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I. Mechanic's Lien Basics

Generally, the term "mechanic's lien," refers to a lien granted by law for the purpose of obtaining priority of payment for the price or value of work performed or materials furnished for fixing or improving something. Florida law recognizes different classes of liens: those created by statute for improving things such as machines, crops, timber, animals, cotton ginning, and other things;[1] and construction liens for labor, services, and materials furnished in improving real property.[2] All are governed by a detailed statutory scheme under Chapter 713, Florida Statutes (2019).

As a result of a 1989 commission on the study of mechanic's lien law, the Florida Legislature changed the name of liens placed on real property arising out of improvement of the property from "mechanic's liens" to "construction liens," effective January 1, 1991.

A. Requirements

To claim a construction lien in Florida, certain procedural requirements must be satisfied, and, while compliance with these procedures is important, Florida courts generally apply a liberal construction favoring the lien-holding contractor or laborer.[3]

Foremost, a construction lien must arise from an agreement between the lienor and another party. A written or oral agreement will support a construction lien; however, contracts implied-in-law will not, so a construction lien must be based upon either an express or implied-in-fact contract.[4] Further, construction liens only apply to privately owned property.[5] While improvements made to property under a private lease on government land are lienable, a separate remedy applies for property owned by the government.[6]

The security for a construction lien depends upon the right, title, and interest of the person contracting for improvements.[7] Naturally, if the property is held

in fee simple, the entire interest of the property owner will be subject to the construction lien. When property is owned in joint ownership or as a leasehold, the scope of the lien is usually commensurate with the rights and interests of the party contracting for the improvements. If a lessee contracts for improvements, the lessor's interest will not be subject to the lien if the lease contains language that prohibits lien liability and the landlord records either a copy of the lease, a short form memorandum of the lease, or a notice in the public records of the county in which the property is located.[8]

Both persons and entities involved in construction or repair of real property have lien rights under the Florida lien law.[9] These parties include laborers,[10] materialmen,[11] contractors,[12] subcontractors,[13] sub-subcontractors,[14] subdivision improvers,[15] and professional lienors.[16] Unlicensed contractors, however, are not permitted to enforce their contracts or to obtain the benefits of a construction lien.[17]

As noted above, adherence to the procedural provisions of the construction lien statute are critical to enforcement.[18] Chronologically, the first document to be recorded for a construction lien is usually the notice of commencement.[19] A notice of commencement must be recorded before the start of construction (or the recommencing completion of any improvement after a default), and the improvements described must be commenced within ninety (90) days after its recording, or the notice is void.[20] Notably, even when commencement timely occurs, the notice itself—unless specifically indicated or amended—remains valid for only one (1) year.[21] A notice of commencement must specifically include details of the improvement project, all of which are expressly incorporated into the statute within a standard form.[22]

Next, a notice to owner should be served before the lienor commences furnishing labor, services, or materials.[23] The notice may be served up to forty-five (45) days after the lienor commences his or her services but must, in any event, be served before the owner makes final payment in reliance upon a final contractor's affidavit.[24] With the exception of design professionals, who are exempt from this requirement,[25] failure to serve a notice to owner is a complete defense to enforcement of a lien by any person.[26]

The party seeking to file the lien may do so during the performance of their work or during the furnishing of materials on the property or improvement to be liened.[27] However, all claims of lien must be recorded within ninety (90) days of the last date upon which the lienor furnished labor, services or materials or the date of the prime contractor's default for a lienor claiming through the prime contractor, whichever occurs first.[28]

B. Enforcement and Foreclosure

Suit to enforce a construction lien must be filed no later than one (1) year from the date of recording[29] unless this period is shortened by a notice of contest of lien[30] or by service of a summons to show cause.[31] As an action to foreclose a lien is an *in rem* proceeding, it must be brought in the county (or federal district) where the property or other security for the lien is situated.[32] The property owner is an indispensable party to an action to foreclose a construction lien,[33] and when property is owned by a couple, both spouses are indispensable parties regardless of whether both or only one signed the contract for improvements.[34]

As a general principle of equity and public policy to avoid multiplicity of suits, a contractor is generally entitled to join its unpaid subcontractors and suppliers in an action to enforce a lien.[35] However, neither a contractor nor subcontractor is not an indispensable party to an action by any other subcontractor and/or supplier to enforce a lien against an owner.[36]

The prevailing party in an action to enforce a construction lien is entitled to recover its attorneys' fees and costs.[37] However, the prevailing party generally must prevail on all the 'significant issues,' not merely a successful defense or foreclosure on the lien claim alone.[38] Also, a property owner may also seek entitlement to attorneys' fees for a fraudulently filed lien.[39] A successful lienor is also entitled to recover pre-judgment interest in addition to the amount of the lien.[40] Further, construction lien rights are cumulative to any other rights and remedies a lienor may have.[41] Therefore, actions for breach of contract, open account, account stated, goods sold and delivered, or any other remedial relief available may be sought in conjunction or in addition to enforcement of a construction lien. This further may also include entitlement to additional finance charges arising from the subcontractor or suppliers' contract with another contractor in the privity chain.[42] A lienor may also settle and satisfy a construction lien against an owner and retain rights to pursue the balance against a lienor's customer.

C. Ability to Waive and Limitations on Lien Rights

The right to claim a construction lien cannot be waived in advance either by contract, agreement, or any other method; in other words, a lien right may be waived only to the extent of services that have already been furnished.[43] Any waiver of the right to claim a lien made in advance is unenforceable under Florida law.[44] Forms for waiver and release of lien upon progress and final payment are expressly incorporated into the statutory language and have been specifically upheld by the courts.[45]

II. Public Project Claims

Constitutional restraints prohibit pledging public-owned land for debt without having an election. As these constitutional issues make lien law impractical for publicly owned property, Florida law provides for statutory payment (and performance) bonds for the purpose of protecting the general

contractor, owner, and the public as well as laborers, material suppliers, and subcontractors on projects where these persons are unable to acquire construction liens.

A. State and Local Public Work

Florida law requires the successful bidder for Florida Department of Transportation ("FDOT") construction or maintenance contracts to provide a payment and performance bond in an amount equal to the awarded contract price.[46] For other governmentally owned construction projects, Florida's "Little Miller Act," section 255.05, Florida Statutes, requires any person entering into a contract with any state, county, city, or political subdivision thereof to execute and record a payment and performance bond.[47]

i. Notices and Enforcement

Section 337.18, Florida Statues, sets forth bond requirements for construction or maintenance performed pursuant to FDOT contracts, which begins by mandating that any contractor required to furnish a payment and performance bond under the section to maintain a copy of the bond at its principal place of business and at the job-site office.[48] Any claimant who is not in privity with the contractor for an FDOT project, must provide written notice that he or she intends to look to the bond for protection no later than ninety (90) days after first furnishing labor, materials, or supplies for the project.[49] After not receiving payment for his or her labor, services, or materials, a claimant must deliver to the contractor and to the surety written notice of performance and nonpayment.[50] This notice of nonpayment may not be served earlier than forty-five (45) days after first furnishing labor, materials, or supplies for the project, or later than ninety (90) days after final furnishing of labor, materials, or supplies by the claimant.[51]

A section 337.18 bond claimant has a right of action against both the contractor and the surety for the amount due to him or her, including unpaid finance charges due under the claimant's contract.[52] Further, the prevailing party in an action to enforce a claim against a payment bond under section 337.18 is entitled to recover attorneys' fees and costs.[53] Any action on the bond must be instituted by a claimant against the contractor or surety within 365 days after the final acceptance of the contract work by the department, but such action may not involve FDOT.[54]

Section 255.05, Florida Statutes, sets forth bond requirements for governmental contracts other than FDOT work. Under this section any person entering into a contract with any state, county, city, or political subdivision thereof must first record its payment and performance bond in the public record of the county where the improvement is located,[55]

and before commencing work, the contractor must provide the public entity a certified copy of the recorded bond.[56] A claimant who is not in privity with the contractor for work performed pursuant these governmental contracts must provide written notice that he or she intends to look to the bond for protection no later than forty-five (45) days after first furnishing labor, materials, or supplies for the project.[57] After not receiving payment for his or her labor, services, or materials, a claimant must deliver to the contractor and to the surety written notice of performance and nonpayment.[58] This notice of nonpayment may not be served earlier than forty-five (45) days after first furnishing labor, materials, or supplies for the project, or later than ninety (90) days after final furnishing of labor, materials, or supplies by the claimant.[59] An action for labor, materials, or supplies provided, but not paid for, may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served.[60] A section 255.05 bond claimant has a right of action against both the contractor and the surety for the amount due to him or her, including unpaid finance charges due under the claimant's contract.[61] The prevailing party in an action to enforce a claim against a payment bond under section 255.05 is further entitled to recover attorneys' fees and costs.[62] Any action must be instituted against the contractor or the surety on the payment bond within one (1) year after the performance of the labor or completion of delivery of the materials or supplies, but such action may not involve the public authority.[63]

B. Claims to Public Funds

Not applicable in Florida.

III. Statutes of Limitation and Repose

A. Statutes of Limitation and Limitations on Application of Statutes

An action founded on the design, planning, or construction of an improvement to real property must be brought within four (4) years from the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor[64] and his or her employer, whichever date is latest.[65] However, if an action concerns a latent defect, the time runs from the time the defect is first discovered, or should have been discovered with the exercise of due diligence.[66]

The 2018 Legislature added two provisions to this statute of limitations, which apply to any action commenced on or after July 1, 2018, regardless of when the cause of action accrued.[67] First, a provision allowing any counterclaims,

cross-claims, and third-party claims arising out of the conduct, transaction, or occurrence set out in a pleading to be commenced up to one (1) year after service of the pleading to which such claims relate, regardless of whether these newly asserted claims would otherwise be time barred.[68] Second, a provision designating that correction or repairs performed on construction which is within the scope of a duly issued building permit and final certificate of occupancy or certificate of completion, does not extend the period of time within which an action must be commenced.[69] This four- (4) year limitation for actions founded on the design, planning, or construction of an improvement to real property generally applies to any action arising out of improvements to real property whether the action is pursued on the basis of a contract, negligence, violation of a building code, or other theory of recovery.[70]

In some rare circumstances, claims against design professionals filed by parties in privity with those professionals will need to be brought within two (2) years;[71] however, when there is no direct contract between the professional and the person injured by professional negligence, the two- (2) year statute does not apply.[72]

Similarly if the four- (4) year construction defect limitation does not apply, legal or equitable actions on a written contract are subject to a five- (5) year statute of limitations;[73] tort actions (including intentional torts, trespass, fraud, and negligence) and actions founded on an oral or implied contract are subject to a four- (4) year statute of limitations;[74] wrongful death actions are subject to a two- (2) year statute of limitations;[75] and actions for specific performance or to enforce equitable liens relating to improvements to real estate are subject to a one- (1) year statute of limitations.[76]

B. Statutes of Repose and Limitations on Application of Statutes

Any action "founded on" the design, planning, or construction of improvements to real property must be commenced within ten (10) years following 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 or termination of the contract between the professional engineer, registered architect or licensed contractor and his or her employer, whichever date is latest.[77] While the statute of limitations is statutorily tolled under certain circumstances, these provisions do not toll the statute of repose, except as noted within the statue itself.[78] Most recently, the Florida's Fourth District Court of Appeal controversially held that the delivery of a Chapter 558 pre-suit notice of alleged construction defects within a townhome complex "commenced an action" before expiration of the statute of repose, sufficient to effectively toll and negate its application.[79]

Notably, Florida's Fifth District Court of Appeal also recently held that an engineer's post-construction structural review of a newly completed residential home did not fall within the context of the 10-year statute of repose contained within section 95.11(3)(c), Florida Statutes.[80] Even though the engineering review took place well outside of the 10-year repose period, structural design defects were more recently discovered by the original owner within the 2-year professional statute of limitation period.[81] The Court held that the action for professional engineering negligence was not subject to the 10-year statute of repose because the reviewing engineer did not design, plan, or construct any improvement to the real property and thus the action against it was not "founded on" the design, plan, or construction (turning on the fact that the improvements were already complete, albeit newly, at the time of the engineer's review) necessary to frame it within section 95.11(3)(c).[82]

IV. Pre-suit Notice of Claim and Opportunity to Cure

Prior to filing any action alleging construction defects, a claimant is required under Florida law to comply with statutory pre-suit notice and opportunity to cure requirements.[83] Premised upon the Legislature's belief that it is beneficial to have an alternative method to resolve construction disputes and aimed both at reducing the need for litigation as well as protecting the rights of property owners, these requirements apply to all actions alleging construction defect claims against contractors, subcontractors, suppliers, and design professionals for damage to real or personal property.[84]

Giving deference to its statutory namesake, the required pre-suit notice is commonly referred as a Chapter 558 Notice of Construction Defects. The Chapter first defines several terms as used within the statutory scheme. A "claimant" is any "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."[85] However, the term claimant specifically excludes contractors, subcontractors, suppliers, or design professionals.[86] An "action" is defined within the Chapter 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."[87] Further, a "construction defect" is defined to mean any "deficiency in or arising out of the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, ore remodeling of real property resulting from" defective materials, products, or components used in the construction or remodeling, a violation of applicable building codes, failure of the design to meet applicable professional standards of care, or failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction.[88]

