

**IN THE COURT OF APPEALS
OF THE FIRST JUDICIAL CIRCUIT**

FIRST DISTRICT CASE NO.: 1D21-714

L.T. NO.: 15-CA-3417

NICHOLAS J. KOSTELNY and
JULIANNE L. KOSTELNY,
husband and wife,
Appellant

vs.

BLUEWATER BAY RESORT, LLC,
a Florida Limited Liability Company,
and EUROPCO MANAGEMENT COMPANY OF AMERICA, LLC,
a Florida Limited Liability Company,
Appellee

INITIAL BRIEF ON THE MERITS

September 29, 2021

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850-200-0261

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POINT ON APPEAL

The Court should not cling to a final judgment and two post-summary judgments founded on Plaintiff's fraud and misapplication of law. The Court should use Kostelnys' Motion to Vacate Pursuant to Fla. Rule of Jud. Admin.2.330(h) [now, 2.330(j)] which is the approved method to obtain a legally correct and just outcome.

HISTORY AND FACTS

In June 2015, six weeks after Kostelnys bought their home, lawyer Jerome Zivan ("Europco") wrote Kostelnys, claiming rights to enforce expired covenants in non-HOA plats in which he has no ownership. (A1.949¹) He claimed Kostelnys violated covenants by building a fence. Kostelnys live in unincorporated Okaloosa County. There's no HOA. Mrs. Kostelny, a realtor, knew MRTA had extinguished their plat's 1981 covenants. Zivan produced no document stating he, or adjacent golf course Bluewater Bay Resort ("BBR"), had rights over Kostelnys' home. Kostelnys were conformant with County laws and codes.

Zivan spearheaded and paid for an effort to revitalize the expired covenants. (A1.894-896) The effort failed. (A2.302-306) So, BBR/Europco

¹ References to Appendices are written as "A1" for Appendix Part 1, "A2" for Part 2, etc., followed by the page number.

sued Kostelnys claiming that Kostelnys' 47 foot fence blocked the retrieval of errant golf balls along the 120-foot boundary between BBR and Kostelnys; the fence impaired golf play; and that there existed an "implied easement...to allow for the play of golf." (A1.195,197-198, 202) The amended complaint mentions golf 110 times, and never mentions redevelopment. (A1.1607-1608, "golf" pleadings indexed.)

BBR/Europco alleged that a covenant prohibiting fences adjacent to the golf course was an "implied negative easement," thus qualified for extinguishment exception by means of §712.03, Fla. Stat., which preserves easements in use. BBR/Europco pled to "temporarily enter" Kostelnys' property for "the limited purpose of errant golf shots during play and retrieval of such shots." (A1.204 ¶34(c))

Unknown to the trial court or Kostelnys, after filing an amended complaint, and prior to their affidavits "for golf" and summary judgment motion, BBR and Europco each signed a State Development of Regional Impact (DRI) report, representing 100% BBR's golf course as developable raw land entitled to additional dwelling units in the DRI. (A1.1593,1596) The land reported as entitled to dwelling units included the area where golf balls were allegedly blocked by Kostelnys' fence.

BBR later testified 32 times the purpose of the suit was for golf,

golfers, and the game of golf. (A1.662-665) Europco testified 34 times in affidavit that the pled relief was “for golf.” (A1.491-494) But BBR/Europco’s real reason for the suit was to gain “implied” easement rights established by a court decree, because there are no true easements over Kostelnys’ property. Using private lands for stormwater dissipation gives BBR/Europco’s joint development venture more land for new homes. (A2.320, 715, 946) County Development Code 6.01.052 prohibits fences in lands used as stormwater dissipation. (A2.165-166) For BBR/Europco’s plan to succeed, Kostelnys’ fence had to be destroyed.

In April 2016, Kostelnys’ counsel moved for summary judgment, not informing Kostelnys it meant no material facts were in dispute. But in every pleading, there were disputes of fact. BBR/Europco filed a cross-motion for summary judgment. In hearing, Judge Stone created an ‘As I read it...’ interpretation, even though the word “fences” is not in the paragraph about building setbacks. (A1.1167, compare A1.214, Sec.5.) The parties’ counsel agreed there was no dispute in facts. (A1.1167) On leaving the courtroom that day, Judge Stone remarked to Mrs. Kostelny that this was the strangest lawsuit he’d ever seen.

Three months passed. The Court corresponded in favor of BBR/Europco. (A1.748) Four months later, BBR/Europco began harassing

Kostelnys about their backyard beekeeping hobby, and demanded Kostelnys' beehive be moved, and the Court enter the order to destroy Kostelnys' fence. (A1.786-787, A2.188, A2.200) BBR/Europco's counsel prepared a proposed order that altered the relief pled. The expanded final order was signed and entered by the court, exactly as crafted by opposing counsel. (A1.pp.794-796) It granted BBR/Europco architectural control over the rear 50 feet of Kostelnys' homestead, required Kostelnys to destroy their fence, and proclaimed Kostelnys' property was "subject to easements" – easements, plural and unspecified. The order does not even mention golf ball retrieval, which was the focus of the complaint.

Bell moved to withdraw as counsel, over Kostelnys' objection. Kostelnys wanted representation to somehow fairly adjudicate this. The Court granted the motion for Bell to withdraw. (A1.867-868) Kostelnys, shocked that a judge could grant previously unwritten rights over their home to strangers, believed there was a loophole in MRTA, not that the judge was prejudiced and erroneous. (A1.846-847) Kostelnys asked to stay the fence removal, in case amendment could be made legislatively to MRTA, and stop the legal pilfering of homeowners' property rights.

Within a few weeks, BBR worked with a local builder to re-grade the golf course to point-discharge stormwater onto the back of Kostelnys'

home. (A1.821-824) Kostelnys used an immense amount of manual labor to deflect water at the worst entry point, and negotiated with the builder to attempt redirect of inflow. BBR's stormwater encroaching on Kostelnys' land continues to be a chronic nuisance.

Two months later, Kostelnys discovered new evidence that would have changed the result of the trial. In an action styled *EFI v. Bluewater Bay Resort* (Okaloosa 2016 CA 186), a case also assigned to Judge Stone, EFI sued BBR to stop BBR's claim of developer rights for nine of BBR's 36 fairways. Developer-homebuilder Randy Wise Homes intervened. EFI included counts for civil theft, unjust enrichment, and conversion. So prior to final judgment here, Judge Stone knew of BBR/Europco's false claim of "development rights." (A1.1571-1573)

Following information in that docket, Kostelnys found that after BBR filed their amended complaint against Kostelnys, and before testifying in support of their summary judgment motion, BBR and Europco had each filed and certified the DRI declaring 100% of BBR's golf course was developable land - including the area where golf balls were allegedly "blocked" at the property boundary by Kostelnys' fence.

