ActionLine

A publication of The Florida Bar's Real Property, Probate & Trust Law Section

www. flabarrpptl.org

Vol. XXVI, No. 2
THE FLORIDA BAR
Winter 2004

Advocates Fight to Preserve Full Funding for Section 8 Housing Vouchers

By Charles Elsseser, Esq., Florida Legal Services, Inc., Miami, Florida

During this past year, and likely in the years to come, the federal housing budget appropriation process has focused, and will continue to focus, on the Section 8 Housing Choice Voucher Program. Since its inception under President Nixon in 1974, the federal Section 8 Housing Choice Voucher Program has been one of the most successful and bipartisan housing programs serving the very lowest income households. For the first time in its existence, however, the program is being threatened with reduced budget appropriations that will significantly reduce its effectiveness. Housing advocates nationwide, including significantly Public Housing Authorities, have spent the past year educating both the public and lawmakers about the importance of this program in protecting the poorest and most vulnerable households' access to affordable housing. Those efforts will have to increase if this program is to continue to play a central role in federal housing assistance.

What is the Section 8 Housing Choice Voucher Program?

In 2001 the Millennial Housing Commission described the Section 8 voucher program as the "linchpin" of federal housing policy because it is "flexible, cost-effective, and successful in its mission" which is "providing very low-income renters access to the privately owned housing stock." Similarly, a 2002 study

See "Section 8," page 24

Chair's Message:

Why?

By Laird A. Lile, Esq., Laird A. Lile, P.A., Naples, Florida, Chair

"Looking beyond gender and race, focusing on inclusion and alleviation of apathy within membership of the Bar, the committee is charged with the task of increasing the participation of all members in activities, sections, committees and voluntary bars, while developing ways to increase the number of diverse and inclusive participants in these areas. Building upon suggestions from Diversity in the Legal Profession Final Report and Recommendations the committee will prioritize, plan and ultimately make recommendations of program implementation to the Board of Governors."

This is the charge from Kelly Overstreet Johnson, President of The Florida Bar, to a newly formed Membership Outreach Task Force. This Task Force is chaired by Alan Bookman, President-Elect of The Florida Bar and a long-time, active member of the Real Property, Probate and Trust Law Section.

Leadership of The Florida Bar has realized that many of its nearly 92,000 members are

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Happy Holidays to one and all!

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Thank You for Your Leadership as Section Chair, Louis Guttmann

By S. Dresden Brunner, Esq., Naples, Florida

Louis B. Guttmann, III was the fourth generation in his family born in Pensacola, Florida. He has spent most of his life in Florida, going to University of Florida for college and law school, practicing law in Florida, and then rising to lead The Real Property, Probate and Trust Law Section of The Florida Bar. Louis just concluded his service as Section Chair for the 2003-2004 year.

Louis has served the RPPTL Section in many other roles as well. He has served as Treasurer (1998-1999), Circuit Representatives Director (1999-2000), Real Property Law Division Director (2000-2002), Chair of the Marketable Record Title Act and Public Lands Committee (1983-1990), and Chair of the Legislative Review Committee (1991-1996).

Louis takes his commitment to Florida real property law seriously. While he was serving as the Section's Chair, he also served as the Chair of the Insurers' Section of the Florida Land Title Association. Louis also supported the Florida Land Title Association as the Zone III Vice President (1994-1995) and Chair of its Governmental Affairs and Judiciary Committee (1995).

This year under Louis' leadership resulted in great strides in improving the Section's website. Louis had the vision to improve the Section's technology. In June 2004, the redesigned website was revealed to offer more information and benefits to the Section membership as well as serve as a tool for communicating. Louis also has the vision of bringing the Section's publication, *ActionLine*, into the electronic media age.

Incoming chair, Laird A. Lile stated, "Lou has been a wonderful mentor for me in the Section. From his leadership on the Legislative Committee when I was a young Section member, to his foresight in expanding the delivery of information by the website, to his good counsel while I served as Chair-Elect, Lou has been a leader. Lou and his delightful wife, Paula, have gone above and beyond for the Section. What a year!"

Although Louis and Paula now live in Orlando, Louis brought the Section's Executive Council back to his hometown for a weekend of meetings in November 2003. In addition to scheduling outings to historic areas, Louis arranged for the attendees to view the U.S. Navy's Blue Angels' homecoming air show. As with the Blue Angels, Louis' work for the Section and his leadership as the Chair fly high. The Section has benefited from Louis' term as the Chair and we thank Louis and Paula for all they have done for the RPPTL Section!

Outgoing Section Chair, Louis B. Guttmann, III and his lovely wife, Paula Guttmann.

Florida Landlord/Tenant Law Update

By Barbara M. Pizzolato, Esq., Barbara M. Pizzolato, P.A., Fort Myers, Florida

RETOOK POSSESSION AND WANT FINAL JUDGMENT?

In *Olen Residential Realty Corp. v. Romine,1* the Court addressed the plaintiff's right to damages after the plaintiff took back possession following an eviction proceeding.

Count II of the Complaint sought rent for January 2004 plus "complete rent through the term of the lease" plus "contractual fees." The defendant had deposited a portion of the January rent into the Court Registry but had failed to deposit February rent.

The Court's opinion focused on the plaintiff's request for liquidated damages in the amount of three times monthly rent plus all of March rent together with a rental concession fee of $1,774 for a total liquidated damages fee of about five months' rent. At trial, the plaintiff had presented no evidence of a good faith effort to re-let the premises despite the fact that the complex had an average occupancy rate of 98%.

In reviewing the enforceability of liquidated damages clauses, the Court stated that a "liquidated damages" clause must fail if an option is granted to the landlord to either choose liquidated damages or to sue for actual damages because it indicates an intent to penalize the defaulting tenant and negates the intent to liquidated damages in the event of breach. Since, the option means that neither party intended the liquidated damages sum to be the agreed-upon measure of damages, the provision is invalid.

Several provisions in the subject lease provided for a "liquidated damages" figure while additional provisions granted the plaintiff its full remedies under Chapter 83 F.S. against the defendant tenant even if those damages exceeded the "liquidated damages" sums. Consequently, the Court held, no agreed-sum for damages had been established between the parties to the lease and the liquidated damages clause was unenforceable.

Next, the Court addressed Section 83.75 F.S., which provision specifically permits liquidated damages but only as applied to tenants at the end of their lease. Since, the defendant in this case had been evicted and was not at the end of his lease, the Court held, the plaintiff had no remedy under Section 83.75 F.S. Rather, the Court held, Section 83.595 F.S. of the Florida Residential Landlord Tenant Act (the "Act") governs the plaintiff's measure of damages. The Act prohibits a landlord from collecting "double rent" and any lease provision in violation of the Act is void.

Pursuant to the Act:
1. if the tenant breaches and the landlord takes possession or the tenant delivers possession or has abandoned, the landlord may:
(a) treat the lease as terminated and take possession for his own account, thereby terminating the tenant's liability for future rent;
(b) retake possession for the tenant's account, holding the tenant liable for the difference between the rental stipulated in the lease and what, in good faith, the landlord is able to recover from re-letting; or
(c) stand by and do nothing, holding the tenant liable for the rent as it comes due.

2. if the landlord retakes for the tenant's benefit, the landlord has a duty to exercise good faith in attempting to re-let and must credit the tenant's account for any rentals received therefor. Good faith is defined to mean that the landlord will use the same effort he were to use in the initial effort to rent the premises but doesn't have to give the premises a preference in leasing over other available units.

Consequently, the landlord has an affirmative duty to mitigate damages in the event that he retakes possession for the benefit of the tenant.

Since the plaintiff, at trial, presented no evidence that it had made a good faith effort to re-let the premises, the Court presumed that the plaintiff took possession for its own account and the plaintiff's damages were limited to unpaid rent, plus utilities and water to date of retaking, late fees incurred prior to retaking on March 3, 2004 when the tenant's liability terminated plus court costs and attorney's fees.

BANKRUPTCY STAY FOR TENANT'S BENEFIT – NOT THIS TIME.

In *Mincey v. Leicht2*, the plaintiff commenced an eviction proceeding against the defendants on July 22, 2004. One of the defendants, Jeffrey Leicht ("Jeffrey"), answered and the Court set a Rent Determination Hearing for August 5, 2004 ultimately requiring that Jeffrey deposit $3,500 no later than August 9, 2004.

On August 6, 2004, Jeffrey filed a written request arguing that the eviction should be stayed and he should not be required to deposit rent because the plaintiff filed Chapter 13 and that the plaintiff may not, without bankruptcy court leave, commence an eviction proceeding.

