No. 21-5629

IN THE
Supreme Court of the United States

ALBA DUQUE,

Petitioner,

v.

CHABAD AT THE CIVIC CENTER, INC
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

ALBA DUQUE
3805 Johnson Street
Hollywood, FL 33021
Petitioner

QUESTIONS PRESENTED FOR REVIEW

Respondent Chabad at the Civic Center, Inc. was granted a Judgment in an Specific Performance Case against Petitioner , Alba Duque; The Circuit Court Judge strike a Quit Claim Deed as an evidence in the case without a legal cause; this document was essential for the dismissal of the case.

The questions presented are as follows:

(1)-Can a Real Estate Contract be legally valid and enforceable if not all the required parties signed it?

(2)-When a Quit Claim Deed became legally valid?

(3)-Can a Circuit Court Judge disregard a legal document as evidence?

(4) Does a Quitclaim Deed Have to be Recorded to be Valid in the State of Florida?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Alba Duque, was the defendant in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County and the Appellant in the Fourth District Court of Appeal of Florida. Miss Duque is an individual. Thus, there are no disclosures to be made by her pursuant to Supreme Court Rule 29.6.

The Respondent is Chabad at the Civic Center, Inc. is a Florida Non- Profit Corporation

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PETITION FOR WRIT OF CERTIORARI

Alba Duque respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth DCA after the Florida Supreme Court decline to accept jurisdiction

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INTRODUCTION

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000). "Where no genuine issue of material fact is shown to exist, the only question for the appellate court is whether the summary judgment was properly granted under the law." *Yardum v. Scalese*, 799 So.2d 382, 383 (Fla. 4th DCA 2001) (citing *Wesley Constr. Co. v. Lane*, 323 So.2d 649, 650 (Fla. 3d DCA 1975)). Thus, "[a] trial court's ruling on a motion for summary judgment regarding a pure question of law is reviewed *de novo." Fernandez v. Homestar at Miller Cove, Inc.*, 935 So.2d 547, 550 (Fla. 3d DCA 2006).

Florida law has long recognized the use of specific performance to enforce contracts for the sale of homestead property. See Koplon v. Smith, 271 So.2d 762, 763 (Fla.1972) (explaining that while two witnesses are required to obtain specific

performance of a contract to sell a homestead, there is no similar requirement to specifically perform a contract to sell nonhomestead property); Scott v. Hotel Martinique, 48 So.2d 160, 161 (Fla.1950) (holding that "a contract for the sale of homestead property may be specifically enforced if the contract has been jointly executed by the husband and wife in the presence of two subscribing witnesses"); Westerberg v. Nininger, 6 So.2d 378, 379–80 (Fla.1942) (affirming a trial court's grant of specific performance of a homestead property); Shedd v. Luke, 299 So.2d 58, 59–60 (Fla. 1st DCA 1974) (stating that it is settled law in Florida that two witnesses are required to obtain specific performance of a homestead); Bowers v. Medina, 418 So.2d 1068, 1069 (Fla. 3d DCA 1982) (affirming judgment ordering specific performance of a contract to sell residential home); Carrol v. Dougherty, 355 So.2d 843, 843–46 (Fla. 2d DCA 1978) (affirming summary judgment granted in favor of the purchasers who brought suit for specific performance of a contract for sale of sellers' homestead, and holding "that contracts to convey homestead realty fall into the same category as contracts to convey any other kind of real estate").

Genuine Issue of Material Fact- The exístanse of a valid contract

The remedy of specific performance is equitable in nature and governed by equitable principles. *Strahan v. Haynes,* 33 Ariz. 128, 139, 262 P. 995,

999 (1928). Thus, it is not an appropriate remedy if there is evidence of unfairness, fraud, or overreaching on the part of the non-breaching party. *Shreeve v. Greer*, 65 Ariz. 35, 39, 173 P.2d 641, 644 (1946). Moreover, a non-breaching party does not have the right to specific performance, but must prove several elements and overcome various equitable defenses in order to succeed in such an action. *Canton v. Monaco P'ship*, 156 Ariz. 468, 470, 753 P.2d 158, 160 (Ct. App. 1987).

REPORTS OF OPINIONS BELOW

The opinion of the Fourth DCA giving rise to this petition is *Duque v. Chabad at the Civic Center, Inc. (4D20-*1690, Fla. 4th DCA 2021)

STATEMENT OF BASIS FOR JURISDICTION

The *per curiam* affirmance sought to be reviewed was entered by the Fourth DCA on May 13th, 2021. On June 4th, 2021 The Florida Supreme Court declined to accept jurisdiction; therefore, the Fourth DCA was the last resort from which Petitioner could seek review.

Therefore, The Court's jurisdiction is invoked under 28 U.S.C §1257 (a). *Florida Star v. B.J.F., 530 So.2d 286, 288 n.3 (Fla. 1988).*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty or property without due process of law...."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall ... deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Rule of Civil Procedure 1.540(b) provides: "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment... for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken."

STATEMENT OF THE CASE

A. Statement of the Facts

Respondent filed a Complaint on June 17th, 2019 for Specific Performance Due to a Breach of Contract and Damages.
Petitioner and Luis Guillermo La Torre (Ex- husband) share ownership of the property matter of the litigation since April 18th, 2018
Petitioner signed a Real Estate Sales Contract with Respondent on April 30th, 2019, but Luis Guillermo La Torre (Indespensab,e Party) did not.
On March 3rd, 2020 Petitioner filed a Motion to Dismiss Complaint with prejudice stating that the Sales Contract was not valid and that since a valid contract was necessary in order to file a complaint for specific performance the case needed to be dismissed with prejudice.
On July 29th, 2020 the Circuit Court granted Final Judgment to Respondent striking the Warranty Deed from the Case as requested from Respondent's attorney; the reason for the strike the Warranty Deed was that the other title holder of the property (Luis Guillermo La Torre) did not received the Deed on time, this is not accurate;, Since Guillermo La Torre was present at the time the Deed was signed, there are affidavits that confirm this fact
Petitioner immediately appeal the same day of the order
The Fourth DCA Affirmed the Order of the Circuit Court Judge.

How impartial is the 4th DCA?
The front page article reported "***there is no question that the Fourth District is pro-business and couldn't care less about homeowners.***" (emphasis added). It further reported that the Fourth DCA "abuses *per curiam* affirmances, or PCAs, to avoid explaining their rulings

on lender standing, ... [and] misuses the tool to strategically sidestep writing opinions that could provide grounds for rehearing. Instead, they say it uses the decisions to wipe out options for further review and avoid conflicts with other district courts." Instead of a reasoned opinion that would create conflict jurisdiction for further review, the Fourth DCA issues a PCA that says: you lose because we said so and there's nothing you can do about it.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO PROTECT DUE PROCESS RIGHTS GUARANTEED BY 14TH AMENDMENT TO HE U.S. CONSTITUTION AND TO PREVENT FRAUD ON THE COURT OR BIASED.