In 2015, Kostelnys had duly consulted a Senior County Planner to see if BBR had ulterior motives with the lawsuit. But the Senior Planner

wasn't privy to the State report. (A2.204-219) The true reason why BBR wanted Kostelnys' fence gone finally emerged. Prohibiting fences and obtaining a previously unwritten "implied" easement by court decree would allow BBR to bleed their development footprint onto adjacent parcels, allowing more impervious surface on 36 fairways which are mostly wetlands and lakes. These fairways already cause stormwater nuisance to dozens of adjacent homes. Per the 1977 regional Development Order's terms, each of BBR's fairways is burdened with 1992 recorded easements requiring BBR's land to carry stormwater away from all the surrounding plats. Impervious surface potential is reduced by BBR's obligation to manage additional stormwater. (A2.632-641)² BBR's engineer admits the easements must be accounted for in BBR's redevelopment. (A2.639)

Over time, BBR/Europco has persuaded dozens of homeowners to move fences in from property lines, because BBR/Europco claimed to "control" their properties. (A2.727-732) During this case, BBR/Europco sent emails to influence neighbors: BBR was ready to sue if homeowners did not yeild. In County Official Records, Zivan has filed hundreds of fictitious filings of "Developer Setback Variances" on the titles of homeowners. (A1.981-984)

² In 2021, a Notice of Preservation was properly filed in Official Records, to preserve these easements "in use."

Kostelnys filed a Fla. R. Civ. P. 1.540(b)(3) motion. The trial court denied it without hearing, and without seeing BBR/Europco's withheld DRI report. Time was tolled while Kostelnys appealed, asking the First District for an evidentiary hearing. (1D17-3711) The appeal was returned PCA.

Kostelnys made a successive 1.540 motion on November 19, 2018, including different evidence. Kostelnys propounded limited discovery: Did Randy Wise Homes, buyer/developer of nine of BBR's 36 fairways, have an interest in this Fence Blocks Golf Balls case? Kostelnys requested production of emails to neighbors, showing BBR/Europco intended to extend this ruling to other homes. Zivan had recently recorded yet another fictitious "easement" over the parcel next to Kostelnys. (A2.297-298) Judge Stone denied discovery, and assessed Kostelnys fees for Plaintiffs, despite being shown case law directing discovery before a 1.540(b) evidentiary hearing. (A.1731) Judge Stone pronounced "colorable entitlement to relief," and scheduled an evidentiary hearing four months ahead. (A1.1778, 1790)

Near the date, Judge Stone's judicial assistant had given away the hearing time. (A1.1792) In subsequent months, both parties requested to reschedule the evidentiary hearing, but without response. (A1.1793-1798) Meanwhile, Kostelnys filed a counter-suit for relief from BBR's stormwater nuisance, because flooding from BBR's land persists, and is eroding

Kostelnys' soils. (Okaloosa 2019 CA 618 F, *Kostelny v. Bluewater Bay Resort*) Kostelnys see their newly built patio cracking and tilting into sandy soils which are washed out during each flood event. BBR needs to fix their grading and clean out the drainage system. A decree that stormwater must be managed as the recorded easement directs, onto BBR's land, would defend against BBR/Europco's claim that Kostelnys' yard is a ditch for BBR/Europco's new plat.

BBR obtained a developer's license. (A2.244-246) BBR sold 50% interest in its lands to Randy Wise Homes (A2.265-293), and Kostelnys' request for admission on that point was revealed by fact. The golf course behind Kostelnys closed in October 2019. (A2.712-720) The *EFI v. BBR* case settled, with four of the nine HOA-landlocked fairways to be developed. BBR deeded an unbuildable section of fairway to the County, for a playground by a dangerous intersection where a child had died in a traffic accident the year before. (A2.719)

The *Kostelny v. BBR* stormwater nuisance case lagged a year in discovery objections. BBR's surveyor GCT told Kostelnys that GCT had been working out stormwater problems behind Kostelnys during the Fence Blocks Golf Balls case. (A2.397-400) In hearing on March 12, 2020, Steve Hall, BBR's development attorney (also counsel for BBR's development

engineer JPE) admitted having development documents for BBR's land behind Kostelnys home. In the hearing, BBR refused to deny Kostelnys' allegations that the Fence case was a setup to gain development rights over Kostelnys' home. Six days later, Judge Stone recused himself sua sponte. He had presided over this case for 4.5 years.

Kostelnys timely filed a Fla. R. Jud. Admin. 2.330(h) motion to vacate prior judgments and orders, and amend answers and affirmative defenses in light of the true facts. (A1.1898-2065) A successor judge recused himself. Judge Flowers was assigned and scheduled a hearing.

Kostelnys corresponded to the Court, requesting Covid-19 protocols for witnesses at their long-awaited evidentiary hearing. (A1.2072-2073) Kostelnys intended to call BBR's surveyor GCT and engineer JPE to testify that development plans were made while BBR/Europco were pleading "for the limited purpose of entry and retrieval of golf balls." (A2.751-765) Judge Flowers issued an order prohibiting witness testimony. (A1.2074-2075)

An evidentiary hearing was scheduled and noticed for July 22, 2020, also a hearing for the motion which is the subject of this appeal, together with BBR/Europco's multiple, threatening §57.105 motions. Judge Flowers aggressively interrupted and drilled Kostelnys with questions. (A2.435-437) Kostelnys asked for disqualification. (A2.555-569) The proceedings did not

conclude for a written motion. Kostelnys were not allowed to present their position. It was a cruel disappointment, because Kostelnys had waited **four years** for an evidentiary hearing, but the proceedings were a farce and a personal assault, and ended two hours early with Judge Flowers interrupting, "Mrs. Kostelny's finished." (A2.505 line 20) Within 48 hours, Kostelnys filed a disqualification motion. (A2.522-532) Judge Flowers entered an Order of Recusal. (A2.571) Opposing counsel wrote up proposed orders, again with expanded conclusions not uttered by the court, and emailed them to the JA. Kostelnys moved to re-hear. (A2.533-545)

Kostelnys filed a second 2.330(h) Motion to vacate Judge Stone's orders, also Judge's Flowers' order prohibiting witness testimony. (A2.572-642) Kostelnys moved to change venue with seven supporting affidavits of non-kin County homeowners. BBR/Europco filed a §57.105 sanctions motion on it. (A2.643-733) Two more judges were assigned and recused themselves. Hon. John T. Brown was assigned. On the morning of a case management conference, BBR/Europco filed a memo asking that their elaborated drafts of orders be signed. (A2.866-873) BBR/Europco's memorandum, filed later, begged that no evidentiary hearing be held that that would enter evidence into the record. (A2.869)

Judge Brown announced in email he would deny Kostelnys' 2.330(h)

Motion. (A2.895) Kostelnys requested the JA to schedule the already-filed rehearings of these motions. She refused, and proposed scheduling the sanctions motions. This prejudice prompted Kostelnys to move for disqualification. (A2.898-1025) Judge Brown granted disqualification, then entered the orders. Kostelnys discovered that during the July 22, 2020 proceedings, Judge Flowers was represented by opposing counsel Leslie Sheekley in his domestic HOA matter – a case from which he had recused himself. Also, Judge Flowers was landlord and former law partner of Plaintiff's development lawyer. And Judge Brown's father and Randy Wise's father were mayors together in neighboring towns. It's a small town. Kostelnys filed a second motion to change venue, and also a motion to release the audio recording of the July 22, 2020 proceedings.

On May 28, 2021, The Appellate Court relinquished jurisdiction to obtain a ruling on rehearing. BBR/Europco filed an opposition to rehearing. Kostelnys filed a reply, a memorandum in support, and a motion to calendar a hearing. BBR/Europco announced closure of nine more fairways - now a total of 27 fairways and driving range closed. (A3.393) The trial court held no further hearing, but denied rehearing. After the trial court denied rehearing both Kostelnys' 1.540(b)(3) motion, and 2.330(h) motion, BBR/Europco released predevelopment drawings for the Lakes course –

except for the area behind Kostelnys' home, which they say will remain a park 'for now.'

