IN THE COURT OF APPEALS

OF THE FIRST JUDICIAL CIRCUIT

FIRST DISTRICT CASE NO.: 1D24-1783

L.T. NO.: 2022-CA-1775

NICHOLAS J. KOSTELNY and
JULIANNE L. KOSTELNY,
husband and wife,
Appellants/Plaintiffs

vs.

BLUEWATER BAY RESORT, LLC,
THOMAS HANKS.
EUROPCO MGMT. CO. OF AMERICA, LLC;
JEROME ZIVAN,
Appellees/Defendants
_____/

INITIAL BRIEF

November 11, 2024

Nicholas and Julianne L Kostelny, *pro se*
750 Prestwick Cove
Niceville FL 32578
850-200-0261

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SUMMARY

This is an appeal of an order granting Defendants' motion to dismiss. Appellant's complaint alleges clear facts which are supported by evidentiary exhibits. The complaint specifies causes of action which are all well settled in Florida law. There is no valid basis to deny any of Appellant's causes of action from trial and adjudication. The trial court exceeded the four corners of the complaint by granting the motion to dismiss it with prejudice. The complaint should be remanded with instructions to the trial court.

The Complaint pleads six counts, grouped in three aspects.

1. The first aspect (Counts I-IV) is that facts, the specific elements of each count, and the evidence show that Kostelnys were damaged by Defendants' fraudulent scheme to pilfer real property rights, to diminish Kostelnys' property, and to enrich Defendants' land re-development prospects. Extrinsic fraud is described and documented in and around a prior action referred to herein as the "Fence Action".[1] This suit serves as a collateral attack to the Fence Action which produced an unappealed

[1] *Bluewater Bay Resort and Europco Management Company of America v. Kostelny,* Okaloosa County Circuit Civil 2015 CA 3417. For simplicity, that case is referred to herein as the Fence Action. The Fence Action's post-judgment appeals were in front of this Court as Case Nos. 1D17-3711, 1D21-0422, 1D21-0713, and 1D21-0714.

decree obtained by Defendants' fraud on the court.

2. The second aspect of this suit (Count V) is a request for a decree under Chapter 86, Fla. Stat. Kostelnys presented there is doubt as to the status of Kostelnys' title on account of Defendants' further claims of rights over Kostelnys' homestead. Defendants sold or purported to sell "developer rights" over Kostelnys' homestead. Kostelnys plead the statutory provision for a decree to determine the status of all rights associated with their homestead's deed. *Even if* adjudication were to determine there was no negligence, misrepresentation, fraud, or abuse of process by Defendants, declaratory relief remains a cause of action.
3. The third aspect of this suit (Count VI) is a petition for relief from injunction due to changed circumstances. Kostelnys put forth that since the 2015 Fence Action was allegedly brought "for golf" (R.547 ¶48-53); and argued "for golf" (R.549 ¶64-71) and the decree was granted "for golf", and applicable specifically to Kostelnys' "golf course lot" (R.419-421), then, since the course has ceased golf operations, the Fence Action's injunction prohibiting Kostelnys from full use of their property should be stricken as no longer equitable. *Even if* adjudication determines no relief from Counts I-IV and Florida law imposes a "golf" easement, relief from injunction due to changed circumstances remains a triable cause of action.

FACTS

Financially-failing golf course Bluewater Bay Resort ("BBR") had dim prospects for re-development of 36 soggy fairways engineered to be the drainage basin in a late-1970's Development of Regional Impact ("DRI"). BBR's fairways and ponds are used in lieu of detention ponds within the subdivisions. (R.295-319) BBR's lands are burdened with recorded easements granted to 1600 surrounding acres of residential subdivisions containing more than 4,000 homes. The easements give rights appurtenant to title to each lot in each subdivision, for flow of surface water from the subdivision onto and through BBR's land. (R.172-173) The fairways percolate water in open space, channel water through in-ground pipes and above-grade swales, and regulate flow with weirs, culverts and ponds. (R.295-319) Surface water is filtered by soils, and eventually flows into wetlands at Choctawhatchee Bay. (R.286-292) The drainage and utility easements are part of the DRI Master Drainage Plan and were memorialized in Official Records at the end of the DRI's primary development phase.

Homeowners in Bluewater Bay DRI had little or no knowledge of the 122-page document recording the easement in 1992. (R.155 et seq) If not timely preserved by a properly recorded notice, then in 2022, effect of the Marketable Record Title Act (§712 Fla. Stat. or "MRTA") would free BBR's

land from its obligation to serve as a drainage basin for the DRI – an obvious advantage to BBR's re-development. (R.548 Ftn.)

BBR's narrow fairways are a challenge for new streets of homes. Without special variances, lot yield was meager. A two-point approach was needed to convince County oversight to allow BBR's desired density. First, the County must accept that BBR could reduce established building-footprint setbacks from lot lines, so that entire streets of homes could fit on the fairways. (R. 1248-1279)

Secondly, the proposed re-plat would have so much impervious area (streets and roofs) that BBR needed greenspace to meet stormwater runoff development standards. BBR teamed with Jerry Zivan, an otherwise-retired development lawyer (Fla. Bar #185027) who'd been a payroll employee for the original DRI applicant. (R.322) Since dissolution of the DRI's developer Bluewater Bay Development Company, Ltd. ("BBDC") in 1993, Zivan had set himself up as a "Grand Poobah" in Bluewater Bay. He meandered the neighborhoods, knocking on doors to investigate pool construction, landscaping plans, or the like, aiming to persuade (or intimidate), and claiming he controlled what was acceptable to the "Developer" in the fully-sold subdivisions. (R.86-91, R.1243-1246) In a planned community with subdivision-specific covenants but no master HOA, most people didn't

question him. Zivan maintains the name of the company Europco Management Company of America, LLC ("Europco"). Decades before, this was the name of the DRI applicant's corporate general partner executing documents on behalf of developer-landowner BBDC, Ltd. (R. 323)