Notwithstanding, pursuant to 11 USC §362(a)(1), the Court held, the filing of a bankruptcy petition operates as a stay of a judicial, administrative, or other action or proceeding *against the debtor only.* In addition, the Court stated, since, under the bankruptcy act, the debtor's projected disposable income is applied to payment under the bankruptcy plan, and rent is part of disposable income, arguably, the debtor was obligated to commence the eviction proceeding. Consequently, the Court held, no leave of the Bankruptcy Court or Chapter 13 Trustee was required prior to commencing the eviction proceeding.

COUNTY COURT PROPERLY STRUCK COUNTERCLAIM

In *Mosseri v. Olen Residential Realty Corp.3,* the appellate court made short shrift of the appellant's contentions.

As an initial matter, the Appellant contended that the lower court erred in entering the final default judgment arguing that the trial court lacked jurisdiction over the issues, that the order and judgment were based on misrepresentations and that double rent was not warranted.

The Appellant cited *Jafra Steel Corp. v. City of Miami*, 174 So.2d 624 (Fla. 3d DCA 1965) for the proposition that a county trial court lacks

jurisdiction to rule on a motion to strike a counterclaim that exceeds the jurisdictional limit of the county court because jurisdiction lies with the circuit court. However, the Appellate Court pointed out, that decision had been reversed by the Florida Supreme Court in *City of Miami v. Jafra Steel Corp.*, 184 So.2d 178 (Fla. 1966).

The Appellant next contended that the summons was defective but made no reference to the record. The Appellate Court thoroughly reviewed the record, found good service and, consequently, refused to disturb the presumption that the trial court had jurisdiction.

Next, the Court held, the Appellant's contention that the order and judgment were based on misrepresentations was also not supported by the record. Where the trial court makes no specific findings of fact in its final judgment, the reviewing court must accept the facts to be those shown by the evidence most favorable to the prevailing party, the Court stated. Based on that presumption, the Court held that the trial court's decision was supported by substantial competent evidence and the Appellant had failed in his burden of demonstrating error.

Finally, the Appellant contended that double rent was unwarranted. The Court disposed of that argument simply by citing to Florida Statute §83.58, which statute clearly states that the landlord may recover double rent at the end of a lease term if the tenant fails to surrender possession.

You guessed it, the Appellant was not represented by counsel.

P.O. BOX THREE-DAY NOTICE NEEDS MORE TIME

In *2918 Jackson Street LLC v. Ocasio4*, the defendant filed Motion to Dismiss Plaintiff's Complaint for Tenant Eviction without Leave to Amend and Defendant's Motion for Judgment on the Pleadings.

The plaintiff had attached a three-day notice to the complaint. The Court held that the three-day notice was defective on its face and failed to comply with Section 83.56(3) of the Florida Statutes because it listed the landlord's address and place for payment of rent as a post office box without giving the defendant an additional five (5) days for mailing as required by Rule 1.090(e) of the Florida Rules of Civil Procedure and Florida Case Law. Since it is impossible to deliver rent or keys to a post office box, an additional five days must have been allowed for the mailing thereof.

Since the defective notice did not terminate the lease, a predicate condition to the commencement of the eviction proceeding and an essential element of plaintiff's case, there was no requirement for defendant to pay rent into the Court Registry.

The defendant's motions were granted and the defendant was held the prevailing party.

MORE DEFECTIVE NOTICES

In *Lee v. Partone5*, the Court once again addressed the issue of defective notice.

The plaintiff had attached a three-day notice to the Complaint. The Court held that it was fatally defective, failed to terminate the defendant's rental agreement, and, consequently, at the time of filing the action, the plaintiff had no cause of action for eviction.

Specifically, the three-day notice was defective because it (i) demanded that the tenant vacate **within six (6) days** for failing to pay a security deposit even though a security deposit is not rent and may not be demanded in a **three-day notice**; and (ii) did not give the defendant the opportunity to pay and remain in possession (remember, you pay – you stay).

In addition, the Complaint was fatally defective (i) because it alleged that an oral agreement had expired by timely notice given and the defendant refused to vacate but the three-day notice established that the tenancy was a month-to-month tenancy and Florida law does not authorize a three-day notice or six-day notice to terminate a month-to-month tenancy – a **fifteen (15)-day notice** is required to have been given and must terminate on the last day of the rental period at midnight; and (ii) it sought to evict the tenant for having a dog over 25 pounds, but neither the three-day notice nor the six-day notice met the requirement that the tenant be given a **seven-day notice** to cure.

Since the notices were statutory, they could not be corrected in the same case, and the Defendant's Motion to Dismiss without Leave to Amend was granted.

Endnotes:

1. 11 Fla. L. Weekly Supp. 840b (15th Jud. Cir.).
2. 11 Fla. L. Weekly Supp. 933b (17th Jud. Cir.).
3. 11 Fla. L. Weekly Supp. 976a (17th Jud. Cir. (Appellate)).
4. 11 Fla. L. Weekly Supp. 1016a (17th Jud. Cir.).
5. 11 Fla. L. Weekly Supp. 1017 (17th Jud. Cir.)

ActionLine Publication Schedule

ActionLine is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, or articles of general interest** to Dresden Brunner at dresden@comcast.net. The article shold be in Word format. Please do NOT include graphics in the article, unless they are illustrative charts or graphs. Prospective authors may call Dresden Brunner at (239) 580-8104 to obtain additional publication guidelines.

The publication deadlines for upcoming issues of *ActionLine* are as follows:

***ActionLine* Issue**	**Publication Deadline**
Spring 2005	January 31, 2005
Summer 2005	April 30, 2005
Fall 2005	July 31, 2005
Winter 2005	October 31, 2005

Persons with comments or suggestions for improvement of *ActionLine* may e-mail them to the above address.

Legislative and Case Law Update and Executive Council Meeting at The Breakers:

The Passing of the Torch

August 5 – 8, 2004

By Robert S. Swaine, Esq., Swaine, Harris & Sheehan, P.A., Sebring, Florida

The Section's 24th Annual Legislative and Recent Caselaw Update and Executive Council meeting was at The Breakers in beautiful Palm Beach, Florida from August 5-8 and was sponsored by Attorneys' Title Insurance Fund, Inc. The Executive Council meeting was lead by the Section's new chair, Laird A. Lile, along with the new slate of officers elected during the Section's Annual Convention in Key West.

The Legislative Update CLE addressed a wide variety of current issues, involving, recently passed Legislation, Intestacy, Condominium law, Baker Act, Mobile Homes, Annuities, Real Estate Legal Opinions, Article V, MJP, Community Associations, MRTA, Advanced Directives, Construction Defects, Mediation, web research tips and the Office of Statewide Guardian.

The speakers included a mix of veterans and newcomers: Peter Dunbar, Sandra Diamond, Michael Gelfand, Richard Milstein, David Eastman, Rohan Kelley, David Brittain, Roger Larson, Burt Bruton, Rep. J. Dudley Goodlette, Justice Kenneth Bell, Keith Kromash, William Sklar, Sam Boone, Lee Weintraub, Robert Goldman, Laura Sundberg, Deborah Goodall, Judge Mel Grossman, Pat Hancock and "The Hardest Working Man in Probate Show Business," David Brennan.

After the CLE, the RPPTL-PAC had a meeting to discuss the current political races. Laird A. Lile, founding Chair of the RPPTL-PAC, observes "The RPPTL-PAC fills an important need in participating in the legislative process. The RPPTL-PAC is unlike many other political action groups, as we are not seeking to protect our personal fiscal interests, but rather to ensure sound real property, probate and trust laws for the residents of Florida. While our causes deserve consideration on their own, contributions to political campaigns are still helpful to having our legislative agenda considered. The mechanism that the RPPTL-PAC affords for addressing these political campaign contributions is efficient and effective." Lile adds, "Membership in the RPPTL-PAC is available at many contribution levels and is encouraged to anyone who cares about the future of real property, probate and trust law in Florida." Anyone interested in joining should contact Laird A. Lile.

On Saturday, August 7, during the Executive Council meeting, Marsha Rydberg advised the Section on the status of a recent Council of Sections meeting. According to Rydberg, The Florida Bar has advised that it gives the Sections an annual "subsidy" of $447,000.00 and that this shortfall must be addressed. The Council is primarily considering two options to resolve the deficit: 1) increase the percentage of dollars to be paid to The Florida Bar from the Sections or 2) eliminate the printing rebates ($140,000.00). Essentially the choices are for the Sections either to pay more or to receive less in services. Rydberg, along with Lile and the majority of members present, disliked either choice and feels that the Sections provide significant benefit to The Florida Bar which more than offsets the asserted deficit. Additionally, certain members of the Council and this Section expressed concern about how the deficit was calculated by The Florida Bar.

