Chapter 1

The Usual Suspects: Typical Construction Claims and Defenses

1-1 APPLICABLE LAW

Construction defects implicate both federal and state law, though typically these claims are litigated (or arbitrated) under state law. While many claims and defenses are created by statute, decisional case law plays an integral role in not only defining the scope and application of these claims and defenses, but sometimes in limiting them. Conversely, as has been seen with common law warranties and design professional liability, statutes sometimes limit or expressly overrule decisional law.

1-2 EXPRESS WARRANTY CLAIMS

Express warranties are, as the name suggests, created by *express* contractual obligations, and their scope is limited by their terms.[1] Express warranties do not always require words to be created, but can derive from the conduct of the seller such as where the seller shows the buyer a blueprint or other description of the goods sold.[2] Under Florida law, written warranties are treated like a contract between a buyer and seller, and may therefore limit or foreclose

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[1] *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 525 (1992) ("A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty.").

[2] *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. 3d DCA 1977).

available remedies.[3] For instance, developers may properly disclaim express warranties in the sale of condominiums.[4] On the other hand, a contractor routinely warrants that its work will be free from defects and will conform to the requirements of the "Contract Documents." But such warranties exclude damage or defects caused from the owner by abuse, improper maintenance, or operation, or from normal wear and tear.[5] The contractor generally also provides a one-year warranty against defects appearing in workmanship or materials during the warranty period. Such warranty requires that the owner provide notice of the defect during the warranty period and provide a reasonable opportunity to make repairs. Failure to provide notice can result in the owner's waiver of the right to require the contractor to correct the deficiency or to make a claim for breach of warranty. Where the contractor is timely notified and fails or refuses to make repairs, the owner may then do so and pursue recovery for the costs under a breach of warranty claim.[6]

Generally, subcontractors are required to provide similar warranties in a subcontract agreement that run in favor of the contractor either directly or by a "flow-down" provision that binds the subcontractor to the same extent that the contractor is bound to the owner under the prime contract. The contractor's warranty to correct defects in the work does not generally cover defects in design where the owner has hired an architect to design the improvements.[7] Under these circumstances, the owner impliedly

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3. *Aprigliano v. Am. Honda Motor Co., Inc.*, 979 F. Supp. 2d 1331, 1340 (S.D. Fla. 2013) (citing *David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1318 (S.D. Fla. 2009)); *see* Fla. Stat. §§ 672.316, 627.718, 672.719.

4. *See Belle Plaza Condo. Ass'n, Inc. v. B.C.E. Dev., Inc.*, 543 So. 2d 239 (Fla. 3d DCA 1989) (upholding dismissal of association's express warranty claim where developer disclaimed in bold and conspicuous language in condominium conversion documents any express or implied warranties). It bears noting, however, that an express warranty disclaimer may not apply to certain post-market representations of the seller, which may create new express warranties. *See Brady v. Medtronic, Inc.*, No. 13-62199-CIV-BLOOM/VALLE, 2015 WL 11181971, at *8 (S.D. Fla. Mar. 30, 2015) (noting that medical device label which disclaimed all express and implied warranties did not require the conclusion that defendants could not have plausibly made subsequent express warranties while engaging in off-label promotion).

5. *See, e.g.*, AIA Document A-201—2017, § 3.5.1.

6. *See, e.g.*, AIA Document A-201—2017, § 12.2.2.1.

7. The contractor may, however, be liable for design deficiencies where its express warranty guarantees the sufficiency of the plans and specifications for their intended purposes. *See Fred Howland, Inc. v. Gore*, 13 So. 2d 303 (Fla. 1943) (finding liability where contractor warranted that the plans and specifications were "suitable and adapted" for the work and guaranteed "the sufficiency and efficiency" of the plans and specifications "for their intended purpose").

warrants that the contractor will be able to build what is shown in the plans and specifications and that the completed improvements will be fit for their intended purposes.[8]

With respect to the sale of "goods" (materials) under Florida's Uniform Commercial Code ("UCC"),[9] any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Further, any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. And any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.[10] Formal words such as "warrant" or "guarantee" or that the seller has a "specific intention" to make a warranty are not necessary to create an express warranty; however, an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[11]

Express warranties generally extend to only those in direct privity, but may also extend to subsequent and remote purchasers.[12]

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8. *See* discussion in § 1-6:3 below.

9. *See* FLA. STAT., Chapter 672, *et seq.* "Goods" are defined in relevant part as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." FLA. STAT. § 627.10.

10. *See* FLA. STAT. § 672.313(1); *see also Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. 3d DCA 1977). As noted by the court in *Kavanaugh*:

> The defendant Keenan argues that he never in so many words warranted the accuracy of the information contained in the logbook and was in fact ignorant of the admittedly false information on the prior repair history of the airplane. The simple answer to that argument is that an express warranty need not be by words, but can be by conduct as well, such as, the showing of a blueprint or other description of the goods sold to the buyer. Moreover, fraud is not an essential ingredient of an action for breach of express warranty and indeed it is not even necessary that the seller have a specific intention to make an express warranty. It is sufficient that the warranty was made which formed part of the basis of the bargain.

Miles, 350 So. 2d at 1093.

11. *See* FLA. STAT. § 672.313(2).

12. *See Aprigliano v. Am. Honda Motor Co., Inc.*, 979 F. Supp. 2d 1331, 1340 (S.D. Fla. 2013) (citing *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 457–58 (Fla. 3d DCA 2005) (holding the plaintiff—a subsequent purchaser who was not in privity of contract with the manufacturer—was entitled to enforce the terms of the manufacturer's warranty because the warranty extended to subsequent purchasers) and *Fischetti v. Am. Isuzu Motors, Inc.*, 918 So. 2d 974, 976 (Fla. 4th DCA 2005) ("The manufacturer can hardly be heard to

As commonly seen with manufacturer warranties for materials or equipment furnished by a contractor or subcontractor as part of a project close-out, an owner is an express intended beneficiary and may recover under the warranty. However, such warranties typically have exclusions and are subject to certain conditions being met. For instance, such warranties commonly do not cover damage caused by excessive wear and tear, abuse, or modifications to the product, and an owner must perform routine maintenance. Failure to comply with these conditions may void an otherwise valid warranty.[13]

1-3 STATUTORY IMPLIED WARRANTY CLAIMS

Unlike express warranties, implied warranties are not created by contract. Instead, they are granted by statute or exist at common law based upon the nature of the transaction and the relationship

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resurrect a common law requirement of privity when it has itself voluntarily provided a warranty that runs in favor of remote purchasers of its product.")). In 2023, the Florida legislature enacted Section 559.956, Florida Statutes, which governs the transfer of heating, ventilation, and air-conditioning system manufacturer warranties for residential real property, and provides as follows:

> (1) If a residential real property that includes a heating, ventilation, and air-conditioning (HVAC) system as a fixture to the property is conveyed to a new owner, a manufacturer's warranty in effect on that system or a component of that system:
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> (a) Is automatically transferred to the new owner; and
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> (b) Continues in effect as if the new owner was the original purchaser of such system or component, as applicable.
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> (2) A warrantor continues to be obligated under the terms of a manufacturer's warranty agreement for a warranty transferred under this section and may not charge a fee for the transfer of the warranty.
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> (3) The transfer of a manufacturer's warranty under this section does not extend the remaining term of the warranty.
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> (4) A manufacturer's warranty for an HVAC system is deemed registered with the manufacturer if a contractor licensed under part I of chapter 489:
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> (a) Installs the new HVAC system; and
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> (b) Provides the manufacturer of the HVAC system with the date of the issuance of the certificate of occupancy for installations relating to new construction, or the serial number of the HVAC system for installations relating to existing construction, as applicable.
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> (5) A contractor licensed under part I of chapter 489 who installs a new HVAC system must document the installation through an invoice or a receipt and provide the invoice or receipt to the customer.

[13] *See Aprigliano v. Am. Honda Motor Co., Inc.*, 979 F. Supp. 2d 1331, 1340 (S.D. Fla. 2013); *see also* Fla. Stat. §§ 672.316, 627.718, 672.719.

of the parties.[14] Implied warranties can be found under both federal and state law, and may properly be modified, or even excluded entirely, by the party providing the implied warranty.

1-3:1 Magnuson-Moss

The Magnuson-Moss Federal Trade Commission Improvement Act ("the Magnuson-Moss Act" or "Act")[15] provides certain remedies to "consumers" against "suppliers" and others providing express and implied warranties for breach of those warranties in connection with the sale of "consumer products" as defined by the Act. While the Magnuson-Moss Act does not create any new warranties, it allows consumers to enforce existing warranties and provides a private cause of action in state or federal court against the "supplier" or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.[16] Moreover, to the extent not inconsistent, remedies under the Act are cumulative to other remedies afforded by federal and state law.[17] However, application of the Magnuson-Moss

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[14] Common law warranties, *see* discussion in § 1-5 below.

[15] 15 U.S.C. § 2301, *et seq.*

[16] The Magnuson-Moss Act defines "implied warranty" as one arising under state law in connection with the sale by a "supplier" of a "consumer product." 15 U.S.C. § 2301(7). Thus, consumers seeking to enforce an implied warranty under the Act should be mindful of Florida's privity requirement. Absent privity, a claim for breach of implied warranty generally does not lie. *See, e.g., Ocana v. Ford Motor Co.*, 992 So. 2d 319 (Fla. 3d DCA 2008). *Cf. Brusherd v. Ford Motor Co.*, No. 3:08-cv-513-J-JRK, 2009 WL 10670567, at *3 (M.D. Fla. Sept. 18, 2009) (noting that under Florida law, properly pled agency allegations can give rise to privity between manufacturers and purchasers necessary to maintain a breach of implied warranty claim). *See also Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1234 (S.D. Fla. 2013) ("Literal privity can be finessed by a proxy: direct beneficiary or third-party beneficiary status.") (internal citations omitted).

Unless excluded or modified (by § 672.316, Florida Statutes), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Fla. Stat. § 672.314. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is (unless excluded or modified by § 672.316), an implied warranty that the goods shall be fit for such purpose. Fla. Stat. § 672.315.

"Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . ." Fla. Stat. § 672.105(1). Thus, a buyer of defective goods, whether for personal or commercial use, is protected by the UCC, but only those buyers for personal use may enforce applicable warranties under the Act.

[17] 15 U.S.C. § 2311; *see Ocana v. Ford Motor Co.*, 992 So. 2d 319, 324 (Fla. 3d DCA 2008) (noting that the Magnuson-Moss Act modifies the applicability and operation of the UCC and to the extent applicable, supersedes inconsistent provisions of the UCC) (citing *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 455 (Fla. 3d DCA 2005)).

Act to construction defects appears limited to those involving "consumer products" which are primarily for *personal, family or other household* use and are not for resale.[18] Further, in order to enforce an implied warranty under the Act, privity is required under Florida law.[19] While the Magnuson-Moss Act may have some utility in the construction defect arena, such as with defective building materials, other statutory and common law remedies, discussed below, have broader application to construction defects.

1-3:2 Florida's Uniform Commercial Code

In the context of the sale of "goods", the UCC provides buyers with certain implied warranties.[20] In a breach of implied warranty case, the plaintiff has the burden of establishing that a defect was present in the product; that it caused the injuries complained of; and that the defect existed at the time the retailer or supplier parted

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18. 15 U.S.C. § 2301(1).

19. *See Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988) (recognizing that doctrine of strict liability supplanted all non-privity breach of implied warranty claims but contract action for breach of implied warranty remains where privity of contract is shown). While not expressly overruled by *Kramer*, the Supreme Court's previous decision in *Manheim v. Ford Motor Co*., 201 So. 2d 440, 441–42 (Fla. 1967) (allowing a purchaser to sue a manufacturer for breach of implied warranty—in the absence of privity—where the plaintiff was only seeking economic damages) no longer appears to be binding precedent. *See Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1233 (S.D. Fla. 2013) ("Although not expressly overruled, insofar as the *Manheim* decision jettisons the privity requirement it has been effectively overruled by *Kramer* . . . and its progeny.") (internal citations omitted). *See also GAF Corp. v. Zack Co.*, 445 So. 2d 350, 352 (Fla. 3d DCA 1984) (barring implied warranty claim against manufacturer of defective roofing materials where plaintiff lacked privity with manufacturer); *Ingram v. Andritz, Inc.*, 3:21cv778-TKW-EMT, 2021 WL 5278731, at *1 (N.D. Fla. June 29, 2021) (citing *Kramer*).

20. *See* Fla. Stat. §§ 672.714, 672.715; *see Armadillo Distrib. Enters., Inc. v. Hai Yun Musical Instruments Mfr. Co., Ltd.*, 142 F. Supp. 3d 1245 (M.D. Fla. 2015). As the court explained:

> Under Florida's U.C.C., there are two distinct implied warranties: an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. The warranty of merchantability is implied in any contract for the sale of goods, 'if the seller is a merchant with respect to goods of that kind.' In order for goods to be merchantable, the goods must be 'fit for the ordinary purposes for which such goods are used,' among other requirements. By contrast, the implied warranty of fitness for a particular purpose arises only when 'a seller has reason to know a particular purpose for which the goods are required and the buyer relies on the seller's skill or judgment to select or furnish suitable goods.' Under those circumstances, an implied warranty arises 'that the goods shall be fit for such purpose.'

Id. at 1254 (internal citations omitted).

possession with the product.[21] This burden may be satisfied where the product malfunctions during normal operations, based upon the legal inference that the product was defective at the time of injury and at the time it was within the control of the supplier.[22] A breach of these implied warranties allows the buyer to recover both actual and consequential damages from the seller.[23] However, a buyer may not recover both the purchase price and the cost to remedy the seller's breach, as such an award would place the buyer in a better position than it would have been had the contract been fully performed.[24] Further, although damages need not be proven with scientific precision, they cannot be based upon "speculation or guesswork."[25] Unlike the Magnuson-Moss Act, whose reach is limited to defective products in the personal, family or household setting, the UCC's application is much broader. However, as discussed below, the UCC will not provide a remedy in all construction defect situations.

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21. *Marcus v. Anderson/Gore Homes, Inc.*, 498 So. 2d 1051 (Fla. 4th DCA 1981); *see Amoroso v. Samuel Friedland Fam. Enters.*, 604 So. 2d 827, 833 (Fla. 4th DCA 1992), *aff'd*, 630 So. 2d 1067 (Fla. 1994) (setting forth the elements of a claim for breach of implied warranty, including "[t]hat the product was defective when transferred from the warrantor" and "[t]hat the defect caused the injury"); *McCraney v. Ford Motor Co.*, 282 So. 2d 878, 878 (Fla. 1st DCA 1973) (stating that to recover for breach of express warranty, a plaintiff must prove both causal connection and damages); *Lash v. Noland*, 321 So. 2d 104, 105 (Fla. 4th DCA 1975) ("it has been held that a defect must be proven to hold a manufacturer liable in negligence or warranty") (citing *Cromarty v. Ford Motor Co.*, 308 So. 2d 159 (Fla. 1st DCA 1975)), *quashed on other grounds*, 341 So. 2d 507 (Fla. 1976); *Mattes v. Coca Cola Bottling Co. of Miami*, 311 So. 2d 417 (Fla. 4th DCA 1974) (defective product must be the cause of injury); *but see Armor Elevator Co. v. Wood*, 312 So. 2d 514, 515 (Fla. 3d DCA 1975) ("The plaintiff was not under a duty to pin point any exact mechanical deficiency for or by reason of which the device proved defective and failed . . . .").

22. *Marcus v. Anderson/Gore Homes, Inc.*, 498 So. 2d 1051, 1052 (Fla. 4th DCA 1981).

23. *See* Fla. Stat. §§ 672.714, 672.715.

24. *See Koplowitz v. Girard*, 658 So. 2d 1183, 1185 (Fla. 4th DCA 1995) (holding trial court erred in action for breach of contract and implied warranty of fitness where buyer was awarded return of all sums paid under contract in addition to cost of remedying seller's breach); declined to extend by *A&E Adventures LLC v. Intercard, Inc.*, 529 F. Supp. 3d 1333, 1358 (S.D. Fla. 2021) (reversing the trial court's order awarding the buyer *both* the money it paid the seller *and* the full cost of replacing the product because the award "placed [the] buyer in a better position than it would have been in had the contract been fully performed" and thereby gifted the buyer a free product). *But see Burroughs Corp. v. Joseph Uram Jewelers, Inc.*, 305 So. 2d 215 (Fla. 3d DCA 1975) (upholding jury verdict in amount exceeding purchase price of computer system on the basis of value of system to purchaser).

25. *See Thomas v. Winnebago Indus.*, No. 8:16-cv-177-T-23TGW, 2017 WL 2348789, at *4 (M.D. Fla. May 30, 2017) (citing *Smith v. Austin Dev. Co.*, 538 So. 2d 128, 129 (Fla. 2d DCA 1989)).

1-3:2.1 Predominant Factor Test

Where a contract is one exclusively for services, the UCC does not govern. The UCC may also not apply where a contract involves the sale of both goods and services (so-called "hybrid" contracts). Most jurisdictions follow the "predominant factor" test to determine whether such hybrid contracts are transactions in goods, and therefore covered by the UCC, or transactions in services, and therefore excluded.[26] As noted by the Eleventh Circuit, "[u]nder this test, the court determines 'whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).'"[27] Several Florida courts have applied this test.[28]

Where the predominant aspect of the transaction is the furnishing of goods, the UCC will apply. Where services are primarily involved, the UCC will not govern. Generally, the UCC's implied warranties do not pass from the contractor to an owner because a contractor is viewed as a provider of services, not a merchant in the sale of goods.[29] However, in the context of construction the

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[26] *See Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

[27] *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1329–30 (11th Cir. 1998) (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

[28] *See United States Fid. & Guar. Co. v. N. Am. Steel Corp.*, 335 So. 2d 18, 21 (Fla. 2d DCA 1976) ("Since the predominant nature of the transaction was the furnishing of a product rather than services, we believe that the fabricated pipe could properly be characterized as goods."); *Birwelco-Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So. 2d 255 (Fla. 3d DCA 2001) (following *BMC Indus., Inc.* and noting that court must decide whether contract is predominantly one for goods or for services); *Ge Lin v. Ecclestone Signature Homes of Palm Beach, LLC*, 59 So. 3d 267 (Fla. 4th DCA 2011) ("We must look to the predominant nature of the transaction in determining whether to apply the Uniform Commercial Code's Article 2, regarding the sale of goods."); *Allied Shelving & Equip., Inc. v. Nat'l Deli, LLC*, 154 So. 3d 482, 484 (Fla. 3d DCA 2015) ("In such instances, the determination whether the 'predominant factor' in the contract is for goods or for services is a factual inquiry unless the court can determine that the contract is exclusively for goods or services as a matter of law.").

[29] *See Lonnie D. Adams Bldg. Contractor, Inc. v. O'Connor*, 714 So. 2d 1178 (Fla. 2d DCA 1998) (citing *Jackson v. L.A.W. Contracting Corp.*, 481 So. 2d 1290, 1292 (Fla. 5th DCA 1986) ("Addressing the implied warranty claims, the contract in this case was not one for the sale of goods or sale of a product by a merchant but was to repair, sealcoat, and restripe the owner's private road. The supplying of the Cosmicoat was a minor element in the transaction, which was essentially one for services. Accordingly, the contractor's work was not a transaction in goods within the meaning of (the UCC)")). *Cf. Biscayne Roofing v. Palmetto Fairway Condo. Ass'n, Inc.*, 418 So. 2d 1109, 1110 (Fla. 3d DCA 1982) (holding that Biscayne Roofing breached its express warranty as well as its implied warranties of fitness and merchantability where it substituted roofing materials without authority).

answer is not always apparent, and some courts have determined that whether the UCC applied where both goods and services are provided presented a factual determination that could not be resolved as a matter of law on summary judgment.[30] With regard to new residential construction, the Florida Supreme Court has noted that homebuyers "bought finished products—dwellings—not the individual components of those dwellings" (albeit in the context of the economic loss rule, discussed in more detail in Section 1-6:1 below).[31] As such, the argument could be made that the UCC's implied warranties do not provide a remedy for residential defects since the "finished products" (homes), as opposed to their individual components, would appear to fall outside the definition of "goods."[32]

1-3:2.2 Waiver of Implied Warranties

Notwithstanding the UCC's application of implied warranties to contracts for the sale of goods, these warranties can be expressly modified or excluded by the seller or by the parties' course of conduct.[33] To be effective, the language of a waiver "must mention merchantability and in case of a writing must be conspicuous."[34] Similarly, for the implied warranty of fitness, "the exclusion

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30. For instance, as part of an expansion and retrofit project at Miami-Dade county's Resource Recovery Plant, a company provided a well water treatment system that caused delays requiring the county to pay delay damages. In considering whether the contract was for the provision of goods, not for services, and hence governed by the Uniform Commercial Code, the court determined that the contract was ambiguous—even where both sides claimed the contract was clear and unambiguous—and thus presented a question of fact not appropriate for summary judgment. *Birwelco-Montenay, Inc. v. Infilco Degremont, Inc.*, 827 So. 2d 255, 257 (Fla. 3d DCA 2001); *see Eastern Portland Cement Corp. v. F.L. Smidth, Inc.*, No. 8:08-cv-637-T-24 TBM, 2009 WL 3010820, at *5 (M.D. Fla. Sept. 16, 2009) (finding genuine issues of material fact precluding summary judgment as to whether UCC applied where contract for design and manufacture of a pneumatic ship unloader involved both goods and services).

31. *See Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993), *receded from, Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).

32. *See* Fla. Stat. § 672.105(1) (defining goods as being "movable at the time of identification to the contract for sale"). One could argue that what is purchased, a completed home, is not "moveable" within the meaning of the UCC unlike its components. Even if the UCC did govern, as a practical matter, contracts for the sale of new homes invariably contain waivers of all implied warranties in lieu of an express warranty provided by the homebuilder. Waiver of implied warranties is discussed in more detail in § 1-3:2.2 above.

33. *See* Fla. Stat. § 672.316.

34. Fla. Stat. § 672.316(2).

must be by a writing and conspicuous."[35] The conspicuousness requirement is satisfied where the exclusion is in all capital letters and/or in bold text.[36] An exclusion of all implied warranties of fitness may also be found where the language provides that "(t)here are no warranties which extend beyond the description on the face hereof."[37]

A disclaimer of all warranties by the seller is valid even when the only remedy afforded by the manufacturer fails of its essential purpose.[38] Thus, it would seem that a supplier of defective materials could avoid liability by effectively waiving all warranties, express and implied, and providing the buyer with an alternate remedy under the manufacturer's warranty. On the other hand, if the supplier itself provides an exclusive or limited remedy that fails, the buyer may have recourse against the seller.[39]

Where warranties have not been modified or excluded, the seller may nonetheless limit the remedies for breach of warranty (as provided in §§ 672.718 and 672.719).[40] As between merchants, a limitation on liability may be effective even where the other merchant does not expressly consent.[41]

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35. Fla. Stat. § 672.316(2).

36. *See Rudy's Glass Constr. Co. v. E. F. Johnson Co.*, 404 So. 2d 1087 (Fla. 3d DCA 1981). Moreover, a disclaimer which is otherwise conspicuous is not rendered inconspicuous merely because it appears on the reverse side of a document, such as where the front of the document contains a noticeable reference to terms or conditions which are located on the reverse side. *Id.* at 1089. However, "[w]here there is nothing on the face of the writing to call attention to the back of the instrument, it is likely that the disclaimer is inconspicuous." *Id.* "Consequently, an examination of the circumstances of each particular case is necessary in order to determine whether a reverse side disclaimer is conspicuous." *Id.*

37. Fla. Stat. § 672.316(2).

38. *See Frank Griffin Volkswagen, Inc. v. Smith*, 610 So. 2d 597, 601–02 (Fla. 1st DCA 1992) (upholding dealer's waiver of all warranties even though manufacturer's numerous repair efforts under its warranty proved unsuccessful).

39. Fla. Stat. § 672.719(2) ("Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code."). "[T]he 'essential purpose' of a contract is unfulfilled when repeated unsuccessful efforts to repair a product has completely failed in its intended purpose." *Monsoon, Inc. v. Bizjet Int'l Sales & Support, Inc.*, No. 16-80722-CIV-MARRA/MATTHEWMAN, 2017 WL 747555, at *7 (S.D. Fla. Feb. 27, 2017) (citing *Parsons v. Motor Homes of Am., Inc.*, 465 So. 2d 1285, 1292 (Fla. 1st DCA 1985)). *See Pearson v. Winnebago Indus., Inc.*, No. 5:15-cv-43-Oc-PRL, 2016 WL 6893937, at *5 (M.D. Fla. Nov. 23, 2016) ("[A] warranty fails of its essential purpose if the warrantor does not successfully repair defects within a reasonable time or within a reasonable number of attempts.").

40. Fla. Stat. § 672.316(4).

41. *See Paul Gottlieb & Co., Inc. v. Alps S. Corp.*, 985 So. 2d 1 (Fla. 2d DCA 2007) (finding limitation of consequential damages clause on back of seller's finished goods form, as

1-3:3 Florida's Condominium Act

Florida's Condominium Act[42] grants developers and purchasers of new condominiums certain implied warranties against defects in construction.[43] The warranties provided by the developer to purchasers are broader than those provided by the contractor, subcontractors and suppliers to the developer and purchasers.[44] While the former encompasses both fitness and merchantability for purposes or uses intended and extends to all personal and real property provided by the developer either in the unit or for use by

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additional contractual term, was not material alteration exception within meaning of "battle of the forms" provision of UCC). In *Alps*, the court concluded that the additional term was not a material alteration, and thus became part of the contract, because the contract at issue was the sixth in a series between the parties and each contract included the limitation of liability term. As such, the court found that the buyer, acting as a reasonable merchant, could not have been surprised by the additional term. *Id.* at 7. It is not clear whether the buyer actually had knowledge of the waiver, and where a buyer does not have actual knowledge, the argument can be made there was no intentional waiver. However, as *Alps* demonstrates, a court will likely find a waiver where the parties have had numerous dealings and presumably know (or should know) the content of the contractual forms they sign. As one court has noted:

> Section 2-207 [of the UCC] accounts for today's reality that the traditional common law "mirror image" rule—which foreclosed contractual formation where terms of an offer and acceptance varied—is "both unfair and unrealistic in the commercial context." . . . While the terms of an offer and of an acceptance in today's commercial transactions will rarely "mirror" each other, § 2-207 nevertheless allows parties to form a contract in situations where they reach an agreement and subsequently exchange forms "which purport to memorialize the agreement, but which differ because each party has drafted his form to give him advantage." (internal quotations and citations omitted).

Option Wireless, Ltd. v. OpenPeak, Inc., No. 12-80165-CIV-MARRA, 2012 WL 6045936, at *4 (S.D. Fla. Dec. 5, 2012). *See Building Materials Corp. of Am. dlb/a GAF Materials Corp. v. Henkel Corp.*, No. 6:15-cu-00548-ACC-GJK, 2016 WL 7666151 (M.D. Fla. Aug. 30, 2016), *vacated and remanded on jurisdictional grounds*, 2017 WL 4082440 (M.D. Fla. Apr. 17, 2017) (providing in-depth discussion on "battle of the forms" under the UCC).

42. FLA. STAT. Chapter 718, *et seq.*

43. *See* FLA. STAT. § 718.203. Similar implied warranties apply to cooperatives as well. *See* FLA. STAT. § 719.203. But they do not exist for homeowner associations. *See* FLA. STAT. Chapter 720, *et seq.*

44. In *Turnberry Ct. Corp. v. Bellini*, 962 So. 2d 1006 (Fla. 3d DCA 2007), the court rejected a developer's attempt, relying on the language of § 718.203(1)(e), to avoid liability for defective air conditioning (mechanical) equipment serving a single unit. The court recognized the principle that specific statutory provisions govern over general provisions, but noted that applying this principle to § 718.203(1) "contravenes another well-accepted precept of statutory construction which requires reconciliation among seemingly disparate provisions of a statute so as to give effect to all its parts" (citation omitted). Accordingly, the court held that the general warranties provided by developers pursuant to subsections (a) through (d) of § 718.203 applied notwithstanding the specific limitation in subsection (e). *Id.* at 1009.

unit owners,[45] the latter encompasses only fitness as to the work performed or materials supplied.[46] These warranties apply to the contractor and any lower tiered subcontractors and suppliers, but not to manufactures.[47] To be in compliance with the statutory implied warranty of fitness, the contractor (subcontractor) must provide work and materials which conform with generally accepted standards of workmanship and performance of similar work and materials meeting requirements specified in the contract.[48]

The warranties provided by the statute vary in duration from one to three years and, depending on the specific warranty provided, are measured from either the date of closing of the purchase or possession (whichever is earlier), completion of a building or improvement(s), or completion of all construction. It should be noted that with respect to warranties provided by the developer,[49] the warranty period is extended for one year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than five years.[50]

For purposes of calculating the warranty period, "completion of construction" means issuance of a certificate of occupancy from the governmental authority having jurisdiction over the work

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45. *See* Fla. Stat. § 718.203(1).

46. *See* Fla. Stat. § 718.203(2).

47. *See Harbor Landing Condo. Owners Ass'n, Inc. v. Harbor Landing, L.L.C.*, 78 So. 3d 120 (Fla. 1st DCA 2012) (holding that manufacturers are generally not "suppliers" providing a warranty under § 718.203(2)); *see also Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288 (Fla. 4th DCA 2013) (upholding dismissal of claim against manufacturer under § 718.203(2) where complaint failed to contain essential allegation that manufacturer furnished, sold, or delivered anything to the association, i.e., that it "'was in the business of making the product available to consumers,' as opposed to merely 'producing or assembling' the product" that a contractor, not a consumer, purchased and used for the project). However, under certain circumstances a manufacturer may have liability under the statute. *Harbor Landing*, 78 So. 3d at 121 ("This is not to say that a manufacturer can never be considered a supplier for purposes of the warranties provided in § 718.203(2).").

48. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995). *See D.R. Horton, Inc. - Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc.*, 266 So. 3d 1201, 1205 (Fla. 1st DCA 2018) (holding that condominium association was required to show units were uninhabitable to establish breach of implied warranties by developer and general contractor under § 718.203(1)).

49. These warranties include the roof and structural components of a building or other improvements, and as to mechanical, electrical, and plumbing elements serving improvements of a building, except mechanical elements serving only one unit. *But see Turnberry Ct. Corp. v. Bellini*, 962 So. 2d 1006 (Fla. 3d DCA 2007) (holding that developer's warranty of fitness and merchantability extended to central air conditioning unit that was integral part of luxury condominium despite developer's claim that statute excluded mechanical systems for a single unit).

50. Fla. Stat. § 718.203(1)(e).

(i.e., the building department), or, where such certificates or their equivalents are not issued, the building has reached substantial completion of the work according to the plans and specifications.[51] These warranties extend not only to initial purchasers but also to successor owners.[52] The warranties are conditioned upon routine maintenance being performed by the association (unless such maintenance is the obligation of the developer or a developer-controlled association).[53] However, the failure to perform routine maintenance must be causally related to the defect. Where it is not, a developer may still be liable notwithstanding the lack of maintenance.[54]

Statutory implied warranties may also be created by the conversion of property to a condominium. When existing improvements are converted to ownership as a residential condominium, the developer is required to establish reserve accounts for capital expenditures and deferred maintenance, provide certain warranties, or post a surety bond.[55] When the developer funds reserve accounts in accordance with the statute, the developer makes no implied warranties. As an alternative to establishing reserve accounts, or when a developer fails to properly establish such accounts, the developer is deemed to grant to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended.[56] The warranty period begins when the developer records a notice of intended conversion of the property and continues for three years thereafter, or records the declaration of condominium and continues for three years thereafter, or ends one year after owners other than the developer obtain control of the association, whichever occurs last. However,

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51. FLA. STAT. § 718.203(3). On June 16, 2015, House Bill 87 was signed into law which revised this definition, effective October 1, 2015. *See* Laws of Florida, s. 4, ch. 2015–165. Under the revised definition, "completion of construction" now includes issuance of a temporary certificate of occupancy that allows for occupancy of the entire building.

52. FLA. STAT. § 718.203(5).

53. FLA. STAT. § 718.203(4).

54. *See Stroshein v. Harbor Hall Inlet Club II Condo. Ass'n, Inc.*, 418 So. 2d 473, 474 (Fla. 4th DCA 1982) (holding developer liable for breach of implied warranty of fitness for defects in tennis courts despite association's lack of routine maintenance where cracks in court surface did not result from lack of maintenance but instead from improper drainage and inadequate foundation).

55. FLA. STAT. § 718.618(1).

56. FLA. STAT. § 718.618(6).

in no event will the warranty period last more than five years.[57] As with new condominiums, implied warranties on converted properties are conditioned upon routine maintenance being performed, unless maintenance is the obligation of the developer or a developer-controlled association.[58] These warranties, too, extend to subsequent purchasers.[59]

The Condominium Act also provides purchasers with a remedy against the developer for false or misleading statements made in advertising or promotional materials including, but not limited to, the prospectus. Under the Condominium Act, a buyer may seek rescission of the purchase agreement or damages before closing. After closing, the buyer is limited to damages only and must bring the claim within one (1) year following the later of the buyer's closing, issuance of a certificate of occupancy (or its equivalent in the relevant jurisdiction), or the developer's completion of the common elements and recreational facilities (whether pursuant to written contract or applicable law), but in no event later than five (5) years after the closing.[60] The prevailing party in any action under this section is entitled to recover reasonable attorney's fees.[61] This section may provide an alternative remedy where a buyer reasonably relies upon statements which are material to the condition of the property though such condition may not otherwise constitute what is commonly understood as a "defect."

1-4 OTHER STATUTORY REMEDIES

In addition to warranty claims, other statutory remedies are available to address construction defects. These may be pursued along with warranty claims or may be brought independently where warranty claims do not lie.

1-4:1 Florida Building Code Violation

The Florida Building Code Act ("the FBC Act")[62] provides a private cause of action to anyone damaged as a result of a material violation of the statute or the Florida Building Code against the

57. Fla. Stat. § 718.618(6).
58. Fla. Stat. § 718.618(6)(a).
59. Fla. Stat. § 718.618(6).
60. Fla. Stat. § 718.506(1)(a)-(d).
61. Fla. Stat. § 718.506(2).
62. Fla. Stat. § 553.70, *et seq.*

person or party who committed the material violation.[63] In other words, where construction fails to comply with the Florida Building Code, then, notwithstanding any other available remedies, the FBC Act provides an aggrieved party with a civil remedy against the contractor.[64] However, liability under the FBC Act generally does not extend to the contractor's qualifying agent.[65] Furthermore, a remedy under the statute is unavailable when all required permits are obtained, the building department or other governmental agency having jurisdiction over the work approves the plans, and the construction project passes all required inspections under the code, unless the person or party (committing the violation) knew or should have known that the material violation existed.[66] Moreover, where a contractor establishes compliance with the statute by demonstrating that it obtained the required permits, the plans were approved, and the construction passed all required inspections, a party's bare allegation that the contractor "knew or should have known that violations existed" is insufficient to establish a claim under the statute.[67]

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63. Fla. Stat. § 553.84. The statute was amended by ch. 2023-22, Laws of Florida, and became effective on April 13, 2023. The statute now requires a "material" violation, as opposed to any violation, and defines "material violation" as a Florida Building Code violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.

64. The statute may also be used by a contractor against a subcontractor that provides defective work. *See Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So. 2d 61, 64 (Fla. 2d DCA 2005). Architects, too, may have liability where their design fails to comply with the building code. *See Edward J. Seibert, A.I.A. Arch. & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc.*, 573 So. 2d 889, 892 (Fla. 2d DCA 1990), *rev. denied*, 583 So. 2d 1034 (Fla. 1991) ("It is clear that Seibert had a duty to design the second floor units and their fire exits in a manner that complied with the Standard Building Code and his failure to use due care in doing so would make him liable.").

65. *Scherer v. Villas Del Verde Homeowners Ass'n, Inc.*, 55 So. 3d 602, 604 (Fla. 2d DCA 2011) (holding that chapter 489, Florida Statutes, the licensing and regulatory chapter governing construction contracting, does not create a private cause of action against the individual qualifier for a corporation acting as a general contractor) (citing *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994)). *Cf. Evans v. Taylor*, 711 So. 2d 1317, 1318 (Fla. 3d DCA 1998) (finding *Murthy* inapplicable where claims were not brought under Chapter 489, Florida Statutes, and qualifying agent personally performed work).

66. *See* Fla. Stat. § 553.84. The statute was amended by ch. 2023-22, Laws of Florida, and became effective on April 13, 2023. The statute now requires a "material" violation, as opposed to any violation, and defines "material violation" as a Florida Building Code violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.

67. *See Cohen v. Hartley Bros. Constr., Inc.*, 940 So. 2d 1251, 1253 (Fla. 1st DCA 2006); *see also Gazzara v. Pulte Home Corp.*, 207 F. Supp. 3d 1306, 1310 (M.D. Fla. 2016) (dismissing building code violation claim as entirely conclusory where plaintiff alleged only that builder

1-4:2 Florida Deceptive and Unfair Trade Practices Act

Known as Florida's "little FTC (Federal Trade Commission) Act", the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA" or "Act"), protects the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.[68] The Act focuses on whether an act is deceptive, not whether a defendant knew that the allegedly violative conduct was occurring.[69] FDUTPA provides a civil remedy to anyone aggrieved by a violation of the statute without regard to any other remedy or relief to which such person is entitled.[70] While earlier versions of the statute applied only to "consumers" engaged in a "consumer transaction," the current statute applies to both private individuals and commercial interests.[71] Thus, Florida courts have concluded that "the 1993 Amendments to FDUTPA made clear that the statute is not limited to purely "consumer transactions," but rather apply "to any act or practice occurring 'in the conduct of any trade or commerce' even as between purely commercial interests."[72] However, a "consumer transaction" actionable under the statute may not apply to sophisticated commercial transactions between a manufacturer and distributor.[73]

"installed stucco siding which violated the Code, causing the stucco siding to fail, thus Pulte violated Section 553.84").

68. *See* Fla. Stat. § 501.202(2). Those considering an action under the statute should be cautioned that upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees. Fla. Stat. § 501.211(3).

69. *Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297, 1302 (S.D. Fla. 2011).

70. Fla. Stat. § 501.211(1).

71. *See James D. Hinson Elec. Contracting, Inc. v. Bellsouth Telecomms., Inc.*, No. 3:07-cv-598-J-32MCR, 2008 WL 360803, at *2 (S.D. Fla. Feb. 8, 2008). As noted by the court, the statute's 1993 amendment deleted FDUTPA's definitions of "consumer transaction" and "supplier" while broadening its definition of "consumer" to include "any commercial entity."

72. *James D. Hinson Elec. Contracting, Inc. v. Bellsouth Telecomms., Inc.*, No. 3:07-cv-598-J-32MCR, 2008 WL 360803, at *2 (S.D. Fla. Feb. 8, 2008).

73. *Golden Needles Knitting & Glove Co., Inc. v. Dynamic Mktg. Enters., Inc.*, 766 F. Supp. 421 (W.D. N.C. 1991) (applying Florida law); *but see Crowley Liner Servs., Inc. v. Transtainer Corp.*, No. 06-21995-CIV-O'SULLIVAN, 2007 WL 433352, at *4 (S.D. Fla. Feb. 6, 2007) (calling into doubt *Golden Needle* since it was based on an earlier version of the statute before the legislature's July 1, 2001 amendments effectively broadened the scope of "consumer transactions," allowing a broader class of complainants).

It should be noted that a claim under FDUTPA need not involve multiple transactions. Instead, it can "aris(e) from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract."[74] While several courts have found that a cause of action for civil damages under the Act is legally insufficient where the plaintiff fails to demonstrate that it has not previously been engaged in the business involved,[75] or where the plaintiff is pursuing a competitor,[76] the continued validity of these decisions is questionable given the 1993 amendments to the statute that broadened the reach of the Act beyond what had previously been limited to "consumer transactions."[77] Further, a claim under the

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74. *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003).

75. *See, e.g., Monsanto Co. v. Campuzano*, 206 F. Supp. 2d 1252, *modified* 206 F. Supp. 2d 1270 (S.D. Fla. 2002); *Darrell Swanson Consol. Servs. v. Davis*, 433 So. 2d 651 (Fla. 1st DCA 1983) (citing *Black v. Dep't of Legal Affairs*, 353 So. 2d 655 (Fla. 2d DCA 1977)).

76. *See, e.g., M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) (rejecting claim under the Act involving competing home builders) (citing *Darrell Swanson Consol. Servs. v. Davis*, 433 So. 2d 651, 652 (Fla. 1st DCA 1983) and *Bryan Heating & Air Conditioning Corp., Inc. v. Carrier Corp.*, 597 F. Supp. 1045, 1053 (S.D. Fla. 1984)).

77. *See Merrill Lynch Bus. Fin. Servs., Inc. v. Performance Mach. Sys. U.S.A., Inc.*, No. 04-60861-CIV-MARTINEZ-KLEIN, 2005 WL 975773, at *9 (S.D. Fla. Mar. 4, 2005) ("The relevant discussion (in *Black v. Department of Legal Affairs*) turned on an interpretation of the term 'consumer transaction' which was omitted from the statute in 1993 when FDUTPA underwent substantial revision.") (citing *Tampa Bay Storm, Inc. v. Arena Football League, Inc.*, No. 96-29-CIV-T-17C, 1998 WL 182418, at *7 (M.D. Fla. Mar. 19, 1998) (discussing some of the differences in the pre- and post-1993 versions of FDUTPA)). *Accord Global Tech Led, LLC v. Hilumz Int'l Corp.*, No. 2:15-cv-553-FtM-29CM, 2017 WL 558669 (M.D. Fla. Feb. 14, 2017). As the court in *Global Tech* explained:

> It is true that the Eleventh Circuit, construing a prior version of the FDUTPA [in *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1494 (11th Cir. 1990)], concluded that the statute "[did] not apply to suits between competitors." But, in that version of the statute, the damages provision (FLA. STAT. 501.211(2)) allowed only "consumers" to seek damages, which Florida courts interpreted as preventing suits for money damages by those currently or previously engaged in the same business as the defendant . . . . In the 2001 version of the statute, the word "consumer" in Section 501.211(2) was replaced with the word "person." . . . This change has led numerous courts—including this Court and at least two different Florida appellate courts—to conclude that the legislature intended to allow competitors to seek damages under the FDUTPA . . . . Accordingly, the Court finds that Defendants' status as Plaintiffs' "competitors" does not prevent Defendants from maintaining a claim for damages under the FDUTPA.

Global Tech Led, 2017 WL 558669, at *5 (internal citations omitted). *See also Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cnty., Inc.*, 169 So. 3d 164, 169 (Fla. 4th DCA 2015) ("We agree with the reasoning in *Kelly.* 'It is a well-established presumption that the legislature intends to change the law when it amends a statute.' Therefore, the

statute cannot be stated based upon oral representations which are in contradiction of written terms of a contract, because reliance on such representations is unreasonable as a matter of law.[78] Although a FDUTPA claim is somewhat similar to a claim sounding in fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.[79] Thus, a plaintiff is not required to prove fraud to state a claim under the Act.[80] It is sufficient to show that a defendant "knowingly fails to disclose a material defect that diminishes a product's value."[81]

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legislative change regarding the claimant able to recover under FDUTPA from a 'consumer' to a 'person' must be afforded significant meaning. This change indicates that the legislature no longer intended FDUTPA to apply to only consumers, but to other entities able to prove the remaining elements of the claim as well.") (internal citation omitted). It should be noted that the Eleventh Circuit declined to extend *Caribbean* in *Ounjian v. Globoforce, Inc.*, 89 F. 4th 852, 860 (11th Cir. 2023) (noting that, while a plaintiff need not be a consumer to assert a FDUPTA claim, a plaintiff must "prove that there was an injury or detriment to consumers.") (quoting *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cnty., Inc.*, 169 So. 3d 164, 169 (Fla. 4th DCA 2015)) (emphasis omitted)); *see also Stewart Agency, Inc. v. Arrigo Enters.*, 266 So. 3d 207, 212 (Fla. 4th DCA 2019) ("While an entity does not have to be a consumer to bring a FDUTPA claim, it still must prove the elements of the claim, including an injury to a consumer.").

78. *Dorestin v. Hollywood Imps., Inc.*, 45 So. 3d 819, 825 (Fla. 4th DCA 2010).

79. *Koch v. Royal Wine Merchants, Ltd.*, 847 F. Supp. 2d 1370 (S.D. Fla. 2012); *State of Florida, Off. of Att'y Gen., Dep't of Legal Affairs v. Wyndham Int'l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004). *See SIG, Inc. v. AT & T Digital Life, Inc.*, 971 F. Supp. 2d 1178, 1195 (S.D. Fla. 2013) (noting that FDUTPA "sweeps far more broadly than the doctrine of fraud or negligent misrepresentation") (internal citation omitted).

80. *State of Florida, Off. of Att'y Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005).

81. *Matthews v. Am. Honda Motor Co., Inc.*, No. 12-60630-CIV-WILLIAMS, 2012 WL 2520675, at *3 (S.D. Fla. June 6, 2012) (citing *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. 1st DCA 2000) (finding reliance not required where alleged nondisclosure and deceptive practice by wireless communication services provider reduced value of cell phones)). *See Felice v. Invicta Watch Co. of Am., Inc.*, No. 16-CV-62772-RLR, 2017 WL 3336715, at *3 (S.D. Fla. Aug. 4, 2017) (finding allegations that *Invicta* misrepresented a watch's suitability for diving and water-related activities and concealed known defects in advertising campaign designed to entice consumers to purchase products known to be defective, stated a claim under the Act). *Cf. Carriuolo v. Gen. Motors Co.*, 823 F.3d 977 (11th Cir. 2016) (finding misrepresentations about vehicle crash ratings actionable under the Act despite no defects in the vehicles). While *Carriuolo* did not involve a construction defect claim, it is instructive. In considering the appropriateness of class certification for alleged misrepresentations by General Motors regarding the crash safety ratings of its vehicles, the Eleventh Circuit affirmed the lower court's ruling in favor of certification. In doing so, the Court implicitly found that the plaintiffs stated claims under FDUTPA even though there was no allegation that the vehicles were in any way defective. The fact that General Motors incorrectly represented that its vehicles had certain crash ratings when they did not (which allegedly reduced their value), satisfied the requirements of the statute:

> FDUTPA prohibits '[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.' . . . To satisfy the first element,

A person who has suffered a loss as a result of a violation of the statute may recover actual damages, plus attorney's fees and court costs.[82] As a general rule, the measure of actual damages under FDUTPA is the difference in market value of the product in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the agreement between the parties. However, the purchase price is the appropriate measure of actual damages when a product is rendered valueless as a result of the defect.[83] Thus, while FDUTPA might provide a remedy to recover certain costs associated with defective construction or misrepresentations concerning the suitability of building materials or systems, only "actual damages" are recoverable.[84] For purposes of recovery under FDUTPA, "actual damages" do not include consequential or exemplary damages.[85] In order to recover attorney's fees, a party must not only prevail under the Act, but also recover a net judgment in the litigation.[86] An award of fees under the

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> the plaintiff must show that 'the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances.' . . . Under Florida law, an objective test is employed in determining whether the practice was likely to deceive a consumer acting reasonably. That is, '[a] party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.'

Id. at 983 (internal citations omitted). Thus, a manufacturer or supplier of a construction product or building system that does not perform as represented or meet certain advertised standards may have liability under the Act even in the absence of proof that the product is defective.

82. Fla. Stat. § 501.211(2).

83. *Clear Marine Ventures Ltd. v. Brunswick Corp.*, No. 08-22418-CIV-MORENO, 2010 WL 528477, at *3 (S.D. Fla. Feb. 11, 2010) (citing *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002)); *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311, 314 (Fla. 4th DCA 1998); *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. 3d DCA 1984).

84. *See Clear Marine Ventures Ltd. v. Brunswick Corp.*, No. 08-22418-CIV-MORENO, 2010 WL 528477, at *3 (S.D. Fla. Feb. 11, 2010); *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584–85 (Fla. 3d DCA 1984).

85. *See, e.g., Rollins, Inc. v. Heller*, 454 So. 2d 580, 584–85 (Fla. 3d DCA 1984) (disallowing value of stolen property and punitive damages where burglar alarm failed); *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla. 1st DCA 1985) (disallowing costs of repair of termite damage where termite inspection report was false); *Clear Marine Ventures Ltd. v. Brunswick Corp.*, No. 08-22418-CIV-MORENO, 2010 WL 528477, at *4 (S.D. Fla. Feb. 11, 2010) (disallowing costs of repair, stigma damages and other consequential damages for defective custom sports fishing vessel); *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, No. 16-17450, 2017 WL 3207125, at *2 (11th Cir. July 28, 2017) (disallowing lost profits).

86. *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 368 (Fla. 2013); *see Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 270 (Fla. 1st DCA 1985); *see also Banner v. Law Off. of David J. Stern, P.A.*, 198 So. 3d 1133, 1137 (Fla. 4th DCA 2016).

Act is discretionary.[87] Once the court determines entitlement, the prevailing party may recover fees spent on the entire case unless fees are attributable to attorney services which are clearly unrelated to the FDUTPA claim.[88]

The statute does not cover claims for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.[89] The statute also has no application in other contexts that may relate to defective construction.[90] The Act has, though, been applied to real estate transactions, and thus to the prospective purchase of a condominium, since "trade or commerce" within the meaning of the statute is defined as trade in "any property," which encompasses real estate transactions.[91] The Act may also provide a remedy against a manufacturer that makes misleading

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87. *See Humane Soc'y of Broward Cnty., Inc. v. Fla. Humane Soc'y*, 951 So. 2d 966 (Fla. 4th DCA 2007). In exercising its discretion, a trial court may consider several non-exclusive factors such as: (1) the scope and history of the litigation; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting in similar circumstances; (4) the merits of the respective positions-including the degree of the opposing party's culpability or bad faith; (5) whether the claim brought was not in subjective bad faith but frivolous, unreasonable, groundless; (6) whether the defense raised a defense mainly to frustrate or stall; (7) whether the claim brought was to resolve a significant legal question under FDUTPA law. *Id*. at 971.

88. *See Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 271 (Fla. 1st DCA 1985) ("[S]ection 501.2105 contemplates recovery of attorney's fees for hours devoted to the entire litigation or civil case and does not require allocation of attorney time between the chapter 501 count and other alternative counts based on the same consumer transaction unless the attorney's services clearly were not related in any way to establishing or defending an alleged violation of chapter 501."); *see also Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 370 (Fla. 2013) ("[E]ven if a FDUTPA claim is based on the same transaction as an alternative theory of recovery, a court may allocate attorney's fees under section 501.2105 for only the FDUTPA portion of an action if either (1) counsel admits that the other services provided in that action were unrelated to the FDUTPA claim, or (2) a party establishes that the services related to non-FDUTPA claims 'were clearly beyond the scope of a 501 proceeding.'") (quoting *Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 272 (Fla. 1st DCA 1985)). *See Mandel v. Decorator's Mart, Inc. of Deerfield Beach,* 965 So. 2d 311, 314 (Fla. 4th DCA 2011). It bears noting that a party who successfully defends a FDUTPA claim may be awarded fees and costs even where it does not prevail on a counterclaim; *see also Chow v. Cham Yam Chau*, 640 Fed. Appx. 834, 842 (11th Cir. 2017) (construing Florida precedent and holding that defendant was "prevailing party" for purposes of award of fees and costs under FDUTPA even though it did not succeed on its counterclaims).

89. Fla. Stat. § 501.212(3).

90. *See, e.g.*, Fla. Stat. § 501.212(6) (relating to claims against brokers for sale of real estate) and § 501.212(7) (relating to commercial real property).

91. *See Zlotnick v. Premier Sales Grp., Inc.*, 431 F. Supp. 2d 1290 (S.D. Fla. 2006), *aff'd,* 480 F.3d 1281 (11th Cir. 2007).

representations about its products.[92] Moreover, a contractor's incomplete work may give rise to liability under the Act.[93] FDUTPA has even been applied to the breach of a commercial lease where the failure to maintain the premises led to numerous code violations and the collapse of a wall of a building.[94] In determining whether alleged conduct violates FDUTPA, a court should also take into consideration whether the Federal Trade Commission and other federal courts deem such conduct to be an unfair method of competition or an unconscionable, unfair or deceptive act or practice under federal law.[95]

1-4:3 Home Warranty Associations

Home Warranty Associations, which are governed by statute,[96] are defined as "any corporation or any other organization, other than an authorized insurer, issuing home warranties.[97] The

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92. *See Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297 (S.D. Fla. 2011) (allegation that window and door manufacturer made misleading representations about its products that would have deceived an objectively reasonable person was sufficient to demonstrate causation for purposes of stating claim under FDUTPA; *see also Carriuolo v. Gen. Motors Co.*, 823 F.3d 977 (11th Cir. 2016) (finding vehicle manufacturer's misrepresentations about crash ratings actionable under FDUTPA).

93. *See Tri-County Plumbing Servs., Inc. v. Brown*, 921 So. 2d 20 (Fla. 3d DCA 2006) (homeowner brought successful claim under FDUTPA against plumbing contractor that walked off project and left home without running water, with holes in walls, and with trench dug around home).

94. *See Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274 (Fla. 4th DCA 2005).

95. *State of Florida, Off. of Att'y Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005).

96. *See generally* Fla. Stat. § 634.301, *et seq.*

97. Fla. Stat. § 634.001(c). Home warranties or warranties are defined as:

> any contract or agreement whereby a person undertakes to indemnify the warranty holder against the cost of repair or replacement, or actually furnishes repair or replacement, of any structural component or appliance of a home, necessitated by wear and tear or an inherent defect of any such structural component or appliance or necessitated by the failure of an inspection to detect the likelihood of any such loss. However, this part does not prohibit the giving of usual performance guarantees by either the builder of a home or the manufacturer or seller of an appliance, as long as no identifiable charge is made for such guarantee. This part does not permit the provision of indemnification against consequential damages arising from the failure of any structural component or appliance of a home, which practice constitutes the transaction of insurance subject to all requirements of the insurance code. This part does not apply to service contracts entered into between consumers and nonprofit organizations or cooperatives the members of which consist of condominium associations and condominium owners and which perform repairs and maintenance for appliances or maintenance

statute sets forth certain licensing, financial, reporting, and other requirements for home warranty associations (including insurers that act as home warranty associations), as well as certain prohibited activities.[98] Violation of the statute is grounds for suspension or revocation of any license issued to a home warranty association pursuant to the statute,[99] and in the case of an insurer, can result in the suspension or revocation of its certificate of authority to do business as an insurer in the State of Florida.[100] The statute also sets forth the required format and contents of, as well as the procedures for issuance and assignment of, a home warranty.[101] Relevant to defect claims, a person damaged by a violation of the statute has a civil remedy, which includes actual damages or $500, whichever is greater, together with court costs and attorney's fees.[102] Punitive damages may be awarded to a prevailing plaintiff, but only where the acts giving rise to the violation "occur with such frequency as to indicate a general business practice and these acts are: (a) Willful, wanton, and malicious; or (b) In reckless disregard for the rights of any insured."[103] Notably, before punitive damages under the statute may be sought, a plaintiff must post in advance "the costs of discovery" which are forfeited to the defendant if no punitive damages are awarded.[104] Prior to initiating a civil action pursuant to the statute, a plaintiff must give written notice to the department (of financial services) and the insurer stating with specificity the facts which allegedly constitute the violation and the law upon which the plaintiff is relying. The notice must also shall state it is given in order to perfect the right to pursue the civil remedy authorized by the statute. If, within 30 days after

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> of the residential property. This part does not apply to a contract or agreement offered by a warranty association in compliance with part III, provided such contract or agreement only relates to the systems and appliances of the covered residential property and does not cover any structural component of the residential property.

98. *See, e.g.*, Fla. Stat. §§ 634.303–634.304; §§ 634.306–634.307; §§ 634.3076–634.3077; § 634.3078; § 634.319; §§ 634.321–634.322; and § 634.326. These are just some of the requirements, and other applicable provisions should also be reviewed.

99. *See* Fla. Stat. § 634.308.

100. *See* Fla. Stat. § 634.308(4).

101. *See* Fla. Stat. § 634.312.

102. *See* Fla. Stat. § 634.3284(1).

103. *See* Fla. Stat. § 634.3284(2).

104. *See* Fla. Stat. § 634.3284(3).

receiving the notice, the damages are paid or the circumstances giving rise to the violation are corrected, then no action may be brought pursuant to the statute.[105] Significantly, the statute does not permit a plaintiff to bring a class action suit against a home warranty association.[106]

1-5 COMMON LAW CLAIMS

1-5:1 Implied Warranty Claims

In the seminal case of *Gable v. Silver*, the Florida Supreme Court extended common law implied warranties of merchantability and fitness to the sale of new homes and condominiums.[107] As the Court would later explain: "With *Gable*, Florida joined a rapidly growing minority of states which has recognized, as an exception to the general rule of caveat emptor in sales of real estate, an implied warranty of habitability or merchantability in the sale of new residences. A majority of the jurisdictions in this country now recognizes such a warranty."[108] The test for a breach of implied warranty is "one of reasonableness, i.e., whether the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality."[109] However, these warranties do not apply in the commercial setting where the doctrine of *caveat emptor* still governs.[110] It is also well established

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105. *See* FLA. STAT. § 634.3284(3).

106. *See* FLA. STAT. § 634.3284(4).

107. *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972), *cert. discharged*, 264 So. 2d 418 (Fla. 1972). In denying further (*certiorari*) review, the Florida Supreme Court adopted the holding of the district court of appeal making it binding precedent throughout Florida. *See also Putnam v. Roudebush*, 352 So. 2d 908 (Fla. 2d DCA 1977).

108. *Conklin v. Hurley*, 428 So. 2d 654, 656 (Fla. 1983). *Conklin*, however, declined to extend the warranty created by *Gable* to the purchase of an empty lot containing a defective seawall.

109. *Putnam v. Roudebush*, 352 So. 2d 908, 910 (Fla. 2d DCA 1977).

110. *See, e.g., Haskell Co. v. Lane Co., Ltd.*, 612 So. 2d 669 (Fla. 1st DCA 1993). *Cf. Transcapital Bank v. Shadowbrook at Vero, LLC*, No. 4D14-4650, 2017 WL 3169271 (Fla. 4th DCA July 26, 2017) (applying doctrine to buyer's fraud claim in commercial real estate transaction). "This doctrine places the duty to examine and judge the value and condition of the property solely on the buyer and protects the seller from liability for any defects." *Id.* at *4 (quoting *Turnberry Ct. Corp. v. Bellini*, 962 So. 2d 1006, 1007 (Fla. 3d DCA 2007) (citation omitted)). There are, however, several exceptions to the doctrine, such as: "(1) where some artifice or trick has been employed to prevent the purchaser from making independent inquiry; (2) where the other party does not have equal opportunity to become apprised of the fact; and (3) where a party undertakes to disclose facts and fails to disclose the whole truth." *Id.* at *5 (quoting *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So. 2d 363, 364 (Fla. 4th DCA 1994) (citation omitted)). Additionally, the doctrine is inapplicable

that a developer may be held liable for damages for breach of implied warranties for failure to construct according to plans or in a workmanlike or acceptable manner or for failure to provide a unit or building which is reasonably habitable.[111] These warranties run in favor of the condominium association and (at least) the first purchasers of the units from the developer.[112] It should be noted, however, that common law implied warranties have now been expressly limited by statute.[113]

1-5:2 Tort Claims

Generally, parties in privity that suffer purely economic losses are limited to the remedies afforded by their contract or implied by law.[114]

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where the seller breaches a fiduciary duty to the buyer. *Id.* at *5 (citing *Glass v. Craig*, 83 Fla. 408, 91 So. 332, 335 (1922)).

