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INTRODUCTORY REMARKS

For this installment of the Recent Developments, we examine recent decisions of both the United States Supreme Court and the Florida Supreme Court. The opening Note examines the United States Supreme Court’s decision in *Town of Castle Rock v. Gonzales* (*Gonzales II*),¹ where the Court held that the Due Process Clause of the Fourteenth Amendment does not provide a party protected under a restraining order a legitimate claim of entitlement to enforcement of the restraining order.² The second Note examines the United States

1. 125 S. Ct. 2796 (2005).
 2. Amanda Quirke contributed this Note.

Supreme Court's decision in *Kelo v. City of New London (Kelo II)*,³ where the Court held that a city's exercise of eminent domain power in furtherance of an economic development plan satisfies the constitutional "public use" requirement.⁴

Our coverage of recent Florida Supreme Court decisions begins with *American Home Assurance Co. v. National Railroad Passenger Corp.*,⁵ where the court answered certified questions from the Eleventh Circuit Court of Appeals involving the proper application of Florida statutes governing comparative fault and restrictions on the waiver of sovereign immunity.⁶ Our Florida Supreme Court coverage continues with *Boca Burger, Inc. v. Forum (Boca Burger II)*,⁷ which held that a plaintiff has an absolute right to amend its complaint once as a matter of course before a responsive pleading is served and a trial court has no discretion to deny such an amendment; a defendant may assert an affirmative defense, including the defense of federal preemption, in a motion to dismiss; and an appellate court may, in "appropriate circumstances," impose sanctions on an appellee or its lawyer for the frivolous defense of a patently erroneous trial court order.⁸ Our final Note examines *Sunset Harbour Condominium Ass'n v. Robbins*,⁹ where the Florida Supreme Court held that a state statute prohibiting assessment of value for the tax year on real property improvements not substantially completed on January 1 comports with the Florida Constitution's just valuation requirement.¹⁰

CONSTITUTIONAL LAW—A PROTECTED PARTY HAS NO LEGITIMATE CLAIM OF ENTITLEMENT TO ENFORCEMENT OF A RESTRAINING ORDER WHICH WOULD BE PROTECTED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—*Town of Castle Rock v. Gonzales (Gonzales II)*, 125 S. Ct. 2796 (2005).

Respondent, Gonzales, claimed the Town of Castle Rock violated her due process rights under the Fourteenth Amendment based on the police department's failure to enforce a restraining order against her husband.¹¹ Gonzales claimed the Town of Castle Rock deprived her of her property interest in the enforcement of the restraining order without due process because the police department had "an official policy or custom of failing to respond properly to complaints of

3. 125 S. Ct. 2655 (2005).

4. Melinda Parks contributed this Note.

5. 908 So. 2d 459 (Fla. 2005).

6. Maureen Walterbach contributed this Note.

7. 912 So. 2d 561 (Fla. 2005).

8. Jessica Slatten contributed this Note.

9. 914 So. 2d 924 (Fla. 2005).

10. Richard Junnier contributed this Note.

11. *Town of Castle Rock v. Gonzales (Gonzales II)*, 125 S. Ct. 2796, 2800 (2005).

restraining order violations” and “tolerate[d] the non-enforcement of restraining orders by its police officers.”¹² The Tenth Circuit held Gonzales had a protected property interest in the enforcement of the restraining order and the town deprived her of due process based on the police department’s failure to take her seriously and enforce the restraining order.¹³ On appeal by the Town of Castle Rock, the Supreme Court reversed and found Gonzales has no protected property interest under the Due Process Clause of the Fourteenth Amendment.¹⁴

Respondent obtained a restraining order against her husband in conjunction with a divorce proceeding.¹⁵ On June 22, 1999, respondent realized her three daughters were missing from the yard of the family home and notified the police department at 7:30 p.m.¹⁶ Gonzales, suspecting her husband had taken the girls, showed the officers a copy of the restraining order, but the officers stated “there was nothing they could do” and instructed her to call the police department if the children did not return home by 10:00 p.m.¹⁷ Gonzales talked to her husband on his cell phone at 8:30 p.m., in which he informed her that he and the girls were at an amusement park in Denver.¹⁸ Gonzales called the police again and asked if they would check for her husband at the amusement park or put out an all points bulletin for her husband.¹⁹ The police again suggested she should wait until 10:00 p.m. to see if her husband would return her daughters.²⁰

She contacted the police at 10:10 p.m. but was instructed to wait until midnight.²¹ After finding nobody at her husband’s apartment, she called the police at 12:10 a.m. and was instructed to wait for an officer to arrive.²² The officer never came to the apartment, so she went to the police station at 12:50 a.m., where she was ignored.²³ At 3:20 a.m., her husband went to the police station and opened fire

12. *Id.* at 2802 (citing Petition for Writ of Certiorari, app. at 129(a), *Gonzales II*, 125 S. Ct. 2796 (No. 04-278)).

13. *Gonzales v. City of Castle Rock (Gonzales I)*, 366 F.3d 1093 (10th Cir. 2004), *vacated*, 125 S. Ct. 2796 (2005).

14. *Gonzales II*, 125 S. Ct. at 2810-11.

15. *Id.* at 2800.

16. *Id.* at 2801.

17. *Id.* (quoting Petition for Writ of Certiorari, app. at 126(a), *Gonzales II*, 125 S. Ct. 2796 (No. 04-278)).

18. *Id.*

19. *Id.* at 2801-02.

20. *Id.* at 2802.

21. *Id.*

22. *Id.*

23. *Id.*

with a semiautomatic handgun.²⁴ He was killed by return fire from the police.²⁵ All three daughters were found dead in his truck.²⁶

The issue addressed by the Supreme Court is whether Gonzales has an interest in the enforcement of a restraining order which is protected by the Due Process Clause of the Fourteenth Amendment.²⁷ “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”²⁸ An entitlement is created from “an independent source such as state law.”²⁹ However, “[a]lthough the underlying substantive interest is created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.”³⁰

The Tenth Circuit found that Colorado law created an entitlement based on the language printed on the restraining order³¹ and a state statute requiring enforcement under certain conditions.³² The Tenth Circuit focused on the mandatory language in the Colorado statute, including a requirement that “[a] peace officer *shall* arrest” and “*shall* use every reasonable means to enforce a protection order.”³³ The Tenth Circuit also found that the legislative intent behind the statute was “to alter the fact that the police were not enforcing domestic abuse restraining orders” and that any other interpretation “would render domestic abuse restraining orders utterly valueless.”³⁴

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 2803.

28. *Id.* (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

29. *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)).

30. *Id.* at 2803-04 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 10 (1978)).

31. The language printed on the back of the restraining order contained an instruction to law enforcement officials stating:

YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.

Id. at 2801.

32. *Gonzales v. City of Castle Rock (Gonzales I)*, 366 F.3d 1093, 1101 (10th Cir. 2004); see COLO. REV. STAT. § 18-6-803.5(3) (2001).

33. *Gonzales I*, 366 F.3d at 1104 (emphasis added) (quoting COLO. REV. STAT. § 18-6-803.5(3) (2001)).

34. *Id.* at 1108-09.

Contrary to the findings of the Tenth Circuit, the majority found the Colorado statute did not create an entitlement because it did not impose a mandatory requirement to enforce restraining orders.³⁵ This interpretation reconciled the statutory language with the “deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands.”³⁶ Under the Due Process Clause of the Fourteenth Amendment, “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”³⁷

The majority also found that obligations of the police department are different when the subject of the order is not present, noting the fact that Gonzales’s husband was not present and his whereabouts were unknown.³⁸ Citing other cases which found that an arrest may be impossible when the alleged abuser is not at the home, the Court found the Colorado statute contemplated this situation by including a provision that only required an officer to “seek a warrant for the arrest” when an arrest would be “impractical” under the circumstances.³⁹ Gonzales did not clearly identify whether she was entitled to having her husband arrested, having the police seek a warrant, or having them use reasonable means to enforce the restraining order.⁴⁰ “Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed ‘entitled’ to something when the identity of the alleged entitlement is vague.”⁴¹

The Supreme Court also found that even if there were an entitlement created under the Colorado statute, it may not create a property interest under the Due Process Clause of the Fourteenth Amendment.⁴² The Court found the right to the enforcement of a restraining order does not “have some ascertainable monetary value” and thus is not property under the “*Roth*-type property-as-entitlement” line of cases.⁴³ The property interest claimed by Gonzales arises incidentally from the government function of arresting people who it has probable cause to believe have committed a crime.⁴⁴

35. *Gonzales II*, 125 S. Ct. at 2805.