In addition to the RPPTL-PAC, the various committees of the Section met throughout the weekend. If you have an interest in learning more about these committees, please contact Julius J. Zschau for more information.

This meeting was great, Laird. The Section looks forward to the upcoming year under your leadership and thanks Lou Guttmann, Immediate Past Chair, for the great year that he gave us.

Judge Patricia Thomas and her husband Jimmy Thomas attend the Welcome Reception.

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RPPTL at The Breakers

Paula Guttmann (left) and Trish Boone enjoy the weekend.

Rick Gans is getting his little daughter introduced to the Section.

William E. Sherman (left) receives the William S. Belcher Lifetime Professionalism Award from Louis Guttmann.

Bob Goldman and Martha Edenfield enjoy the Welcome Reception.

RPPTL at The Breakers

The CLE seminar was a success thanks to the hard work of the Seminar Coordinators and the outstanding speakers.

Allie Lile at the Sunday brunch.

Bob, Jody and little Madeline Swaine.

PHOTOS BY JOHN NEUKAMM AND MICHAEL GELFAND.

"WHY?"
from page 1

not involved in voluntary bar activities, sections or committees. Only 28,715 members of The Florida Bar are section members, although many are members of more than one section, resulting in about 56,000 section memberships. Increasing the involvement of members of our Bar is a worthy goal.

The Real Property, Probate and Trust Law Section has over 9,000 members. Over 1,500 members and representatives serve on our 70+ committees and liaisons positions. The governing body of the Section is over 200 in number. During the course of a year, thousands attend Section seminars, utilize the listservs, visit the website, purchase forms and benefit from other projects made possible by Section volunteers. All in all, the Section is doing an admirable job of facilitating participation.

Yet, the Real Property, Probate and Trust Law Section can certainly do more. Increasing overall participation and, in particular, the diversity of our colleagues, must always be on the minds of your Section's leadership. On that note, please encourage the members of The Florida Bar who you know are not yet involved in sections, committees, or otherwise in voluntary bar activities to get active. Share this article with them. And, if you would like to become more active, do so. That choice is yours.

But "why?" Rather than respond as my philosophy professor might have suggested with "why not?," let me share with you just some of the reasons for active participation in The Florida Bar's activities, sections, committees and voluntary bars:

- Business networking – a/k/a marketing.
- Knowing the law in your practice area better than many and as well as most.
- Meeting your colleagues other than while negotiating a transaction or litigating a will contest.
- Making a difference in the quality of law for the residents of Florida.
- Making a difference in the quality of law that you deliver to your clients.
- Learning Florida geography. (I came to Florida (from Ohio) at the beginning of my legal career not knowing much about the geography of Florida. My bar activities changed that, as I have attended Section meetings from Langdon Beach to Ferdinanda Beach to Estero and everywhere in between, including Lake City and River Ranch (located near Pensacola, Jacksonville, Naples, the I-10/I-75 intersection, and nowhere, respectively).)
- Traveling to places outside of Florida for bar meetings. (For instance, I have taken my family to Banff, Canada; New Orleans; Washington, DC; New York City and Colonial Williamsburg, all for Section meetings.)
- Making wonderful, lasting friendships.

In fairness, there are reasons for not being active with voluntary bar organizations. The demands of a law practice, the tugs of family and the out of pocket costs all quickly come to mind. These, and others, are issues for most of us. While no magic wand can be waived to make these problems disappear, in many situations the severity of the concern can be diminished.

Yes, a law practice is demanding. A common demand is bringing in new work and clients. Meeting other lawyers throughout the state, and even in your area of Florida, can serve as a source of referrals for you. At some firms, one of the demands comes in the form of billable hour expectations. Looking beyond the billable hour horizon, the benefit of partici-

Opportunity for Involvement: Pro Bono Committee

The Pro Bono Committee is seeking **real estate and probate attorneys** to participate in a newly created statewide Clear Title Project to represent Legal Aid clients. Representation will qualify for **reportable pro bono hours.** Please call either Andrew O'Malley 813-250-0577 or Adele I. Stone 954-925-5501 for further details and registration.

pation to the participating lawyer individually and the firm as a whole comes into view. Participation provides a unique means for keeping up with the changing law and establishing networks for you and your firm.

With two young children (and an amazing wife), I feel the tugs of family. Whenever possible, I include my family in the meetings and introduce them to you. I try to make them a part of my professional activities rather than allow them to feel as though they are in competition for my attention. The RPPTL Section's Executive Council encourages family participation; the meetings are often held in child-friendly locations. Spouses and guests are encouraged to attend the evening social events, and activities for spouses, guests, and sometimes for children are planned over the course of the meeting-weekends.

And, yes, the costs can be significant. However, the generosity of our sponsors and the fiscal prudence exercised by your officers allow most Section events to be provided at far below actual "cost." There is no better investment that I have made during my professional career than my participation in professional activities such as the Real Property, Probate and Trust Law Section meetings. The returns are many fold and come in various forms.

A first step to getting involved is to contact the Section Circuit Representative from your circuit. Discuss the areas of interest for you and the committees that would relate to you and your practice. The names of the Circuit Representatives and their respective contact information were printed in the Fall 2004 issue of *ActionLine;* alternatively, you can locate the information on the Section's website: *www.flabarrpptl.org.* (Of course, you could begin by submitting an article to *ActionLine* about an interesting matter on which you are working.)

As the Membership Outreach Task Force seeks to determine the sources of resistance to participation by so many, these issues should be considered. The Board of Governors should establish policies to encourage active, inclusive Sections and other bar organizations, while working toward reducing the barriers, fiscal and otherwise, to participation.

One significant message that this Task Force can deliver to the Board of Governors is that The Florida Bar should encourage, financially and otherwise, the good work of the Sections and other groups. A former President of The Florida Bar established a budget related committee which is evaluating options likely to adversely impact Section finances. Any recommendation from that committee that seeks to impede broad based involvement, including by imposing charges and costs on sections that historically have been absorbed by The Florida Bar, should be met with a resolute "NO."

In closing, let me thank you for your participation and ask for you to become more involved and encourage those around you to get involved.

In Memoriam

Cora Nell Haggard is remembered and mourned

By S. Dresden Brunner, Esq., Naples, Florida

Cora Nell Haggard, a respected and deeply loved member of the RPPTL Section, died on June 7, 2004 at the age of 60. Born in 1944, she has a remarkable story of her career path and service and contributions to the legal and banking professions and to the environment. Her life story is briefly detailed in the Resolution of the Executive Council, which is reprinted herein.

At the Attorney-Trust Officer Liaison Conference on June 18, 2004, Laird A. Lile recognized Cora Nell's leadership and hard work as the chair of such Conference for many years. He stated that the Conference was dedicated to Cora Nell and held a moment of silence in her memory.

Further, the Resolution for Cora Nell Haggard was ratified by the Executive Council and was presented to her children at the Palm Beach meeting at The Breakers on Friday, August 6, 2004.

Lewis "Lukie" Ansbacher will be missed

By S. Dresden Brunner, Esq., Naples, Florida

Lewis "Lukie" Ansbacher, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, died at the age of 75 on February 7, 2004. He served his country in the armed forces, served his community in Jacksonville, and served the legal profession through his involvement in a number of legal organizations. His life story is briefly detailed in the Resolution of the Executive Council, which is reprinted herein.

One past Chair of the Section noted, "Lukie will be missed; he always had such a fine perspective on the details of matters and insightful approaches to all he handled." Another former Chair recalls, "He was one of our Council members to whom the Section meant a great deal, personally, as reflected in his attendance over the years and in his kindness to so many of us when we were new lawyers... He was attentive to detail and really cared about his clients."

The Resolution for Lewis "Lukie" Ansbacher was presented to his son, Barry Ansbacher, also a RPPTL Section member and Executive Council member, at the Palm Beach meeting at The Breakers on Friday, August 6, 2004.

LEFT: Laird Lile presents the Section's Resolution honoring Cora Nell Haggard to her children Becky McCarron (left) and Michael Haggard (center).

RIGHT: Louis Guttmann presents the Section's Resolution honoring Lewis "Lukie" Ansbacher to Lukie's son Barry Ansbacher.

