SUPREME COURT OF FLORIDA

RYBOVICH BOAT WORKS, INC. and ROBERT C. FISHER,

Petitioners,

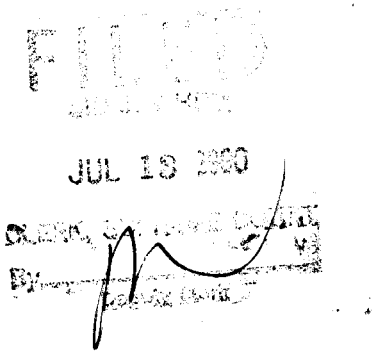
v.

RANDALL W. ATKINS, as Trustee,

Respondent.
_____/

Case No: 76052

Fourth District No: 89-2194



PETITIONERS' INITIAL BRIEF

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W2575d

STATEMENT OF THE CASE

This suit was originally filed by a seller of real property against a purchaser for damages and to quiet title after the purchaser defaulted and interfered with the subsequent attempts of the seller to convey the property to a new purchaser. The purchaser filed a counterclaim for specific performance after the expiration of the one year statute of limitations applicable to specific performance actions. The seller's for Motion for Summary Judgment based upon the running of the statute of limitations was granted.

The Fourth District Court of Appeal reversed the trial court by construing and extending the decision of this Honorable Court in Allie v. Ionata, 503 So.2d 1237 (Fla. 1987) to allow the filing of the purchaser's time-barred claim for specific performance as a compulsory counterclaim. The Fourth District Court of Appeal rejected this Petitioner's argument that the Allie v. Ionata decision applied solely to pleas in recoupment seeking money damages and did not apply to a time-barred claim for specific performance. The Opinion of the Fourth District Court of Appeal concedes that there is no reported authority anywhere in the country which has allowed a time-barred claim for specific performance to be raised as a compulsory counterclaim.

On rehearing, the Fourth District Court of Appeal certified the following question as being of great public importance pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure:

> Does the holding of Allie v. Ionata permit the maintenance of a time-barred claim for specific performance when it is filed as a compulsory counterclaim?

This Honorable Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Fla. R. App. P. and Article V, Section 3(b)(3), Florida Constitution (1980).

STATEMENT OF FACTS

On June 18, 1985, Petitioners RYBOVICH BOAT WORKS, INC. and ROBERT C. FISHER (hereinafter collectively "FISHER"), as Seller, and Respondent RANDALL W. ATKINS ("ATKINS"), as Purchaser, entered into a written Agreement for Purchase and Sale and Option of certain real property (the "Property") located in Palm Beach County, Florida. Appendix filed in the Fourth District Court of Appeal by ATKINS at 127.[1] The Agreement was subsequently modified by nine written amendments and is hereinafter sometimes referred to collectively as the "Agreements". Id. at 127, 194-217. The Ninth Amendment required ATKINS (and not FISHER) to establish the closing date by giving FISHER at least seven (7) days advance written notice and indicated that the closing date had to be not later than December 5, 1987. Id. at 216. However, ATKINS failed to provide the required notice and no closing took place. Id. at 129.

On February 12, 1988, FISHER sent a letter to ATKINS declaring him to be in default. On February 18, 1988, ATKINS sent a letter which declared FISHER to be in default of the Agreement. Id. at 226-27. Subsequently, FISHER attempted to sell the property to another buyer, but shortly before the closing, ATKINS' lawyer, acting on a tip from the broker in the original transaction, telephoned the title insurance company which had undertaken to insure the new buyer's title and indicated that ATKINS had an interest in the property. Id. at 3-4. As a result, the title insurance company refused to insure the new buyer's title over the claim made by ATKINS and the new transaction was therefore aborted. Id. at 4.

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[1]Hereinafter, all references to the Appendix duly prepared and filed in the Fourth District Court of Appeal by Respondent RANDALL W. ATKINS shall be in the form "ATKINS App. at __."

On May 4, 1988, FISHER filed an action against ATKINS in the Circuit Court. Appendix filed in the Fourth District Court of Appeal by FISHER at 1.[2] The Complaint was subsequently amended and contained in five counts:

a. Count I for breach of the Agreement;

b. Count II for injunctive relief to prevent ATKINS from asserting any right, title, claim or interest in the Property;

c. Count III to quiet title to the Property pursuant to Chapter 65, Florida Statutes;

d. Count IV for damages for ATKINS' slander to FISHER's title to the Property; and

e. Count V for ATKINS' interference with FISHER's subsequent agreement to sell the Property to the new buyer.

ATKINS App. at 1-10.

On May 10, 1989, more than a year after FISHER's suit was filed, ATKINS filed the Counterclaim For Specific Performance And Other Relief against FISHER without leave of court. ATKINS App. at 127-241.[3] The Counterclaim was stated in three counts:

a. Count I for specific performance of the Agreement;

b. Count II for tortious interference with business relationships; and

c. Count III for breach of contract damages in excess of Sixty-Five Million Dollars ($65,000,000.00).

Id.

FISHER answered the Counterclaim and interposed, as one affirmative defense, that ATKINS' claim for specific performance was barred by the

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[2]Hereinafter, all references to the Appendix duly prepared and filed in the Fourth District Court of Appeal by FISHER shall be in the form of "FISHER App. at _____."

[3]Rule 1.170(f), Fla. R. Civ. P., provides "when a pleader fails to set up a counterclaim or cross-claim through oversight, inadvertence or excusable neglect or when justice requires, the pleader may set up the counterclaim or cross-claim by amendment with leave of the court". ATKINS did not obtain such leave of court in violation of this Rule.

applicable statute of limitations. Id. at 245. Section 95.11(5)(a), Fla. Stat. provides that claims for specific performance must be filed within one year.

FISHER moved for Summary Judgment on ATKINS' counterclaim for specific performance and FISHER's count to quiet title to the Property. Id. The trial court granted FISHER's Motion for Summary Judgment on the basis that the statute of limitations for the specific performance claim had expired (because the claim was filed more than one year after the cause of action accrued) and quieted title to the Property in FISHER. Id. at 289-90.

ATKINS filed a Petition for Writ of Certiorari with the Fourth District Court Of Appeal with respect to the Summary Judgment granted by the trial court. By Opinion filed March 14, 1990 (the "Opinion"), the Fourth District Court Of Appeal granted the Writ of Certiorari and quashed the Summary Judgment granted by the trial court. See Exhibit "A" to FISHER's Supreme Court Appendix. The Fourth District Court Of Appeal based its decision solely on the authority of Allie v. Ionata, 503 So.2d 1237 (Fla. 1987). Judge Stone dissented, stating: "I cannot and would not make the leap from recognition of a right to assert a time-barred counterclaim in recoupment to allowing a similarly barred counterclaim for specific performance." Opinion at 4.

FISHER timely filed a Motion for Rehearing, Motion for Rehearing En Banc, and Motion For Certification pursuant to Rule 9.330(a), Fla. R. App. P. By Opinion filed May 9, 1990, the Fourth District Court Of Appeal stated:

> We are sympathetic to respondent's legal arguments and, but for Allie v. Ionata, 503 So.2d 1237 (Fla. 1987), might have adopted them. However, we are constrained by what we perceive the Allie holding to be. We deny the motion for rehearing but certify the following question to the Supreme Court pursuant to Rule 9.330(a), Florida Rules of Civil Procedure, as a question of great public importance.

> Does the holding of Allie v. Ionata permit the maintenance of a time barred claim for specific performance when it is filed as a compulsory counterclaim?

See Exhibit "B" to FISHER's Supreme Court Appendix.

FISHER timely filed their Notice To Invoke Discretionary Jurisdiction with this Court. By Order dated May 29, 1990, this Court accepted jurisdiction and established the briefing schedule in this matter. This Court granted FISHER an extension to July 11, 1990 to serve this Brief.

SUMMARY OF ARGUMENT

A time-barred claim for specific performance should not be permitted under the reasoning of Allie v. Ionata, 503 So.2d 1237 (Fla. 1987). In Allie v. Ionata, this Court was asked to pass upon the following certified question:

> Does the running of the statute of limitation on an independent cause of action bar the recovery of an affirmative judgment in recoupment on a compulsory counterclaim?