In the six-year history of this case, four of six Okaloosa Circuit Judges have recused themselves; two more are disqualified on Kostelnys' motions; the case is now in County court. Successor Judge Ward denied rehearing without a hearing. The only instance a court ever allowed time to discuss merits of this case was 40 minutes on September 18, 2016.

SUMMARY OF THE ARGUMENT

Kostelnys' Motion to vacate prior rulings, timely made after the sua sponte recusal of Judge Stone, should have been granted. This case is an abuse of process. BBR/Europco perpetrated fraud on the court by alleging false facts, presenting false testimony, and by withholding material information from the trial court and from Kostelnys. These issues have never been properly judged. The case must be tried on the true merits.

There was judicial misapplication of §712., Fla. Stat. There was enlargement on the plain language of the expired covenants, and the summary judgment order grants easement rights that were not pled. There was dissent in material facts, and summary judgment was inappropriate.

Kostelnys' counsel made not just tactical errors but also failures of

fiduciary duty, including having a conflict of interest.

The successor court's prohibition of witnesses at an evidentiary hearing, and its hostility toward Kostelnys during hearing of the motion denied and appealed here, shows prejudice. The issues were never truly judged in a bona-fide hearing. The motion is legally meritorious, and the prior judgments must be vacated. Kostelnys are owed due process, and should have an opportunity to amend answers and defenses in light of new information on BBR/Europco's false allegations, withheld documents, and true intent in bringing this action.

STANDARD OF REVIEW

A Motion to Vacate Judgment pursuant to Fla. R. Jud. Admin. 2.330(h) examines the legal correctness of the ruling. This case involves Plaintiffs' claims based on §712.03, Florida Statutes, presenting a question of statutory interpretation, properly reviewed de novo. - *Dept. of Transp. v. Clipper Bay Investments*, 160 So. 3d 858, 862 (Fla. 2015), *Sancho v. Smith*, 830 So.2d 856, 861 (Fla. 1st DCA 2002).

Summary judgment error of a recused judge is an issue of law. "Summary judgments present a classic example of the type of decisions that are subject to the de novo standard of review." Philip J. Padovano, Florida Appellate Practice 148 (2nd ed. 1997)

BBR and Europco claim rights to enforce a declaration of covenants in Kostelnys' plat. "Review and interpretation of the Declaration's language is de novo." – *Roebuck v. Sills*, 306 So.3d 374 (Fla. 1st DCA 2020).

ARGUMENT ON APPEAL

Modification or reversal of a predecessor judge's order is justified when there is error of law or "there exists some special circumstances such as mistake or fraud upon the court." - *Berrien v. State*, 189 So. 3d 285, 287 (Fla. 1st DCA 2016), citing *Blitch v. Owens*, 519 So. 2d 704, 705 (Fla. 2d DCA 1988).

I. BBR/EUROPCO'S FRAUD ON THE COURT MUST NOT BE TOLERATED.

1. BBR/Europco Made False Allegations and Representations.

1A. BBR/Europco Falsely Claimed Unity of Title. No unity of title ever existed between Kostelnys' parcel and BBR's parcel. Kostelnys parcel was platted in 1981. Kostelnys discovered later that BBR's parcel was created in 1992 by lands consolidated by various developers. Mr. Zivan wrote to County Commissioners in 2015, informing the Commissioners that BBR was never a developer in the region, and BBR's land was created by pooling lands held by the various development entities. (A3.356) Mr. Zivan

former employer was involved with the developers and investors in the regional development. A few months later, Zivan represented the exact opposite to the trial court. (A1.23, A1.188, A1.196 ¶4, A1.197 ¶9, A1.201 ¶23, A1.202 ¶26, A1.203 ¶33)

1B. BBR/Europco Falsely Claimed Rights to Enforce SAN Covenants.

This lawsuit is a malicious prosecution. Neither BBR nor Europco ever owned any property within the SAN Plat. Neither BBR nor Europco ever had standing to enforce covenants, bring an action for SAN covenant enforcement, or benefit from SAN covenants. Neither BBR nor Europco were party to the contract of covenants for SAN Plat. Contracts are distinguished from easements. “An easement...is essentially an inherently legal interest in land, as distinguished from a restriction resulting from a restrictive covenant, which is but a creature of equity arising out of contract.” - *Homer v. Dadeland Shopping Center, Inc.*, 229 So. 2d 834 (Fla. 1969). “The [Bay Harbor Islands] Court concluded that the better view was that restrictive 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).

“[In Bay Harbor Islands,] we found that the better view (and the emerging trend) is that restrictive 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).

“[R]estrictions of the kind we are concerned with here . . . convey no interest in the land, are not true easements, and at best may be relied upon and enforced between the parties thereto and their successors with notice.” - *Board of Public Instruction v. Town of Bay Harbor I*, 81 So. 2d 637, 642 (Fla. 1955).

No document was presented that BBR/Europco hold rights over Kostelnys’ property. “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).

SAN Covenants were never intended to benefit an adjacent subdivision. The covenants were established for the benefit ONLY of co-owners in the plat. - *Cf. Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 307, 309 (Fla. 2nd DCA 1966).

1C. BBR/Europco Falsely Claimed “Developer Rights” to Issue “Setback Variances.” BBR/Europco is fully aware that developer rights

did not pass along to a golf course from the developer of Kostelnys' Lot, (BBDC) who had sold all SAN lots by March 1983. (A3.359) Development rights don't convey with fee simple title. - *Howard v. Murray*, 184 So. 3d 1155 – (Fla.1st DCA 2015). The owner of Kostelnys' Lot was not a signatory of the 122-page Agreement attached to the complaint. Rather, that Agreement documents BBDC and BBR are grantors of drainage and utility easements to Kostelnys' Lot, running “over, on, through and across” BBR's land for the flow of waters from the subdivision. (A1.257-258, 332) No rights were subtracted from Kostelnys' lot by that document.

1D. BBR/Europco Falsely Claimed Covenants Were Excepted From Extinguishment by §712.03, Fla. Stat., and were dedicated for BBR/Europco's benefit.

1D(i). MRTA extinguished SAN covenants in 2011. Additionally, at Section 34, SAN covenants state an expiration on January 1, 2029. A contract of covenants with an expiration date cannot give easement rights in perpetuity to a neighboring parcel. SAN covenants' only reference to the golf course is a prohibition on residents entering the golf property, except when registered for golf play. Even if the SAN Declaration was still effectual, “[C]ovenants are strictly construed in favor of the free and unrestricted use of real property. ...The expressed intent of the parties is

the controlling factor. Intent unexpressed will be unavailing, and substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant.” – *Cf. Hagan v. Sabal Palms, Inc.*, *ibid.* See also, *Dorsey v. Robinson*, 270 So. 3d 462 (Fla. 1st DCA 2019); decades of residency in a mobile home located on the land does not constitute an exception to extinguishment under §712.03.

1D(ii). At Section 32, SAN Covenants state they can be amended by the owners in the Plat. While effective, a vote could have eradicated any of the covenants, including the fence prohibition BBR/Europco seeks to enforce.