CIRCUIT COURT JUDGES ARE ALWAYS BIASED IN FAVOR OF LAWYERS , THAT SHARE RELIGIOUS BELIEVES

The Sales Contract in this case id *unenforceable*

"A contract where the parties have not complied with the requirements of the statute is neither void nor voidable; it has much effect upon the legal relations of the contracting parties with each other and with third persons. It can be properly described as unenforceable, however, in as much as the ordinary legal remedies are unavailable. If the defense of the statute is properly made, a judgment for damages for breach of the contract cannot be obtained; and neither can a decree for specific performance unless there has been fraud, mistake, or substantial part performance or action in reliance on the contract. It has been held that a statutory criminal process, provided for the enforcement of certain types of contracts, is not available; and the contract cannot be indirectly enforced

by the use of tort remedies by alleging that refusal to perform the contract or to execute a sufficient memorandum is tortious, or by suing the seller of goods in trover because he has repudiated the oral contract and sold the goods to a third person.

The statute may make a contract 'invalid';

The Court's opinion in Taylor v. Maness, 941 So.2d 559 (Fla. 3d DCA 2006), which was relied on by the trial court, prohibits specific performance of contracts to sell homestead property. However, nowhere in Taylor do we suggest that specific performance is unavailable to enforce a properly executed contract based on the homestead status of the property. In Taylor, specific performance was unavailable because the subject property was both Mr. and Mrs. Maness' homestead, but only Mr. Maness signed the contract to sell the property. Taylor, 941 So.2d at 563–64. Because Mrs. Maness did not sign the contract, this Court concluded that the contract was not capable of being specifically performed. Id. at 564.

In this case Petitioner ALBA DUQUE was not the only title holder at the moment that she signed the Sales Contract , LUIS GUILLERMO LA TORRE was a title holder and indispensable party at the time she signed the Sales Contract ; however the Circuit Court Judge strike the Deed that was signed one year before the filing of the Specific Performance lawsuit complaint.

NO VALID CONTRACT, NO BREACH OF CONTRACT

The traditional elements of a breach of contract damages claim are well known to every law student: 1) the existence of a valid contract; 2) a breach of that contract; and 3) damages caused by that breach.[1] There is no requirement that the breach be material for the other party to recover damages. As the *Restatement (Second) Contracts* explains: "[E]very breach gives rise to a claim

for damages,"[2] and "[a] determination that a failure is not material means only that it does not have the effect of" excusing the future performance of the other party to the contract.[3]

So, until the end of the last millennium, the materiality of a breach of contract was not a proper element of a damages claim in any jurisdiction within the United States.[4] Now, however, four of Florida's district courts of appeal have charted a new course — one requiring proof of a "material" breach, thereby setting Florida adrift from the other 49 states in the country.

The federal judiciary has noticed this novelty of Florida contract law: In a national breach of contract class action, *Mazzei v. Money Store*, 288 F.R.D. 45 (S.D.N.Y. 2012), the Southern District of New York was required to address Florida's "unusual. . . 'materiality' requirement,"[5] and in a 2010 decision, *Hostway Services v. HWAY FTL*, 2010 WL 3604671 (S.D. Fla. 2010), federal Judge Cohn carefully dissected the genesis of Florida's "materiality requirement." In reviewing the Florida intermediate appellate courts' break from traditional contract law, he traced back what had actually happened, focusing on the Fifth District's 2000 decision in *Abbott Labs v. GE Capital,* 765 So. 2d 737, 740 (Fla. 5th DCA 2000):

Nonetheless, many Florida courts have included 'material breach' as one of the elements of a breach of contract claim. Notably, in *Abbott Labs*, the Florida district court injected the materiality requirement without explanation. Moreover, the cases cited by *Abbott Labs* do not list 'material breach' as an element of a breach of contract action. *See* [*Abbott Labs*] (citing *Mettler, Inc. v. Ellen Tracy, Inc.,* 648 So. 2d 253, 255 (Fla. 2d DCA 1994); *Abruzzo v. Haller*, 603 So. 2d 1338 (Fla. 1st DCA 1992). Furthermore, many of the Florida courts that have listed 'material breach' as one of the elements in a breach of contract action can be traced back to *Abbott Laboratories.*[6]

Federal courts often cite *Abruzzo* when setting forth the materiality requirement for a breach of contract action under Florida law. *Abruzzo*, however, does not mention materiality as an element of a breach of contract action.[7]

Having examined the jurisprudential history of Florida's materiality requirement, Judge Cohn concluded that it "appear[ed] to be the result of spontaneous generation."[8]

He was right. Indeed, from the time of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) , until its third-millennium "spontaneous generation" in *Abbott Laboratories,* materiality had never been a required element of a breach of contract damages action in any state court.[9] The Fifth District just "injected the materiality requirement without explanation" in *Abbott Laboratories.*[10] After that decision, the Fourth District in *J.J. Gumberg Co. v. Janis Services,* 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003) , and the Third District in *Murciano v. Garcia,* 958 So. 2d 423, 423 (Fla. 3d DCA 2007), added the same, novel element.

Judge Cohn was unable to locate a single case "where the Supreme Court of Florida ha[d] held that a party must prove a material breach to prevail in a breach of contract action."[11] To the contrary, in *Found Health v. Westside EKG Associates*, 944 So. 2d 188 (Fla. 2006), issued after the Fourth and Fifth districts had already adopted the materiality requirement, the supreme court listed the elements of a third-party breach-of-contract damages claim, but as Sherlock Holmes surely would have noticed, the dog did not bark:[12] The Florida Supreme Court did not add the new "materiality" element.[13]

Like the Florida Supreme Court, the First District has never included materiality as an element for a breach of contract damages claim. The court's decisions simply list the same elements that the Florida Supreme Court and the other 49 states require: 1) a valid contract; 2) a breach; and 3) damages caused by that breach.[14]

Until recently, the Second District had also never included a materiality element for breach of contract damages claims.[15] In June 2013, however, the court announced that the elements of a breach of contract claim were "(1) a valid contract, (2) a *material* breach, and (3) damages" in *Havens v. Coast Florida, P.A.*, 117 So. 3d 1179 (Fla. 2d DCA 2013).[16] The *Havens* decision is intriguing because it actually substituted materiality for causation — an even more radical break from traditional notions of contract law. In support, the decision cited one case, *Rollins, Inc. v. Butland,* 951 So. 2d 860 (Fla. 2d DCA 2006), a decision of the same court that did not include materiality as an element.