Allie v. Ionata accordingly addressed the limited issue of claims in recoupment. Pleas in recoupment concern solely the recovery of monetary damages. Historically, defendants could raise pleas in recoupment only to the extent that their claim did not exceed the amount of the plaintiff's claim. Defendants could not recover a judgment on a plea in recoupment although they could entirely offset the amount of the plaintiff's claim. The historic inability of defendants to recover on pleas in recoupment for time-barred claims was reversed by this Court in its Allie v. Ionata opinion. The Court held that defendants could recover on their defensive pleas in recoupment notwithstanding the fact that the claims could not be raised as independent actions because they were time-barred.

The Fourth District Court of Appeal in the instant matter has decided that this Court's holding in Allie v. Ionata applies to all compulsory counterclaims, not merely pleas in recoupment. The Fourth District so held notwithstanding its express acknowledgment that a "specific performance claim is not similar to a claim in recoupment." Opinion at 3.

Allie v. Ionata merely decided time-barred pleas in recoupment filed as compulsory counterclaims could support monetary awards in favor of defendants. It addressed only pleas in recoupment and no other claims. The Fourth District's opinion in this matter thus erroneously extends the Allie v. Ionata rule to all compulsory counterclaims, regardless of their nature.

FISHER contends that insofar as specific performance is not a plea in recoupment, the Allie v. Ionata decision does not control the instant case. Moreover, the Allie v. Ionata doctrine should not be extended to claims for specific performance. The Florida Legislature set a one-year statute of limitations for specific performance claims, the shortest limitations period in the State of Florida. The Legislature has thus recognized the need for a party to proceed expeditiously if it intends to compel a party to perform a contract which has been breached. The Legislature clearly concluded that prejudice would result from a later-instituted action for specific performance. The Fourth District cannot assume away any prejudice from a later-filed specific performance claim merely because a suit for damages was previously instituted by the other party. The Legislature's clear intent in prescribing an extremely short statute of limitations for specific performance actions must be upheld by this Court and should not be struck down.

The fundamental fairness issue of the recoupment cases is absent here. In the cases relied upon by ATKINS, defendants were required to defend claims that plaintiffs could bring based on longer limitations periods while being unable to assert compulsory counterclaims subject to shorter limitations periods. Here, instead, FISHER acted quickly to assert their claims for damages and to quiet title. For over a year, ATKINS had the opportunity to raise his claims, but did not do so. He finally asserted his claims without leave of court. The instant case does not involve an innocent defendant who was blind-sided by a plaintiff calculatedly exploiting differing limitations periods. Rather, this Court has before it a defendant well aware of claims to quiet title which he actively defended and sat idly by, making no attempt to assert a claim for specific

performance to purchase the land whose title FISHER was trying to quiet. This is not a case where the defendant did not know exactly when his cause of action accrued. Fairness is not on the side of ATKINS who failed to assert his claim through neglect or for the purposes of delay. The sole blame for ATKINS not timely filing his claim for specific performance rests squarely on his own shoulders; the Allie v. Ionata rationale should not be extended to save him from his own neglect.

If this Court allows time-barred claims for specific performance of contracts for the purchase and sale of real property to be raised as compulsory counterclaims, Florida's entire real estate industry will be subjected to lengthy periods of risk and uncertainty which are unprecedented in any other state. A seller would have five (5) years from the breach of a purchase and sale agreement within which to file suit against the purchaser. Then, rather then proceed against the seller within one year, the purchaser would be free to counterclaim at any time thereafter for specific performance. If, as happened in the instant case, the counterclaim was not asserted for more than a year after suit was filed, claims for specific performance could potentially be asserted six years or more after the cause of action accrued, far longer than the Legislature has deemed appropriate. Moreover, allowance of tardy specific performance claims will affect not only the parties to the original contract but also third parties who may attempt to purchase or encumber the property.

The mere fact a specific performance claim could be allowed to be filed after the one year statutory period may render property unmarketable for up to six years after a failed attempt to close on an original contract. In the interim, title insurers will necessarily be compelled to include an exception from coverage in all of their policies. Consequently, purchasers

will refuse to close on subsequent contracts without obtaining releases from prior buyers, who may withhold releases for a price. Financial institutions and will not loan funds to purchase or refinance such properties. In the interim, sellers will not want to risk spending new money to improve, repair or replace worn out portions of their property. In this way, unscrupulous purchasers will be able to extend an "unmarketability stranglehold" on property for years beyond the one year statutory period. Sellers will be loathe to file suits against defaulting purchasers to recover deposits or to seek damages because, during the pendency of those suits, original vendees will be able to file time-barred claims for specific performance thereby rendering the sellers' properties unmarketable for many years. Indeed, sellers might be forced by subsequent vendees to warrant that they have not sued and contract not to sue prior purchasers during the pendency of any new contracts. Sellers and brokers will be bound to disclose to subsequent purchasers that a prior contract had failed or that breach of contract litigation was pending during which an original purchaser could file a time-barred claim for specific performance. If they should fail to do so, the sellers and brokers might be exposed to claims for fraud or misrepresentation. If the Court were to allow the one year statute on specific performance claims to be evaded, it is clear that the same logic would enable a contractor, materialman or laborer to respond to an owner's suit over construction defects with a counterclaim to foreclose a mechanics' lien beyond the one year period which the Legislature established for foreclosing mechanics' liens. The consequence of the Fourth District Court of Appeal decision is to unreasonably impede, complicate and restrain the alienation of property.

The Legislature mandated a one-year statute of limitations on specific performance claims. The Legislature did not provide for any conditions or exceptions. The Fourth District Court of Appeal's decision essentially ignores §95.051, Fla. Stat., in which the Legislature listed the circumstances which would toll the running of the Statute of Limitations. That Statute doesn't include the pendency of a suit for breach of contract concerning the subject property as an event which would toll the limitations period. The one-year statute on specific performance actions is only one part of an extensive legislative scheme which promotes marketability of title. The allowance of time-barred specific performance claims would amount to impermissible judicial legislation undermining the legislative policy to support marketability of title and limitation of claims.

The common law also requires that specific performance claims be filed with reasonable promptness. If time-barred actions were allowed, the results in specific performance cases would hinge on the subjective and discretionary decisions reached by individual judges as to whether those claims were filed with reasonable promptness. The uniform bright line established by the Legislature for such claims to be filed within one year would be erased. Simply stated, the public policy and legislative scheme favoring the certainty and marketability of Florida real estate titles will be severely impaired. The practical ramifications to such a holding could prove to be devastating. This Court should not extend the Allie decision to permit time-barred claims for specific performance.

ARGUMENT

THE HOLDING OF ALLIE V. IONATA DOES NOT AND SHOULD NOT PERMIT THE ALLOWANCE OF A TIME-BARRED CLAIM FOR SPECIFIC PERFORMANCE WHEN FILED AS A COMPULSORY COUNTERCLAIM

A. ALLIE IS LIMITED TO A TIME-BARRED CLAIM IN RECOUPMENT FOR MONEY DAMAGES ONLY AND DOES NOT APPLY TO A CLAIM FOR SPECIFIC PERFORMANCE.

In Allie v. Ionata, 503 So.2d 1237 (Fla. 1987), this Court was petitioned to answer a certified question of great public importance, to wit:

> Does the running of the statute of limitation on an independent cause of action bar the recovery of an affirmative judgment in recoupment on a compulsory counterclaim?

See Allie v. Ionata, 466 So.2d 1108 (Fla. 5th DCA 1985). In Allie, Ionata sued for restitution and rescission of the purchase of several parcels of land from Allie. In defense, Allie pled the relevant statute of limitations and counterclaimed for the unpaid balance on the notes for two of the parcels. The trial judge entered judgment in favor of Ionata, but the Fifth District held that the action as to two of the contracts was barred by the statute of limitations. See Allie v. Ionata, 417 So.2d 1077 (Fla. 5th DCA), review denied, 424 So.2d 761 (Fla. 1982). After remand, Allie revived his counterclaim for the balance due on the two notes. In response, Ionata interposed Allie's fiduciary breach and pled recoupment as a defense, requesting restitution and rescission of the contracts. The trial court granted Ionata's motion for summary judgment on the claim of recoupment and granted affirmative relief in the form of an award of monetary damages in favor of Ionata. On a second appeal to the Fifth District, the court reversed in part, limiting Ionata's recovery to the amount claimed by Allie. Allie v. Ionata, 466 So.2d at 1113.

