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11 Stetson J. Advoc. & L. 300 (2024)

The Unglamorous World of Towing Litigation: Florida Law is Rewritten

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I. Introduction

300. In *The Problems of Jurisprudence*, while discussing "objectivity in statutory interpretation," Judge Posner poses the following example:

> Suppose I ask my secretary to call Z and tell him I must cancel our lunch date today — I have been called out of town suddenly. The secretary notices that on my calendar I have marked lunch with Y, not Z, but it is too late to check back with me, because I have left the office and cannot be reached. Is it not plain that the secretary should call Y, even though there was no semantic or internal ambiguity in my instruction?[2]

301. Statutory interpretation in many ways is similar to Judge Posner's example. Sometimes, a statute's intent is ambiguous in a way that leaves the reader in a flip-of-the-coin proposition. Other times, we can fully grasp the intent of particular legislation as plainly as the secretary above can review the Judge's calendar entries.

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2 Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 268 (1990).

302. This article, though, does not have the ambitious goal of being a study in the complex subject of statutory interpretation. It simply wishes to highlight (1) an example of statutory interpretation gone wrong, twice and (2) the realities of the arcane world of towing litigation affected by these incorrect decisions. More specifically, I discuss the twist to Fla. Stat. §715.07 (2021)[3] by the decisions in *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.* [4] and *Am. Towing of Miami, LLC v. Espinal*.[5]

303. To understand why *Mallery* and *Espinal* are problematic, both the realities of the towing world and the history of towing statute should be analyzed.

II. The Arcane World of Towing Litigation

304. Imagine a low-income mother that is getting ready to drop off her child at school before heading to her full-time job as a legal assistant. When she comes out of her apartment, she can't find her car in her condominium's parking lot. Thinking she forgot where she parked the night before, she keeps looking desperately as her kid will be late for school and she will be late for work. As she can't find it, she believes it may have been towed. There are no visible towing signs in the community. She calls the police to see if they can tell her something about her vehicle, but they know nothing. She calls the community association manager to find out and they know nothing about her car. As she walks around the community, frustrated, she finds a poorly posted, faded tow sign hidden behind bushes with the information of AA Towing Service. She calls AA Towing, which confirms it has her car and has taken it to a lot fifteen miles away. The mother, in a rush, and already late to drop off her child, calls the school to notify them that her child will be late. She also calls work to tell them that she will be late. The mother calls an Uber to get to the towing lot. The Uber bill is $30, yet she makes $14 an hour at the office.

305. When she arrives at the towing lot in a questionable neighborhood, she approaches a window where a less than nice person confirms her car is there. The gentleman asks for a driver's license and proof of ownership. She shows her driver's license and an insurance card where she's listed as an insured; the car is in her husband's name. The towing company employee tells her that she needs her husband to be there to pick up the car or a notarized affidavit from her husband allowing her to pick up the car. Nobody else is making a claim on that vehicle other than the mother. The mother calls her husband, who rushes out of work to get an affidavit notarized at a FedEx office nearby and then emails her a picture of the affidavit. The towing company employee

3 Fla. Stat. §715.07 (2021).

4 *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 361 (Fla. 2d DCA 2020).

5 *Am. Towing of Miami, LLC v. Espinal*, 318 So.3d 598 (Fla. 3d DCA 2021).

tells her that she has to pay $300: $150 for towing, $25 for dollies, $75 for storage, and a $50 "admin. fee." No administrative fee is permitted in that city. The mother gives the towing company employee her credit card. The towing company employee says he only takes cash. She is with her child in an area that does not look very friendly; she's scared.

306. She then has to take another Uber to an ATM nearby to get the $300. The ATM does not provide more than $200 at a time so she has to do the operation twice incurring two $6 fees. The mother takes an Uber back with her seven-year-old to the towing lot, hands the cash to the employee who tells her to sign a receipt before she can have her car. The receipt contains a release of liability for any damages to the vehicle, which she has not been able to see yet. The receipt states she was "parked on grass." In reality one of her tires was hovering by a couple of inches over some blades of grass in a parking space that is two feet narrower than what the state code requires. No warning sticker had been posted in her car that she was "parked on grass." The mother goes to the lot, opens her car, drives out, rushing to drop her kid to school and to get to work where her boss needs her for an upcoming trial. The total turn around is three hours. Her kid is nervous and upset. Her boss is upset and screams at her because he was unable to submit the exhibits for a trial on time and fires her. Mother is out of a job and $342 poorer. That money was intended to pay part of that month's rent which is $1,000. She can't make rent and her landlord threatens eviction. Things gets worse from then on.