See the resolutions honoring Cora Nell and Lukie, pages 14 and 15.

Resolution

Of the Executive Council of the Real Property, Probate & Trust Law Section Of the Florida Bar Recognizing the Service and Contributions of

Cora Nell Haggard

To the Legal and Banking Professions and the Environment

Whereas, Cora Nell Haggard, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, died at the age of 60 on June 7, 2004; and

Whereas, after earning a degree in English from Florida State University, Cora Nell taught history and English at Miami Palmetto Senior High School, one of the top-ranked public high schools in the State of Florida; and

Whereas, while raising her two young children, Cora Nell resumed her education by enrolling in law school at the University of Miami, where she earned a Master's degree in Tax Law and graduated cum laude; and

Whereas, while Cora Nell's early legal career included a sophisticated tax and estate planning practice with some of the nation's largest law firms, she retained her North Florida "country-girl" roots and charm, and she always maintained a deep love of the land; and

Whereas, early in Cora Nell's legal career, she spearheaded a project that led to the preservation of an environmentally significant 1,000 acre tract of land on Chesapeake Bay which is now under the management of the National Audubon Society, and her role in that matter was a source of great pride to her; and

Whereas, through Cora Nell's guidance and counsel, many of her wealthy clients utilized their resources not only for the benefit of their families, but also for the benefit of society through charitable and philanthropic planning; and

Whereas, Cora Nell was an active member of the Real Property, Probate & Trust Law Section of The Florida Bar, where she became involved in the early years of the Attorney / Trust Officer Liaison Conference, an annual convention jointly sponsored by the RPPTL Section and The Florida Bankers Association; and

Whereas, Cora Nell eventually became the Chair of the Conference, and, under her leadership, the attendance grew from 40 to over 400 people, and, after her four years of service as Chair, she was asked by the leadership of the Section to remain involved with the Conference as its unofficial "Godmother" so she could continue to lend her guidance and advice to successor Chairs; and

Whereas, Cora Nell spoke at numerous seminars throughout the State on behalf of The Florida Bar and other legal organizations, served on various committees seeking to reform and improve the law and was an active member of the RPPTL Section's Executive Council for many years; and

Whereas, one past Chair of the Section noted "in all the law firms where Cora Nell practiced, she left behind only friends and admirers. She was a very likable person; people warmed up to her immediately. Her talents as a lawyer stemmed not only from her mastery of complex technical matters, but also her ability to communicate with and lead others in an effective way"; and

Whereas, after returning to the family tree farm in Sneads in the Florida Panhandle, she was awarded Jackson County's prestigious honor of "Tree Farmer of the Year" in 1998; and

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Cora Nell has provided to the Real Property, Probate & Trust Law Section, the banking profession and the environment during her lifetime and acknowledges that she will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar that the loss of Cora Nell Haggard is mourned and that her distinguished service and rich contributions to the practice of law, particularly to the practice of estate planning law, will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar this 15th day of July, 2004.

_____

Laird Lile, Chair
Real Property, Probate & Trust Law Section
of The Florida Bar

Resolution

Of the Executive Council of the
Real Property, Probate & Trust Law Section
Of the Florida Bar
Recognizing the Service and Contributions of

Lewis "Lukie" Ansbacher

To the RPPTL Section, the Nation and his Community

Whereas, Lewis "Lukie" Ansbacher, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, died at the age of 75 on February 7, 2004; and

Whereas, Lukie, who knew he wanted to be a lawyer since he was 10 years old, graduated from Lee High School in Jacksonville, Florida at the age of 15; and

Whereas, after graduating from the University of Florida, where he earned his undergraduate and law degrees and was a member of Florida Blue Key, Lukie served in the U.S. Army as a member of the JAG Corps during the Korean conflict; and

Whereas, during his service in the Army, Lukie earned his Master of Laws degree from George Washington University in Washington, D.C.; and

Whereas, after completing his service to his country in the mid-1950s, Lukie returned to Jacksonville, set up his law practice and married his wife, Sybil, with whom he raised three sons, Richard, Lawrence and Barry; and

Whereas, Lukie became an active member of the Jacksonville community, where he served as a director of three banks, as an officer of the Jacksonville Jewish Center, as President of the Jewish Family and Community Services organization, and as a member of several Gubernatorial Task Forces; and

Whereas, Lukie also served the Florida Bar and other legal organizations through his service as President of the Jacksonville Legal Aid Society, as a director of Attorneys' Title Insurance Fund, Inc., and as a member of the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar; and

Whereas, Lukie's service to the RPPTL Section included his long-standing and dedicated service as the Chair and Vice Chair of the Real Property Division's Legal Forms Committee, and nearly all of the legal forms approved by the Section were originally drafted by Lukie; and

Whereas, one past Chair of the Section noted "Lukie will be missed; he always had such a fine perspective on the details of matters and insightful approaches to all he handled." Another former Chair recalls "He was one of our Council members to whom the Section meant a great deal, personally, as reflected in his attendance over the years and in his kindness to so many of us when we were new lawyers. I had a deal with him years ago; he was attentive to detail and really cared about his clients."

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Lukie has provided to his nation, his community and The Florida Bar, including the Real Property, Probate & Trust Law Section, during his lifetime and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar that the loss of Lewis "Lukie" Ansbacher is mourned, that his distinguished service and contributions are respected, appreciated and acknowledged, and that his rich contributions to the practice of law, particularly to the practice of real estate law, will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar this 21st day of February, 2004.

_____
Louis B. Guttmann, III, Chair
Real Property, Probate & Trust Law Section
of The Florida Bar

Legislators Honored With Section Awards

By Martha Edenfield, Esq., Pennington Law, Tallahassee, Florida

The RPPTL Section recognized five Florida legislators at the August 2004 meeting at The Breakers in Palm Beach for outstanding support of the Section. Three Distinguished Legislative Service Awards were presented. Senator Walter G. Campbell, Jr., Representative J. Dudley Goodlette, and Representative Jeffrey D. Kottkamp each received an award. Rising Star Awards were given to two Freshmen members of the Florida Legislature that are going to be stars in their service to the State and have already become stars for the Section. Representative Ellyn Bogdanoff and Senator Dave Aronberg each received a Rising Star award.

Senator Walter G. "Skip" Campbell, Jr. has been the Section's champion in the Senate for years. He has served on the Judiciary Committee since he was elected to the Senate in 1996 and is one of the brightest lawyers to ever have served in the Florida Legislature. Skip has been very instrumental in real property areas every year, sponsoring SB 1184 on condominiums and HOA's in 2004. Skip also sponsored the Section's bill in this last session which allowed the guardian of the property to challenge a revocable trust during the grantor's life time in situations in which there was fraud or undue influence (SB 2688 the Senate companion to Representative Ellyn Bogdanoff's bill, HB 1327). (These bills did not pass as they got caught up in the end of the session confusion.) Skip helped with the revisions to the Article V legislation that included the permanent clarification on the elimination of duplicate fees in both probate and guardianship proceedings, as well as the Section's Timeshare foreclosure initiative.

Representative J. Dudley Goodlette has also been a Section Star - long before he was elected to serve in the Legislature 1998. As a Member of the Florida Legislature, Dudley has been a stalwart in the promotion of the Section's initiatives. Dudley also helped with the revisions to the Article V legislation that included the permanent clarification on the elimination of duplicate fees in both probate and guardianship proceedings, as well as the Section's Timeshare foreclosure initiative. Dudley was a key player in the House on the Condo/HOA bills and his primary focus was to make sure that the items opposed by the Section did not get amended into the bills.

Representative Jeffrey D. Kottkamp was unable to attend the presentation in Palm Beach as he was recovering from surgery and the Section hopes to present his award to him in person when the Section goes to Tallahassee in February.

Senator David Aronberg is in his freshman term as a Legislator and is the vice chair of the Senate Judiciary Committee. A former Attorney General, this is Dave's first public service as an elected official. On behalf of the section, Dave sponsored SB1986, the Senate Companion bill to HB 529, dealing with Deeds of Conveyance (The "Raborn Fix"). This bill was one of the first to pass the full Legislature in 2004. Despite some good-natured freshmen hazing from his colleagues who initially defeated the bill in the Committee, Dave completely mastered the subject matter area and the bill passed unanimously.