With BBR's fairways re-development in mind, Zivan and BBR proposed to breathe life into expired subdivision covenants which mentioned a developer easement at the rear of subdivision parcels. But there were some legal problems with that idea. The 'easement' had never been used for any utilities. The Declaration of Covenants wasn't subscribed by two witnesses, so void ab initio as to reserving or conveying a real property interest. The Declaration self-stated the 'easement' could not be used for lands lying outside the subdivision. The 'easement' had not been depicted or referred to on the Plat Certificate when the plat was subsequently recorded. (R.318) Nor was the Declaration of Covenants referred to by Official Records Book and Page number on the Plat Certificate. Nor were 'easement' or covenants referenced by OR Book and Page number on the statutory warranty deeds when the subdivision lots were conveyed to purchasers. (R.75-83) And more than 30 years had passed, so MRTA had extinguished the old Declaration. Still, that didn't deter Defendants who hoped to bring the 'easement' into the future and persuade the County to allow use of the 'easement' at the rear of

every lot of each subdivision adjacent to BBR's land. In this way BBR could encroach its re-plat onto the periphery of residential lots platted decades before. Zivan had already been grooming residents to move their constructions inward of residents' property lines and accept his assertions of a rear-yard easement.

In 2015 the Kostelnys, a married couple with careers in real estate and architectural sciences, bought a home adjacent to BBR's "Lakes Course". Within six weeks Zivan wrote letters, made phone calls, and appeared at Kostelnys' home. Zivan claimed rights to prohibit Kostelnys from completing construction of a code-compliant fence located entirely on Kostelnys' parcel - despite having no affiliation with any County agency, or HOA, or any ownership in the subdivision as basis to enforce the expired subdivision covenants which had precluded fences. "I am contacting you in my role as "Successor Developer" under the Declaration of Covenants" asserted Zivan. (R.869) Kostelnys refuted his claims based on MRTA's effect, lack of record notice on deeds, and other reasons.

Zivan/Europco then attempted to renew 1981 covenants in Kostelnys' subdivision through Florida Dept. of Economic Opportunity process. The attempt failed, as no HOA bylaws exist. (Sect. 720.406(1)(a), Fla Stat.) The DEO's Final Order was not appealed. (R. 103-107, R.541. ¶23-25)

So Europco and BBR sued Kostelnys in Circuit Court, pleading to "temporarily enter" Kostelnys' property for "the limited purpose of errant golf shots during play and retrieval of such shots." (R.119 ¶34(c)) BBR/Europco sought to enjoin Kostelnys from maintaining a 47-foot long fence inside Kostelnys rear 120-foot boundary, alleging this fence would "block the game of golf." Directly contrary to well settled law, they argued the covenants' fence prohibition was not extinguished by MRTA. (R.129)

Misrepresenting standing to bring a covenant enforcement action, BBR/Europco attached to the Complaint (and later their Amended Complaint) a long, bleary copy of a deed irrelevant to either property. (R.138-153, R.544 ¶37-40, R.893-894) BBR/Europco also misrepresented that a 'reciprocal' easement not executed by the owner of Kostelnys' parcel gave rights over Kostelnys' lot (platted 11 years prior). (R.155) Zivan for Europco (R.381-389) and Hanks for BBR (R.392-397) testified extensively on the obstacle to the play of golf caused by the fence on Kostelny's property.

After filing the complaint, but before moving for summary judgment, and entirely concealed from the trial court and Kostelnys, Hanks for BBR and Zivan for Europco each filed a biannual DRI report over their signatures, certifying that that land adjacent to Kostelnys' fence was slated for re-development and entitled to all additional dwelling units allotted to the DRI.

(R. 1138-1140, 1150)

In truth, Kostelnys' fence was an obstacle not to golf but to BBR/Europco's re-development density. Using Kostelnys' parcel (and others) for a drainage swale around their proposed plat required prohibiting Kostelnys' short fence, since County Land Development code prohibits fences in drainage swales. (R.540, ¶18-20)

The trial court ruled for BBR/Europco. Tackling the "setbacks" obstacle to the density and lot yield they wanted, BBR/Europco craftily wrote into the Fence Action's decree additional language that BBR/Europco held rights to create setback variances. (R.1210-1212) This was decreed even though Kostelnys' parcel had a home standing on it for 28 years, and no building setbacks were at issue. (R.552-553 ¶89-90)

After the Fence Action, Defendants closed their golf course. In 2019 BBR sold a 50% interest in its holdings to developer Randy Wise's subsidiary company, and recorded the sale and transfer of rights to use easements over Kostelnys' property reserved by "Developer". (R. 557-558 ¶107-109, R.569) In a June 9, 2022 Okaloosa County Planning Commission hearing which approved Lakes Course Fairways #4-8 land use change from Recreational to Residential use, Defendants also requested and received approval to change setback variances within the DRI. (R.555 ¶99) BBR then platted its

former driving range to lots with 20-foot front yard setbacks and 15-foot rear yard setbacks (recorded at Plat Book 30, Page 7).

The Fence Action was one phase in a long-range scheme to gain fractional real property rights and change DRI regulations in a manner persuasive to the County Growth Management agency. By the fraudulent concealment, Kostelnys were unable to defend themselves against the true legal issues of land use and drainage on and around Kostelnys' property, or prevent a term in the covenants from being enlarged into "easements" over their real property. Kostelnys are damaged by loss of their homestead use, loss of property improvements, loss of privacy, loss of quiet enjoyment, attorney fees, and other damages. Kostelnys' causes of action are triable, and this Complaint should not have been dismissed.

PROCEDURAL HISTORY

This action was filed June 11, 2022. At the time, Kostelnys had a pending appeal of a Rule 1.540(b)(2) motion in the Fence Action (1D2021-0713) which could have addressed and adjudicated some of the issues brought forth in this complaint. The Fence Action Rule1.540(b)(2) motion hearing was presided by a Judge concurrently represented by Leslie Sheekley, BBR/Europco's counsel in the Fence Action; he was also former law partner

of Zivan; he had represented Europco at trial and appeal; and he has ties with BBR's development counsel Dana Matthews as Matthews' law partner and associate in Triple M Investors, LLC. That Judge entered an Order barring all evidence at Kostelnys' evidentiary hearing. During the hearing Kostelnys orally moved for disqualification because of the Judge's livid animosity toward Kostelnys, but the Judge refused to end the hearing. He pronounced Kostelnys' Rule 1.540(b)(2) motion was denied. After Kostelnys' written motion, he later entered an order of recusal but not an order on the hearing.