The difference between the elements of causation and materiality is (let's just say it) *material* : *Causation* requires that a loss "ordinarily follows the breach of such a contract in the usual course of events, or that reasonable men in the position of the parties would have foreseen as a probable result of breach."[17] *Materiality* requires proof that the breach goes "to the essence of the contract."[18] Justified by this higher burden, materiality properly plays a role in contract law that loss causation alone cannot: A material breach excuses the other party from all future performance.[19] Mere loss causation — termed a "partial breach" — permits only the recovery of damages.[20]

Florida's district courts of appeal that have embraced the "materiality" element appear not only to be in conflict with the Florida Supreme Court, but also to be the only appellate courts in the U.S. that require a breach be material in order to recover damages in a breach of contract case.[21] Nonetheless, in 2013, the Florida Supreme Court adopted Standard Jury Instruction 416.4, "Breach of Contract — Essential Factual Elements." The instruction tells jurors that a breach of contract plaintiff seeking damages must prove that the defendant failed to do something "essential" to the contract (or did something that the contract prohibited as an essential feature of the contract).[22] As a

separate element, the plaintiff must also prove causation — that it was "harmed by the breach."[23]

The ensuing Sources and Authorities section states: "An adequately pled breach of contract action requires three elements: (1) a valid contract; (2) a *material* breach; and (3) damages. *This general rule was enunciated by various Florida district courts of appeal.* "[24] In support, the instructions cite decisions from each of the five district courts of appeal, but those citations provide a dubious foundation.

Two of the decisions — *Knowles v. C.I.T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977), and *Mettler, Inc. v. Ellen Tracy, Inc,* 648 So. 2d 253 (Fla. 2d DCA 1994) — do not even colorably impose a materiality requirement. The entirety of the contract law discussion in *Knowles* consists of the following sentence: "It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach."[25] The discussion in *Mettler* (which was also cited in *Abbott Laboratories*) is no more supportive: "All the elements for breach of contract are sufficiently pled to state this cause of action. [The plaintiff] alleged an offer, acceptance, consideration, a contract, breach of the contract and damages."[26] The other three decisions are *Abbott Laboratories*[27] and two district court decisions that rely on that decision.[28]

Jury instructions are not substantive law, of course. That is why the Florida Supreme Court typically cautions — as it did when it adopted the standard instructions for contract and business cases — that "it would be inappropriate for this [c]ourt, at this time, and without a case or controversy before us, to adjudicate all legal principles embodied in these recommended instructions as correctly setting forth the substantive law applicable in any particular case."[29]

When the opportunity presents itself, however, the Florida Supreme Court should resolve whether

materiality is a required element of a breach of contract claim for damages. The issue is important because adding materiality as an element is more than a major policy shift from over 150 years of jurisprudence; it makes Florida a significantly different legal environment for businesses, including those considering where to locate. Only in Florida do contracting parties lack the ability to recover damages that partial breaches of their contracts cause — an inability that fundamentally undermines their reasonable economic expectations.

[1] 17B C.J.S. Contracts §824 (2013).

[2] Restatement (Second) Contracts §236, comment a.

[3] *Id.* at §241, comment a. "Even if not material, the failure may be a breach and give rise to a claim for damages for partial breach (§§236, 243))." *Id.* at §241, comment (1981). *See also id.* at §235, comment b . ("When performance is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial."); *see also* ("[I]f the breach is not material, the damages may be recovered, but are limited to those recoverable for a partial breach."); *accord* 3 E. Farnsworth, Contracts §12.8 (1990).

[4] *See, e.g., Reynolds Metals v. Hill*, 825 So. 2d 100, 105 (Ala. 2002); *Alaska Energy Auth. v. Fairmont Ins.*, 845 P.2d 420, 424 n.3 (Alaska 1993); *City of Tucson v. Super. Ct. (Dong),* 569 P.2d 264, 266 (App. 1977); *Smith v. Eisen*, 245 S.W.3d 160, 168 (Ark. Ct. App. 2006); *Oasis West Realty v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992); *Sullivan v. Thorndike*, 934 A.2d 827, 833 (Conn. App. Ct. 2007); *H-M Wexford, LLC v. Encorp.*, 832 A.2d 129, 140 (Del. Ch. 2003); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009); *Norton v. Budget Rent A Car*, 705 S.E.2d 305, 306 (Ga. Ct. App. 2010); *808 Dev., LLC v. Murakami*, 141 P.3d 996, 1013 (2006); *Franklin Bldg. Supply v. Hymas*, 339 P.3d 357

(Idaho 2014); *Allstate Ins. v. Winnebago County Fair*, 475 N.E.2d 230, 236 (Ill. App. 2d Dist. 1985); *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671, 694 (Ind. Ct. App. 2010); *Iowa Mortgage Ctr. v. Baccam*, 841 N.W.2d 107, 111 (Iowa 2013); *Stechschulte v. Jennings*, 298 P.3d 1083, 1098 (2013); *Fannin v. Commercial Credit Corp.* , 249 S.W.2d 826, 827 (Ky. 1952); *Favrot v. Favrot*, 68 So. 3d 1099, 1108 (La. Ct. App. 2011); *Advanced Const. Corp. v. Pilecki*, 901 A.2d 189, 196 (Me. 2006); *Down E. Energy Corp. v. RMR, Inc.*, 697 A.2d 417, 421 (Me. 1997); *Traylor v. Grafton*, 332 A.2d 651, 674 (1975); *Lease-It v. Massachusetts Port Auth.*, 600 N.E.2d 599, 602 (Mass. App. Ct. 1992); *Miller-Davis Co. v. Ahrens Const.*, 848 N.W.2d 95, 104 (2014); *Lyon Fin. Svc. v. Illinois Paper & Copier*, 848 N.W.2d 539, 543 (Minn. 2014); *Bus. Communications v. Banks*, 90 So. 3d 1221, 1225 (Miss. 2012); *Premier Golf Missouri v. Staley Land Co.,* 282 S.W.3d 866, 873 (Mo. Ct. App. 2009); *Union Interchange v. Allen*, 370 P.2d 492, 496 (1962); *Kotrous v. Zerbe*, 846 N.W.2d 122, 126 (2014); *Calloway v. City of Reno*, 993 P.2d 1259, 1265 (Nev. 2000); *LeTarte v. W. Side Dev., LLC*, 855 A.2d 505, 508 (2004), *EnviroFinance Group v. Envtl. Barrier Co.*, 113 A.3d 775, 787 (App. Div. 2015); *McCasland v. Prather*, 585 P.2d 33 6, 338 (N.M. Ct. App. 1978); *Agway, Inc. v. Curtin*, 557 N.Y.S.2d 605 (1990); *Furia v. Furia*, 498 N.Y.S.2d 12 (N.Y. 1986); *Poor v. Hill*, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000); *Barrett v. Gilbertson*, 2013 ND 35, ¶7, 827 N.W.2d 831, 835; *Jarupan v. Hanna*, 878 N.E.2d 66, 73 (Ohio Ct. App. 2007); *Coen v. SemGroup Energy Partners*, 310 P.3d 657, 666 (Okla. Civ. App. 2013); *Slover v. Oregon State Bd. of Clinical Soc. Workers*, 927 P.2d 1098, 1101 (Or. Ct. App. 1996); *Orbisonia-Rockhill Joint Mun. Auth. v. Cromwell Tp., Huntingdon County*, 978 A.2d 425, 428 (Pa. Commw. Ct. 2009); *Petrarca v. Fid. & Cas. Ins. Co.*, 884 A.2d 406, 410 (R.I. 2005); *S. Glass & Plastics Co., Inc. v. Kemper*, 732 S.E.2d 205, 209 (S.C. Ct. App. 2012); *Morris, Inc. v. State, ex rel. State Dept. of Transp.*, 2011 S.D. 85, ¶ 34, 806 N.W.2d 894, 903 (S.D. 2011);