Chapter 558 specifically does not bar, limit, or create any rights or defenses, except as specifically provided within the Chapter.[89] This is often its greatest criticism, as it does not practically help to resolve many defect claims, if any at all. However, pursuant to the Chapter,

construction defect claimants are not authorized to file a construction defect action in Florida without first complying with the pre-suit and notice requirements outlined therein.[90] Further, to the extent that any arbitration clause conflicts with Chapter 558, the statute explicitly controls.[91] A court is required to stay any action, without prejudice, if the claimant filed the action alleging a construction defect without first fully complying with the statute.[92]

Specifically, Chapter 558 requires a claimant to serve written notice of his or her claim on the contractor, subcontractor, supplier or design professional at least sixty (60) days before filing a lawsuit alleging construction defects.[93] If the action involves an association representing more than twenty (20) parcels, the claimant must serve notice at least one-hundred-twenty (120) days before filing the action.[94]

The notice "must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect . . . [and] identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden."[95] Claimants must "endeavor" to serve notice within fifteen (15) days after discovery of an alleged defect, although untimely service of notice will not bar the filing of an action.[96] A person served with a Chapter 558 Notice "is entitled to perform a reasonable inspection of the property or of each unit subject to the claim to assess each alleged construction defect" within thirty (30) days after service of the notice, or within fifty (50) days for claims involving more than twenty (20) parcels.[97]

Subject to conditions within the Chapter, if the person served with notice of a claim concludes destructive testing is necessary to determine the nature and cause of each alleged construction defect, these inspections may even include destructive testing under certain terms and conditions set forth in the statute.[98] Within forty-five (45) days after service of a notice, or within seventy-five (75) days after service of a notice involving more than 20 parcels, the recipient must serve a written response to the claimant.[99] The response must be in the nature of one of the following: (a) an offer to remedy the alleged construction defect at no cost to the claimant with a detailed description of the proposed repairs and a timetable for completion; (b) an offer to settle the claim by monetary payment that will not obligate the person's insurer, with a timetable for making the payment; (c) an offer to settle the claim with a combination of repairs and monetary payment that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for completion of repairs and making payment; (d) a statement that the person disputes the claim and will not remedy the defect or settle the claim; or (e) a statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within thirty (30) days after notification to the insurer of the claim.[100]

Within ten (10) days of receipt of a notice of claim, or within thirty (30) days for claims involving more than twenty (20) parcels, the party served with a notice may also serve a copy of the notice to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim, noting the specific defect for which it believes each party served is responsible.[101] Parties receiving notices in this manner may inspect the property in the same manner as provided for as to the original recipient.[102] Within fifteen (15) days after service of a notice in this manner, or within thirty (30) days for claims involving more than twenty (20) parcels, the person served must serve a written response

to the person from which he or she received the notice.[103] The response must include a report, if any, of the scope of any inspection performed of the property and the findings and results of the inspection.[104] The response may also include one or more offers or statements as provided for as to the original recipient's response.[105]

Upon request, the claimant and any person served with notice under the Chapter, shall exchange any "design plans, specifications, and as-built plans; photographs and videos of the alleged construction defect identified in the notice of claim; expert reports that describe any defect upon which the claim is made; subcontracts; purchase orders for the work that is claimed defective or any part of such materials; and maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any resulting damages."[106] Expert reports exchanged between the parties during the pre-suit process may not be used in any subsequent litigation for any purpose, with the exception of a testifying expert, and a party may assert any claim of privilege recognized under Florida law in response to a document request.[107] Any party who fails to provide requested materials is subject to the same sanctions as a court may impose for a discovery violation.[108]

If the person served with a claim disputes the claim and will not agree to either remedy the defect or settle the claim, or does not respond to the notice within the time provided, a claimant may proceed with an action without further notice.[109] A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice on the person making the offer within forty-five (45) days after receipt.[110]

The service of a written Chapter 558 Notice tolls the applicable statute of limitations related to any person covered under the Chapter until the later of either ninety (90), or one-hundred-twenty (120), days, as applicable, after service of the notice or thirty (30) days after the end of the repair or payment period stated in an offer.[111] While not expressly stated in the Chapter and presently controverted, at least one Florida jurisdiction recognizes that a pre-suit Chapter 558 notice can be used to negate the statute of repose.[112]

Providing of a copy of a Chapter 558 notice to an insurer, if applicable, does not constitute a claim for insurance purposes unless the terms of the policy specify otherwise.[113] However, the Florida Supreme Court more recently analyzed the Chapter 558 pre-suit processing in the context of determining whether the process is a "suit" for the purposes of analyzing whether service and receipt of a notice under the Chapter triggers an insurer's duty to defend and indemnify an insured.[114] The policy at issue before the Florida Supreme Court broadened the definition of a "suit" beyond more than just civil proceedings alleging damages to which the policy applied; under the policy, a "suit" included "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."[115] Tracking this policy language, the Florida Supreme Court found that under the terms of the policy, if the insurer consents to submission of defect claims to the Chapter 558 process, the process is a "suit" as defined under the policy and invokes the insurer's duty to defend.[116] The Court, however, did not address whether the insurer in question did or did not consent to its insured's participation in the Chapter 558 process, and therefore whether the process was, in the context of this case, actually a "suit," or not.[117]

V. Insurance Coverage and Allocation Issues

A. General Coverage Issues

"Coverage" in the insurance context encompasses two duties an insurance company has with respect to its insured: the duty to defend and the duty to indemnify.[118] The duty to defend is distinct from and broader than the duty to indemnify.[119] An insurer's obligation to defend a claim made against its insured is determined from the allegations in the complaint and the applicable language of the policy. All doubts concerning the duty to defend are resolved in favor of providing a defense.[120] Accordingly, if the allegations set forth any facts potentially bringing a claim within the scope of coverage, the insurer has a duty to defend; "and if the complaint alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the insurer is obligated to defend the entire suit."[121] "Consequently, an insurer may be required to defend a suit even if the true facts later show that there is no coverage."[122]

The duty to indemnify, however, is much narrower than the duty to defend. "In contrast to the duty to defend, the duty to indemnify is dependent upon the entry of a final judgment, settlement, or a final resolution of the underlying claims by some other means."[123] Therefore, while the duty to defend is measured by allegations, even if the facts alleged are untrue or legal theories are ultimately unsound, "the duty to indemnify is measured by the facts as they unfold at trial or are inherent in the settlement agreement."[124]

Under Florida law, insurance contracts are construed in accordance with the plain language of the policy as bargained for by the parties, giving each term its plain and unambiguous meaning.[125] The language and terms of an insurance contract likewise determine the scope and extent of insurance coverage afforded.[126] Insuring clauses in policies "are construed in the broadest possible manner to affect the greatest extent of coverage."[127] Any "ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy."[128]

A party seeking coverage under an insurance policy has the initial burden of proving that the underlying claim against is within the coverage of the policy.[129] Only once coverage is established does the burden shift to the insurer to establish the applicability of any exclusions.[130] However, the burden does rest on the insurer to show that exclusions in a policy apply.[131]

B. Trigger of Coverage

Commercial general liability ("CGL") policies are most often purchased on an occurrence coverage basis. This generally means insurance coverage is afforded under CGL policies for "personal injury," "property damage," etc.,

caused by an "occurrence" and which occurs during the policy period. An "occurrence" is generally defined as an accident including continuous or repeated exposure to substantially the same general harmful conditions. Therefore, coverage is triggered when an "occurrence" results in "personal injury" or "property damage;" however, this inquiry becomes more complicated when multiple policies, causes, and damages are involved.

To trigger coverage under a specific policy, Florida law generally recognizes that while the damage itself must occur during a policy period, the "occurrence" need not.[132] In determining at what time damage occurs, Florida recognizes four, generally accepted "trigger of coverage" theories: (1) exposure; (2) manifestation; (3) continuous trigger; and (4) injury in fact.[133] Under the exposure theory, property damage occurs upon installation of the defective product.[134] Under the manifestation theory, property damage occurs at the time the damage manifests itself or is discovered.[135] The continuous trigger theory defines property damage as occurring continuously from the time of installation until the time of discovery.[136] Finally, under the injury-in-fact trigger, sometimes referred to as damage-in-fact, in the context of property damage, coverage is triggered when the property damage underlying the claim actually occurs.[137] Usually, discussions of exposure and continuous trigger theories are confined to asbestos and toxic-tort cases, respectively.

Florida courts have adopted both the manifestation and injury-in-fact triggers.[138] The disagreement stems from differing interpretations of two cases – *Trizec Properties, Inc. v. Biltmore Construction Co.*, 767 F.2d 810 (11th Cir.1985), and *Travelers Insurance Co. v. C.J. Gayfer's & Co.*, 366 So. 2d 1199 (Fla. 1st DCA 1979).[139]

In *Gayfer's*, the court interpreted the term "occurrence" in a policy provision that read as follows: "[The Insurer] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage . . . caused by an occurrence" during the policy period.[140] The underlying suit alleged that the insured negligently installed a roof drainage system during the policy period, and, after the policy period expired, a joint in the drainage system failed, discharging water into the building.[141] The *Gayfer's* court never discussed when the damage occurred because it was undisputed that the damages occurred after the policy expired.[142] Rather, the *Gayfer's* court was concerned with whether the fact that a negligent act that caused the damage occurred during the policy period was enough to trigger coverage, or if the actual damage had to have occurred during the policy period.[143]

To resolve this issue, the court looked at the definition of "property damage" from the policy, which stated that "property damage means the physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or . . . loss of

use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."[144] The court determined that the language of the policy was unambiguous and that the damage itself—not just the negligent act—had to occur during the policy period.[145] In explaining its holding, the court stated that "[t]he term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense here."[146]

Following this ruling, two decisions interpreted the sentence in *Gayfer's* mentioning the word "manifests" to mean that Florida now followed the manifestation trigger theory.[147] Several subsequent cases have continued to follow those decisions' lead without separately analyzing *Gayfer's*; which, as noted, only addressed the issue of whether a negligent act alone was sufficient to trigger coverage, not when damage "occurs" to trigger coverage.[148]

However, in a subsequent decision, the Eleventh Circuit in *Trizec*, unlike the court in *Gayfer's*, did address the issue of when damage occurs in order to trigger coverage.[149] In *Trizec*, a roof deck was negligently installed, causing water intrusion damage.[150] The policy at issue in *Trizec* applied to "property damage . . . caused by an occurrence," and property damage was defined in part as "physical injury to or destruction of tangible property occurring during the policy period."[151] The *Trizec* court therefore interpreted this language as requiring an injury-in-fact analysis, stating that "the damage itself . . . must occur during the policy period for coverage to be effective" and that "[t]here is no requirement that the damages 'manifest' themselves during the policy period" in order to trigger coverage.[152]

After determining an occurrence appropriately falls within policy coverage, the next piece of the trigger puzzle is an analysis of whether the occurrence is the "cause" of the injury or damages. Sometimes more than one factor or a combination of circumstances give rise to a party's loss or damages. In this scenario, Florida follows two standards for determining whether a claim is covered when damage is the result of more than one cause: the concurrent cause doctrine and the efficient proximate cause doctrine.[153] Which standard applies depends on whether the causes are dependent or independent from each other.[154] "Causes are independent when they are unrelated such as an earthquake and a lightning strike, or a windstorm and wood rot."[155] "Causes are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire."[156]

If causes are independent of each other, then the concurrent cause doctrine applies.[157] Under the concurrent cause doctrine, coverage is provided so long as one cause is covered, even if other causes are not covered.[158]

Dependent causes are analyzed under the efficient proximate cause doctrine, where the "efficient proximate cause" is the cause that instigates or sets the others in motion.[159] A loss caused by multiple perils will be covered if the "efficient proximate cause" is a covered peril; if the "efficient proximate cause" is not covered under the policy, then the claim for damages is not covered even if the other causes are covered. However, the efficient proximate cause doctrine will not be incorporated into an insurance policy, if doing so renders part of the policy meaningless.[160] For example, where the efficient cause of damage is a "necessary antecedent of the damages' direct cause," the efficient proximate cause doctrine will not be applied.[161]

In *Arawalk*, the Eleventh Circuit was called upon to determine whether the efficient proximate cause doctrine should be applied to analyzing coverage for damages to a plane's engine caused by overheating.[162] Overheating was excluded under the policy as "wear and tear;" but plaintiff's negligence allegedly caused the overheating, and negligence was covered by the policy.[163] Recognizing that negligence, the covered cause, is almost always the efficient cause of "wear and tear," the Eleventh Circuit, applying Florida law, held that the loss was not covered because any wear and tear exclusion could effectively be eviscerated if the insured could show that up-keep was not properly performed.[164]

Among all of the other hotly-contested trigger-of-coverage issues is the scope of loss, damages, or injury; namely, what property damages or construction defects are covered under comprehensive general liability policies. In 2007, the Florida Supreme Court in *U.S. Fire Insurance Co. v. J.S.U.B., Inc.*, analyzed "whether a post-1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work."[165]