The Fifth District's limiting of Ionata's recovery to the amount claimed by Allie directly conflicted with the holding of Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982). In Cherney, Moody, an attorney, represented Mr.

and Mrs. Cherney in a 1977 adoption. In January, 1980, Moody filed suit in county court for the collection of fees for those adoption proceedings. The Cherneys counterclaimed for compensatory and punitive damages. The trial court dismissed the counterclaim with prejudice on the ground that it sounded in legal malpractice and was barred by the two-year statute of limitations. Section 95.11(4)(a), Fla. Stat. (1980). It was undisputed that as of November 1977, the Cherneys were on inquiry notice of the accrual of a cause of action against Moody and that the notice commenced the running of the statute of limitations. Thus, the First District held that the Cherneys' cause of action for legal malpractice, as an independent cause of action, was barred by the running of the two-year statute of limitations by the time Moody filed his suit in January, 1980. Cherney v. Moody, 413 So.2d at 867.

The First District nevertheless concluded that it was an error to dismiss the counterclaim with prejudice. It based its decision, in part, on the fact that it is "well-settled that a counterclaim for recoupment may be asserted although barred by the statute of limitations as an independent cause of action," citing Payne v. Nicholson, 100 Fla. 1459, 131 So. 324, 326 (Fla. 1930).

The First District went on to observe that the Cherneys' counterclaim exceeded the jurisdictional amount of the county court and of Moody's suit for fees allegedly owed. That raised the issue of whether the Cherneys could recover an affirmative judgment above the amount sued on by Moody. The court stated:

> There is conflicting authority as to whether a plea in recoupment which is otherwise barred as an independent cause of action may be used to obtain an affirmative judgment or may only be used defensively to reduce the amount the plaintiff demands. We have examined the history of the plea of recoupment in Florida and conclude for the reasons given below that a plea of recoupment may

be used to obtain an affirmative judgment even though barred as an independent cause of action by the statute of limitations.

Cherney v. Moody, 413 So.2d at 867.

The First District then set forth a scholarly historical examination of pleas of recoupment. The court noted that pleas of recoupment were originally defensive in nature and did not permit recovery of an affirmative judgment. This was contrasted with a plea of setoff which was of statutory origin and arose from a separate transaction or occurrence from the plaintiff's claim and permitted recovery of an affirmative judgment. Pleas of recoupment were converted into offensive pleas, and the distinction between recoupment and setoff largely eliminated by Chapter 14823, Laws of Florida (1931) which provided that pleas of recoupment "shall have the same force and effect, and create the same right of recovery to the defendant as pleas of setoff, and form the proper basis for judgment in favor of the defendant in the same manner and to the same extent as pleas of setoff." 413 So.2d at 868. The Court evaluated the referenced Act, stating:

> The evident purpose of the statute is to remove the restriction by which the pleader was formally prevented from recovering the amount established by him over that found to be due the plaintiff. Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 147 Fla. 311, 2 So.2d 890, 893 (Fla. 1941).

Id. at 868.

A further change occurred in 1941 when the legislature enacted statutes which provided that the defendant may claim relief exceeding an amount or different in kind from that sought in the pleading of the plaintiff. Id. The First District went on to conclude that the distinction between setoffs and recoupment was not abolished. Rather, compulsory counterclaims seemed to be recognized as presentable by recoupment and permissive counterclaims could be raised by setoff. The First District stated:

> Based on the above history of the plea of recoupment, we are convinced that the 1931 legislature created a statutory right to an affirmative judgment on a plea of recoupment and that this statutory right has been preserved through the various adaptations and enactments which have produced the current Florida Rule of Civil Procedure 1.170.

Cherney, 413 So.2d at 869.

The Court concluded by agreeing with the dissent of Judge Pearson in Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla. 3d DCA 1975) that "the intent of the present rules will be best served by holding that a compulsory counterclaim in recoupment permits the recovery of an affirmative judgment even though barred as an independent cause of action by the running of the statute of limitations." Id. at 869. The court recognized that its holding conflicted with the DeMirza decision and also certified the above question to the Supreme Court.

The only issue before this Court in Allie v. Ionata was whether defendants could raise time-barred compulsory counterclaims as pleas in recoupment and succeed in obtaining a money judgment against the plaintiff in excess of the plaintiff's claim. In other words, the question was not whether equitable relief could be granted as a counterclaim although time-barred as an affirmative claim -- instead the Allie Court was only asked whether or not Ionata's plea in recoupment (for damages) on a time-barred claim was limited in dollars by the dollar amount of the plaintiff's claim. This Court answered that limited certified question in the negative, holding that the defendant's claim is not so limited in amount. In reaching its decision, this Court adopted the analysis of Justice Shaw in Cherney delineating the history of the plea of recoupment referred to above. Moreover, the Court was persuaded by the consideration of the purposes of statutes of limitations "designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected

enforcement of stale claims." Allie v. Ionata, 503 So.2d at 1240. This Court concluded:

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defense arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses or compulsory counterclaims that stem from that action. The same rationale which permits the defense of recoupment at all on a claim which would be barred by the statute of limitations supports the recovery of affirmative relief. We can perceive no logical reason to prohibit an affirmative judgment in such circumstances.

Allie v. Ionata at 1240.

As indicated, however, the factual circumstances and claims presented by Allie v. Ionata pertained solely to competing claims for money damages and did not address a claim for specific performance. Indeed, the Fourth District Court of Appeal Opinion in the instant case is the first reported decision from any court (including Allie v. Ionata) which addresses the issue. The Fourth District Court of Appeal stated "our research has not revealed any similar case in this jurisdiction or anywhere in the country where a time barred claim for specific performance has been allowed as a compulsory counterclaim on the legal theory of recoupment. . . " Opinion at 3. Notwithstanding the complete absence of any precedent to support its decision, the Fourth District Court of Appeal ignored the one year limitations period mandated by the legislature and extrapolated from the Allie decision to allow time-barred specific performance claims to be raised as compulsory counterclaims.

The only reported decision which addressed a similar issue was Stein v. Cherry, 158 Pa.Super. 329, 44 A.2d 846 (1945). In Stein, the court held that the defense of recoupment not available to a defendant who sought to recover

personal property rather than its value. The same distinction should be carefully drawn here since, what ATKINS seeks is to have the Court compel the sale of the Property, not merely damages for breach of contract (which claim was also raised in his Counterclaim in a separate Count, not involved in this Appeal. ATKINS App. at 134-35).

The underlying rationale of the recoupment cases is conspicuously absent in this action. The Allie decision was premised upon a principle of fundamental fairness underlying the decisions which allow time-barred pleas of recoupment to be raised defensively: plaintiffs ought not to be allowed to exploit the differing lengths of disparate statutes of limitations by stalling the filing of their claims until after the shorter limitations period expires in order to eliminate defensive claims. The Court, in Cherney, supra, found such exploitation to be intolerable and ruled an attorney could not escape responsibility for his own malpractice by waiting to pursue collection of his attorneys' fees for that representation more than two years after a cause of action for malpractice had accrued. This Court also would not tolerate an effort by a lender to purge a usury-infected contract after the running of a shorter statute of limitations on usury claims. Beekner v. Cawthon, 145 Fla. 252, 198 So. 794 (Fla. 1940).

The instant case is not one where a plaintiff waited to make a claim until the defendant's cause of action was barred by a shorter statute of limitations. Rather, it was FISHER, as plaintiff, who acted promptly to assert his claims for damages and to quiet title. The Agreement called for closing not later than December 5, 1987. FISHER formally declared ATKINS to be in default of the Agreement by letter dated February 12, 1988. ATKINS responded by declaring FISHER in default by letter dated February 18, 1988.

On May 4, 1988, five months after ATKINS failed to close and less than three months after the declarations of default, FISHER filed suit on the Agreement. ATKINS was served May 24, 1988. The case had been active for more than one year before ATKINS filed a counterclaim without leave of court.

As stated in City of Orlando v. Williams, 493 So.2d 15, 16 (Fla. 5th DCA 1986):

> Section 95.11(5)(a), Fla. Stat. (1985) requires that an action for specific performance of a contract shall be commenced within one year. Consistent with Florida law, this means that the statute of limitations begins to run on the date the contract is breached. Central National Bank v. Central Bancorp, Inc., 411 So.2d 358 (Fla. 3d DCA 1982). Stated differently, the statute of limitations starts running when there has been notice of an invasion of plaintiff's legal rights or notice of plaintiff's right to a cause of action. Toledo Park Homes v. Grant, 447 So. 2d 343 (Fla. 4th DCA 1984); Smith v. Continental Insurance Co., 326 So.2d 189 (Fla. 2d DCA 1976).