36. *Id.* at 2806.

37. *Id.* at 2803.

38. *Id.* at 2807. The dissent disagrees with this fact, instead asserting the “‘scene’ of the violation was wherever the husband was currently holding the daughters, [so] this case does not implicate the question of an officer’s duties to arrest a person who has left the scene and is no longer in violation of the restraining order.” *Id.* at 2820 (Stevens, J., dissenting).

39. *Id.* at 2807 (majority opinion) (citing COLO. REV. STAT. § 18-6-803.5(3)(b) (2001)).

40. *Id.*

41. *Id.*

42. *Id.* at 2809.

43. *Id.* See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 964 (2000).

44. *Gonzales II*, 125 S. Ct. at 2810.

“[A]n indirect and incidental result of the Government’s enforcement action . . . does not amount to a deprivation of any interest in life, liberty, or property.”⁴⁵

In the concurrence, Justice Souter found that another flaw is Gonzales’s claim to a property interest in a state mandated process.⁴⁶ He cited precedent which said that “[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”⁴⁷ Thus, the Court has always made a distinction between a substantive interest and the process required by the Due Process Clause of the Fourteenth Amendment to protect that interest. Finding that Gonzales had a property interest in the enforcement of the restraining order would “collaps[e] the distinction between property protected and the process that protects it.”⁴⁸

The dissent found that there is an entitlement to enforcement of restraining orders because in the domestic violence context, police discretion is removed and enforcement is mandatory.⁴⁹ Justice Stevens discredited the majority’s position that since Gonzales failed to specify what police action she was entitled to, that the police action cannot be mandatory.⁵⁰ Stevens treated the statute as requiring mandatory enforcement, whether it is to arrest the alleged offender, seek a warrant, or use reasonable means to enforce the restraining order.⁵¹

Focusing on the particular context of the restraining order in this case, Justice Stevens noted that Colorado was one of many states that passed mandatory arrest statutes in the mid-1990s to take “aim at the crisis of police underenforcement in the domestic violence sphere.”⁵² “The purpose of these statutes was precisely to ‘counter police resistance to arrests in domestic violence cases by removing or

45. *Id.* (quoting *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980)).

46. *Id.* at 2812 (Souter, J., concurring).

47. *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)).

48. *Id.*

49. Prior to its analysis of the case, the dissenting opinion takes issue with the Supreme Court’s interpretation of Colorado law in conflict with the Tenth Circuit, because the Supreme Court should defer to “the views of a federal court as to the law of a State within its jurisdiction” unless the decision is “clearly wrong.” *Id.* at 2814 (Stevens, J., dissenting) (quoting *Phillips v. Wash. Legal Found.*, 542 U.S. 156, 167 (1998)). The dissent suggests a proper method would have been to certify the question to the Colorado Supreme Court in alignment with the principles of federalism, to “avoid[] the unnecessary adjudication of difficult questions of constitutional law” and to promote “judicial economy and fairness to the parties.” *Id.* at 2816.

50. *Id.* at 2819.

51. *Id.* at 2819-20.

52. *Id.* at 2817. Studies during that time period showed police officers only arrested alleged abusers three to ten percent of the time, and thirteen percent of the time when the victim had visible injuries. *Id.* at 2818 (citing Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 542).

restricting police officer discretion; mandatory arrest policies would increase police response and reduce batterer recidivism.’⁵³

Justice Stevens also rejected the majority’s rigid view of property as something that has some ascertainable monetary value, noting that “our cases have found ‘property’ interests in a number of state-conferred benefits and services.”⁵⁴ In addition, the dissent analogized Gonzales’s interest in enforcement of the restraining order to a private contract for security services, which has “some ascertainable monetary value” and would certainly qualify as a property interest protected by the Due Process Clause of the Fourteenth Amendment.⁵⁵ “The fact that it is based on a statutory enactment and a judicial order entered for her special protection, rather than on a formal contract, does not provide a principled basis for refusing to consider it ‘property’ worthy of constitutional protection.”⁵⁶

Justice Stevens’s dissent focused more on the context and facts of the case to find the Colorado statute imposed a mandatory requirement for police to enforce the restraining order. “[T]he crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing*.”⁵⁷ Thus, in Justice Stevens’s view, since Gonzales “had a property interest in the enforcement of the restraining order, state officials could not deprive her of that interest without observing fair procedures.”⁵⁸

In contrast, the majority focused on the discretion vested in a police officer to enforce a restraining order; it found Gonzales did not have a legitimate claim of entitlement and thus had no property interest which would be protected by the Due Process Clause of the Fourteenth Amendment. Therefore, a protected party has no cause of action against a police department for failure to enforce a restraining order, as the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its “substantive” manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as “a font of tort law.”⁵⁹

53. *Id.* at 2817 (quoting Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1670).

54. *Id.* at 2822.

55. *Id.* at 2823 n.19.

56. *Id.* at 2823-44.

57. *Id.* at 2819-20.

58. *Id.* at 2824. Alluding to the tragic facts of this particular case, Stevens notes, “At the very least, due process requires that the relevant state decisionmaker *listen* to the claimant and then *apply the relevant criteria* in reaching his decision.” *Id.*

59. *Id.* at 2810 (majority opinion).

CONSTITUTIONAL LAW—A CITY’S EXERCISE OF EMINENT DOMAIN POWER IN FURTHERANCE OF AN ECONOMIC DEVELOPMENT PLAN SATISFIES CONSTITUTIONAL “PUBLIC USE” REQUIREMENT—*Kelo v. City of New London (Kelo II)*, 125 S. Ct. 2655 (2005).

In December 2000, nine petitioners brought an action in the New London Superior Court⁶⁰ claiming that the taking of their properties by the City of New London for economic development purposes violated the “public use” restriction in the Fifth Amendment of the Constitution.⁶¹ The superior court granted petitioners’ request for permanent injunctive relief for a portion of the property included in petitioners’ complaint. However, the Connecticut Supreme Court upheld the taking as constitutional, concluding that “economic development projects created and implemented . . . that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.”⁶² On appeal, the Supreme Court affirmed.⁶³

The City of New London (“City”), a “distressed municipality,” was targeted for economic revitalization because of high unemployment and a decline in total population throughout the 1990s.⁶⁴ In the search for some form of economic development, city leaders resurrected the private, nonprofit New London Development Corporation (NLDC) and authorized a \$5.35 million bond issue to support its planning activities.⁶⁵ Additionally, the City hoped to benefit from the erection of a \$300 million research facility by pharmaceutical company Pfizer Inc.⁶⁶

60. See *Kelo v. City of New London (Kelo II)*, 125 S. Ct. 2655, 2660 (2005).

61. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. For a discussion of the above quoted clause’s applicability to the states through the Fourteenth Amendment, see *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

62. *Kelo v. City of New London (Kelo I)*, 843 A.2d 500, 520 (Conn. 2004).

63. *Kelo II*, 125 S. Ct. at 2669.

64. *Id.* at 2658. In 1996, more than 1500 people lost jobs as a result of the federal government closing the Naval Undersea Warfare Center in Fort Trumbull. *Id.* In 1998, the City’s unemployment rate was almost double that of the State. *Id.* A population of slightly less than 24,000 was the City’s lowest since 1920. *Id.*

65. *Id.* at 2659. The NLDC was originally created in 1978 to aid the City with economic development. *Kelo I*, 843 A.2d at 508. The statutory provision authorizing such creation states in pertinent part: “Any municipality which has a planning commission is authorized, by vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency and exercise through such agency the powers granted under this chapter . . .” CONN. GEN. STAT. ANN. § 8-188 (West, Westlaw through 2006 Supplement).

66. *Kelo II*, 125 S. Ct. at 2659. In 1998, Pfizer Inc. announced plans to develop a global research facility on a site adjacent to the Fort Trumbull area. *Kelo I*, 843 A.2d at 508.