Several prior opinions had established that from a policy perspective, the purpose of CGL coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.[166] Previous precedent based upon both this policy consensus and exclusionary language contained in pre-1986 CGL policies consistently held that faulty workmanship that damages the contractor's own work can never constitute a covered "occurrence."[167] The Florida Supreme Court addressed this well-recognized proposition of Florida law head on, noting none of the previous opinions expressly considered whether it was appropriate to apply this rationale to cases involving different policy provisions.[168] Further, because the leading case on this point involved a claim of faulty workmanship by a contractor, rather than a claim of faulty workmanship by a subcontractor, the court determined it should not be

binding and looked to the language of the post-1986 CGL policy it was faced with as its primary guidance in resolving the dispute.[169]

In doing so, the court first addressed "whether a subcontractor's faulty workmanship that results in damage to the contractor's work can constitute an 'occurrence' as that term has been defined under Florida case law."[170] After parsing the differences between a contractor's work and a subcontractor's work including the differing end products, the court concluded "that faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy."[171] Next, the court turned to an analysis of what constitutes "property damage," recognizing that in order to determine whether a policy provides coverage for an insured's losses, it must address whether the "occurrence" caused "property damage" within the meaning of the policies.[172]

Starting with the premise "that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage,'" the court found that the claims alleged in the case before it did not involve a claim for the cost of repairing the subcontractor's defective work, but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work.[173] Noting that the cause of the claimed structural damage in the case before it was "physical injury to tangible property," the court concluded that the structural damage to the homes was in fact "property damage" within the meaning of the policy.[174] Therefore, the court held, "physical injury to the completed project that occurs as a result of the defective work can constitute 'property damage' as defined in a CGL policy."[175] Accordingly, "a post–1986 standard form commercial general liability policy with products completed-operations hazard coverage, issued to a general contractor, provides coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage."[176]

The Florida Supreme Court further interpreted and applied the *J.S.U.B.* ruling in its subsequent decision in *Auto-Owners Insurance Company v. Pozzi Window Company*.[177] There, the facts involved claims that water intrusion was occurring due to either defective windows or defective installation of windows. However, the court could not determine the ultimate outcome in the case because it did not have a sufficient factual basis to apply the legal principles that it established. The court ruled instead that "if the claim in this case is for the repair or replacement of windows that were defective both prior to installation and as installed, then that is merely a claim to replace a 'defective component' in the project"[178] and it is not covered because there would be no "property damage" under the policies. In contrast, "if the claim is

for repair or replacement of windows that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property" and the claim is covered.[179]

C. Allocation Among Insurers

Allocation among insurers is ordinarily determined by applying the explicit terms of the relevant insurance policies. Florida "courts will not rewrite insurance policies, nor add meaning that is not present, or otherwise reach results contrary to the intentions of the parties."[180] Moreover, "Where two or more policies of insurance each contain similar 'other insurance' clauses whereby the insurers attempt to limit their liability for an insured's loss covered by these policies, proration according to the policy limit is the proper method of determining the liability of the respective insurers."[181] In considering whether the coverage provided by insurance policies is primary or excess under Florida law, courts determine the intent of the parties "solely by the *language* of the policies unless the language is ambiguous."[182] Therefore, when "there is no incompatibility among other insurance provisions, they are to be enforced by their terms."[183]

In Florida, there are three basic types of "other insurance" clauses: escape, excess, and *pro rata*.[184] An escape clause completely voids the insurance coverage and includes language such as "this insurance shall not apply" or is "void" if other collectible insurance applies.[185] An excess clause does not void the coverage but merely provides that the coverage will be "excess" over other valid and collectible insurance.[186] Finally, a *pro-rata* clause provides that each insurer will be responsible for a share of total liability on a pro-rated basis.[187]

Under Florida law, when other insurance clauses are "mutually repugnant," the coverage is deemed to be *pro rata*.[188] The reported decisions are not entirely consistent on what constitutes mutual repugnancy, referring variously to "other insurance" clauses. The challenge in these circumstances becomes the determination of when such provisions are in fact "repugnant."

On June 18, 2019, Florida Governor Ron DeSantis signed into law House Bill 301, which creates section 624.1055, Florida Statutes. The statute creates a right of contribution among liability insurers for defense costs whenever an insurer has a duty to defend claims or suits filed in the State of Florida. Prior to the passage of House Bill 301, under Florida law, there was no right to contribution among primary co-carriers.[189] In *Argonaut*, the Third District Court of Appeal found that "the duty of each insurer to defend its insured is personal and does not insure to the benefit of another insurer."[190] However, since the enactment of section 624.1055, insurers who have paid more than their "fair share" of defense costs will have an independent right to seek contribution against co-carriers who share that duty.[191] To state a claim for equitable contribution, "insurers must "share (1) the same level of obligation (2) on the same risk (3) to the same insured."[192] The statute applies to

contribution claims related to the defense of insureds and additional insureds, as the statute states that it applies to any claim, suit, or other action initiated on or after January 1, 2020.

D. Issues with Additional Insurance

In 2003, the legislature enacted Chapter 558, Florida Statutes, to provide "an alternative method to resolve construction disputes" between owners and contractors. The Chapter 558 process begins when an owner or claimant serves a written Chapter 558 notice on a contractor (or subcontractor, supplier, or design professional). The current version of the statute requires that a claimant serve a written notice of claim describing "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."[193]

The Florida Supreme Court discussed the Chapter 558 process in its seminal decision in *Altman Contractors, Inc. v Crum & Forster Specialty Ins. Co.*[194] The Florida Supreme Court's decision arose out of a declaratory judgment action filed by Altman Contractors, Inc. ("Altman") in the U.S. District Court for the Southern District of Florida. Altman is based upon construction defect claims brought by the Sapphire Fort Lauderdale Condominium Association, Inc. (the "Association) against Altman, wherein the Association served Altman with several Chapter 558 notices of claim regarding a multitude of defects to the condominium. Altman notified its insurance carrier, Crum & Forrester ("Crum") and demanded that Crum defend and indemnify Altman against the Association's claims. Crum denied that it had any to duty to defend Altman on the basis that the claim was not in suit; however, Crum exercised its discretion to retain counsel to defend Altman against the Association's claims subject to a reservation of rights. Altman objected to Crum's denial of coverage and rejected the counsel selected by Crum. Altman demanded that Crum pay for its defense costs incurred after being served by the Association with the Chapter 558 Notice. After Crum denied Altman's demands, Altman settled its claims with the Association and filed its declaratory judgment action seeking a declaration that Crum owed Altman a duty to defend and indemnify Altman under its policies, as well as reimbursement for its fees and costs.

Ultimately, the U.S. District Court ruled in favor of Crum finding that the Association's Chapter 558 notices did not constitute a "suit" under the CGL policies.[195] Altman appealed the action to the U.S. Court of Appeals for the 11th Circuit, which later certified the following question to the Florida Supreme Court: "Is the notice and repair process set forth in Ch. 558, Florida

> Statutes, a 'suit' within the meaning of the commercial general liability policy issued by [Crum] to [Altman]?"
>
> The Florida Supreme Court ultimately held in *Altman* that "[a]lthough the chapter 558 process does not constitute a 'civil proceeding,' it is included in the policy's definition of 'suit' as an 'alternative dispute resolution proceeding' to which the insurer's consent is required to invoke the insurer's duty to defend the insured."[196] As a result of the Florida Supreme Court's decision in *Altman*, general contractors have attempted to circumvent *Altman* by pleading generally in their declaratory judgment complaints that insurers have "consented" to participation in the chapter 558 process, or alternatively, have waived consent. Whether these allegation pass muster, is presently up for debate.

VI. Contractual Indemnification

A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages because of liability to a third party. The right to indemnity arises through either an express or implied contract; and are accordingly subject to the general rules governing formation, validity, and construction of all contracts.

Well-settled Florida law disfavors, and generally invalidates, exculpatory agreements that seek to shift "the cost of a party's misconduct from the perpetrator to the injured party '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.'"[197] Because indemnification agreements can potentially produce the same result as an exculpatory provision by shifting responsibility for the payment of damages back to the injured party, they are strictly construed and scrutinized by the courts.[198]

An agreement for indemnification that protects an indemnitee against its own negligence is valid[199] as long as the contract expresses in clear and unequivocal terms an intent to indemnify against the indemnitee's own wrongful actions.[200] Thus, contracts purporting to indemnify a party against its own negligence will be enforced only if they clearly express such an intent. A general provision indemnifying the indemnitee against any and all claims, standing alone, is not sufficient.[201] In addition, if a contractual indemnity provision requires reference to other parts of the contract to ascertain its meaning, then it does not contain the clear and unequivocal terms required to indemnify the indemnitee against its own negligence.[202]

The question of construction of an indemnity contract is usually one of law for the court applying recognized rules of construction.[203] Thus, the terms of the indemnity contract determine whether the indemnitor is obligated to reimburse the indemnitee for a particular claim.[204] The contract must be construed according to the intention of the parties as gathered from the writing and the circumstances under which the writing was made in the particular case.[205] Accordingly, the intent of the parties and the scope of the indemnification provision are derived from the language of the contract and the circumstances in which it was made.[206]

Notwithstanding these general rules, any portion of an agreement or contract for construction, alteration, repair or demolition of a building or structure is void and unenforceable under Florida law where a party to the contract seeks to obtain indemnification from another party for its own active negligence,[207] unless the contract contains 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.[208] An indemnification provision subject to this requirement may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than: "(a) the indemnitor; (b) any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or (c) the indemnitee or its officers, directors, agents, or employees."[209]

However, an explicit exception exists if a design professional provides professional services for a public agency, that agency may require a professional services contract under which the professional indemnifies and holds harmless the agency, and its officers and employees from liabilities, damages, losses, and costs, including but not limited to, reasonable attorneys' fees, to the extent the injury was caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional and other persons employed or utilized by the design professional in the performance of the contract.[210]

Where the liability of the obligor under a contract is not based on an indemnity clause but on the obligor's breach of contract by failing to make the obligee a named insured as required by the contract, such action is distinguishable from the case where the contract requires the indemnitee to be insured by a policy of insurance maintained by the indemnitor.[211]

VII. Contingent Payment Agreements

A. Enforceability

A contract may have conditions required to be performed prior to the payment obligation becoming due. The most common contingency to payment is that a contractor receive payment from an owner. However, there may be other contingencies to payment, such as the furnishing of a satisfactory release.[212] In these cases, where the parties agreed to such terms, absent any applicable contract formation defenses, a party failing to show it furnished a satisfactory release cannot prove its case as failure to furnish a satisfactory release under the contract is a failure to perform a condition precedent to payment.

B. Requirements

In order for a "pay-when-paid" provision to be enforceable, the terms of the subcontract must clearly and unambiguously explain that the subcontractor fully accepts the risk that the owner may not pay the general contractor, and in that instance, the subcontractor will not be paid for its work until the general contractor has been paid.[213] Unless the terms of the subcontract are clear and

unambiguous and the intention to transfer risk to the subcontractor is obvious, the "pay-when-paid" provision is likely not enforceable.

Where it is clear and unambiguous from the contract that payment to the subcontractor is not earned and is not payable at all unless payment for the subcontractor's work is received by the contractor from the owner, then such a clause is enforceable.[214]

The courts have provided insight as to what interpret as "clear and unambiguous terms." For instance, the Florida Supreme Court found a clause that stated that final payment would be made to a subcontractor "within 30 days after the completion of the work included in this subcontract, written acceptance by the architect and full payment therefore by the owner" to be ambiguous and unenforceable.[215] Likewise, a District Court of Appeals found a "pay when paid" clause that stated "Payments will be made for the value of the work installed each week within seven (7) business days after receipt of payment from the owner" to be ambiguous and unenforceable.[216]

VIII. Scope of Damage Recovery

A. Personal Injury Damages vs. Construction Defect Damages[217]

In a construction defect case, the recoverable damages are generally the reasonable cost of construction and completion under the terms of the contract, unless such an award would be unreasonable or constitute economic waste.[218] Where the award would be unreasonable or constitute economic waste, damages will be calculated by the value that the product contracted for would have held if properly constructed, less the value of the product that was actually delivered.[219]

In contrast, personal injury plaintiffs who have proven liability are entitled to recover an amount that will fairly and adequately compensate them for their injuries. This amount may be derived from numerous factors including compensation for injury, pain, emotional distress, disability, disfigurement, loss of capacity for enjoyment of life, past and future medical expenses, lost past earnings, and lost earning capacity.[220]

Additionally, the spouse of a plaintiff can recover for loss of consortium and services.[221] Parents of a plaintiff can recover damages for their care and treatment of their minor child, loss of their child's services, earnings, and earning capacity, and loss of filial consortium for the period of the child's minority.[222]

B. Attorney's Fees Shifting and Limitations on Recovery

Florida follows the "American Rule" with respect to entitlement to attorneys' fees, providing that "attorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or contractual agreement authorizing their recovery."[223] Further, entitlement for attorneys' fees, whether based on contract or statute, must be pled.[224]

One inherent premise of the "American Rule" is that an award of attorneys' fees is, foremost, in derogation of common law.[225] Therefore, attorneys' fees are unavailable in common-law actions unless a distinct statutory or contractual authority authorizing recovery of fees exists.[226]

While prevailing-party fee clauses are common and enforceable under Florida law, a contractual attorneys' fee provision must be strictly construed.[227] A typical prevailing-party clause is set forth using standard language similar to the following: "The prevailing party in litigation arising from this contract shall be entitled to recover attorneys' fees and costs from the nonprevailing party."[228] Florida law statutorily requires any contractual fee provision to operate reciprocally; section 57.105(7), Florida Statutes, provides that "[i]f a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorneys' fees to the other party when that party prevails in any action.[229]

Fees provisions in the construction industry become complicated, especially with the prevailing use of indemnification provisions. It is important to understand which type of provision a contract contains or which to rely upon in each circumstance. As a general rule, "'an indemnitee is entitled to recover, as part of his damages, reasonable attorney's fees and reasonable and proper legal costs and expenses, which he is compelled to pay as a result of suits by or against him in reference to the matter against which he is indemnified.'"[230] However, indemnification clauses that do not limit recovery of attorneys' fees to the prevailing party in suits between the parties to the indemnification contract are construed under Florida law to apply only to claims by third parties.[231] The distinction between recovery of fees incurred in defending against third-party claims versus fees incurred in prosecution of first-party claims arises from arguably the most basic of Florida's contract jurisprudence.