1D(iii). SAN Covenants were deemed extinguished and unrenewable by 2015 Administrative Order DEO-15-182 of the Fla. Dept. of Economic Opportunity. No special exceptions were made regarding fences.

1D(iv). To preserve an easement, a person must actually have an easement in the first place. Florida Supreme Court at *H & F Land v. Panama City-Bay County Airport and Industrial District*, 763 So.2d 1167-1178 (Fla. 1999), provides ample explanation to nullify any claim that an exception to covenant extinguishment could survive without a recorded Notice of Preservation. All easements, even those held under §712.03,

require preservation within 30 years. No such preservation notice appears in the 30-year chain of title to Kostelnys' lot. At 1172-1173 in *H & F Land*:

“A core concern of MRTA was that there be no "hidden" interests in property that could be asserted without limitation against a record property owner. In other words, MRTA shifted the burden to those claiming "any claim or interest" in property to come forward in a timely fashion and assert that interest publicly. Creating judicial exceptions to this comprehensive legislative scheme would undermine the core purpose of MRTA of providing stability to property law by requiring that all claims to an interest in property be recorded.”

...“The Marketable Record Title Act is also a recording act in that it provides for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished.”

1D(iv). 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.” BBR/Europco were never in possession of the lands subject to SAN covenants, and had no preservation rights under §712.03(3), Fla. Stat.

1E. *BBR/Europco falsely claimed Kostelnys' fence blocked golf balls.*

It did not. However, scrub brush on BBR's side of the property line did block golf balls on the part of the course known as the “Rough.” (A1.767-

775) Golf is played on the fairways. The Rough is out of bounds for play. Private property such as Kostelnys' home is not used for golf play.

Aside from not being finished (3), all elements of malicious prosecution action are present here: (1) an original criminal or civil judicial proceeding against Kostelnys was commenced; (2) BBR/Europco was the legal cause of the original proceeding against the Kostelnys as the defendant in the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of BBR/Europco; (4) absence of probable cause for the original proceeding; (5) [legal] malice on the part of BBR/Europco; and (6) the Kostelnys suffered damage as a result of the original proceeding. - *Burns v. GCC Beverages, Inc.*, 502 So.2d 1217 (Fla. 1986).

2. BBR/Europco Withheld Material Evidence Dispositive to the Case.

When information is deliberately withheld, trial courts have the duty to protect the function, dignity, and integrity of the judicial system - *Tramel v. Bass*, 672 So. 2d 78, 83, (Fla. 1st DCA 1996).

"It is the rule in this state that a new trial should be granted on the ground of newly discovered evidence if "supported by a showing that neither the plaintiff nor his attorneys were at fault in securing the evidence, and that it was material to the issue and not cumulative, and was of such character as that if believed by the jury would have

necessitated a different result.” - Ogburn v. Murray, 86 So.2d 796 (Fla. 1956). “[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. (citations omitted) - *Kline v. Belco, Ltd.*, 480 So. 2d 126 (Fla. 3rd DCA 1985).

2A. Plaintiffs Withheld Development Intent and Feasibility Studies.

When this Complaint was filed, attorneys Steve Hall and Jesse Rigby were also working with Plaintiffs to analyze development potential of BBR’s fairways. (A3.344-350) Later, in a hearing for the action to abate stormwater nuisance on Kostelnys’ parcel, Steve Hall admitted to development drawings adjacent to Kostelnys’ home and claimed “work product” privilege. Six days later Judge Stone recused himself.

2B. Plaintiffs Withheld Development Report to the State. Three weeks after BBR/Europco filed their amended complaint, and before testifying in support of their summary judgment motion, BBR and Europco each filed a development report to the State of Florida. (Exhibit at A1.1580-1605; Argument at A1.1564-1567.) BBR and Europco designated themselves "Developers." It was certified and signed both by Tom Hanks, affiant for BBR, and by Jerome Zivan, affiant for Europco. BBR and Europco did not disclose to the State DEO that a golf course already exists on that land,

and actually “RE-development” was required, because the fairways already serve as watersheds for the adjacent residential plats. Withholding that report suppressed vital information dispositive to the case. A failure to notify constitutes misconduct of an adverse party. - *Crowley v. Crowley*, 678 So. 2d 435, footnote (Fla. 4th DCA 1996).

3. BBR/Europco Each Testified in Bad Faith.

Five months after Plaintiffs reported their redevelopment plans, BBR/Europco filed a summary judgment motion which mentioned golf 129 times, emphasizing the purpose of lawsuit and relief pled was “for golf.” (A2.134-135) BBR/Europco had ample time to notify the court of changes planned for BBR’s land use. Instead, Plaintiffs testified to the contrary. Europco's affidavit describes in detail how Kostelnys’ 47-foot fence blocks the play of golf and interferes with BBR's golf business. He mentions golf 34 times. (A1.491-494) BBR’s affidavit states 32 times that the purpose of the suit was for golf, golfers, or the game of golf. (A1.662-665) These affidavits were not in good faith.

Fla. R. Civ. P. 1.150(g).

(g) Affidavits Made in Bad Faith. If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court must immediately order the party employing them

to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

On October 18, 2016, in BBR's Memorandum after the hearing, details from BBR/Europco's affidavits, and the lawsuit's purpose of golf, were referenced and repeated.

When previous testimony is contrary to what is presented at a subsequent trial, it is intrinsic fraud. "[I]n such a situation the due diligence requirement is relaxed so that "a party is not required to anticipate false testimony from the opposing party and, therefore, is not required to discover evidence that would refute the false testimony.'" - *Dynasty Express Corp. v. Weiss*, 675 So. 2d 235 (Fla. 4th 1996). See also, concurring opinion in *Metropolitan Dade County v. Martinsen*, 736 So. 2d 794, (Fla. 3rd DCA 1999).

Perjury and fraud upon the court are unacceptable. *Alston v. Shiver*, 105 So. 2d 785 (Fla. 1958), speaks of the "court's and the public abhorrence of false testimony." At *Parker v. Parker*, 950 So. 2d 388 (Fla. 2007): "false misrepresentation ... constitutes intrinsic fraud." *Parker*, at 391, cites to *DeClaire v Yonahan*, 453 So.2d 375 (Fla. 1984): "Intrinsic fraud... applies to fraudulent conduct that arises within a proceeding and

pertains to the issues in the case that have been tried or could have been tried. This Court . . . has expressly held that false testimony given in a proceeding is intrinsic fraud.”

“The integrity of the civil litigation process depends on the truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way.” - *Robinson. v. Weiland*, 988 So. 2d at 1113 (Fla. 5th DCA 2008). For lawyer Mr. Zivan, his affidavit also violates American Bar Association’s Rule 3.3 Candor Toward the Tribunal. Kostelnys brought this to the attention to the trial court. (A3.276)

4. BBR and Europco Colluded in Extrinsic Fraud Against Kostelnys.

DeClaire, *ibid.*, holds, “[T]his Court has defined extrinsic fraud as the prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; ... ignorance of the adversary about the existence of the suit or the acts of the plaintiff...and so on.” BBR /Europco withholding facts, and the decoy pleadings “for golf” is extrinsic fraud upon Kostelnys. Misrepresentation and concealment of the true facts is fraud. - *Winston v. Winston*, 684 So. 2d 315 (Fla. 4th DCA 1996).