111. *Schmeck v. Sea Oats Condo. Ass'n, Inc.*, 441 So. 2d 1092 (Fla. 5th DCA 1983) (citations omitted); *see David v. B&J Holding Corp.,* 349 So. 2d 676 (Fla. 3d DCA 1977) (builder impliedly warrants that unit will be constructed in accordance with specifications); *Fort Towers S., Inc. v. Hill York Sales Corp.*, 312 So. 2d 512 (Fla. 3d DCA 1975) (applying implied warranties of fitness and merchantability to installation of defective air conditioning units by subcontractor); *Lonnie B. Adams Bldg. Contractor v. O'Connor*, 714 So. 2d 1178 (Fla. 2d DCA (1998) (renovation contractor owed duty to owner to perform the contract in a workmanlike manner); *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th DCA 1989) (same); *Drexel Props., Inc. v. Bay Colony Club Condo., Inc*., 406 So. 2d 515, 519 (Fla. 4th DCA 1981) ("[A]s to original purchasers, there exists an implied warranty of substantial compliance with plans and specifications approved by the governmental authority, of compliance with applicable building codes, and of fitness and merchantability; *cf. Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc.*, 235 So. 2d 548, 552 (Fla. 1st DCA 1970) (holding subcontractor not liable for breach of implied warranty where brick defects were latent and subcontractor was required to furnish specified brick from a particular manufacturer); *see Florida Bd. of Regents v. Mycon Corp.*, 651 So. 2d 149, 153 (Fla. 1st DCA 1995) (noting that if contractor is directed to use a particular brand-name product which cannot perform as specified, contractor should not be held liable if product fails to perform or is defective). This does not mean that the developer must deliver a perfect house. But it does mean that major defects, as determined by the trier of fact, entitle the original buyer to damages to remedy or repair the defects."), *disapproved on other grounds, Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc*., 620 So. 2d 1244 (Fla. 1993), *receded from, Tiara Condo. Ass'n, Inc. v. Marsh & McClennan Cos., Inc*., 110 So. 3d 399 (Fla. 2013).

112. *Schmeck v. Sea Oats Condo. Ass'n, Inc.*, 441 So. 2d 1092, 1097 (Fla. 5th DCA 1983).

113. *See* Fla. Stat. § 553.835 (2012). The statute was created in direct response to the holding of *Lakeview Reserve Homeowners v. Maronda Homes, Inc*., 48 So. 3d 902 (Fla. 5th DCA 2010) (extending builder's implied warranty obligations of fitness for a particular purpose, merchantability, and habitability to private roads, drainage systems, retention ponds, and underground pipes "immediately supporting" residential subdivision). Per its enabling legislation, the statute took effect July 1, 2012, and purported to apply to all cases accruing before, pending on, or filed after that date. *See* Laws of Florida, s. 3, ch. 2011–161. The Florida Supreme Court subsequently upheld the decision, ruling that the statute could not be applied retroactively. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1276 (Fla. 2013).

114. *See Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) (discussing application of economic loss rule to parties in privity or remote manufacturers

However, where there is personal injury or damage to "other property" arising from defects in manufacturing, construction, or design, certain tort claims are permissible and not barred by the economic loss rule (*see* Section 1-6:1 below). While *Tiara*[115] all but eliminated the economic loss rule except in limited circumstances involving claims against manufacturers, certain limitations on tort liability still remain.

1-5:2.1 Strict Liability

The doctrine of strict liability holds a manufacturer liable in tort where it places an unreasonably dangerous product on the market, knowing that it will be used without inspection for defects, and it proves to have a defect that causes personal injury or property damage.[116] The doctrine has since been expanded "to others in the distributive chain including retailers, wholesalers, and distributors."[117] Thus, liability may be imposed under a theory of strict liability in tort, as distinct from a breach of implied warranty of merchantability, for injury to the user of a defective product or to a bystander.[118] The elements of a cause of action for strict liability in tort are: (1) The manufacturer's relationship to the product in question; (2) The product has a defective and unreasonably dangerous condition; and (3) The existence of a proximate causal connection between such condition and the user's injuries or damages.[119] Strict liability applies regardless of whether the injury is the result of a manufacturing or design defect.[120] In order to hold

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of products that cause damage only to the product itself), *receded from, Tiara Condo. Ass'n, Inc. v. Marsh & McClennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013), *abrogation recognized by Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383 (Fla. 2d DCA 2018).

115. *Tiara Condo. Ass'n, Inc. v. Marsh & McClennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013).

116. *See West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976).

117. *Samuel Friedland Fam. Enters. v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994).

118. *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 89 (Fla. 1976); *see Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla. 1988) (holding that doctrine of strict liability in tort announced in *West* supplants all non-privity, breach of implied warranty cases, but that latter remedy remains where privity of contract is shown).

119. *Ford Motor Co. v. Hill*, 404 So. 2d 1049 (Fla. 1981) (citing *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976)).

120. *Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1051 (Fla. 1981); *see McConnell v. Union Carbide Corp.*, 937 So. 2d 148 (Fla. 4th DCA 2006) (same), *disapproved on other grounds*, *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 516 (Fla. 2017); *Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331 (Fla. 1st DCA 1983) (applying strict liability to elevator manufacturer regardless of whether alleged defects were in design or manufacturing).

the manufacturer liable in tort under a theory of strict liability, the product must have been used for its intended purpose.[121] Under certain circumstances, the doctrine has been used to impose liability on contractors performing activities with a "high degree of risk."[122] The doctrine does not, however, impose liability on contractors for structural improvements to real property.[123] Similarly, the doctrine does not apply to the design of structural improvements.[124]

1-5:2.2 Negligence

Unlike strict liability claims, negligence arises when one owing a duty to another breaches that duty, thereby proximately causing injury or damage to another.[125] The focus in negligence is not whether one intends to cause a specific injury to another, but whether one's

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121. *See High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992) (manufacturer of electrical transformers was not subject to strict liability for injuries sustained as a result of exposure to polychlorinated biphenyls (PCBs) that occurred during dismantling of transformers at scrap metal salvage business, because of substantial alteration of product at time of exposure and because dismantling of product was not intended "use").

122. *See Hutchinson v. Capeletti Bros., Inc.*, 397 So. 2d 952 (Fla. 4th DCA 1981) (pile driving); *Morse v. Hendry Corp.*, 200 So. 2d 816 (Fla. 2d DCA 1967) (blasting).

123. *See, e.g., Neumann v. Davis Water & Waste, Inc.*, 433 So. 2d 559 (Fla. 2d DCA 1983), *rev. denied*, 441 So. 2d 632 (Fla. 1983) (holding that strict liability did not extend to structural improvements to real estate and, hence, did not constitute a basis for recovery of claim for wrongful death of three-year-old who drowned in defective sewage treatment tank which was installed or assembled by contractor as an integral part of a sewage facility); *see also Jackson v. L.A.W. Contracting Corp.*, 481 So. 2d 1290 (Fla. 5th DCA 1986) (holding that roadwork contractor which mixed road sealer with water according to manufacturer's instructions for use prior to applying sealer to private road was not a manufacturer of the sealer and could not be strictly liable as a manufacturer to motorists injured when their automobile skidded on slippery surface of roadway). Where, instead, injuries result directly from a defective product manufactured by a defendant, which product itself has been incorporated into real property before the injury from the product occurred, the doctrine may apply. *Jackson v. L.A.W. Contracting Corp.*, 481 So. 2d 1290, 1292 (Fla. 5th DCA 1986). *See also Edward M. Chadbourne, Inc. v. Vaughn*, 491 So. 2d 551 (Fla. 1986) (holding public road not a "product" for purposes of applying strict liability to contractor who repaved it); *Craft v. Wet 'N Wild, Inc.,* 489 So. 2d 1221 (Fla. 5th DCA 1986) (construction of amusement park water slide); *Seitz v. Zac Smith & Co., Inc.*, 500 So. 2d 706 (Fla. 1st DCA 1987) (construction of floodlight tower); *Simmons v. Rave Motion Pictures Pensacola, L.L.C.*, 197 So. 3d 644 (Fla. 1st DCA 2016) (construction of movie theater seating system).

124. *See Easterday v. Masiello*, 518 So. 2d 260 (Fla. 1988) (design of jail facility).

125. *See, e.g., Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003). As noted by *Johnson*:

> [t]raditionally, a cause of action based on negligence comprises four elements:
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> 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
> 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty . . . .

conduct could foreseeably cause injury.[126] Application of this theory of liability to contractors or manufacturers for defects in construction or manufacturing, or architects and engineers for defects in design, is no different, particularly where personal injury or property damage results.[127] On the other hand, where a plaintiff is seeking purely economic losses from a contractor that do not involve personal injury or property damage, a negligence claim may still be barred.[128]

Liability in negligence may also be cut off where the completed work is accepted by the owner and the defect is obvious.[129] "Under the *Slavin*[130] doctrine, a contractor cannot be held liable for injuries sustained by third parties when the injuries occur after the contractor completed its work, the owner of the property accepted the contractor's work, and the defects causing the injury were patent."[131] Where the defect is not latent, "the owner is charged with knowledge of it, and the contractor is relieved of liability because it is the owner's intervening negligence in not correcting it which is the proximate cause of the injury."[132] The test for whether a defect

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3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage . . . .

873 So. 2d 1182, at 1185 (citation omitted).

126. *See McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992) ("As to duty, the proper inquiry . . . is whether the defendant's conduct created a foreseeable zone of risk, not whether the defendant could foresee the specific injury that actually occurred."). "Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty . . . either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Id.* at 503.

127. *See, e.g., Beck v. Ritchie*, 678 So. 2d 502 (Fla. 1st DCA 1996) (involving personal injury claim where electrical contractor was allegedly negligent in securing pay phone outlet box or in failing to disconnect electrical power to wires in the box); *Atchley v. First Union Bank of Fla.*, 576 So. 2d 340 (Fla. 5th DCA 1991) (involving claim by homeowner against contractor for negligently repaired roof that leaked).

128. *See* § 1-6:1 below for discussion on the Economic Loss Rule.

129. *See Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959).

130. *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959).

131. *Plaza v. Fisher Dev., Inc.*, 971 So. 2d 918 (Fla. 3d DCA 2007) (citations omitted); *Valiente v. R.J. Behar & Co., Inc.*, 254 So. 3d 544 (Fla. 3d DCA 2018).

132. *Brady v. State Paving Corp.*, 693 So. 2d 612, 613 (Fla. 4th DCA 1997), *rev. denied*, 705 So. 2d 10 (Fla. 1997); *see Kala Invs., Inc. v. Sklar*, 538 So. 2d 909 (Fla. 3d DCA 1989) ("Under the *Slavin* rule, since its advent expanded to limit the liability of engineers and architects as well as contractors, the original wrongdoer is not relieved of liability if the defect is found to be 'latent,' that is, not apparent by use of one's ordinary senses from a casual observation of the premises, or 'hidden from the knowledge as well as from the sight and . . . not [discoverable] by the exercise of reasonable care.'") (internal citations omitted).

is patent or latent is whether the defective nature of the condition would be obvious to the owner with the exercise of reasonable care.[133] This doctrine is discussed in more detail in Section 1:6-2 below.

Unlike contractors, architects and engineers may be sued in negligence for purely economic losses despite a lack of privity.[134] In rendering services, architects and engineers, like other professionals, have a duty "imposed by law . . . to perform such services in accordance with the standard of care used by similar

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[133] *See Pep Boys-Manny, Moe & Jack, Inc. v. Four Seasons Com. Maint., Inc.*, 891 So. 2d 1160 (Fla. 4th DCA 2005).

[134] *See Moransais v. Heathman*, 744 So. 2d 973, 984 (Fla. 1999) ("We also hold that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party."), *receded from by Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013), *abrogation recognized by Martinez v. QBE Specialty Ins. Co.*, No. 8:18-cv-263-T-36AAS, 2018 WL 4354831 (M.D. Fla. Sept. 12, 2018). *See also Hewitt-Kier Constr., Inc. v. Lemuel Ramos & Assocs., Inc.*, 775 So. 2d 373 (Fla. 4th DCA 2000) (noting that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party where a "special relationship" exists). In *Hewitt-Kier*, the court found that a special relationship may exist between a contractor and an owner's design professional under § 552 of the Restatement (Second) of Torts (1976). 373 So. 2d at 375. *See also A. R. Moyer Inc. v. Graham*, 285 So. 2d 397, 402 (Fla. 1973) (holding a third-party general contractor, who may foreseeably be injured or sustain an economic loss proximately caused by the negligent performance of a supervising architect's contractual duties has a cause of action against the alleged negligent architect, notwithstanding absence of privity); *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 8 (Fla. 5th DCA 1994) (upholding negligence claim by general contractor against engineer on authority of *A. R. Moyer*); *Grace & Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 92-94 (Fla. 4th DCA 2019) (upholding claims by general contractor against supervising architect on authority of *A. R. Moyer*). As the Court in *A. R. Moyer* recognized, "[t]he power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility." *A. R. Moyer Inc.*, 285 So. 2d at 401 (internal citation omitted). The holding of *A. R. Moyer* was later limited "strictly to its facts" in *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 n.9 (Fla. 1993), based upon the economic loss rule. However, the Florida Supreme Court later receded from *Casa Clara* in *Tiara*. Thus, the original holding of *A. R. Moyer* (without limitation to its facts) would appear to remain intact. It has been held that the duty of a supervising architect to a contractor announced in *Moyer* does not extend to subcontractors. *See Spancrete, Inc. v. Ronald E. Frazier & Assocs., P.A.*, 630 So. 2d 1197, 1198 (Fla. 3d DCA 1994) (citing to *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.*, 582 So. 2d 47, 49 (Fla. 2d DCA 1991) (declining to extend *Moyer* to subcontractors absent limited exceptions)). While *Spancrete* refused to extend *A. R. Moyer* as "strictly confined to its facts," *Id.* at 1198, at least two courts post-*Tiara* have cited to *Spancrete*. *See University Cmty. Hosp., Inc. v. Pro. Serv. Indus., Inc.*, No. 8:15-cv-628-T-27EAJ, 2017 WL 740998, at *3 n.4 (M.D. Fla. Feb. 24, 2017); *Suffolk Constr. Co., Inc. v. Rodriguez & Quiroga Architects Chartered*, No. 16-CV-23851-GAYLES, 2018 WL 1335185, at *5 (S.D. Fla. Mar. 15, 2018). Thus, it would appear that the holding of *Spancrete* remains intact, though could be questioned in light of *Tiara* and its recession from *Casa Clara*. In fact, at least one federal court has questioned the holding of *Spancrete* in light of *Tiara's* overruling of *Casa Clara*, and further noted that *McElvy* "did not hold that a plaintiff's status as a subcontractor, alone, is dispositive of whether a duty exists under *Moyer*." *Bautech USA, Inc. v. Resolve Equip., Inc.*, No. 23-60703-CIV-ALTONAGA/Strauss, 2023 WL 4186395, at *5-6 (S.D. Fla. June 26, 2023).

professionals in the community under similar circumstances."[135] However, their liability has now been expressly limited by statute.[136]

Non-privity manufacturers of defective materials, on the other hand, generally have no liability in negligence for purely economic losses caused by their defective products.[137] Moreover, damages for the cost of replacing other components of a completed system which incorporated the defective product may not fall within the

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135. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th DCA 1989); *see also Bay Garden Manor Condo. Ass'n, Inc. v. James D. Marks Assocs., Inc.*, 576 So. 2d 744 (Fla. 3d DCA 1991) (holding that engineering firms that inspected apartment building and improvements before conversion into condominium could be sued in negligence by purchasers of condominium units, even though there was no privity between purchasers and engineers; engineers were hired to prepare reports of structural inspection that would guide others in making business decisions).

136. Pursuant to § 558.0035(1), Florida Statutes (2013):

> A design professional employed by a business entity or an agent of the business entity is not individually liable for damages resulting from negligence occurring within the course and scope of a professional services contract if:
>
> (a) The contract is made between the business entity and a claimant or with another entity for the provision of professional services to the claimant;
>
> (b) The contract does not name as a party to the contract the individual employee or agent who will perform the professional services;
>
> (c) The contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence;
>
> (d) The business entity maintains any professional liability insurance required under the contract; and
>
> (e) Any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract. As used in the statute, a "business entity" includes any corporation, limited liability company, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

137. *See GAF Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. 3d DCA 1984) (holding that contractor's sole remedy, if any, for economic losses sustained from defective roofing materials would be action for breach of implied warranty of merchantability or related breach of contract action against party which sold the materials); *see also Aetna Life & Cas. Co. v. Thermo-O-Disc, Inc.*, 511 So. 2d 992, 994 (Fla. 1987) (finding that buyer under contract for sale of goods could not recover economic losses in tort without a claim for personal injury or damage to property other than the allegedly defective goods). For manufacturers in privity, the proper remedy lies in warranty. *See Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988) (noting that doctrine of strict liability in tort announced in *West* supplants all non-privity, breach of implied warranty cases, but that latter remedy remains where privity of contract is shown).

exception to the rule for damage to "other property."[138] However, where a manufacturer makes direct statements to prospective purchasers about the quality or appropriateness of its products to induce the purchase of them from a third-party supplier or vendor, the strict application of privity is relaxed, and the manufacturer may be held liable for economic losses under these circumstances—albeit in the nature of a warranty claim[139] or FDUTPA claim.[140]

1-5:2.3 Misrepresentation and Nondisclosure

The essence of misrepresentation is the making of a false statement by one party that causes another party to act in reliance on the misstatement which results in some harm or loss to the relying party. Misstatements may be either intentional or unintentional. Fraud occurs where the misstatement is intentional. Where it is unintentional, negligent misrepresentation is said to occur. Oftentimes, the party making the misstatement is in a contractual relationship with the relying party. However, privity of contract is

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138. *See Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995) (barring home builder's negligence claim against manufacturer of defective chemical where treated plywood damaged structural integrity of roof, requiring replacement of plywood and other components of roof system); *see also Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993) (finding that defective concrete used in residential homes was "an integral part of the finished product"—the houses the homebuyers bargained for—and thus the "other property" exception did not apply), *receded from, Tiara Condo. Ass'n, Inc. v. Marsh & McClennan Cos., Inc.*, 110 So. 3d 399 (Fla. 2013). The Court in *Tiara* noted that its opinion in *Casa Clara* "was not unanimous, especially as to (its) characterization of 'other property.'" *Tiara*, 100 So. 3d at 414 n.5. Thus, it is not clear as to manufacturers whether "other property" still excludes other areas of completed construction incorporating the defective product which may be adversely affected by it.

139. *See Cedars of Lebanon Hosp. Corp. v. European X-Ray Distribs. of Am., Inc.*, 444 So. 2d 1068, 1072 (Fla. 3d DCA 1984); *Carnival Corp. v Rolls-Royce PLC*, No. 08-23318-CIV-BLOOM/Valle, 2009 WL 3861450, at *3 (S.D. Fla. Nov. 17, 2009) (finding significant direct contacts sufficient to meet the privity requirement where, during contacts with plaintiff, manufacturer made representations about the qualities and attributes of its propulsion system, and that plaintiffs relied on these representations in deciding to purchase the system); *see also New Nautical Coatings, Inc. v. Scoggin*, 731 So. 2d 145, 147 (Fla. 4th DCA 1999) (affirming a breach of warranty claim against a manufacturer when the manufacturer's representative was heavily involved in the transaction but a third-party shop provided the services to the plaintiff); *MacMorris v. Wyeth, Inc.*, No. 2:04CV596FTM-29DNF, 2005 WL 1528626, at *3 (M.D. Fla. June 27, 2005) (holding that under Florida law certain circumstances satisfy the privity requirement even in the absence of a direct purchase from the manufacturer).

140. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d 977 (11th Cir. 2016) (finding class certification appropriate under FDUTPA for claims involving inaccurate vehicle crash ratings); *Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297 (S.D. Fla. 2011) (allegation that window and door manufacturer made misleading representations about its products that would have deceived an objectively reasonable person was sufficient to demonstrate causation for purposes of stating claim under FDUTPA).

not required to state a claim for negligent misrepresentation. Where the parties are in privity, the misrepresentation may simply relate to one party's performance under the contract, and therefore, not be actionable as misrepresentation.[141] Nondisclosure, as its name implies, occurs when a party fails to make a statement under circumstances where it has a duty to do so. Where misrepresentation may give rise to liability in both residential and commercial settings, nondisclosure only applies in the sale of residential homes.

1-5:2.3a Fraud

To establish fraud a party must demonstrate: (1) a false statement of fact; (2) known by the defendant to be false at the time it was made; (3) made for the purpose of inducing the plaintiff to act in reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representation; and (5) resulting damage to the plaintiff.[142] Unlike negligent misrepresentation, fraud does not require *justifiable* reliance.[143] In other words, the recipient of an

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141. *See* § 1-6:1 below for discussion on the Economic Loss Rule.

142. *Poliakoff v. Nat'l Emblem Ins. Co.*, 249 So. 2d 477, 478 (Fla. 3d DCA 1971). To show reliance, "the plaintiff must demonstrate that it took action amounting to [a] substantial change of position." *Local Access, LLC v. Peerless Network, Inc.*, No. 6:14-cv-399-Orl-40TBS, 2016 WL 5373326, at *11 (M.D. Fla. Sept. 26, 2016) (quoting *Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1315 (11th Cir. 1998)). "A change of position is 'substantial' when it causes injury to the party changing its position." *Id.* at *11 (citing *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1986)).

143. *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010). Some courts continue to misstate "justifiable" reliance as an element. However, these cases often rely on *pre-Butler* decisions and should not be followed. As noted by the court in *Democratic Republic of the Congo v. Air Capital Grp., LLC*, No. 12-20607-CIV-ROSENBAUM/SELTZER, 2013 WL 3223688 (S.D. Fla. June 24, 2013):

> In its 2010 *Butler* decision, the Florida Supreme Court clarified that "[j]ustifiable reliance is not a necessary element of fraudulent misrepresentation." The Florida Supreme Court based its conclusion, in part, on the policy of prohibiting "one who purposely uses false information to induce another into a transaction from profiting from such wrongdoing." While the Court recognizes that courts continue to characterize the fourth element of fraudulent inducement as "justifiable reliance," these courts often cite *pre-Butler* authorities, and, in any event, the Florida Supreme Court has spoken definitively on the issue.

Id. at *9 n.3 (internal citations omitted); *but see Billington v. Ginn-La Pine Island, Ltd., LLLP*, 192 So. 3d 77, 85 n.4 (Fla. 5th DCA 2016) (interpreting *Butler* to still require justifiable reliance for fraud but noting that "a lack of due diligence or investigation into the truth of a representation does not negate the claim of justifiable reliance"); *see also Winfield Invs., LLC v. Pascal-Gaston Invs., LLC*, 254 So. 3d 589, 2018 WL 3946066, at *3 (Fla. 5th DCA Aug. 17, 2018) (calling into doubt *Butler*'s elimination of the justifiable reliance requirement as set forth in prior Florida Supreme Court precedent). However, in

intentional misrepresentation need not investigate its truth because "a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him."[144] Moreover, a false representation may be actionable even if made after an agreement is entered where the contract has not yet been fully performed.[145] While a party is under no affirmative obligation to discover the falsity of an intentional misstatement, a party may not, as a matter of law, rely on a statement he knows to be false,[146] or which is contradicted by a subsequent written agreement.[147] Although fraud generally deals in a false statement

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the context of settlement negotiations, in a recent decision, the Eleventh Circuit in *Affiliati Network, Inc. v. Wanamaker*, 847 Fed. Appx. 583 (11th Cir. 2021) noted that "[e]ven after *Butler*, Florida intermediate courts have continued to hold that 'following accusations of fraud, the accuser may not then 'justifiably rely' on the representations of the accused in subsequent negotiations aimed at resolving the dispute.'" *Id.* at 588.

144. *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (quoting *Gilchrest Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 336–37 (Fla. 1997)).

145. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1986) (*called into doubt on other grounds by Winfield Invs., LLC v. Pascal-Gaston Invs., LLC*, 254 So. 3d 589, 2018 WL 3946066, at *3 (Fla. 5th DCA Aug. 17, 2018)). In *Johnson*, the seller of a home-made certain misrepresentations to the buyers about the condition of the roof after the purchase and sales agreement had been signed and the initial deposit had been made pursuant to the agreement, but prior to the buyers' additional deposit and closing. Nonetheless, the Court found reliance on the misrepresentations by the buyer sufficient to establish fraud:

> To be grounds for relief, the false representations need not have been made at the time of the signing of the purchase and sales agreement in order for the element of reliance to be present. The fact that the false statements as to the quality of the roof were made after the signing of the purchase and sales agreement does not excuse the seller from liability when the misrepresentations were made prior to the execution of the contract by conveyance of the property. It would be contrary to all notions of fairness and justice for this Court to place its stamp of approval on an affirmative misrepresentation by a wrongdoer just because it was made after the signing of the executory contract when all of the necessary elements for actionable fraud are present.

Johnson, 480 So. 2d at 628.

146. *See Addison v. Carballosa*, 48 So. 3d 951, 955 (Fla. 3d DCA 2010) ("In addressing the justifiable reliance element of a fraudulent inducement claim . . . the Florida Supreme Court reaffirmed its earlier position . . . and recognized that 'there may be cases in which the falsity of a statement is obvious, and under those circumstances no cause of action could be stated, [and] it would be entirely proper for a trial court to rule against the plaintiff as a matter of law.'").

147. Courts have found that "reliance on fraudulent misrepresentations is unreasonable *as a matter of law* where the alleged misrepresentations contradict the express terms of the ensuing written agreement." *Garcia v. Santa Maria Resort, Inc.,* 528 F. Supp. 2d 1283, 1295 (S.D. Fla. 2007) (emphasis in original); declined to extend by *Molbogot v. MarineMax East, Inc.*, No. 20-cv-81254-MATTHEWMAN, 2022 WL 2670297, at * 9 (S.D. Fla. July 11, 2022) (rejecting defendant's position and finding at the summary judgment stage that fraud in the inducement claim was not barred by the wording of an "as is" contract, which did not contain

concerning a *present* or *past* fact, a promise to perform a *future* act may constitute fraud "where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform."[148]

1-5:2.3b Negligent Misrepresentation

A party is liable for negligent misrepresentation when, in the course of his business, profession or employment—or in any other transaction in which he has a pecuniary interest—he supplies false information for the guidance of others in their business transaction which causes pecuniary loss resulting from their justifiable reliance upon the information. An action for negligent misrepresentation is founded on the supplying party's failure to exercise reasonable care or competence in obtaining or communicating the false information. However, liability for negligent misrepresentation is limited to loss suffered by the person (or one of a limited group

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an explicit and specific disclaimer of liability for fraud). *See Hillcrest Pacific Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) ("A party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract."). Moreover, some courts have held that "[f]raudulent inducement claims will fail . . . where the subsequent contract simply says nothing about the allegedly false promise." *Ferox, LLC v. ConSeal Int., Inc.,* No. 14-60048-CIV-GAYLES, 2016 WL 1242165, at *9 (S.D. Fla. Mar. 30, 2016) (citations omitted). Furthermore, "a party cannot justifiably rely on representations not contained in a subsequent agreement . . . ***where the party participated in drafting the agreement and did not reduce the representations to writing.***" *Id.* (quoting *Corporate Fin., Inv. v. Principal Life Ins. Co.*, 461 F. Supp. 2d 1274, 1291 (S.D. Fla. 2006)) (emphasis in original). *See also Billington v. Ginn-La Pine Island, Ltd., LLLP*, 192 So. 3d 77 (Fla. 5th DCA 2016) (holding that "non-reliance" and "waiver" clauses in lease barred claimed for fraudulent inducement); *but see, Lower Fees, Inc. v. Bankrate, Inc*., 74 So. 3d 517, 519 (Fla. 4th DCA 2011) (holding that general provision of agreement disclaiming reliance on any representations not contained in the agreement did not bar seller's claim for rescission based upon fraudulent inducement). It should be noted that the Fourth District Court of Appeals recently distinguished *Lower Fees* in *Florida Holding 4800, LLC v. Lauderhill Mall Inv., LLC*, 317 So. 3d 121, 124 (Fla. 4th DCA 2021) (holding that no contract provision can preclude rescission on the basis of fraud in the inducement unless the provision explicitly states that fraud is not a ground for rescission). *See also Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1030 (11th Cir. 2017) (rejecting defendants' claim that "as is" and "entire agreement" clauses barred fraudulent inducement claims); *Smith v. Jackson*, No. 16-81454-CIV-MARRA, 2017 WL 1047033, at *4 (S.D. Fla. Mar. 20, 2017) ("[A]n as is clause does not bar a plaintiff from bringing a fraud claim. Specifically, the Florida Supreme Court in *Oceanic Villas* held that where an agreement is procured by fraud or misrepresentation every part of the contract is vitiated because it is well settled that a party cannot contract against liability for his own fraud.") (quoting *Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1027 (11th Cir. 2017) and citing *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689, 690 (Fla. 1941)).

148. *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367, 1372 (Fla. 4th DCA 1981) (holding that purchasers of lots stated a claim for fraud where developer, through sales brochures and oral statements from its sales personnel, promised to make certain improvements surrounding the lots in the future but failed to do so).

of persons) for whose benefit and guidance the party intends to supply the information or knows that the recipient intends to supply it.[149]

As a practical matter, intent can be difficult to establish, making it challenging to prove fraud. Thus, a claim for negligent misrepresentation should be brought simultaneously with a claim for fraud since Florida procedural law allows a party to state claims in the alternative.[150] This allows a party, which ultimately may fall short of establishing an intentional misrepresentation, to recover under a lesser negligence standard.