Representative Ellyn Bogdanoff is a true Freshman, elected to the House in a special election and beginning her service in 2004, so this was her first session. Ellyn is a recently admitted member to The Florida Bar and is already known as a very bright and talented lawyer - and she knows no fear! Ellyn was the fearless sponsor of HB 1327, the Probate section's legislation dealing with contesting trusts before they become irrevocable. As our sponsor, she researched the law and learned the issue inside and out, keeping us on point and working tirelessly until the last possible chance to pass the bill.

Ellyn serves on the House Judiciary Committee and already made an impression with the other lawyers in the Legislative process as a force to be reckoned with. She was a supporter of all of the Section's 2004 initiative that were heard in the Judiciary committee. We hope to be working with her on many future issues.

The Section is grateful to each Legislator for his or her help this year.

This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

Legislative Awards

Representative Dudley Goodlette holds the Distinguished Legislative Service Award presented to him by the Section.

Senator Walter G. Campbell, Jr. (center) was presented a Distinguished Legislative Service Award from Pete Dunbar (left) and Sandra Diamond.

Sandra Diamond presented Senator David Aronberg (center) a Rising Star Award.

Representative Ellyn Bogdanoff receives a Rising Star Award.

PHOTOS BY JOHN NEUKAMM AND MICHAEL GELFAND

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Prepared by the Forms Committee of the Real Property, Probate and Trust Law Section and marketed through Florida Lawyers Support Services, Inc. {FLSSI (the Section's non-profit corporation)}. These forms are prepared by the same committee and practitioners who have been preparing and modifying the probate forms in excess of ten years. The committee consists of leading Florida probate & guardianship practitioners who are committed to a complete annual review **(2005 forms available January 1, 2005)**, as necessary, revision of the forms and the copyrighted forms hereafter will contain evidence of their annual revision. The committee and the RPPTL Section will also continue to work with Probate Judges of Florida to assure them that the forms containing the FLSSI logo are the only forms officially sponsored by our Section.

Additionally, FLSSI is now licensing software vendors to use the official Section forms, which license mandates that the software will prohibit any changes to the text of the form using our font. This gives Probate Judges confidence in the integrity of the forms.

You should be aware that software programs are now available that are advertised as official "Florida Bar" forms. These are not the current forms sponsored by the Real Property, Probate and Trust Law Section and prepared by the Section's specialists. As with all products that you purchase, satisfy yourself that you are obtaining the best product available and, in this instance, also satisfy yourself that you are obtaining the input of the best legal talent available. I would submit that this talent is and has been found in the Forms Committee of the Real Property, Probate and Trust Law Section.

Respectfully submitted,
Roger O. Isphording, President,
Florida Lawyers Support Services, Inc.

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Real Property Case Summaries

By Stephen Edward Silkowski, Esq., Jacksonville, Florida

MARKETABLE RECORD TITLE ACT DOES NOT EXTINGUISH RIGHT TO STATUTORY RIGHT OF WAY.

Blanton v. City Of Pinellas Park, 2004 Fla. LEXIS 1827, 29 Fla. L. Weekly S 614 (Fla. October 21, 2004)

The issue in this case was whether the Marketable Record Title to Real Property Act (MRTA) could operate to extinguish a valid claim to a statutory way of necessity authorized by section 704.01(2), Florida Statutes.

Blanton filed suit against the City of Pinellas Park to force the defendants to allow access to a landlocked ten-acre parcel of land that Blanton purchased in 1975. The plaintiff asserted that he was entitled to a statutory way of necessity. To support this claim, Blanton alleged that in order to access the nearest practical road he had to cross a defendant's property.

The issue in the prior H &F Land case involved a claim to a common law way of necessity, not a statutory one. To obtain a statutory way of necessity, the landowner must establish that the land is (1) outside of a municipality, (2) "being used or desired to be used" for residential or agricultural purposes, and (3) "shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road." If these three circumstances exist, then the owner of the landlocked parcel is entitled to "use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, . . . over, under, through, and upon the lands which lie between" the landlocked parcel and the public or private road "by means of the nearest practical route."

No judicial determination is required for the landlocked owner to assert the right to a statutory way of necessity. The Legislature, however, has provided for a judicial remedy when the servient landowner objects or refuses to permit the use of a statutory way of necessity, allowing a circuit court to determine entitlement to the easement; the type, extent, duration, and location of the easement; and compensation for use of the easement. When this judicial remedy is utilized, section 704.04, Florida Statutes, expressly provides that "the easement shall date from the time the award is paid."

A common law way of necessity is an implied reservation or grant that arises when a single grantor conveys part of a parcel of land resulting in either the part conveyed or the part retained being cut off from access to a public road. This implied reservation results from the application of the presumption that whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. In other words, in a property conveyance the deed of the grantor as much creates the way of necessity as it does the way by grant, the only difference between the two being that one is granted in express words and the other only by implication.

The common-law rule of an implied grant of a way of necessity was thereby recognized, specifically adopted, and clarified by the court. Such an implied grant exists where a person has heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over his land, or has heretofore retained or hereafter retains land that is inaccessible, except over the land that the person conveys. In such instances a right-of-way is presumed to have been granted or reserved. Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common source other than the original grant from the state or United States; provided, however, that where there is a common source of title subsequent to the original grant from the state or United States, the right of the dominant tenement shall not be terminated if title of either the dominant or servient tenement has been or should be transferred for nonpayment of taxes either by foreclosure, reversion, or otherwise.

A common law way of necessity is an easement from its inception. A landowner, however, who meets the requirements for a statutory way of necessity does not obtain an easement until an award ordered by the circuit court is paid. See § 704.04, Fla. Stat. Therefore, the right to a statutory way of necessity is more akin to a "privilege" than to an interest in land, unless and until an action in the circuit court results in the establishment of an easement.

Although the court recognized that the "all claims" language in MRTA is broad in scope and that MRTA does not contain an express exception for statutory ways of necessity in section 712.03, Fla. Stat., it noted that the "all claims" language is limited by section 712.04, Fla. Stat., to those claims that "depend upon any act, title transaction, event, or omission that occurred prior to the effective date of the root of title."

Applying MRTA to common law ways of necessity is straightforward. Because a common law way of necessity is created at the time of the title transaction that created the landlocked property, a claim to a common law way of necessity can be extinguished under section 712.04 if that title transaction occurred prior to the root of title. In contrast, as noted by the Real Property, Probate and Trust Law Section of the Florida Bar in its amicus brief, "applying MRTA and its thirty-year clock to section 704.01(2) does not work."

The difficulty arises because, prior

continued, next page

to a judicial determination under section 701.04, there is no definitive "act, title transaction, event or omission" that gives rise to a "claim" to a statutory way of necessity for the purposes of applying MRTA.

MRTA's objectives would not be furthered by applying its provisions to statutory ways of necessity. As the supreme court explained in H & F Land, a core concern of MRTA is that there be no 'hidden' interests in property that could be asserted without limitation against a record property owner. Further, MRTA's provisions contain a scheme to accomplish the objective of stabilizing property law by clearing old defects from land titles, limiting the period of record search, and clearly defining marketability by extinguishing old interests of record not specifically claimed or reserved.

Because a common law way of necessity depends on the existence of unity of title, a historical examination of the chain of title is required to determine whether a landlocked property owner has a valid claim. However, determining whether a landlocked owner has a valid claim to a statutory way of necessity requires only findings on the current status of the property—that the parcel is landlocked, that the parcel is outside a municipality, and that the parcel is being used or is desired to be used for one of the enunciated purposes. Thus, determining whether an owner of landlocked property has a valid claim to a statutory way of necessity does not require another property owner or a court to "go behind" a legitimate deed and conduct a historical evaluation of the chain of title. Therefore, a statutory way of necessity is not a "hidden" interest in land.

Moreover, because a claim for a statutory way of necessity does not rest on the chain of title, extinguishing claims to statutory ways of necessity will neither clear old defects from land titles, limit the period of the record search, nor clearly define marketablility. Although an unrecorded common law way of necessity burdens the parcel that it cuts across without clear notice and without compensation to the landowner, all landowners are on notice of statutory ways of necessity by virtue of section 704.01(2), Fla. Stat. In addition, a landowner whose parcel becomes burdened by a statutory way of necessity is entitled to a judicial determination of both the nearest practical route and the compensation due.

The court further concluded that public policy weighs in favor of holding that MRTA is inapplicable to statutory ways of necessity. Although state public policy may have altered with respect to the methods of land use, sensible utilization of land continues to be one of society's most important goals. Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes greater as tourism, commerce, and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stockraising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways. Holding that MRTA operates to extinguish a claim to a statutory way of necessity would, contrary to legislative intent, render these landlocked parcels unusable, either because the landlocked

owner is without a means of access to the parcel or is being asked to pay an exorbitant fee.