In 2000, the City approved an NLDC development plan⁶⁷ that was “projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”⁶⁸ The NLDC plan focused on ninety acres in the Fort Trumbull area of New London and encompassed seven parcels intended to “capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract” and to “make the City more attractive and . . . create leisure and recreational opportunities on the waterfront and in the park.”⁶⁹ To accomplish its plan, NLDC was authorized by the City to use eminent domain, if necessary, to acquire the needed land.⁷⁰ After successfully purchasing most of the real estate in the ninety-acre area, negotiations with petitioners failed.⁷¹

Petitioner Kelo bought her Fort Trumbull waterfront house in 1997 and has since made extensive improvements.⁷² Petitioner “Dery was born in her Fort Trumbull house in 1918 and has lived there” ever since, including sixty years with her current husband.⁷³ Overall, nine petitioners owned fifteen properties in Fort Trumbull, which were either owner-occupied or held for investment purposes.⁷⁴ Four properties were in Parcel 3 of the development plan, and eleven were in Parcel 4A.⁷⁵ There was no evidence that any of these properties were blighted or in poor condition; rather, as petitioners allege, they were the subject of condemnation “only because they happen to be located in the development area.”⁷⁶

The Supreme Court granted certiorari to determine “whether a city’s decision to take property for the purpose of economic develop-

67. Economic, environmental, and social ramifications were studied. *Kelo II*, 125 S. Ct. at 2659 n.2. Six alternative development proposals were evaluated with an ultimate conclusion by the Office of Planning and Management that the project was within state and municipal development policies. *Id.*

68. *Kelo I*, 843 A.2d at 507.

69. *Kelo II*, 125 S. Ct. at 2659. Parcel 1 is designated for a waterfront conference hotel that will include restaurants, shopping and marinas; Parcel 2 will have eighty new residences and space for a new U.S. Coast Guard Museum; Parcel 3 is located immediately north of the Pfizer facility with 90,000 square feet of research and development office space; Parcel 4A will be used to either support the adjacent state park with parking or retail services or to support the marina; Parcel 4B will include a renovated marina and the final stretch of the riverwalk; Parcels 5, 6, and 7 will provide land for office and retail space, parking and water-dependent commercial uses. *Id.*

70. *Id.* at 2660. The statute relied on by the City states in pertinent part that “[t]he development agency may, with the approval of the legislative body, and in the name of the municipality, acquire by eminent domain real property located within the project area.” CONN. GEN. STAT. ANN. § 8-193(a) (West, Westlaw through 2006 Supplement).

71. *Kelo II*, 125 S. Ct. at 2660.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

ment satisfies the ‘public use’ requirement of the Fifth Amendment.⁷⁷ Relying heavily on its previous decisions in *Berman v. Parker*⁷⁸ and *Hawaii Housing Authority v. Midkiff*,⁷⁹ a 5-4 Court found for the City.⁸⁰ The Court’s holding stands for the proposition that modern eminent domain law does not distinguish between *public use* and *public purpose*.

The Court began its analysis by acknowledging that “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”⁸¹ However, “it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.”⁸² The Court, though, relied on neither of these propositions to dispose of the case.⁸³ Instead, the Court broadened the issue to “whether the City’s development plan serves a ‘public purpose’”⁸⁴ and discussed at length cases supporting the Court’s rejection of “any literal requirement that condemned property be put into *use* for the general public.”⁸⁵

First, in *Berman*, the Court upheld the exercise of eminent domain to condemn a department store, itself unblighted, located in a blighted area of Washington, D.C.⁸⁶ The condemnation was in accordance with a redevelopment plan authorized by statute.⁸⁷ To justify condemning the thriving department store, the Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.”⁸⁸

77. *Id.* at 2661.

78. 348 U.S. 26 (1954).

79. 467 U.S. 229 (1984).

80. Justice Stevens wrote the opinion, Justice Kennedy concurred with an opinion, and Justice O’Connor dissented with an opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. Justice Thomas also wrote a separate dissenting opinion. *Id.*

81. *Kelo II*, 125 S. Ct. at 2661.

82. *Id.*

83. *Id.*

84. *Id.* at 2663 (emphasis added).

85. *Id.* at 2662 (emphasis added) (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

86. *Berman v. Parker*, 348 U.S. 26 (1954).

87. District of Columbia Redevelopment Act of 1945, 60 Stat. 790 (1946). Section 2 of the Act made a “legislative determination”:

[O]wing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to standard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose

§ 2. The Act neither defined “slums” nor “blighted areas.” *Berman*, 348 U.S. at 28 n.1.

88. *Berman*, 348 U.S. at 35.

Instead, Justice Douglas, writing for the majority, announced “[i]t is within the power of the legislature to determine that the *community* should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”⁸⁹ In other words, it is up to the legislature to determine whether the condemnation meets a public purpose. Furthermore, the Court determined that there is no need for the public to actually use the condemned property as long as the condemnation furthers a legitimate public purpose.⁹⁰

Next, in *Midkiff*, a unanimous Supreme Court reaffirmed *Berman*'s deferential approach to legislative judgments in declaring a public purpose. In *Midkiff*, the Court upheld a statute whereby fee title was taken from lessors and transferred to lessees (for compensation) in order to reduce the concentration of land ownership.⁹¹ The Court concluded that the State's purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use.⁹² The Court further explained that “it is only the taking's purpose, and not its mechanics,” that matters in determining public use.⁹³ Therefore, even if the State was taking property from one landowner and giving it to another, which traditionally was not allowed under the public use clause, the purpose stated in *Midkiff* was found constitutional.

In *Kelo*, the Court relied principally on three factors to determine that economic revitalization constituted sufficient public use. First, the City had a carefully formulated economic development plan that it believed would provide appreciable benefits to the area, including new jobs and increased tax revenue:

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.⁹⁴

Next, the Court relied on the precedents embodied in *Berman* and *Midkiff* to dispense with petitioners' arguments that economic devel-

89. *Id.* at 33 (emphasis added).

90. *Id.* The Court stated that it is solely up to Congress to determine how the property is to be used once it has determined that a public purpose has been established. *Id.*

91. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231-32 (1984). The Hawaii Housing Authority was required to hold a public hearing to determine whether the condemnation by the State “will effectuate the public purposes” of the Act. *See* HAW. REV. STAT. ANN. § 516-22 (West, Westlaw through 2005 legislation). If so, acquisition of the land was thereby authorized. *Id.*

92. *Midkiff*, 467 U.S. at 241-42.

93. *Id.* at 244.

94. *Kelo v. City of New London (Kelo II)*, 125 S. Ct. 2655, 2665 (2005).

opment does not qualify as a public use and that using eminent domain for economic development crosses the boundary between public and private takings.⁹⁵ In *Berman*, the Court endorsed the purpose of transforming a blighted area into a “well-balanced” community through redevelopment.⁹⁶ In *Midkiff*, the Court upheld the interest in breaking up a land oligopoly that “created artificial deterrents to the normal functioning of the State’s residential land market.”⁹⁷ Accordingly, the Court claimed “[i]t would be incongruous to hold that the City’s interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those . . . interests,” and found “no basis for exempting economic development from our traditionally broad understanding of public purpose.”⁹⁸ Furthermore, “the government’s pursuit of a public purpose will often benefit individual private parties.”⁹⁹ In rejecting the unconstitutionality of the idea that under the redevelopment plan land would be leased or sold to private developers for redevelopment, the Court acknowledged “ [t]he public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.’ ”¹⁰⁰

Finally, the Court restated its deference to federalism and state decisionmaking and decided not to second-guess the effectiveness of the City’s development plan or its determinations about what land is necessary to carry out the project.¹⁰¹ “ ‘When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.’ ”¹⁰² Accordingly, the Court found

95. *Id.* at 2665-66.

96. *Id.* at 2665 (citing *Berman*, 348 U.S. at 26, 33).

97. *Id.* (quoting *Midkiff*, 467 U.S. at 242).

98. *Id.* at 2665-66. The City relied upon the Connecticut Legislature’s declaration of policy in municipal development projects:

It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives . . . that permitting and assisting municipalities to acquire and improve unified land and water areas . . . in distressed municipalities . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

CONN. GEN. STAT. ANN. § 8-186 (West, Westlaw through 2006 Supplement).

99. *Kelo II*, 125 S. Ct. at 2666.

100. *Id.* (quoting *Berman*, 348 U.S. at 34).