BancorpSouth Bank v. Hatchel, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App. 2010); *Tooele Assoc. v. Tooele City*, 2012 284 P.3d 709, 714 (Utah 2012); *Bair v. Axiom Design*, 20 P.3d 388, 392 (Utah 2001); *Reynolds v. Chynoweth*, 68 Vt. 104; (1895) *Ramos v. Wells Fargo*, 770 S.E.2d 491, 493 (Va. 2015); *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.* , 899 P.2d 6, 9 (Wash. Ct. App. 1995); *Sneberger v. Morrison*, 776 S.E.2d 156, 171 (W. Va. 2015); *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 714 N.W.2d 582, 588 (Wis. Ct. App. 2006) *aff'd sub nom. Brew City Redevelopment Group, LLC v. Ferchill Group*, 2006 WI 128, ¶11, 724 N.W.2d 879; *Schlinger v. McGhee*, 2012 WY 7, ¶12, 268 P.3d 264, 268 (Wyo. 2012); *Morris v. U.S.*, 33 Fed. Cl. 733, 751 (Fed. Cl. 1995).

[5] *Mazzei*, 288 F.R.D. at 67.

[6] *Hostway Services,* 2010 WL3604671 at *8-9 (S.D. Fla. 2010) (citing *J.J. Gumberg Co. v. Janis Servs.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003); *Friedman v. N.Y. Life Ins.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008) (citing *J.J. Grumberg*); *Merin Hunter Codman, Inc. v. Wackenhut Corrs. Corp.* , 941 So. 2d 396, 398 (Fla. 4th DCA 2006) (citing *J.J. Grumberg*).

[7] *Id.* (citing *Beck v. Lazard Freres & Co*, 175 F.3d 913, 914 (11th Cir. 1999)); *Trowell v. S. Fin. Group, Inc.,* 315 Fed. Appx. 163, 165 (11th Cir. 2008)).

[8] *Id.* at *9.

[9] *See* note 4 (breach of contract decisions from the other 49 states — none of which included materiality as an element required for recovery of damages in partial breach of contract cases).

[10] *Hostway*, 2010 WL 3604671 at *8.

[11] Nonetheless, Judge Cohn felt compelled to include the materiality requirement because the 11th Circuit had listed it as an element under Florida law. *Hostway*, 2010 WL 3604671 at *8-9 (citing *Vega v. T-Mobile USA*, 564 F.3d 1256, 1272 (11th Cir. 2009); *Beck*, 175 F.3d at 914).

[12] Sir Arthur Conan Doyle, *Silver Blaze*, The Memoirs of Sherlock Holmes (1892).

[13] *Found Health*, 944 So. 2d at 194-95.

[14] *See Knowles v. C.I.T.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977) ("It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach."); *see also A.R. Holland, Inc. v. Wendco Corp.*, 884 So. 2d 1006, 1008 (Fla. 1st DCA 2004) ("In the proceeding below, it was Holland's burden to prove that (1) a contract existed, (2) the contract was breached, and (3) damages flowed from that breach."); *Capitol Envtl. Services v. Earth Tech,* 25 So. 3d 593, 596 (Fla. 1st DCA 2009) ("The injured party is entitled to recover all damages that are causally related to the breach so long as the damages were reasonably foreseeable at the time the parties entered into the contract.").

[15] *Rollins, Inc. v. Butland,* 951 So. 2d 860, 876 (Fla. 2d DCA 2006); *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994); *Cerniglia v. Davison Chem.*, 145 So. 2d 254, 255 (Fla. 2d DCA 1962).

[16] *Havens,* 117 So. 3d at 1181 (citing *Rollins*, 951 So. 2d at 876) (emphasis added).

[17] *Natural Kitchen v. Am. Transworld*, 449 So. 2d 855, 860 (Fla. 2d DCA 1984) (quoting 5 A. Corbin, Corbin on Contracts §1010 at 79 (1964)).

[18] *Sublime, Inc. v. Boardman's Inc.* , 849 So. 2d 470, 471 (Fla. 4th DCA 2003).

[19] *See, e.g., Indem. Ins. v. Caylao*, 130 So. 3d 783, 786 (Fla. 1st DCA 2014) (quoting 14 Steven Plitt, *et al* ., Couch on Insurance §199.81 (3d ed. 2012) (discussing "'the fundamental principle of contract law that a material breach by one contracting party excuses the performance by the other party and that an immaterial breach does not'").

[20] Restatement (Second) of Contracts §236(2) (1981).

[21] *See* note 4.