1-5:2.3c Nondisclosure

Unlike misrepresentation, the tort of nondisclosure does not require an affirmative misstatement, and is more in the nature of fraudulent concealment. In the seminal case of *Johnson v. Davis*,[151] the Florida Supreme Court examined then existing law in Florida (and other jurisdictions) concerning a seller's disclosure obligations in the setting of residential home sales. At the time in Florida, a seller in an "arm's length" transaction was generally under no duty to make disclosures concerning defects.[152] The trend in other

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[149] *See Gilchrest Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997) (adopting Restatement (Second) of Torts, § 552 (1977)). As the Court in *Gilchrest* recognized:

> Under [the Restatement's definition], a misrepresenter is liable only if the recipient of the information justifiably relied on the erroneous information. The comment to § 552 explains why a negligent misrepresenter should be considered less culpable than a fraudulent misrepresenter. 'The liability stated in this Section is . . . more restricted than that for fraudulent misrepresentation . . . . When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences. The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions.'

Gilchrest Timber Co., 696 So. 2d at 337 (emphasis in original omitted).

[150] *See* Fla. R. Civ. P. 1.110 ("Relief in the alternative or of several different types may be demanded."); *see also* Fed. R. Civ. P. 8(a)(3) (a pleading must contain . . . "a demand for the relief sought, which may include relief in the alternative or different types of relief.").

[151] *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1986).

[152] *See, e.g., Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876, 882 (Fla. 2d DCA 1961) ("In the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arm's length transaction is ordinarily not actionable misrepresentation unless some artifice or trick has been employed to prevent the representee from making further independent inquiry."); *Banks v. Salina*, 413 So. 2d 851, 852 (Fla. 4th DCA 1982) (sellers of home with

jurisdictions, however, had been to restrict, not extend, the doctrine of *caveat emptor* in these circumstances. Finding the law in Florida to be outdated and nonconforming "with current notions of justice, equity, and fair dealing," the Court held that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer, which is equally applicable to all forms of real property, new and used.[153] As one court has recognized: "Unlike the cause of action for fraudulent misrepresentation, a non-disclosure case under *Johnson* does not focus on the seller's state of mind motivating the non-disclosure . . . . Nothing in the Supreme Court's holding in *Johnson* indicates that actionable non-disclosure must be accompanied by the same intent to defraud required in other types of fraud cases."[154]

While *Johnson* requires disclosure by a seller of residential homes, including the seller's broker,[155] this duty has not been extended to those who develop and market such homes.[156] Moreover, the duty

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defective roof and swimming pool, of which sellers had knowledge, had no duty to disclose when parties dealing at arms-length). However, "nondisclosure of a material fact may be deemed fraudulent where the other party does not have equal opportunity to become apprised of the fact." *Ramel*, 135 So. 2d at 882 (internal citations omitted).

153. *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1986).

154. *Billian v. Mobil Corp.*, 710 So. 2d 984 (Fla. 4th DCA 1998).

155. *See Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1363–65 (Fla. 1st DCA 1987) (extending *Johnson* to broker); *Revitz v. Terrell*, 572 So. 2d 996, 998 n.5 (Fla. 3d DCA 1990) (same); *Syvrud v. Today Real Est., Inc.*, 858 So. 2d 1125 (Fla. 2d DCA 2003) (same); *Goodman v. Rose Realty West, Inc.*, 193 So. 3d 86, 87 (Fla. 4th DCA 2016) (same). Similarly, a seller's broker may also be liable to a buyer on the theories of negligent and fraudulent misrepresentation. *See Young v. Johnson*, 538 So. 2d 1387 (Fla. 2d DCA 1989). This is true even where the contract contains a "no-reliance" clause. *See Kjellander v. Abbott*, 199 So. 3d 1129, 1331 (Fla. 1st DCA 2016) (holding that buyers stated claims against brokers for fraudulent misrepresentation, fraudulent concealment, and breach of the duties of honesty, candor and fair dealing notwithstanding provision in sales contract that purchasers would rely solely on representations of sellers and third-parties other than the brokers for verification of the home's condition).

156. *See Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329 (11th Cir. 2014). *Virgilio* involved a class action against a home vendor and other entities that knowingly sold and marketed undeveloped lots in a residential subdivision without disclosing that it was adjacent to land previously used as a bombing range during World War II and remained laden with unexploded bombs, ammunition, ordnance, and related chemicals. Alleging that the vendor and entities were agents of one another, the purchasers brought claims against them under *Johnson* asserting liability for failure to disclose. While noting that the duty under *Johnson* has been extended to a seller's broker, *Virgilio*, 680 F.3d at 1336, citing *Rayner* and *Revitz*, the court declined to extend this duty to the defendants finding the absence of an agency relationship. 680 F.3d at 1337. Nor has *Johnson* been extended to commercial real estate transactions where the doctrine of *caveat emptor* still applies. *See Haskell Co. v. Lane*

to disclose hidden defects under *Johnson v. Davis* is not waived by an "as is" clause in the sales contract.[157]

1-5:3 Express Contractual Claims

Contractual claims are founded on enforceable promises. In order to be enforceable, the promises must be supported by valid consideration.[158] In the context of construction contracts, consideration is typically satisfied by parties exchanging bargained for promises (i.e., a contractor agrees to perform some scope of work in exchange for the owner's promise of payment of an agreed upon amount, along with other general terms and conditions). While most construction contracts are written, aside from the Statute of Frauds[159] which bars certain oral contracts, there is no legal impediment to enforcement of an oral agreement. Indeed, this author has pursued and prevailed on many claims based on oral promises. The challenge, however, is in establishing what the parties actually agreed to and whether there was a "meeting of the minds" on the essential terms. Whether a contract is oral or written, it is essential that the parties mutually agree upon the material terms.[160] This does not mean that all details of an agreement must be fixed in order to have a binding agreement.[161] But where there is no

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Co., Ltd., 612 So. 2d 669, 674 (Fla. 1st DCA 1993) ("However, it would appear that the doctrine still applies to leases of commercial real property. Similarly, it would appear that the doctrine continues to apply to sales of commercial real property.") (internal citations omitted); *Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc.*, 578 So. 2d 363, 364 (Fla. 3d DCA 1991) ("Nowhere does [*Johnson*] conclude that the duty of disclosure is present in the sale of commercial property . . . . Nowhere does *Johnson* address or change the long line of case law establishing caveat emptor as the rule in the sale of commercial property."); *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005) ("Johnson's application is limited to non-commercial real property transactions.").

157. *See Levy v. Creative Constr. Servs. of Broward, Inc.*, 566 So. 2d 347 (Fla. 3d DCA 1990); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1364 (Fla. 1st DCA 1987). *See also Syvrud v. Today Real Est., Inc.*, 858 So. 2d 1125, 1130 (Fla. 2d DCA 2003) (finding provision in addendum to contract that purported to disclaim, on behalf of the sellers and both brokers, any representations, warranties, or guarantees concerning the condition of the property and its fitness for a specific purpose was functional equivalent of "as is" clause which did not negate duty under *Johnson*).

158. *See* § 1-6:7 below for discussion on failure for lack of consideration.

159. *See* § 1-6:9 below.

160. *Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co.*, 773 So. 2d 96, 97 (Fla. 2d DCA 2000); *see Metropolitan Dade Cnty. v. Estate of Hernandez*, 591 So. 2d 1124 (Fla. 3d DCA 1992) (for agreement to be legally enforceable, it must be firm or definite in its essential terms).

161. *See Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 408 (Fla. 1974) ("Even though all the details are not definitely fixed, an agreement may

agreement on essential terms, an enforceable agreement does not exist.[162] What is an "'essential term' varies widely according to the nature and complexity of each transaction and is evaluated on a case-by-case basis."[163] Moreover, one party cannot retain the option to perform under an agreement, as this would make the agreement illusory and therefore unenforceable.[164]

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be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto."). *Compare Buck-Leiter Palm Ave. Dev., LLC v. City of Sarasota*, 212 So. 3d 1078, 1081–82 (Fla. 2d DCA 2017) (concluding that initial redevelopment agreement that contemplated entering future agreement was not merely an agreement to agree in future where language demonstrated that parties agreed upon essential and definite terms and intended for agreement to be binding contract) *with Aldora Aluminum & Glass Prods., Inc. v. Poma Glass & Specialty Windows, Inc.*, 683 Fed. Appx. 764, 769 (11th Cir. 2017) (holding memorandum of understanding requiring parties to enter into future lease was unenforceable where it failed to describe what would be an "acceptable (lease) agreement").

[162] *Jacksonville Port Auth., City of Jacksonville v. W. R. Johnson Enters., Inc.*, 624 So. 2d 313, 315 (Fla. 1st DCA 1993). For example, "[f]ailure to sufficiently determine quality, quantity, or price may preclude the finding of an enforceable agreement." *Id. See Truly Nolen, Inc. v. Atlas Moving & Storage Warehouse, Inc.*, 125 So. 2d 903, 905 (Fla. 3d DCA 1961) ("It is apparent that if a purported agreement is so vague and so uncertain in the specifications of the subject matter that the court cannot identify that subject matter or determine its quality, quantity or price, it will be unenforceable."); *David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990) ("'If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.'") (quoting Restatement (Second) of Contracts, § 33, comment a. (1981)); *de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 680 (Fla. 1st DCA 2007) ("A meeting of the minds of the parties on all essential elements is a prerequisite to the existence of an enforceable contract, and where it appears that the parties are continuing to negotiate as to essential terms of an agreement, there can be no meeting of the minds.").

[163] *Nichols v. Hartford Ins. Co. of the Midwest*, 834 So. 2d 217, 219 (Fla. 1st DCA 2002); *Socarras v. Claughton Hotel, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d DCA 1979) (same); *Boardwalk at Daytona Dev. LLC v. Paspalakis*, 220 So. 3d 457, 461 (Fla. 5th DCA 2016) (same). *See Giovo v. McDonald*, 791 So. 2d 38, 40 (Fla. 2d DCA 2001) ("Certainly, what is an 'essential term' of a contract differs according to circumstances."). Where an essential term is missing or the terms of the agreement are unclear, the parties' own interpretation of their agreement may govern. *See Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 407 (Fla. 1974) ("Where the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court . . . ."); *see also Circuitronix, LLC v. Kapoor*, No. 15-cv-61446-BLOOM/Valle, 2016 WL 8710148, at *4 (S.D. Fla. Dec. 19, 2016) (construing essential term of settlement agreement that was admittedly "vague and ambiguous" based upon parties' mutual understanding of term prior to entering agreement).

[164] *See Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1985) ("Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound.").

As discussed earlier, contract claims may be based on either express or implied obligations which create separate and distinct theories of recovery.[165] Even when asserting an express contract claim, it is important to note that the law creates certain implied obligations which are tied to the parties' express contractual obligations.[166] One such implied obligation is the implied covenant of good faith, fair dealing, and commercial reasonableness.[167] This implied covenant arises because "[a] contract is an agreement whereby each party promises to perform their part of the bargain in good faith, and expects the other party to do the same."[168] Thus, this implied covenant is designed to protect the contracting parties' reasonable expectations.[169] "[G]ood faith means honesty, in fact, in the conduct of contractual relations."[170] However, as one court has recognized, the rights conferred by the implied covenant of good faith and fair dealing are limited.[171] For example, there must first

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165. *See* §§ 1-2, 1-3, and 1-5:1 above for discussion of express and implied warranty claims. There exist other implied contract claims which are beyond the scope of this book (*quantum meruit* which is based upon a contract implied in fact, and quasi-contract which is based upon a contract implied in law). An in-depth discussion of these claims can be found in *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., Inc.*, 695 So. 2d 383 (Fla. 4th DCA 1997).

166. *See First Nationwide Bank v. Fla. Software Servs., Inc.*, 770 F. Supp. 1537, 1542 (M.D. Fla. 1991) ("Every contract includes not only its written provisions, but also the terms and matters which, though not actually expressed, are implied by law, and these are as binding as the terms which are actually written or spoken.") (citing *Sharp v. Williams*, 192 So. 476, 480 (1939)).

167. *See County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997); *see also Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999). "A breach of the implied covenant of good faith and fair dealing is not an independent cause of action, but attaches to the performance of a specific contractual obligation." *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005). Accordingly, "a claim for a breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law in the absence of a breach of an express term of a contract." *Id.*; *see Insurance Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232 (Fla. 4th DCA 2001) (upholding dismissal of complaint alleging breach of implied covenant of good faith and fair dealing where plaintiff failed to allege breach of an express provisions of the contract).

168. *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999) (quoting *First Nationwide Bank v. Fla. Software Servs., Inc.*, 770 F. Supp. 1537, 1544 (M.D. Fla. 1991)).

169. *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999); *see also Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005) ("[In] Florida . . ., every contract contains an implied covenant of good faith and fair dealing, which requires the parties to 'follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations.'") (citation omitted).

170. *Harrison Land Dev., Inc. v. R & H Holding Co., Inc.*, 518 So. 2d 353, 355 (Fla. 4th DCA 1987).

171. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1316 (11th Cir. 1999).

be a breach of an express contractual provision.[172] The duty of good faith is not abstract and must relate to the performance of an express term of the contract.[173] Where the contract has been fully performed or has expired, there can be no breach of the implied covenant of good faith.[174] Furthermore, the implied obligation of good faith cannot be used to vary the terms of an express contract.[175] Moreover, where a contract gives a party substantial discretion to promote that party's self-interest, the implied covenant of good faith serves as a "gap-filling default rule."[176] In filling the gaps, the implied covenant of good faith limits that party's ability to "act capriciously to contravene the reasonable contractual expectations of the other party."[177]

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172. *See Hospital Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998).

173. *Hospital Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998). *See Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005) ("A breach of the implied covenant of good faith and fair dealing is not an independent cause of action, but attaches to the performance of a specific contractual obligation.") (citing *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999)); *see also Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 251 (Fla. 4th DCA 2009) (noting that implied duty of good faith cannot attach to another implied obligation). Accordingly, "a claim for a breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law in the absence of a breach of an express term of a contract." *Centurion*, 420 F.3d at 1152; *see also Insurance Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1235 (Fla. 4th DCA 2001) ("The duty of good faith does not attach until the Plaintiff can establish a term of the contract that HPS was obligated to perform."). *Cf. PL Lake Worth Corp. v. 99Cent Stuff-Palm Springs, LLC*, 949 So. 2d 1199, 1201 (Fla. 4th DCA 2007) (holding that where lease was silent on landlord's obligation to provide certain financial information requested by tenant, landlord breached implied duty of good faith cooperation in refusing to provide the information which was necessary for tenant to make informed decision whether to exercise option).

174. *Bernstein v. True*, 636 So. 2d 1364 (Fla. 4th DCA 1994).

175. *City of Riviera Beach v. John's Towing*, 691 So. 2d 519, 521 (Fla. 4th DCA 1997); *see Flagship Nat'l Bank v. Gray Distrib. Sys., Inc.*, 485 So. 2d 1336, 1340 (Fla. 3d DCA 1986) (holding that good faith obligation of Uniform Commercial Code § 671.203 may not be imposed to override express terms in contract).

176. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007) ("Despite broad characterizations of the implied covenant of good faith, we have recognized that it 'is a gap-filling default rule,' which 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.'") (quoting *Publix Super Mkts., Inc. v. Wilder Corp. of Del.*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004)).

177. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007) (quoting *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097–98 (Fla. 1st DCA 1999)).

1-6 COMMON LAW DEFENSES

1-6:1 The Economic Loss Rule

The "economic loss" rule has been the subject of much debate and uncertainty among both trial and appellate lawyers, as well as the judiciary since its first application in Florida in 1987 when the Florida Supreme Court decided the seminal case of *Florida Power & Light Co. v. Westinghouse Electric Corp*.[178] *Westinghouse* marked the beginning of what would become over two and half decades of the application of the rule in Florida to bar tort claims for "purely economic losses" that were not accompanied by personal injury or damage to other property.[179] In 2013, the Court all but eliminated the rule in *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*,[180] except in the context of products liability, receding from many of its prior decisions. Outside of products liability, the effect of *Tiara* is not entirely clear, given the reliance on these prior decisions by Florida's lower appellate courts. A brief discussion of the history of the rule, including its application both before and after *Tiara* may provide guidance in better understanding the future of the rule in Florida.

While application of the rule in *Westinghouse* began in the context of products liability—to bar FPL's claims in negligence for defective steam generators designed, manufactured and furnished by Westinghouse—the Court quickly expanded its use to services in the case of *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*[181]—to deny recovery in negligence for what amounted to a breach of contract by Southern Bell which used an incorrect phone number in an advertisement for AFM causing only economic damages.

The Court later applied this doctrine in *Casa Clara* to deny recovery in tort to homeowners which had purchased newly

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178. *Florida Power & Light Co. v. Westinghouse Elec. Corp*., 510 So. 2d 899 (Fla. 1987).

179. As the Court would later explain in *Casa Clara*, purely economic losses are "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993).

180. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 407 (Fla. 2013).

181. *AFM Corp. v. S. Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987).

constructed homes containing defective concrete.[182] There, the Court rejected the homeowners' claims against the supplier of the concrete even in the absence of privity where there was no personal injury or damage to property other than the defective concrete itself. Relying on the reasoning of *Casa Clara*, the Court in *Airport Rent-A-Car v. Prevost Car, Inc.*,[183] similarly held that the rule barred a cause of action for negligence against the manufacturer of defective buses where the only damage was to the buses themselves. However, a year later, the Court noted that the economic loss rule had not eliminated causes of action based on intentional or negligent conduct committed independently of a contractual breach, when it held that an action for fraudulent inducement was not barred by the rule.[184] Similarly, in *PK Ventures, Inc. v. Raymond James & Associates*,[185] the Court held that the rule did not preclude a cause of action by the buyer of commercial property against the seller's broker for negligent misrepresentation.

Just two years later, acknowledging that its pronouncements on the economic loss rule had not always been clear and had been the subject of "criticism and commentary," the Court, in *Moransais v. Heathman*,[186] declined to extend the rule to a "professional" whose negligent conduct caused economic harm, even in the absence of privity. Reinforcing its desire to scale back the reach of the economic loss rule, shortly after *Moransais* the Court issued its ruling in

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182. *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1248 (Fla. 1993).

183. *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So. 2d 628 (Fla. 1995).

184. *See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996); *see also TGI Dev., Inc. v. CV Reit, Inc.*, 665 So. 2d 366, 366 (Fla. 4th DCA 1996), *approved* 689 So. 2d 255 (Fla. 1996) ("Fraud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule."). Following the Court's pronouncement in *HTP, Ltd.* other courts continued to recognize this exception. *See, e.g., La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710, 713 (Fla. 4th DCA 1998) (fraudulent inducement claim not barred be economic loss rule even when coupled with breach of express warranty claim for same damages). The exception existed because "one may be fraudulently induced into a contract setting high expectations the seller dashes be absconding or delivering something so different in kind from the contractual understanding that the seller's intent never to honor the contract is manifest." *Maxcess, Inc. v. Lucent Techs., Inc.*, No. 6:04-cv-204-Orl-31DAB, 2005 WL 6125471, at *8 (M.D. Fla. Jan. 5, 2005), *aff'd*, 433 F.3d 1337 (11th Cir. 2005).

185. *PK Ventures, Inc. v. Raymond James & Assocs., Inc.* 690 So. 2d 1296 (Fla. 1997).

186. *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

Comptech International, Inc. v. Milam Commerce Park, LTD,[187] holding that the rule did not bar free standing statutory causes of action (such as the one provided under § 553.84, Florida Statutes, for violation of the building code). Thereafter, the Court continued to chip away at the economic loss rule by expressly limiting its application to parties in privity of contract or a manufacturer or distributor of a defective product that only damages itself.[188]

Despite the Court's express limitations on the economic loss rule in *Indemnity*, and still concerned with what it viewed as the "unprincipled expansion . . . of the rule beyond (the Court's) original limited intent," the Court took "a final step" in *Tiara* to eliminate the rule except in cases involving products liability.[189] In so holding, the Court receded from its prior rulings to "return the economic loss rule to its origins in products liability" established over 25 years earlier in *Westinghouse*.[190] With its ruling, it appears the Court has opened the door to expanded tort recovery, which could result in the proliferation of construction defect (and other) claims once barred by the economic loss rule.[191] Indeed,

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187. *Comptech Int'l, Inc. v. Milam Com. Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999), *abrogation recognized by Martinez v. QBE Specialty Ins. Co.*, No. 8:18-cv-263-T-36AAS, 2018 WL 4354831 (M.D. Fla. Sept. 12, 2018).

188. *See Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), *abrogation recognized by Tank Tech., Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383 (Fla. 2d DCA 2018).

189. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 407 (Fla. 2013).

190. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 407 (Fla. 2013).

191. Though not controlling, Justice Pariente's concurring opinion in *Tiara* contains a persuasive discussion as to why the Court's majority opinion did not alter the fundamental principles underlying the rule which still remain and provide certain limitations on tort recovery:

> Our decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the economic loss rule was always intended to apply only to products liability cases . . . . The majority's conclusion that the economic loss rule is limited to the products liability context does not undermine Florida's contract law or provide for an expansion in viable tort claims. Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and . . . our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.

several courts applying *Tiara* have refused to dismiss tort claims on the basis of the rule, and have strictly limited its application to products liability claims.[192] However others, even outside of products liability, have continued to deny tort recovery based on traditional tort principles where such claims are not independent

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Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc., 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., concurring). *See also Gil-Samuel v. Nova Biomedical Corp.*, 298 F.R.D. 693, 694 (S.D. Fla. 2014) (holding economic loss rule did not bar negligence claim against manufacturer of defective glucose test reading strips where the plaintiff's claim "extend[ed] beyond a mere depressed economic expectation because . . . the product defect led to further injury and economic losses beyond damage to the product itself."); *see Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 983 n.2 (D.C. 2014) (noting *Tiara* has "narrow[ed] applicability of the economic loss rule to products liability claims"); *but see Gazzara v. Pulte Home Corp.*, 207 F. Supp. 3d 1306, 1309 (M.D. Fla. 2016) (noting "Florida's economic loss rule bars tort claims by owners of defective products who suffer solely economic losses" and dismissing claim against home builder for negligent failure to build per code) (citing *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc*., 620 So. 2d 1244 (Fla. 1993)) (refusing to create exception to economic loss rule for homeowners) and *Tiara* (reaffirming application of economic loss rule in products liability cases). *See also Lucarelli Pizza & Deli v. Posen Constr., Inc*., 173 So. 3d 1092, 1095 (Fla. 2d DCA 2015) (questioning "whether the supreme court in *Curd* and *Tiara Condominium* intended to allow customers of a local utility company who have suffered only economic loss to sue every contractor or automobile driver that negligently ruptures a gas line, knocks down a power pole, or otherwise disrupts utility service.").

192. *See, e.g., Altenel, Inc. v. Millennium Partners, L.L.C.*, 947 F. Supp. 2d 1357, 1368 (S.D. Fla. 2013) ("Thus, because this case does not center on a products liability claim, the Court concludes that the economic loss rule does not apply."); *Lehman Bros. Holdings, Inc. v. Campbell*, No. 3:12-cv-259, 2013 WL 3479525, at *2 (E.D. Tenn. July 10, 2013) ("But the Tiara ruling is clearly applicable here. Because this case has nothing to do with product liability, the court denies [the] motion to dismiss.") (applying Florida law); *Federal Deposit Ins. Corp. v. Fla. Title Grp., Inc.*, No. 12-21890-CIV-MORENO, 2013 WL 5237362, at *7 (S.D. Fla. Sept. 17, 2013) ("This case is not a products liability case. Thus, the economic loss rule does not apply."); *Cf. Azure, LLC v. Figueras Seating U.S.A., Inc*., No. 12-cv-23670-UU, 2013 WL 12093811, at *6 (S.D. Fla. July 18, 2013) (holding that plaintiff's fraud and misrepresentation claims were not barred by the independent tort doctrine, citing Justice Pariente's concurring opinion in *Tiara*). *See also F.D.I.C. v. Lennar Corp*, No. 2:12-CV-595-FTM-38, 2014 WL 201663, at *7 (M.D. Fla. Jan. 17, 2014) ("In *Tiara*, the Florida Supreme Court drastically curtailed the application of the economic loss rule so that it undoubtedly has no relevance to the claims arising out of the alleged false valuations report at issue in this case."); *Marian Farms, Inc. v. Suntrust Bank, Inc.*, 135 So. 3d 363, 364 (Fla. 5th DCA 2014) (reversing dismissal of negligence claims against bank in light of *Tiara*); *Global Digital Sols., Inc. v. Murphy*, No. 14-80190-CIV-HURLEY, 2014 WL 5089796, at *11 (S.D. Fla. Oct. 9, 2014) (noting that "the Florida Supreme Court has recently limited application of the economic loss rule to products liability matters"); *Bornstein v. Marcus*, 169 So. 3d 1239, 1243 (Fla. 4th DCA 2015) ("Appellant argues that the supreme court recently curtailed the economic loss rule in *Tiara* . . . We agree and, as such, we reverse the trial court's dismissal of these claims."); *Merlin Petroleum Co., Inc. v. Sarabia,* No. 8:16-CV-1000-T-30TBM, 2016 WL 3126753, at *3 (M.D. Fla. June 3, 2016) ("Florida law makes clear that the economic loss rule is inapplicable here."); *B&H Farms, LLC v. Winfield Sols., LLC*, No. 2:16-cv-323-FtM-99MRM, 2016 WL 6138625, at *2 (M.D. Fla. Oct. 21, 2016) ("Since the Amended Complaint does not allege a products liability claim, the economic loss rule does not bar the claim."); *Marketran, LLC v. Brooklyn Water Entmt., Inc.*, 16-CV-81019-DIMITROULEAS, 2017 WL 1304121, at *3 (S.D. Fla. Feb. 8, 2017) ("Since Brooklyn's counterclaims do not involve products liability, the economic loss rule is inapplicable.").

of a contractual breach, and parties are afforded a contractual remedy.[193] And others have refused to apply former "exceptions" to the economic loss rule in disallowing tort claims against manufacturers where only economic damages were present.[194]

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[193] *See Joyeria Paris, SRL v. Gus & Eric Custom Servs., Inc.*, No. 13-22214-CIV-O'SULLIVAN, 2013 WL 6633175, at *4 (S.D. Fla. Dec. 17, 2013) (dismissing fraud claim where allegation that defendant failed to pay sales commission was same conduct supporting claim for breach of oral contract); *Kaye v. Ingenio, Filiale De Loto-Quebec, Inc.*, No. 13-61687-CIV-ROSENBAUM/HUNT, 2014 WL 2215770 (S.D. Fla. May 29, 2014) (dismissing fraudulent inducement claim where alleged fraud was covered by terms of licensing agreement). Relying on Justice Pariente's concurring opinion in *Tiara*, the court noted:

> Nevertheless, the fact that the economic-loss rule does not apply to cases where the parties are in contractual privity does not mean that parties in contractual privity may recast causes of action that are otherwise breach-of-contract claims as tort claims. Instead, 'fundamental contractual principles' already properly delineate the general boundary between contract law and tort law. *Tiara*, 110 So. 3d at 409 (Pariente, J., concurring) (internal citation omitted). Therefore, to set forth a claim in tort between parties in contractual privity, a party must allege action beyond and independent of breach of contract that amounts to an independent tort. *See Tiara*, 110 So. 3d at 408 (Pariente, J., concurring) (internal citation omitted).

Kaye, at *5. *See also Alhassid v. Bank of Am., N.A.*, 60 F. Supp. 3d 1302, 1316 (S.D. Fla. 2014) (dismissing civil conspiracy claims where facts supporting claims were identical to remaining breach of contract allegations); *Osan v. Verizon Fla. LLC*, No. 8:15-cv-104-T-36TGW, 2016 WL 2745001, at *4 (M.D. Fla. May 11, 2016) (dismissing fraudulent inducement claim against former employer where alleged fraud was "precisely the same as a potential breach of contract claim" under separation agreement); *XP Global, Inc. v. A.V.M., L.P.*, No. 16-cv-80905-BLOOM/Valle, 2016 WL 4987618, at *4–8 (S.D. Fla. Sept. 9, 2016) (dismissing tort claims relating to breach of confidentiality agreement on basis of independent tort doctrine); *Callaway Marine Techs., Inc. v. Tetra Tech, Inc.*, No. 16-cv-20855-GAYLES, 2016 WL 7407769, at *5 (S.D. Fla. Dec. 22, 2016) (finding no tortious conduct independent of alleged breach of contract and dismissing negligent misrepresentation claim against subcontractor where purported pre-contract misrepresentations were each incorporated into the subcontract); *Goldson v. KB Home*, No. 8:17-cv-340-T-24 AEP, 2017 WL 1038065, at *3 (M.D. Fla. Mar. 17, 2017) (dismissing homeowner's fraud claim against builder based upon alleged misrepresentations in payment applications about work completed and payments to subcontractors, as duplicative of contract claims); *Peebles v. Puig*, 223 So. 3d 1065, 1069 (Fla. 3d DCA 2017) (holding fraudulent misrepresentations made during performance of sales commission contract not actionable since resulting damages not independent and distinct from contractual damages).