101. *Id.* at 2668.

102. *Id.* at 2667 (quoting *Midkiff*, 467 U.S. at 242). The Court diffused the parade of horrors argument by stating that the Takings Clause “ ‘operates as a conditional limita-

that a rule requiring postponement of every condemnation pending judicial approval would be too burdensome on states in successfully implementing redevelopment plans.¹⁰³

In her dissent, Justice O'Connor accused the majority of effectively deleting the words "for public use" from the Takings Clause.¹⁰⁴ Although Justice O'Connor wrote the majority opinion in *Midkiff*, her dissent here declared that if economic development meets the public use requirement, there is no longer a distinction between private and public use of property.¹⁰⁵

Justice O'Connor explained that the exceptional circumstances in the cases cited by the majority warranted legislative deference. For example, the eradication of blight and slums in *Berman* and the elimination of oligopoly in *Midkiff* were cases where the "extraordinary precondemnation use of the targeted property inflicted affirmative harm on society."¹⁰⁶ These rare circumstances clearly were not present in *Kelo*, and the majority's application of such legislative deference "significantly expands the meaning of public use."¹⁰⁷

Succinctly summarizing her opinion of the majority's reasoning, Justice O'Connor declared, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."¹⁰⁸ Further, "[s]tates play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them."¹⁰⁹

Justice Thomas raised similar concerns in his dissent and agreed that the cases cited by the majority for the proposition that *public use* means *public purpose* rather than *use by the public* were exceptions to the rule.¹¹⁰ In fact, Justice Thomas characterized the Court's proclaimed deferential standard as "deeply perverse" and urged the Court to return to the original meaning of the public use clause, from which the Court has clearly deviated.¹¹¹

tion, permitting the government to do what it wants so long as it pays the charge." *Id.* at 2667 n.19 (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring)). Further, the Court refused to consider cases executed outside of an integrated development plan, simply stating that "the hypothetical cases . . . can be confronted if and when they arise." *Id.* at 2667. Assuming that the City was exercising its power within its authority, the Court found no need to craft "an artificial restriction on the concept of public use." *Id.*

103. *Id.* at 2668.

104. *Id.* at 2671 (O'Connor, J., dissenting).

105. *Id.*

106. *Id.* at 2674.

107. *Id.* at 2675.

108. *Id.* at 2676.

109. *Id.* at 2677.

110. *Id.* at 2683 (Thomas, J., dissenting).

111. *Id.* at 2687.

However, until the Court revisits this issue, it will be up to the states to decide whether to increase the burden on the government's exercise of eminent domain. The majority's "broader and more natural interpretation of public use as 'public purpose'"¹¹² no doubt sets a standard that can easily be met, at least in federal court, for most condemnation proceedings.

TORTS—SOVEREIGN IMMUNITY—THE NEGLIGENCE OF AN ACTIVE TORTFEASOR SHOULD BE APPORTIONED TO THE VICARIOUSLY LIABLE PARTY UNDER FLORIDA'S COMPARATIVE FAULT STATUTE AND FLORIDA'S STATUTORY RESTRICTION ON THE WAIVER OF SOVEREIGN IMMUNITY IS NOT APPLICABLE TO THE INDEMNIFICATION PROVISION OF A CONTRACT BETWEEN A MUNICIPAL AGENCY AND A PRIVATE ENTITY—*American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005).

The Eleventh Circuit Court of Appeals certified four questions of Florida law to the Florida Supreme Court because there was no controlling precedent for its pending case.¹¹³ The case originated in the federal district court for the Middle District of Florida, and the court of appeals consolidated several appeals for which the resolutions to the certified questions applied.¹¹⁴

The case arose out of an incident in which an Amtrak passenger train collided with a hauler rig stalled on the railroad tracks, damaging the combustion turbine engine the rig was carrying.¹¹⁵ The Kissimmee Utility Authority (KUA) entered into an agreement with Florida Municipal Power Agency (FMPA) for fifty percent of the ownership of an electric power plant and to share electricity production costs.¹¹⁶ KUA then entered into a crossing agreement with CSX Transportation (CSX) to construct, use, and maintain a road grade crossing over CSX's tracks, so vehicles and people could cross over the tracks to the power plant.¹¹⁷ The agreement required KUA to "defend, indemnify, protect, and save [CSX] harmless from and against" certain designated losses and casualties . . . [and] required KUA to indemnify any company whose property was operated by CSX at the railroad crossing."¹¹⁸

KUA contracted with General Electric (GE) for the purchase and delivery of equipment for the plant.¹¹⁹ GE then contracted with Stew-

112. *Id.* at 2662 (majority opinion).

113. *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 462-63 (Fla. 2005).

114. *Id.* at 462.

115. *Id.* at 463-64.

116. *Id.* at 463.

117. *Id.*

118. *Id.*

119. *Id.*

art & Stevenson Services, Inc. (S&S) to purchase and customize equipment for the power plant, who then contracted with Rountree Transport and Rigging, Inc. (“Rountree”) to transport the combustion turbine.¹²⁰ As the Rountree transporters were adjusting the height of the rig on the tracks, the collision took place.¹²¹ A series of lawsuits ensued between the parties and their insurers.¹²² The district court separated the suit into a liability phase and a damages phase.¹²³

Of the questions certified to the Florida Supreme Court, the first regarded a comparative fault issue, and the other three regarded indemnification agreements and sovereign immunity issues.¹²⁴ The first question arose as a result of AHA’s argument to the Eleventh Circuit that its damages should not be limited under the comparative fault principles of section 768.81, *Florida Statutes*, particularly subsections (2) and (3).¹²⁵ The statute codified the holding of *Hoffman v. Jones*,¹²⁶ and “[n]othing in the legislative history of this statute indicates an intention other than a direct codification of this Court’s adoption of comparative liability.”¹²⁷

The first certified question, “Should a vicariously liable party have the negligence of the active tortfeasor apportioned to it under *Florida Statute* § 768.81 such that recovery of its own damages is reduced concomitantly?,”¹²⁸ asks whether, under Florida’s comparative fault law, a vicariously liable party should have the active tortfeasor’s negligence apportioned to it.¹²⁹

AHA argued that because “fault” is used, but neither it nor its subrogor were directly negligent, the comparative fault statute was inapplicable.¹³⁰ The railroads, however, focused on the plain meaning of the word “chargeable” and contended that it is broad enough to in-

120. *Id.*

121. *Id.* at 463-64.

122. *Id.* at 464.

123. *Id.*

124. *Id.* at 462-63.

125. Section 768.81, *Florida Statutes*, provides in pertinent part:

(2) Effect of contributory fault.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.

(3) Apportionment of damages.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability

FLA. STAT. § 768.81(2)-(3) (2005).

126. 280 So. 2d 431 (Fla. 1973).

127. *Am. Home Assurance*, 908 So. 2d at 469.

128. *Id.* at 466 (emphasis omitted).

129. *Id.* at 469.

130. *Id.* at 465-66.

clude vicariously liable parties.¹³¹ The court concluded in favor of the railroads, noting that AHA's interpretation would render "chargeable" as surplusage and that vicarious liability always involves liability without fault but still carries the entire burden of the active tortfeasor.¹³² Thus, the statute applied to vicariously liable parties, as well as active tortfeasors.¹³³ Furthermore, it noted as a matter of policy, "it would be a dangerous precedent to allow insurers, through subrogation, to have a greater right to damages than their insureds."¹³⁴

The court then ruled on the second certified question: "Given that Kissimmee Utility Authority, a municipal agency under Florida law, agreed by contract to indemnify a private party, is the agreement controlled by the restrictions on waiver of sovereign immunity found in *Florida Statute* § 768.28?"¹³⁵ Before this statute was enacted, the state and counties were immune from tort liability, but municipalities were not immune.¹³⁶ However, municipalities were still included within the definition of "state agencies or subdivisions" within this statute.

When the legislature abrogates the state's sovereign immunity, which the Florida Constitution gives it the power to do, the waiver must be "clear and unequivocal," must be "strictly construe[d]" by the Court, and will not be found as a product of inference or implication.¹³⁷ In light of this, the court concluded that the indemnification provision, in which "KUA agreed to assume responsibility for the negligence of CSX and its employees and for that of companies affiliated with CSX . . . [and] placed no limit on the amount KUA has to pay out per claimant and per accident," was based on a disagreement over breach of contract, so the waiver for tort liability did not ap-

131. *Id.* at 466.