Kostelnys informed the successor judge of the first judge's ties to BBR and Europco, the bar on evidence, and the derogatory remarks made to Kostelnys during the hearing. But successor judge refused to re-hear the Rule 1.540(b)(2) evidentiary hearing, even pursuant to Kostelnys' renewed Fla. R. Jud. Admin. 2.330(j) Motion. Kostelnys moved for disqualification and filed a Petition for Writ of Prohibition (1D21-0422). After granting his disqualification, the successor judge entered void orders denying both motions.

All the other Okaloosa Circuit Civil judges successively assigned to the Fence action recused themselves. When assigned to a County Court Judge, he refused to schedule either rehearing on the Fla. R. Civ. P. 1.540(b)(2)

motion, or the Fla. R. Jud. Admin. 2.330(j) motion. Kostelnys appealed. (1D2021-0713 and 1D21-0714) This Appellate Court granted a temporary relinquishment of jurisdiction for the County Court Judge to re-hear Kostelnys' Rule 1.540(b)(2) motion. But the County Court Judge again refused to reschedule any hearings. Jurisdiction returned to this Appellate Court.

In June 2022, Kostelnys filed this action, wishing to spur resolution and gain back use of their homestead after seven years of legal battle. The judge who granted his disqualification from the Fence Action was assigned to this new case. Defendants moved to dismiss this complaint and to sanction the complaint under Fla. Stat. §57.105. Kostelnys received additional legal opinions from two more consulting attorneys with experience in fraud cases, and filed an Amended Complaint for Conspiracy to Commit Fraud, Abuse of Process, and Petition to Vacate Injunction Due to Change in Circumstances (referred to herein simply as "the Complaint"). Defendants amended their motion to dismiss it.

Kostelnys began discovery. Defendants' counsel, and counsel for surveyor Allen Tucker (involved in Defendants' plat-encroachment scheme) colluded and persistently dodged scheduling of depositions. Defendants an Emergency Motion for Protective Order and Objection to Subpoenas, asking

to stay Kostelnys' requests for production and all discovery pending a hearing on the motion to dismiss. (R.687) Kostelnys responded with a Motion to Compel. (R.694) Defendants opposed it. (R.717)

During a hearing on Defendants' discovery objections, counsel for Hanks/Zivan expressed difficulty in finding the Complaint's Exhibits (entered separately in the Docket). Kostelnys later refiled the Complaint with Exhibits attached all in one e-filing. (R.811-1285)

The Judge issued an order taking Judicial Notice of his own void order in the Fence Action. He ordered that the hearing on the Motion to Dismiss would be non-evidentiary. He granted Defendants a protective order and stayed all discovery. He quashed the subpoenas. Verbiage in the order (prepared of course by opposing counsel Sheekley) included argument from Defendants' motion to dismiss and sanction. (R.723-727) Kostelnys moved to disqualify the Judge and their motion was granted. In December 2022 Kostelnys appealed the disqualified judge's orders. (1D 2022-3871)

The appeal of the Fence Action Order on the Rule 1.540(b)(2) motion remained pending until mid-2023. It was decided by this court that Kostelnys' November 18, 2018 Rule 1.540(b) motion was untimely. (1D21-0713)

The appeal in this instant case was dismissed for lack of jurisdiction on September 23, 2023. Every assigned Circuit Civil Judge entered orders of

recusal. The case was assigned to a County Court Judge - the same successor Judge also assigned to the related case *Kostelny v. Bluewater Bay Resort*, Okaloosa Circuit Civil 2019 CA 618 (the "Stormwater Action"). [2] Kostelnys moved to change venue, supported by seven affidavits of local persons who know the local prejudices in favor of Defendants and their partner, Randy Wise. Wise's father was the mayor of the local town Niceville for many decades. Wise and his 63 subsidiary companies are an active political influence. The Judge over the two cases denied Kostelnys' motion to change venue. In the Stormwater Case, the Judge denied Kostelnys' motion to compel production of the DRI's Master Drainage Plan – a document which directly supports Kostelnys' claims and defenses.

Then, the Judge heard Defendants' Motion to Dismiss in this instant case, and granted the dismissal. (R1532-1533) Kostelnys moved for

[2] The trial court here took judicial notice of this related case. In the 2019 Stormwater Action, Kostelnys sought a decree on their parcel's rights as to the DRI Master Drainage Plan easement, and also to enjoin BBR's chronic civil trespass of stormwater discharging onto Kostelnys' parcel. In response BBR opened up a large trench to discharge water from the lip of a nearby detention pond, so that it backflows stormwater directly to the rear center of Kostelnys' parcel when the detention pond is at a high level.

BBR filed a counterclaim alleging a drainage easement was created in the subdivision covenants, and that Kostelnys were prohibited from deflecting water away from their parcel. The case settled November 1, 2024. No decree was ever made on the claims of either party, and the parties reserved rights for their claims and defenses in this case and its appeals.

reconsideration and made the points in the Complaint simple and clear. (R.1534-1574) The Judge denied reconsideration. (R. 1575-1576)

ARGUMENT

Standard of Review. Kostelnys are entitled to "the rights of access to courts and trial by jury"); see Art. I, § 21, Fla. Const. (guaranteeing access to Florida's courts for "redress of any injury"); Art. I, § 22, Fla. Const. (guaranteeing that the right to a jury trial "remain[s] inviolate"). "The public policy of Florida favors liberality in permitting amendments to pleadings so that the resolution of disputes will be on their merits." *Dimick v. Ray*, 774 So.2d 830, 833 (Fla. 4th DCA 2000); Fla. R. Civ. P. 1.190(a).