[194] *See Burns v. Winnebago Indus., Inc.*, No. 8:13-cv-1427, 2013 WL 4437246, at *4 (M.D. Fla. Aug. 16, 2013) (dismissing purchaser's negligent misrepresentation and fraudulent concealment claims against manufacturers based on alleged defects in recreational vehicle and its components leading to premature corrosion); *Aprigliano v. Am. Honda Motor Co., Inc.*, 979 F. Supp. 2d 1331 (S.D. Fla. 2013) (dismissing purchasers' strict products liability and negligence claims against motorcycle manufacturer based on alleged transmission defect); *In re Atlas Roofing Corp. Shalet Shingle Prods. Liab. Litig.*, No. 1:14-CV-31 79-TWT, 2015 WL 3796456, at *3 (N.D. Ga. June 18, 2015) (dismissing homeowner's negligent misrepresentation and fraudulent inducement/concealment claims against manufacturer of defective roofing shingles as "certainly related to the Defendant's obligation under the contract: to provide Shingles that meet the stated standard of quality") (applying Florida law); *In re Takata Airbag Prods. Liab. Litig.*, No. 14-24009-CV-Moreno, 2016 WL 3388713,

In the wake of *Tiara*, how courts will apply the economic loss rule (or independent tort doctrine) outside of products liability, regardless of whether the parties are afforded a contractual remedy, is uncertain. As the Eleventh Circuit aptly noted, "the exact contours of this possible separate limitation, as applied post-Tiara, are still unclear."[195] What is clear after *Tiara* is that courts' application of the rule has not been uniform. However, "the standard appears to be that 'where a breach of contract is combined with some other conduct amounting to an independent tort, the breach can be considered negligence.'"[196] And, as previously stated, other tort claims, such as fraudulent inducement, still remain viable, even for recovery of purely economic losses and notwithstanding contractual remedies.[197]

1-6:2 The *Slavin* Doctrine

The *Slavin*[198] doctrine protects a contractor from claims from third parties suffering personal injury or property damage from

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at *9 (S.D. Fla. June 15, 2016) (dismissing purchasers' fraudulent concealment claims against car manufacturer as alleging "precisely what breach of warranty claims would allege"); *Melton v. Century Arms, Inc.*, No. 16-21008-CIV-MORENO, 2017 WL 1063449, at *5 (S.D. Fla. Mar. 20, 2017) (dismissing tort claims against rifle manufacturer seeking only economic damages regarding the quality of its products, noting such damages "would be precisely what a breach of warranty claim would allege"). It is important to note, perhaps, that in these cases disallowing tort claims, direct privity with the manufacturers was not present. Where privity does exist, or its application is relaxed due to the relationship of the parties [*see* discussion in § 1-5:2.2 above] these cases and the justification for application of rule would appear to be less compelling. *See, e.g., Smith v. Jackson*, No. 16-81454-CIV-MARRA, 2017 WL 1047033, at *4 (S.D. Fla. Mar. 20, 2017) (noting that even with *Tiara's* clarification that the economic-loss rule applies only to cases involving products liability, "it is still possible to set forth a claim in tort between parties in contractual privity if a tort is alleged that is beyond and independent of the breach of contract claim").

195. *Lamm v. State St. Bank & Tr.*, 749 F.3d 938, 947 (11th Cir. 2014).

196. *Lamm v. State St. Bank & Tr.*, 749 F.3d 938, 947 (11th Cir. 2014) (quoting *U.S. Fire Ins. Co. v. ADT Sec. Servs., Inc.*, 134 So. 3d 477, 480 (Fla. 2d DCA 2013)).

197. *See* fns. 184 and 192 above. *See also Prewitt Ent., LLC v. Tommy Constantine Racing, LLC*, 185 So. 3d 566, 570 (Fla. 4th DCA 2016), *reh'g denied* (Mar. 3, 2016), *rev. denied*, No. SC16-600, 2016 WL 3017739 (Fla. May 20, 2016) (recognizing viability of fraudulent inducement claim as an independent tort because the representations were about *present* circumstances at the time of sale, verifiably true or false at the time the representation was made and therefore did not merge with post-sale causes of action); *Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1030 (11th Cir. 2017) (finding buyer's fraud allegations separate and distinct from sellers' performance under contract where they concerned representations about yacht's condition and certain international building standards which were not set forth in contract).

198. *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959); *see Valiente v. R.J. Behar & Co., Inc.*, 254 So. 3d 544 (Fla. 3d DCA 2018).

defective construction.[199] In order to prevail under the doctrine, the contractor must show that the owner of the property finally accepted the work with knowledge of the defect giving rise to the claim.[200] In other words, the defect must be patent. In such instance, the owner of the property will be liable for the unsafe condition created by the defective work. However, mere knowledge by an owner of a condition does not automatically render the defect patent.[201]

On the other hand, where an owner has not finally accepted the work, or is unaware of the defect (i.e., it is latent) at the time of final acceptance of the work, the contractor remains liable for the defect. As one court has described, "The *Slavin* doctrine considers the respective liability of an owner and contractor, after the owner has resumed possession of the construction, for injuries to a third

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199. The doctrine has also been applied to architects and engineers. *See Easterday v. Masiello*, 518 So. 2d 260, 261 (Fla. 1988).

200. *Foster v. Chung*, 743 So. 2d 144, 146 (Fla. 4th DCA 1999) (holding that "[a] contractor is not liable to third parties for injuries that occur after the contractor has completed its work and the work has been accepted by the property owner."). Whether a contractor's (or design professional's) work has been accepted to cut off liability will depend on the degree of control exercised by the owner over the work. *See McIntosh v. Progressive Design & Eng'g, Inc*., 166 So. 3d 823, 830 (Fla. 4th DCA 2015) ("'Acceptance' is the term applied for shifting the responsibility to correct patent defects to the party in control. In essence, acceptance will move along the timeline of a construction project, passing to each entity maintaining control of the work. This application makes perfect sense. Once an entity completes its work, and that work is accepted, the burden of correcting patent defects shifts to the entity in control. It is the controlling entity's intervening negligence in not correcting a patent defect that proximately causes the injury.").

201. *See Brady v. State Paving Corp*., 693 So. 2d 612 (Fla. 4th DCA 1997). In *Brady*, plaintiffs who were injured in an accident on an expressway brought an action against the state transportation department, alleging that it knew or should have known of a dangerous condition that allowed water to puddle on the expressway, and also sued the contractors involved in the construction of the expressway, alleging that the condition was a latent defect. While there was evidence that the water on the road may have been obvious to the department, the depth of the water was not obvious, and it was the depth which made the condition dangerous. Thus, the court explained "the test under *Slavin* would not be whether the water itself was obvious, but rather whether the dangerous nature of the water was obvious." *Brady*, 693 So. 2d at 613 (citation omitted). *Compare Foster v. Chung*, 743 So. 2d 144 (Fla. 4th DCA 1999) (finding issue of fact on whether defect was patent, precluding summary judgment for contractor which designed and constructed roadway improvement, where cause of ponding water on roadway was not obvious) (citing *Brady v. State Paving Corp*., 693 So. 2d 612 (Fla. 4th DCA 1997)) *with Vancelette v. Boulan S. Beach Condo. Ass'n, Inc.*, No. 3D16-1632 & 3D16-1338, 2017 WL 2664685, at *2 (Fla. 3d DCA June 21, 2017) (barring personal injury claims based upon *Slavin* where work was accepted by the owner after sidewalk access ramp causing injury was identified on punch list as "not constructed to plans (Possible tripping hazard)").

person for negligence of the contractor in the construction of the improvement."[202] The rationale of the rule is that:

> [b]y occupying and resuming possession of the work the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author.[203]

The doctrine though has no applicability to liability of an owner arising from breach of a contractual obligation.[204]

1-6:3 The *Spearin* Doctrine

Unlike the warranties established by *Gable* and its progeny,[205] certain implied warranties run in favor of contractors. Under the *Spearin*[206] doctrine (also known as the implied warranty of constructability[207]), an owner impliedly warrants that its plans and specifications are suitable for construction. Since the contractor is required to build "according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."[208]

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202. *Gonsalves v. Sears, Roebuck & Co.*, 859 So. 2d 1207 (Fla. 4th DCA 2003).

203. *Slavin v. Kay*, 108 So. 2d 462, 466 (Fla. 1959).

204. *See Cisu of Fla., Inc. v. Aetna Cas. & Sur. Co.*, 457 So. 2d 1118 (Fla. 1st DCA 1984) (noting *Slavin* and other decisions involving negligence were not applicable to lessee's claim for breach of lease arising from defective roof repairs performed by landlord's contractor). *Cf. University Cmty. Hosp., Inc. v. Pro. Serv. Indus., Inc.*, No. 8:15-cv-628-T-27EAJ, 2017 WL 2226578, at *7 (M.D. Fla. May 19, 2017) (finding *Slavin* inapplicable as a defense to claims by hospital owner against geotechnical firm for breach of contract and professional negligence which allegedly resulted in additional foundation work and delays, noting that the geotechnical firm was not being sued for injuries sustained by a third party).

205. *See* § 1-5:1 above.

206. *United States v. Spearin*, 248 U.S. 132 (1918).

207. *See Underwater Eng'g Servs., Inc. v. Utility Bd. of City of Key West*, 194 So. 3d 437, 446 n.4 (Fla. 3d DCA 2016).

208. *United States v. Spearin*, 248 U.S. 132, 136 (1918). By raising this defense, a contractor has the burden of proving "not only that there was a defect in the specifications, but that the defect in the specifications was the proximate cause of the failure . . . ." *Underwater Eng'g Servs., Inc. v. Utility Bd. of City of Key West*, 194 So. 3d 437, 446 n.4 (Fla. 3d DCA 2016) (citing *Rick's Mushroom Serv., Inc. v. U.S.*, 521 F.3d 1338, 1345 (Fed. Cir. 2008)

The contractor can also use the doctrine to pursue affirmative claims.[209] Pursuant to the doctrine, a hiring party is liable for unanticipated construction costs incurred due to a latent defect in the project plans or specifications.[210] For a contractor to recover damages from a public owner, under either a *Spearin* claim that the contractor followed plans and specifications mandated by the owner (or that the owner breached a duty to provide bidders with information that would not mislead them), the contractor must show that it relied on an alleged defect or misrepresentation made by the owner, and that its reliance was reasonable.[211] However, "reliance is not considered reasonable if the alleged defect or misrepresentation was 'an obvious omission, inconsistency or discrepancy of significance' or if the contractor knew about the defect or misrepresentation during the bidding process but said nothing to the owner."[212]

Further, where a public owner does not mislead the contractor, a disclaimer or exculpatory clause in a public contract which is not invalid per se may negate the liability of the contracting authority for extra costs incurred as a result of errors in the drawings.[213] The focus is on whether the government has provided bidders with

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(holding contractor was required to prove that "defect in [design] specifications was the proximate cause" of the damages flowing from the breach of implied warranty created under *Spearin*)).

209. The doctrine would appear not to apply where a contractor is not in privity with the owner. *See, e.g., Lincoln v. Fla. Gas Transmission Co*., No. 4:13-cv-74-MW/CAS, 2014 WL 3057113, at *5 (N.D. Fla. July 7, 2014) ("It is not clear that the *Spearin* doctrine may be used in this case to provide compensation to Plaintiff who is not a party in any contract with any Defendant.") (citing *Rick's Mushroom Serv., Inc. v. U.S.*, 521 F.3d 1338, 1345 (Fed. Cir. 2008)); *see also Rick's Mushroom Serv., Inc.*, 521 F.3d at 1345 (finding that under *Hercules, Inc. v. U.S.*, 516 U.S. 417 (1996), one "could not recover on an implied warranty under *Spearin* because such a warranty does not extend as far as third-party claims."). *See also* discussion in § 1-3:1 above (noting privity requirement to enforce implied warranty claims).

210. *Phillips & Jordan, Inc. v. State Dep't of Transp.*, 602 So. 2d 1310 (Fla. 1st DCA 1992).

211. *Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth.*, 436 F. Supp. 2d 1276 (M.D. Fla. 2005).

212. *Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth.*, 436 F. Supp. 2d 1276, 1310 (M.D. Fla. 2005) (citations omitted); *see also Otis Elevator Co. v. W.G. Yates & Sons Constr. Co.*, 589 Fed. Appx. 953, 959 (11th Cir. 2014) ("A subcontractor cannot recover based on its reasonable but unilateral resolution of an ambiguity, however, if the subcontractor is subjectively aware of that ambiguity when bidding on the construction contract and fails to clarify that ambiguity by inquiring of the contractor.") (citations omitted).

213. *Miami-Dade Water & Sewer Auth. v. Inman, Inc.*, 402 So. 2d 1277 (Fla. 3d DCA 1981), *rev. denied*, 412 So. 2d 466 (Fla. 1982).

information that will not mislead them.[214] On the other hand, where a contractor is misled by relying on inaccurate representations, a disclaimer clause requiring inspection of the site will not prevent the contractor from recovering additional costs under a differing site conditions clause.[215]

1-6:4 Indemnification and Contribution

While indemnification and contribution are *affirmative* claims, typically they are raised as a defensive measure—by cross-claim or third-party complaint—when responding to a plaintiff's lawsuit.

1-6:4.1 Common Law Indemnification

In order to prevail on a common law indemnity claim, a party must meet two requirements: (1) the indemnitee must be faultless and its liability must be solely vicarious for the wrongdoing of another; and (2) in order for the faultless party to shift liability to the other, the indemnitor must be at fault.[216] Common law indemnity transfers the entire loss from one party to another and liability must be vicarious. The following description demonstrates the general understanding of common law indemnity:

> Common law indemnity shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held

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214. *Hendry Corp. v. Metro. Dade Cnty.*, 648 So. 2d 140 (Fla. 3d DCA 1994). In *Hendry*, the court refused to impose a duty on the county to disclose information where the county did not make any affirmative misrepresentation:

> In seeking reversal, Hendry asks this court to impose upon Dade County a duty heretofore not recognized in Florida—that Dade County had an obligation to disclose facts in its possession when its superior knowledge or silence would convey a false impression, even when it has made no affirmative misrepresentation. However, our courts have recognized only that the government has an affirmative duty to provide bidders with information that will not mislead them.

Id. at 141 (citations omitted).

215. *Hendry Corp. v. Metro. Dade Cnty.*, 648 So. 2d 140, 142 (Fla. 3d DCA 1994).

216. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 642 (Fla. 1999); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246 (Fla. 2d DCA 2011); *Zeiger Crane Rentals, Inc. v. Double A Indus., Inc.*, 16 So. 3d 907 (Fla. 4th DCA 2009).

> liable. A weighing of the relative fault of tortfeasors has no place in the concept of indemnity for the one seeking indemnity must be without fault. In order for a common law indemnity claim to stand, a two-pronged test must be satisfied: (1) the indemnitee must be faultless and (2) the indemnitee's liability must be solely vicarious for the wrongdoing of another.[217]

Where a vicariously liable party settles a claim, it may nevertheless pursue indemnification against the actively negligent party.[218]

1-6:4.2 Contractual Indemnification

While common law indemnity is an equitable remedy that arises out of a special relationship and vicarious liability, "contractual indemnity" is concerned only with the express language of the indemnification agreement.[219]

Indemnity agreements are often categorized on the basis of scope—broad, intermediate, and limited. Each form of agreement can be recognized by key phrases, or variations of those phrases, that define the extent of the indemnity obligation. If the indemnitor can recognize the form of the agreement, and avoid the most onerous form, risk transfer may be minimized.

A *broad* form agreement is the least desirable from the indemnitor's perspective because the indemnitee seeks indemnification for all damages arising out of performance of the contract, even where the damage was caused in whole or in part by the indemnitee. In other words, the indemnitee is protected even where it is solely at fault. Thus, these clauses effectively shift the entire risk of loss from the indemnitee to the indemnitor. Florida permits this form of indemnification if the contract expresses this intent in "clear and unequivocal terms" and otherwise complies with applicable statutory requirements. An initial review of proposed indemnity

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217. *Zeiger Crane Rentals, Inc. v. Double A Indus., Inc.*, 16 So. 3d 907, 911 (Fla. 4th DCA 2009).

218. *Rosati v. Vaillancourt*, 848 So. 2d 467, 473 (Fla. 5th DCA 2003) (citing *GAB Bus. Servs., Inc. v. Syndicate* 627, 809 F.2d 755 (11th Cir. 1987) (construing Florida law) and *Maseda v. Honda Motor Co.*, 861 F.2d 1248 (11th Cir. 1988) (construing Florida law)).

219. *See Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 721 So. 2d 1254 (Fla. 5th DCA 1998).

agreements should focus on identifying language that will impose a broad indemnity obligation, such as "all damage arising out of indemnitor's performance of the contract, whether or not caused in whole or in part by indemnitee's acts or omissions." This, or any similar language, should not be agreed to without a complete understanding of the risks involved and without obtaining additional compensation (i.e., increased contract price) for the additional risk undertaken. Alternatively, if price cannot be negotiated for the additional risk, a less onerous form of indemnity such as "intermediate" or "limited" should be obtained.

An *intermediate* form agreement is, as the name implies, the middle ground between broad form and limited indemnity. Under this form, the indemnitor agrees to protect the indemnitee from all liability, unless the indemnitee is 100 percent at fault. This is often accomplished by imposing indemnity for damage "caused in whole or in part by indemnitor, regardless of whether or not caused in part by a party indemnified hereunder." While an improvement over the broad form, this form is not the ideal for the indemnitor because it still shifts the risk of the entire loss to the indemnitor unless the indemnitee is solely at fault.

Florida courts disfavor contracts wherein a party seeks to indemnify itself from its own negligent or wrongful acts and impose express requirements on such provisions. In particular, because indemnity provisions seek to charge one party with the damages or the default of another party, these provisions must be "in writing and signed by the party to be charged therewith or by some other person by him or her thereunto lawfully authorized."[220] And indemnity provisions must express "an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms."[221]

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220. FLA. STAT. § 725.01.

221. *Cox Cable Corp. v. Gulf Power*, 591 So. 2d 627, 629 (Fla. 1992). *Compare Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co*., 374 So. 2d 487, 489 (Fla. 1979) (provision requiring lessor of scaffolding from manufacturer to assume "all responsibility for claims asserted by any person whatever growing out of the erection and maintenance, use or possession of said equipment" and to hold harmless from all such claims held insufficient to provide indemnity for manufacturer's own negligence) *with University Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507, 508–09 (Fla. 1973) ("we choose to follow the rationale . . . requiring a specific provision protecting the indemnitee from liability caused by his own negligence."). Moreover, "[c]ontracts for direct indemnity will not be inferred; . . . An indemnification provision that is silent or unclear whether it applies to

Where a private party to a construction contract seeks indemnification for its own fault, indemnity provisions are required to "contain[ ] a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any."[222] This monetary limitation must not be less than $1 million per occurrence, unless otherwise agreed by the parties."[223] Failure of indemnity provisions to comply with these and other statutory requirements can render the provisions unenforceable.[224] As a matter of public policy, construction contracts involving a public entity or project which require a party to indemnify another party for its own negligence is void.[225] The same prohibition applies to public contracts involving design professionals.[226]

Unlike *broad* and *intermediate* forms which allow the indemnitee to recover even where it is at fault, a *limited* form agreement limits an indemnitor's obligation to damages caused by the indemnitor's

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first-party claims will normally be interpreted to apply only to third-party claims." *MVW Mgmt., LLC v. Regalia Beach Devs. LLC*, 230 So. 3d 108, 112 (Fla. 3d DCA 2017). Thus, an "agreement to indemnify [a party] against 'any and all claims' does not clearly and unequivocally express an intent to include claims by [other party] that result exclusively from the negligence of the [first party]." *Id.* (citing *University Plaza*, 272 So. 2d at 511).

222. Fla. Stat. § 725.06(1).

223. Fla. Stat. § 725.06(1).

224. Fla. Stat. § 725.06(1). However, only that portion of the indemnity clause that violates the statute is void. *See CB Contractors, LLC v. Allens Steel Prods., Inc.*, 261 So. 3d 711 (Fla. 5th DCA 2018). The statute, and therefore its prohibition on enforceability, only extends to *construction* contracts involving real property. *See Kone, Inc. v. Robinson*, 937 So. 2d 238, 241 (Fla. 1st DCA 2006) ("Examining the statute's language, we have failed to discern a legislative intent to apply § 725.06, Florida Statutes (1999), to non-construction contracts such as the [elevator service and maintenance agreement] involved in this case . . . Had the Legislature intended this statute to apply to all contracts concerning real property, it could have simply included the term 'contractor' in the statute.") (internal citations omitted); *see also Blok Builders, LLC v. Katryniok*, 245 So. 3d 779, 783 (Fla. 4th DCA 2018) (finding Section 725.06(1) inapplicable to contract involving the laying and maintenance of utility lines since contract did not involve construction of a building, structure, appurtenance, or appliance). Importantly, the court in *Blok Builders* also held that incorporation of the prime contract into the subcontract did not render the subcontractor liable to the owner for contractual indemnity where neither the subcontract nor prime contract expressly named the owner as an indemnitee. *See Blok Builders*, 245 So. 3d at 783–84 ("As to BellSouth, we conclude that the court erred in determining that Blok owed a duty of indemnity and a duty to defend BellSouth. Under the Blok/Mastec contract, Blok agreed to indemnify Mastec and its directors, officers, and agents. Nowhere does it require Blok to indemnify BellSouth. And, although the subcontract incorporated the provisions of the BellSouth/Mastec contract, that contractual indemnification provision required that Mastec, not its subcontractors, indemnify BellSouth.").

225. Fla. Stat. § 725.06(3).

226. *See* Fla. Stat. § 725.08.

negligence, avoiding an obligation to indemnify for damages caused in whole or in part by the indemnitee. This can be accomplished by defining the obligation as "claims, losses, damages and expenses, but only to the extent caused in whole or in part by the negligent acts or omissions of indemnitor." Under this form, parties to the agreement are only responsible for indemnity to the extent of their own liability, on a comparative basis of fault; even where the indemnitee is only partially at fault, the indemnitor would have no indemnity obligation.[227] An extremely cautious indemnitor might be inclined to further limit its liability by including language such as "the indemnity obligation does not apply to claims caused in whole or in part by the acts or omissions of indemnitee."

Determining fault under a broad or intermediate form indemnity agreement is unnecessary since an owner obtains indemnity for one hundred percent of the loss regardless of whether the owner is partially at fault.[228] With a limited form agreement, however, an analysis of each party's relative degree of liability may be necessary such as where the contractor is partially at fault since the contactor is responsible for damages to the extent of its own negligent acts or omissions. This same analysis is necessary where the owner and contractor both agree to indemnify each other from their own respective fault, as seen with the ConsensusDocs, particularly where the owner or contractor is entitled to reimbursement of its defense costs paid above its percentage of liability.

The determination of whether a provision falls into one category or the other, and thus requires an apportionment of fault between parties, is not always apparent. As one court has recognized:

> . . . the phrase "to the extent . . . attributable . . . to [Holcim]" as written in this indemnification provision is ambiguous. Two circuits have reached the same conclusion in interpreting similar albeit not identical language. *See Olin Corp. v. Yeargin*

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227. As discussed in more detail in Chapter 2 below, the language of the AIA A201 and ConsensusDocs 200 appears to follow this form of indemnity.

228. It should be noted that even where the indemnity agreement does not require apportionment of fault between the parties to the agreement, apportionment between a party and non-parties is permissible. *See Continental Fla. Materials v. Kusherman*, 91 So. 3d 159, 164 (Fla. 4th DCA 2012) (allowing apportionment of fault under § 768.61, Florida Statutes, between injured employee of contractor, subcontractor, and subcontractor's driver who caused injury).

> *Inc.*, 146 F.3d 398, 404 (6th Cir. 1998) ("The phrase 'to the extent' could be interpreted to impose a percentage limitation on [the indemnitor's] duty to indemnify. Or, 'to the extent,' read with [other contract language], could be construed to mean that [the indemnitor's] duty is triggered only if it is at least partly at fault."); *Liberty Mut. Ins. Co. v. Pine Bluff Sand & Gravel Co., Inc.*, 89 F.3d 243, 246-47 (5th Cir. 1996) (providing that two "reasonable interpretations" of the contract language "except to the extent it is caused in part by [the indemnitee]" exist, i.e., indemnification only if indemnitee was "*not in any way responsible* for an underlying claim" or "the **indemnity** provision incorporates the principles of **comparative** negligence") (emphasis in original).[229]

Indeed, some courts construing language suggesting that a particular form of indemnity was intended have ruled another form applied.[230] These cases underscore the need for an owner and

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[229] *Ohio Cas. Ins. Co. v. Holcim (US), Inc.*, 548 F.3d 1352, 1357 (11th Cir. 2008). *See also Smith v. U.S.*, 497 F.2d 500 (5th Cir. 1974) (determining whether a comparative negligence analysis was necessary where clause at issue provided for indemnity "for any and all claims" and whether the government would be entitled to indemnity despite its own negligence).

[230] *See Continental Fla. Materials v. Kusherman*, 91 So. 3d 159 (Fla. 4th DCA 2012) (limiting indemnity by subcontractor to general contractor and owner for loss resulting only from subcontractor's acts or omissions). The subcontract in *Continental* contained the following indemnity language:

> *ARTICLE XXXII: INDEMNIFICATION*
>
> 32.1 *Subcontractor agrees to indemnify*, defend and hold harmless Contractor and Owner and their respective officers, representatives and employees, *from any claim, liability, damage, loss, judgment or cost, . . . arising out of or in any manner pertaining to this Agreement or the Work hereunder*, by an act, omission or default of Subcontractor or any of Subcontractors' sub-Subcontractors or suppliers of any tier or their respective employees or representatives, whether or not caused in part by any act, omission or default of Contractor. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton, or intentional misconduct of the Contractor, or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of Subcontractor or any of its sub-Subcontractors, materialmen, or agents of any tier or their respective employees. Liability under his subsection shall not exceed $3,000,000.00, the parties acknowledging that such amount bears a reasonable commercial relationship to this Agreement.

contractor to unequivocally state in their agreement whether the contractor will be required to indemnify the owner from its own negligence. Without a clear expression of intent to do so, courts will not find such indemnity.[231]

Another difficulty with determining fault in comparative indemnity is that it requires an analysis of apportionment of fault under tort principles although the claim arises in contract.[232]

Id. at 163 (emphasis in original).

While the above provision would appear to provide for an intermediate form of indemnity (by use of the words "whether or not caused **in part** by any act, omission or default of Contractor") (emphasis added)) requiring indemnification for one hundred percent of the loss, the court instead interpreted this provision to provide for a limited form of indemnity requiring indemnification only to the extent the subcontractor was responsible for the loss:

> The general indemnity provision provides for the subcontractor to indemnify the general contractor and owner from loss resulting from the subcontractor's acts or omissions. It does NOT provide for the subcontractor to indemnify the general contractor for loss resulting from the general contractor's own acts or omissions.

Id. at 164. The court based its ruling on the general law in Florida that indemnity agreements which protect parties from their own negligence are disfavored. *Id.*

231. *See University Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507, 510–11 (Fla. 1973) (a general provision indemnifying the indemnitee "against any and all claims," standing alone, is not sufficient). *Cf. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072, 1077 (Fla. 5th DCA 2003) (finding language "regardless of whether or not it is caused in part by a party indemnified hereunder" clearly expressed parties' intent that contractor indemnify engineer for its own wrongful conduct).

232. *See Ohio Cas. Ins. Co. v. Holcim (US), Inc.*, 548 F.3d 1352, 1357 (11th Cir. 2008) (noting that it was unclear whether state law allowed recovery under a comparative fault or negligence theory within a contractual indemnity provision). The facts in *Holcim* illustrate this difficulty. Holcim, which operated a cement manufacturing plant, hired ISOM a general contractor to perform work at its facility. The agreement between Holcim and ISOM provided that ISOM would indemnify and hold harmless Holcim:

> from any and all claims, demands, actions, penalties, fines, losses, costs or other liabilities . . . arising out of or resulting from [ISOM's] breach of warranty or performance of this agreement or any act or omission of [ISOM], whether occurring on [Holcim's] premises or elsewhere. However, [ISOM] shall have no obligation to [Holcim] to the extent such losses are attributable to the negligence or willful misconduct of [Holcim].

Id. at 1354 (ellipses in original). An ISOM employee suffered serious injuries while working at the plant and brought an action against Holcim and two of its employees alleging "negligence, willfulness and wantonness" but did not name ISOM in the suit. *Id.* Holcim demanded indemnity from ISOM under the agreement. However, ISOM and its insurer refused to contribute to settlement of the claim, and as a result, litigation ensued between Holcim, ISOM and its carriers over whether the indemnity agreement was breached. *Id.* at 1355. Because the Eleventh Circuit could not determine whether ISOM could be liable under Alabama law which applied, the Court certified the following question to the Alabama Supreme Court: "Whether, under Alabama law, an indemnitee may enforce an indemnification provision and recover damages from an indemnitor resulting from the combined or concurrent fault or negligence of the indemnitee and indemnitor?" *Holcim* is instructive since Florida law (*see generally* Fla. Stat. Ch. 440) like Alabama law, shields an employer from liability for injuries to its employees which arise in the course of employment.

Moreover, under a comparative fault analysis, a party without direct fault, which is only vicariously liable, may still have the liability of an active tortfeasor apportioned to it.[233]

All indemnity contracts are subject to the general rules of contract construction, and thus are typically a matter of law for the courts to resolve.[234] If the contract is found to be ambiguous, courts will construe it against the party who drafted it, and will admit extrinsic evidence to assist the court in its interpretation of the ambiguous agreement.[235] Furthermore, courts strictly construe indemnity provisions in favor of the indemnitor.[236]

However, "[t]he general rule of indemnification is that an indemnitor who has notice of the suit filed against the indemnitee by the injured party and who is afforded an opportunity to appear and defend it is bound by a judgment rendered against the indemnitee as to all material questions determined by the judgment . . . Florida courts often refer to the effect of this rule as 'vouching in' the indemnitor."[237] The rule is "[p]remised on the concepts of estoppel and res judicata."[238] Thus, the judgment rendered in the underlying action is binding for the purpose of enforcing the indemnity

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Thus, it is not clear to what extent an indemnity agreement in these circumstances would protect the indemnitee from third-party claims by the indemnitor's own employees. *See also Southern R.R. Co. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96, 103 (S.D. Ga. 1974) (recognizing that applying the comparative negligence doctrine to contractual indemnity creates its own special problems).

233. *See American Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005) (holding vicariously liable party should have negligence of active tortfeasor apportioned to it under Fla. Stat. § 768.81 such that recovery of its own damages is reduced accordingly).

234. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999); *U.S.B. Acquisition Co., Inc. v. Stamm*, 660 So. 2d 1075 (Fla. 4th DCA 1995); *Improved Benevolent & Protected Order of Elks of World, Inc. v. Delano*, 308 So. 2d 615 (Fla. 3d DCA 1975).

235. *See Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 434 (Fla. 1980); *C R Mall, Inc. v. Sears, Roebuck & Co.*, 667 So. 2d 1016 (Fla. 5th DCA 1996); *see also U.S.B. Acquisition Co., Inc. v. Stamm*, 660 So. 2d 1075, 1079 (Fla. 4th DCA 1995); *Westinghouse Elec. Corp. v. Prudential Ins. Co. of Am.*, 547 So. 2d 721, 722 (Fla. 1st DCA 1989).