132. *Id.* at 471.

133. *Id.* at 470-71.

134. *Id.* at 471.

135. *Id.* at 467 (emphasis omitted). Section 768.28, *Florida Statutes*, provides in pertinent part:

In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

FLA. STAT. § 768.28(1) (2005).

136. *Am. Home Assurance*, 908 So. 2d at 472.

137. *Id.*

ply.¹³⁸ Thus, KUA's payout was not limited by subsection (5) of the statute, which allows \$100,000 per claimant and \$200,000 per accident.¹³⁹ Consequently, the court answered the second certified question in the negative.¹⁴⁰

Justice Quince, who concurred in part and dissented in part, rejected this conclusion stating, "While the crossing agreement is a contract, the provision at issue clearly relates to tort liability."¹⁴¹ This is problematic because then the state can contract to do what it does not otherwise have the power to do, "i.e., waive sovereign immunity for tort liability beyond the limits specified by the Legislature in section 768.28."¹⁴² Quince further emphasized that if a government entity cannot indemnify a second government entity for the second's negligence without express statutory authorization, then it does not follow that the first government entity should be able to indemnify a private party for its negligence.¹⁴³ Thus, Quince reasoned that the indemnity clause between KUA and CSX should be limited by the restrictions in section 768.28, *Florida Statutes*.¹⁴⁴

Quince's position highlighted that the majority decision may allow the governmental entities to circumvent the law, which would then essentially render the law meaningless. Justice Cantero's concur-

138. *Id.* at 473.

139. *Id.* at 474. Section 768.28(5), *Florida Statutes*, provides:

The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$100,000 or \$200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the \$100,000 or \$200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

FLA. STAT. § 768.28(5) (2005).

140. *Am. Home Assurance*, 908 So. 2d at 474.

141. *Id.* at 480 (Quince, J., concurring in part and dissenting in part).

142. *Id.*

143. *Id.* at 480-81.

144. *Id.* at 482.

rence noted, in a historical overview of sovereign immunity, that the dissent's position may have merit in a discussion regarding a state and its agencies but emphasized that position "ignores the broad powers conferred on municipalities to 'exercise *any* power for municipal purposes, except when expressly prohibited by law.'"¹⁴⁵ Furthermore, Cantero pointed out that the statute granted immunity to municipalities where they previously had none, so this derogation of common law must be strictly construed.¹⁴⁶ Because the statute actually granted the municipalities immunity above the common law limits but granted states immunity up to specified limits, the statute "must be construed in favor of granting immunity to the state, but *against* granting it to a municipality."¹⁴⁷

The court then turned to the third certified question, which also regarded sovereign immunity: "Is the indemnification agreement instead controlled by the rule for breach-of-contract actions enunciated in *Pan-Am Tobacco Corp. v. Department of Corrections*?"¹⁴⁸ This case held that the state is not immune from contracts that it enters into because the contracts should be binding and enforceable on both parties.¹⁴⁹

The court distinguished that case from the present one because *Pan-Am* involved a state and the present case involves a municipality, which has the power to execute contracts and be liable for its breach.¹⁵⁰ This power stems from Florida's Constitution, which "gives municipalities 'governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services . . . except as otherwise provided by law,'"¹⁵¹ and the Municipal Home Rule Powers Act, which recognizes the same powers that are limited only when "expressly prohibited by law."¹⁵²

The court concluded that even before *Pan-Am*, KUA and other municipalities already had the power to execute contracts.¹⁵³ It also noted that even if KUA did need express authorization to execute the crossing agreement, section 163.01(15)(k), *Florida Statutes*,¹⁵⁴ pro-

145. *Id.* at 477 (Cantero, J., concurring) (quoting FLA. STAT. § 166.021(1) (1993)).

146. *Id.*

147. *Id.* at 478.

148. *Id.* at 467 (majority opinion) (emphasis and citation omitted).

149. *Id.* at 474.

150. *Id.* at 474-75.

151. *Id.* at 475 (quoting FLA. CONST. art. VIII, § 2(b)).

152. *Id.* (quoting FLA. STAT. § 166.021(1) (1997)).

153. *Id.*

154. This provision provides:

(15) Notwithstanding any other provision of this section or of any other law except s. 361.14, any public agency of this state which is an electric utility, or any separate legal entity created pursuant to the provisions of this section, the membership of which consists only of electric utilities, and which exercises or

vided express authorization.¹⁵⁵ Thus, KUA could not invoke sovereign immunity to relieve itself from liability under the contract.¹⁵⁶

The dissent agreed with the majority that KUA had the authority to contract for municipal services, including the crossing agreement.¹⁵⁷ “However, both the constitutional provision and the Municipal Home Rule Powers Act recognize that the powers of a municipality may be limited when ‘otherwise provided by law.’ ”¹⁵⁸ Thus, even though KUA had authority to contract, it did not have the authority to extend the government’s liability beyond section 768.28 by changing the indemnity agreement.¹⁵⁹ *Pan-Am* held that a state agency could not claim a sovereign immunity defense in a breach of contract action based on a written contract that the state had authority to enter.¹⁶⁰ Thus, because KUA did not have authority to enter into the indemnity agreement provision of the contract, the indemnity agreement was not controlled by *Pan-Am*.¹⁶¹ The dissent, like the majority, answered the third question in the negative but under this different reasoning.¹⁶²

Because the third question was answered in the negative, the fourth question (“If *Pan-Am* applies, does a municipal agency like Kissimmee Utility Authority lose the protection of sovereign immunity only if it has specific statutory authorization to enter into indemnification agreements, or is it sufficient that the agency more generally has statutory authorization to contract with private parties?”) was not addressed.¹⁶³

proposes to exercise the powers granted by part II of chapter 361, the Joint Power Act, may exercise any or all of the following powers:

.....
 (k) The limitations on waiver in the provisions of s. 768.28 or any other law to the contrary notwithstanding, the Legislature, in accordance with s. 13, Art. X of the State Constitution, hereby declares that any such legal entity or any public agency of this state that participates in any electric project waives its sovereign immunity to:

1. All other persons participating therein; and
2. Any person in any manner contracting with a legal entity of which any such public agency is a member, with relation to:
 - a. Ownership, operation, or any other activity set forth in sub-subparagraph (b)2.d. with relation to any electric project; or
 - b. The supplying or purchasing of services, output, capacity, energy, or any combination thereof.

FLA. STAT. § 163.01(15).

155. *Am. Home Assurance*, 908 So. 2d at 476.

156. *Id.*

157. *Id.* at 481 (Quince, J., concurring in part and dissenting in part).

158. *Id.*

159. *Id.* at 482.

160. *Id.* at 479.

161. *Id.* at 481-82.

162. *Id.* at 482.

163. *Id.* at 463, 467, 476 n.6 (majority opinion) (emphasis omitted).

Upon answering the certified questions, the court returned the case to the Eleventh Circuit Court of Appeals for disposition.¹⁶⁴ The Eleventh Circuit affirmed the district court's opinion based on these answers, holding that the district court properly assigned the fault of the active tortfeasor to the subrogee in accordance with the Florida Supreme Court's conclusion that section 768.81, *Florida Statutes*, applied to vicariously liable parties.¹⁶⁵ Also, in combination with further reasoning by the Eleventh Circuit, the Florida Supreme Court's answers to the second and third questions led the Eleventh Circuit to conclude that the indemnification provision of the contract was valid.¹⁶⁶

PRETRIAL PROCEDURE—APPEAL AND ERROR—PLAINTIFF HAS AN ABSOLUTE RIGHT TO AMEND A COMPLAINT ONCE AS A MATTER OF COURSE BEFORE A RESPONSIVE PLEADING IS SERVED AND A TRIAL COURT HAS NO DISCRETION TO DENY SUCH AN AMENDMENT; A DEFENDANT MAY ASSERT AN AFFIRMATIVE DEFENSE, INCLUDING THE DEFENSE OF FEDERAL PREEMPTION, IN A MOTION TO DISMISS; AND AN APPELLATE COURT MAY, IN APPROPRIATE CIRCUMSTANCES, IMPOSE SANCTIONS ON AN APPELLEE OR ITS LAWYER FOR FRIVOLOUS DEFENSE OF A PATENTLY ERRONEOUS TRIAL COURT ORDER—*Boca Burger, Inc. v. Forum (Boca Burger II)*, 912 So. 2d 561 (Fla. 2005).