Kostelnys assert that when Plaintiffs certified over their signatures to Fla. DEO that their land was future development area entitled to additional dwelling units allocated to the DRI, BBR/Europco were at that point estopped from making claims against Kostelnys' property to benefit "golf." "Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position[.]" - *Fla. Dep't of Health & Rehab. Servs. v. S.A.P.*, 835 So.2d 1091, 1096 (Fla. 2002) (citation omitted). "The elements of equitable estoppel are `(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.'" - *Curci Village Condo. Ass'n v. Maria*, 14 So.3d 1175, 1177 (Fla. 4th DCA 2009) (quoting *State v. Harris*, 881 So.2d 1079, 1084 (Fla.2004)).

At *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."

A party seeking to establish fraudulent misrepresentation is required

to prove the following elements: (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).

5. This Action is an Abuse of Process.

Because BBR's purpose for the suit was really development advantage, they crafted the Final Order to state the real intent of the suit. Instead of writing the order so BBR could enter Kostelnys' property "for the play of golf and retrieval of golf balls," the form order declared Kostelnys' property was "subject to easements" – plural, and unspecified. It also granted authority for BBR/Europco to create "setback variances." This immediate alteration of the purpose of the Complaint, the Affidavits, and the summary judgment motion shows conclusively that the action is an 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. (citation omitted) 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 Ftn. 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).

BBR/Europco immediately used, and continues to use, this civil process for a purpose other than that for which it was designed. Prior to the recording of the summary judgment in April 2017, BBR/Europco pled the court to force Kostelnys to relocate a beehive in their rear yard. (A.786-787) A.1767-1776) A few weeks after the summary judgment order, BBR worked with a local builder to re-grade the golf course to point-discharge water onto Kostelnys’ lot. Kostelnys reported this to County Public Works, and informed the Court of it during a hearing on their motion to stay the

destruction of their fence. (A1.2046-2047, A1.821-824) In September 2017, Mrs. Kostelny witnessed surveyors at work on the course behind their property. GCT Surveyors told Mrs. Kostelny they had been working on the stormwater problems. (A2.397-399) JP Engineering has documents related to stormwater management in the area pled to remain unobstructed “for golf.” (A2.750-753)

BBR/Europco sent widely-circulated emails to many neighbors, announcing BBR/Europco had prevailed here, and fences were not allowed in rear yards of properties which had not even been parties to the litigation. (A1.295-298) In 2020, Zivan wrote in a local online forum that the drainage easement is reversed from its true direction. (A2.308) In March 2021, BBR’s counsel wrote Kostelnys, stating that Kostelnys were being watched and suspected of building a fence along their side boundary; in reality, Kostelnys installed a flower bed border and birdhouse.

BBR’s intent is to use the decree pled for golf balls as a basis to use Kostelnys’ land for stormwater drainage. Kostelnys spoke with County Attorney who said it was a civil matter and the court should decide if Kostelnys’ land can be used. In *Kostelny v. Bluewater Bay Resort*, 2019 CA 618 F: Docket #230, Page 4, ¶50(sic), BBR claims, “In a ruling by the Court in a related matter, such easement is valid under MRTA.” In the

June 23, 2021 hearing on that motion, BBR insisted the ruling here establishes that BBR has a drainage easement over Kostelnys' land...even though (1) drainage was never addressed in this case, and (2) the easement recorded at OR Book 1648, Page 2068-2069, 2143 grants Kostelnys' lot drainage rights the opposite direction - *over BBR's land*.

6. Circumstantial Evidence Shows Conspiracy for Fraud.

In 2019, BBR/Europco publicly stated they were losing \$100,000 per year keeping the course open. (A2.258) Yet BBR/Europco brought this costly litigation against Kostelnys, claiming “injury” from Kostelnys’ 47-foot-long fence. (A2.220-221) County Land Development Code 6.01.052 prohibits fences in lands used as stormwater dissipation for new plats. (A2.915-916) Kostelnys’ fence had to be removed for BBR/Europco to effect their scheme. Obtaining a previously unwritten “implied” easement by court decree would allow BBR to bleed their development footprint onto adjacent parcels, allowing more impervious surface – and buildable lots – on 36 fairways which are mostly wetlands and lakes.

After the trial court denied rehearing, BBR/Europco applied for land use change at other Lakes Fairways, and released engineering schematics. Most of the Lake Course’s ponds were deeded to a shelter corporation of co-owner Randy Wise Homes, possibly since many adjacent

homeowners chronically suffer flooding from BBR's surface water. The County and FEMA contributed to a phased ~\$465,000 project to mitigate the flooding on the east half of the Lakes Course. BBR/Europco is threatening other neighbors based on this lawsuit, so that neighbors also relinquish property rights, and allow BBR to use adjacent lands for stormwater drainage because of a fictitious "easement." (A1.1239-1241, A2.294-298, A2.1019) The neighbors are willing to testify to this.

The circumstantial evidence adds weight to the already-convincing burden of 50% probability. "[E]vidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." - *Mitchell v. State*, 306 So. 3d 255, 258 (Fla. 3rd DCA. 2020).

The trial court should have carefully scrutinized all this circumstantial evidence. A trial court abuses its discretion in refusing to consider newly discovered and potentially material evidence that could not have been discovered earlier. - *Blue v. Blue*, 66 So. 2d 228, 229-30 (Fla. 1953); also, *Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc.*, 586 So. 2d 482 (Fla. 4th DCA 1991). "[C]ourts must deal firmly and publicly with a litigant's fraud on the very judicial system the litigant asks to render justice. Over 2,000 years

ago, Roman law recognized the deterrent effect of harsh penalties in the phrase “Ut poena ad paucos, metus ad omnes perveniat”—“That punishment may come to a few, the fear of it should affect all.” - *Willie-Koonce v Miami Sunshine Transfer and Tours Corp*, 233 So.3d 1271 (Fla. 3rd DCA 2017). Fraud should never be swept under the rug.

7. BBR/Europco Oppose Relief, Even With a Closed Golf Course.

BBR/Europco’s complaint alleged an “easement is necessary for the operation of the Lake Golf Course by RESORT OWNER [BBR].” (A1.203 ¶133) Although BBR got an easement through fraud on the court, that didn’t keep the Lakes course open; it closed in October 2019. (A2.725) Kostelnys’ future fence won’t block golf balls, and for that reason alone, BBR/Europco shouldn’t oppose ending litigation by vacating the orders.

Zivan has held meetings to ‘warm up’ local residents to redevelopment. (A2.251-259) BBR and Europco are now a joint venture to redevelop BBR’s golf course properties. (A2.946) The golf clubhouse and driving range were rezoned commercial/residential. (A2.320) Kostelnys’ property is no longer classified as “SFR Golf” by Okaloosa County Tax Assessor, but now, simply as “SFR.” (A2.909-911) Civil litigation requires that just over a 50% probability is sufficient to establish the pleader’s argument. The facts here give ample evidence that BBR/Europco, now

“Bluewater Bay Development Venture” or “BBDV” (A2.946) are fighting long and hard to keep Kostelnys' fence down, even though it no longer “blocks golf.” The golf “injury” was a sham pleading. BBR/Europco is hanging on to the order they crafted, which grants plural and unspecified easements over Kostelnys’ property.