[22] *In re Standard Jury Instructions — Contract & Bus. Cases*, 116 So. 3d 284, 306 (Fla. 2013) ("[Defendant] failed to do something essential which the contract required [him][her][it] to do. [Defendant] did something which the contract prohibited [him][her][it] from doing and that prohibition was essential to the contract.").
[23] *Id.*
[24] *Id.* (emphasis added).
[25] *Knowles*, 346 So. 2d at 1043.
[26] *Metter*, 648 So. 2d at 255 (citing *Perry v. Cosgrove*, 464 So. 2d 664, 667 (Fla. 2d DCA 1985)).
[27] *Abbott Laboratories*, 765 So. 2d at 740.
[28] *Murciano*, 958 So. 2d at 423-24, from the Third District and *Friedman*, 985 So. 2d at 58, from the Fourth District. *Murciano* relies solely on *Abbott Laboratories*. *Friedman* relies solely on *J.J. Grumberg*, 847 So. 2d at 1049, but that decision, too, relies solely on *Abbott Laboratories*.
[29] *In re Standard Jury Instructions — Contract & Bus. Cases*, 116 So. 3d 284, 287 (Fla. 2013).
In this case the contract is not valid; therefore, It can not be a breach of contract

Zimmerman v. Diedrich
97 So. 2d 120 (1957)
Frieda ZIMMERMAN, Appellant, v. George S. DIEDRICH, Appellee.
Supreme Court of Florida.

In the pleading it was averred that the appellant and appellee entered into a contract for the sale by the appellee, and the purchase by the appellant, of certain property described as "The South 10 acres, more or less, of the South Three Quarters of the West Half of the Southwest Quarter of the Northeast Quarter, of Section 25, Township 43 South, Range 42 East" for the sum of $22,000.

The chancellor concluded that the contract was not enforceable by specific performance because of failure to comply with Sec. 689.01, Florida Statutes 1955, F.S.A., since the signature of but one witness appeared upon it, and he commented that in his opinion the requirements of this statute are supplemental to those of Sec. 725.01, Florida Statutes 1955, F.S.A.

The appellant insists that compliance only with Sec. 725.01, supra, is necessary and that this court so held in Lente v. Clarke, 22 Fla. 515, 1 So. 149, 151, when it was stated that Sec. 1, page 214 of McClellan's Digest related to present conveyances of title of certain interests in land "and not *122 to agreements or contracts to convey the same in the future." This was the law that has now become, with certain changes to which we will presently refer, Sec. 689.01, supra. In that case Sec. 1, page 208 of McClellan's Digest was said to require neither witnesses nor a seal to a contract in order to hold the person to an obligation to convey in the future. This section was the predecessor of Sec. 725.01, supra.

It is true that in the case of Hammond v. Hacker, 93 Fla. 194, 111 So. 511, cited by appellant, signatures to the instrument involved were witnessed by only one person but it was purely by inference that the case held the execution of the contract sufficient for the pivotal point was the adequacy of the description, and the question of proper attestation was not directly presented or decided. In another case, Simons v. Tobin, 89 Fla. 321, 104 So. 583, also cited by appellant to support her position that no witnesses to a contract for deed are needed to render the instrument enforceable by specific performance, the question of lack of witnesses was not raised but the court held that a contract formed by an exchange of letters and telegrams could be specifically enforced. We agree with the appellant that in these circumstances names of witnesses would not appear. The law announced in

Simons v. Tobin, supra, had been the holding in Meek v. Briggs, 80 Fla. 487, 86 So. 271.

All the decisions to which we have alluded were rendered prior to the year 1941 when, as the appellant candidly advises us, the legislature amended Sec. 689.01, supra, by substituting the word "instrument" for the word "deed". The question then arises whether or not the substitution amounted to a requirement that all contracts for deed, as well as deeds, be executed in the presence of two witnesses.

Advert to three decisions rendered by this court, after the adoption of the amendment, which the appellee contends support the view of the chancellor that more formality in the execution of agreements for deeds, in order to make them specifically enforceable, was made necessary: Scott v. Hotel Martinique, Inc., Fla., 48 So. 2d 160; Abercrombie v. Eidschun, Fla., 66 So. 2d 875; and Cox v. La Pota, Fla., 76 So. 2d 662.

In the first of these three cases, Scott v. Hotel Martinique, Inc., supra, the court held that a contract for sale of homestead property could be specifically enforced if executed by the husband and wife in the presence of two witnesses. The court referred to the opinion in Jacobs v. Berlin, 158 Fla. 259, 28 So. 2d 539, in which it was written that part of the premises involved constituted a homestead and there could be no specific performance to convey that part, and inasmuch as the part that was homestead could not be isolated, the bill for specific performance was properly dismissed. Obviously the court recognized a distinction between the prerequisites of a contract to convey homestead and non-homestead property, in order to make the contract enforceable by specific performance.

In the second case, Abercrombie v. Eidschun, supra, the court again dealt with homestead property and held that

the chancellor erred when he denied a motion to dismiss a complaint in which was sought specific performance of a contract which had not been acknowledged and to the signatures of which there was but one witness.

In the third case, Cox v. La Pota, supra, the court again considered a contract to sell homestead property and it was held that the sellers were estopped to deny that the contract was enforceable since they had signed it and surrendered it to their own broker for the purpose of obtaining the signatures of witnesses before forwarding the instrument to the purchasers, and by their action had caused the buyers to expend money and materially change their position. The only statute cited in the opinion was Sec. 689.01, supra. But it *123 is plain from a study of expressions of this court on the subject, and especially from the very decision, Scott v. Hotel Martinique, Inc., quoted at length in Abercrombie v. Eidschun, supra, that the controlling law was Secs. 1 and 4 of Article X of the Constitution, F.S.A. The court observed that Sec. 708.07, supra, when amended "did not dispense with the requirement of two subscribing witnesses but only with the formal requirement of acknowledgment."

Before the amendment in 1947, Sec. 708.07, supra, which was titled "Specific performance against married woman," contained the provision that coverture should not prevent a decree of specific performance against husband and wife of an agreement to sell her property or relinquish her right of dower but that no such contract could be "enforced unless * * * executed and acknowledged in the form prescribed for conveyances of her real property and for relinquishment of dower." So at this place in the history of the legislation a contract to convey a married woman's separate estate or to relinquish her dower had to bear her separate acknowledgment, Sec. 693.03, Florida Statutes 1941, F.S.A. At the time it was also the law of the state that an

estate or interest of freehold could not be created or granted save by an instrument in writing "signed in the presence of two subscribing witnesses * * *." Sec. 689.01, Florida Statutes 1941, F.S.A.

In 1947, Sec. 708.07, supra, was amended by substituting for the requirement that a contract to convey a married woman's separate property or to relinquish her dower be executed and acknowledged in the manner prescribed for conveyance of such property and relinquishment of dower the provision that coverture would not prevent a decree for specific performance of the contract "regardless of whether the same [was] acknowledged or not."