In this case, FISHER did not wait until after one year passed to assert his claims to prevent ATKINS from asserting a claim for specific performance. It was ATKINS who made no attempt to specifically enforce the Agreement for more than seventeen (17) months after the closing date passed, fifteen (15) months after he declared FISHER to be in default of the Agreement and more than one year after suit was filed by FISHER on the Agreement.[4] No action taken by FISHER surprised ATKINS to his detriment. ATKINS simply slept on his rights and unfortunately persuaded the Fourth District Court of Appeal to rescue him and enable him to prevent FISHER from re-selling the Property -- two years after the defaults were declared.

Indeed, ATKINS was well aware of the claims being made against him and cannot claim that he would have been forced to defend a newly filed action

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[4]In fact, ATKINS filed his Counterclaim fourteen (14) months after he interfered with FISHER's attempt to sell a third party on the grounds he, ATKINS, had a right to the Property.

without ever having had an opportunity to raise his own claims. To the contrary, ATKINS was freely able to assert his specific performance claim, and should have done so within the time and in the manner required.[5] To allow a time-barred claim for specific performance to be filed would reward ATKINS for his dilatoriness and would completely contravene the requirement for asserting an action for specific performance expeditiously as required both in the statute of limitations and case law.

In the instant case, it makes no sense to permit ATKINS to file a time-barred claim for specific performance since he had ample time to do so before the limitations period expired. The holding in Allie should therefore not only be limited to recoupment cases (i.e., involving reciprocal claims for money damages) but, if extended, the Allie holding should apply only to cases where the breach of contract claim is filed after the expiration of the shorter statute of limitation. There is simply no rationale whatsoever for expanding Allie to apply to instances where the party seeking to file a time-barred claim under the shorter statute of limitations had an opportunity to do so during the pendency of litigation but failed, without explanation, to do so. Otherwise, parties will not feel compelled to file claims timely within the limitations period but, rather, will delay, confident that they will be allowed to file time-barred actions as compulsory counterclaims as long as the main action remains pending. This result will contravene a strong long-standing public policy which prefers the timely filing of claims without delay.

In his dissenting opinion in this case, Judge Stone stated: "I cannot and would not make the leap from recognition of a right to assert a

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[5]When ATKINS finally decided to assert the claims, he did so without leave.

time-barred counterclaim in recoupment to allowing a similarly barred counterclaim for specific performance." Opinion at 4. FISHER contends there are very strong logical and practical reasons why this Court should not make such a quantum leap, notwithstanding the laudatory purposes underlying the Allie v. Ionata decision. As the Fourth District Court of Appeal itself recognized, "a specific performance claim is not similar to a claim in recoupment." Opinion at 3. The Fourth District Court of Appeal erroneously concluded that the distinction was without a difference. The differences, however, are profound and irrefutable.

The history of the treatment of pleas in recoupment does not justify the result reached by the Fourth District Court of Appeal in the instant case. See Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982). Pleas in recoupment and setoffs are matters of dollars and cents. Allie v. Ionata holds that the amount of the claim in recoupment is not limited to the amount of the offensive claim. There may be affirmative relief, i.e., a plea in recoupment may exceed the plaintiff's claim. Yet, specific performance is not essentially defensive in nature. Specific performance is an entirely different remedy and should be treated as such accordingly.[6]

The rationale of the Allie v. Ionata decision was that a plaintiff should anticipate the filing of compulsory counterclaims in recoupment and, therefore, should not be allowed to claim that he was prejudiced by the filing of such claim after the applicable statute of limitations expired. That decision was premised on the notion that not only should such a defendant be allowed to negate the plaintiff's claim, but should be entitled

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[6]The Opinion notes at page 2 that in Allie v. Ionata the plea in recoupment requested the equitable remedies of rescission and restitution. Notwithstanding the fact that these are equitable remedies, the holding in Allie v. Ionata only dealt with the issue of monetary damages.

to recover an "affirmative judgment". The Court reasoned that if an affirmative defense based on a time-barred claim could be allowed as a defense, then the Defendant should be permitted to present the same evidence in a compulsory counterclaim in recoupment to recover money damages. The "affirmative judgment" (which the Allie opinion refers to) is limited to resolving money damage claims between the two parties to a transaction; it should not be extended to the granting of specific performance which will affect various third parties to the original transaction.

The Fourth District Court of Appeal misapplied the Allie rationale in extending its holding to time-barred specific performance compulsory counterclaims. A claim for specific performance is not an affirmative defense to an action for breach of contract damages. Under the Allie rationale, it is understandable that a client might want to file a time-barred action for professional malpractice against an attorney who files a breach of contract action for fees after the running of the shorter statute of limitations for malpractice. See Cherney v. Moody, supra. It is not logical that the filing of a breach of contract action by a party to a real estate sales transaction would cause a party to that transaction to decide to file a time-barred action for a specific performance years after the transaction should have closed. The elements and proof necessary to establish such a claim are quite different from a compulsory counterclaim for breach of contract seeking money damages.

Precedent exists to allow a recoupment claim to reduce or eliminate a plaintiff's claim for money damages. Contrarily, there is absolutely no precedent permitting a time-barred claim for specific performance in recoupment; that type of claim does not reduce, eliminate or "recoup" against the plaintiff's claim. Rather, it rewards a delinquent defendant

with the opportunity to resurrect a time-barred claim to obtain real property.

The Allie decision depends on the presumption of the absence of prejudice from the allowance of a time-barred compulsory counterclaim for money damages in recoupment. In contrast, the subject statute of limitations is premised upon the existence of prejudice to a party who must defend a specific performance claim filed beyond the one year period.

The Court in Allie has placed great reliance upon the presumption that prejudice can not be asserted by a plaintiff whom the defendant then calls upon to litigate other aspects of a transaction. The Fourth District Court of Appeal's extrapolation from Allie incorrectly assumes that once a party files an action, he cannot be prejudiced by the filing of any kind of compulsory counterclaim, regardless of what statute of limitations period might have applied to the barred action, what kind of relief the barred action might be seeking or what innocent third parties might have by then become involved and prejudiced. Yet, in a specific performance context, such presumption of the absence of prejudice directly contravenes the legislative presumption of the existence of prejudice. The presumption of the absence of prejudice is particularly inappropriate in the instant case. During the period of ATKINS' silence, the property which is the subject matter of the Agreement was under contract to another individual who has invested large sums in the property. The sale ultimately did not close because ATKINS' claim for specific performance was still outstanding. Even in the absence of a sale, requiring FISHER to keep property worth more than Ten Million Dollars ($10,000,000.00) off the market for more than five years, despite the fact that no closing occurred and no timely claim to the property had been made by ATKINS, is also clearly prejudicial. Therefore,

the Fourth District Court of Appeal decision undermines a clear legislative directive based upon well-established public policy. Since a claim for specific performance is so drastically different from a claim in recoupment for money damages, Allie should not be extended.

B. THE LEGISLATIVE SCHEME AND PUBLIC POLICY SUPPORTING MARKETABILITY OF TITLE WILL BE SEVERELY UNDERMINED BY THE ALLOWANCE OF TIME-BARRED CLAIMS FOR SPECIFIC PERFORMANCE.

The Fourth District Court of Appeal decision under review in the instant case, if not reversed, will disrupt the legislative scheme and undermine numerous long standing public policies which support, encourage and provide for the certainty and marketability of real estate titles. Indeed, one practical and immediate consequence of the Fourth District's decision, if not revised, will be to render titles unmarketable where buyers and sellers do not close on contracts, until the expiration of the five year limitations period for filing breach of contract claims or the conclusion of litigation. Prior to the decision under review, if an action for specific performance had not been filed within one (1) year, the marketability of the subject property was not affected by the fact that a transaction between a seller and an original buyer did not close or that litigation was being pursued. If that decision is not reversed, the delicate balance struck by the Legislature between enabling parties to a failed sales transaction to compel specific performance and the need to ensure marketability of title by limiting the specific performance period will be significantly altered and materially harmed.

1. THE THREAT OF SPECIFIC PERFORMANCE DEFEATS MARKETABILITY OF TITLE.

Unlike other forms of property, land is permanent, immovable and indestructible. Due to its unique character, a special body of law has developed around its ownership. The Court in Cunningham v. Haley, 501 So.2d

649 (Fla. 5th DCA 1986) discussed the following public policy involved in marketable titles:

> In a nation such as ours, where property is subject to private ownership, the rights of citizens to own, to use, and to transfer land are most valued rights. The enjoyment of those rights is directly related to the existence of a relatively safe, simple, and inexpensive system for assuring the marketability of land titles and their ready transferability. Because of the enduring nature of land, the value of its use and ownership, and the variety and complexity of interests in land permitted under English and American law, land titles tend in time to accumulate defects, divergent claims and rights and restrictions and limitations which erode their marketability. Good public policy decrees that there be a limit to which these matters are permitted to adversely affect the marketability of land titles. The past should not be able to forever rule the present from the grave. (Emphasis supplied)

Ibid. at 652.