“[A] party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [its] ends.” - *Metropolitan Dade County v. Martinsen*, 736 So. 2d 794, (Fla. 3rd DCA 1999).

II. THE TRIAL COURT ERRED AS A MATTER OF LAW.

8. **The Trial Court Erred in Creating New Unspecified Easements.**

8A. Florida’s Statute of Frauds requires easements to be in writing. - 20 Fla. Jur. 2d Easements §§ 16–24 (2014) and *Branscombe v. Jupiter Harbour, LLC*, 76 So. 3d 942, 947 (Fla. 4th DCA 2011). There’s no evidence of an easement over or on Kostelnys’ parcel mentioned on any deeds in Kostelnys’ chain of title, or in official records, or on the SAN Plat drawing, or on the survey of Kostelnys’ lot, or agreed between the parties.

8B. The face of SAN Plat states all easements in the plat are dedicated to the public. It does not state any easements are reserved. It

does not say easements conveyed to the public can later be taken back, and conveyed to a segregate parcel of land created in 1992.

9. Section 712.10, Fla. Stat. is to be “Liberally Construed.”

Correctly applying MRTA required the court to determine that the SAN covenants were extinguished, exactly as did Fla. DEO in Final Order DEO-15-182. (A2.302-306) “The purpose of MRTA is to extinguish 'stale' restrictions on real property; those that are more than 30 years old, measured from the 'root of title.' ” – Leslie D. Sheekley (counsel for BBR/Europco), *New Laws to Preserve and Revive HOA Covenants*, Hand Arendall Harrison Sale Client Alert, July 2, 2018.

SAN Covenants were recorded in advance of the Plat, and aren't listed by Book and Page on deeds in Kostelnys' chain of title; they're mentioned only by general reference. “[M]any deeds to single-family homes/lots contain only a general reference to covenants and restrictions of record, and therefore don't qualify for an exception to extinguishment.” – Leslie D. Sheekley, *New Laws to Preserve and Revive HOA Covenants*, *ibid*.

10. Covenants Do Not Support Easements For Lands Not in the Plat.

The SAN Covenants at O.R. Book 1111, Page 1131 et. seq. make an opening statement at Section 1:

“(1) SINGLE FAMILY RESIDENCE ONLY. No structure shall be erected, altered or permitted to remain on any lot in Subdivision other than for use as a single family residence. The main residence on each lot shall be not more than 35 feet in height above the normal surface of the ground. No building situated on any lot shall be rented or leased separately from the rental or lease of the entire property, nor shall any property be leased for use other than as a single family residence. **Nothing herein contained shall be construed to permit any lot owner to use any lot** for road purposes or **as an easement to any lands not contained within the Subdivision.**” (emphasis added)

In the SAN Covenants’ *first declared terms*, this dictum prohibits any lands “not contained within the Subdivision” from using any SAN lot as an easement. BBR’s land is “not contained within the Subdivision.” Kostelnys’ Lot 17 cannot be used as an easement to BBR’s land.

11. Dissent in Material Facts Precluded Summary Judgment.

BBR/Europco testified that Kostelnys’ fence blocked golf balls. BBR/Europco alleged golfers could enter Kostelnys’ property and held an “implied easement.” BBR/Europco alleged fences were “meant” to be included in the paragraph which described building setbacks.

Kostelnys denied BBR/Europco’s allegations and insisted no document allowed strangers to enter their home’s grounds. Kostelnys

testified the fence did not block golf balls. Kostelnys pointed out the plain language of the covenants, and that the word “fence” was not in the Covenants’ building setbacks paragraph. Kostelnys denied there was an implied easement, and denied existence of any document or law from which an “implied negative easement” could be derived. There were multiple, repeated dissents in the material facts. Yet during the hearing, counsel mistakenly agreed there was no dispute in facts.

It was judicial error when the prior court stated, “[Section] five, as I read it defines a fence as a structure. And I know there are some restrictions that say that a fence is not a structure, it's just depending upon how the language is written. And I was just sort of addressing what I heard from Mr. Bell, was that fences are different than structures but, as I read these covenants, they're not.” (Compare, A1.1922 and A1.215 ¶5.)

A trial court should not interject words into a contract when plainly absent. The word “fence” does not appear in the paragraph regarding Setbacks in the subdivision, nor is there a designation that fences are a permanent structure that is governed by setback requirements, as a house is. “Restrictive covenants are to be strictly construed in favor of the landowner and the free use of his property.” - *Moss v. Inverness Highlands Civic Ass'n*, 521 So.2d 359 (Fla. 5th DCA 1988). “To impute such a

restriction” as the prior court did here “would cut against the principle that such restraints are not favored and are to be strictly construed in favor of the free and unrestricted use of real property.” – *Leamer v. White*, 156 So.3d 567, 572 (Fla. 1st DCA 2015) (citation omitted).

The need for the court to adhere to the specific language in covenants is particularly important where the use of owner’s use is common and predictable, such as fencing one’s backyard. If the contract of covenants didn’t say it, the court shouldn’t add it. The trial court thus added to the dissent in facts, and weighed evidence without a bench trial. In summary judgment, a court may not resolve questions of fact, resolve conflicts in testimony or evidence, or enter judgment on disputed inferences drawn from the evidence. - *Burroughs Corp. v. American Druggist’s Insurance Co.*, 450 So.2d 540 (Fla. 2nd DCA 1984).

A judge is tasked with taking charge of the assigned case with due process, and applying the law. “[I]f the evidence *raises the slightest doubt* upon any issue of material fact, if it is conflicting, if it will permit of different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.” - *Crovella v. Cochrane*, 102 So. 2d 307, 310 (Fla. 1st DCA 1958). “[I]f there are issues of fact and the *slightest* doubt remains, a summary judgment cannot

be granted. - *Williams v. City of Lake City*, 62 So. 2d 732, 733 (Fla. 1953) (emphasis original). Further, where conflicting inferences may reasonably be adduced from the evidence, even where the evidence itself is not in conflict, a motion for summary judgment should be denied. - *Booth v. Mary Carter Paint Company*, 182 So. 2d 292, 297 (Fla. 2nd DCA 1966).

12. The Trial Court Did Not Edit the Proposed Order to Relief Pled.

The trial court made no oral decision after a 40-minute summary judgment hearing and a request for supplemental memoranda. Instead, the court simply corresponded with a ruling in favor of BBR/Europco (A1 .748) Injustice occurred in the wording of the Final Order, composed by opposing counsel, unchanged by the Court, which grants more than the complaint's plea for relief “for golf.” Opposing counsel wrote that Kostelnys’ lot is “subject to easements” – plural and unspecified. Golf balls and the game of golf are not mentioned.

In reviewing the proposed order, Judge Stone should have seen red flags. He presided also in *EFI v. BBR/Randy Wise*, Okaloosa 2016 CA 186F, a concurrent case litigating BBR/Europco’s tortious attempt to gain unwritten rights. Judge Stone has an L.L.M. in real estate real estate law; he knows after BBDC conveyed all SAN Plat titles in fee simple to subsequent owners, BBDC had no unrecorded “implied” residual rights 32

years later. BBDC could not convey to BBR/Europco that which it did not own. Signing an Order granting BBR/Europco developer rights to control setbacks was erroneous. And the Order posed as if the court had made a finding of facts, when no facts were tried.