Well-settled Florida law disfavors, and generally invalidates, exculpatory agreements that seek to shift "the cost of a party's misconduct from the perpetrator to the injured party '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.'"[232] Because indemnification agreements can potentially produce the same result as an exculpatory provision by shifting responsibility for the payment of damages back to the injured party, they are strictly construed and scrutinized by the courts.[233] Indeed, "the view that general

indemnity language automatically includes indemnity for first-party claims would 'permit a garden variety indemnity clause to be used to exculpate a contracting party from liability to the other party to the agreement.'"[234]

For these reasons, Florida courts have continually recognized that indemnity provisions which do not limit recovery of attorneys' fees to the prevailing party apply only to fees incurred for claims brought by third parties and are not applicable for fees incurred to defend or prosecute claims between the parties to the indemnification contract.[235]

Therefore, for indemnity for attorneys' fees to apply in first-party claims, the provision must clearly and unambiguously show an intent to extend indemnity to first-party claims between the parties to the contract; and "[a]n indemnity provision that is silent or unclear whether it applies to first-party claims will normally be interpreted to apply only to third-party claims."[236]

Florida's Fourth District in *Century Village v. Chatham Condominium Associations*, was one of the first Florida court to address application of an indemnification clause in this context to actions between the contracting parties.[237] The applicable indemnification clause in the case before the Fourth District provided as follows:

INDEMNIFICATION

> Lessee covenants and agrees with Lessor that during the entire term of this Lease, the Lessee will indemnify and save harmless the Lessor against any and all claims, debts, demands, or obligations which may be made against Lessor, or against Lessor's title of the premises, arising by reason of or in connection with the making of this Lease and the ownership by Lessee of the interest created in the Lessee hereby, and if it becomes necessary for the Lessor to defend any action seeking to impose such liability, the Lessee will pay the Lessor all costs of Court and attorney's fees incurred by the Lessor in effecting such defense, in addition to any other sums which the Lessor may be called upon to pay by reason of the entry of a judgment against the Lessor in the litigation in which such claim is asserted.[238]

Finding it was "quite obvious" that the clause was not intended to apply to actions between the parties, but that it was rather intended to apply to third-party actions, the court held that the Lessor was not entitled to recover attorneys' fees incurred in defending a suit by the Lessee.[239] The court

specifically cautioned that finding otherwise "would amount to accepting the incongruous theory that although the [Lessees] may be successful in their litigation, they would nevertheless have to satisfy their own judgment in addition to paying the lessor's costs."[240]

Following this ruling, the Florida Supreme Court adopted the Third District's reasoning in analyzing a similar indemnity provision in *Penthouse North Association v. Lombardi*, 461 So. 2d 1350 (Fla. 1985). In *Penthouse*, a condominium association filed an action against its directors, which the trial court dismissed after finding the action was barred by the statute of limitations.[241] Following dismissal, the trial court found the association's articles of incorporation did not authorize an award of attorneys' fees for the prevailing party in the case at hand and struck the directors' request for attorneys' fees.[242] Explicitly adopting the *Century Village* reasoning on appeal, the supreme court found that a theory recognizing indemnification between the parties to the contract would produce an incongruous result and held that no statutory or contractual basis for an award of attorneys' fees existed between the parties below.[243]

In *Sunshine Bottling Co. v. Tropicana Products, Inc.*, the Third District again analyzed a claim for attorneys' fees in the context of a first-party dispute rising out of a contract between Tropicana and its orange juice bottler, Sunshine.[244] Sunshine filed suit against Tropicana for breach of contract and promissory estoppel following a dispute that arose when Tropicana altered its canning specifications.[245] Tropicana counterclaimed for promissory estoppel, *quantum meruit*, and breach of contract, and requesting recovery of attorneys' fees.[246] A jury found in favor of Sunshine on all claims and awarded Sunshine $592,000 for damages on its promissory estoppel claim.[247] Following post-trial motions, on appeal, the Third District in reviewing the parties' contract, noted although the contract at issue contained an indemnification clause whereby the parties "agreed to indemnify each other for damages and other losses (including fees) arising from litigation brought by third parties for injuries or damages attributable to the party not sued[,]" the contract did not contain a prevailing-party, fee shifting provision in the event of litigation between the parties.[248] Recognizing that in the absence of a clear and unambiguous contractual provision or a statutory right, each party is responsible for its own attorneys' fees, the court held that Sunshine had no contractual or statutory basis for recovery of its attorneys' fees incurred in prosecuting or defending the first-party claims between the contracting parties and was not entitled to fees in the action below.[249]

The First District Court of Appeals similarly denied recovery of attorneys' fees to a prevailing party in a breach of contract action in *Traylor Bros. v. Melvin*, 776 So. 2d 947, 948 (Fla. 1st DCA 2000). Citing the *Penthouse* holding, in its short, succinct opinion, the First District noted despite prevailing on its contract action, the contract at issue below contained

indemnification clauses, which "do not provide for an award of attorney's fees to the prevailing party in litigation between the contracting parties."[250]

Aside from a contractual agreement, some of the more commonly encountered statutory provisions providing for recovery of attorneys' fees are Florida's "frivolous lawsuit" statute, section 57.105, and Florida's "Offer of Judgment and Demand for Judgment" statute, section 768.79.[251]

Section 57.105(1)(a), Florida Statutes, requires a court to award the prevailing party reasonable attorneys' fees, in equal amounts by the losing party and the losing party's attorney, on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial was not supported by the material facts necessary or would not be supported by the application of then-existing law to those material facts.[252] "The word 'shall' in section 57.105 has been found to evidence the legislative intent to impose a mandatory penalty in the form of reasonable attorney's fees to discourage baseless claims, by placing a price tag on losing parties who engage in these activities."[253] Counsel for a party may also be held liable for attorney's fees under section 57.105 if counsel failed to conduct an objective, reasonable investigation of material facts supporting his client's claim.[254]

Florida's "Offer of Judgment and Demand for Judgment" statute serves as an enticement to settle claims by imposing sanctions in the form of fees and costs upon a party who unreasonably rejects a settlement offer made pursuant to the statute.[255] Pursuant to the statute, a party who rejects an offer and does not do at least seventy-five (75) percent as well as offered at trial, i.e., the opposing party beats his or her offer at trial by at least twenty-five (25) percent, the party rejecting the offer will have to pay the offeror's attorneys' fees and costs from the date of the offer.

C. Consequential Damages

A party may recover consequential damages, subject to the traditional limitations related to causation, foreseeability, and certainty.[256] The party seeking consequential damages must specifically include a reference to the same factors in their complaint.[257]

D. Delay and Disruption Damages

In Florida, a party is entitled to recover losses that accrued as a result of a delay or disruption in construction or improvement of the subject property.[258] These damages are strictly governed by statute and case law.

A compensable delay is one caused by the party receiving the work, that impacts the critical path of the contractor, and results in extra cost to the contractor, which are not concurrent with the contractor's delay.[259] To find that the party receiving the work caused compensable delay in performance of a contract, the general rule is that someone other than the contractor, or one for whom the contractor is responsible, must have been the sole proximate cause of the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period.[260]

Excusable delays may also be defined in the contract. A breach of common-law duties of good faith and fair dealing may also be the basis for claims of compensable delay and disruption, entitling the contractor to an equitable adjustment.[261]

Nevertheless, a contract may include a "no-damage-for-delay" clause, which may be enforceable if the clause is clearly worded.[262] Of particular note, since a no-damage-for-delay clause may relieve a party from the consequences of his or her own actions they are strictly construed.

E. Economic Loss Doctrine

The Florida Supreme Court's decision in *Tiara Condominium Association v. Marsh & McLennan Companies*, in 2013, was widely regarded as a significant retreat in the scope of the economic loss rule.[263] Historically, the rule bars an action in tort for claims arising in products liability where the plaintiff has suffered no personal injury or damage to other property.[264] Initially, the economic loss rule served to offer manufacturers protection from liability for economic damages caused by a defective product by limiting liability to the damages provided by warranty law.[265] With the introduction of strict liability for personal injury cases, courts began to hear cases questioning whether they should permit causes of action in tort for purely economic damages caused by defective products.[266] The strict liability doctrine was not intended to undermine the warranty provisions of contract law, but rather to govern the separate problem of physical injuries caused by defective products. Where the parties were in contractual privity, warranty law provided the best route for recovery of economic damages, but courts had to consider how to deal with this type of damages for parties who did not enjoy contractual privity.[267] From this inquiry came the economic loss rule; Florida courts determined that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."[268]

The economic loss rule was widely applied with certain exceptions to cases in which the parties were in contractual privity and one party sought to recover damages in tort for matter arising under the contract. This expansion of the rule created confusing and inconsistent precedent amongst Florida Courts. The

Florida Supreme Court recently revisited the economic loss rule and its application in *Tiara Condominium Association v. Marsh & McLennan Cos*.[269]

In *Tiara*, the Florida Supreme Court addressed the following certified question: "Does the economic loss rule bar an insured's suit against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely for economic losses?"[270] The court not only answered in the negative but the held that "the application of the economic loss rule is limited to products liability cases. Therefore, we recede from prior case law to the extent that it is inconsistent with this holding."[271] In arriving at this decision, the Florida Supreme Court noted the ever-expanding application of the economic loss rule and discussed the prior application of the economic loss rule to parties in contractual privity and to parties not in privity. The Florida Supreme Court noted that contractual privity provided actions based on breach of warranty for economic damages.[272] Determining that parties not in privity may seek recovery under warranty claims for defective products under current law, the Florida Supreme Court held, "In exchange for eliminating the privity requirements of warranty law and expanding the tort liability for manufacturers of defective products which cause personal injury, we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself."[273] The Florida Supreme Court concluded, holding, "Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability."[274]

Following this opinion, confusion permeated the courts with respect to whether the heavily relied upon rule still applied in the context of construction defect litigation.[275] This discussion begins with the Florida Supreme Court's opinion in *Casa Clara Condominium Association v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993). Defining what qualifies as a product with respect to a construction project, the Florida Supreme Court, in *Casa Clara*, disagreed that "other property" included "individual components and items of building material."[276] Rather, the court reasoned,

> to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant. Generally, house buyers have little or no interest in how or where the individual components of a house are obtained. They are content to let the builder produce the finished product, i.e., a house. These homeowners bought finished products—dwellings—not the individual components of those dwellings. They

> bargained for the finished products, not their various components.[277]

This precedent is nothing solely attributable to the *Casa Clara* opinion. For example, the *Casa Clara* court cited the Virginia Supreme Court's holding in *Sensenbrenner v. Rust, Orling &Neale Architects, Inc.*, 374 S.E. 2d 55 (Va. 1988).[278] In *Sensenbrenner*, the plaintiff homeowner entered into a contract with a general contractor for the construction of a new home with an enclosed swimming pool.[279] The contractor contracted with, among others, an architect and a pool subcontractor.[280] Upon completion, the contractor conveyed the property to the homeowner.[281] Subsequently, the pool settled, rupturing water pipes.[282] The homeowner brought a claim for negligent design and supervision against the architect, and negligent construction against the pool contractor.[283] Affirming dismissal of the tort claims, the Virginia Supreme Court held:

> Although sales of real estate are not controlled by product liability concepts in other respects, the rule limiting recovery for economic losses to the law of contracts does apply to sales of real property alleged to be qualitatively defective. Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. . . .
>
> The controlling policy consideration underlying tort law is the safety of persons and property—the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.
>
> The plaintiffs here alleged nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective . . . . This is a purely economic loss, for which the law of contracts provides the sole remedy.