The Florida Supreme Court has defined the concept of marketability of title in very broad terms:

> As a general rule, a purchaser is not required to accept a conveyance if the title of the vendor is reasonably doubtful. The purchaser is entitled to what is termed a marketable title, and this means not merely a title valid in fact, but a title that must be such as to make it reasonably certain that it will not be called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto and must be free from reasonable doubt as to any question of fact or law necessary to sustain its validity. It must be, as is sometimes said, a title which can be sold to a reasonable purchaser or mortgaged to a reasonable person of reasonable prudence, and which is not subject to such a doubt or cloud to affect its market value. (Emphasis supplied)

Adams v. Whittle, 101 Fla. 705, 713-714, 135 So. 152, 155 (1931) (Cited in Boyer, Florida Land Transactions, §14.02). (See also, Model Land Company v. Crawford, 20 So.2d 122, 124 (Fla. 1944); Chafetz v. Price, 385 So.2d 104, 106 (Fla. 3d DCA 1980). A marketable title is one free of encumbrances and free of any right or interest in a third person which is incompatible with the full enjoyment and ownership of the property. If the title is in litigation or is the subject of controversy, it is unmarketable unless the pleadings indicate the claim is invalid or the adverse claim appears to be

stale or without merit. See Friedman, Contracts and Conveyances of Real Property, §4.1 (3rd Ed. 1975), Maupin, Marketable Title, §290 (3rd Ed. 1921); 2 Patton, Titles §603 (2d Ed. 1957). As a general rule, a purchaser is not required to accept a conveyance if the title of the seller is reasonably doubtful. See Adams v. Whittle, supra. The pendency of litigation respecting the property to be conveyed renders title unmarketable. See Chafetz v. Price, supra. In Chafetz, the pendency of litigation by an original purchaser seeking specific performance of an alleged pre-existing contract for the sale of the same real property as covered by the contract in the filed action for specific performance rendered the seller's title unmarketable; the title would be rendered marketable only by an Order of Dismissal with Prejudice of the original purchaser's action. The Court stated that purchasing property before pending litigation is finally concluded represents "the paradigm of unmarketability." Chafetz at 106. As long as the threat of a time-barred specific performance claim looms, title to property will be unmarketable.

It is not even necessary for a lis pendens to be filed in the Public Records to render title unmarketable if a purchaser has actual knowledge of the litigation. The courts of this state have long followed the general principle that a third party purchaser, aware of a prior contract to sell to another, is not a bona fide purchaser and the conveyance to such third party is subject to judicial cancellation, where, for example, an original purchaser prevails in a specific performance suit. (See e.g., Ray v. Hocker, 61 So. 500 (Fla. 1913); Hallmark Builders, Inc. v. Hickory Lakes of Brandon, Inc., 458 So.2d 45 (Fla. 2d DCA 1984); Coates v. Hale, 429 So.2d 761 (Fla. 1st DCA 1983); and McAlister v. Salas, 485 So.2d 1333 (Fla. 2d DCA 1986)). Until the decision of the Fourth District Court of Appeal, if the

original buyer did not file an action for specific performance within one year, the subsequent purchaser could take free of any unlitigated claim of the original purchaser. The Fourth District decision renders the title to real property unmarketable for at least as long as the statute of limitations on suits for breach of written contract or as long as it takes to conclude the particular litigation and the time for appeal has expired. The holding of the Fourth District Court of Appeal extends the effectiveness of a threat of a successful specific performance claim well beyond the one year statute of limitations found in Florida Statute 95.11(5)(a) and adversely impacts the marketability of all land titles.

2. THE LEGISLATIVE SCHEME PROMOTING MARKETABILITY OF TITLE WILL BE UNDERMINED BY THE FOURTH DISTRICT COURT OF APPEALS HOLDING

The Florida Legislature has consistently reflected its intent to stabilize land titles, give predictability and certainty to land ownership, and encourage the alienability of property for the welfare of the public. Cunningham, supra. There are in existence a large number of curative acts in the Florida Statutes which operate on defective instruments to either validate the instruments or bar claims which otherwise might be asserted because of the defects. These acts contribute materially to the marketability and validation of titles.

For example, probably the most significant legislation for the purpose of stabilizing titles was the adoption of the Marketable Record Title Act ("MRTA") Chapter 712, Fla. Stat., by the Florida Legislature in 1963. This Act was intended to extinguish all claims in existence for a period of thirty years or more which conflict with a record chain of title which is at least that old. Ibid. The Act accomplishes this by declaring as marketable record title any estate or interest in land reflected by a recorded chain of

title for thirty years or more, and it extinguishes, subject to certain exceptions, all interests which are older than the root of title. The purpose of the MRTA is to simplify and facilitate land transactions by letting interested parties rely on record title. See Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973).

In Askew v. Sonson, 409 So.2d 7 (Fla. 1981) this Honorable Court determined that the MRTA may constitutionally divest the State of title to lands which were granted for school purposes, including the 16th section in each Township. The Supreme Court concluded that the task of defining which state lands, if any, are to be excluded from the operation of the MRTA is a legislative function in view of the clear language and purpose of the Act.

The Court in Askew clearly underscored the importance of adhering to the legislative mandate concerning the applicability of the MRTA and the public policy protecting the marketability of title behind it. This Court should do no less in the case sub judice.

The MRTA includes a slander of title provision in Fla. Stat. §712.04. This section states no person may use the privilege of filing notices under the Act for the purposes of asserting false or fictitious claims to land. Fla. Stat. §712.10 calls for liberal construction so that the legislative purpose of simplifying and facilitating land title transactions may be accomplished. Under the Fourth District's decision, if an owner filed a slander of title action under the MRTA, could a defendant circumvent the MRTA's 30-year limitations period by filing a compulsory counterclaim or recording in the Public Records in connection therewith?

The general law of adverse possession in a broad sense may be regarded as a special type of curative legislation designed to protect against defects in the possessor's title. At the end of the period of adverse

possession, the adverse possessor has a valid fee simple title. See e.g. §§§95.16, 95.18, and 95.21, Fla. Stat.

Other examples of the legislative intent to stabilize land titles for the welfare of the public pervade the Florida Statutes. Effective July 1, 1987, the Legislature amended Fla. Stat. §§55.081 and 55.10 to provide that certified judgments recorded on or after July 1, 1987 will remain effective as a lien against real property for seven years (rather than for twenty as was the case under the prior law) unless extended as provided for by law. The Legislature was intending to eliminate stale judgment liens in favor of the alienability of real property. Likewise, Fla. Stat. §48.23(2) provides for the cancellation of a recorded notice of lis pendens after one year if the action is not founded on a recorded instrument or a mechanic's lien (although the court could extend the effectiveness of the lis pendens by Court order).

Various other examples exist to illustrate the scope of the legislative scheme designed to protect marketability of title. (See FISHER's Supreme Court Appendix Exhibit "C")

Another clear expression of the legislative intent to provide for clear titles to real property can be found in Chapter 65 of the Florida Statutes which codifies the remedy of a property owner to file a complaint to have a claim or interest which casts a cloud on his title cancelled and removed. The authority of a court of equity in a quiet title action rests on the principle that the instrument or proceeding constituting the cloud may be used to embarrass or adversely affect the title of the party who is the real owner. See Realty Secur. Corp. v. Johnson, 111 So. 532 (Fla. 1927). The provisions of Chapter 65, Fla. Stat., are to be liberally construed and applied to obtain a speedy determination and adjudication of the validity

and effect of hostile claims. See McDaniel v. McElvy, 108 So. 820 (Fla. 1926). The Fourth District's willingness to give ATKINS an unlimited (or at least an indefinite) period of time to assert his specific performance claim makes a shambles of this "speedy determination" of titles objective. Instead, the Fourth District has ironically penalized FISHER for his promptness in filing suit by permitting ATKINS to file a time-barred counterclaim and justifying its decision by reaching for a "recoupment" theory that no court in the country has ever applied to claims not involving money damages.

