney's strategy or mental impressions." The lightly-redacted time entries mostly pertained to the specific legal issue being researched. And the GT Defendants presented evidence that even with the redactions, the entries were "adequately described."

Fifth, Spanakos complained that the GT Defendants' attorneys' timesheets "reflected numerous entries reflecting communications with its client." The test for awarding fees for attorney-client communications is whether the time spent was "reasonably necessary." The appellate court held that the trial court did not abuse its discretion in awarding time for attorney-client communications, as such communications were reasonably necessary and not the result of the GT Defendants' "eccentricities," and the work was not necessitated by the clients' own behavior.

Spanakos also objected based on the reasonable client standard and the costs for expert witness fee, which were summarily dismissed by the appellate court.

***Retherford v. Kirkland*, 363 So. 3d 132 (Fla. 1st DCA 2023):** A party does not "cure" a waiver of a defense by raising it in an amended motion to dismiss, even if filed before the hearing; the clear and unambiguous language of Fla. R. Civ. P. 1.140(g) prevents a defendant from raising at a later time a defense which was available when the motion to dismiss was first made.

***American Auto. Ins. Co. v. FDH Infrastructure Services, LLC*, 48 Fla. L. Weekly D1091 (Fla. 3d DCA May 31, 2023).**

A Texas-based specialty contractor was tasked with installing an upgraded antenna on an existing television tower. In anticipation of the installation, the company retained FDH Infrastructure Services, LLC ("FDH") to perform a structural analysis as to the stability and weight-bearing capacity of the tower, and to assess the proposed rigging plan. FDH furnished a "Qualified Engineering Review Letter," which included the requested calculations.

Construction commenced, and shortly thereafter, the rigging components failed, resulting in three workers falling to their deaths. Confronted with a series of claims, the insurers paid out benefits under their respective policies, and filed suit against FDH, seeking equitable and contractual subrogation on the theory that erroneous load calculations precipitated the underlying insurance claims. FDH sought summary judgment, alleging, among other grounds, the action was barred by the two-year professional malpractice statute of limitations contained in section 95.11(4)(a). The trial court granted the motion, and the insurers appealed.

On appeal, the insurers contended that the claim was more appropriately governed by the four-year statute of limitations set forth in section 95.11(3)(c), Florida Statutes (2022), because theirs is "[a]n action founded on the design, planning, or construction of an improvement to real property." The appellate court agreed.

When a cause of action is ostensibly subject to competing statutes of limitation, three well-entrenched tenets of statutory construction guide the court's analysis: (1) a specific statute preempts a more general statute; (2) a later statute is given effect over an earlier statute; and (3) if a doubt arises, the longer period of limitations should ordinarily prevail.

The appellate court held that "Section 95.11(3) applies narrowly to only construction-based claims. This provision stands in contrast to section 95.11(4), which encompasses any 'professional malpractice' action." Additionally, the court explained that FDH was contractually obligated to assess the structural integrity of the tower and rigging plan prior to the commencement of construction," and that "[p]erforming the calculations necessary to enable the construction of the new antenna on the existing building was part and parcel of that task. Given the parameters of the contract, the summary judgment record established the subrogation 'action[s] [were] founded on the ... planning ... of an improvement to real property.'" Consequently, the court found that the insurers' claims fell within the purview of the longer 4-year statute of limitations.

In a footnote, the court stated that "It is true that section 95.11(3)(c) is typically applied to cases involving latent construction defects. It is equally true, however, that the plain statutory language does not lend itself to a restrictive interpretation."