The Florida Supreme Court used its discretionary jurisdiction pursuant to article III, section 3, subsection (b)(3) of the Florida Constitution¹⁶⁷ to resolve a conflict between the Second and Fourth District Court of Appeal concerning “whether a trial court has discretion to deny a plaintiff leave to amend the complaint once before a responsive pleading is served.”¹⁶⁸ In *Volpicella v. Volpicella*, the Second District held that under the Florida Rules of Civil Procedure “a party may amend his pleading once as a matter of course at any time before a responsive pleading is served” but also noted that “[t]his rule has not yet been construed as depriving a trial court of discretion to withhold leave to amend a pleading to which no response has been served.”¹⁶⁹ Subsequently, in *Forum v. Boca Burger, Inc. (Boca Burger*

164. *Id.* at 476.

165. Nat'l R.R. Passenger Corp. (Amtrak) v. Rountree Transp. & Rigging, Inc., 422 F.3d 1275, 1281, 1285 (11th Cir. 2005).

166. *Id.* at 1283, 1285.

167. That subsection provides that the Florida Supreme Court:

May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

FLA. CONST. art. 5, § 3(b)(3).

168. *Boca Burger, Inc. v. Forum (Boca Burger II)*, 912 So. 2d 561, 563 (Fla. 2005).

169. 136 So. 2d 231, 232 (Fla. 2d DCA 1962).

D), the Fourth District noted that although the *Volpicella* decision “[found] a residual discretion in the trial judge to deny leave to amend when sought by a party before the filing of a responsive pleading,” it “doubt[ed] the correctness of the second district’s assertion of residual discretion [because] Rule 1.190(a) [Florida Rules of Civil Procedure] states a rule, not a discretion, as regards to amending before a responsive pleading is filed.”¹⁷⁰

Additionally, the court held that by accepting jurisdiction to review the conflict between the districts, it also had “authority to address other issues properly raised.”¹⁷¹ Thus, the court also addressed the issues of whether a defendant may assert an affirmative defense, specifically the defense of federal preemption, in a motion to dismiss and whether “an appellate court may . . . impose sanctions on an appellee or its lawyer for its frivolous defense of a patently erroneous trial court order.”¹⁷² This Note first briefly outlines the procedural history preceding the court’s decision and then examines the court’s treatment of the above issues in the order presented.

Forum filed an action against Boca Burger, Inc. for declaratory judgment, injunctive relief, and damages under the Florida Deceptive and Unfair Trade Practices Act.¹⁷³ “Boca Burger filed a motion to dismiss with prejudice, arguing that Forum’s complaint failed to state a cause of action and was otherwise preempted by federal and [Florida] law” and subsequently scheduled a hearing.¹⁷⁴ On the day of the hearing, Forum filed an amended complaint without leave of court,¹⁷⁵ alleging additional statutory and common law violations.¹⁷⁶ At the hearing on the motion to dismiss, the trial judge refused to recognize the amended complaint as filed and granted Boca Burger’s motion to dismiss the original complaint with prejudice on the grounds that the claims were preempted by federal and Florida law.¹⁷⁷ Forum appealed the trial court’s decision, and on appeal the Fourth District reversed, holding that the “essential problem” with Boca Burger’s argument that Forum’s claims were preempted by fed-

170. 788 So. 2d 1055, 1059 (Fla. 4th DCA 2001).

171. *Boca Burger II*, 912 So. 2d at 563 (citing its previous decision in *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982), for the proposition that “once the Supreme Court accepts jurisdiction over a case to resolve the legal issue in conflict, it may, in its discretion, consider other issues properly raised and argued before the Supreme Court”).

172. *Id.*

173. *Id.*

174. *Id.* at 563-64.

175. *Id.* at 564. The amended complaint was filed by “new (though not substitute) counsel.” *Id.* The trial judge expressed two problems with the amended complaint: “[T]he complaint had been amended without leave of court, and the lawyer at the hearing was not the lawyer who had signed the original complaint on the plaintiff’s behalf.” *Boca Burger I*, 788 So. 2d at 1058.

176. *Boca Burger II*, 912 So. 2d at 564.

177. *Id.* at 565.

eral law was that the argument was “raised at the wrong time, under the auspices of the wrong motion.”¹⁷⁸ The Fourth District reasoned that “the pre-emption defense is an avoidance, not a real defense, [that] should be pleaded as an affirmative defense and resolved . . . on motion for summary judgment.”¹⁷⁹ Regarding the trial court’s decision to dismiss Forum’s complaint, the Fourth District held:

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. With the case having proceeded only as far as the filing of an original complaint and a motion to dismiss, the [trial] court had no discretion to refuse to accept the new pleading.¹⁸⁰

Further, the Fourth District found that “Boca Burger’s counsel misled the trial court into believing that it had discretion to refuse Forum’s amended complaint,” concluded that “counsel could not have made such an argument in good faith at either the trial or appellate levels,” and “imposed trial *and* appellate court sanctions against Boca Burger’s counsel.”¹⁸¹ Boca Burger appealed the Fourth District’s decision.

On review, the Florida Supreme Court first pointed to the plain language of Rule 1.190(a) of the Florida Rules of Civil Procedure, which provides:

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.¹⁸²

The court reasoned that “by its terms the rule provides for amendment of as right (first sentence) and amendment by agreement or leave of court (second sentence), depending on the circumstances.”¹⁸³

178. *Boca Burger I*, 788 So. 2d at 1061.

179. *Id.* at 1062 (citing FLA. R. CIV. P. 1.110(d) in support of its holding).

180. *Id.* at 1057. The Fourth District emphasized that “[a] motion to dismiss is not a ‘responsive pleading’ because it is not even a pleading.” *Id.* (citing FLA. R. CIV. P. 1.100(a), which designates permissible pleadings, provides that “[n]o other pleadings shall be allowed,” and does not include a motion to dismiss in its list of permissible pleadings).

181. *Boca Burger II*, 912 So. 2d at 565.

182. *Id.* at 566-67 (quoting FLA. R. CIV. P. 1.190(a)).

183. *Id.* at 567.

The court acknowledged that the first sentence of Rule 1.190(a) “grants plaintiffs an automatic right to amend the complaint once before a responsive pleading is served.”¹⁸⁴ Further, the court held that “the filing of a motion to dismiss does not terminate a plaintiff’s absolute right to amend the complaint once as a matter of course” as “a motion to dismiss is not a ‘responsive pleading’ because it is not a ‘pleading’ under the rules.”¹⁸⁵ Applying these principles to the decision under review, the court held:

Because Boca Burger had not served its answer, and had only filed a motion to dismiss, Forum had the right to file an amended complaint, even if that amendment was filed on the day of—or even just before—the hearing on Boca Burger’s motion to dismiss the original complaint.¹⁸⁶

Next, the court clarified the time at which a judge’s discretion to deny amendment of a complaint arises:

A judge’s discretion to deny amendment of a complaint arises only after the defendant files an answer or if the plaintiff already has exercised the right to amend once. At that time, the second and fourth sentences of rule 1.190(a) apply: “*Otherwise* a party may amend a pleading only by leave of court or by written consent of the adverse party. . . . Leave of court shall be given freely when justice so requires.”¹⁸⁷

The court noted several cases that have acknowledged a court’s discretion to deny amendment of a complaint but clarified that all these cases “concerned either a plaintiff’s second (or subsequent) amendment or an amendment requested after the answer was filed.”¹⁸⁸ Consequently, the court approved the Fourth District’s holding that “a court has no discretion to deny an amendment under the first sentence of the rule” and disapproved *Volpicella* “to the extent it holds that a trial court retains any discretion to deny an amendment under [the first sentence of the rule]—regardless of whether the plaintiff simply files an amended complaint or requests leave of court to file one.”¹⁸⁹

184. *Id.*

185. *Id.*

186. *Id.* (“The rule clearly grants a plaintiff one free amendment to perfect the complaint before an answer is served.”).