A trial court must accept as true the complaint's well-pleaded factual allegations and draw all reasonable inferences from the allegations in favor of the plaintiff. *Maciejewski v. Holland,* 441 So.2d 703, 704 (Fla. 2d DCA 1983) Speculation by the court as to whether the allegations will ultimately be proven is not permitted.

The trial court's Order granting dismissal (R.1532-1533) focuses on Counts I and II (concealment during the pendency of the Fence Action).

The Order does not address the time span of Count III, Conspiracy for Fraud, reaching back before the Fence Action (Zivan's pre-suit assertions of

control over Kostelnys' lot); occurring through 2019 when Defendants sold 'developer easements' over Kostelnys' parcel (Exhibit 20, R.831 ¶107-108) and announced that unexpired subdivision covenants authorized Defendants to dissipate stormwater onto BBR-adjacent residential parcels (R.452); and through 2021 as Defendants changed land use (R.469) and used their "authority" to reduce building setbacks within the DRI. All these fraudulent acts damaged Kostelnys who incurred litigation losses, homestead use loss, suffered erosion from surface water, and lost benefits they'd had from the prior, higher - and drier - standard of development. (R.573)

The trial court's Order does not address Count IV, Abuse of Process addressing Defendants' manipulation of the court which damaged the integrity of the judicial process, and the ongoing misuse of the decree for purposes not intended. (R.575)

The trial court's Order does not address Count V, Declaratory Relief pursuant to Chapter 86, Fla. Stat., as to the true and correct rights of Kostelnys' deed and title to their homestead. (R.578)

The trial court's Order does not address Count VI, Kostelnys' Petition for Relief from Injunction Due to Changed Circumstances. (R.580)

When a court determines the sufficiency of a complaint to state a cause of action, its review is limited to an examination only of the complaint and its

attachments (known as the “four-corners rule”).

To bring the 2015 Fence Action within the “four corners”, the Complaint incorporated relevant pleadings from the Fence Action as well as records supporting the facts in the Complaint. Kostelnys attached these Exhibits:

- Exhibit 1, deraignment of title to Kostelnys’ home evidencing no rights for Defendants (R.75-83)
- Exhibit 2, pre-suit threats made by Zivan regarding control of Kostelnys’ homestead (R.86-91)
- Exhibit 3, pre-suit communication from Zivan to County which contradicted allegations in the Fence Action complaint (R.86-91)
- Exhibit 4, attempt to revitalize covenants; DEO’s Final Order denying revitalization of expired covenants over Kostelnys’ parcel (identical issue pled in Circuit Civil Fence Action) (R.100-107)
- Exhibit 5, the 2015 Fence Action Amended Complaint with its 110 references to golf (R. 110-283, See also Exhibit 9 at R.1104-1114)
- Exhibit 6, the DRI Development Order (R.286-292)
- Exhibit 7, elements of the Master Drainage Plan imbedded in and on BBR’s land (R.295-319, See also easement grant at R.172-173)
- Exhibit 8, testimony from the original founder and investor of Bluewater Bay Development Company, Ltd. stating that Zivan received no rights from BBDC who was the Developer of Kostelnys’ subdivision (R.322)
- Exhibit 9, quotations from Defendants’ summary judgment motion pleading “for golf” 129 times (R.1115-1123)
- Exhibit 10, BBR / Europco’s February 2016 DRI report impeaching testimony in the Fence Action (R.542-543 ¶28-32, R.1131-1152)
- Exhibit 11, BBR’s land is not Vacant but is developed as part of the DRI Drainage Plan (R. 1154)
- Exhibit 12, Zivan testifying 34 times the lawsuit’s purpose was “golf” (R.1156-1164)
- Exhibit 13, Hanks testifying 32 times the lawsuit’s purpose was “golf” (R.1167-1172)

- Exhibit 14, dates of Fence Action photo evidence falsified (R.1175-1188)
- Exhibit 15, Defendants heckle Kostelnys about other features on their homestead (R.1207)
- Exhibit 16, Final Decree which does not mention “golf” except as regards a “golf course lot” (R.1210-1212)
- Exhibit 17, citations to Okaloosa County Land Development Code §6.01.052(4) barring fences in stormwater swales (R.1217-1218)
- Exhibit 18, Defendants propose to use adjacent properties for stormwater management (R.1220-1221)
- Exhibit 19, Defendants publicly reveal they were losing about $100,000 per year on golf operations during the time Defendants were suing Kostelnys "for golf' consequently they must end their golf operations and re-plat to residential lots (R.1224-1231)
- Exhibit 20, Portion of Deed in Official Records wherein BBR conveys “Developer Rights” over Kostelnys’ parcel and subdivision to co-investor Fate’s Place 2000 LLC. (R.1234)
- Exhibit 21, BBR, Zivan, and Fate’s Place 2000, LLC. proceed with land use change for re-development of the drainage basin, and change the DRI setbacks (R.1237-1241)
- Exhibit 22, Zivan’s social media comments that easements exist on the rear of residential parcels for BBR’s drainage use (R.1243-1246)
- Exhibit 23, BBR begins development of Lakes Course (R.1248-1279)
- Exhibit 24, Kostelnys’ parcel is reclassified and no longer considered ‘SFR Golf” by County Tax Assessor (R.1282-1284)

Since the Complaint alleges fraud, it was improper to grant Defendants’ motion to dismiss prior to a trial or evidentiary hearing. See, *Robinson v. Kalmanson*, 882 So.2d 1086, 1088 (Fla. 5th DCA 2004) ("A court can seldom determine the presence or absence of fraud without a trial or evidentiary proceeding.")

