2023 Construction Litigation Case Law Update

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Construction Litigation Subcommittee Co-Chairs

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CONSTRUCTION LICENSING

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 filed claim with the Licensing Board to attempt to receive maximum $50,000 from Construction Recovery Fund (CRF).
- Homeowners submitted stipulated lump-sum judgment, contract, information on additional costs to complete 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.

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

- On a re-review by the Board, Homeowners submitted additional materials and a recalculated amount of damages, arguing that 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 the $275,000 settlement payment from reducing their damages, by unilaterally allocating the settlement funds to damages not otherwise recoverable from the Fund.

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

- (1) The Board is entitled to obtain its own evidence and preform its own calculations to determine "actual damages," 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 newly-created affidavits, because alleged developments occurring after the Contractor's breach were irrelevant to the issue of damages.
- (2) 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."

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

- A homeowner hired her neighbor, who was not a licensed contractor, to perform certain home renovation services. Over the course of several months, the neighbor was paid $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."

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

- 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.

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Construction Defect Litigation

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

- Pulte owned land and then constructed a series of townhomes.
- 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 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.

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

- 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.

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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 supplier SICIS and signed Terms and Conditions of Sale documentation.
- The Terms and Conditions of Sale contained a warranty provision extending to all purchasers of tile from SICIS "and to those persons who, under applicable state law, are entitled to rely hereon as third party beneficiaries."
- The Terms and Conditions of Sale also contained an arbitration provision.
- 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.

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

- SICIS moved to compel arbitration, contending the claims against it 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.

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

- 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.

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Construction Contract and Lien Litigation

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, and over the next several years the College hired CCI to work on numerous construction projects in accordance with the Master Contract via separate purchase orders.
- One of these purchase orders was datedJuly 2013, but CCI failed to prosecute work, and the College terminated CCI in April 2014.
- The parties met in September 2014, at which point CCI sent the College summaries of open and recently completed projects.
- Later, the College mailed CCI a "Reconciliation Report" with 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.)

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

- 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 deposited the checks. CCI disputed the adjusted amount for the one of the projects and complained that it was additionally entitled to statutory interest due to the College's failure to make prompt payments.
- The College refused to pay any additional funds and CCI filed suit.

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

- The College later moved for final summary judgment, arguing that CCI waived and released all claims by accepting "Final Payment." The trial court granted the motion.
- 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."

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

- Aquastar Holdings purchased a condo building and hired Avant Design Group to administer the build-out of the unit. The parties entered into a series of "Proposals" requiring Aquastar to pay for the cost of goods and services of the vendors and contractors Avant hired for the buildout work, and to pay 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 the property. Avant sued to recover balances allegedly due to it from Aquastar, and Aquastar brought claims against Avant and its three owners individually, asserting breach of contract, conversion, fraudulent lien, and violation of Florida's Deceptive and Unfair Trade Practices Act.

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

- 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 primary issue at trial 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.

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

- 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 the trial court's award of damages for fraud against Avant.

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

- 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.

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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 APM 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.

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

- 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. The 5th DCA reached the issue of whether Seminole County could obtain certiorari relief on the nonfinal order denying its motion to dismiss.

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

- 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.**
- The 5th DCA also 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.

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

- WB's Septic & Sitework, Inc. ("WBS") contracted with Eddie Tucker to perform work on his mother, Cybil Tucker's, property. WBS sued both Tuckers for lien foreclosure, breach of contract, and quantum meruit.
- The owner of WBS testified that he signed a contract with Eddie, and that the contract also listed Cybil. He testified that Eddie advised he was acting as Cybil's agent and that Cybil was aware of WBS's performing work on the property.
- Eddie Tucker testified that he had his mother's permission to enter into contracts to place a mobile home on her property, but denied discussing details with Cybil. He testified that his copy of the contract did not include his mother's name.
- Cybil Tucker testified that Eddie installed a mobile home and septic system on her property with her permission, and that she had no knowledge regarding contractors working on her property.

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

- 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, 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 1st DCA affirmed. Although "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."
- The doctrine of quantum meruit will not apply when a valid, written contract exists, even where the defendant 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.

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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*."

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

- 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.
- The 3rd DCA upheld the trial court's order.