236. *See Bodon Indus., Inc. v. Brown*, 645 So. 2d 33, 36 (Fla. 5th DCA 1994); *Sol Walker & Co. v. Seaboard Coast Line R. Co.*, 362 So. 2d 45, 49 (Fla. 2d DCA 1978).

237. *Ashtead Grp. PLC v. Rentokil Initial PLC*, 7 So. 3d 606, 609 (Fla. 2d DCA 2009) (quoting *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072, 1079 (Fla. 5th DCA 2003)).

238. *Ashtead Grp. PLC v. Rentokil Initial PLC*, 7 So. 3d 606, 609 (Fla. 2d DCA 2009) (quoting *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072, 1079 (Fla. 5th DCA 2003)).

agreement against the indemnitor with regard to the material facts litigated in the main action.[239]

A related but similar concept to indemnification is a hold harmless agreement. Where indemnification provisions relate to third-party claims against an owner arising from the contractor's work, hold harmless provisions protect the owner against first-party claims of the contractor. A hold harmless agreement is defined as a "contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility."[240] Florida courts consider a hold-harmless clause to be an exculpatory clause, which releases one party from his own error (first-party liability).[241] A "hold harmless" agreement can release a wrongdoing indemnitee where an indemnity agreement would not have the same effect. Unlike a hold harmless provision, an indemnity agreement is defined as a

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239. *See Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 450 (Fla. 2007) ("It is well settled that 'where an indemnitor has notice of a suit against his indemnitee and is afforded an opportunity to appear and defend, a judgment therein rendered against the indemnitee, if without fraud or collusion, is conclusive against the indemnitor as to all material questions therein determined.'") (internal citation omitted); *see also Gallagher v. Dupont*, 918 So. 2d 342, 348 (Fla. 5th DCA 2005) (same) (citing *Coblentz v. Am. Sur. Co. of N.Y.*, 416 F.2d 1059, 1062–63 (5th Cir. 1969)); *Ashtead Grp. PLC v. Rentokil Initial PLC*, 7 So. 3d 606, 609 (Fla. 2d DCA 2009). Where the underlying judgment, however, is procured by fraud or collusion, or is unreasonable in amount, the judgment can be challenged. *See Bradfield v. Mid-Continent Cas. Co.*, 143 F. Supp. 3d 1215, 1240 (M.D. Fla. 2015) (citing *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 534 Fed. Appx. 926, 928 (11th Cir. 2013)). "If an insurer can prove that either element is unsatisfied, the consent judgment cannot be enforced." *Mid-Continent*, 534 Fed. Appx. 926, at 928. "[W]hether a settlement is reasonable and prudent is what a reasonably prudent person in the position of the defendant [the insurer] would have settled for on the merits of plaintiff's claim." *Home Ins. Co. v. Advance Mach. Co.*, 443 So. 2d 165, 168 (Fla. 1st DCA 1983) (citations omitted). Objective and subjective factors are considered, "including the degree of certainty of the tortfeasor's subjection to feasibility, the risks of going to trial and the chances that the jury verdict might exceed the settlement offer." *Id.* Further, an insurer does not waive the right to challenge a settlement on the grounds of fraud or collusion merely because it had prior knowledge of the settlement and failed to object. *Sidman v. Travelers Cas. & Sur.*, 841 F.3d 1197, 1204–05 (11th Cir. 2016). "[T]he relevant inquiry for determining whether to enforce a *Coblentz* agreement against an insurer that wrongfully denied coverage and refused to defend is whether the agreement was produced through fraud or collusion, not whether the insurer had notice of the settlement and an opportunity to object to it. A contrary approach would render *Coblentz's* fraud or collusion exception meaningless, as all *Coblentz* agreements arise out of an insurer's refusal to defend its insured." *Sidman*, 841 F.3d at 1205.

240. Philip L. Bruner and Patrick J. O'Connor, Jr., 3 *Bruner & O'Connor Construction Law* § 10:25 (June 2018 Westlaw Ed.).

241. *See Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 320 (Fla. 4th DCA 1984); *Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP*, 832 So. 2d 270, 272 (Fla. 4th DCA 2002); *see also* Bryan A. Garner, *Indemnify and Hold Harmless*; *Save Harmless*, 15 Green Bag 2d 17 (Autumn 2011).

contractual arrangement whereby one party agrees to protect the second party from loss or damage that results from the liability to a third party. While indemnity provisions address third-party liability, and hold-harmless provisions are exculpatory and address first-party liability, Florida courts often interpret both provisions using the same set of case law, with the same limitations on liability. As one court has explained:

> Although there is a difference between contracts of indemnification and hold-harmless agreements, we deem the central holding of the above cases to apply as well to a hold harmless agreement that, as here, functions much like an indemnification agreement . . . . Although there is a distinction in definition between an exculpatory clause and an indemnity clause in a contract, they both attempt to shift ultimate responsibility for negligent injury, and so are generally construed by the same principles of law. An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. An indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party (sometimes back to the injured party, thus producing the same result as an exculpatory provision).[242]

As with indemnity agreements which protect a wrongdoing indemnitee from its own negligence, "[e]xculpatory clauses are disfavored in the law because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss."[243] As such, these clauses are strictly construed against the party seeking to be relieved of

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[242] *Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP*, 832 So. 2d 270, 272 (Fla. 4th DCA 2002).

[243] *Brooks v. Paul*, 219 So. 3d 886, 887 (Fla. 4th DCA 2017) (quoting *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008)).

responsibility[244] and are enforceable "only where and to the extent that the intention to be relieved was made clear and unequivocal in the contract . . . [with] wording . . . so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away."[245] Further, such clauses may not be used to protect a party from its own intentional misconduct.[246]

1-6:4.3 Contribution

Joint and several liability refers to the situation when more than one defendant performs separate and independent acts which combine to produce a single economic injury, resulting in each defendant becoming individually and collectively responsible for all resulting consequences.[247] Because of joint and several liability, a defendant could become obligated to pay more than its share of liability. To remedy this situation, a defendant could bring a contribution claim against another defendant to recover the additional amount of damages paid to a prevailing plaintiff.

In 2006, the concept of joint and several liability was repealed by the Florida Legislature[248] and gave way to the "comparative fault" approach, where a tortfeasor's degree of liability was limited to his own degree of fault, thus eliminating the need for contribution claims.[249] In 2023, the Florida Legislature went a step further,

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244. *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So. 2d 565, 567 (Fla. 2d DCA 2008); *see also Obsessions in Time, Inc. v. Jewelry Exch. Venture, LLLP*, 247 So. 3d 50 (Fla. 3d DCA 2018).

245. *Murphy v. Young Men's Christian Ass'n of Lake Wales, Inc.*, 974 So. 2d 565, 568 (Fla. 2d DCA 2008) (quoting *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st DCA 1991)). *But see Elalouf v. Sch. Bd. of Broward Cnty.*, 311 So. 3d 863, 866 (Fla. 4th DCA 2021) (distinguishing *Murphy* and *Brooks v. Paul*, 219 So. 3d 886, 887 (Fla. 4th DCA 2017) noting that "the qualifying language [in the releases] created confusion because the entity seeking to be released from liability agreed to exercise reasonable care in providing the activity despite the release's broad disclaimer of liability.").

246. *See Fuentes v. Ownen*, 310 So. 2d 458, 460 (Fla. 3d DCA 1975) (holding that broad form exculpatory clause in lease could not reasonably be construed to constitute intelligent waiver of liability for intentional tort committed by landlord and finding that attempt to exempt oneself from liability for intentional tort is generally declared void).

247. *See generally Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *University of Miami v. All-Pro Athletic Surfaces, Inc.*, 619 So. 2d 1034 (Fla. 3d DCA 1993).

248. *See* FLA. STAT. § 768.81(3) (2006).

249. *See Nucci v. Buchanan Ingersoll & Rooney PC*, No. 8:15-CV-518-17AEP, 2016 WL 5843429, at *6 (S.D. Fla. Oct. 4, 2016) ("In 2006, the Florida Legislature eliminated joint and several liability in negligence actions . . . . Thus, a party is 'liable only for the share of total damages proportional to its fault.' As a result of this amendment, courts consistently hold that a third-party claim for contribution is obsolete in negligence actions, and that the

adopting what is referred to as "modified comparative fault," where in a negligence action, "any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages."[250]

1-6:5 Waiver, Estoppel, and Variation

1-6:5.1 Waiver

Waiver is the intentional relinquishment or abandonment of a known right or privilege.[251] Like estoppel, it can be established through express language or inferred by actions or conduct demonstrating intent to relinquish one's rights.[252] Waiver requires (1) a right, privilege, advantage, or benefit which can be waived; (2) actual or constructive knowledge; and (3) the intention to relinquish the right.[253] A course of dealing may establish a waiver or modification of contractual provisions that might otherwise require a party's performance.[254]

1-6:5.2 Estoppel

Estoppel was created at common law to prevent wrongs and guard against fraud.[255] The elements of equitable estoppel are: (1) representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and

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party seeking contribution should instead plead the fault of the non-party as an affirmative defense.") (internal citations omitted).

250. *See* Fla. Stat. § 768.81(6) (2023) which was implemented by Laws of Florida, ch. 2023-15, s. 9 and became effective March 24, 2023. The amended statute applies to any causes of action filed after the effective date.

251. *See, e.g., Petersen v. Fla. Bar*, 720 F. Supp. 2d 1351 (M.D. Fla. 2010) (citing *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)); *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293 (S.D. Fla. 2010) (citing *Hale v. Dep't of Revenue*, 973 So. 2d 518, 522 (Fla. 1st DCA 2007)); *Caraffa v. Carnival Corp*., 34 So. 3d 127 (Fla. 3d DCA 2010); *WSG W. Palm Beach Dev., LLC v. Blank*, 990 So. 2d 708 (Fla. 4th DCA 2008).

252. *See Caraffa v. Carnival Corp*., 34 So. 3d 127, 130 (Fla. 3d DCA 2010) ("Waiver is the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.").

253. *Bishop v. Bishop*, 858 So. 2d 1234, 1237 (Fla. 5th DCA 2003); *Zurstrassen v. Stonier*, 786 So. 2d 65, 70 (Fla. 4th DCA 2001).

254. *See Fletcher v. Laguna Vista Corp*., 275 So. 2d 579, 581 (Fla. 1st DCA 1973) (noting that parties to AIA contract through their course of dealings interpreted and modified the document to grant authority to architect to change contract sum); *Doral Country Club, Inc. v. Curcie Bros., Inc*., 174 So. 2d 749, 751 (Fla. 3d DCA 1965) (holding that subsequent course of dealing between parties established a waiver of contract provision requiring written authorization for extras or additions).

255. *Miami Gardens, Inc. v. Conway*, 102 So. 2d 622 (Fla. 1958).

(3) a change in position detrimental to the party claiming estoppel and reliance on the representation.[256] The purpose of estoppel is to protect those who have been misled by the other party and often involves the other party's wrongdoing or deception.[257] Its essence is that a person should not be permitted to unfairly assert inconsistent positions.[258] Thus, where the words or actions of one party cause the other to forebear to his detriment, estoppel operates to prevent harm to the innocent party.[259] While estoppel can be based upon silence, it cannot exist where the parties have equal knowledge of the facts or the same means of ascertaining that knowledge.[260]

Two main distinctions between waiver and estoppel are (1) waiver involves the act and conduct of only one of the parties while equitable estoppel involves the conduct of both parties; and (2) waiver does not carry implication as to fraud or deception on the part of either party while estoppel frequently does. "Nevertheless, waiver, although it is not technically speaking an estoppel, may be affected by various acts and different courses of conduct which operate in the final analysis as an estoppel or at least a quasi-estoppel."[261] While the concepts of waiver and estoppel

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256. *Sun Cruz Casinos, L.L.C. v. City of Hollywood, Fla.*, 844 So. 2d 681, 684 (Fla. 4th DCA 2003); *Cosman v. Bea Morley Real Est. Grp., Inc.*, 820 So. 2d 1040, 1041 (Fla. 4th DCA 2002). *See also State ex rel., Watson v. Gray*, 48 So. 2d 84, 88 (Fla. 1950) ("Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract or of remedy.").

257. *Therrell v. Reilly*, 151 So. 305, 306 (1932). However, as one court noted, "[t]he doctrine of estoppel should be applied with great caution and is applied only where to refuse its application would be virtually to sanction a fraud." *Pelican Island Prop. Owners Ass'n, Inc. v. Murphy*, 554 So. 2d 1179, 1181 (Fla. 2d DCA 1989) (citations omitted).

258. *See Pelican Island Prop. Owners Ass'n, Inc. v. Murphy*, 554 So. 2d 1179, 1181 (Fla. 2d DCA 1989).

259. *Miami Nat'l Bank v. Greenfield*, 488 So. 2d 559 (Fla. 3d DCA 1986) (citing *State ex rel., Watson v. Gray*, 48 So. 2d 84, 88 (Fla. 1950) ("The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury.")).

260. *See Pelican Island Prop. Owners Ass'n, Inc. v. Murphy*, 554 So. 2d 1179, 1181 (Fla. 2d DCA 1989); *see also Overstreet v. Bishop*, 343 So. 2d 958, 960 (Fla. 1st DCA 1977) (citing *Price v. Stratton*, 33 So. 644, 647 (Fla. 1903) ("Where the condition . . . is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.")).

261. *Abrogast v. Bryan*, 393 So. 2d 606, 607 (Fla. 4th DCA 1981) (quoting Fla. Jur. 2d, Estoppel & Waiver, § 86). *See South Fla. Reg'l Plan. Council v. State Land & Water*

are not unique to construction claims, they should be considered where the facts and circumstances implicate application of these doctrines to bar otherwise viable claims. For instance, through course of conduct, the parties to an agreement may understand that certain obligations—though stated in the contract—were abandoned, such as use of proprietary materials or stated quantities or the time for performance. In such circumstances, the contractor (or subcontractor) could argue that an owner's (contractor's) claim based on failure to comply with the specified obligations is barred by waiver or estoppel.

1-6:5.3 Variation

Variation of a contract occurs when changes—which individually might fall within a "variations" (or "changes") clause—are so numerous that collectively they result in fundamentally changing the scope of work under the contract. This situation is referred to as either abandonment or "cardinal change"[262] and can happen when an owner (or contractor) makes excessive changes beyond what the parties reasonably anticipated when they entered into the contract (subcontract). There is no requirement that the owner (or contractor) intend to abandon the contract by making excessive changes. Abandonment may be implied as a result of the numerous changes. Furthermore, abandonment may be implied where the parties ignore the procedural formalities of the contract associated with making changes. Unlike waiver or estoppel—which may bear directly on a defect claim—variation likely would have

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Adjudicatory Comm'n, 372 So. 2d 159 (Fla. 3d DCA 1979) (finding that Council's knowledge of administrative proceedings and failure to act constituted both waiver and estoppel).

262. As noted by one court, "The cardinal change doctrine is a creature of the body of law which has arisen in the context of disputes over government contracts":

> [A cardinal change] occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then, a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Atlantic Dry Dock Corp. v. U.S., 773 F. Supp. 335, 339 (M.D. Fla. 1991) (quoting *Allied Materials & Equip. Co. v. U.S.*, 569 F.2d 562, 563–64 (1978)). "There is no automatic or easy formula to determine whether a change is beyond the scope or not [of the changes clause]. Each case must be analyzed on its own facts and circumstances giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole." *General Dynamics Corp. v. U.S.*, 585 F.2d 457, 462 (1978).

no direct relation to the claim, but might be used to demonstrate an abandonment of the entire contract, thus potentially rendering a provision contained within the contract unenforceable.[263] While this argument will generally not apply to most defect claims, it should not be ruled out where a cardinal change could be asserted.

1-6:6 Failure to Mitigate

Mitigation of damages, sometimes also referred to as the doctrine of "avoidable consequences," commonly applies in contract and tort actions and is based on the notion that a party should not benefit from its failure to take reasonable measures to avoid the consequences of another's actions.[264] The doctrine, however, is somewhat inaccurately identified as the "duty to mitigate" since there is no actual *duty* to mitigate.[265] In fact "the injured party is not compelled to undertake any ameliorative efforts."[266] Instead "(t)he doctrine simply 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured party could have

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263. *See, e.g., Gustafson v. Jenson*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (noting that contract may be abandoned, and once abandoned, may not be enforced).

264. *See Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009) (citing generally 17 Fla. Jur. 2d, *Damages*, §§ 103-04 (2004)); *see also Jenkins v. Graham*, 237 So. 2d 330 (Fla. 4th DCA 1970) ("The principle of 'avoidable consequences' upon which the reduction of damages rule is grounded . . . finds its application in virtually every type of case in which the recovery of a money judgement or award is authorized . . . . It addresses itself to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff.").

265. *See Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009); *see also In re Standard Jury Instructions in Civil Case—Report No. 2011-01 (Unlawful Retaliation)*, 95 So. 3d 106, 113 (Fla. 2012) ("**NOTES ON USE FOR 415.13**: 1. This instruction does not use the term 'duty to mitigate' because this is more accurately an application of the doctrine of avoidable consequences and 'duty' implies a mandatory obligation.") (bold and underlined text in original) (citing *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009)); *In re Standard Jury Instructions—Contract & Bus. Cases*, 116 So. 3d 284, 339 (Fla. 2013) ("**NOTE ON USE FOR 504.9 (MITIGATION OF DAMAGES:** This instruction does not use the somewhat inaccurate term 'duty to mitigate' damages because '[t]here is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts.')") (bold text in original) (citing *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009)); *In re Standard Jury Instructions in Civil Case—Report No. 16-01*, 214 So. 2d 552, 559–60 (Fla. 2017) ("NOTES ON USE FOR 417.10 . . . As to plaintiff's 'duty to mitigate' damages in cases involving wrongful discharge . . . (internal citations omitted), this instruction does not use the term 'duty to mitigate' because this is more accurately an application of the doctrine of avoidable consequences.") (underlined text in original) (citing *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009)).

266. *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009).

reasonably avoided.'"[267] However, a party is not required to engage in extraordinary efforts to mitigate.[268] "Rather, the injured party is only accountable for those hypothetical ameliorative actions that could have been accomplished through 'ordinary and reasonable care,' without requiring undue effort or expense."[269]

While in principle the doctrine of avoidable consequences is an easy concept to grasp, its application is not always so obvious, and establishing the defense could be challenging.[270] For example, if an owner is aware that defective construction is allowing water intrusion which is damaging the interior of the building, and the owner thereafter fails to take measures to prevent further water intrusion or protect the contents of the building from further damage, the doctrine would appear to prevent the owner from recovering from the contractor for the additional damages that could have been avoided had the owner taken such measures. But what if the owner could not remedy the situation (timely or at all), and the contractor refused to make repairs? Why should the contractor's

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267. *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009) (citations omitted) (emphasis in original).

268. *See Thompson v. Fla. Drum Co.*, 651 So. 2d 180, 182 (Fla. 1st DCA 1995). Interestingly, in reversing a judgment based upon the trial court's improper admission of evidence of the plaintiff's failure to utilize its available insurance to mitigate the damages it was seeking from the defendant, the court in *Thompson* certified the following question to the Florida Supreme Court: "In an action for breach of contract may the breaching party present evidence of the injured party's casualty insurance in mitigation of damages?" *Id.* at 182. In answering the certified question in the negative, the Supreme Court agreed with the appellate court that "regardless of the theory of recovery, negligence or contract, it was error to allow the jury to be apprised of [the plaintiff's] insurance coverage." *Florida Drum Co. v. Thompson*, 668 So. 2d 192, 193 (Fla. 1996). While it would appear that evidence of insurance is generally irrelevant to the issue of mitigation, the Court noted that its holding "should *not* be interpreted to exclude evidence of insurance where there is a provision in the contract between parties which would make it relevant." *Id.* at 193 n.1 (emphasis in original). Thus, where a party fails to obtain contractually required insurance, or fails to make a claim against such insurance, or, having made a claim against such insurance, loses otherwise available coverage due to its actions or inactions, it would appear from the Court's holding in *Thompson* that the door remains open to introduce such evidence. *See Florida Drum Co.*, 193 n.2 (Fla. 1996) (citing FLA. STAT. § 90.402 regarding admissibility of relevant evidence).

269. *Systems Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009); *see also Graphic Assocs., Inc. v. Riviana Rest. Corp.*, 461 So. 2d 1011, 1014 (Fla. 4th DCA 1984) (doctrine "prevents a party from recovering those damages inflicted by a wrongdoer which the injured party 'could have avoided without undue risk, burden, or humiliation'") (quoting Restatement (Second) of Contracts § 305(1) (1979)).

270. As the Florida Supreme Court aptly recognized long ago, "(t)o plead the doctrine of avoidable consequences . . . . 'would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.'" *Sullivan v. McMillan*, 19 So. 340 (Fla. 1896).

liability for defective work be limited? Should the owner's inability to remedy the defect (or remedy it sooner) provide legal justification to preclude the owner from recovering the additional damages from the contractor's defective work? This will necessarily depend on whether the owner's failure to act was "reasonable" under the circumstances. In the face of a contractor's defense of failure to mitigate, might the owner raise (as a reply to an affirmative defense) its inability to make repairs to counter such a defense?[271] These questions reflect the potential difficulty in applying this defense, even where the owner has knowledge of the problem and fails to act.

What if the owner in our example asserts it was not aware of the water intrusion problem until a certain point in time? Would the defense apply only after the owner's *actual* knowledge of the problem (and subsequent *intentional* failure to act) or may the contractor show the owner reasonably *should* have known of it at an earlier point in time (and thus was *negligent* for failing to discover it and act sooner)? The latter seems plausible given the apparent transformation of the doctrine into the modern concept of comparative fault.[272] One could certainly argue that an owner's failure to act was not unreasonable if the owner was not yet aware of the problem.[273] However, that begs the question of when the owner should become aware. How often should the owner be "looking" for possible defects? Once a day? Once a week? Once a month? How extensive should the owner's "investigation" be? General? Detailed? By the owner, or instead through a third-party professional? Or should it be sufficient that the owner becomes aware when the damage manifests itself?

Sometimes the result of a defect such as water intrusion may manifest itself, but its effects may be hidden or not readily observable. A residential owner may be less inclined to conduct

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271. *See, e.g., Banks v. Salina*, 413 So. 2d 851 (Fla. 4th DCA 1982) (suggesting owner's financial inability might justify failure to make repairs to leaking roof).

272. *See, e.g., Parker v. Montgomery*, 529 So. 2d 1145 (Fla. 1st DCA 1988), cited with approval, *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996); *see also Jacobs v. Westgate*, 766 So. 2d 1175, 1181 (Fla. 3d DCA 2000) (noting the abolishment of the doctrine with the adoption of comparative negligence).

273. *See Norman v. Mandarin Emergency Care Ctr., Inc.*, 490 So. 2d 76, 78 (Fla. 1st DCA 1986) (doctrine does not apply where injured party is not chargeable with notice that damages are likely to ensue); *see also Sanchez & Body & Soul Retreat, LLC v. Cinque*, 238 So. 3d 817 (Fla. 4th DCA 2018).

inspections or routine maintenance than a commercial owner which might otherwise alert the owner to a problem. The former's lack of inspections or "routine" maintenance may be reasonable under the circumstances, and thus may not be a proper basis to raise the defense. However, to the extent the defense might apply, it only prevents recovery of damages that could have been reasonably avoided; it does not bar the entire action.[274]

Practitioners and parties should consider these potential challenges in establishing the defense before raising it as a matter of course.[275]

1-6:7 Lack or Failure of Consideration

As all legal practitioners (and most non-lawyers) know, valid consideration is a fundamental element of an enforceable contract the lack of which causes the contract to fail.[276] On the other hand, failure of consideration occurs where a party fails to provide the agreed upon consideration.[277] Both are defenses to an action arising under a contract.[278] While as a practical matter, demonstrating the complete lack of consideration to support a construction contract may prove challenging, this defense could have limited application to defect claims and should therefore not be overlooked.

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274. *Parker v. Montgomery*, 529 So. 2d 1145, 1147 (Fla. 1st DCA 1988).

275. Though beyond the scope of this book, another example, where the defense may prove more useful, is with non-payment claims. A surety could assert failure to mitigate where a bond claimant continued to furnish labor, materials or services to a project in the face of substantial non-payment, or non-payment over a significant period of time, instead of stopping thereby mitigating its losses. The bond claimant could counter the defense by establishing that, while substantial, the amount was incurred over a relatively short period of time and the claimant had no reason to know that its customer would be unable to pay. Even if non-payment occurred over a longer period of time, the defense may not bar the claim where other factors are involved such as past credit history between the claimant and its customer or where the extension of credit was consistent with industry standards. *See, e.g., Graybar Elec. Co. v. Stratton of Fla., Inc.*, 509 So. 2d 1133 (Fla. 2d DCA 1987) (applying doctrine to supplier's claim against contractor's payment bond but finding insufficient evidence to support defense where there was no evidence that supplier knew or should have known of subcontractor's payment problems and thus should have avoided the consequences thereof).

276. *See Jones v. McCallum*, 21 Fla. 392 (Fla. 1885) ("A 'consideration of some kind is absolutely necessary to the forming of a good contract.'").

277. *See Holm v. Woodworth*, 271 So. 2d 167, 169 (Fla. 4th DCA 1972) ("In the general law of contracts, want of consideration means a total lack of any valid consideration for a contract, failure of consideration is the neglect, refusal or failure of one of the parties to perform or furnish the consideration agreed upon.").

278. *Vichaikul v. S.C.A.C. Enters., Inc.*, 616 So. 2d 100 (Fla. 2d DCA 1993) (failure of consideration); *Howdeshell v. First Nat'l Bank of Clearwater*, 369 So. 2d 432, 434 (Fla. 2d DCA 1979) (lack of consideration).

For instance, where an owner's defect claim against a contractor arises from an obligation that was part of the original agreement or added to the scope of the agreement by change order, the contractor could assert the obligation was unenforceable if there was no valid consideration for the work or change in work. And where the owner's obligations under the agreement are illusory, lack of consideration could be raised.[279] A promise is illusory where "one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor—who says, in effect, 'I will if I want to.'"[280] Such a promise "does not constitute consideration for the other promise, and thus, the contract is unenforceable against either party."[281] Furthermore, failure of consideration could give rise to other remedies by the contractor.[282] On the other hand, where a party's performance under an agreement is not expressly conditioned upon certain performance by the other party, the defense of failure of consideration does not lie.[283] While this defense

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279. *See Allington Towers N., Inc. v. Rubin*, 400 So. 2d 86, 87 (Fla. 4th DCA 1981) (noting appropriate defense would be lack of consideration where promises are illusory or unenforceable).

280. *Office Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370 (Fla. 4th DCA 2003) (internal citation omitted).

281. *Office Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370 (Fla. 4th DCA 2003).

282. *See Duncan Props., Inc. v. Key Largo Ocean View, Inc.*, 360 So. 2d 471, 472 (Fla. 3d DCA 1978) (acknowledging the usual remedy for failure of consideration, standing along, is an action at law for damages, but failure amounting to breach of a dependent covenant to an agreement may give rise to a right of rescission). A covenant is considered dependent "where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted." *AVVA-BC, LLC v. Amiel*, 25 So. 3d 7, 11 (Fla. 3d DCA 2009) (quoting *Steak House, Inc. v. Barnett*, 65 So. 2d 736, 737 (Fla. 1953)). *See also Royal v. Parado*, 462 So. 2d 849, 855 (Fla. 1st DCA 1985) ("As a rule, a court of equity will ordinarily rescind an instrument only for fraud, accident or mistake, and not because of the mere want or failure of consideration; an action for damages at law is usually considered adequate where failure of consideration exists."). To support rescission, however, there must be a total failure of consideration. *See Ganaway v. Henderson*, 103 So. 2d 693, 700 (Fla. 1st DCA 1958) ("In the absence of fraud or other recognized equitable grounds, partial failure of consideration is not regarded as (sic) basis for cancellation or rescission, while total failure of consideration is so regarded.") (Sturgis, C. J. dissenting).

283. *See Silber v. Cn'R Indus. of Jacksonville, Inc.*, 526 So. 2d 974, 977 (Fla. 1st DCA 1988). In *Silber*, owners of a hotel and condominium project and the general contractor entered into a settlement agreement with Cooper, a subcontractor, which provided for certain payments to the subcontractor upon, and within a specified period of time from, execution of the agreement and for completion of certain work by the subcontractor. *Id.* at 976. The agreement further provided that Cooper was not released from payments due subcontractors or suppliers of Cooper. *Id.* In defense of Cooper's action for non-payment under the agreement, the owners and general contractor alleged failure of consideration

may prove helpful in defending some defect claims, it should be noted that the sufficiency of consideration is generally a question of fact that is not properly resolvable by summary judgment.[284]

1-6:8 Prior Material Breach

Failure to perform under a contract does not always amount to a breach of the agreement. In order to be a breach, the failure to perform must be "material" and not minor.[285] A provision is material where it "go(es) to the essence of the contract."[286] Where a prior material breach occurs by one party, the non-breaching party is discharged of any further obligations remaining under the contract, provided however, that the non-breaching party must first establish performance on its part.[287] As the Court in *Hyman v. Cohen* noted:

> A material breach, as where the breach goes to the whole consideration of the contract, gives to the injured party the right to rescind the contract or to treat it as a breach of the entire contract—in other words, an entire or total breach—and to maintain an action for damages for a total breach. Whenever

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due to Cooper's failure to obtain releases and pay all subcontractors and suppliers, and to complete work in a timely fashion. *Id.* In rejecting this defense, the court noted that the settlement agreement did not contain any provision requiring Cooper to pay its subcontractors as a condition of performance, and that neither the agreement, the general contract, nor the subcontract contained any explicit provision requiring completion of the work by a specified date. Further, the court ruled that none of these documents required the court to imply such an obligation as argued by the owners and general contractor. *Id.* at 977.