COUNTS I-III: NEGLIGENT MISREPRESENTATION, FRAUDULENT MISREPRESENTATION, CIVIL CONSPIRACY FOR FRAUD

The Complaint presents prima facie evidence of extrinsic fraud – fraud outside the courtroom and outside the litigation - as well as fraud on the court by fundamental mistruths to the court which injured the integrity of the judicial process. (R.563-578) Just as much as Edna Faye Cox brought fabrications to the court, hoping for a windfall (*Cox v. Burke*, 706 So. 2d 43 (Fla. 5th DCA 1998)), Defendants here gathered up mistruths, argued against controlling law, and hoped to hit a jackpot. Zivan is all the more culpable. As an officer of the court, Zivan has a duty of honesty towards the tribunal. Where an attorney neglects that duty and obtains a judgment based on conduct that actively defrauds the court, such judgment may be attacked, and subsequently overturned as fraud on the court. It is intolerable for a professional in his position to abuse the confidence placed in his office. See, *Tramel v. Bass*, 672 So. 2d 78, 85 (Fla. 1st Dist. 1996) ("A knowing alteration or fabrication of evidence by those trusted with enforcing the laws of the state offends the traditional notions of due process of law under the federal and state constitutions.")

Defendants' scheme was malicious, sentient, planned, and deliberate. At *Adams v. Whitfield*, 290 So. 2d 49, 51 (Fla.1974):

> “[L]egal malice may be inferred entirely from a lack of probable cause.
>
> An award of punitive damages also requires only proof of legal malice, not necessarily actual malice, and this is true whether the cause of action is for malicious prosecution, for some other tort, or for a breach of contract. With regard to punitive damages in general, this Court stated in Winn and Lovett Grocery Co. et al. v. Archer et al., supra:
>
> > "... Exemplary [punitive] damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others... ."
>
> Therefore, in any case, punitive damages may be awarded based upon legal malice which may be inferred from, among other things, gross negligence indicating a wanton disregard for the rights of others.”

- *Adams v. Whitfield*, 290 So. 2d 49, 51 (Fla.1974)

Defendants’ scheme intended to violate Florida’s protective laws insuring marketable title, laws guarding against fraudulent conveyance of real property, and laws assuring that purchasers of real property may rely on record notice including the Plat Certificate. Defendants – including Zivan who is an officer of the court - sought to weasel around these protective laws.

Rather than accepting a lesser level of development that could be

honestly achieved within the scope of Defendants' own real property rights, Defendants greedily sought ultra-dense development by puppeting a legal action, adding language in the final order authorizing setback variances, and decreeing that Kostelnys property was subject to "easements" (plural, and unspecified) for Defendants' benefit. (R. 419-421)

Defendants' scheme pre-dated and post-dated the Fence Action litigation. They planned in advance of the judicial process, defied a prior court's Final Order, misrepresented standing, misrepresented facts, argued against controlling law, testified falsely, inflated the decree to grant themselves easements, forced Kostelnys to destroy their fence and to move their hobby out of their rear yard, re-graded the soil on BBR's land to discharge water onto Kostelnys' lot, sold rights to use easements [3] over Kostelnys' home and subdivision, formed a joint venture to change land use, and commenced re-development.

The Fence Action decree was never about "golf." At *Rigot v. Bucci,* 245 So. 2d 51 (Fla. 1971): "We hold that only a preponderance or greater

[3] Specifically BBR sold "non-exclusive right to utilize easements reserved by Bluewater Day Development Company, Ltd. , as "Developer", in protective covenants and restrictions for St. Andrew's Village North, dated February 12, 1981 and recorded in Official Record Book 1111, Page 1131, Okaloosa County, Florida Records." (R.442)

weight of the evidence is required to establish fraud, whether the action is at law or in equity. See 37 C.J.S. Fraud § 114; 37 Am.Jur.2d, Fraud and Deceit, §§ 468, 469. [4]

Kostelnys' defense was hampered by not knowing the true facts. When Kostelnys retained legal counsel from Clark-Partington for the Fence Action, Defendants didn't disclose they'd hired Jesse Rigby at the same firm to advise them on BBR's land re-development. (R. 548 ¶60) Defendants' true aim with litigation was unavailable to Kostelnys, since it included Defendants' work product with development lawyers, surveyor Allen Tucker, consultant Laura Burrough, and others extrinsic to the "golf" corners of the complaint.

"The integrity of the civil litigation process depends on the truthful disclosure of facts…[T]his Court has defined extrinsic fraud as;…ignorance of the adversary about the … acts of the plaintiff." *DeClaire v. Yonahan*, 453

[4] See also, *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998) ("Fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."); *Bongard v. Winter*, 516 So.2d 27, 27 (Fla. 3d DCA 1987)("[A] present misrepresentation concerning a future intent may form the basis for actionable fraud where the party making the misrepresentation is aware at the time that it is in fact false.")

So.2d 375, 378-379 (Fla. 1984). "When a party is once found to be fabricating or suppressing documents, the natural, indeed, the inevitable conclusion is that he has something to conceal, and is conscious of guilt." *Tramel v. Bass*, 672 So. 2d 78, 85, Ftn. 7 (Fla. 1st DCA 1996). “[T]he fact that the evidence could have been produced at trial is irrelevant; the law does not require a party to anticipate that the opposing party will introduce inaccurate testimony and to have available at trial evidence to refute such testimony.” *Kline v. Belco, Ltd*., 480 So. 2d 126 (Fla. 3rd DCA 1985).

A party seeking to establish fraudulent misrepresentation is required to prove (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation. *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010).

Defendants defied a prior Order from a DEO Administrative Law Judge determining that the subdivision covenants were extinguished and could never be revitalized. Defendants were obligated by candor to the court to disclose res judicata as to Kostelnys’ subdivision covenants, and the existing ruling adverse to their claim. Instead, Defendants negligently and fraudulently pled for the Circuit Court to re-do the DEO’s decision.

Defendants negligently and fraudulently misrepresented standing to enforce expired covenants for Kostelnys' subdivision in which Defendants owned no real property. The misrepresentation caused the trial court to assume a false jurisdiction over the matter. Defendants misrepresented deeds, documents, facts, and law.

Defendants exploited and damaged Kostelnys by the fraud. Kostelnys lost use of their home, lost the quiet enjoyment of their home, lost privacy, lost property, expended attorney fees, and suffered other damages.