3. STATUTES OF LIMITATIONS PROMOTE MARKETABILITY OF TITLE.

The Legislature has enacted several important statutes of limitations which promote and safeguard the legislative policy in favor of marketability of title to real property, the foremost of which is the subject statute, Fla. Stat. §95.11(5)(a), which provides that an action for specific performance of a contract must be brought within one year. Other statutes of limitation which promote marketability are as follows:

- Fla. Stat. §713.22 which provides that no mechanic's lien shall continue for a period longer than one year after the claim of lien has been recorded, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction.

- Fla. Stat. §85.051 which provides that when there has been no record of a notice of lien, action to enforce a lien must be brought within 12 months from the accrual of the unpaid rent, the performance of work, or the furnishing of the materials, and if there has been such record, the action must be brought within 12 months from the time of such record.

- Fla. Stat. §718.110(10) which validates the declaration or other condominium documents if an action contesting the compliance with the requirements for formation is not brought within three years of the filing of the declaration.

- Fla. Stat. §95.281 which terminates the lien of a mortgage or other instrument (a) five years after the date of final maturity if the maturity is ascertainable from the record, and (b) twenty years after the date of the mortgage if the final maturity is

not ascertainable from the record. There are further provisions in this statute pertaining to advancements for taxes and the effect of extension agreements.

- Fla. Stat. §95.22 which limits the right of any person to bring an action to recover real property of a decedent that had been conveyed previously by one or more heirs or devisees of the decedent purporting to convey the entire interest of the decedent, after seven years from the date of recording of the conveyance.

- Fla. Stat. §95.231(1) which provides that five years after recording a deed, it can be accepted as valid and of record even though there are no witnesses.

- Fla. Stat. §95.231(2) which provides that after twenty years from the recording of the deed or the probate of a will purporting to convey real property, no persons shall assert any claim to the property against the claimants under the deed or will or their successors in title.

- Fla. Stat. §95.091(1)(a) which provides that any tax lien that by law is granted to the state or its political subdivisions, or to any other entity having authority to levy and collect taxes shall expire 5 years after the date the tax is assessed or becomes delinquent, whichever is later.

- Fla. Stat. §95.11(2)(c) which requires that an action to foreclose a mortgage be commenced within five years.

- Fla. Stat. §95.12 which provides that no action to recover real property or its possession shall be maintained unless the person seeking recovery, or his predecessor, was possessed of the property within seven years before the commencement of the action.

- Fla. Stat. §95.21 which sets a three year limitation on bringing an action to question any irregularity in the conveyance of real property by an executor, administrator or guardian.

It is evident that the purpose of §95.031. Fla Stat., governing computation of time for statutes of limitation is to make more precise the dates upon which various statutes of limitation begin to run and end. It is also manifestly clear that the Fourth District's decision in the instant case renders all of these limitations inoperative if the actions being limited can be asserted in a counterclaim posture. Was the Fourth District Court of Appeal deliberate or even aware that its decision would have such a far reaching effect?

The Fourth District Court of Appeal's decision not only contradicts and abrogates the authority of the Legislature by extending the one year statute of limitation governing specific performance actions, it also overturns numerous prior court decisions. The deleterious effect the District Court of Appeal decision could have on existing statutes and case law is illustrated by reviewing this Court's decision in Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988). In that case, a contractor appealed from an order dismissing his mechanic's lien foreclosure action. The contractor had failed to provide the owner with a contractor's affidavit as required by §713.06(3) Fla. Stat. The contractor attempted to amend his complaint to show delivery of the contractor's affidavit. This Court held that the amendment could be made provided that the one year statute of limitations had not run prior to the filing of the amended Complaint. The basis for the Court's decision was that §713.22(1) Fla. Stat. provides that a mechanic's lien foreclosure action must be filed within the limitation period of one year from the recording of the claim of lien.

Under the Fourth District Court of Appeal decision in the case under review, if an owner filed a breach of written contract claim after one year from the recording of the contractor's mechanic's lien, the contractor would be allowed to file a time-barred mechanic's foreclosure action as a compulsory counterclaim. That decision, in effect, would overrule this Court's ruling in the Holding Electric, Inc. v. Roberts case.

This Court stated in Jack Stilson & Co. v. Caloosa Bayview Corp., 278 So.2d 282 (Fla. 1973) that,

> The purpose of the fixed period as provided in such statutory remedies as the one involved here in the mechanic's lien law was to make definite and certain the time within which the matter can be considered as ended. It effects more than the immediate parties in many instances. There are lenders, buyers, and others who rely on the fixed period of time in the lien law. This assurance should

not be destroyed by an "open-ended" right of amendment by a lienor beyond the period provided by the statute.

Ibid at 283.

The same rationale which prevents a mechanic's lienor from filing time-barred claims to foreclose mechanic's liens should apply to prevent a party from filing a time-barred action for specific performance, whether as a compulsory claim or not. See Scott v. Haufler, 526 So.2d 996 (Fla. 1st DCA 1988); Corbin Well Pump and Supply, Inc. v. Koon, 482 So.2d 525 (Fla. 5th DCA 1986) (after expiration of the statutory period, the right to bring a mechanic's lien foreclosure action was extinguished); and Harris Paint Co. v. Multicon Properties, Inc., 326 So.2d 43 (Fla. 1st DCA 1976).

Simply stated, the statutes cited above could be circumvented by applying the holding of the Fourth District Court of Appeal. If, in any pending action the Defendant can file a compulsory counterclaim without regard to the running of applicable statutes of limitation, marketability of title will be suspect and the stability sought to be created by the legislative scheme shaken.

4. THE LEGISLATURE INTENDED FLA. STAT. §95.11(5)(a) TO PROVIDE A BRIGHT LINE LIMITATIONS PERIOD

The uniqueness of specific performance as a remedy is underscored by the exceptionally brief statute of limitations prescribed by the Florida Legislature. Before 1975, Chapter 95, Fla. Stat., did not separately establish a statute of limitations for specific performance which, therefore, was governed by a four-year "catch-all" provision. Section 95.11(3)(p), Fla. Stat. (1973). By enactment of Ch. 74-382, effective January 1, 1975, the Legislature decreed that such an action must be commenced within one year. The Florida Legislature thus created a statute of limitations which is matched in brevity only by that in Connecticut which

provides for one year to bring an action for breach of an executory contract to sell real estate. See Chapter 47-33a, Laws of Connecticut. No other state provides such a short limitations period. In contrast, the pleas in recoupment raised in Allie v. Ionata concerned substantially longer statutes of limitations: five years for legal and equitable actions on a written contract (§95.11(2)(b), Fla. Stat.) and four years for an action for rescission of a contract (§95.11(3)(e), Fla. Stat.).

Since the filing of a specific performance claim will render title unmarketable, the Legislature, in sanctioning the filing of such a claim, has ordained that it must be filed within one year. In doing so, the Legislature sought to balance the rights of parties to a real estate sales transaction to compel the performance of a contract, on the one hand, against the public policy of ensuring that title to property will remain marketable, on the other. The Fourth District Court of Appeal decision frustrates the legislative intent and disrupts the delicate balance sought by the Legislature.

The legislative intent in limiting the period in which claims for specific performance could be filed was reflected in the reduction from four years to one year. The Legislature could not have expressed its intent any more clearly than by providing as it did that among those actions which had to be filed within one year was, "[A]n action for specific performance of a contract." Fla. Stat. §95.11(5)(a). The Legislature did not set forth any exceptions or conditions, as it did with various other statutes of limitations. Nor did the Legislature include the pendency of litigation over breach of contract claims as a ground for tolling the limitations period under §95.051, Fla. Stat.

We are not dealing with a statute similar to the one controlling the filing of medical malpractice claims, recently reviewed by this Court in Barron v. Shapiro, 15 FLW 340 (June 14, 1990), where the Legislature mandated that such actions had to be filed "within two years from the time the incident is discovered, or should have been discovered, with the exercise of due diligence." There is usually little doubt as to when a claim for specific performance accrues. Typically, it is either the failed closing date or, if that date is uncertain, when one party declares the other party to be in default, at the latest.

The Legislature provided for a bright line at one year and did not add language to the subject statute which would permit or encourage the application of conditions or exceptions. The Legislature could have included (but did not include) a provision that the one year period applied except in those instances where a suit for breach of contract concerning the subject property remained pending. However, the Fourth District Court of Appeal decision has the effect of judicially extending the one year limitations period for specific performance actions to whatever other statute of limitation applies to the original claim filed by the adverse party (e.g., five years in a breach of written contract claim). After such claims are filed, some remain pending for many years and involve multiple appeals and remands for further proceedings. It is conceivable that the Fourth District Court of Appeal decision could lead to the filing of time-barred claims for specific performance as many as ten or more years after a given transaction should have closed! During that entire period, regardless of whether the specific performance claim had been filed, the title to the subject property would be rendered unmarketable by the possibility of such a claim, contrary to legislative intent.