284. *See Coquina Ridge Props. v. E. W. Co.*, 255 So. 2d 279 (Fla. 4th DCA 1971) (finding whether evidence offered by defendant was sufficient to establish want or failure of consideration was question of fact to be resolved by trier of fact).

285. *See Covelli Fam., L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 752 (Fla. 4th DCA 2008) ("A party's 'failure to perform some minor part of his contractual duty cannot be classified as a material or vital breach.'") (quoting *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972)).

286. *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972). *See Federal Deposit Ins. Corp. v. Wright*, No. 3:16-cv-00169-MCR-EMT, 2016 WL 6462164, at *2 (N.D. Fla. Oct. 28, 2016) ("A material breach occurs when a party fails to perform an essential part of the contract.") (citations omitted).

287. *See Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845 (Fla. 1st DCA 1990) (holding that contractor's failure to install roofing system as required under the contract and refusal to repair it without further payment was material breach discharging owner's duty to pay until defective roof was repaired); *see also Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) ("Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability.") (internal citations omitted).

> there is a total breach of a contract by one party to it, the other is at liberty to treat the contract as broken and desist from any further effort on his part to perform it. In other words, he may abandon it and recover as damages for the breach the profits he would have received by a full performance . . .[288]

Timely payment is considered to be a material obligation.[289] Thus, an owner's or contractor's unjustified failure to timely pay amounts due under a prime contract or subcontract may be deemed a material breach which would relieve the contractor or subcontractor of further performance, including correcting any deficiencies in its work.[290] However, the timing of payment would need to be considered "of the essence," so as to render a delay in performance a material breach.[291] Parties should also be mindful that failure to adhere to the contractually required method of payment could render payment untimely and a material breach of the agreement.[292] It is important to note, however, that a prior material breach by one party will not operate as a total

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288. *Hyman v. Cohen*, 73 So. 2d 393, 397 (Fla. 1953) (quoting 12 Am. Jur., *Contracts*, § 389 (1953)).

289. *See Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 2003) (holding that lessee's failure to timely make payment under settlement agreement constituted material breach).

290. *Cf. Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845 (Fla. 1st DCA 1990) (finding contractor's failure to pay subcontractor proper where subcontractor refused to repair defective roof and fulfill its contractual obligations).

291. *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 2003) ("The modern trend of decisions concerning brief delays by one party in performance of a contract or conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is not to treat such delays as a failure of a constructive condition discharging the other party unless performance on time was clearly an essential and vital part of the bargain.") (internal citation omitted). *Cf. Moss v. Moss*, 959 So. 2d 375, 377 (Fla. 3d DCA 2007) (holding that father's tender of settlement check for child support three days late was "substantial compliance" with settlement agreement where parties did not make timing of payment an essential term and no hardship resulted from the delay). *See also Atlanta Jet v. Liberty Aircraft Servs., LLC*, 866 So. 2d 148, 150–51 (Fla. 4th DCA 2004) (holding that airplane purchaser was not entitled to terminate sale agreement due to late closing where contract did not make time of the essence or contain penalties for delay and purchaser suffered no hardship due to the delay).

292. *See Grouper Fin., Inc. v. World Gym, NBM, Inc.*, 873 So. 2d 593 (Fla. 3d DCA 2004) (holding failure to make timely payment of rent under settlement agreement a clear and material breach where agreement required payment by cashier's check or wire transfer and tenant tendered simple corporate check which bounced twice) (citing *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 2003)).

breach where further performance is demanded by that party.[293] Moreover, conduct following a breach could create new enforceable obligations upon the parties.[294] Therefore, parties should proceed cautiously when faced with a material breach to avoid arguments of waiver or the potential creation of entirely new obligations outside of the original agreement. Careful consideration should be made by the non-breaching party whether to treat the contract as terminated or whether to continue demanding performance by the breaching party. Sometimes prudence dictates allowing the breaching party to continue, to mitigate damages, as where a project is nearing completion and finding a replacement contractor would be cost prohibitive either in completion or delay costs. Under these circumstances, the non-breaching party could demand performance under a written reservation of rights and later seek damages for the breach.[295] Where an owner instead elects to terminate, a contractor which has been wrongfully terminated could assert prior breach as a defense to an owner's claim of incomplete work since the contractor was deprived of the ability to finish the work and therefore should not be charged for the completion costs.[296] However, an owner which has wrongfully terminated the contract should still be entitled to offset the contractor's damages for any deficiencies in the contractor's work.[297]

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[293] *See City of Miami Beach v. Carner*, 579 So. 2d 248, 251 (Fla. 3d DCA 1991) ("The rule is quite clear that a contracting party, faced with a material breach by the other party, may treat the contract as totally breached and stop performance. However, if the complaining party continues to demand performance from the breaching party, damages can only be recovered for partial breach.").

[294] *See McMillan v. Shively*, 23 So. 3d 830, 831 (Fla. 1st DCA 2009) (noting that parties' conduct following material breach of first contract may have created new enforceable contract implied in fact).

[295] Parties should be mindful though of the distinction between enforcement of an agreement and damages for its breach. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003) ("By enforcing a contract, it is assumed that the contract has continuing validity and a party is ordered to comply with its terms. A breach of contract action presupposes that the contractual relationship is at an end because of a material breach by one party and damages are sought by the non-breaching party as a substitute for performance.").

[296] Where one contracting party prevents performance or acts of the other party required to be performed or prevents discharge of a contractual duty, such actions are generally considered a breach of contract. *Gulf Am. Land Corp. v. Wain*, 166 So. 2d 763, 764 (Fla. 3d DCA 1964); *see County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1051 (Fla. 1997) (citing *Gulf American* with approval).

[297] The proper measure of damages by a contractor against an owner for breach of contract is the contractor's lost profit together with the reasonable cost of labor and materials incurred in good faith in partial performance of the contract. *First Atlantic Bldg.*

1-6:9 Statute of Frauds

The statute of frauds, a concept originating from the common law, has been adopted (and expanded) by statute in Florida.[298] The statute "was enacted to prevent fraud and the enforcement of claims based on loose verbal statements made faulty by the lapse of time."[299] As noted long ago by the Florida Supreme Court in *Yates v. Ball*:[300]

> The statute of frauds grew out of a purpose to intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos. To accomplish this, the statute requires that all actions based on agreements for longer than one year must depend on a written statement or memorandum, signed by the party to be charged. The statute should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose,

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Corp. v. Neubauer Constr. Co., 352 So. 2d 103, 104 (Fla. 4th DCA 1977); *Diversified Com. Devs., Inc. v. Formrite, Inc.*, 450 So. 2d 533, 535 (Fla. 4th DCA 1984). *See also Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845, 847 (Fla. 1st DCA 1990) ("Under Florida law, the proper measure of damages in a breach of contract action by a subcontractor against the contractor, where the contract has not been fully performed, is either *quantum meruit*, or the subcontractor's lost profit in addition to an amount representing the reasonable cost of labor and materials incurred in good faith in the partial performance of the contract."). Where the contractor has achieved "substantial performance" of the work, the contractor is entitled to recover the full contract price less the damages which the owner has suffered as a result of the contractor's failure to perform in strict accordance with the plans and specifications. *See Oven Dev. Corp. v. Molisky*, 278 So. 2d 299, 303 (Fla. 1st DCA 1973). As a general rule, the measure of the owner's damages under such circumstances "is the cost of correcting the defects or completing the omissions, rather than the difference in value between what ought to have been done in the performance of the contract and what has been done, where the correction or completion would not involve unreasonable destruction of the work done by the contractor and the cost thereof would not be grossly disproportionate to the results to be obtained." *Edgar v. Hosea*, 210 So. 2d 233, 234 (Fla. 3d DCA 1968) (internal citation omitted). *See also Temple Beth Sholom & Jewish Ctr., Inc. v. Thyne Constr. Corp.*, 399 So. 2d 525, 526 (Fla. 2d DCA 1981) ("The proper measure of damages for construction defects is the cost of correcting the defects, except in certain instances where the corrections involve an unreasonable destruction of the structure and a cost which is grossly disproportionate to the results to be obtained.").

298. *See* FLA. STAT. § 725.01; *see also* FLA. STAT. § 672.201.

299. *LaRue v. Kalex Constr. & Dev., Inc.*, 97 So. 3d 251, 253 (Fla. 3d DCA 2012); *see Harris v. Sch. Bd. of Duval Cnty.*, 921 So. 2d 725, 733 n.8 (Fla. 1st DCA 2006) ("The purpose of the statute of frauds is to 'intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos.'") (citing *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777, 779 (Fla. 1966) (internal citation omitted)).

300. *Yates v. Ball*, 181 So. 341 (Fla. 1937).

> courts should be reluctant to take cases from its protection.[301]

Relevant to defect claims, and perhaps having limited application, the statute bars enforcement of any *oral* agreement that cannot be performed within one year of the making of the agreement[302] or for the sale of goods the price of which is $500 or more.[303] For *written* agreements for design or construction, or the sale of goods,

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[301] *Yates v. Ball*, 181 So. 341, 344 (Fla. 1937), *receded from on other grounds*, *Browning v. Poirier*, 165 So. 3d 663, 665 n.3 (Fla. 2015). In holding that an oral agreement of indefinite duration which could be performed within one year fell outside the statute of frauds, the Court in *Browning* receded from the "general and qualifying rule" announced in *Yates,* noting that "[a]lthough the *Yates* decision was inartful in its discussion of a general and qualifying rule the manner in which this Court applied the statute of frauds in *Yates* is in accord with the majority approach to interpreting a statute of frauds." *Browning*, 165 So. 3d at 665–66 (Fla. 2015). It bears noting that the statute of frauds may bar other claims arising from the oral agreement. *See Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d 318, 319 (Fla. 5th DCA 2002) ("To the extent that Conner attempts to assert tort claims, they are likewise barred, as they flow from the alleged oral contract and are merely derivative."); *Bankers Tr. Co. v. Basciano*, 960 So. 2d 773, 778 (Fla. 5th DCA 2007) ("We further conclude that the trial court erred when it failed to grant summary judgment or JNOV on Mr. Basciano's negligent misrepresentation and FDUTPA claims as those claims were premised on the same conduct and representations that were insufficient to form a contract and are merely derivative of the unsuccessful contract claim."). Other courts, however, have allowed such derivative claims. *See Harrison v. Pritchett*, 682 So. 2d 650, 652 (Fla. 1st DCA 1996) (holding *quantum meruit* claim not barred); *Ala v. Chesser*, 5 So. 3d 715, 718 (Fla. 1st DCA 2009) (allowing claim for unjust enrichment); *Attanasio v. Excel Dev. Corp.*, 757 So. 2d 1253, 1256 (Fla. 4th DCA 2000) (reversing dismissal of fraud and negligent misrepresentation claims by purchasers against real estate developer based on statute of frauds where misrepresentations did not concern promises to perform in the future, but rather, related to existing benefits of the property); *Hayes v. Moon*, No. 16-80365-CIV-MARRA, 2017 WL 2547205, at *5 (S.D. Fla. June 13, 2017) (finding unjust enrichment claim "not an action 'upon' the contract" and thus not barred by statute of frauds). On the other hand, in the absence of an enforceable agreement, the doctrine of promissory estoppel cannot be used to thwart the underlying purpose of the statute. *See Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777, 779 (Fla. 1966) ("The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counteraction to the legislatively created Statute of Frauds. This we decline to do."); *accord Coral Way Props., Ltd. v. Roses*, 565 So. 2d 372, 374 (Fla. 3d DCA 1990).

[302] *See* FLA. STAT. § 725.01. The one-year period relates to the performance of the oral agreement itself, and a not a collateral obligation of the agreement. *See Loper v. Weather Shield Mfg., Inc*., 203 So. 3d 898 (Fla. 1st DCA 2015). *Loper* involved a homeowner's claims against a window manufacturer alleging breach of an oral agreement and fraud arising out of the manufacturer's alleged agreement to replace and issue a new warranty for defective windows. The court concluded that the parties' agreement did not contravene the statute of frauds simply because it required the issuance of a *ten-year* warranty on the replaced windows. *Id.* at 905. Noting that "[t]he proper focus is on the *parol contract itself*, not the warranty," *Id*., the court held that "issuance of the warranty for the replacement windows could have been performed by the manufacturer within a year, thereby removing the statute of frauds as a bar." *Id.* at 908.

[303] *See* FLA. STAT. § 672.201.

the statute would have no application.[304] The "writing" required to avoid application of the statute does not necessarily mean a formal, executed agreement. The writing, if signed by the party against whom enforcement is sought,[305] can be "some note or memorandum" of the agreement[306] which "may take any possible form."[307] Further, more than one writing may be considered.[308] Thus, if a party provides a written estimate, or some other writings containing the proposed terms of an agreement, though not rising to the level of a formal executed agreement between the parties, the defense should not apply to bar enforcement of the agreement by the other party. Moreover, the writings necessary to take an agreement "out of the statute of frauds" may occur subsequent to the oral agreement.[309] Thus, in attempting to establish the validity of an oral agreement, practitioners and parties should pay careful attention to written communications or other writings between the parties throughout a project. Oftentimes, these critical documents may not be part of the customary (paper) project files and exist only in electronic format such as e-mail or even text messages, which a party is entitled to discover.[310]

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304. The statute does apply, however, to the extent a party seeks to enforce an *oral* modification to the written agreement. *See Wharfside at Boca Pointe, Inc. v. Superior Bank*, 741 So. 2d 542, 545 (Fla. 4th DCA 1999) ("An agreement that is required by the statute of frauds to be in writing cannot be orally modified."). Thus, the statute would ostensibly bar an oral modification that is not performable within one year or involves the sale of goods of $500 or more.

305. It is not necessary for the party seeking enforcement to sign it. *See White v. Syfrett*, 955 So. 2d 1110, 1114 (Fla. 1st DCA 2006) ("Syfrett's argument concerning the failure of appellant Laura White to sign the contract lacks merit because Syfrett himself, 'the party to be charged' signed the contract.") (citing FLA. STAT. § 725.01 (2002)).

306. *See* FLA. STAT. § 725.01.

307. *Kolski ex rel. Kolski v. Kolski*, 731 So. 2d 169, 171 (Fla. 3d DCA 1999).

308. *See de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 681 (Fla. 1st DCA 2007) (noting that contract must be embodied in one or more written documents or memoranda signed by the party against whom enforcement is sought); *see also Kolski ex rel. Kolski v. Kolski*, 731 So. 2d 169, 171 (Fla. 3d DCA 1999) ("Further, '[f]or purposes of the statute of frauds, several writings, only one of which is signed by the debtor, may be aggregated to satisfy the statute provided that the signed writing expressly or implicitly refers to the unsigned document.'") (internal citation omitted).

309. *See Kolski ex rel. Kolski v. Kolski*, 731 So. 2d 169, 172 (Fla. 3d DCA 1999) (finding that specific reference to terms of a loan agreement made in a subsequent will together with canceled checks in the precise amount of the semi-annual interest payments on the loan and with notations that they were for "loan interest" were sufficient writings to take the oral agreement out of the statute of frauds).

310. *See* FLA. R. CIV. P. 1.280(b)(c) ("A party may obtain discovery of electronically stored information in accordance with these rules."); Fed. R. Civ. P. 34 ("A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the

While many projects last less than a year, some can and often do take more than one year to complete. For these projects, the statute of frauds could apply to bar enforcement of an oral agreement. The inquiry is whether the parties *intended* performance to last longer than one year.[311] Even where a contract is capable of being performed within a year, the contract falls within the statute, and thus is barred, where the parties intended that performance extend beyond one year.[312] However, "when an agreement is 'susceptible of performance within a year, and the evidence shows that it was expected to have been performed within that time,' it is not barred by the statute of frauds."[313] Likewise, where an agreement is for an indefinite period and is capable of performance within a year, the statute does not apply.[314]

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requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."). In today's digital era and the broad range of permissible electronic discovery available, litigants are able to isolate and obtain these documents with relative ease from various electronic platforms (such as servers, desktops, laptops, i-pads, cell phones and other pda's). Depending on the size of the searchable information and search parameters involved, electronic discovery can involve significant expense and may not be appropriate for all cases.

311. *LaRue v. Kalex Constr. & Dev., Inc.*, 97 So. 3d 251, 255 (Fla. 3d DCA 2012) ("The intent of the parties is a determinative factor."); *see also Yates v. Ball*, 181 So. 341, 344 (Fla. 1937) ("[T]o make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made."), *receded from on other grounds*, *Browning v. Poirier*, 165 So. 3d 663, 665 n.3 (Fla. 2015).

312. *See Hospital Corp. of Am. v. Assocs. in Adolescent Psychiatry, S.C.*, 605 So. 2d 556, 557 (Fla. 4th DCA 1992) (rejecting argument that an earlier termination of agreement for impossibility of performance makes it capable of being performed in one year) (citing *All Brand Imps., Inc. v. Tampa Crown Distribs., Inc.*, 864 F.2d 748 (11th Cir. 1989)) (holding that "[t]he Florida Statute of Frauds bars enforcement of an oral contract that was intended by the parties to last longer than a year, even though the contract could have been terminated for cause within a year").

313. *LaRue v. Kalex Constr. & Dev., Inc.*, 97 So. 3d 251, 255 (Fla. 3d DCA 2012); *see Strack v. Fred Rawn Constr., Inc.*, 908 So. 2d 563 (Fla. 4th DCA 2005) (upholding oral agreement to repair defects in home subsequent to closing on purchase where contract could be performed within one year).

314. *See Browning v. Poirier*, 165 So. 3d 663, 666 (Fla. 2015) (holding that oral agreement of indefinite duration which could be performed within one year fell outside the statute of frauds). *See also Byam v. Klopcich*, 454 So. 2d 720, 721 (Fla. 4th DCA 1984) (holding that oral employment agreement, which was of indefinite duration and therefore capable of performance within one year, was not within the statute of frauds); *Cabanas v. Womack & Bass*, 706 So. 2d 68, 69 (Fla. 3d DCA 1998) (finding that statute of frauds did not bar breach of contract claim where oral employment contract was for an indefinite time, terminable at will by either party, and had been fully performed); *Martinez v. Lieberman*, 920 So. 2d 128, 129 (Fla. 3d DCA 2006) (finding that at best, the

Another way to avoid application of the statute is to show full performance of an agreement.[315] Part performance, on the other hand, does not remove an agreement from the statute where a party is not seeking specific performance, but instead files an action for damages for breach of the oral agreement.[316] Moreover, the doctrine of part performance does not apply to personal services contracts, and thus would not prevent application of the statute.[317]

1-6:10 Laches

Laches is an equitable doctrine that existed at common law to bar enforcement of a claim where unreasonable delay in bringing

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agreement was an oral contract for an indefinite time, and therefore it was not barred by the statute of frauds); *Elliot v. Carl H. Winslow, Jr., P.A.*, 737 So. 2d 609 (Fla. 2d DCA 1999) ("[U]nder our controlling precedent, the statute of frauds does not bar enforcement of an employment agreement for an indefinite period."); *AV-MED, Inc. v. French*, 458 So. 2d 67, 68–69 (Fla. 3d DCA 1984) (holding that an employment agreement for a specific salary plus commissions for an indefinite period of time, which was fully performed, removed the agreement from the statute of frauds).

315. *LaRue v. Kalex Constr. & Dev., Inc.*, 97 So. 3d 251, 2554 (Fla. 3d DCA 2012) ("Full performance of an oral agreement, however, may remove the agreement from the statute of frauds if the agreement is capable of being performed within a year and was, in fact, performed within one year."). *See Harris v. Sch. Bd. of Duval Cnty.*, 921 So. 2d 725, 733 n.8 (Fla. 1st DCA 2006) ("If one party to an oral contract discharges its obligations under the contract, the statute of frauds does not countenance the other party's accepting the benefits of the agreement while walking away from its own undertakings."); *J.F. Hoff Elec. Co., Inc. v. Goldstein*, 560 So. 2d 419, 421 (Fla. 4th DCA 1990) (holding statute of frauds not applicable where contract sued upon between homeowner and subcontractor had been fully executed, and owner had agreed to pay subcontractor the amount owed by general contractor as well as for additional work to be performed by subcontractor following general contractor's abandonment).

316. *See Dwight v. Tobin*, 947 F.2d 455 (11th Cir. 1991) (noting that while courts may use the doctrine of part performance to remove a contract from the statute of frauds for the purpose of granting specific performance or other equitable relief, the doctrine is not available in an action solely for damages at law) (applying Florida law). While *Tobin* acknowledged several Florida appellate decisions that referenced "partial performance" in cases where the courts declined to apply the Statute of Frauds to bar actions at law for damages, the Court either distinguished these cases or noted that they did not directly address the issue of whether "partial performance" applied only in equitable actions. Thus, the Court declined to follow them, noting that "[u]ntil the Florida Supreme Court shows some definitive indication that it intends to change the rule limiting partial performance to actions in equity, we must follow this rule." *Id.* at 460.

317. *Miller Constr. Co. v. First Indus. Tech. Corp.*, 576 So. 2d 748, 750 (Fla. 3d DCA 1991); *see Johnson v. Edwards*, 569 So. 2d 928, 929 (Fla. 1st DCA 1990) ("It is now well established that partial performance of a contract for personal services is not an exception to the provisions of the Statute of Frauds.") (citing *Tobin & Tobin Ins. Agency, Inc. v. Zeskind*, 315 So. 2d 518 (Fla. 3d DCA 1975) and *Rowland v. Ewell*, 174 So. 2d 78 (Fla. 2d DCA 1965)). Relevant here, design contracts are considered personal service contracts, *Miller,* 576 So. 2d at 751, and thus partial performance would not avoid application of the statute.

the claim prejudiced a party's ability to defend against the claim.[318] In order to prevail on the defense, a defendant must demonstrate: (a) conduct on the part of the plaintiff giving rise to the situation upon which the complaint is based; (b) the failure of the plaintiff, having had knowledge or notice of the defendant's conduct, to assert his rights by suit; (c) lack of knowledge on the part of the defendant that the plaintiff would assert the right on which he based his suit; and (d) injury or prejudice to the defendant if relief is accorded to the plaintiff.[319] While modern statutes of limitation[320] serve a similar function, the doctrine still exists and could potentially be raised in defense of a defect claim. However, it has been held that laches generally does not come into play until the applicable statutory limitations period has expired.[321] And where suit is brought within the statute of limitations, laches may be applied "only where strong equities appear."[322] Moreover, the party raising the defense must prove it by "very clear and positive evidence."[323]

In determining whether laches exists the test is "whether the delay has resulted in injury, embarrassment, or disadvantage to any person, and particularly to the person against whom the relief is sought."[324] There is no bright line rule for the length of time

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318. *Bethea v. Langford*, 45 So. 2d 496, 498 (Fla. 1949) ("The doctrine of laches is bottomed not simply upon the number of years which have elapsed between the accruing of rights and the assertion of them, but upon unreasonable delay in enforcing a right, coupled with a disadvantage to the person against whom the right is sought to be asserted.").

319. *Lennar Homes, Inc. v. Dorta-Duque*, 972 So. 2d 872, 879 (Fla. 3d DCA 2007).

320. *See* § 1-7 below discussing statutory limitations period for defect claims. *See also* Fla. Stat. § 95.11(6) ("Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.").

321. *See Briggs v. Estate of Geelhoed By & Through Johnson*, 543 So. 2d 332, 333 (Fla. 4th DCA 1989).

322. *Appalachian, Inc. v. Olson*, 468 So. 2d 266, 269 (Fla. 2d DCA 1985).

323. *Ipec, Inc. v. Int'l Printing Machinery Corp.*, 251 So. 2d 911, 913 (Fla. 3d DCA 1971) (citing *Van Meter v. Kelsey,* 91 So. 2d 327, 332 (Fla. 1956)); *see also Lennar Homes, Inc. v. Dorta-Duque*, 972 So. 2d 872, 879 (Fla. 3d DCA 2007) (noting elements of laches must be proven by clear and convincing evidence).

324. *Bethea v. Langford*, 45 So. 2d 496, 498 (Fla. 1949).

necessary to establish laches, and each case must be considered in light of the circumstances.[325] To be sufficient,

> the delay must have been such as practically to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible, as through loss or obscuration of evidence of the transaction in issue; or there must have occurred in the meantime a change in conditions that would render it inequitable to enforce the right asserted.[326]

Since the defense applies to equitable actions only[327] it would appear to have limited, if no practicable, application to defect claims which typically arise out of contract or negligent performance, which are actions at law. Still, the defense should not be overlooked entirely where an equitable claim is brought and it can be shown that an unreasonable delay in bringing the claim adversely affected the party against whom the claim was brought.

1-6:11 "First Costs"/Betterment

The concept of "first costs" has been applied in the context of design defect claims. Where a design professional's plans are deficient, an owner is not entitled to recover the additional costs of construction that would have been incurred if the initial design plans matched the final design plans.[328] "[T]he concept of 'first cost' is to assure that a party entitled to damages is not 'placed,

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325. *See Fort Pierce Bank & Tr. Co. v. Sewall*, 152 So. 617, 618 (Fla. 1934).

326. *Fort Pierce Bank & Tr. Co. v. Sewall*, 152 So. 617, 618 (Fla. 1934).

327. *Reed v. Fain*, 122 So. 2d 322, 325 (Fla. 2d DCA 1960) ("Generally it is well recognized that statutes of limitation apply to law actions and the doctrine of laches applies to equity cases. The two arise from separate sources, and though they may coincide in various cases, laches will take into consideration the prejudicial effects towards a party while a statute of limitation will not.").

328. *See School Bd. of Broward Cnty. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1070 (Fla. 4th DCA 2014). The concept is also commonly referred to as betterment. *Id.* at 1064 (noting that architect was permitted to seek set-off from school board's damages for "first costs and/or betterment credit."). *See also Broward Cnty. v. CH2M Hill, Inc.*, 302 So. 3d 895 (Fla. 4th DCA 2020) (concluding that trial court erred in computing County's damages based upon an improper measure of County's expectation interest where trial court computed damages based upon County's expenditures in redesigning and reconstructing Taxiway C in accordance with a completely different design).

because of th[e] breach, in a position better than which he would have occupied had the contract been performed' as agreed."[329]

In *Lochrane Engineering*,[330] the court, though not using the term, aptly explained the concept of "first cost" in considering the liability of, and the proper measure of damages against, a design engineer who negligently designed an inadequate but repairable septic tank system.[331] Noting that the measure of damages against a design professional is different than for a fixed price contractor for breach of their respective duties of care, the court in *Lochrane* held that an engineer was not liable for the full cost of a properly designed system.[332] However, a design professional is properly liable for

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329. *School Bd. of Broward Cnty. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1070 (Fla. 4th DCA 2014).

330. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228 (Fla. 5th DCA 1989).

331. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 230 (Fla. 5th DCA 1989).

332. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 233 (Fla. 5th DCA 1989). In reaching this conclusion, the court provided the following illustration:

> If a fixed-price contractor agrees to install an adequate drain field and installs a 1,000 square foot drain field which is later determined to be insufficient and to need 200 square feet more area, the contractor, being liable for the cost of repairs, is liable to the owner in damages for the cost of installing the additional feet of drain field. However, if a knowledge able owner retains a (knowledgeable) civil engineer . . . and requests a professional opinion as to specifications for . . . (an adequate) drain field . . . and, after doing the necessary study and field test . . . the engineer states his opinion (by word or design specification) that a 1,000 square foot drain field would be adequate and the owner has that system installed, and later it is determined that a 1,200 square foot drain field was necessary for an adequate system, the engineer, not being an insurer or guarantor of his professional opinion, would not be liable to the owner for professional malpractice (negligence) unless it was also determined that in forming and expressing his opinion that a 1,000 square foot drain field would be adequate, the engineer was negligent by falling below the level of performance of the average reasonable and prudent engineer performing similar professional services in the particular community. Assume further that it was determined that the engineer was professionally negligent, what would be the proper measure of damages? Is the engineer, like the fixed-price contractor, liable to the owner for the full amount of installing an additional 200 square foot of drain field? Not necessarily. Assume that the engineer had originally specified 1,200 square feet of drain field (or that the engineer in this case had originally specified an aerobic system) the owner, not the engineer, would have paid for the additional 200 feet of drain field (or the aerobic system). The owner, not the engineer, should pay for the additional 200 feet of drain field whether originally specified and then installed, or later found to be needed and obtained, because the necessity for the additional 200 feet of drain field was caused by the owner's need to dispose of the sewage

damages that flow from his professional negligence,[333] including where the costs of construction to implement the correct design are more than they would have been had the design been sufficient initially.[334] Thus, an omission of a design element that is later added would normally involve only "first costs", whereas a design error more likely would require the performance of additional work by the contractor that could have been avoided, and therefore, would go beyond such costs.[335] That is not to say the defense should always bar claims arising from design omissions where, for example, the cost of implementing a design omission is more than it would have been when the contract was entered.[336]

The concept of "first costs" has also been applied in the context of contractor liability for defective construction.[337]

> produced by the structure served and was not caused by the engineer's failure to have originally correctly estimated the quantity of drain field necessary to meet that need.

Id. at 232–33.

333. *See Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 233 (Fla. 5th DCA 1989) ("This does not mean that an engineer is never liable for damages that properly flow from his professional negligence. He is liable when damages are legally caused by his professional negligence as when an insufficiently designed structure fails and the failure causes damages.").

334. *See Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 233 (Fla. 5th DCA 1989) ("Also, if the cost of later installing the additional 200 feet of drain field costs more than it would have cost if installed as part of the original undertaking, the engineer would be liable for the difference as well as any other consequential damages."). *See also Soriano v. Hunton, Shivers, Brady & Assocs.,* 524 So. 2d 488, 490 (Fla. 5th DCA 1988) (holding that structural engineer was not responsible for cost of additional steel which would necessarily have been incurred and paid for by the owner had a design modification been part of the original design). *Cf. Lillibridge Health Care Servs., Inc. v. Hunton Brady Architects, P.A.*, No. 6:08-cv-1028-Orl-28KRS, 2010 WL 3788859, at *8 (M.D. Fla. Sept. 24, 2010) (distinguishing *Lochrane* and finding engineer liable for cost of additional roof top air handling unit required by code where there was insufficient evidence that additional unit would have been required had engineer properly designed the HVAC system initially).