Defendants continue to fraudulently and negligently publicly misrepresent the decree, stating the decree against Kostelnys is imposed on other DRI residents, resulting in "7.5 foot drainage easement" imposed on other residents' properties adjacent to BBR's land. [5]

COUNT IV – ABUSE OF PROCESS

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed. (cit.

[5] Although not litigated here, many DRI residents gave up land use when Zivan threatened them, and moved fences 20 feet or more inward of the owners' property line. Some forfeited swimming pools or made major modifications to their landscaping at Zivan's insistence. Affidavits and testimony on this exist. In County Official Records, Zivan has filed more than 200 fictitious "variances" and "permissions" over various real properties in the DRI, many without the property owners' knowledge.

omit.) For the cause of action to exist there must be a use of the process for an immediate purpose other than that for which it was designed." *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. 3rd DCA 1984). Footnote 7 adds: ""Legal malice" is presumed to exist if the plaintiff establishes that the process has been used for an improper purpose. It is often said that proof of "malice" is required; but it seems well settled that, except on the issue of punitive damages, this does not mean spite or ill will, or anything other than the improper purpose itself for which the process is used." At Footnote 11: ""Legal malice" generally means that the act was deliberate conduct without reasonable cause."

Kostelnys have a cause of action for abuse of process here: the elements are: (1) an illegal, improper, or perverted use of process by the BBR [the future defendant]; (2) an ulterior motive or purpose in exercising the illegal, improper, or perverted process; (3) damages to the future plaintiff [Kostelnys] as a result." *Valdes v. GAB Robins N. Am. Inc.*, 924 So.2d 862 (Fla. 3rd DCA 2006).

Abuse of process is an improper, willful act. *Peckins v. Kaye*, 443 So. 2d 1025 (Fla. 2nd DCA 1983)(Abuse of process consists not in issuance of process, but rather in perversion of process after its issuance; writ or process must be used in manner or for purpose not intended by law.)

Defendants' protests against the Complaint. Sifting through many words and much repetition in the joint Motion to Dismiss, Defendants object to the causes of action; argue res judicata; and point to expiry of limitations on Counts I-IV. Kostelnys showed the trial court that Defendants' protests such as res judicata and the expiration of the statute of limitations are appropriately raised in the answer, not on a motion to dismiss. *United Servs. Auto. Ass'n v. Selz*, 637 So.2d 320 (Fla. 4th DCA 1994). (R-1288-1289)

Defendants' argument of res judicata points not to the Fence Action's summary judgment, but to Kostelnys' post-judgment Rule 1.540(b)(2) Motion later determined by this Court to be untimely, and dismissed. *Kostelny v. Bluewater Bay Resort, LLC*, 386 So. 3d 216 (Fla. 1st DCA 2023). Although Kostelnys' 2018 Rule 1.540(b)(2) motion attempted to put before the court Defendants' disingenuous pleadings in the Fence Action, the issues were never adjudicated. Even if Kostelnys' Rule 1.540 motion ***had*** been granted, vacating judgments under Rule 1.540 doesn't adjudicate on the merits. Fact finding in such a proceeding is limited to those facts necessary to a disposition of the motion for relief and does not extend to a finding on the actual substantive issues in the cause. *SPS Corp. v. Kinder Builders, Inc*., 997 So. 2d 1232 (Fla. 3rd DCA 2008). And, "When a court vacates a judgment pursuant to a rule 1.540 motion, the effect of that ruling is to return

the case and the parties to the same position that they were in before the court entered the judgment." *Bane v. Bane*, 775 So.2d 938, 941 (Fla. 2000).

If granted, Kostelnys' Rule 1.540 motion could have tried BBR/Europco's misrepresentations and fraud within the scope of the Fence Action with amended answers, defenses, a counterclaim, and discovery. But that didn't take place. And ultimately, the order entered by the judge after granting his disqualification was void. At *Davis v. State*, 849 So. 2d 1137 (Fla. 1st DCA 2003): "Once a trial judge recuses himself from a given case, any subsequent orders he enters in that case are void and have no effect."); *Campos v. Campos*, 230 So. 3d 553, 555 (Fla. 1st DCA 2017) ("[O]rders entered by a recused judge are void.")

As for the petition for prohibitive writ (Case No.1D21-0423):

> "[E]xtraordinary writ petitions filed in any Florida court shall not be considered decisions on the merits which would bar the litigant from presenting the same or a substantially similar issue on appeal or by a subsequent writ petition, or by other means, in the same or a different Florida court."
>
> - *Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004).

And,

> "The doctrine of res judicata applies when four identities are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made. …

> “This Court and other Florida courts have held that a ruling must be "on the merits" for an issue to have truly been "decided" and thus preclude the consideration of an issue on the basis of res judicata.”
>
> - *Topps,* ibid at 1255.

These four identities are not present between the Fence Action and this case. (R.729) This complaint alleges torts, not covenant enforcement (the basis of the Fence Action). See also, *Ginsberg v. Lennar Florida Holdings*, 645 So. 2d 490, 495 (Fla. 3rd DCA 1994) showing fourteen examples how contract actions are distinct from tort actions and cannot be commingled. Kostelnys differentiated the issues in the chart at R.737, comparing all counts in all three actions. No issues align so as to create res judicata. Additional supportive citations were presented at R.740. Having taken judicial notice of the other cases, the trial court was aware of the distinction of issues, law argued there, and law applicable to the case here.

With regard to the statute of limitations, Kostelnys seek to recover lost lost real property rights, a portion of their “bundle” of rights appurtenant to their title. Kostelnys cited at R.7128:

Section 95.001(2)(a) - Actions on recovery of real property.

> An action founded upon fraud under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the

> time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

This action seeks to overturn a Florida judgment or decree. An action on a judgment or decree of a court of record in this state must be commenced within twenty years. Section, 95.11(1), Fla. Stat. As to limitations for torts, Kostelnys argued that the fraud continues ongoingly as the Fence Action's decree is misused, so this action is timely.