187. *Id.*

188. *Id.* at 567-68 (citing Fla. Nat’l Org. for Women, Inc. v. State, 832 So. 2d 911 (Fla. 1st DCA 2002); Dimick v. Ray, 774 So. 2d 830 (Fla. 4th DCA 2000); Kohn v. City of Miami Beach, 611 So. 2d 538 (Fla. 3d DCA 1992); Bouldin v. Okaloosa County, 580 So. 2d 205 (Fla. 1st DCA 1991); Adams v. Knabb Turpentine Co., 435 So. 2d 944 (Fla. 1st DCA 1983); and Highlands County Sch. Bd. v. K.D. Hedin Constr., Inc., 382 So. 2d 90 (Fla. 2d DCA 1980) as examples).

189. *Id.* at 568. In a dissenting opinion joined by Justice Quince, Justice Lewis argued that the majority and the Fourth District incorrectly determined that this case turned on

As discussed above, in accepting jurisdiction to resolve a conflict between the district courts of appeal, the supreme court has discretion to address other issues properly raised on appeal,¹⁹⁰ and in the instant case, the court used its discretionary jurisdiction to address the issue of whether a defendant may assert an affirmative defense, specifically the defense of federal preemption, in a motion to dismiss.¹⁹¹ In overruling the Fourth District's holding "that Boca Burger could only plead the preemption defense as an affirmative defense, and therefore the issue could only be resolved on motion for summary judgment,"¹⁹² the court reasoned that "the issue of federal preemption is a question of subject matter jurisdiction [and that] lack of subject matter jurisdiction may be properly asserted in a motion to dismiss."¹⁹³ Thus, the court held that "[a] defendant may, at its option, raise any affirmative defense, including the defense of federal preemption, in a motion to dismiss."¹⁹⁴

Additionally, the court used its discretionary jurisdiction to address the issue of whether an appellate court may impose sanctions on an appellee or its lawyer for its frivolous defense of a patently erroneous trial court order. As previously discussed, the Fourth District imposed sanctions on Boca Burger for advocating, at both the trial and appellate levels, that the trial court had discretion to deny Forum's amendment of the original complaint. The court noted that the trial court had not imposed sanctions for Boca Burger's actions and held that "no authority exists for an appellate court's imposition of sanctions for conduct occurring in the trial court."¹⁹⁵ Conversely, the court held that, on appeal, "a district court may, in appropriate circumstances, impose sanctions for counsel's defense of a patently erroneous order [in front of the appellate court]."¹⁹⁶ However, the

law applicable to "a simple and routine filing of an amended complaint," as the amendment to the complaint at issue was far from routine as it contained "a multitude of defects and failures to follow the Rules of Judicial Administration." *Id.* at 581 (Lewis, J., dissenting) (indicating defects of the amendment, such as the fact that the signatures on the complaint were not those of Forum's attorney of record).

190. *See supra* note 154 and accompanying text.

191. *Boca Burger II*, 912 So. 2d at 568 (majority opinion).

192. *Id.*

193. *Id.* (citing FLA. R. CIV. P. 1.140(b) as supporting authority) (citations omitted).

194. *Id.* However, the court noted that "when a defendant asserts such a defense in a motion to dismiss, a trial court must determine the issue as a matter of law based only on the well-pleaded allegations in the complaint, assuming the truth of the facts asserted." *Id.*

In a dissenting opinion joined by Justice Quince, Justice Lewis argued that "[t]he question seized upon by the district court as to how preemption is to be presented (motion to dismiss or affirmative defense) was never asserted, discussed, or preserved for appellate consideration." *Id.* at 582 (Lewis, J., dissenting).

195. *Id.* at 569 (majority opinion) ("If the district court was concerned with counsel's conduct in the trial court, the proper procedure would have been to remand for the circuit court to allow the trial court to determine for itself whether to impose sanctions.").

196. *Id.*

court found that the record lacked sufficient information for it to determine “how much, if any, of the district court’s decision was based on counsel’s conduct on appeal” and, therefore, determined that the proper outcome was to remand the case to the Fourth District for the court to determine whether sanctions for Boca Burger’s, or its counsel’s, conduct before the Fourth District are appropriate.¹⁹⁷

Additionally, the court provided guidance as to what constitutes “appropriate circumstances” for imposing sanctions.¹⁹⁸ The court noted that recent revisions to section 57.105, *Florida Statutes*, greatly expand a litigant’s ability to obtain sanctions against an opponent who raises unsupported claims or defenses.¹⁹⁹ Further the court found that, “*as a matter of law*,” section 57.105, *Florida Statutes*, is not limited in applicability to appellants.²⁰⁰ Thus, even though

197. *Id.* at 574 (“If [on remand] the district court does impose sanctions, it should state clearly whether its sanctions are to be imposed against Boca Burger itself, its counsel, or both” and that the Fourth District “may also remand to the trial court [so that the trial court can determine] whether to impose sanctions for conduct that occurred in that court”). The court instructed that, on remand, the district court should “reconsider its order imposing sanctions, addressing only conduct on appeal.” *Id.*

In a dissenting opinion joined by Justice Quince, Justice Lewis took issue with the majority’s failure to consider the trial court record and argued:

The transcript of the trial level hearing and the form of the dismissal *with prejudice* belies the district court’s analysis and that of the majority with regard to the Rule of Civil Procedure being the controlling issue in the trial court and demonstrates that the dismissal represented an arguable decision by the trial court on the substance of the core claim and defense, correctly or incorrectly, which remains as an arguable controlling issue. As recognized by the majority, the issue of preemption is fundamental to the power of the court to act and is a question of subject matter jurisdiction that may be raised at any time. In my view, on these facts and Florida law at that time, it was not sanctionable for this attorney to attempt to support the trial judge’s decision with regard to the judicial administration rules or to assert a lack of jurisdiction due to preemption as a matter of law. Although the majority proclaims that today it has not punished counsel, it has returned this case to the district court of appeal for consideration to do so tomorrow, as a result that is, in my view, incorrect as a matter of law and accompanied by the incorrect concepts that the trial level proceedings are “moot,” the propriety of a court’s decision is irrelevant to the consideration of punishment of a party due to the position it asserts, and the announced basis of a court’s order is unimportant in analyzing whether an order is “patently erroneous.” This case has simply become misdirected and should not be remanded for sanctions, but returned to the trial court for the case to proceed.

Id. at 584 (Lewis, J., dissenting).

198. *Id.* at 569-74 (majority opinion).

199. *Id.* at 569-71 (holding that under the revised version of section 57.105, *Florida Statutes*, sanctions are available upon a showing “that the party and counsel ‘knew or should have known’ that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of ‘then-existing’ law”).

200. *Id.* at 570 (analyzing section 57.105, *Florida Statutes*, and holding that “an appellee is not shielded *as a matter of law* from the imposition of sanctions in an appropriate case”).

an appellee, by definition, is defending an order of the trial court [and] [a]ppellate courts, therefore, should impose sanctions against an appellee only in rare circumstances. . . . [A]n appellee cannot hide behind the “presumption of correctness” of an order that the appellee itself procured by misrepresenting the law or the facts.²⁰¹

Finally, the court found that appellate counsel “has an independent ethical obligation to present both the facts and the applicable law accurately and forthrightly” and noted that this obligation “will sometimes require appellate counsel to concede error where, although trial counsel obtained a favorable result, either the facts were not as represented to the trial court or the law is clearly contrary to the appellee’s position and no good-faith basis exists to argue that it should be changed.”²⁰² However, the court clarified that this ethical obligation does not require “appellate counsel [to] concede error [based on] the statistical chances for reversal.”²⁰³ Instead, counsel must concede error only where defending the trial court’s ruling would be tantamount to defending an “indefensible” order.²⁰⁴ Notwithstanding the court’s explicit holding, it remains to be seen how often Florida attorneys will erroneously request sanctions against appellees who are legitimately defending a trial court’s order because they believe the court’s order to be patently erroneous.

201. *Id.* at 571 (“The presumption of correctness is necessarily based on another presumption: that the appellee correctly informed the trial court of the facts and applicable law.”).

202. *Id.*

203. *Id.* This ruling responded to Boca Burger’s argument that “adopting a rule allowing sanctions against appellees will require ‘the extreme, indeed unprofessional act, of throwing in the towel when there is *any* chance that an order may be reversed on appeal.’” *Id.* (internal quotation marks omitted).