From an examination of the cases cited by the appellee, it is plain that the court purposed to require as much formality in the execution of contracts for the sale of homestead property as must be followed in the execution of contracts for the sale of the separate property of a married woman or the relinquishment of her dower in order to make the agreements enforceable by specific performance.

This is apparent from the blending in the opinions of the provisions of Secs. 1 and 4 of Article X of the Constitution and the provisions of Sec. 708.07, supra, before and after it was amended. This statute relates to coverture as an impediment to decrees for specific performance against a husband or wife, or both, for the sale of the property of the wife or the relinquishment of her right of dower. Before the amendment such a contract had to be executed in the presence of two witnesses and acknowledged by the wife; after the amendment an acknowledgment was no longer necessary. If the statute is construed literally, it does not apply to homestead property. But the court seems to have resorted to this statute as the one defining the manner in which alienation could eventually be

accomplished by an instrument "duly executed" as specified in Sec. 4 of Article X of the Constitution. It is true that in that section no mention is made of contracts to sell, but only of deeds and mortgages. We apprehend that the writers of the opinions had in mind that if the execution of contracts to sell homesteads were not so formalized, the transfer of homestead property, sacrosanct as it is, could be eventually effected by decree of *124 specific performance, although the contract forming the basis of such a transfer would have small resemblance to the formality with which it was intended that conveyances of homesteads should be accomplished.

Sec. 689.01, supra, applies to conveyances as distinguished from contracts to convey, but in Cox v. La Pota, supra, the writer referred to that statute in determining what was necessary to an enforceable contract to convey a homestead.

In conclusion after a careful study of the Constitution and the decisions, and the statutes cited in the decisions, that the court meant that agreements to convey homestead property must, to be specifically enforceable, be signed in the presence of two witnesses as required by Sec. 689.01, supra, for valid conveyances, and by Sec. 708.07, supra, for enforceable contracts to convey the separate property of married women and to relinquish dower.

Secs. 689.01 and 725.01, supra, must be read together and that therefore two witnesses to signatures on contracts for deed are in all cases a prerequisite to the remedy of specific performance. If only the latter statute is followed, the contract would yet be unenforceable unless the former is followed also. Such a ruling would be inconsistent with the decision that a contract could be formed by correspondence, signed by "the party to be charged," as was held in Meek v. Briggs and Simons v. Tobin, both supra [80 Fla. 487, 86 So. 272].

The decisions in these two cases have not become inapposite by the passage of the 1941 amendment to Sec. 689.01, supra, because as late as 1952 in the case of Mehler v. Huston, Fla., 57 So. 2d 836, this court held, as it had in Meek v. Briggs and Simons v. Tobin, both supra, that contracts growing out of an exchange of correspondence could be specifically enforced.

In conclusion after an earnest effort to reconcile decisions with statutes and with each other that a contract for sale of realty must, to be enforceable, bear two witnesses if the property to be conveyed is homestead, or the separate property of a married woman, or if the relinquishment of dower is to be effected; that the two statutes first cited do not implement each other in all instances.

In the present case, the seller contends that the sales contract is not enforceable because no all title holders signed it; that a valid deed was signed a year before the specific performance lawsuit, and therefore this invalidated the sales contract. Therefore, she argues, the contract lacked mutuality of obligation and was unenforceable and void.

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One party to a contract could not obtain specific performance if that remedy was unavailable to the other party. (See, e.g., Roy v. Pos (1920) 183 Cal. 359, 364 [191 P. 542].) However, the Restatement of Contracts rejected this rule. "The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party." (Rest., Contracts, § 372, subd. (1). See also 7 Witkin, Summary of Cal. Law (8th ed. 1974) pp. 5274-5276.)

In the present case, the seller contends that the trial court exceeded its jurisdiction when it "Strike" the Warranty Deed signed by Petitioner/ Seller given right of the property title to a 3rd party Guillermo La Torre .

The judgment of the trial court is affirmed. [1] The trial court based its decision on the fact that appellant wife did not sign the purchase agreement, and that, as a consequence, had the respondents brought this action for specific performance, appellants would have been able to avoid the contract. The trial court relied on Wagner v. Peshastin Lbr. Co. (1928), 149 Wash. 328, 270 Pac. 1032, wherein this court quoted from Pomeroy's Specific Performance of Contracts (3d ed.), § 165, as follows:

"`... if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement.'"

The trial court concluded that the contract must be such that at the time it is entered into it is enforceable by either of the parties against the other.

In the present case we cannot agree with the trial court's conclusion respecting the legal significance of the failure of the appellant wife to sign the contract in the first instance. In Leroux v. Knoll (1947), 28 Wn. (2d) 964, 184 P. (2d) 564, which, like the case at bar, was an action for specific performance of a real estate contract, the plaintiff-purchaser did not sign the earnest-money receipt. The court, in granting specific performance, cited Western Tbr. Co. v. Kalama River Lbr. Co., 42 Wash. 620, 85 Pac. 338, as authority for its decision. In Western Tbr. Co. v. Kalama River Lbr. Co., supra, the court quoted with approval from 2 Warvelle, Vendors, p. 748:

"`Equity will not direct a performance of the terms of the agreement of one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement; yet, as in a case where an agreement which the statute of frauds requires to be in writing has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which he does not confer upon the other, upon the filing of a bill for enforcement in equity by the party who was before unbound, he thereby puts himself

under the obligation of the contract. The contract then ceases to be unilateral; for by his own act the unbound party makes the contract mutual, and the other party is enabled to enforce it.'"

Contracts which convey or encumber community realty and which the wife does not sign are not void. They are merely voidable, and it is the wife who has the power of avoidance. She may, as she wishes, either accept or reject *775 the voidable action of her husband. Stabbert v. Atlas Imperial Diesel Engine Co. (1951), 39 Wn. (2d) 789, 238 P. (2d) 1212. In the case at bar the wife, by joining with her husband in bringing this action for specific performance, has chosen to accept and ratify the voidable action of her husband.

I dissent for the following reasons:

(1) It is conceded that the contract involved in this proceeding was for the sale of real property owned by appellant husband and wife as community property, and that the wife did not sign the contract. A contract to sell real estate is an encumbrance upon the land. Culmback v. Stevens, 158 Wash. 675, 291 Pac. 705 (1930). See, also, Griffith v. Whittier, 37 Wn. (2d) 351, 223 P. (2d) 1062 (1950); Peterson v. Paulson, 24 Wn. (2d) 166, 163 P. (2d) 830 (1945). By statute, the wife is an indispensable party to the sale, conveyance or encumbrance of community real estate. RCW *778 26.16.040. Since it is conceded that an indispensable party did not sign the instrument, it is unenforcible and void as a contract of sale.