> Recovery in tort is available only when there is a breach of a duty "to take care for the safety of the person or property of another." The architect and the pool contractor assumed no such duty to the plaintiffs by contract, and the plaintiffs' complaint alleges no facts showing a breach of any such duty imposed by law.[284]

Moreover, in his concurring opinion in *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So. 2d 532, 544 (Fla. 2004), Justice Cantero referred to the Supreme Judicial Court of Massachusetts's holding in *Berish v. Bornstein*, 770 N.E. 2d 961, 975 (Mass. 2002), noting "damages sought, in tort, for economic losses from a defective building are just as offensive to tort law as damages sought for economic losses stemming from a defective product."[285]

The *Tiara* court specifically receded from its prior economic loss rule precedent to the extent it was inconsistent with its holding.[286] Nothing inconsistent exists between *Tiara* refocusing the economic loss rule as applicable only in the products liability context and the *Casa Clara* analysis defining buildings and structures as products. The *Tiara* decision impacts merely one sentence of the *Casa Clara* opinion; where the majority notes, "The cases in conflict, *Adobe*, *Drexel*, and *Latite*, incorrectly refused to apply the economic loss rule to what should have been contract actions, and we disapprove them."[287] As noted above, claims arising in products liability are quintessentially claims in which the parties do not enjoy privity of contract. This was the inherent premises of *Tiara*, and it is inconsistent with *Tiara* for the economic loss rule to apply in contract actions. The rest of the *Casa Clara* decision remains consistent with, and unaffected by, the *Tiara* ruling.[288]

The court recognized, however, for claims in which the parties are in contractual privity, the independent tort doctrine precludes parties from recasting causes of action in tort that are otherwise breach of contract claims.[289] Although sometimes incorrectly referred to as an "economic loss rule exception," the independent tort doctrine provides that in an action between parties in contractual privity, a plaintiff asserting a tort claim must allege action beyond and independent of the breach of contract, which amounts to an independent tort.[290] To set forth a claim in tort between parties in contractual privity, a party must allege action beyond and independent of a breach of contract that amounts to an independent tort.[291] Common pleading strategy provides that a party may plead actions in the alternative; however, a tort claim fails as a matter of law if it does not set forth a tort independent of a duty owed under its contract.

F. Interest

Plaintiffs are generally entitled to recover prejudgment interest on contract claims. In rare instances, plaintiffs will also be able to recover prejudgment interest for non-contract cases if there was an ascertainable loss that occurred at a specific time prior to the entry of judgment.[292]

Generally, interest accrues on a Florida judgment at the statutory rate set on December 1st of every year for the following year by the Chief Financial Officer for the State of Florida.[293] The rate is calculated by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding five hundred (500) basis points to the averaged federal discount rate.[294]

G. Punitive Damages

Section 768.72, Florida Statutes (2019), governs claims for punitive damages. Pursuant to the statute a claimant is not entitled to punitive damages unless the claimant makes an evidentiary showing that a reasonable basis for recovery of punitive damages exists.[295] In other words, punitive damages will not be awarded if the claimant has not made a clear and convincing evidentiary showing that the defendant was guilty of intentional misconduct or gross negligence.[296]

"Intentional misconduct" under the statute means that the defendant had actual knowledge that the conduct was wrong and created a high probability of injuring or causing damage to the claimant, but despite that knowledge, intentionally pursued the same course of conduct; and that conduct caused injury.[297] For a defendant's conduct to rise to the level of "gross negligence," the conduct must be so reckless or careless that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.[298]

Of note, employers, principals, corporations and other legal entities are only liable for punitive damages if "intentional misconduct" or "gross negligence" has been shown, and one of the following is shown: (a) the employer, principal, corporation or other legal entity actively and knowingly participated in such conduct; (b) the officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or (c) the employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and contributed to the loss, damages, or injury suffered by the claimant.[299]

Nevertheless, Florida does cap punitive damages awards under certain circumstances.[300] Where the fact finder determines that at the time of injury the defendant had specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages.[301] Where the fact finder determines that wrongful conduct was

motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct together with the high likelihood of injury was actually known, the punitive damages award may not exceed the greater of four (4) times the amount of compensatory damages awarded to each claimant or $2 million.[302] Otherwise, an award of punitive damages may not exceed the greater of three (3) times the amount of compensatory damages awarded to each claimant or $500,000.[303]

Application of this section operates on a post-judgment basis, and the jury may neither be instructed nor informed of these caps.[304] Further, a claimant's attorneys' fees, if payable based upon the judgement, are, to the extent that the fees are based on a punitive damages award, calculated based on the final judgment for punitive damages.[305]

H. Liquidated Damages

Liquidated damages are enforceable as long as the assessment of actual damages as of the time of making the contract is uncertain and the provision for liquidated damages is not strictly a penalty.[306]

There is no strict objective rule for determining whether a sum stipulated for breach of contract is a penalty. Courts take into account the reasonableness of the provisions, the certainty of establishing actual damages, and the intent of the parties.[307] The determination of whether liquidated damages are enforceable, or unenforceable as a penalty, is a question of law for the court.[308] In determining whether liquidated damages operates as a penalty, the amount of damages is analyzed for reasonableness.[309] Liquidated damages must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach to show that the parties could only have intended to induce full performance, rather than to liquidate their damages.[310] If the liquidated damages are unreasonable, the courts will consider the damages to be a penalty and will not enforce them.[311] Where it is doubtful whether a contract clause is a penalty or liquidated damages, the court will construe the payment of an arbitrary sum as a penalty.[312]

If a contract calls for a party to be able to elect to have liquidated damages or actual damages, the liquidated damage clause may be considered to be a penalty and unenforceable.[313] Further, where a contract grants one party the option of liquidated damages or actual damages, such language demonstrates that the liquidated damages are an invalid penalty and will not be enforced.[314]

Liquidated damages for delay and loss of use can be assessed in addition to actual damages for defects. However, liquidated damages will not be assessed in addition to actual damages where only liquidated damages are provided for in the contract.[315]

Parties should be cautious of the terms of prime contracts versus subcontracts when liquidated damages are concerned. For example, a subcontractor who actually causes a delay may not be held liable for liquidated damages assessed against a contractor if the subcontract contains no liquidated damages provision.[316] A pass through provision may similarly allow liquidated damages for a period of delay caused by a subcontractor to be passed from the contractor to the subcontractor who caused the delay.[317]

IX. Case Law and Legislation Update

Filed on February 19, 2019 by Volusia County representative David Santiago (R-Dist. 27), House Bill 911 (and its companion Senate Bill 1246) sought to make substantial changes to Chapter 558, *supra*, including a requirement that the parties to all construction defect actions participate in "mandatory nonbinding arbitration" within 180 days of filing a lawsuit (presumptively the original suit, not third-party actions). Among other issues, the proposed language did not appear to account for the complexity of what often becomes third- and fourth-party actions against subcontractors/sub-sub-contractors or the amount of time needed to locate and serve them all. Moreover, in Florida, "nonbinding arbitration" is somewhat of a misnomer. While it might be less-binding than truly binding arbitration, it is a mistake to assume that nonbinding arbitration is completely "nonbinding." In fact, there are often very significant consequences and risks with entering into even nonbinding arbitration. The proposed legislation died in subcommittee but was reborn in a similar proposal filed for the 2020 session, House Bill 295 filed on October 4, 2019 and referred to the Florida House Judiciary Committee.

In December 2018, Florida's Fifth District Court of Appeal substantially weakened section 725.06, Florida Statutes, that once purported to void indemnity clauses in construction contracts that attempt to require one party to indemnity the other for its own negligence without proper restrictions/limitations.[318] The court ultimately held that clauses running afoul of the statute are only void and unenforceable as to the "portion" purporting to impose indemnity obligations on the acts or omissions of the indemnitee (*i.e.*, only that part of the clause that violates the statute, not the whole clause).[319] Moreover, the court also reversed summary judgment against a claim for common law indemnity, taking a liberal interpretation of what constitutes a "special relationship" so as to apply it to the relationship between a general contractor and subcontractor for the purposes of implied indemnity.[320]

On appeal of a jury verdict and final judgment against D.R. Horton totaling more than $9M, Florida's First District Court of Appeal affirmed the award and rebuffed the general contractor's arguments that the condominium association's experts failed to apply reliable methodology and that the association did not present sufficient evidence of actual damages at trial, among other significant aspects of a lengthy opinion.[321]

In July 2019, Florida's Second District Court of Appeal held that the subsequent purchaser of a private residence was subject to the original language of the special warranty deed conveyed from the builder to the original purchaser that incorporated a valid arbitration agreement concerning any claims of defective construction.[322] Thus, a valid arbitration provision properly incorporated into the language of a special warranty deed was a covenant running with the land and is binding on subsequent purchasers.[323] While an appeal to the Florida Supreme Court was initially dismissed, that order was vacated in October 2019, and it appears likely the Court will hear arguments on this issue, which could have wider implications.

After the Florida Legislature's adoption of the more robust *Daubert*[324] standard for expert testimony serval years ago,[325] the Florida Supreme Court has, as of May 2019, indicated that *Daubert* is now law in Florida,[326] after rejecting it just last year.[327] With several new judicial appointments under Governor DeSantis to the Florida Supreme Court, the formal adoption of Daubert should lead to unification of legislative intent and procedural implementation that puts to rest a confusing dispute between the Court and the Legislature.[328]

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[1] As to miscellaneous liens, see §§ 713.50 to 713.79, Florida Statutes (2019).
[2] As to construction liens, see §§ 713.001 to 713.37, Florida Statutes (2018).
[3] *See Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1199 (Fla. 2009). *Compare*, *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So.2d 623, 625–26 (Fla.1995) (noting that strict compliance with Construction Lien Law's time requirements is necessary because "[c]ontracting parties need certainty about when time periods for notification begin"); *with Premier Finishes, Inc. v. Maggirias*, 130 So. 3d 238, 242 (Fla. 2d DCA 2013) ("[A]bsent a showing of prejudice, a deficiency, error, or omission will not invalidate the [construction] lien.") (citing *Johnson & Bailey Architects P.C. v. Se. Brake Corp.*, 517 So.2d 776, 778 (Fla. 2d DCA 1988)).
[4] *CDS & Assocs. of Palm Beaches, Inc. v. 1711 Donna Rd. Assocs., Inc.*, 743 So. 2d 1223, 1225 (Fla. 4th DCA 1999); *see also Niehaus v. Big Ben's Tree Serv., Inc.,* 982 So. 2d 1253, 1254 (Fla. 1st DCA 2008) ("[A] construction lien can arise only when a valid contract exists between the parties […and] [in FN1] [a] contract implied in law is not a contract at all, but a legal fiction hinging on the concept of unjust enrichment;" thus, no lien can arise).
[5] § 713.01(23), (26), Fla. Stat. (2019).
[6] § 255.05, Fla. Stat. (2019).
[7] § 713.10 (1), Fla. Stat. (2019).
[8] § 713.10 (2)-(3), Fla. Stat. (2019).
[9] *See* 713.01(18), Fla. Stat. (2019) (defining a "Lienor" as a "person" who is a contractor; subcontractor; sub-subcontractor; laborer; materialman who contracts with the owner, contractor, subcontractor, or sub-subcontractor; or a professional lienor and includes his or her successor in interest. Professional lienors, including design professionals, are further defined under section 713.03, Florida Statutes (2019)).
[10] § 713.01(16), Fla. Stat. (2019) ("'Laborer' means any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others.").
[11] § 713.01(20), Fla. Stat. (2019) ("'Materialman' means any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof.").