Indeed, the Fourth District's decision, read literally, indicates that statutes of limitations generally are no longer applicable to any claims whatsoever if they are presented in the posture of counterclaims. Surely, this holding goes far beyond (and, to a considerable extent, ignores) the facts in the instant case and, through such over-generalizations, takes the law into unchartered waters with consequences whose fairness and correctness in future cases cannot possibly be assured.

5. THE FOURTH DISTRICT COURT OF APPEAL DECISION CONSTITUTES IMPERMISSIBLE JUDICIAL LEGISLATION

The Fourth District Court of Appeal decision impermissibly substitutes its judgment for that of the Legislature in extending the one year statute of limitations.

Statutes of limitations are also predicated on public policy (See Brown v. Case, 86 So. 684 (Fla. 1920); Davidson v. Grady, 105 F.2d 405 (Fla. 1939)), and are designed to prevent the assertion of stale claims after the lapse of a long period of time. Statutes of limitations are intended to encourage prompt filing of valid claims by fixing arbitrary periods within which the right to enforce such claims must be asserted and to protect defendants against unusually long delays in the filing of lawsuits. See Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976).

Engrafting an exception into a statute of limitations which the Legislature did not see fit to put into the statute would amount to judicial legislation. Morgan v. Amerada Hess Corp., 357 So.2d 1040 (Fla. 1st DCA 1978). The modern tendency of construction is against engrafting exceptions to the operation of statutes of limitation where the Legislature has not seen fit to expressly so provide. Exceptions to the operation of such statutes will not be read into them merely to compensate for difficult

cases. 35 Fla. Jur.2d, Limitations and Laches, §57. The guiding principles controlling the interpretation of statutes generally govern the construction of statutes of limitations; the tendency is to favor liberality in their construction since they are remedial statutes; in determining whether or not exceptions to the operation of a statute of limitations should be read into it, the tendency of the Courts is toward strictness; such exceptions will not readily be implied. 35 Fla. Jur.2d, Limitations and Laches, §11. Statutes of limitations are to be liberally interpreted in favor of repose, whether they be criminal or civil statutes. U.S. v. Phillips, 843 F.2d 438, 443 (11th Cir. 1988). While Courts will not strain either the facts or the law in aid of a statute of limitation, nevertheless such enactments will receive a liberal construction in furtherance of their manifest objects and ought not to be explained away. Foremost Properties, Inc. v. Gladman, 100 So.2d 669 (Fla. 1st DCA 1958); Smith v. City of Arcadia, 185 So.2d 762 (Fla. 2d DCA 1966).

Courts and commentators have argued that courts are ill-equipped to set a particular limitations period. Within broad boundaries, such a decision is largely arbitrary and, therefore, best left to legislative judgment. Also, a limitations question involves more precise line-drawing than courts should perform. Unlike the related concepts of laches, a limitations period does not allow the Court discretion to consider the good or bad faith of the litigants, the harm from delay, or the particular circumstances of a given case. Kaulbach, "A Functional Approach to Barring Limitations for Federal Statutes," 77 Cal. Law Rev. 133 (1989). In cases involving real property and a statute of limitations which is part of an overall legislative scheme to establish marketability of title, it would be especially disruptive for a court to substitute its judgment for that of the Legislature concerning

under what circumstances the statute of limitations should not be applied as enacted. The allowance of time-barred actions for specific performance as compulsory counterclaims would essentially amount to permitting an indeterminate period within which such actions could be filed. As Chief Justice Marshall stated soon after our nation's courts were first established, a cause of action without a time limitation would be "utterly repugnant to the genius of our laws." Adams v. Woody, 6 U.S. (2 Cranch) 336, 342 (1805) (cited in Kaulbach, supra). Such a result cannot be countenanced.

Statutes of limitations embody a Legislature's balancing of the state's interest in repose and accurate, efficient prosecution of lawsuits, on the one hand, against the interests of preserving a potential plaintiff's right to sue, on the other. Kaulbach, supra. Only where there is reasonable doubt concerning a legislative intention to provide for a shortened limitation period should that doubt be resolved in favor of a plaintiff. Haney v. Holmes, 364 So.2d 81 (Fla. 2d DCA 1978). The Legislature clearly manifested its intent in the subject statute of limitations to not allow specific performance claims to be filed beyond one year. There should be no benefit of doubt granted in favor of the allowance of a time-barred action even as a compulsory counterclaim.

This Court is obligated to enforce both the spirit and the letter of the law enacted by the Legislature. Holly v. Auld, 450 So.2d 217 (Fla. 1984)(It is not the Court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the Court); Webb v. Hill, 475 So.2d 591 (Fla. 1954) (Courts must apply law as it finds it and it has no authority to amend or change the law or to adopt or enact a law in accordance with its views); Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947)(A

court cannot read into a statute a limitations of its application and thereby reduce it by construction to apply it to a more limited field than that which the Legislature attempted to cover); State ex rel Register v. Safer, 368 So.2d 620 (Fla 1st DCA 1979)(Courts have no function of legislation, but simply seek to effectuate intent of Legislature); Fla. Dept. of Commerce, Division of Employment Security v. Todd, 353 So.2d 622 (Fla. 2d DCA 1978)(When Legislature passes laws, it is deemed to have expressed its intent by the words found in the statute and courts may not "write in" legislative intent in absence of direct or indirect language supporting such intent). If the Fourth District Court of Appeal's decision is allowed to stand, the bright line of the Legislature's one year statute of limitations will be clouded with uncertainty and unpredictability.

6. SPECIFIC PERFORMANCE CLAIMS MUST COMPLY WITH THE REASONABLE PROMPTNESS REQUIREMENT

It is ordinarily incumbent upon a party seeking specific performance to demonstrate that he has acted with reasonable promptness in electing to seek conveyance of title to the property under contract by specific performance. As stated in Shirley v. Lake Butler Corporation, 123 So.2d 267, 270 (Fla. 2d DCA 1960):

> . . . Nevertheless, it is the duty of a purchaser who is not in possession, if he would invoke the aid of a court of equity, when he is put upon notice that the vendor cannot or will not deliver a good title as he contracted to do, to elect with reasonable promptness whether he will seek by suit for specific performance the conveyance of such title as the latter can convey, with abatement in the purchase price where appropriate, or whether he will resort to an action at law for his damages for breach of the contract, or whether, on the other hand, he will exercise his right to consider the contract abandoned. Where the purchaser neglects for an unreasonable time under all the circumstances, without sufficient explanation, to elect and act upon his equitable remedy, his right to specific performance may be barred by his own laches, notwithstanding the original default of the vendor, and although time is not of the essence. (Emphasis supplied)

Where a party has not acted with reasonable promptness in bringing a timely specific performance claim, the court, sitting in equity as the trier of fact, may deny the claim. The effect of the Fourth District Court of Appeal's decision is to enable individual judges throughout the state to decide whether a given specific performance claim brought after the one year limitations period was filed with reasonable promptness. That determination will turn on the individual circumstances of the case and personal predisposition of the individual judge. In the past, it could be concluded with reasonable certainty that once a specific performance claim was not filed within one year, title to the property was marketable. Now, marketability will remain in limbo; whether a time-barred claim for specific performance will be allowed may turn on a subjective discretionary conclusion reached by the presiding judge in the particular case rather than based on an objectively determinable one year period. The Fourth District's decision gives a defendant who is at fault, or who may simply be unscrupulous, an inchoate interest in the property until the plaintiff's desire to resell his property convinces him to dismiss his claim for damages to which he may be wholly entitled from the defendant.

In the case sub judice, ATKINS offered no explanation (nor did the Fourth District Court of Appeal condition its ruling on the reasonableness of an explanation) as to why he delayed in filing his compulsory counterclaim for specific performance until after the statute of limitations had expired and FISHER's action had been pending for more than a year. Shouldn't the delinquent party at least be required to demonstrate: (1) legally sufficient excusable neglect as to why the claim was not filed within the limitation period (which is required, for example, to set aside a default); (2) the adverse party will not be prejudiced by the allowance of

the time-barred action; and (3) third parties not involved in the litigation will not be prejudiced by the allowance of the time-barred action? Further, shouldn't a party be absolutely barred from raising a delinquent claim for specific performance where it is not filed until after the underlying litigation has been pending for more than one year?