“Although a trial court may request, as it did in this case, that counsel for both parties submit a proposed final judgment, the court may not adopt the judgment verbatim, blindly, or without making in-court findings.” *Rykiel v. Rykiel*, 795 So.2d 90, 92 (Fla. 5th DCA 2000), quashed on other grounds, 838 So.2d 508 (Fla. 2003). The appearance of impropriety exists when the trial judge adopts verbatim one party's one-sided final judgment, especially where the judge did not orally announce findings or rulings during or at the end of trial. The possible impropriety is that the trial judge may be perceived to have delegated his decision-making authority to ...[one party's]... counsel because it does not appear that the judge independently made factual findings and legal conclusions.” - *West v. West*, 228 So.3d 727 (Fla. 5th DCA 2017).

As at *West*, “the potential harm in verbatim adoption of one party's proposed judgment was compounded here because the final judgment contains numerous errors, including many findings that are not supported by competent substantial evidence in the record.” - *Corp. Management Advisors v. Boghos*, 756 So 2d 246, 248 (Fla. 5th DCA 2000).

At *Ross v. Botha*, 867 So. 2d 567, 572 (Fla. 4th DCA 2004): “It is. . .

difficult to believe, on such fact-intensive issues as presented here, that an attorney can be so omniscient as to the court's findings that they could be entirely correct without a single edit where the court made no rulings in open court. ... Unfortunately, proposed orders prepared by one side are frequently one-sided as to findings and rulings." A proposed final judgment by a party should be used as a starting point, but cannot "substitute for a thoughtful and independent analysis of the facts, issues and law by the trial judge. ... The practice of entering verbatim orders without an editing change is frowned upon, since there is an appearance that the judge did not exercise his or her independent judgment in the case." – *Perlow v. Berg-Perlow*, 875 So.2d 383, 389-390 (Fla. 2004).

13. The Prior Court Did Not Accept a Pro Se Pleading as to Intent.

Kostelnys' motion made on October 16, 2017 was, in substance, a successive 1.540(b)(3) motion attempting to show the court evidence of the abuse of process, and fraud on the court. After the prior court denied [newly *pro se*] Kostelnys' first 1.540(b) motion, Kostelnys received poor legal advice and tried to enter evidence under the wrong kind of motion. If the exact same pleading had been presented under the title "Second Motion for Relief per Rule 1.540(b)," it wouldn't have been sanctioned. "[P]ro se pleadings are entitled to liberal construction." - *Eichelberger v.*

Brueckheimer, 613 So. 2d 1372, 1373 (Fla. 2nd DCA 1993). “A pleading will be considered what it is in substance, even though mislabeled.” - *Estate of Willis v. Gaffney*, 677 So. 2d 949 (Fla. 2nd DCA 1996). “The character of a motion will depend upon its grounds or contents, and not on its title.” - *Jones v. Denmark*, 259 So.2d 198, 200 n. 1 (Fla. 3rd DCA 1972). “[A] pro se litigant and his pleadings should be liberally construed.” - *Chancey v. Chancey*, 880 So 2d 1281, 1282 (Fla 2nd DCA 2004).

BBR/Europco’s §57.105 motion against this pleading, sent to Kostelnys with the 21-day safe harbor letter, was not sufficient specific to identify any reason why Kostelnys’ motion could be sanctionable. The standard requires that a party be given notice of the cause for sanctions. Of course, an opposing party need not give legal advice. However, the nature of the error must be stated so that the party, if in honest error, may remedy or withdraw the pleading. Otherwise, the safe harbor letter is useless. In this instance, the §57.105 motion needed only to state, “Attorney fees were not pled in Answers and Affirmative Defenses and Kostelnys’ motion is not timely.” One sentence only; then Kostelnys could have amended the pleading if they were adequately notified; but BBR/Europco’s October 6, 2017 sanctions motion served 21 days in advance was not legally sufficient. The prior court prejudicially granted that sanctions motion.

14. The Trial Court Erred in Denying Discovery and Testimony.

On January 19, 2020 the court pronounced a colorable entitlement to relief, but denied any discovery prior to an evidentiary hearing. (A1.2063) Then it assessed fees for Plaintiff against Kostelnys for bringing a discovery motion. This is unjust. There is ample precedent for discovery prior to an evidentiary hearing. Kostelnys expected an unbiased court to allow confirmation of the true facts. “If the allegations in the moving party's motion for relief from judgment raise a colorable entitlement to ... relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.” - *Dynasty Express Cmp. v. Weiss*, 675 So. 2d 235, 239 (Fla. 4th DCA 1996) (emphasis added). It “works an injustice” to deny discovery which confirms misconduct and perjury.

Later, Judge Flowers prejudicially forbade further discovery and prohibited testimony at the evidentiary hearing on July 22, 2020. (A1.2075-2075); he neglected to have a clerk present to accept and enter evidence; he waved away competent, substantial evidence of Kostelnys' claims and defenses. Trial and appellate courts base sound judgments on the very information Judge Flowers excluded. Any trial court exceeds its jurisdiction when it deliberately denies due process. The purpose of the evidentiary hearing is to work out and arrive at the truth of the controversy, and to

examine the law that bears on the prior judge's rulings. "[W]hen presented with a prior interlocutory ruling that is based on a clearly mistaken interpretation of the law it is indeed appropriate for the succeeding judge to vacate or modify the prior order." - *Russ v. City of Jacksonville*, 734 So.2d 508, 511 (Fla. 1st DCA 1999). Judge Flowers was unwilling to listen to anything. A question presented is, "How can any matter be justly resolved without the clarity of discovery?" No discovery whatsoever has been allowed for Kostelnys' claims and defenses against BBR/Europco's fraud. The only discovery propounded was April 11, 2016 when Plaintiffs were requested to admit six questions on Kostelnys' fence blocking golf balls. All other information has been compiled by Kostelnys who wish for the rulings to be vacated, to be left in peace without BBR/Europco's surveillance and interference, to clear the slander on their property's title, and for themselves and other neighbors not to be injured by this abuse of process.

III. KOSTELNYS' COUNSEL FAILED IN FIDUCIARY DUTY

14. **Conflict of Interest.**

Kostelnys' counsel Keith Bell was appointed by Kostelnys' title insurer, Fidelity National Title Group. For insurance coverage, Kostelnys had to accept Fidelity's choice of counsel. Mr. Bell neglected to thoroughly check conflicts of interest, which would have revealed that BBR was

already working with development attorney Jesse Rigby at his same firm, Clark-Partington. (A1.1575, A2.99)

15. Errors and Neglect.

Bell neglected to set for hearing the Motion to Dismiss prepared by Kostelnys' previous attorney, showing BBR/Europco had no standing to bring the case. (A1.184-192) Kostelnys thought the court had rejected the Motion to Dismiss (including the facts that BBR/Europco never had ownership, financial interest, unity of title, or covenant enforcement authority), and BBR/Europco could sue anyway. Kostelnys have Bell's work proposal to Fidelity, which *did* include arguing the Motion to Dismiss, but the work was not performed. Sadly, by not challenging BBR/Europco's standing to bring the case in the first place, the issue was waived.