[12] § 713.01(8), Fla. Stat. (2019) ("'Contractor' means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract [and] . . . includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract . . . .").
[13] § 713.01(28), Fla. Stat. (2019) ("'Subcontractor' means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in [section 443.101, Florida Statutes (2019)]").
[14] § 713.01(29), Fla. Stat. (2019) ("'Sub-subcontractor' means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in [section 443.101, Florida Statutes (2019)]").
[15] § 713.04, Fla. Stat. (2019).
[16] § 713.03, Fla. Stat. (2019).
[17] § 489.128(2), Fla. Stat. (2019).
[18] *Compare* § 713.05, Fla. Stat. (2019) (addressing liens of persons in privity of contract with the owner); *with* § 713.06, Fla. Stat. (2019) (addressing liens of persons not in privity of contract with the owner).
[19] *See* § 713.13, Fla. Stat. (2019).
[20] *See* § 713.13(1)-(2), Fla. Stat. (2019).
[21] *See* § 713.13(6), Fla. Stat. (2019).
[22] § 713.13(1), Fla. Stat. (2019).
[23] § 713.06(2)(a), Fla. Stat. (2019). *But see Carter Sand Co., Inc. v. Baymeadows, Inc.*, 320 So. 2d 14, 15 (Fla. 1st DCA 1975) (holding that in the case of a lienor working below a subcontractor, notice must be served before final payment is made to the subcontractor). The Carter precedent, however, is often criticized as being in direct contention with the language of the statute. *See, e.g., Tuttle/White Constructors, Inc. v. Hughes Supply, Inc.*, 371 So. 2d 559, 564 (Fla. 4th DCA 1979).
[24] § 713.06(2)(a), Fla. Stat. (2019).
[25] § 713.03(3), Fla. Stat. (2019).
[26] § 713.06(2)(a), Fla. Stat. (2019).
[27] § 713.08(5), Fla. Stat. (2019).
[28] *Id. See* § 713.01(12); (13), Fla. Stat. (2019), (defining "final furnishing" and "furnish materials.").
[29] § 713.22(1), Fla. Stat. (2019). Should the 365th day fall on a Saturday, Sunday, or legal holiday, the time period is extended to the next business day. *Lehmann Dev. Corp. v. Nirenblatt*, 629 So. 2d 1098, 1099 (Fla. 2d DCA 1994).
[30] § 713.22(2), Fla. Stat. (2019).
[31] In the event a summons to show cause is served, suit to enforce the lien must be filed within twenty (20) days of service of the summons. § 713.21(4), Fla. Stat. (2019).
[32] *See, e.g., SAAD Homes, Inc. v. Rivero*, 23 So. 3d 862, 863 (Fla. 3d DCA 2009).
[33] *Compare Citibank, N.A. v. Villanueva*, 174 So. 3d 612, 613 (Fla. 4th DCA 2015) ("The fee simple title holder is an indispensable party in an action to foreclose a mortgage on property."); *with Diversified Mortg. Inv'rs v. Benjamin,* 345 So. 2d 392, 393 n.1 (Fla. 3d DCA 1977) ("The property owner is a necessary party at time of suit to foreclose a mechanic's lien.") (citing *Deltona Corp. v. Indian Palms, Inc.*, 323 So. 2d 282, 283 (Fla. 2d DCA 1975); *McGuire v. Consol. Elec. Supply, Inc.*, 329 So. 2d 411, 412 (Fla. 4th DCA 1976)).
[34] *Moore v. Leisure Pool Servs., Inc.*, 412 So. 2d 392, 393 (Fla. 5th DCA 1982).
[35] *Morris & Esher, Inc. v. Olympia Enters., Inc.*, 200 So. 2d 579, 582 (Fla. 3d DCA 1967).
[36] *Gorman Co. of Fort Lauderdale, Inc. v. Frank Maio Gen. Contractor, Inc.*, 438 So. 2d 1018, 1019 (Fla. 4th DCA 1983) (citing *Bybee v. Stearn*, 95 So. 2d 529, 531 (Fla. 1957)).
[37] § 713.29, Fla. Stat. (2019).
[38] *See Marocco v. Brabec*, No. 1D17-894, 2019 WL 1498321, at *4 (Fla. 1st DCA Apr. 5, 2019) (holding the trial court did not abuse discretion in denying an award for attorney's fees where the home owner successfully defended the lien foreclosure but did not prevail under Florida's "significant issues" test amongst the other claims); *see also HHA Borrower, LLC. v. W.G. Yates & Sons Constr. Co.,* 266 So. 3d 1267, 1268 (Fla. 5th DCA 2019) (holding that, on equitable grounds, neither party was entitled to attorneys' fees, even where both prevailed on significant issues).
[39] § 713.31(2)(c), Fla. Stat. (2019). In Florida, the property owner is also granted the right of an independent cause of action for the filing of a fraudulent construction lien. *Id.*

[40] *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985); *Summerton v. Mamele*, 711 So. 2d 131, 133 (Fla. 5th DCA 1998) ("The trial court has no discretion with regard to awarding prejudgment interest and must do so applying the statutory rate of interest in effect at the time the interest accrues.").
[41] § 713.30, Fla. Stat. (2019).
[42] § 713.06(1), Fla. Stat. (2019); *see also Fernandez v. Manning Bldg. Supplies, Inc.*, No. 1D18-4819, 2019 WL 4655988, at *2 (Fla. 1st DCA Sept. 25, 2019) (distinguishing interest accruing as a "delinquency charge" versus interest accruing as a "financing charge").
[43] § 713.20(2), Fla. Stat. (2019).
[44] *Id.*
[45] § 713.20(4)-(5), Fla. Stat. (2019); *Stock Bldg. Supply of Fla., Inc. v. Soares Da Costa Const. Servs., LLC*, 76 So. 3d 313, 318 (Fla. 3d DCA 2011).
[46] § 337.18, Fla. Stat. (2019).
[47] § 255.05, Fla. Stat. (2019).
[48] § 337.18(1)(b), Fla. Stat. (2019).
[49] § 337.18(1)(c), Fla. Stat. (2019).
[50] *Id.*
[51] *Id.*
[52] § 337.18(1)(b), Fla. Stat. (2019).
[53] § 337.18(1)(d), Fla. Stat. (2019).
[54] § 337.18(1)(b), (d), Fla. Stat. (2019).
[55] § 255.05(1), Fla. Stat. (2019). Public bond statute voids venue or forum selection clauses. *Travelers Cas. & Ins. Co. of Am. v. Cmty. Asphalt Corp.*, 221 So. 3d 742, 743-44 (Fla. 3d DCA 2017).
[56] § 255.05(1)(b), Fla. Stat. (2019).
[57] § 255.05(2)(a)2, Fla. Stat. (2019).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] § 255.05(1)(c), Fla. Stat. (2019).
[62] § 255.05(2)(a)2, Fla. Stat. (2019).
[63] § 255.05(10), Fla. Stat. (2019).
[64] The Florida Legislature defined "completion of the contract" to mean, "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." *Fla. Stat.* § 95.11(3)(c) (2019). Prior to this Legislative enactment, completion of the contract, according to a prior decision by Florida's Fifth District Court of Appeals, occurred when final payment was actually made to the contractor. *Cypress Fairway Condo. v. Bergeron Const. Co. Inc.*, 164 So. 3d 706, 708 (Fla. 5th DCA 2015) (holding that "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. It is not our function to alter plain and unambiguous language under the guise of interpreting a statute […]. Accordingly, we conclude that the statute of repose commenced to run on the date of completion of the contract, which, in this case, was the date on which final payment was made under the terms of the contract."). By defining completion in this way, a party could effectively extend another's liability for construction defects by delaying final payment.
[65] § 95.11(3)(c), Fla. Stat. (2019).
[66] *Id. See Covenant Baptist Church, Inc. v. Vasallo Constr., Inc.*, 273 So. 3d 236 (Fla. 3d DCA 2019) ("Under Florida law, '[w]hen a newly finished roof leaks it is not only apparent, but obvious, that someone is at fault.'") (quoting *Kelley v. Sch. Bd. of Seminole Cty.*, 435 So.2d 804, 806 (Fla. 1983)).
[67] LIMITATION OF ACTIONS, 2018 Fla. Sess. Law Serv. Ch. 2018-97 (C.S.C.S.H.B. 875) (WEST).
[68] § 95.11(3)(c), Fla. Stat. (2019) ("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 a pleading may be commenced up to 1 year after the pleading to which such claims relate is served, even if such claims would otherwise be time barred.").
[69] *Id.* This amendment essentially codified long-standing Florida case law rejecting the "continuous treatment" doctrine for construction defect claims. *See Sch. Bd. of Seminole County v. GAF Corp.*, 413 So. 2d 1208, 1211–12 (Fla. 5th DCA 1982), *quashed sub nom. Kelley v. Sch. Bd. of Seminole County*, 435 So. 2d 804 (Fla. 1983). Pursuant to the continuous treatment doctrine, the accrual of a malpractice cause of action is suspended until treatment ends or the professional relationship is terminated. *Id.* (describing the doctrine in the construction context as, when a person, "relying upon a 'professional' to resolve and cure a problem within the ambit of their professional relationship, and

where the professional continuously works on the problem and assures the client the problem is being solved," makes the issue of when that person knew or should have known his problem was permanent and irreparable, a question of fact).

[70] *Dubin v. Dow Corning Corp.*, 478 So. 2d 71, 73 (Fla. 2d DCA 1985) ("A special statute of limitations which addresses itself to specific matters takes precedence over a general statute."); *see also Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 295 (Fla. 5th DCA 2016) (holding that work performed by unlicensed contractor still subject to four-year statute of limitations founded on construction or an improvement to real property).

[71] § 95.11(4)(a), Fla. Stat. (2019).

[72] *Pensacola Executive House Condo. Ass'n, Inc. v. Baskerville-Donovan Eng'rs, Inc.*, 566 So. 2d 850, 853 (Fla. 1st DCA 1990), *aff'd* 581 So. 2d 1301 (Fla. 1991).

[73] § 95.11(2)(b), Fla. Stat. (2019).

[74] § 95.11(3).

[75] § 95.11(4)(d).

[76] § 95.11(5)(a), (b).

[77] § 95.11(3)(c), Fla. Stat. (2019).

[78] *Busch v. Lennar Homes, LLC*, 219 So. 3d 93, 96 n.2 (Fla. 5th DCA 2017), *reh'g denied* (May 30, 2017) (rejecting the argument that service of a Chapter 558 notice tolled the statute of repose for construction defect claim because if filed prematurely the lawsuit would merely have been stayed, not dismissed); *but see, infra* footnote 79.

[79] *Gindel v. Centex Homes*, 267 So. 3d 403, 407 (Fla. 4th DCA 2018). Upon the Court's order granting the appellees' motion for certification of conflict, the Fourth District Court of Appeal certified the following question to the Florida Supreme Court:

> DOES COMPLIANCE WITH THE [pre-suit] NOTICE REQUIREMENT UNDER SECTION 558.004(1), FLORIDA STATUTES (2014) CONSTITUTE THE COMMENCEMENT OF A CIVIL ACTION OR PROCEEDING SUFFICIENT TO TOLL THE STATUTE OF REPOSE SET FORTH IN SECTION 95.11(3)(C), FLORIDA STATUTES (2014)?

272 So. 3d 417 (Fla. 4th DCA 2019).

[80] *Manney v. MBV Eng'g, Inc.*, 273 So. 3d 214, 215-17 (Fla. 5th DCA 2019)

[81] *Id.*

[82] *Id.*

[83] §§ 558.001-.005, Fla. Stat. (2019).

[84] § 558.001.

[85] § 558.002(3).

[86] *Id.*

[87] § 558.002(1).

[88] § 558.002(5).

[89] § 558.004(12).

[90] § 558.003. *But see, Banner Supply Co. v. Harrell*, 25 So. 3d 98, 100 (Fla. 3d DCA 2009) (denying certiorari and petition for writ of mandamus as to trial court's refusal to abate action where plaintiff did not comply specifically with Chapter 558 because abatement would have been futile to the purpose of the pre-suit notice requirements).

[91] § 558.004(14).

[92] §§ 558.003; 558.004(7). *But see, Banner Supply Co. v. Harrell*, 25 So. 3d 98, 100 (Fla. 3d DCA 2009) (denying certiorari and petition for writ of mandamus as to trial court's refusal to abate action where plaintiff did not comply specifically with Chapter 558 because abatement would have been futile to the purpose of the pre-suit notice requirements).

[93] § 558.004(1)(a).

[94] *Id.*

[95] § 558.004(1)(b).

[96] § 558.004(1)(c).

[97] § 558.004(2). The statute further incorporates a claimant's corresponding duty to reasonably accommodate access and inspections. *Id.* ("The claimant shall provide . . . reasonable access to the property during normal working hours to inspect the property to determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect. The person served with notice under subsection (1) shall reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections.").

[98] *Id.*

[99] § 558.004(5).
[100] *Id.*
[101] § 558.004(3).
[102] *Id.*
[103] § 558.004(4).
[104] *Id.*
[105] *Id.*
[106] § 558.004(15).
[107] *Id.*
[108] *Id.*
[109] § 558.004(6).
[110] § 558.004(7).
[111] § 558.004(10).
[112] *See Gindel v. Centex Homes*, 267 So. 3d 403 (Fla. 4th DCA 2018).
[113] § 558.004(13).
[114] *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017).
[115] *Id.* at 277-78.
[116] *Id.* at 279.
[117] *Id.*
[118] *Morgan Intern. Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.,* 617 So. 2d 455, 457 (Fla. 3d DCA 1993).
[119] *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 813 (Fla. 1st DCA 1985).
[120] *Id.* at 814.
[121] *Id.* at 813-14.
[122] *IDC Const., LLC. v. Admiral Ins. Co.*, 339 F. Supp. 2d 1342, 1349 (S.D. Fla. 2004) (citing Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992); *Klaesen Bros., Inc. v. Harbor Ins. Co*., 410 So. 2d 611 (Fla. 4th DCA 1982)).
[123] *IDC Const., LLC*, 339 F. Supp. 2d at 1349.
[124] *Id.*
[125] *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003); *Rigby v. Underwriters at Lloyds, London*, 907 So. 2d 1187, 1181, n.1 (Fla. 3d DCA 2005).
[126] *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006).
[127] *Id.*
[128] *Id.*
[129] *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. 2d DCA 1984).
[130] *E. Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005).
[131] *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1065 (Fla. 1983).
[132] *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1265 (M.D. Fla. 2002) (citing *Trizec Props., Inc. v. Biltmore Const. Co.*, 767 F.2d 810, 813 (11th Cir. 1985)); *Carithers v. MidContinent Cas. Co.*, 782 F.3d 1240, 1247 (11th Cir. 2015).
[133] *Auto Owners Ins. Co*., 227 F. Supp. 2d at 1266.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *See, e.g., Assurance Co. of Am. v. Lucas Waterproofing Co., Inc.*, 581 F. Supp. 2d 1201, 1206 (S.D. Fla. 2008); *N. River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F. Supp. 2d 1284, 1289 (S.D. Fla. 2006);*Auto Owners Ins.* Co., 227 F. Supp. 2d at 1266; *Am. Motorists Ins. Co. v. Southern Sec. Life Ins. Co.*, 80 F. Supp. 2d 1280, 1284 (M.D. Ala. 2000) (applying Florida law); *Harris Specialty Chems., Inc. v. U.S. Fire Ins. Co.*, Case No. 3:98–CV–351, 2000 WL 34533982 at *12 (M.D. Fla. 2000); *Travelers Ins. Co. v. C.J. Gayfer's & Co.*, 366 So. 2d 1199 (Fla. 1st DCA 1979) (citing, *inter alia*, *Prieto v. Reserve Ins. Co.*, 340 So. 2d 1282 (Fla. 3d DCA 1977));*but see Trizec Props., Inc. v. Biltmore Const. Co.*, 767 F.2d 810, 813 n.6 (11th Cir. 1985) (rejecting manifestation theory in context of duty to defend, but noting that "We need not and do not decide whether [the insurer's] theory ... that damages must manifest themselves . . . before coverage is triggered . . . is a correct or incorrect statement of the law in general").
[139] *Axis Surplus Ins. Co. v. Contravest Const. Co.*, 921 F. Supp. 2d 1338, 1346 (M.D. Fla. 2012).
[140] *Id.* at 1346-47 (citing *Gayfer's*, 366 So. 2d at 1200).
[141] *Id.*