At R.595-596, Defendants argue against Zivan and Hanks being named individually. However,

> "Under Florida law, "an officer of a corporation who commits or participates in a tort, whether or not it is in furtherance of corporate business and whether or not it is by authority of the corporation, is liable to the injured party whether or not the corporation is also liable." P.V. Constr. Corp. v. Kovner, 538 So.2d 502, 504 (Fla. 4th DCA 1989). As such, [Appellants'] complaint alleged sufficient facts regarding [Defendant's] participation in the complained-of wrongdoing to support a claim against [Defendant] individually."

- *Edwards v. Landsman*, 51 So. 3d 1208, 1214 (Fla. 4th DCA 2011)

COUNT V: DECLARATORY RELIEF UNDER CHAPTER 86, FLA. STAT.

The Complaint attached as Exhibit 1 certified copies of all deeds in Kostelnys' chain of title (R.857-865) and asked for a decree under Chapter 86 as to the rights involving their property. (R.578-579) Section 86.021, Fla. Stat. provides:

> "Any person claiming to be interested or who may be in doubt about his or her rights under a . . . contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

Since Kostelnys' deraignment of title does not demonstrate a valid reservation of easement by developer BBDC, or demonstrate conveyance of any rights for BBR or Europco from Kostelnys' first deed onward, Kostelnys seek to vacate the Fence Action decree based on its legal error.

> "[E]jectment need only contain a statement setting forth chronologically the chain of title upon which he will rely at trial. If any part of such chain of title is recorded, the statement must set forth the names of the grantors and the grantees, and the book and page of the record thereof. 20 Fla. Jur.2d Ejectment and Related Remedies, §§ 26, 29; § 66.021(4), Florida Statutes (1987). In a suit to quiet title, the plaintiff may allege the validity of his title in even more general terms, a mere allegation that he is the owner in fee of the lands in question being sufficient. 20 Fla.Jur.2d Ejectment and Related Remedies, § 130."
>
> - *Fish v. Post of Amvets No. 85*, 560 So. 2d 337, 339 (Fla 1st DCA 1990).

Kostelnys argued that the decree from the Fence Action does not conform with multiple Florida Statutes including the Marketable Record Title Act (§712), Statute of Frauds (§725.01), Conveyance Statute (§689.01), Adverse Possession (§95.16), Record Notice (§695.01), and the Plat Act (§177). (R. 738-739) Numerous case laws demonstrating these and other statutes and legal doctrines prove that easements rights clouding Kostelnys' fee simple absolute title should never have been awarded to BBR/Europco by the Fence Action. [6]

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[6] *The following law and more was presented in the Fence Action and/or Stormwater Action, of which the trial court took judicial notice.*

As to Defendants' claims on the basis of the expired subdivision covenants: "[R]estrictive covenants are not interests in real property, as are easements, but are mere contractual rights…" *Ryan v. Town of Manalapan*, 414 So. 2d 193 (Fla. 1982). "[R]estrictive covenants, such as building restrictions, do not constitute compensable property rights because they are not true easements and do not convey an interest in land." *Palm Beach*

County v. Cove Club Investors, 734 So. 2d 379 (Fla. 1999). “Because the law does not favor the acquisition of prescriptive rights, use or possession of another's land is presumed to be subordinate to the owner's title, and with the owner's permission...” *Suwannee River Water Management District v. Price*, 651 So.2d 749 (Fla. 1st DCA 1995).

As to Defendants’ claim of easements: Florida Statutes require all easements to be depicted on the Plat Certificate. See, §177.021, Fla. Stat. (The recording of plats serves to “establish the identity of all lands shown on and being a part of such plats.”); §177.031(7)(a), Fla. Stat. (easements must be demarcated on the plat as to purpose and limited uses). A general reference to “restrictive covenants” on Plat or Deed is insufficient to permanently memorialize covenants. §712.02, Fla. Stat.; *Lyday v. Myakka Valley Ranches Improvement Assoc., Inc*., 279 So. 3d 733, 735 (Fla. 2d DCA 2019).

The Plat Certificate is the authoritative instrument in determining the legal definition of a platted parcel. A land developer who subdivides and sells lots with legal descriptions referencing the plat is subsequently bound to the grantees to adhere to all representations shown on the face of the plat. *McCorquodale v. Keyton*, 63 So. 2d 906 (Fla. 1953). “It is the conveyance with reference to the plat that creates the rights in the purchasers to have the plat maintained according to its references.” *Coffman v. James*, 177 So. 2d 25, 30 (Fla. 1st DCA 1965) See also, *Cunningham v. Haley*, 501 So.2d 649, 652-53 (Fla. 5th DCA 1986) (Intent of MRTA is that covenants, easements, use restrictions, interests, and claims are extinguished by §712.03(1), Fla. Stat. unless specific reference is made by book and page of record on the face of the Plat); *Huck v. Kenmare Commons Homes Ass'n,* No. 1D20-3318 (Fla. 1st DCA 2023) a covenant was determined to be unenforceable where the Plat Certificate did not support the covenant as described in the text of the declaration.

To preserve an easement, one must actually <u>have</u> an easement in the first place. At *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004, 1011 (Fla. 1977): “Section 712.03(3) provides that the rights of any person in possession of the lands are not extinguished or affected by the Marketable Record Title Act, so long as such person is in possession...Subsection (3) applies only so long as the person remains in possession.”

Defendants were never “in possession of” or paid taxes on Kostelnys’ lot or any of the lands subject to the covenants at issue here, so had no preservation rights under §712.03, Fla. Stat. An exception to extinguishment under §712.03 isn’t preserved even by a circumstance such as decades of

The Fence Action decree should be stricken from public records connected to Kostelnys' fee simple title to their real property, and Kostelnys' title should be quieted as to Defendants' legally unsupportable claims – both past and future. "Liberally construed" MRTA protects homeowners from stale claims and adverse interest. §712.10, Fla. Stat. Ultimately "all claims" are voided by failure to assert a claim within 30 years. *H & F Land v. Panama City-Bay Co. Airport,* 736 So.2d 1167 (Fla. 1999). Defendants failed to preserve any "developer easement" claim against Kostelnys' parcel by 2011.