307. This could be a law school exam hypothetical, and in it, you should have issue-spotted at least eight violations of the Towing Statute. Unfortunately, our mother's situation is neither fictitious nor rare. It is in fact based on a real case. Most private tows are a very unpleasant, or even traumatic experiences. In a state with no widespread public transportation, private vehicles are indispensable for traveling to and from places every day. Most arguably illegal tows, do not end up in court; the consumer pays the fee and moves on. One reason consumers move on is the lack of towing litigation attorneys. As you drive through virtually any city in Florida, and perhaps the United States, you will run into a billboard saying: INJURED? CALL 1-800-INJURY; or SMITH GOT ME $800K, CALL 1-800-SMITH. To a lesser extent, you will see advertisements from property claims lawyers, family, labor law, or perhaps immigration. Never will you run into a lawyer advertising representation in illegal towing cases.

308. But why? Fla. Stat. §715.07 (2021) provides mandatory attorney's fees should a consumer prevail in an illegal tow case, just like the Fair Labor Standards Act ("FLSA"),[6] or the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"),[7] or other consumer protection statutes. One would think that a mandatory fee provision would attract plenty of plaintiff lawyers to invest in these types of cases. Many counties and cities

6 29 U.S.C. § 203.

7 Fla. Stat. §501.201 et seq. (2021).

also have enacted specific ordinances and "towing bills of rights," providing even more protections to consumers who are illegally towed — including attorneys' fees as well. Yet, Fla. Stat. §715.07 (2021) and the corresponding ordinances have not attracted plaintiff attorneys to invest in towing cases as they would in a personal injury, or an FLSA case– and this is certainly not for lack of a market. It is fair to say that there are as many, or even more, tows than there are car accidents.

309. The issue is that low value towing cases include litigation obstacles. A consumer may not want to go through a deposition or trial over a $200 towing fee. A towing attorney then, will think twice before taking a case when the consumer is in the heat of the moment, post tow, knowing that, when things cool down, he or she won't want to invest the time the case requires. A good towing case requires a committed plaintiff. Illegal towing attorneys will prioritize cases with actual damages to the car, where the consumer has more "skin in the game," and will more likely come through at trial.

310. The fact that tow cases are litigated in small claims, also makes it difficult. Small claims courts are not ideal, for lack of a better word. If you are passionate about the law, legal briefs, legal analysis, procedure, and the rules of evidence — none of that happens there. There's no time for briefing, analysis, or for the small claims judge to be appraised of this unknown, rarely used §715.07 statute. Small claims are a case factory where courts are inundated with quickly resolved or negotiated small debt collection cases. Collection lawyers come with 20 plus cases a piece, where seconds — not even minutes — are dedicated to each. There is no time for jury trials. Judges, with busy dockets to manage, will give you a certain look when you say at the Pretrial Conference that you have a jury trial demand. In small claims court, there is no required answer to the complaint. After filing the complaint, called the "statement of claim," the defendant must appear at a pretrial conference where he has to plead on the allegations of the statement of claim. If the defendant denies liability, the case is either set for trial or sent to mandatory mediation depending on the judge. In addition, judges in small claims courts around the state, even in plainly illegal tows, are extremely hesitant to find liability over a $200 tow bill knowing the defendant's exposure to thousands of dollars in legal fees.

III. A Brief History of §715.07

311. Section 715.07 was, from its inception, a civil liability statute. It was first approved by the Florida Legislature in 1975.[8] Back then, a tow truck operator did not have a legal possessory interest over vehicles it towed on behalf of a property owner. This is because, in Florida, a tow operator does not acquire a common law lien over vehicles it

8 Fla. HB. 249 §1 (1975).

tows pursuant to requests for non-consensual tows by property owners. Nonetheless, it appears that towing companies routinely withheld vehicles after non-consensual tows until the vehicle owners paid them a sum of money for the return of the vehicle. This practice resulted in the case of *Murrell v. Trio Towing Serv., Inc.*[9]

312. In *Murrell*, a vehicle that was parked in a no-parking zone was removed by a towing company on behalf of a property owner. The vehicle owner demanded his vehicle back from the towing company, who refused to return it unless the vehicle owner paid $15 for towing and storage. In response, the vehicle owner sued the towing company for conversion. After a jury awarded the vehicle owner more than $30,000 in compensatory and punitive damages, the towing company appealed.