204. *Id.* In support of this ruling, the court cited Florida decisions for the proposition that an attorney’s obligation to pursue his or her client’s lawful objectives cannot be used to “justify unprofessional conduct by elevating the perceived duty to zealously represent over all other duties.” *Id.* (citing *Lingle v. Dion*, 776 So. 2d 1073, 1078 (Fla. 4th DCA 2001)). Additionally, the court referenced section 57.105, *Florida Statutes*, the Florida Bar rules of professional conduct, and the oath of admission to the Florida Bar as warnings “that counsel must be governed by considerations other than mere zealous advocacy for the client.” *Id.* at 571-72. Further, the court cited twenty-six published opinions since the beginning of 2004 in which the state of Florida has conceded error on appeal, *id.* at 572 n.5, and thirteen published opinions since the beginning of 2003 in which civil litigants have conceded error on appeal, *id.* at 572 n.6, and reasoned that “the sheer number of such cases demonstrates that not only do the rules *require* counsel to concede error in appropriate cases [but also that] counsel can and do adhere to these rules in practice.” *Id.* at 572. Finally, the court excerpted a portion of the Fourth District’s opinion concerning the “lawyer’s duty of candor to a tribunal” in support of its holding that conceding error on appeal is professional:

Even if it hurts the strategy and tactics of a party’s counsel, even if it prepares the way for an adverse ruling, even though the adversary has himself failed to cite the correct law, the lawyer is required to disclose law favoring his adversary when the court is obviously under an erroneous impression as to the law’s requirements.

Id. at 573.

CONSTITUTIONAL LAW—TAXATION—FLORIDA STATUTE PROHIBITING ASSESSMENT OF VALUE FOR THE TAX YEAR ON REAL PROPERTY IMPROVEMENTS NOT SUBSTANTIALLY COMPLETED ON JANUARY 1 COMPORTS WITH THE FLORIDA CONSTITUTION'S JUST VALUATION REQUIREMENT—*Sunset Harbour Condominium Ass'n v. Robbins*, 914 So. 2d 924 (Fla. 2005).

Recently the Florida Supreme Court held that section 192.042(1), *Florida Statutes*, which prohibits assessment of value on real property improvements “not substantially completed on January 1,”²⁰⁵ comports with the Florida Constitution’s just valuation requirement.²⁰⁶ In making this determination, the court differentiated between assessment statutes that exempt certain real property from a fair market valuation and statutes that merely delay a fair market valuation.²⁰⁷

The Florida Constitution requires that all property be assessed a just valuation for the purposes of determining appropriate ad valorem taxation.²⁰⁸ It provides for only five exceptions to this rule, relating to matters of agricultural land, certain types of personal tangible property related to trade and livestock, homestead exemptions, historic properties, and additional homestead exemptions regarding improvements to land for the purpose of serving certain family members.²⁰⁹ The Florida Constitution further charges the legislature with determining the manner in which the “just valuation” is assessed.²¹⁰ Just valuation, for the purposes of this context, is synonymous with “fair market value.”²¹¹

Sunset Harbour Condominium (“Sunset”) was in its final phase of construction as of January 1, 1997.²¹² The local property appraiser (Robbins) determined that the construction was “substantially complete” and assessed the property at a value of nearly \$23 million.²¹³ When Sunset’s owners association filed suit to challenge Robbins’ determination that the construction was “substantially complete,”

205. The relevant provision reads:

All property shall be assessed according to its just value as follows:

(1) Real property, on January 1 of each year. Improvements or portions not substantially completed on January 1 shall have no value placed thereon. “Substantially completed” shall mean that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.

FLA. STAT. § 192.042 (2005).

206. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 927 (2005).

207. *Id.* at 931 (citing *Culbertson v. Seacoast Towers E., Inc.*, 212 So. 2d 646 (Fla. 1968)).

208. FLA. CONST. art. VII, § 4.

209. *Id.* § 4(a)-(e).

210. *Id.* § 4.

211. *Sunset Harbour*, 914 So. 2d at 928 n.4.

212. *Id.* at 927.

213. *Id.* The exact amount of the assessment was \$22,935,100. *Id.*

rather than defend his determination, Robbins instead argued that section 192.042's requirement of substantial completion was unconstitutional in that it prevented a just valuation of the condominium.²¹⁴ Both the trial and the appellate courts agreed with Robbins.²¹⁵

The Florida Supreme Court, however, disagreed.²¹⁶ Robbins largely relied on *Interlachen Lakes Estates, Inc. v. Snyder*.²¹⁷ The statute at issue in *Interlachen* required that " 'platted lands unsold as lots shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character until 60 percent of such lands included in one plat shall have been sold as individual lots.' "²¹⁸ In holding that statute unconstitutional, the *Interlachen* court stated, " 'It is true that the constitutional provision allows the Legislature to prescribe regulations for the purpose of securing a just valuation of *all* property, but such regulations must apply to *all* property and not to any one particular class.' "²¹⁹ By taxing similar property differently based upon ownership—that is, the platted land was assessed at its fair market value if it was sold, but assessed as without value if not sold—the statute, in essence, created a regime that granted developers (owners of vast tracks of unsold platted lands) a low assessment on the same property that was given a fair market assessment to individual home owners.²²⁰ In short, the statute in *Interlachen* "did not permit a 'just valuation' of all property."²²¹

The *Sunset* court compared the statute in *Interlachen* with what it declared to be the more relevant precedent, *Culbertson v. Seacoast Towers East, Inc.*²²² The *Culbertson* court, regarding a statute similar to the one at issue in *Sunset*, stated:

The statute constitutes only a temporary postponement of valuation and assessment of incomplete improvements on real property provided the prescribed conditions are met on the annual assessment date. The requirement is simply that the separate classification of such property shall bear some reasonable relationship to the legislative power to prescribe regulations to secure a just evaluation of property. Factors analogous to those here involved

214. *Id.*

215. *Id.*

216. *Id.* at 928.

217. *Id.* at 931 (citing *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973)).

218. *Id.* (quoting *Interlachen*, 304 So. 2d at 434).

219. *Id.* (quoting *Interlachen*, 304 So. 2d at 434).

220. *Id.*

221. *Id.*

222. *Id.* at 929-30 (citing *Culbertson v. Seacoast Towers East, Inc.*, 212 So. 2d 646 (Fla. 1968)).

have in numerous instances been made the basis for special statutory treatment.²²³

The *Sunset* court similarly concluded that the present statute's prohibition against assessment of value to nonsubstantially completed improvements as merely determining the timing of when a fair market assessment will be made.²²⁴ Although the Florida Constitution requires the legislature to secure a just valuation on all property, a requirement which the *Interlachen* statute ran afoul, it permits the method for achieving a just valuation, including the timing of the assessment, to the legislature's discretion.²²⁵

The *Sunset* court was also emphatic that the revisions of the Florida Constitution after the decision in *Culbertson* did not affect its holding.²²⁶ It specifically found "no basis to believe the 1968 revisions to the just valuation provision were intended by the drafters or the public to invalidate the substantial completion statute."²²⁷

The *Sunset* court therefore found *Culbertson's* rule to still be valid and enunciated that the statute directing that just valuation be withheld from an improvement to real property until the improvement is substantially completed to be well within the legislature's discretion granted by the Florida Constitution.²²⁸ Whereas the *Interlachen* statute created a scheme where similar parcels of real property were assessed (and therefore taxed) differently based upon who owned the property, the statute in *Sunset* uniformly taxed similar property (real property with undergoing improvements) the same way. The *Sunset* court also enunciated that the statute "prescribes reasonable guidelines for valuation of incomplete improvements for property tax purposes, which infuse uniformity and certainty in ad valorem taxation."²²⁹ The court even suggested that "[t]he absence of a 'substantial completion' statute would only promote uncertainty and encourage litigation."²³⁰ In conclusion, the rule in *Sunset* permits the legislature to temporarily delay the assessment of a fair market value on improved real property when its improvements are not substantially completed by January 1 of each year.²³¹

223. *Id.* (quoting *Culbertson*, 212 So. 2d at 647).

224. *Id.* at 931-32.

225. *Id.* at 932.

226. *Id.* at 930.

227. *Id.*

228. *Id.* at 932.

229. *Id.*

230. *Id.*

231. *Id.*