[142] *Id.*
[143] *Id.* (citing *Gayfer's*, 366 So. 2d at 1201-02).
[144] *Id*. (citing *Gayfer's*, 366 So. 2d at 1201 n.1.)
[145] *Id.* (citing *Gayfer's*, 366 So. 2d at 1202) ("We find ... that the phrase 'caused by an occurrence' informs the insured that an identifiable event other than the causative negligence must take place during the policy period.").
[146] *Id.*
[147] *American Motorists Ins. Co. v. Southern Security Life Insurance Co.*, 80 F. Supp. 2d 1280 (M.D. Ala. 2000); *Auto Owners Insurance Co. v. Travelers Casualty & Surety Co.*, 227 F. Supp. 2d 1248 (M.D. Fla. 2002) (Report and Recommendation adopted by district judge).
[148] *See, e.g., Mid–Continent Cas. Co. v. Siena Home Corp.*, No. 5:08–CV–385–Oc–10GJK, 2011 WL 2784200, at *3 (M.D. Fla. July 8, 2011); *Mid–Continent Cas. Co. v. CED Constr. Partners, Ltd.*, 721 F. Supp. 2d 1209, 1216 (M.D.Fla.2010); *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 485 F. Supp. 2d 1302, 1309 (M.D. Fla. 2006).
[149] *Axis Surplus Ins. Co.*, 921 F. Supp. 2d 1338, 1348 (M.D. Fla. 2012).
[150] *Id.* (citing *Trizec Properties, Inc. v. Biltmore Const. Co., Inc.*, 767 F.2d 810, 812 (11th Cir. 1985)).
[151] *Id.* (citing *Trizec Properties, Inc.*, 767 F.2d at 812).
[152] *Id.* (citing *Trizec Properties, Inc.*, 767 F.2d at 813). *See also, Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240, 1247 (11th Cir. 2015) (where the court expressed "no opinion on what the trigger should be where it is difficult (or impossible) to determine when the property was damaged").
[153] *See Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1318 (M.D. Fla. 2002).
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 698 (Fla. 2016), *reh'g denied*, SC14-897, 2017 WL 361132 (Jan. 25, 2017); *Paulucci*, 190 F. Supp. 2d at 1319.
[158] *Wallach v. Rosenberg*, 527 So. 2d 1386, 1387 (Fla. 3d DCA 1988).
[159] *Sebo*, 208 So. 3d at 697; *Hartford Acc. & Indemn. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974).
[160] *Arawak & Aviation, Inc. v. Indemn. Ins.*, 285 F.3d 954, 958 (11th Cir. 2002).
[161] *Id.* at 956.
[162] *Arawak & Aviation, Inc. v. Indemn. Ins.*, 285 F.3d 954 (11th Cir. 2002).
[163] *Id.*
[164] *Id.*
[165] *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007).
[166] *Id.* at 880.
[167] *Id.* at 882.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 883.
[171] *Id.* at 888.
[172] *Id.*
[173] *Id.* at 889.
[174] *Id.*
[175] *Id.*
[176] *Id.*at 891.
[177] *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241, 1243 (Fla. 2008).
[178] *Id.* at 1248-49.
[179] *Id.* at 1249.
[180] *Gulf Ins. Co. v. Continental Cas. Co.*, 464 So. 2d 207, 209 (Fla. 3d DCA 1985).
[181] *Id.* at 209-10.
[182] *Towne Realty, Inc. v. Safeco Ins. Co.*, 854 F.2d 1264, 1267 (11th Cir. 1988) (emphasis in original).
[183] *Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005).
[184] *See Auto-Owners Ins. Co. v. Palm Beach Cnty.*, 157 So. 2d 820, 822 (Fla. 2d DCA 1963); *Twin City Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005) *aff'd* 200 Fed. Appx. 953 (11th Cir. 2006).
[185] *See, e.g., Quinlan Rental & Leasing, Inc. v. Linnel*, 484 So. 2d 630, 632 (Fla. 2d DCA 1986) (explaining that an escape clause "avoids" responsibility for coverage); *Auto-Owners Ins. Co.*, 157 So. 2d at 822-24 (analyzing and collecting cases with escape clauses and finding clause at issue was an escape clause where the clause was a non-liability clause and utilized the exclusionary language providing that the insurance "shall not apply. . ."); *see also*

Maryland Cas. Co. v. Reliance Ins. Co., 478 So. 2d 1068, 1071 (Fla. 1985) (explaining that other insurance clause was a "classic 'escape clause'" where it asserted it would apply "only if there is no other valid and collectible insurance"); *Continental Cas. Co. v. Old Republic Ins. Co.*, No. 06-22628-CIV, 2007 WL 4365719 (S.D. Fla. Dec. 11, 2007) (finding that policy contained an escape clause where it provided "The insurance does not apply . . .").

[186] *See Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc.*, 494 So. 2d 487, 489 (Fla. 1986).

[187] *See U.S. Fire Ins. Co. v. Transportation Cas. Ins. Co.*, 747 So. 2d 404, 405 (Fla. 4th DCA 1999).

[188] *See AIG Premier Ins. Co. v. RLI Ins. Co.*, 812 F. Supp. 2d 1315, 1324-25 (M.D. Fla. 2011) (where other insurance clauses are mutually repugnant, parties are liable for a pro rata share of the settlement determined by policy limits); *Certain Underwriters at Lloyds, London Subscribing to Policy No. SA 10092-11581 v. Waveblast Watersports, Inc.*, 80 F. Supp. 3d 1311, 1321 (S.D. Fla. 2015).

[189] *See Argonaut Ins. Co. v. Maryland Cas. Co.*, 372 So.2d 960 (Fla. 3d DCA 1979).

[190] *Id.*

[191] *See, Porto Venezia Condo. Ass'n, Inc. v. WB Fort Lauderdale, LLC*, Case No. 11-60665-CIV, 2012 WL 12838283, at *3 (S.D. Fla. May 29, 2012) ("Equitable contribution allows for co-guarantors to recover from one another if one of them has paid more than his fair share.").

[192] *Zurich Am. Ins. Co. v. S.-Owners Ins. Co.*, 314 F. Supp. 3d 1284, 1298 (M.D. Fla. 2018), *aff'd*, 770 Fed. Appx. 1009 (11th Cir. 2019) (quoting *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, Case No. 6:06–cv–1180–Orl–31UAM, 2007 WL 3275307, at *3 (M.D. Fla. Oct. 31, 2007)).

[193] § 558.004(1)(b), Fla. Stat. (2019).

[194] *Altman Contractors, Inc. v Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017).

[195] *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 124 F. Supp. 3d 1272, 1275 (S.D. Fla. 2015), *rev'd in part, vacated in part*, 880 F.3d 1300 (11th Cir. 2018).

[196] *Altman Contractors, Inc.*, 232 So. 3d at 279.

[197] *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260 (Fla. 2015).

[198] *See id*. at 265; *MVW Mgmt., LLC v. Regalia Beach Developers LLC*, 230 So. 3d 108 (Fla. 3d DCA 2017), *reh'g denied* (Oct. 11, 2017).

[199] *Fla. Dept. of Transp. v. V.E. Whitehurst & Sons, Inc.*, 636 So. 2d 101 (Fla. 1st DCA 1994).

[200] *Fidelity & Guar. Ins. Co. v. Ford Motor Co.*, 707 F. Supp. 2d 1300 (M.D. Fla. 2010) (decided under Florida law); *University Plaza Shopping Center v. Stewart*, 272 So. 2d 507 (Fla. 1973); *Gencor Industries, Inc. v. Fireman's Fund Ins. Co.*, 988 So. 2d 1206 (Fla. 5th DCA 2008); *H & H Painting & Waterproofing Co. v. Mechanic Masters, Inc.*, 923 So. 2d 1227 (Fla. 4th DCA 2006).

[201] *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072 (Fla. 5th DCA 2003).

[202] *H & H Painting & Waterproofing Co.*, 923 So. 2d 1227 (Fla. 4th DCA 2006).

[203] *Fidelity & Guar. Ins. Co.*, 707 F. Supp. 2d 1300; *Park Central Hotel Co. v. Park Corp.*, 97 So. 2d 28 (Fla. 3d DCA 1957).

[204] *Fidelity & Guar. Ins. Co.*, 707 F. Supp. 2d 1300.

[205] *University Plaza Shopping Center*, 272 So. 2d 507; *Bankhead Welding Service, Inc. v. Florida East Coast Ry.*, 240 So. 2d 648 (Fla. 3d DCA 1970); *J. A. Jones Const. Co. v. Zack Co.*, 232 So. 2d 447 (Fla. 3d DCA 1970).

[206] *Fidelity & Guar. Ins. Co.*, 707 F. Supp. 2d 1300.

[207] § 725.06, Fla. Stat. (2019). *Cuhaci & Peterson Architects, Inc. v. Huber Const. Co.*, 516 So. 2d 1096 (Fla. 5th DCA 1987); *Alonzo Cothron, Inc. v. Upper Keys Marine Const., Inc.*, 480 So. 2d 136 (Fla. 3d DCA 1985).

[208] § 725.06. The monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity may not be less than one million ($1,000,000.00) dollars per occurrence unless otherwise agreed by the parties.

[209] § 725.06(1) ("However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee 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 the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.").

[210] § 725.08, Fla. Stat. (2019).

[211] *Apol v. Shaw*, 647 So. 2d 139 (Fla. 1st DCA 1994); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So. 2d 851 (Fla. 2d DCA 1984).

[212] *Team Land Development, Inc. v. Anzac Contractors, Inc.*, 811 So. 2d 698 (Fla. 3d DCA 2002).

[213] *DEC Electric, Inc. v. Raphael Construction Corp.*, 53 So. 2d 427 (Fla. 4th DCA 1989), *aff'd* 558 So. 2d 427 (Fla. 1990).