LOST PROFITS OR LOST RENTS ARE NOT THE PROPER MEASURES OF DAMAGES WHERE PROPERTY BUYER ALLEGES FRAUD IN THE INDUCEMENT: BUYER MUST PROVE ACTUAL PROPERTY VALUE AT PURCHASE DATE.

Kind v. Gittman, 2004 Fla. App. LEXIS 17054 (Fla. 4th DCA November 10, 2004).

In December 1999, when Alan and Patricia Kind sought to refinance their mortgage, Union Planters obtained a "limited appraisal" of their property to determine if they qualified for a loan. The appraisal report estimated the "as is" fair market value of the building at $1.5 million. Although the report included information regarding the building's then current leases and rental income, it expressly stated that the appraised value was based only on the fee simple value of the property and not the leases.

Upon learning that the building was valued at $1.5 million, the Kinds decided to sell the building, instead of refinancing it. Alan Kind made copies of the limited appraisal to hand out to prospective buyers to assist them in obtaining financing. In mid-February 2000, Dr. Gittman, while scouting a location for his new medical clinic, spotted the "for sale" sign outside the Kinds' building. Dr. Gittman met with Alan Kind and discussed, among other things, Dr. Gittman's need for a guaranteed rental income stream from the second floor office suites. Kind provided Gittman with a copy of the limited appraisal that described a rent roll as of December 19, 1999. At that time, the second floor was fully leased. Ultimately, the Kinds accepted an offer of $1.6 million from Dr. Gittman to purchase the building. On May 9, 2000, Dr. Gittman and the Kind's executed a contract for sale and purchase. The contract stated in pertinent part that "no prior or present agreements or representations shall be binding upon Buyer and Seller unless included into this contract. Seller shall, not less than fifteen days before closing, furnish the Buyer copies of all written leases and estoppel letters from each tenant specifying the nature and duration of the tenant's occupancy, rental rates, advanced rent and security deposits paid by the tenant. If Seller is unable to obtain estoppel letters from each Tenant, the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit and Buyer may thereafter contact Tenants to confirm such information. Seller shall, at closing, deliver and assign all original leases to Buyer. The Sellers warrant that the entire second floor of the real property that is the subject matter of this contract, is fully leased, and all leases have a least two years remaining and are transferable to the Buyers".

Pursuant to the contract, and prior to closing, Kind delivered to Dr. Gittman's attorney four subordination and estoppel letters from the second-floor tenants. He also delivered an affidavit to Dr. Gittman's attorney stating that five of the six office suites were fully leased and providing the names of the tenants. At that time, three of the tenants whose leases were described in the 1999 Limited Appraisal had already vacated the premises. After the contract was signed, Kind advised Dr. Gittman that one of the tenants would not be renewing its lease. Kind, however, agreed to sign a supplemental addendum warranting that, if the tenant did not renew its lease, the Kinds would lease that suite.

Dr. Gittman received $1.2 million from Metro Bank to purchase the property, and the Kind's agreed to finance the $400,000 remainder, as well as give Dr. Gittman a second mortgage. On the eve of closing, Dr. Gittman borrowed an additional sum from the sellers to pay for closing costs. On August 30, 2000 Dr. Gittman closed on the purchase of the building and executed a note and purchase money mortgage in favor of the Kinds.

After the buyer purchased the property, he made payments on the $400,000 note and the second promissory note and collected rents as expected from the second floor leases. Five months after the closing, however, a major tenant that had occupied four of the suites vacated the building and the buyer was left with just one tenant. The buyer ceased making mortgage payments to the sellers and commenced this lawsuit against them.

The complaint alleged fraud in the inducement. More specifically, it alleged that the sellers misrepresented the length and rental income of the leases described in the limited appraisal presented to the buyer prior to closing. As a result, the buyer alleged, he paid an inflated value for the property. The buyer's complaint did not contain a breach of contract or warranty count and did not plead special damages, such as lost profits or lost rental income.

The sellers denied the fraud allegations and counterclaimed against the buyer for foreclosure on the $400,000 note and mortgage and for nonpayment of the money he borrowed for closing costs. The case proceeded to trial, with the jury hearing the buyer's claim for fraud in the inducement and the court trying the sellers' mortgage foreclosure action and suit on both notes.

The jury found the sellers liable for fraud in the inducement and awarded damages in the amount of $175,000 based solely on the evidence of "lost rental income." The trial court entered a final judgment in the buyer's favor for $175,000. On the seller's mortgage foreclosure action, the court found for the buyer on his affirmative defense and entered a setoff in the buyer's favor, partially canceling the original promissory note and mortgage to the extent of the jury's $175,000 award.

In the fourth appellate district, two standards exist for measuring damages in an action for fraud, and either may be used depending upon the circumstances. The first standard is the "benefit of the bargain" rule that awards as damages the difference between the actual value of the property and its value had the alleged facts regarding it been true. The second standard is the "out-of-pocket" rule that awards as damages the difference between the purchase price and the real or actual value of the property. Either measure of damages requires a plaintiff to prove the actual value of the property at the time of purchase. Lost profits or lost rents are not the proper measure of damages in a fraudulent misrepresentation case.

In this case, the buyer did not

continued, next page

prove the element of damages. Although he alleged in his complaint that he did not receive the benefit of his bargain because he paid an "inflated price" for the property, at trial he presented no testimony fixing the actual value of the property on the date of the sale. The only evidence of damages that he presented was a description of lost rental profits. Lost rental profits were not a proper measure of damages in this fraud case. Because there was no proof at trial of the correct measure of damages, judgment should have been entered for the sellers.

On cross-appeal, the buyer argued that the trial court abused its discretion in denying his motion to amend the pleadings to conform to the evidence. The District Court of Appeal disagreed and affirmed the trial court's ruling. Allowing the mid-trial amendment to introduce a new and different cause of action for breach of contract would have prejudiced the sellers, as the new issues and grounds of relief would have required additional discovery and possibly additional witnesses.

NEITHER DECLARATORY RELIEF NOR QUIET–TITLE ACTIONS ALLOW THE RECOVERY OF ATTORNEY'S FEES, EVEN AS GENERAL COMPENSATORY DAMAGES, ABSENT A CONTRACTUAL PROVISION OR A STATUTE AUTHORIZING THEM.

Price v. Tyler, 2004 Fla. LEXIS 1876, 29 Fla. L. Weekly S 632 (Fla. October 28, 2004).

The trial court awarded costs and attorneys' fees to the Prices pursuant to the final judgment quieting title. The Prices did not request attorney's fees in their pleadings. While the Prices argued that they did not have to plead attorney's fees based upon the rule that attorney's fees are considered part of the damages in a slander of title case, the Prices did not allege a slander of title claim. Instead, they sued for declaratory judgment, and the court entered a judgment quieting title. Neither type of action permits the recovery of attorney's fees absent a contractual provision or a statute authorizing the same. Moreover, attorney's fees in slander of title cases are considered special damages. When items of special damage are claimed, they must be specifically stated. Thus, the Prices are not entitled to attorney's fees.

The trend of decisions in Florida that uphold attorneys' fees as damages involve slander of title actions that are tort actions in which damages are recoverable, not actions to quiet title, such as the instant case, that are equitable actions in which damages are not generally recoverable. A party seeking to remedy a cloud on his title may bring a quiet title action that is an equitable action for which damages are not available. The supreme court recognized an exception to this general rule, concluding that attorney's fees may be considered an element of damages in cases in which the wrongful act of the defendant has caused the plaintiff to become involved in litigation with third parties, but this exception was not applicable in the instant action.

The Prices filed an action for declaratory relief. The purpose of a declaratory judgment is to determine the rights and duties of the parties without the need to resort to a tort or contract action as a prerequisite to a judicial determination. Section 86.081 of the Florida Statutes governs the award of costs available in these declaratory judgment actions, and provides that the circuit court may award such "costs" as are equitable. "Costs," however, are not generally understood as including attorneys' fees. Additionally, it is long-established that there is no general or controlling provision or principle of law to the effect that attorney fees that may by statute be recovered by the winning party against the losing party in a suit or action, are, or should be regarded as, costs in the case.

An action to quiet title is an equitable proceeding. An equitable action requires equitable relief. Section 65.061 of the Florida Statutes governs quiet title actions. Pursuant to that provision, the court had jurisdiction to "enter judgment quieting the title and awarding possession to the party entitled thereto." The section does not authorize the award of damages and attorneys' fees, and, therefore, the Prices have no statutory entitlement to such fees under this chapter.