Even if Defendants' actions are not ultimately adjudicated as fraud, Count V for a Decree under Chapter 86 is a valid and distinct cause of action. No similar decree has been made as to the total scope of Kostelnys' rights stemming from their Plat Certificate, deraignment of title, and application of real property law.

COUNT VI – RELIEF FROM INJUNCTION DUE TO CHANGED CIRCUMSTANCES

BBR/Europco pled relief "for golf." Now golf has ended on the land behind Kostelnys' home. The injunction against a fence on Kostelnys'

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residency in a mobile home located on the land. *Dorsey v. Robinson*, 270 So. 3d 462 (Fla. 1st DCA 2019). There is no basis in law for Defendants to have an easement on Kostelnys' homestead.

property allegedly impeding golf is no longer equitable. (R.580-581) The Complaint attached announcements from Zivan and BBR that the Lakes Course closed (R.1224-1231), also the public record with certificate of custodian evidencing that Kostelnys' property was now re-classified by the County Tax Assessor from "SFR Golf" to simply "SFR". (R.1282-1284)

Courts have broad discretion regarding injunction modifications. *Reed v. Giles*, 974 So. 2d 624 (Fla. 4th DCA 2008). "As a general rule, permanent injunctions, which remain indefinitely in effect, may be modified by a court of competent jurisdiction "whenever changed circumstances make it equitable to do so." *Alkhoury v. Alkhoury*, 54 So.3d 641, 642 (Fla. 1st DCA 2011) (cit. omit.). A relief from injunction, in and of itself, is a cause of action when the injunction was unentitled in the first place; the standard for determining whether an injunction is wrongfully issued is simply whether the petitioning party was unentitled to injunctive relief. *Parker Tampa Two, Inc. v. Somerset Dev. Corp*., 544 So. 2d 1018, 1021-22 (Fla. 1989). The party injured by the wrongful injunction "is required to institute a separate action at law." *Calder Race Course, Inc. v. Gaitan*, 430 So. 2d 975 (Fla. 3d DCA 1983). An aggrieved party is entitled to damages resulting from the wrongful issuance of an injunction. *Dep't of Health & Rehab. Servs. v. G & J Invs. Corp*., 541 So. 2d 1197, 1200 (Fla. 3d DCA 1988).

Kostelnys argued at R.734:

> Dissolution of covenants is a stand-alone cause of action, and courts have authority to vacate prior covenants and deed restrictions. *Gate Venture v. Skinner*, (1D21-3574, pp 9-10), _ So 2d (Fla. 1st DCA 2022), holding to *Allen v. Avondale Co.,* 185 So. 137, 138 (Fla.1938) and *Wahrendorff v. Moore*, 93 So. 2d 720, 722 (Fla. 1957). It is unjust to sustain the injunction when (1) BBR and Europco had no standing to bring the Fence Action and (2) an injunction can exist only when a clear legal right has been violated, yet BBR and Europco have no legal rights whatsoever over Kostelnys' property other than the fraudulently-obtained Fence Action order. Simply put, *Estate of Johnston v. TPE Hotels, Inc*., 719 So. 2d 22 (Fla. 5th Dist. 1998) mandates that any claim of an easement on Kostelnys' property is nullified by the face of Kostelnys' plat, which shows no easement on Kostelnys' land.

Kostelnys' Motion for Reconsideration of the Order Granting Dismissal pointed out that BBR had sold all its land near Kostelnys. The Motion for Reconsideration attached a certified copy of the Deed to prove the changed circumstances. (R.1548-1572)

In recent years, public outcry had grown against the loss of DRI greenspace. There were concerns among many DRI residents dealing with drainage issues, especially following a $400,000+ FEMA grant remediation for sluggish drainage at just *some* of the wetlands adjacent to BBR's land. In 2024, DRI residents pooled funds totaling 2.4 million dollars (the stated 'development' value and twice the 'golf' value) and purchased 22 of BBR's

derelict 36 fairways. Portions of the abandoned fairways were sold to adjacent parcel owners (R.1573), including to Kostelnys who bought some of BBR's former land behind their home.

The Conveyance Deed from BBR to the new owners includes a permanent deed restriction barring future development and reiterating the land's obligations under the DRI's Master Drainage Plan. (R.1571-1572) It is proof positive that golf will not return to the locale behind Kostelnys, and no fence allegedly hindering golf need be prohibited.

CONCLUSION

No litigant should be allowed to "play" the judicial system with the aim of deceit and unjust profit. As Kostelnys argued in hearing, Defendants resemble a school student who asks the teacher for a hall pass to go to the school nurse, but misuses the pass to steal from other students' lockers. (R.1487-1488) Not only should the hall pass be rescinded, but the deceitful student should make restitution for the stolen items and be subject to the discipline of a tribunal, to caution others who might want to try a similar ploy.

Much more seriously than illustrated by the scheming student, Defendants dishonored the court and pilfered Kostelnys' real property rights, at the same time violating Florida's statutory provisions, homestead protections, and Florida's public policy on free use of real property. Kostelnys were deprived of use of the land they bought without record notice of any claim. Defendants' pilfering increased flooding, erosion, and damages at Kostelnys' home. It created a mountain of judicial labor and left a trash trail behind Defendants' money train.

Kostelnys are entitled to a trial on the comprehensively-pled Complaint. Trial includes examining the allegations of fraud; determining whether the Fence Action decree is supportable by law; deciding if the decree is applicable going forward. It means a remand of this case to the

trial court with instructions to assist the trial court to keep integrity in the judicial process in this case, and in future challenges.

Very Respectfully Submitted,

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I hereby certify that this document complies with the font and word count limit requirements revised as of January 1, 2021. It is printed in Arial 14 point font, and the word count is fewer than 9,000 words.

Signed,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on November 11, 2024 using the Florida Courts eFiling Portal system which will email a copy to:

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