335. A first cost defense would therefore not be applicable to the costs an owner incurs to re-do completed work to rectify a design error such as, for example, the re-design of a completed building foundation that requires the owner to remove and reinstall the foundation. The defense would also be inapplicable where, for example, the re-sizing of ductwork, though not yet installed, would require the contractor, at additional cost to the owner, to re-route the ductwork to avoid conflicts in the field. These costs would be considered recoverable consequential damages. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 233 (Fla. 5th DCA 1989).

336. *See* fn. 333 above. Because the distinction between an "omission" and an "error" may not always be clear, parties and practitioners should focus on whether a design deficiency, however designated, results in additional costs that would otherwise not have been incurred.

337. *See Magnum Constr. Mgmt. Corp. v. City of Miami Beach*, 209 So. 3d 51 (Fla. 3d DCA 2016) (noting that trial court was correct to exclude betterments from its award against contractor, as the measure of damages for breaching a construction contract is "the reasonable cost of construction and completion in accordance with the contract, if

1-7 STATUTES OF LIMITATIONS

1-7:1 Applicable Statutes

Section 95.11(3)(b), Florida Statutes, provides a four-year limitations period for construction and design defect claims. The statute applies to any action:

> founded on the design, planning, or construction of an improvement to real property, with the time running from the date the authority having jurisdiction issues a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion, or the date of abandonment of construction if not completed, whichever date is earliest . . . .[338]

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this is possible and does not involve unreasonable economic waste.") (emphasis in original) (quoting *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037, 1039 (Fla. 1982)); *see also Kritikos v. Andersen*, 125 So. 3d 885, 888 (Fla. 4th DCA 2013) (noting that where, following termination of the contractor, an owner engages in reconstruction under a different design, "the recovery should be limited to what would have been the reasonable cost of repair according to the original design") (quoting *Temple Beth Sholom & Jewish Ctr., Inc. v. Thyne Constr. Corp.*, 399 So. 2d 525, 526 (Fla. 2d DCA 1981)).

338. In 2023, this statute was redesignated as 95.11(3)(b) from 95.11(3)(c) pursuant to Laws of Florida, ch. 2023-15, s. 3, and underwent major changes pursuant to Laws of Florida, ch. 2023-22, s. 1, where the legislature eliminated two of the four triggering events (actual possession by the owner and the date of completion of the contract) and effectively shortened the limitations period by having the time run from the "earliest" date instead of the "latest" date. The statute was further amended to measure the limitations period from issuance of a temporary certificate of occupancy (in addition to a certification of occupancy) or a certificate of completion. It should be noted that the statute applies regardless of whether the claim is brought in an initial action for damages or as a cross-claim or third-party claim for indemnity of contribution. *See State v. Echeverni*, 736 So. 2d 791, 792 (Fla. 3d DCA 1999) (noting that statute "clearly applies to *all* actions 'founded on the design, planning, or construction of an improvement to real property'") (italics in original); *see also Developers Sur. & Indem. Co. v. Italian Cast Store, Inc.*, No. 8:16-cv-3991T-24TGVV, 2017 U.S. Dist. LEXIS 118931, at *8 (S.D. Fla. May 5, 2017) (holding that surety's indemnity claim under written indemnity agreement was subject to four-year period in [the former § 95.11 (3)(c)] not five-year period in § 95.11(2)(b)). Some courts construing the statute, however, have found that certain repairs are not an "improvement" within the meaning of the statute. *See Companion Prop. & Cas. Grp. v. Built Tops Bldg. Servs., Inc.*, 218 So. 3d 989, 991 (Fla. 3d DCA 2016) (applying four-year limitations period in § 95.11(3)(a), Florida Statutes, for "simple repairs" to leaking roof) (citing *Dominguez v. Hayward Industries, Inc.*, 201 So. 3d 100 (Fla. 3d DCA 2015)). As noted in *Dominguez*, the Florida Supreme Court in *Hillsboro* defined "improvement," as contained in Black's Law Dictionary, 890 (4th ed. rev. 1969), as follows:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

Where a defect is latent, the four-year period "runs from the time the defect is discovered or should have been discovered with the exercise of due diligence," but may not be extended beyond seven years "after the date the authority having jurisdiction issues a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion, or the date of abandonment of construction if not completed, whichever date is earliest."[339] Further,

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Dominguez, 201 So. 3d at 102 (quoting *Hillsboro Island House Condo. Apts., Inc. v. Town of Hillsboro Beach.*, 263 So. 2d 209, 213 (Fla. 1972)). *See also Bernard Schoninger Shopping Ctrs., Ltd. v. J.P.S. Elastomerics, Corp.*, 102 F.3d 1173, 1177 (11th Cir. 1997) (relying on *Hillsboro* and Black's Law Dictionary's definition of "improvement" to conclude that the replacement of a shopping center's entire roof was an "improvement to real property"); *Pinnacle Port Cmty. Ass'n, Inc. v. Orenstein*, 952 F.2d 375 (11th Cir. 1992) (applying five-year limitations period for breach of contract instead of four-year statute of limitations for actions "founded on the design, planning or construction of improvement . . . ." for repairs which "were intended not to enhance the assumed value of the property but to restore the walls to their original watertight state"). It also bears noting that the statute does not apply to administrative enforcement proceedings which arise out of defective construction. *See Sarasota Cnty. v. Nat'l City Bank of Cleveland, Ohio*, 902 So. 2d 233 (Fla. 2d DCA 2005) (holding that statute did not apply to County's administrative enforcement proceeding against owner of property to which unpermitted and dangerous improvements were allegedly made).

339. Fla. Stat. § 95.11(2)(c). As with the limitations period, the legislature modified the triggering events, and significantly shortened the repose period to seven (7) years, running from the "earliest" date instead of the "latest" date. The elimination of "completion of the contract" as a triggering event should reduce uncertainty in determining when the limitations and repose periods being to run. Under prior versions of the statute, the "date of completion" of the contract had been interpreted to mean the last act done pursuant to the contract, not necessarily the date of completion of construction. *See Cypress Fairway Condo. v. Bergeron Constr. Co. Inc*., 164 So. 3d 706, 708 (Fla. 5th DCA 2015) ("Completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor. Had the legislature intended the statute to run from the time the contractor completed performance, it could have simply so stated."); *see also Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 3d DCA 2017) (in construction defect action against homebuilder, holding that contract for sale of home was not necessarily completed at time of closing within meaning of statute of repose under [former § 95.11(3)(c)], Florida Statutes, where work remained incomplete at time of closing). In 2017, the statute was amended to expressly provide that completion of the contract means "the later of the date of final performance of all the contracted services or the date that final payment for such services becomes due without regard to the date final payment is made." *See* Laws of Florida, s. 10, ch. 2017–107. While the 2017 amendment helped to clear up uncertainly in the application of this triggering event, the legislature's elimination of this language, along with "actual possession by the owner," in 2023, should streamline application of the statute moving forward and eliminate much of the uncertainty created by the prior versions.

It is also worth noting that the statute was amended in 2018 to extend the then ten-year statute of repose period by one year from the date of service of a pleading for any "counterclaims, cross-claims, and third-party claims that arise out of the conduct, transaction, or occurrence set out or attempted to be set out in [such] pleading . . . even if such claims would otherwise be time barred." *See* Laws of Florida, s. 1, ch. 2018–97. Similarly, the 2023 version of the statute still extends the repose period by the additional one year period. It should be noted that the amended statute applies to any action commenced on or after April 13, 2023, the effective date of the enabling legislation, regardless of when the cause of action accrued, except that any action that would not have been barred under

"if such construction is performed pursuant to a duly issued building permit and if the authority having jurisdiction has issued a temporary certificate of occupancy, a certificate of occupancy, or a certificate of completion, then as to the construction which is within the scope of such building permit and certificate, the correction of defects to completed work or repair of completed work, whether performed under warranty or otherwise, does not extend the period of time within which an action must be commenced."[340] Moreover, "[n]otwithstanding any provision of [the statute] to the contrary, if the improvement to real property consists of the design, planning, or construction of *multiple* buildings, each building must be considered its own improvement for purposes of determining the limitations period set forth in [the statute]."[341] This statute applies regardless of whether the action is founded on contract or negligence.[342] "To

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former 95.11(3)(c), before the amendments, must be commenced on or before July 1, 2024 or the action is time barred. *See* Laws of Florida, ch. 2023-22, s. 3. However, the repose period does not apply to defect claims against a contractor's surety under a performance bond. *See Federal Ins. Co. v. Sw. Fla. Ret. Ctr., Inc.*, 707 So. 2d 1119 (Fla. 1998) (applying five-year limitations period under § 95.11(2)(b), Florida Statutes); *see also BDI Constr. Co. v. Hartford Fire Ins. Co.*, 995 So. 2d 576, 578 (Fla. 3d DCA 2008) (same). For performance bond sureties, the limitations period commences on the date of acceptance of the project as having been completed according to the terms and conditions set out in the construction contract. *Federal Ins. Co.*, 707 So. 2d at 1121. In the context of a subcontract, where the contractor has accepted the work of the subcontractor and paid in full for the work, the action accrues when the subcontractor finishes its work. *BDI Constr.*, 995 So. 2d at 578.

340. Fla. Stat. § 95.11(3)(b).

341. Fla. Stat. § 95.11(3)(b) (emphasis added). It is apparent that the legislature's intent in adding this language to the statute in 2023, as implemented by Laws of Florida, ch. 2023-22, s. 1, was to avoid commencement of the limitations period only upon completion of an *entire* project involving multiple buildings where construction may span several years, particularly with phased developments. *See, e.g., Allan & Conrad, Inc. v. Univ. of Central Florida*, 961 So. 2d 1083, 1087, n.4 (Fla. 5th DCA 2007) (noting the legislature's reference in the preamble to the statute to the date when the improvement to the real property has been completed and holding that plain meaning of the language utilized by the legislature supported trial court's conclusion that correct measuring point for the commencement of the repose period under the fourth prong of the 1989 version of the statute was the latest date that *any* of the parties listed in the statute completed or terminated their contract). *But see Cypress Fairway Condo. v. Bergeron Constr. Co., Inc.*, 164 So. 3d 706, 708 (Fla. 5th DCA 2015) (criticizing *Allan's* reliance on the preamble and avoiding the question of whether "date of completion" refers to the date of completion of construction or the date of completion of the contract); *see also Downs v. U.S.*, No. 06-20861-CIV., 2011 WL 688739 (S.D. Fla. Feb. 18, 2011) (noting that holding in *Allan* indicates that when interpreting and applying former section 95.11 (3)(c), a court must analyze the entirety of the particular improvement to real property, not simply one (out of many) entity's involvement on the project).

342. *See Dubin v. Dow Corning Grp.*, 478 So. 2d 71 (Fla. 2d DCA 1985) (specific provisions of the statute relating to real property improvements take precedence over a general statute of limitations). It also applies regardless of whether the contractor is licensed. *See Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 295–96 (Fla. 5th DCA 2016)

read the statute otherwise would render it meaningless, because [former] § 95.11(3)(c) . . . already provide(s) for a four-year statute of limitations for actions founded on negligence."[343]

For condominiums, this four-year period does not accrue until the date of turnover[344] of control of the condominium association from the developer to the purchasing unit owners.[345] Where there is an obvious manifestation of a construction defect, a plaintiff's notice of the defect, which commences the running of the limitations period, will be inferred at the time of manifestation, regardless of whether the plaintiff had knowledge of the exact nature of the defect.[346] However, where the manifestation of a defect is not obvious, but could be due to causes other than an actionable defect, notice as a matter of law, for purposes of the statute of limitations, may not be inferred.[347] In determining whether notice of water intrusion is sufficient to start the statutory limitations period, courts have distinguished between cases involving leaking roofs,[348]

(rejecting argument that four-year limitations period under [former § 95.11(3)(c)] did not apply to action against unlicensed contractor).

343. *Dubin v. Dow Corning Grp.*, 478 So. 2d 71, 72 (Fla. 2d DCA 1985).

344. "Turnover" occurs upon the happening of certain events listed in § 718.301, Florida Statutes.

345. *See Seawatch of Marathon Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., et al.*, 610 So. 2d 470 (Fla. 3d DCA 1992), *approved*, 658 So. 2d 922 (Fla. 1994); *see also Saltponds Condo. Ass'n, Inc. v. Walbridge Aldinger Co.*, 979 So. 2d 1240, 1244 (Fla. 3d DCA 2008) (applying four-year limitations period from date of turnover). It should be noted, however, that the date of turnover does not toll the statute of response under § 95.11(3)(c). *See Sabal Chase Homeowners Ass'n, Inc. v. Walt Disney World Co.*, 726 So. 2d 796 (Fla. 3d DCA 1999).

346. *See Wishnatzki v. Coffman Constr., Inc.*, 884 So. 2d 282, 285 (Fla. 2d DCA 2004) (citing *Performing Arts Ctr. Auth. v. Clark Constr. Grp., Inc.*, 789 So. 2d 392, 394 (Fla. 4th DCA 2001)). In *Wishnatzki*, the court held that small cracks were not sufficient to put purchasers of a house on notice of construction defects in the foundation—and thus, the four-year statute of limitations applicable to a fraud claim against the vendor—did not bar the claim, where small cracks could have been due to causes other than those sued upon, and evidence supported finding that the purchasers did not have notice of the defective condition until less than four years prior to suit when they observed large cracks and major settlement of the house. *Id.* at 285.

347. *Snyder v. Wernecke*, 813 So. 2d 213, 217 (Fla. 4th DCA 2002). *See Inlet Marina of Palm Beach, Ltd. v. Sea Diversified, Inc.*, 237 So. 3d 395 (Fla. 4th DCA 2018) (quoting *Performing Arts Ctr. Auth. v. Clark Constr. Grp., Inc.*, 789 So. 2d 392, 394 (Fla. 4th DCA 2001) ("[W]here there is an obvious manifestation of a defect, notice will be inferred at the time of manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect. However, . . . where the manifestation is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred.") (emphasis added) (citation omitted)).

348. *See Kelly v. Sch. Bd. of Seminole Cnty.*, 435 So. 2d 804 (Fla. 1983) (citing with approval *K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp.*, 367 So. 2d 1078 (Fla. 3d DCA)), *cert. denied*, 378 So. 2d 350 (Fla. 1979), and *Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architects/Planners, Inc.*, 417 So. 2d 703 (Fla. 2d DCA 1982), *rev. denied*,

underground pipes,[349] exterior stucco,[350] and a combination of causes.[351] In other contexts, courts have looked to when the damage occurred as opposed to when the work giving rise to the damage was performed.[352] Regardless of when the defect is discovered, an action may not be filed after expiration of the repose period.[353]

1-7:2 Agreements Affecting Limitations Period

Parties are free to suspend the statute of limitations by entering into "tolling" or "standstill" agreements, whereby the parties voluntarily forego enforcement of their rights for an agreed upon period of time.[354] These agreements are useful and allow parties to investigate and potentially negotiate resolution of claims without worrying about expiration of the statute of limitations. A typical tolling agreement would toll the limitations period for either a specified or unspecified period of time and would waive the statute

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430 So. 2d 451 (Fla. 1983). *Cf. Companion Prop. & Cas. Grp. v. Built Tops Bldg. Servs., Inc.*, 218 So. 3d 989, 991 (Fla. 3d DCA 2017) (applying four-year limitations period under § 95.11(3)(a) for subrogation action founded on negligence against roofing contractor commencing on date of leak as opposed to date of repairs).

349. *See Board of Trs. of Santa Fe Cmty. Coll. v. Caudill Rowlett Scott, Inc.*, 461 So. 2d 239 (Fla. 1st DCA 1984).

350. *See Performing Arts Ctr. Auth. v. Clark Constr. Grp., Inc.*, 789 So. 2d 392, 394 (Fla. 4th DCA 2001) ("We construe none of these ["roof leak"] cases to hold that in all construction disputes notice attaches the instant a plaintiff discovers any leak in a building.").

351. *Hochberg v. Thomas Carting Painting, Inc.*, 63 So. 3d 861, 863 (Fla. 3d DCA 2011) (holding homeowners' claims against subcontractors time barred where they had knowledge that their newly constructed home had suffered from water intrusion and other obvious construction defects more than four years before filing suit).

352. *See, e.g., Riverwalk at Sunrise Homeowners Ass'n, Inc. v. Biscayne Painting Corp.*, 199 So. 3d 348, 350 (Fla. 4th DCA 2016) (holding negligence action against painting contractor timely under § 95.11(3)(a) where action was brought within four years of discovery of paint beginning to "crack, chip, flake and otherwise fall off from the exterior of the buildings" as opposed to when contractor failed to inspect and test condition of existing stucco prior to applying paint); *see also Wilder v. JP Morgan Chase Bank*, No. 18-20820-CIV-MARTINEZ-OTAZO-REYES, 2018 WL 5629922, at *4 (S.D. Fla. Oct. 30, 2018) (noting the triggering event is notice to or knowledge by the injured party and not the date the negligent act was committed.)

353. *See* Fla. Stat. § 95.11(3)(c) ("In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest."). *See also* fns. 337 and 338 above.

354. While tolling agreements are entered before litigation, standstill agreements are generally entered after litigation has commenced and avoid dismissal of an action for lack of prosecution under Florida Rule of Civil Procedure 1.420(e). *See, e.g., Burde v. Citizens Nat'l Bank of Naples, N.A.*, 779 So. 2d 477 (Fla. 2d DCA 2000), *rev. denied*, 790 So. 2d 1102 (Fla. 2001). A dismissal under Rule 1.420(e) after the statute of limitations has run would operate as a dismissal on the merits since further litigation would be time barred.

of limitations defense during the time of the agreement. If there is an unspecified time, the agreement may provide that the statute would recommence running after the giving of a specified period of notice. At least two Florida appellate courts have been called upon to interpret standstill agreements relating to construction disputes.[355]

While the law does not prohibit parties themselves from entering into these agreements, practitioners should be careful that their representation of parties in the drafting of such agreements does not violate the rules governing attorney conduct.[356]

Unlike standstill or tolling agreements which operate to extend a limitations period, a contract clause shortening the applicable statute of limitations is void under Florida law.[357]

1-8 PRE-SUIT NOTICE AND OPPORTUNITY TO REPAIR: FLORIDA'S CONSTRUCTION DEFECT STATUTE (FLORIDA STATUTES CHAPTER 558)

Before an "action"[358] involving a "construct defect"[359] claim is brought, the party filing the action or "claimant"[360] is required to

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355. *See, e.g., Yusem v. Butler*, 966 So. 2d 405 (Fla. 4th DCA 2007), *quashed on other grounds*, 3 So. 3d 1185 (Fla. 2009); *Morse Diesel Int'l, Inc. v. 2000 Island Blvd., Inc.*, 698 So. 2d 309 (Fla. 3d DCA 1997).

356. *See, e.g., The Fla. Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011) (finding that standstill and settlement agreement in class action benefiting named plaintiffs but harming putative class members violated ethical rules).

357. *See* FLA. STAT. § 95.03; *see also Lawson v. Bd. of Pub. Instruction of Franklin Cnty.*, 159 So. 14 (Fla. 1935) (conflicting provision in contractor's surety bond which had shorter time period than predecessor to § 95.03 did not bar laborers' claims); *National Fire Ins. Co. of Hartford v. L.J. Clark Constr. Co., Inc.*, 579 So. 2d 743, 746 (Fla. 4th DCA 1991) (noting that common law surety bond cannot legally contain provision limiting time within which action under bond could be brought to less than time provided in applicable statute of limitations); *W.F. Thompson Constr. Co. v. Se. Palm Beach Cnty. Hosp. Dist.*, 174 So. 2d 410, 414 (Fla. 3d DCA 1965), *cert. denied*, 180 So. 2d 659 (Fla. 1965) (holding that a "limiting provision" was an invalid attempt to shorten the statute of limitations and against Florida's public policy).

358. "Action" is defined as "any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of real or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect." FLA. STAT. § 558.002(1).

359. As defined in FLA. STAT. § 558.002(5).

360. "Claimant" is defined as "a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages . . . (but) does not include a contractor, subcontractor, supplier, or design professional." FLA. STAT. § 558.002(3). Where a claimant is both an owner and contactor of a project, the statute does not apply. *Specialty Consulting*

provide written notice to the other party of the claim.[361] The notice must be provided at least 60 days before filing suit (or 120 days if the claimant is an association representing more than 20 parcels).[362] Once the notice has been provided, the party receiving the notice must be given a reasonable opportunity to inspect the property and is permitted to perform destructive testing under certain conditions.[363] If the claimant improperly refuses to allow destructing testing, "the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented."[364] The party receiving the notice may serve copies on any other party that performed the work and may be responsible for the defect which is the subject of the notice.[365] Any party receiving such a "downstream" notice is also permitted to conduct an inspection and destructive testing of the property[366] and thereafter may make an offer to remedy, or make payment for, the defect.[367] Furthermore, the claimant and any parties receiving

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Eng'g, Inc., 968 So. 2d 680 (Fla. 4th DCA 2007); *Centex Homes v. Mr. Stucco, Inc.*, No. 8:07-CV-365-T-27MSS, 2007 WL 2264622, at *2 (M.D. Fla. Aug. 6, 2007). It should also be noted that prior versions of the statute defined "claimant" more narrowly to include only homeowners, homeowner associations, and condominium associations. FLA. STAT. § 558.002(3) (2005); *see* FLA. STAT. § 558.002(7) (2005) (defining "dwelling" to which claims applied pursuant to subsection 1 of the statute as including single family houses, multi-family units and residential buildings and associations). Now, with the definition change of "claimant," the statute applies to both residential and commercial projects.

361. "The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. Based upon at least a visual inspection by the claimant or its agents, the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden. The claimant has no obligation to perform destructive or other testing for purposes of this notice." FLA. STAT. § 558.004(1)(b).

362. FLA. STAT. § 558.004(1)(a). Further, [i]f the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted." *Id.*

363. *See* FLA. STAT. § 558.004(2).

364. FLA. STAT. § 558.004(2).

365. FLA. STAT. § 558.004(3) (". . . the person served with notice under subsection (1) may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible.").

366. *See* FLA. STAT. § 558.004(3).

367. *See* FLA. STAT. § 558.004(4) ("The written response must include a report, if any, of the scope of any inspection of the property and the findings and results of the inspection. The written response must include one or more of the offers or statements specified in paragraphs (5)(a)-(e), as chosen by the responding contractor, subcontractor, supplier, or design professional, with all of the information required for that offer or statement.").

a notice may conduct certain pre-suit discovery, including the exchange of expert reports.[368]

The party receiving the original notice is required to provide a written response to the claimant which contains an offer to repair the defect or pay a monetary sum (or both) or which disputes the claim.[369] If the party receiving the original notice either disputes the claim and refuses to make an offer or fails to respond to the notice, the claimant may thereafter proceed with an action against that party without further notice.[370] A claimant who receives timely notice of an offer must timely either accept or reject the offer in writing.[371] If an offer is accepted and the party making the offer fails to make repairs or pay money as agreed, the claimant may thereafter proceed without further notice with an action regarding the defects listed in the notice.[372] If that party provides the repairs or pays the money stated in the offer, the claimant is not permitted to proceed with an action concerning the defects listed in the notice or otherwise provided for in the accepted offer.[373]

Section (5)(a)-(c) of the statute sets forth, among other things, the responding party's ability to make a written "offer to remedy the alleged construction defect at no cost to the claimant," "offer to compromise and settle the claim by monetary payment," or "offer to compromise and settle the claim by a combination of repairs and monetary payment." Of course, the responding party can also submit a "written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim." *Id*. at (5)(d). The responding party can also serve a "written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of serving the claim." *Id.* at (5)(e). However, a notice under the statute "shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise." *Id.* at § 558.004(13). In *Altman Contractors Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017), the Florida Supreme Court held that a chapter 558 notice could potentially trigger an insurer's duty to defend under a policy's "alternative dispute resolution proceeding" but would require the insurer's consent. *Id.* at 279. Thus, the statute allows, but does not necessarily require, an insurer to participate in the chapter 558 process.

368. *See* FLA. STAT. § 558.004(15).

369. The response can also provide that the party's insurer will make the determination of any monetary payment, which may also be combined with an offer to make repairs. *See* FLA. STAT. § 558.004(5)(a)-(e).

370. FLA. STAT. § 558.004(6). The parties may also partially compromise the claim and in that event, the claimant may proceed with an action regarding any unresolved portions of the claim. *See* FLA. STAT. § 558.004(6).

371. *See* FLA. STAT. § 558.004(7); *but see Hebden v. Roy A. Kunnemann Constr., Inc.*, 3 So. 3d 417 (Fla. 4th DCA 2009) (allowing homeowner set-off for defects in homebuilder's suit to foreclose construction lien notwithstanding homeowner's failure to accept or reject offer to make certain repairs where homebuilder never sought to abate action to require compliance with statute).

372. *See* FLA. STAT. § 558.004(8).

373. *See* FLA. STAT. § 558.004(8).

Any offer or failure to offer to repair a defect or pay money in response to a notice is not an admission of liability and is not admissible in any action brought under the statute.[374] Furthermore, a claimant is permitted to proceed to trial regarding only those defects listed in the notice and those "reasonably related to, or caused by, the construction defects previously noticed."[375] Where a claimant fails to comply with the notice or other provisions of the statute before filing an action, then, upon motion, the action may be stayed pending compliance.[376] However, a claimant is not prevented from proceeding with necessary emergency repairs prior to serving a notice[377] or completing a project that has not reached substantial completion.[378] Furthermore, "a notice is not required for a project that has not reached the stage of completion of the building or improvement."[379] It should be noted that serving of a notice tolls the applicable statute of limitations for the time period provided in the statute,[380] but no longer tolls the statute of repose.[381]

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374. *See* FLA. STAT. § 558.004(9).

375. *See* FLA. STAT. § 558.004(11); *see also J.S L. Constr. Co., Inc. v. Levy*, 994 So. 2d 394, 400 (Fla. 3d DCA 2008) (noting that homeowner should not have been allowed to testify about defect or offer evidence at trial of repair costs concerning defect not provided in notice of claim).

376. *See* FLA. STAT. § 558.003; *but see Banner Supply Co. v. Harrell*, 25 So. 3d 98 (Fla. 3d DCA 2009) (holding that abatement of action would be futile where prior to filing suit claimant invited supplier to inspect the property but supplier did nothing to attempt to conduct inspection).

377. *See* FLA. STAT. § 558.004(9).

378. *See* FLA. STAT. § 558.003.

379. FLA. STAT. § 558.003. As defined in the statute, "'[c]ompletion of a building or improvement' means issuance of a certificate of occupancy, whether temporary or otherwise, that allows for occupancy or use of the entire building or improvement, or an equivalent authorization issued by the governmental body having jurisdiction (and) [i]n jurisdictions where no certificate of occupancy or equivalent authorization is issued, the term means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications."). *Id.* at § 558.002(4).

380. *See* FLA. STAT. § 558.004(10); *see also Saltponds Condo. Ass'n, Inc. v. Walbridge Aldinger Co.*, 979 So. 2d 1240, 1244 (Fla. 3d DCA 2008).

381. In a case of first impression, the court in *Gindell v. Centex Homes*, 276 So. 3d 403 (Fla. 4th DCA 2018) held that compliance with the pre-suit notice requirement of Chapter 558 constitutes an "action" for purposes of the statute of repose in the context of the improvement of real property. *Id.* at 407 (citing *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013) and *Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946 (Fla. 1999)). However, in 2019 the Legislature amended § 558.004, Florida Statutes, to expressly provide, in subparagraph (d) therein, that a notice of claim served pursuant to Chapter 558 would not toll any statute of repose under Chapter 95. *See* Laws of Florida, s. 8, ch. 2019–75; s*ee also Spring Isle Cmty. Ass'n, Inc. v. Herme Enters., Inc.*, 328 So. 3d 1120, 1123 n.1 (Fla. 5th DCA 2021) (noting the 2019 statutory amendments to § 558.004).

Unless a claimant and a potential defendant have agreed in writing to opt out of the requirements of the statute, its provisions apply to any claim for legal relief for which the agreement to make the improvement was made after October 1, 2009, and for which the basis of the claim is a construction defect that has arisen after completion of a building or improvement.[382] For a claim of a construction defect pursuant to contracts for improvements entered into between July 1, 2004, and September 30, 2006, and between October 1, 2006, and September 30, 2009, respectively, certain statutorily prescribed notices are required to be set forth in the contracts conspicuously and in capitalized letters.[383] However, notwithstanding these notice requirements, the statute applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include the notice requirements in such contracts entered into before July 1, 2004, does not operate to bar the procedures of the statute from applying to all such actions.[384] Further, notwithstanding § 558.003, unless the parties agree that the statute does not apply, after October 1, 2009, any written contract for improvement of real property entered into between an owner and a contractor, or between an owner and a design professional, must also contain a statutorily prescribed notice (different than the ones required for prior years), but the failure to include such notice does not subject the contracting owner, contractor, or design professional to any penalty.[385]

Finally, the statute does not bar, limit or create any other rights, actions, or theories upon which liability may be based, nor any defenses, except as specifically provided for in the statute.[386]

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382. *See* FLA. STAT. § 558.005(1).

383. *See* FLA. STAT. § 558.005(2).

384. *See* FLA. STAT. § 558.005(5).

385. *See* FLA. STAT. § 558.005(6). As noted in the statute, "[t]he purpose of the contractual notice is to promote awareness of [the statute's] procedures, not to be a penalty." *Id.*

386. *See* FLA. STAT. § 558.004(12); *see also Mann v. Island Resorts Dev., Inc.*, No. 3:08cv297-RS-EMT, 2008 WL 5381390, at *3 (N.D. Fla. Dec. 19, 2008) ("[I]t is clear that Chapter 558 does not create an independent cause of action on which liability may be based.").