In its final judgment quieting title, the trial court cited only section 57.041 of the Florida Statutes in awarding the Prices attorneys' fees, in addition to the costs expended. This was in error. Section 57.041 does not include attorneys' fees in the definition of litigation costs.

THE DENIAL OF A PROPERTY-TAX EXEMPTION IS AN "ASSESSMENT", A CHALLENGE TO WHICH IS SUBJECT TO THE 60-DAY TIME LIMIT.

Ward v. Brown, 2004 Fla. LEXIS 1823; 29 Fla. L. Weekly S 611 (Fla. October 21, 2004).

Here, the court held that the mandatory sixty-day provision of section 194.171(1), Florida Statutes, applies broadly to taxpayers' actions challenging the assessment of taxes against their property, regardless of the legal basis of the challenge. The petitioners are long-term leaseholders of property owned by Santa Rosa County. They filed a class action suit in circuit court seeking a declaratory judgment and injunctive relief against the county property appraiser and tax collector for imposing ad valorem taxes on their leasehold interests, pursuant to section 196.199, Florida Statutes.

Whether couched in terms of an "assessment" or a "classification," the appellants were challenging the property appraiser's judgment to deny them an exemption under chapter 196, Florida Statutes, place their properties on the tax roll, and impose ad valorem taxes. Denials of exemptions are "assessments" subject to the requirements of Section 194.171, Florida Statutes. The supreme court has held that the sixty-day filing period in Section 194.171 is jurisdictional. The petitioners, however, argued that instead of the sixty-day period of non-claim provided for in Section 194.171(2), they are entitled to a four-year statute of limitations period in which to challenge the authority of the tax assessor to tax their property. They contended that they were not truly challenging the "assessment" of taxes against them, but instead they were challenging the "classification" of their property.

The Legislature has set out a comprehensive statutory scheme for counties to assess and collect taxes,

simultaneously with procedures for taxpayer challenges to tax assessments. The supreme court has given a strict construction to the sixty-day non-claim period provided in Section 194.171(2) and has held that compliance with its provisions is mandatory regardless of the nature of the taxpayer's claim.

The court was bound to apply the law adopted by the Legislature in resolving this dispute, and legislative intent was its main guide. The law in Florida provides for a system for tax assessment challenges, in order that counties can perpetuate revenue, even though taxpayers may dispute their obligations. Importantly, this scheme provides counties with the ability to collect revenue during the pendency of taxpayer challenges.

The legislative intent and public policy behind the adoption of the non-claim provision contained in Section 194.171(2), Florida Statutes, that is to ensure prompt paying of taxes due and making available revenues that are not disputed. The Legislature requires taxpayers to pay not less than the amount of the tax that the taxpayer admits in good faith to be owing, but provided that challenges would be dismissed in cases wherein the taxpayer fails to pay the undisputed amount of taxes before they become delinquent. The statutory sixty-day jurisdictional period for filing challenges to tax assessments is intended to facilitate tax collecting and to put individual taxation issues on the fast-track to resolution, in order that counties might continue to function and count on tax revenues to do so. The court concluded that the petitioners' argument that "classification" challenges resulting in a denial of a tax exemption are entitled to a four-year statute of limitations period, while other claims are not, would be contrary to the spirit and purpose of the tax assessment statutes, as well as the explicit provisions of Section 194.171, Florida Statutes, that the court had construed as a statute of non-claim. In practice, if the four-year statute of limitations period suggested by the petitioners were broadly applied, then tax assessment challenges could create a quandary, essentially restricting counties from collecting revenue during the pendency of extended taxation challenges. Petitioners' "classification" arguments were tantamount to disagreements between the parties as to the denial of tax exemptions—not allegations of obvious errors on the part of the property appraisers.

Petitioners were seeking some form of the exemption related to government-owned and leased property. In any case, whether they are claiming an exemption or claiming that the assessors' action is illegal, unlawful, or void as an improper classification or for some other reason, they were still bound by the provisions of Section 194.171(1), Florida Statutes.

by the U.S. General Accounting Office found the voucher program to be the most cost-effective of the federal housing programs examined in the study. The Voucher Program provides rental assistance directly to landlords, generally the difference between thirty percent of the household's income and the market rent. Tenant households can choose any apartment or house provided the landlord is willing to participate in the program and the market rent is less than HUD's Fair Market Rent for the local area.

The program currently assists roughly two million low-income families with children, senior citizens, and people with disabilities but leaves about three-quarters of the eligible households unserved. Because the Voucher Program allows the tenant to pay rent based on the household income, it is one of the few housing subsidies that is able to serve extremely low income households - those making less than 30% of median income.

Local Public Housing Authorities administer the Section 8 voucher program, receiving funds from the federal government, and then entering into subsidy contracts with each individual landlord. Because the goal of the vouchers is to allow families to secure housing in the private market, in safer neighborhoods, with better schools and jobs, the program has enjoyed particularly strong bipartisan support. Congress has never, over the several decades of the program, failed to appropriate enough funds to renew all the existing vouchers for each fiscal year. In fact, given the monumental need, Congress, more often than not, expanded the number of existing vouchers each year.

Why Are Section 8 Housing Vouchers Important to Affordable Housing Advocates?

Section 8 Housing Vouchers are a vital component of every community's affordable housing strategy. They complement other subsidy programs by providing access to affordable housing for the very lowest income households. Most Public Housing Authorities depend on their Section 8 Housing Vouchers as their principal means of providing housing assistance to needy households. That dependence continues to increase as the "vouchering out" of public housing and other project based subsidized housing has become increasingly common.

For tenants, their importance is also obvious. While vouchers may be difficult to use in some communities that lack a supply of existing housing, vouchers are, and hopefully will remain, the major source of housing assistance for very low income households. The demand for Housing Vouchers in Florida was dramatically illustrated in March 2001 when the Miami-Dade Housing Agency opened up its Section 8 waiting list for the first time in many years and received more than 63,000 applications for assistance in ten days.

Recently, nonprofit developers have also begun to understand the importance of these housing vouchers. Acceptance of tenants using Section 8 Housing Vouchers allows developers to make Low Income Housing Tax Credit Projects more affordable to very low and extremely low income households. This allows for increased access by very poor households without threatening turnover or increased vacancies and increases the marketability of projects in poorer neighborhoods. In addition, Public Housing Authorities can now commit their Section 8 Housing Vouchers to specific project or "project base" the vouchers - which provides nonprofit housing developers with the only new source of project-based Section 8 income. Finally, recent changes in the regulations have permitted the limited use of Section 8 vouchers for home ownership which creates a new potential market for nonprofit home builders.

The FY 2004 Section 8 Appropriations Debate

The broad bipartisan support for the Section 8 Housing Voucher program has been significantly tested during the past two years. The Administration's FY 2004 budget proposal requested a Section 8 funding level which, according to the Center for Budget and Policy Priorities, would have left 137,000 authorized housing vouchers unfunded. This proposal, if adopted, would have, for the first time, threatened existing Section 8 voucher tenants with the loss of their housing subsidy solely because of an inadequate appropriation of federal funds.

Because the Section 8 Housing Voucher program is a little more than 50% of the HUD Budget, much of Congress's FY 2004 HUD appropriations debate focused specifically on whether the appropriation would allow for the continued funding of all of the Section 8 vouchers already authorized by Congress and in use by Public Housing Authorities and their tenants. The Center for Budget and Policy Priorities, the National Low Income Housing Coalition, and others produced studies demonstrating the need for an appropriation sufficient to "fully fund" all Housing Vouchers already in use by Public Housing Authorities and the dire consequences any significant reduction in the appropriation would have on Public Housing Authorities and their tenants. Because vouchers serve the very poorest households, the loss or reduction of this housing assistance would force these tenants to either give up their housing or to divert scarce resources from basic needs, such as food, child care, and clothing, in order to pay for housing. Housing advocates spent many months in late 2003 educating members of Congress on the importance of continuing full funding for the Housing Choice Voucher program. Finally, in late January of 2004, these advocates were able to celebrate the passage of the final HUD budget bill with sufficient funds to support all authorized vouchers.