Bell refused Kostelnys' request to properly inform the court of BBR's stormwater nuisance on Kostelnys' property with an affidavit, but told Kostelnys to file a factual statement. (A1.767-784) Bell didn't plead for fee recoupment, which injured Kostelnys financially. He made no counterclaim. (A1.443-447, A1.767-784) Bell didn't make certain defenses, but this may not have mattered in a prejudiced court that already had decided to add the word "fences" to paragraph five of SAN covenants. Local lawyers whom Kostelnys consulted later said later Bell was "hometowned" or

“homeschooled,” since Bell primarily practices in Tallahassee.

Kostelnys had no idea of how lawsuits worked, and Bell didn't educate them on their options. Kostelnys expected a jury trial – hopefully a panel of homeowners who recognized this as an assault on privacy and quiet enjoyment. Bell simultaneously moved for summary judgment and filed only six requests for admission; it was unwise to move for judgment prior to discovery. When Bell agreed in hearing that there were no material facts in dissent, it did Kostelnys a great disservice. When the trial court corresponded in favor of BBR/Europco, Bell didn't tell Kostelnys that a motion for reconsideration can address judicial error, or points overlooked.

When opposing counsel presented a form order, Bell didn't object and file a Motion to Settle an Order, to conform it to relief pled. Rather, he left Kostelnys with the impression that BBR/Europco had prevailed only partly, and not on the “implied right to enter Kostelnys' property” issue. When, Judge Stone offered co-sanguinary recusal following entry of the order, Bell didn't tell Kostelnys it meant a de facto new judge and rehearing. (A1.797-798) Bell neglected to inform Kostelnys that recording of Final Summary Judgment in June 2017 was another 30-day window for appeal. But by then, Bell had already withdrawn as counsel. (A1.867) Bell did not faithfully defend Kostelnys' interests and property rights.

IV. THE ORDER ON APPEAL SHOULD BE REVERSED AND
REMAINED WITH INSTRUCTIONS TO THE TRIAL COURT.

16. The Summary Judgment Must Be Vacated.

The summary judgment was formed in part by fraud. Relief can be based on, inter alia, fraud, misrepresentation, “or other misconduct of an adverse party”. - *Tissier v. Tissier*, 124 So. 3d 448, (Fla. 1st DCA 2013).

There was also misapplication of law. There should have been a trial and finding of facts, not summary judgment. “[O]n appeal from summary final judgment, the appellant is entitled to have the record reviewed so that every reasonable inference is drawn in his favor. ... If the existence of such issues, or the possibility of their existence, is reflected in the record, or the record even raises the slightest doubt in this regard, the summary final judgment must be reversed.” - *Riverwood Condo. Ass'n, Inc. v. Litecrete, Inc.*, 69 So.3d 983, 985 (Fla. 3rd DCA 2011).

“[A]n error is deemed fundamental "when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." J.B., 705 So.2d at 1378; see also *State v. Johnson*, 616 So.2d 1, 3 (Fla.1993) (stating that "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process").”

- *FB v. State*, 852 So. 2d 226 (Fla. 2003). Since these are guidelines for appeals of criminal convictions, how much more so should these guidelines apply when law-abiding Kostelnys present a fundamental error in a Motion to Vacate pursuant to Fla. R. Jud. P 2.330(h)?

And even if there was no fraud or error, the misuse of the order is improper. An easement may not be enlarged upon. *Crutchfield v. F.A. Sebring Realty Co.*, 69 So.2d 328, 330 [Fla. 1954].

17. Relief is Due From the October 2017 Sanctions Order.

Kostelnys' pro se pleading should have been construed as to content: a successive 1.540 motion based on new evidence. Fla. R. Civ. P. 1.380(4) states that fees are not awarded to a denied motion if "the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Kostelnys' discovery request was in good faith, relevant, simple, specific, limited, and amply supported by case law. (A1.1731) This order assessing Kostelnys for BBR/Europco's fees is nonconformant with Rule 1.380(4)'s allowance for good faith motions. This ruling should be vacated. "[T]he successor judge must consider whether the rulings work an injustice on the party." - *Rath v. Network Mktg., L.C.*, 944 So.2d 485, 487 (Fla. 4th DCA 2006).

18. Relief is Due From Orders Blocking Discovery and Testimony.

It was prejudicial to assess fees in January 2019, since Rule 1.380(4) allows good faith, legally substantive pleadings to be argued and denied *without* sanctions. Orders that block discovery also block adjudication on the true merits. Discovery related to the matters litigated here should be allowed, to get to the truth of the matter. Witnesses should not be excluded from an Evidentiary Hearing. The June 19, 2020 Order should be stricken.

19. Kostelnys Should Be Granted Leave to Amend Answers.

Granting relief from judgment for Kostelnys on this motion returns the parties to the position they occupied before the judgment was entered. – *Bane v. Bane*, 775 So. 2d 938, 941 (Fla. 2000). Florida’s policy allows liberal amendment of pleadings, so that cases will be tried on their merits. – Fla. R. Civ. P. 1.190(a); *Hatcher v. Chandler*, 589 So.2d 428, 429 (Fla. 1st DCA 1991). The purpose is “to achieve justice and allow the parties to fully present their respective positions.” – *Walker v. Senn*, 340 So.2d 975, 976 (Fla. 1st DCA 1976). Due process allows Kostelnys to present to the trial court all material evidence which BBR/Europco withheld during trial. There is no bright-line rule as to when a motion to amend is “untimely.” – *Greenburg v. Johnston*, 367 So.2d 229, 231 (Fla. 2d DCA 1979). Amendment to Answers and Affirmative Defenses will not prejudice

BBR/Europco because “requiring a plaintiff to prove its allegations is not prejudice to the plaintiff; it merely offers due process to the defendants.” - *Thompson v. Jared Cane Co. Inc.*, 872 So.2d 356 (Fla. 2nd DCA 2004).

20. The Trial Court Must Make a Finding of Facts.

There must be a judicial determination on many contested facts. Discovery should be allowed. The trial court must weigh evidence withheld by BBR/Europco and new evidence. The trial court should have re-heard the issues when the District Court granted a relinquishment of jurisdiction on May 28, 2021.

PLEA FOR RELIEF

Appellant requests this Honorable Court to enter judgment in Kostlenys’ favor, or in the alternative, to remand the case to the trial court, and include specific directions on the correct legal standards to apply in considering the law and evidence, to enable the trial court to render the required findings of fact and conclusions of law.

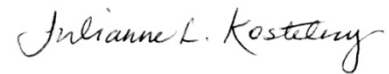
Should the Appellate Court see the appropriateness, Kostelnys plead for directions to the lower tribunal to approve a change of venue for the balance of the litigation.

WHEREFORE, Kostelnys plead the above-stated relief, and for other just relief from this Honorable Court.

Very Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Nick Kostelny", written in a cursive style.

Nicholas J. Kostelny

A handwritten signature in black ink, appearing to read "Julianne L. Kostelny", written in a cursive style.

Julianne L. Kostelny
Defendants, *pro se*
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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 13,000 words.

Signed,

A handwritten signature in brown ink, appearing to read "Nicholas Kostelny". The signature is fluid and cursive, with a large loop at the end.

Nicholas Kostelny
Appellant, *pro se*
email: J.Kostelny@gmail.com
750 Prestwick Cove
Niceville FL 32578
850-200-0261

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on September 29, 2021 using the Florida Courts eFiling Portal system which will email a copy to:

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