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Rhythm & Hues, LLC v. Nature's Lawn Care, Inc., 368 So. 3d 12 (Fla. 4th DCA 2023).

- Rhythm and Hues hired a general contractor to perform unspecified work on its property, who then subcontracted Natures' Lawn Care to perform a portion of the work. The owner had the subcontractor do extra work outside the scope of its subcontract, and allegedly agreed to pay the subcontractor directly. Owner later didn't pay subcontractor for the extra work, taking the position that it paid the GC for that work.
- Subcontractor brought claims against owner for nonpayment based on a contract implied in fact since the work was outside the scope of owner's contract with the general contractor. The county court determined that a contract implied in fact arose between the owner and the subcontractor, and awarded damages to subcontractor.

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Rhythm & Hues, LLC v. Nature's Lawn Care, Inc., 368 So. 3d 12 (Fla. 4th DCA 2023).

- On appeal, the owner asserted that:
  - 1) The existence of a direct contract between it and the general contractor barred subcontractor's claims for a contract implied in fact; and
  - 2) That subcontractor had failed to establish the elements for an implied contract, i.e. that subcontractor had failed to establish that it exhausted all remedies against the general contractor, and that owner had not given consideration to another party for the work performed.

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Rhythm & Hues, LLC v. Nature's Lawn Care, Inc., 368 So. 3d 12 (Fla. 4th DCA 2023).

- The Fourth DCA rejected both of the owner'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 and subject matter 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. The elements that the owner argued were not established by the subcontractor were elements for "contract implied in law" (unjust enrichment) and not for "contracts implied in fact" (quantum meruit).

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Construction-Related Insurance Litigation

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 post-loss benefits in an Assignment of Benefits to the Kidwell Group, LLC d/b/a Air Quality Assessors of Florida ("Air Quality").
- In exchange of the AOB, Air Quality agreed to perform environmental assessments and engineering studies to determine whether the property was reparable and to confirm proper remediation procedures.
- 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.

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

- 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 post-loss 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.

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

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.

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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, which included costs for a full roof replacement. Through the public adjuster, the homeowner then hired Kidwell Group d/b/a Air Quality Assessors of Florida ("Air Quality") to prepare an "engineering report" opining on the cause and extent of the property damage to send to the insurer. The homeowner assigned his benefits under the insurance policy to Air Quality.
- 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 Air Quality's report. Air Quality 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." Air Quality sued the insurer for breach of contract seeking $3,500 in damages.

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

- 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 Air Quality 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 Air Quality 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 Air Quality, and the insurer appealed.

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

- The appellate court reversed and remanded, finding that the trial court erred by denying the motion for a directed verdict because Air Quality 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 Air Quality's report was not used in the roof replacement.
- 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 Air Quality's evidence sufficiently established that the engineering report's cost was a "cost to repair or replace" the property.

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- ***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.

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- ***Saad v.* Abud, 359 So. 3d 855 (Fla. 3d DCA 2023)**: Trial court order concluding that issues are so inextricably intertwined that allocation of time was not possible must include factual findings in support.
- ***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*, 364 So. 3d 1082 (Fla. 3d DCA 2023):** The 4-year statute of limitations in F.S. 95.11(3)(c) (not the 2-year statute of limitations in F.S. 95.11(4)) was applicable to a professional negligence claim against an engineer whose improper rigging plan resulted in three workers' deaths.

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

- A proposal for settlement complied with Section 768.79 and Rule 1.442 when it was "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification."
- 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."
- While appelant agrued the appellee's lawyers engaged in "significant block billing," 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."

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

- Trial court did not abuse its discretion in concluding that attorney time spent on scheduling and exhibit preparation was compensable, because expert testimony showed that tasks like setting up depositions 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."
- Trial court did not abuse its discretion by including partially-redacted time entries in the fee award. 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 even with the redactions, the entries were "adequately described."
- 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 appellants' "eccentricities," and the work was not necessitated by the clients' own behavior.

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Thank You!

- The Florida Bar RPPTL – CLC – Litigation Subcommittee meets <u>the first Thursday of every month at 11:30 am via Zoom.</u>
- Please contact Lucien Johnson (lucien.johnson@foley.com) or Ryan Sullivan (Ryan.Sullivan@hwhlaw.com) to join or volunteer to give a case law update