[214] *Snead Const. Corp. v. Langerman*, 369 So. 2d 591 (Fla. 1st DCA 1978); *Aetna Cas. & Sur. Co. v. Warren Bros. Co., Division of Ashland Oil, Inc.*, 355 So. 2d 785 (Fla. 1978); *Robert F. Wilson, Inc. v. Post-Tensioned Structures, Inc.*, 522 So. 2d 79 (Fla. 3d DCA 1988); *Charles R. Perry Const., Inc. v. C. Barry Gibson & Assocs., Inc.*, 523 So. 2d 1221 (Fla. 1st DCA 1988); *Team Land Dev., Inc. v. Anzac Contractors, Inc.*, 811 So. 2d 698 (Fla. 3d DCA 2002); *Everett Painting Co., Inc. v. Padula & Wadsworth Constr., Inc.*, 856 So. 2d 1059 (Fla. 4th DCA 2003).
[215] *Peacock Const. Co., Inc. v. Modern Air Conditioning, Inc.*, 353 So. 2d 840 (Fla. 1977).
[216] *G.E.L. Recycling, Inc. v. Atl. Envtl., Inc.*, 821 So. 2d 431 (Fla. 5th DCA 2002).
[217] *See generally, WHO'S RESPONSIBLE FOR A CONTRACTOR BEING INJURED OR KILLED ON YOUR COMMERCIAL PROPERTY?*, Michael J. Cox, Esq., THE BRIEFING: TAYLOR DAY LAW BLOG, Jul. 18 2019, *available at* http://www.taylordaylaw.com/blog/whos-responsible-for-a-contractor-being-injured-or-killed-on-your-commercial-property/.
[218] *Gory Associated Indus., Inc. v. Jupiter Roofing & Sheet Metal, Inc.*, 358 So. 2d 93 (Fla. 4th DCA 1978).
[219] *Hampton-Chrysler-Plymouth-Dodge, Inc. v. White*, 448 So. 2d 87 (Fla. 1st DCA 1984).
[220] *Truelove v. Blount*, 954 So. 2d 1284 (Fla. 2d DCA. 2007).
[221] *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995); *Bashaway v. Cheney Bros., Inc.*, 987 So. 2d 93 (Fla. 1st DCA 2008).
[222] *U.S. v. Dempsey*, 635 So. 2d 961 (Fla. 1994); *Cousins Club Corp. v. Silva*, 869 So. 2d 719 (Fla. 4th DCA 2004) (explaining that damages are limited to the period of the child's minority).
[223] *Bidon v. Dep't of Prof'l Regulation*, 596 So. 2d 450, 452 (Fla. 1992). *See also Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004); *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003); *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993).
[224] *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991).
[225] *See Jory v. Dep't of Prof'l Regulation*, 583 So. 2d 1075, 1077 (Fla. 1st DCA 1991).
[226] *See id.*; *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 26 (Fla. 2004).
[227] *See, e.g., Succar v. Safra Nat'l Bank of New York*, 237 Fed. Appx. 526, 529 (11th Cir. 2007); *B & H Constr. & Supply Co. v. District Bd. of Trustees of Tallahassee Cmty. Coll., Fla.*, 542 So. 2d 382, 387 (Fla. 1st DCA 1989).
[228] *Succar*, 237 Fed. Appx. at 529.
[229] § 57.105(7), Fla. Stat. (2019).
[230] *Fallstaff Group, Inc. v. MPA Brickell Key, LLC*, 143 So. 3d 1139, 1143 (Fla. 3d DCA 2014) (*quoting Am. & Foreign Ins. Co. v. Avis Rent–A–Car Sys. Inc.*, 401 So. 2d 855, 857 (Fla. 1st DCA 1981).
[231] *Succar*, 237 Fed. Appx. at 529.
[232] *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260 (Fla. 2015).
[233] *See id.* at 265; *MVW Mgmt., LLC v. Regalia Beach Developers LLC*, 230 So. 3d 108 (Fla. 3d DCA 2017), *reh'g denied* (Oct. 11, 2017).
[234] *MVW Mgmt., LLC*, 230 So. 3d 108 (citing Order, *Regalia Beach Dev. LLC v. MVW Mgmt. LLC*, Case no. 16–3753 CA 22 (Fla. 11th Cir. June 30, 2016) (Hanzman, J.)).
[235] *Succar*, 237 Fed. Appx. at 528–29; *Fallstaff Group, Inc.*,143 So. 3d at 1143 (*quoting Snider v. Continental Ins. Co.*, 519 So. 2d 12, 13 (Fla. 5th DCA 1987) ("Although 'attorney's fees incurred in the defense of a claim indemnified against are part of the damages allowable, . . . attorney's fees incurred in establishing the right to indemnification are not allowable.'")); *Am. & Foreign Ins. Co., v. Avis Rent–A–Car Sys., Inc.*, 401 So. 2d 855 (Fla. 1st DCA 1981).
[236] *Succar*, 237 Fed. Appx. at 528–29 (*citing Univ. Plaza Shopping Ctr., Inc. v. Stewart*, 272 So. 2d 507, 511 (Fla. 1973)) ("For, example, a tenant's agreement to indemnify the landlord against 'any and all claims' does not clearly and unequivocally express an intent to include claims by the tenant that result exclusively from the negligence of the landlord.").
[237] 387 So. 2d 523 (Fla. 4th DCA 1980).
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*at 1351.
[242] *Id.*
[243] *Id.*
[244] 757 So. 2d 1231, 1232 (Fla. 3d DCA 2000).
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*

[250] *Id.*
[251] §§ 57.105, 768.79, Fla. Stat. (2019).
[252] § 57.105(1)(a).
[253] *Albritton v. Ferrera*, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005) (*citing Couch v. Drew*, 554 So. 2d 1185 (Fla. 1st DCA 1989); *Wright v. Acierno*, 437 So. 2d 242 (Fla. 5th DCA 1983)).
[254] *Yang Enters. v. Georgalis*, 988 So. 2d 1180, 1185 (Fla. 1st DCA 2008).
[255] § 768.79.
[256] *Air Caledonie Intern. v. AAR Parts Trading, Inc.*, 315 F. Supp. 2d 1319 (S.D. Fla. 2004).
[257] Fla. R. Civ. P. 1.120(g).
[258] *Tuttle/White Constructors, Inc. v. Montgomery Elevator Co.*, 385 So. 2d 98 (Fla. 5th DCA 1980); *but see Kritikos v. Andersen*, 125 So. 3d 885, 886 (Fla. 4th DCA 2013).
[259] *Hillsborough Cty. Aviation Auth. v. Cone Bros. Contracting Co.*, 285 So. 2d 619 (Fla. 2d DCA 1973).
[260] *George Sollitt Const. Co. v. United States*, 64 Fed. Cl. 229 (2005).
[261] *Metric Const. Co., Inc. v. United States*, 81 Fed. Cl. 804 (2008); *Orlosky Inc. v. United States*, 68 Fed. Cl. 296 (2005).
[262] *C. A. Davis, Inc. v. City of Miami*, 400 So. 2d 536 (Fla. 3d DCA 1981); *Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458 (Fla. 2d DCA 1970); *Marriott Corp. v. Dasta Const. Co.*, 26 F.3d 1057 (11th Cir. 1994); *U.S. for Use and Benefit of Seminole Sheet Metal Co. v. SCI, Inc.*, 828 F.2d 671 (11th Cir. 1987).
[263] *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013).
[264] *See id.* at 403.
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987).
[269] *Tiara Condo. Assn*, 110 So. 3d 399.
[270] *Id.* at 400.
[271] *Id.*
[272] *Id.* at 403.
[273] *Id.* at 405 (*quoting Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532, 541 (Fla. 2004)).
[274] *Id.* at 407.
[275] To add fuel to the fire, both Westlaw and Lexis indicate the *Casa Clara Condominium Association. v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993), opinion was receded from by the court in *Tiara Condo. Assn*, 110 So. 3d 399. This is an incorrect reading of the *Tiara* opinion. See *infra* note 272.
[276] *Casa Clara Condo. Assn. v. Charley Toppino & Sons*, 620 So. 2d 1244, 1247 (Fla. 1993).
[277] *Id.* (internal citations omitted).
[278] *Id.* at 1246-47.
[279] *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 56 (1988).
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.* at 58 (internal citations omitted) (court's emphasis included).
[285] *See also, e.g.*, Order on Parties' Cross-Motions for Summary Judgment, *Central Park LV Condo. v. Summit Contractors*, No. 2010-CA-017748-0 (9th Jud. Cir. Orange Cnty., May 24, 2013); Order on Defendant's Motion to Dismiss, *PME Providence, LLC v. Am. Residential Const. Inc.*, No. 12-CA-121-11 (18th Jud. Cir. Seminole Cnty., Oct. 30, 2013); Order Granting Defendant's Motion to Dismiss, *Siena at Celebration Master Assoc. Inc. v. Winter Park Const. Co.*, No. 2009-CA-6474 (9th Jud. Cir. Osceola Cnty., Sept. 4, 2013), Amended Order Granting Defendant Culligan International Company's Motion for Final Summary Judgment, *Epic Hotel, LLC v. DP Property Holding, LLC*, No. 11-08742-CA-03 (11th Jud. Cir. Miami-Dade Cnty., Aug. 14, 2014).
[286] *Tiara Condo. Assn*, 110 So. 3d at 400.
[287] *Casa Clara Condo. Assn*, 620 So. 2d at 1248.
[288] See *Epic Hotel, LLC v. Culligan Int'l Co.*, 159 So. 3d 1014, 1015 (Fla. 3d DCA 2015) (upholding summary judgment granted relying upon the *Casa Clara* definition of a building as a product after *Tiara*).
[289] *See Tiara Condo. Assn*, 110 So. 3d at 408 (Pariente, J., concurring).
[290] *Id.*

[291] *Id.* at 408-409 (citing *See Lewis v. Guthartz*, 428 So.2d 222, 224 (Fla.1982) (holding that there must be a tort "distinguishable from or independent of [the] breach of contract" in order for a party to bring a valid claim in tort based on a breach in a contractual relationship); *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So.2d 518, 519 (Fla. 3d DCA 1986) ("[A] breach of contract, alone, cannot constitute a cause of action in tort.... It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence." (citations omitted))).
[292] *Watkins Motor Lines, Inc. v. Underwriters at Interest, at Lloyds*, 892 So. 2d 1143 (Fla. 3rd DCA 2005).
[293] § 687.01, Fla. Stat. (2019).
[294] *Id*.
[295] § 768.72(1), Fla. Stat. (2019).
[296] § 768.72(2).
[297] § 768.72(2)(a).
[298] § 768.72(2)(b).
[299] § 768.72.
[300] § 768.73, Fla. Stat. (2019).
[301] § 768.73(1)(c).
[302] § 768.73(1)(b).
[303] § 768.73(1)(a).
[304] § 768.73(4).
[305] § 768.73(3).
[306] *Pembroke v. Caudill*, 37 So. 2d 538 (Fla. 1948); *Hillsborough County Aviation Authority v. Cone Bros. Contracting Co.*, 285 So. 2d 619 (Fla. 2d DCA 1973); *Osceola County v. Bumble Bee Const., Inc.*, 479 So. 2d 310 (Fla. 5th DCA 1985); *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954); *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991); *Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347 (11th Cir. 2000); *Rusniaczek v. Tableau Fine Art Group, Inc.*, 139 So. 3d 355 (Fla. 3d DCA 2014).
[307] *Reframv. Porter*, 343 So. 2d 1343 (Fla. 2d DCA 1977).
[308] *Hungerford Const. Co. v. Florida Citrus Exposition, Inc.*, 410 F.2d 1229 (5th Cir. 1969); *Nicholas v. Miami Burglar Alarm Co.*, 266 So. 2d 64 (Fla. 3d DCA 1972); *Smith v. Newell*, 20 So. 249 (1896).
[309] *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1972); *Goldblatt v. C.P. Motion, Inc.*, 77 So. 3d 798 (Fla. 3d DCA 2011).
[310] *Mineo v. Lakeside Village of Davie, LLC*, 983 So. 2d 20 (Fla. 4th DCA 2008); *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991); *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954); *Goldblatt v. C.P. Motion, Inc.*, 77 So. 3d 798 (Fla. 3d DCA 2011).
[311] *Pembroke v. Caudill*, 37 So. 2d 538 (1948); *U.S. for Use and Ben. of Sunbeam Equipment Corp. v. Commercial Const. Corp.*, 741 F.2d 326 (11th Cir. 1984); *Multitech Corp. v. St. Johns Bluff Inv. Corp.*, 518 So. 2d 427 (Fla. 1st DCA 1988).
[312] *T.A.S. Heavy Equipment, Inc. v. Delint, Inc.*, 532 So. 2d 23 (Fla. 4th DCA 1988).
[313] *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991); *Cloud v. Schenck*, 869 So. 2d 709 (Fla. 1st DCA 2004).
[314] *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991).
[315] *Hall Const. Co., Inc. v. Beynon*, 507 So. 2d 1225 (Fla. 5th DCA 1987).
[316] *Commercial Mech. Co. v. State for Use and Benefit of Am. Air Filter Co.*, 260 So. 2d 540 (Fla. 1st DCA 1972).
[317] *Concrete Sys., Inc. v. Fla. Elec. Co. of Orlando*, 425 So. 2d 632 (Fla. 2d DCA 1983).
[318] *CB Contractors, LLC v. Allens Steel Prod., Inc.*, 261 So. 3d 711, 713 (Fla. 5th DCA 2018); *compare with* § 725.06, Fla. Stat. (2004). The present version of the statute provides the following, in pertinent part, as it relates to private construction projects:

> (1) Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains 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. Notwithstanding the foregoing, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than $1 million per occurrence, unless otherwise agreed by the parties. Indemnification provisions in any such agreements, contracts, or guarantees may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than:
> (a) The indemnitor;
> (b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or
> (c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee 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 the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

Fla. Stat. § 725.06(1) (2019)

[319] *CB Contractors, LLC*, 261 So. 3d at 713.
[320] *Id.*, at 713-14.
[321] *See generally, D.R. Horton, Inc. - Jacksonville v. Heron's Landing Condo. Ass'n of Jacksonville, Inc.*, 266 So. 3d 1201 (Fla. 1st DCA 2018), *reh'g denied* (Feb. 14, 2019)
[322] *Hayslip v. U.S. Home Corp.*, 276 So. 3d 109, 114 (Fla. 2d DCA 2019), review dismissed, No. SC19-1371, 2019 WL 4855854 (Fla. Oct. 1, 2019), vacated, No. SC19-1371, 2019 WL 4864979 (Fla. Oct. 2, 2019)
[323] *Id.*
[324] *See generally, Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582, 113 S. Ct. 2786, 2791, 125 L. Ed. 2d 469 (1993).
[325] *See* §§ 90.702-704, Fla. Stat. (2013).
[326] *In re Amendments to Fla. Evidence Code*, No. SC19-107, 2019 WL 2219714, at *1 (Fla. May 23, 2019), *reh'g denied*, No. SC19-107, 2019 WL 4127349 (Fla. Aug. 30, 2019).
[327] *See DeLisle v. Crane Co.*, 258 So. 3d 1219, 1222 (Fla. 2018), *reh'g denied*, No. SC16-2182, 2018 WL 6433137 (Fla. Dec. 6, 2018).
[328] *See also Florida's Expert Witness Standard: Daubert Reigns Supreme (Again)*, Job Fickett, Esq., THE BRIEFING: TAYLOR DAY LAW BLOG, May 29, 2019, *available at* http://www.taylordaylaw.com/blog/floridas-expert-witness-standard-daubert-reigns-supreme-again/.