FY 2004 Budget Implementation Crisis and the FY 2005 Budget

Any celebration over the FY 2004 "full funding" victory, however muted, was extremely short lived. Immediately housing advocates were confronted with the Administration's FY 2005 Budget which proposed to reduce the funding for the Section 8 Housing Voucher Program by more than $1 billion below the level of the FY 2004 Budget just approved by Congress. The Center for Budget and Policy Priorities, in an initial analysis of the proposed FY 2005 budget, estimated that the proposed funding

level could cause the loss of housing benefits for more than 250,000 families, elderly or disabled households.

These analyses of the budget proposal had just begun to circulate when the other shoe dropped. On April 22, 2004, HUD issued a notice that, for the first time, set forth HUD's novel interpretation of what advocates thought was the FY 04 "full funding" of the Housing Choice Voucher Program. In a notice to the 2,500 Public Housing Authorities that manage the Housing Voucher program, HUD explained that the Housing Authorities would no longer be paid based on the current costs of the vouchers they administer, but instead payment would be based on the cost of vouchers under lease just prior to August 1, 2003, with an adjustment for inflation. Voucher costs at many of these Housing Authorities have risen since August 2003 at a faster rate than the inflation factor utilized by HUD (which is often based on inflation in a region encompassing several states). In addition Public Housing Authority expenses can increase for legitimate reasons not included in the inflation factor, such as reductions in tenant income due to layoffs, reduced work hours or health factors. For most Housing Authorities, this new formula meant a significant reduction in the monthly payments by HUD to the Housing Authorities.

In addition, the April 22nd HUD notice informed the Housing Authorities that the new payment formula would be retroactive to January 2004. Housing Authorities that received higher payments in January, February, and March of 2004 based on the old FY2003 funding system would be required to pay back these "overpayments", meaning that their already reduced payments were reduced even further.

While HUD said that Housing Authorities could use their "reserves" to compensate for any shortfall, and HUD provided some additional funds to increase these reserves, many Housing Authorities continued to be severely underfunded. The consequences of these budget reductions, particularly in midyear, threatened serious consequences for both for Public Housing Authorities and their tenants. While the Housing Authorities' income from the federal government declined, their expenses did not. The Housing Authorities still were bound by their Section 8 contracts which guaranteed landlords' rental payments and set the tenant's maximum contributions. Faced with budget shortfalls, the Housing Authorities were faced with hard choices which often clashed with their mission, and their desire, to provide affordable housing to the neediest families. The Housing Authorities' only options to reduce their Section 8 Housing Voucher expenses were by terminating existing contracts with landlords, lowering rent payments to landlords, raising tenant rents, stopping the reissuance of vouchers that became available, withdrawing vouchers from families who were looking for housing, and/or withdrawing commitments for project-based vouchers in developments underway. Housing Authorities in Florida were forced to consider all of these options. For example, several large Housing Authorities, including Gainesville, Jacksonville, and Panama City were considering freezing the issuance of turnover vouchers. Some, including Gainesville and Sumter County, were forced to consider withdrawing vouchers from households who had been issued the voucher but had not yet found housing. Many reduced their payment standard (the maximum contract rent which the Housing Authority will pay) to below the HUD Fair Market Rents and placed limits on the ability of the voucher holders to move out of the jurisdiction.

Once again Public Housing Authorities, housing advocates, tenants and their allies were forced to spend the summer educating Congress on the importance of fully funding Section 8 vouchers, while simultaneously aggressively arguing with U.S. HUD to reverse its interpretation of the 2004 appropriations language and to provide additional funding for Public Housing Authorities and, ultimately, for the low income tenants.

In response to these concerns several members of Congress began to more closely scrutinize HUD's interpretation of the language that Congress had passed. There were calls for Congressional hearings and oversight. In response, HUD pointed to an appeal process to allow the Housing Authorities to demonstrate their need for a higher inflation factor for FY2004 than HUD had allowed in its April 2004 notice. The Housing Authorities had until July 15 to appeal their funding levels and HUD provided a limited set of criteria upon which it would grant an appeal. Thus, throughout the summer, many Public Housing Authorities struggled with their funding shortfalls, being

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Section 8

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forced to consider such drastic remedies as increased tenant rents or even terminations of existing vouchers. While many of these Housing Authorities appealed the HUD inflation factor, others did not, citing the limited grounds for appeal. Recently, in September 2004, HUD announced that 398 of the more than 2500 Public Housing Authorities nationwide had appealed, and that HUD was providing $156 million in additional funds to 379 of those Housing Authorities.

While it is too soon to assess the full impact of HUD's implementation of the FY 2004 Section 8 appropriation, HUD's funding of additional reserves and provision of additional funds through appeals and various other *ad hoc* funding responses has clearly ameliorated this year's crisis for many of the most severely threatened Housing Authorities and their tenants. However, other Authorities remain underfunded despite HUD's additional assistance. Moreover, the entire crisis was initially created by HUD's April 22nd narrow interpretation of Congress' clear desire to fully fund the Section 8 Housing Choice Vouchers. As the director of the Council of Large Public Housing Authorities (CLPHA) stated, "The truth is Congress had appropriated enough money to fund the vouchers, and made its intent clear. HUD manufactured a crisis that it is now claiming to have solved."

Along the way, the damage done to the Section 8 Housing Voucher Program itself may well be irreparable. The traditional stability of the Housing Voucher Program has been undermined by HUD's April 22nd action. No longer can a landlord, tenant, lender or developer consider Section 8 vouchers as a secure form of housing subsidy. This is not limited to the long term, this year's actions question whether the Section 8 voucher payments are secure even during the year of their appropriation.

Finally, it remains to be seen as to whether FY2005 will simply be a repeat of this year's crisis. As a result of the educational work done by housing advocates this summer, the House budget bill, H.R. 5041, which awaits passage in the House, once again "fully funds" Section 8. However, it contains the same language which HUD utilized in its April 22nd notice to wreak havoc on the program. (Sadly, the House fully funded the Section 8 Housing Voucher program by cutting the funding for all other HUD programs. In addition, the House bill cut Housing Authorities Section 8 reserves from one month to one week. These reserves were vital this year in lessening the impact of HUD's interpretation of the 2004 budget.) On the Senate side, the Senate Appropriations Committee has just sent to the full Senate, S. 2825, its final version of the HUD FY 2005 Appropriations Act. The Senate bill funds all HUD programs, including the Section 8 Housing Voucher program, at higher levels than were appropriated in FY 2004. The funding is sufficient to fully fund the Housing Voucher program and the accompanying report voices continued support for the Section 8 Housing Voucher program. It is not now known when either of these bills will be passed by their respective houses or when the House and Senate will meet in conference to negotiate their differences - or what will occur in the interim.

What is clear, however, is that after years of strong unquestioned support, Section 8 vouchers will survive at its current level only if all housing advocates join with Public Housing Authorities in continuing to educate the public and their governmental representatives — at all levels of government — of the success and the importance of the Section 8 Housing Voucher program in serving the housing needs of the poorest and most vulnerable households.

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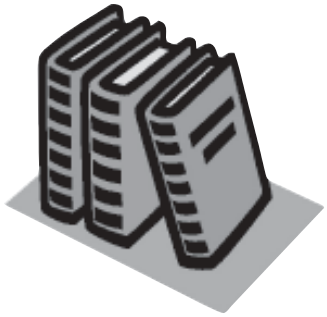

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PUERTO RICO – FOREIGN SELLER? - Is a resident of Puerto Rico subject to the FIRPTA 10% withholding tax when he or she is selling U. S. real estate? No. Since Puerto Rico is a U. S. possession, a resident of Puerto Rico is not subject to the 10% FIRPTA withholding since they are considered to be a U. S. person. Therefore, it is recommended that he or she should sign a non-foreign affidavit to avoid the 10% withholding.

— Thomas C. Roberge, CPA,
St. Petersburg/Sarasota.

Thank You, *ActionLine* Contributors — Thank you to all who contributed to *ActionLine* in 2004, in one way or another. A hearty Thank You to the writers, to the advertisers, to the editors, to the layout editor, to the Section administrator, and to the Section officers! It couldn't have been done without your help.

—S. Dresden Brunner,
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This space is dedicated to providing space and opportunity to readers to share practice tips and brief items of general interest to the RPPTL reader. Contributions may be submitted to Jo Claire Spear by fax or email: Fax: (727) 576-6407; email: Joclairespearpa @aol.com. *Each item should be limited to 100 words or less and should contain your name.*

Pro Bono Committee Help — The Section's Pro Bono Committee is seeking real estate and probate attorneys to participate in a Clear Title Project to represent Legal Aid clients. Call either Andrew O'Malley 813-250-0577 or Adele I. Stone 954-925-5501 for more information.

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