If the Fourth District decision is allowed to stand, it would mean that even where the original breach of contract action is filed within one year from the breach and remains pending for more than one year thereafter, the other side could file a specific performance counterclaim at any time thereafter, so long as the breach of contract action remained pending. FISHER adheres to their position that Allie should not be applied to a time-barred action for a specific performance under any circumstance. That position recognizes that the party who should be precluded from filing a time-barred action for a specific performance will still be able to file a claim for damages in recoupment, time-barred or otherwise.

If this Court should rule against FISHER and apply Allie to specific performance claims, then it should limit its application to only those instances in which the original breach of contract action is filed after the one year period has expired and the specific performance claim is filed within one year from the filing of the breach of contract action. In the case under review, FISHER filed their breach of contract action before the one year period expired (not after); ATKINS' specific performance claim was filed more than one year after the original action was pending (not within one year).

7. PRACTICAL TRANSACTIONAL RAMIFICATIONS.

One need not look beyond the subject case to evaluate the parade of horribles which the Fourth District Court of Appeal decision will introduce

to the real estate industry if its Opinion is not reversed. The ability of a buyer to file a time-barred specific performance claim will render real property unmarketable for a considerable indeterminate period of time. The real estate community and mortgage lenders rely on title insurance to assure them that marketable title is being conveyed or encumbered. Title insurance underwriters will likely include an exception to coverage for a potential loss for damage due to the possibility of a time-barred specific performance claim arising out of a pending breach of contract case. Buyers will be loathe to accept title insurance containing such an exception or buy unmarketable property. An owner's ability to transfer or encumber his property consequently will be severely impaired.

This is an especially acute problem in that since June 25, 1986 all owners' policies of title insurance issued in Florida have been required by law to protect the insured against loss or damage due to the unmarketability of title rather than just the uninsurability of title. Florida Administrative Code Rule 4-21.003(7). Section 627.784, Fla. Stat., specifically prohibits title companies to assume title risks on a casualty basis which arise out of the possible existence of adverse matters. Title insurance companies will now be exposed to greater losses arising from unmarketability and will, therefore, be unwilling to insure over the risk that a specific performance claim cannot be raised beyond the applicable statute of limitations as a compulsory counterclaim in a pending litigation.

A basic title insurance underwriting principle is that no known risk should be insured against unless the probability of loss is remote and the loss is calculable within the accepted limits, especially when the interest is not barred by statute. Prior to the decision of the Fourth District Court of Appeal, a title insurer could review the litigation file and

conclude with certainty that a specific performance claim would be time-barred one year following the breach of the purchase and sale contract. Now it is possible that an action for specific performance can be brought as a compulsory counterclaim well beyond the prescribed one year statute of limitations. The effect of the holding of the Fourth District Court of Appeals extends the effectiveness of a threat of a successful specific performance claim well beyond the one year statute of limitations and adversely impacts the marketability of all land titles.

An unscrupulous party to a failed contract could easily maintain an "unmarketability stranglehold" on a parcel of property by simply placing potential purchasers on actual notice of a pending dispute concerning a prior contract which may involve a claim for specific performance. Such a party could also notify the proposed title insurer of the transaction to ensure that a title policy would not be issued, thereby precluding a prudent second purchaser from closing on a subsequent contract. Scrupulous or not, this is precisely what ATKINS did in the instant case and the Fourth District, by making new law in Florida and the entire country, has not only excused but vindicated his doing so.

An owner of property will be effectively precluded from selling, financing or leasing his property so long as the first purchaser has the right to file a time-barred counterclaim for specific performance. In the interim, an owner of property will not be able to have access to the equity he has in his property. He would continue to pay taxes, keep insurance and maintain improvements at the risk of having to turn them over to a specific performance claimant whose stale rights the owner may inadvertently revive by filing suit years later. The owner will be unable to refinance the property and if he is short of funds he may lose his equity in a foreclosure

action. No prudent lending institution would finance the property under the threat of losing its lien as a consequence of a successful time-barred specific performance claim filed by the original buyer. A lender would make the owner agree not to sue during the term of the loan. There need not even be a specific performance suit actually filed or lis pendens recorded to accomplish these results.

The owner will also be on the horns of a dilemma if he should attempt to list the property for resale. On one hand, he may feel compelled to disclose to prospective purchasers that he is presently involved in (or contemplating) litigation concerning the pre-existing contract during which the original purchaser might be able to assert a time-barred claim for specific performance. The result would be that purchasers would be reluctant to seriously consider committing themselves to the purchase of the property. On the other hand, if the seller failed to disclose the pendency or probability of the filing of a breach of contract claim, the seller could expose himself to a claim by a subsequent purchaser for fraud or misrepresentation.

Likewise, a real estate broker involved in or knowledgeable of the original failed contract might feel compelled to disclose to prospective purchasers all the details concerning the failed contract and the possibility of the original purchaser filing a time-barred action for specific performance. Brokers might also be exposed to claims of misrepresentation if they should fail to disclose such information. Consequently, brokers may become reluctant to work on procuring a purchaser for a property which was the subject of a failed contract. One can even envision a revision to the widely-used Florida Bar-Florida Board of Realtors standard form Contract for Purchase and Sale to now include a representation

by a seller that he had not previously contracted for the sale of the property and that no breach of contract litigation was pending or would be filed by him in the future. One might also anticipate an explosion of litigation arising out of the existence and quality of disclosure in subsequent transactions.

A seller who has a valid claim for breach of contract against a purchaser will be loathe to file a breach of contract action because during the pendency of that suit, the purchaser who breached the contract might, at any time, file a time-barred specific performance claim rendering the title unmarketable. Consequently, sellers will forego access to the courts in pursuit of legitimate claims and thereby forfeit their ability to collect damages for keeping their property off the market during the contracting period or to become whole by the deposit being released to them upon the default of a purchaser.

The Fourth District Court of Appeal probably did not envision the following scenario: A purchaser who defaults under contract for purchase of real property files a spurious breach of contract suit after the one year period but within the five year statute of limitations. The seller defends and claims that the buyer, not he, defaulted and then files a compulsory counterclaim for breach of contract. The buyer could then rely upon the Fourth District Court of Appeal decision and raise a plea in recoupment seeking specific performance even though the action was otherwise time-barred. In that way, a buyer could lead an unsuspecting seller into a trap and cause him to render his property unmarketable. Especially in an instance where a buyer might be judgment-proof, a seller would be inclined to agree to the return of the buyer's deposit or even to pay a tribute in exchange for the buyer's general release and agreement not to pursue his specific performance claim.

In still another scenario, an unscrupulous buyer could record a document which slanders the title of a seller with whom he had previously contracted more than a year prior. The seller might respond by filing a claim for slander of title. Theoretically, the buyer could apply the holding in the Fourth District Court of Appeal decision and defend on the basis that the buyer had a legitimate interest in the subject property and proceed to file a compulsory counterclaim for specific performance which was otherwise time-barred.

Real estate transactions will be adversely affected by the decision of the Fourth District Court of Appeals. The negative practical affects of the decision mandate reversal.

CONCLUSION

The certified question now before this Court should be answered in the negative and the Fourth District Court of Appeal's Opinion should be reversed. This Court's opinion in Allie v. Ionata concerned only pleas in monetary recoupment and did not address time-barred compulsory counterclaims for specific performance. As claims for specific performance are unique and the Legislature has decreed that the shortest possible statute of limitations governs such actions, this Court should not extend Allie v. Ionata to include claims for specific performance. More than just the two parties to a simple sales transaction will be affected adversely by the application of the Fourth District Court of Appeal decision. The legislative scheme will be undermined, the public policy supporting marketability will be severely eroded, and the practical transactional ramifications will be debilitating. Finally, the facts and the equities in this case make it particularly inappropriate to extend Allie v. Ionata in favor of ATKINS who sat on his rights while defending FISHER's claims. Moreover, the need for certainty in real estate titles also militates against expansion of the Allie v. Ionata holding to claims for specific performance.

For all of the foregoing reasons, the Fourth District Court of Appeal's decision in this matter should be reversed and the summary judgment entered in favor of FISHER should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Initial Brief has been furnished by U.S. Mail to ALBERTO MACIA, ESQ., Shea & Gould, 1428 Brickell Avenue, Miami, Florida 33131 this 11th day of July, 1990.

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