"Since the remedy at law for breach of contract is generally by way of compensatory damages, ordinarily a complainant coming into equity for specific performance must show that a recovery of damages for breach of the contract would not constitute an adequate remedy." 49 Am. Jur. 21, § 12.

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(4) Finally, whether a court will order specific performance of a contract or leave one to his remedy at law rests within the sound discretion of the trial court.

Cascade Tbr. Co. v. Northern Pac. R. Co., 28 Wn. (2d) 684, 184 P. (2d) 90 (1947), and cases and authorities cited.

Following trial of these issues the court made findings, concluded there from that plaintiff had no cause of action for specific performance, and entered judgment for defendants.

That plaintiff has suffered no damage as a result of the failure of consummation of the agreement described in paragraph I hereof or as a result of defendants' refusal to consummate said agreement; that if plaintiff had suffered any damage for any such reason, and if she had any cause of action against defendants or either of them for any such damage, she would have an adequate remedy at law, and that any such damage could be fully compensated by money."

Since it was the duty of plaintiff to prove the fairness of the contract and the adequacy of the consideration passing to defendants, in the absence of any evidence on those issues the court would have been warranted in making findings thereon in favor of defendants (Glassell v. City of Los Angeles, (1930) 106 Cal. App. 395, 407 [291 P. 227]; Kohner v. National Surety Co., (1930) 105 Cal. App. 430, 439-40 [287 P. 510]), and if there were such findings they would furnish support for the judgment.

The Due Process Test

This Court has established what essentially a two-is tiered analysis for due process challenges to conduct which, like the one in this case, involves property rather than liberty interests. The first "tier" involves a two-fold inquiry: (1) an examination of whether there has been a significant deprivation or threat of a deprivation of a property right, *see Fuentes v. Shevin*, 407 U.S. 67 (1972), and (2) an examination of whether there is

sufficient state involvement of that deprivation to trigger the Due Process Clause, *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). If there is state action and if that action amounts to the deprivation or threat of a deprivation of a cognizable property interest, the Court proceeds to the second "tier" to then determine what procedural safeguards are required to protect that interest. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

The Court traditionally uses the three-factor test first discussed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to assess what safeguards are necessary to pass muster under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Mathews analysis weighs (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; *see also Doehr*, 501 U.S. at 26-28.

The Significance of the Deprivation

There can be no serious question that Petitioner satisfied the first tier requirement. This Court has been a steadfast guardian of due process rights when what is at stake is a person's right "to maintain control over [her] home" because loss of one's home is "a far greater deprivation than the loss of furniture." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993). Courts have held that even "a small bank account" is sufficient to trigger due process protections. *See Nat'l Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192, 202-205 (D.C. Cir. 2001) (*citing Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489-42 (1931)).

The Risk of Erroneous Deprivation

The risk of an erroneous deprivation when the decision rests on fraudulent evidence manufactured by the opposing party should be selfevident. Using false or fraudulent evidence "involve[s] a corruption

of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 107 (1976). *See also Miller v. Pate*, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding that an uncorrected, misleading statement of law to a jury violated due process); *Darden v. Wainwright*, 477 U.S. 168, 181- 82 (1986) (improper argument and manipulation or misstatement of evidence violates Due Process). *Cf. Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (reversing convictions based on Solicitor General's disclosure that an important government witness had committed perjury in other proceedings, stating that the Court had a duty "to see that the waters of justice are not polluted").

Fraud on the Court Violates Due Process when it Deprives Life, Liberty, or Property

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009). Because fraud on the courts pollutes the process society relies on for dispute-resolution, subsequent courts reason that "a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. Judgments ... obtained by fraud or collusion are void, and confer no

vested title." *League v. De Young*, 52 U.S. 185, 203, 13 L. Ed. 657 (1850). Due process does not permit fraud on the court to deprive any person of life, liberty or property. A biased court also violates constitutional due process guarantees by tolerating that fraud.

"As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court ... by the presentation of known false evidence is incompatible with 'rudimentary demands of justice' ... the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). In *Mooney*, this Court held due process:

> is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived ... a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance ... is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action ... may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers... Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935).

In 2011, the Honorable Judge Gary M. Farmer retired from the Fourth DCA of Florida but wrote a dissent, through the Honorable Judge Mark Polen, following the robo-signing scandal that stated:

> Decision-making in our courts depends on genuine, reliable evidence. The system cannot tolerate even an attempted use of fraudulent documents and false evidence in our courts. The judicial branch long ago recognized its responsibility to deal with, and punish, the attempted use of false and fraudulent evidence. When such an attempt has been colorably raised by a party, courts must be most vigilant to address the issue and pursue it to a resolution. *Pino v. Bank of New York, Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011).

In 1980, Article V of the Florida Constitution was amended to divest the Florida Supreme Court of jurisdiction to review a PCA without a written opinion.[3] In 1993, the Honorable Judge Gerald B. Cope, Jr., of the Third District Court of Appeal, published an extensive article analyzing Florida's Appellate Procedure after the 1980 Amendment. Gerald B. Cope Jr., Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System, 45 Fla. L. Rev. 21 (Jan. 1993). Judge Cope concluded that Florida's written opinion requirement was enacted in a time of crisis and imposed "the most severe limitation on access to the State Supreme Court of any American jurisdiction." Id. at 93.

Two decades after the 1980 amendment, the Florida Supreme Court commissioned a report to study the use of PCA decisions. See, Comm. on Per Curiam Affirmed Dec., Final Report and Recommendations (May 2000).

The majority reported that the PCA performs a useful function when used properly. Id. at 29. However, several practitioners cited a
3 Florida Constitutional Amendment Article V 3(b)(3); *see generally*, Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); *St. Paul Title Ins. Co. v. Davis,* 392 So. 2d 1304, 1305 (Fla. 1981).

The widespread PCA problem which appears arbitrary and undermines the quality of appellate justice in Florida. Id. The Florida Supreme Court adopted the PCA Committee's recommendation to amend Rule 9.330 of Florida's Appellate Procedure to allow litigants to request a written opinion from the Court effective January, 2003.

Former Florida Supreme Court Justice England also concluded this amendment to Rule 9.330 is conceptually flawed and should be repealed. Arthur J. England, Jr., Asking for Written Opinion from a Court That Has Chosen Not to Write One, 78 Mar Fla. B. J. 10, 16 (March, 2004). Justice England saw the procedural infirmity in "asking a District Court to provide an opinion that will expose their rationale to Supreme Court review puts expressly in the hands of District Court judges the discretion to allow or not allow review." Id. at 15.

It is "fundamental black letter law" that a District Court should write an opinion unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot*, 648 So. 2d 137, 138 (Fla. 4th DCA 1994). The Third DCA has abused the PCA to deny appeals speaking out about the use of false endorsements and assignments, fraud on the court, perjury, and the destruction of evidence in defiance of a court ordered subpoena. This breakdown in due process reaches an arbitrary result that conflicts with well-settled law and permits parties to the National

Mortgage

Settlement to continue to defraud courts with the approval, *sub silencio*, of the Florida Court system.

Due Process protects against the arbitrary deprivation of property and reflects the value our constitutional and political history places on the right to enjoy prosperity, free of governmental interference. *Fuentes v. Shevin*, 407 U.S. 67, 80-1,
92 S.Ct. 1983, 1996 (1972).

Under the Magna Carta, the Due Process Clause limits the powers of all branches of government, including the judiciary. *Truax v. Corrigan*, 257, U.S. 312,333, 42 S.Ct. 124, 129 (1921). ChiefJustice
Taft wrote:

> Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws." *Id.* The guaranty of due process "was aimed at undue favor and individual or class privilege.... *Id.*

This is why "Equal Justice Under Law" is etched in all caps across the front of the U.S. Supreme Court. "The vague contours of the Due Process Clause do not leave judges at large." *Rochin v. People of*

California, 342 U.S. 165, 170, 72 S.Ct. 205, 209

(1952). Judges have long been required to give a public reasoned opinion from the bench in support of their judgment. Id. at fn. 4.

The reason given to support state action that takes property may not be so inadequate that it may be characterized as arbitrary. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974). State action is "arbitrary" when it takes without reason or for merely pretextual reasons. *Decarion v. Monroe County*, 853 F. Supp 1415, 1421

(S.D. Fla. 1994).

The "arbitrary and capricious" standard requires a state to examine the relevant data and to articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) *citing*

Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). As the

Florida Supreme Court has held, "one of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida Parole and Probation Commission*, 444 So. 2d 917, 921 (Fla. 1983).

The Florida Supreme Court won't speak out to correct this miscarriage of justice, this Honorable Court is all that is left to protect Petitioner's due process rights enshrined in the 5th and 14th amendments to the U.S. Constitution. This Court instructs:

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed.

1107 (1930). at 681-682, 50 S. Ct., at 454-455.

The Florida Supreme Court instructs that "the disqualification of an appellate judge is a matter which rests largely within the sound discretion of the individual involved." *Giuliano v. Wainwright*, 416 So. 2d 1180, 1181 (1982). "When a litigant seeks to disqualify ... a judge of a district court of appeal, a different, more personal standard applies. The standard enunciated by the Florida Supreme Court is that 'each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.'" *In re Carlton* 378 So. 2d 1212, 1216 (Fla.1979) (On Request for Disqualification). *Clarendon Nat. Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1233 (Fla. 3rd DCA 2008). In *Shogreen*, this Court noted that the Florida Supreme Court "has approved the application of the Carlton standard when that court's appellate-level judges were faced with a court-wide motion for disqualification." *Id. citing, 5–H Corp. v. Padovano*, 708 So. 2d 244, 245–46 (Fla.1997).

This Court instructs "a multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902, 195 L. Ed. 2d 132 (2016). "An unconstitutional failure to recuse constitutes structural error..." *Id.*

"The Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" (citations omitted) Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be

constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017). As this Court has explained:

> The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." (citations omitted). It follows that public perception of judicial integrity is "a state interest of the highest order." (citations omitted) *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666, 191 L. Ed. 2d 570 (2015).

"It is axiomatic that the Due Process Clause entitles a person to an impartial and disinterested tribunal in ... civil ... cases. This requirement of neutrality ... preserves both the appearance and reality of fairness, ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

The Florida Supreme Court has held, "it is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of

justice." *Crosby v. State*, 97 So. 2d 181, 184 (Fla. 1957). The Florida Supreme Court recognized that "prejudice of a judge is a delicate question to raise but ..., if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983). In *Livingston*, the Florida Supreme Court further instructed:

> it is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or
> favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy... *Id.*

The rules regarding judicial disqualification "were established to ensure public confidence in the integrity of the judicial system...." *Livingston* at 1086.

The Fourth DCA has repeatedly denied Motions to Disqualify that set forth many objective reasons to question the court's impartiality. Most obvious is the front page article of the Daily Business Review that explained in great detail how the Third DCA has ruled for homeowners in only 2 cases on standing since 2010, while the other 4 DCAs have ruled for homeowners in hundreds of cases. These foreclosures are prosecuted using the same forms and evidence throughout Florida. As the Daily Business review correctly reported "There is no question that the Third District is pro-business and couldn't care less about homeowners."

CONCLUSION

Circuit Court Judges work with lawyers in multiple cases and besides to share the court room, sometimes they have the same religious believes what make them help each other in their cases against pro-se parties
The basis for the judicial power, which is referenced in Article V, Section 1 of the Florida Constitution, is found in Federalist Number 78, written by Alexander Hamilton as Publius. The Federalist Society warns that:

> The Constitution's promise of due process of law is, among other things, a promise of impartial adjudication in the courts—a promise that people challenging assertions of government power will have access to a neutral tribunal that is not only free from actual bias but free even from the appearance of bias. To the extent that private citizens cannot reasonably be confident that they will receive justice through litigation, they will be tempted to seek extra-legal recourse.

In this case the evidence is irrefutable; a sales contract must be sign by all indispensable parties (All title holders) otherwise the contract is not enforceable, and therefore, a lawsuit for specific performance is not sustain; however, the circuit court judge stroke the evidence from the case without any legal reason.

See Knowles v. C.I.T., 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977) ("It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the

existence of a contract, a breach thereof and damages flowing from the breach."); *see also A.R. Holland, Inc. v. Wendco Corp.*, 884 So. 2d 1006, 1008 (Fla. 1st DCA 2004) ("In the proceeding below, it was Holland's burden to prove that (1) a contract existed, (2) the contract was breached, and (3) damages flowed from that breach."); *Capitol Envtl. Services v. Earth Tech,* 25 So. 3d 593, 596 (Fla. 1st DCA 2009) ("The injured party is entitled to recover all damages that are causally related to the breach so long as the damages were reasonably foreseeable at the time the parties entered into the contract.").

WHEREFORE, this Court should grant the writ and consider the issue on the merits.

Respectfully submitted,

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