313. The Third DCA affirmed the trial court's decision, holding that a towing company had no lien over a vehicle it towed without the consent of the vehicle owner and that withholding the vehicle in exchange for payment constituted conversion as a matter of law.[10] That decision caused towing companies to stop operating in the area and prompted the legislature to pass Fla. Stat. §713.78 (2021),[11] which granted towing companies a lien on vehicles, as long as they complied with the requirements outlined in Fla. Stat. §715.07 (2021).

314. At the time the bill that would become Fla. Stat. §715.07 (2021) was proposed, the legislature made its intent clear. As it was making its way through the legislative process, the bill went to the Judiciary Committee, who drafted a report analyzing the purpose of the statute and how it served that intended purpose. In its analysis of the consequences of the bill, the Judiciary Committee wrote:

> The bill addresses the interests of all parties involved:
>
> (A) For the property owner or lessor, criteria by which a vehicle can be towed away are outlined. In addition, the property owner or lessor is not liable for costs of removal, transportation or storage or damages caused by removal, transportation or storage.
>
> (B) The towing company is given a lien for a reasonable towing and storage fee on any vehicle it removes. ***If the company properly removes the vehicle, it shall not be liable for damages connected with the towing or storing of the vehicle.***
>
> (C) If the owner so requests, he must be notified of the name and location of the person or company that removed his vehicle. If the area from which his car was towed is unattended, the property owner or lessor must leave

9 *Murrell v. Trio Towing Serv., Inc.*, 294 So.2d 331 (Fla. 3d DCA 1974).

10 *Murrell v. Trio Towing Serv., Inc.*, 294 So.2d 333 (Fla. 3d DCA 1974).

11 Fla. Stat. §713.78 (2021).

> prominent notice of the name and location of the towing company. ***The vehicle owner will have recourse against the towing company in the event the vehicle is towed or stored improperly.***[12]

315. The preamble to the initial bill also made explicit the intent for civil liability of §715.07 and its companion §713.78:

> An act relating to towing of motor vehicles; creating Sections 713.78 and 715.07, Florida Statutes; providing for removal of motor vehicles from private property; providing conditions for such removal without liability; establishing liability for improper removal; establishing liens for towing and storage of motor vehicles; establishing immunity from liability for towing and storage under certain conditions; providing an effective date.[13]

316. There is no doubt when reading its legislative history that §715.07 intended to grant immunity in exchange for compliance, and liability for damages in exchange for non-compliance. The statute specifically states

> [w]hen a person improperly causes a vehicle or vessel to be removed, such person shall be liable to the owner or lessee of the vehicle or vessel for the cost of removal, transportation, and storage; any damages resulting from the removal, transportation, or storage of the vehicle or vessel; attorney's fees; and court costs.[14]

IV. The Mallery, Espinal, and Larsen Decisions

317. Until the Second DCA decision in *Mallery*[15] in March 2020, there were no reported appellate decisions dealing with non-consent tows involving §715.07. The Third DCA then followed the Second in *Espinal*[16] in February 2021. The Second DCA then followed its own *Mallery* decision in August 2021 in *Larsens Auto., LLC v. Haberkorn*.[17]

318. In *Mallery*, Dr. Martina Mallery's car was towed by Norm's Bush Auto Sales & Service (Norm's) at the request of her condominium association. When Dr. Mallery tried to retrieve her vehicle from Norm's yard, Norm's did not release it within one hour of her request. Dr. Mallery then sued Norm's for violating §715.07(2)(a)(9), which states:

12 Fla. H.R. Comm. on Judiciary, HB. 249, Staff Summary 1 (April 22, 1975) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.).

13 Fla. HB 249 (1975).

14 Fla. Stat. §715.07(04) (2021).

15 *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 361 (Fla. 2d DCA 2020).

16 *Am. Towing of Miami, LLC v. Espinal*, 318 So.3d 598 (Fla. 3d DCA 2021).

17 *Larsens Auto., LLC v. Haberkorn,* 326 So.3d 785 (Fla. 2d DCA 2021).

> [w]hen a vehicle or vessel has been towed or removed pursuant to this section, it must be released to its owner or person in control or custody within 1 hour after requested.

319. Based on this violation, Dr. Mallery alleged that Norm's was liable to her for damages including "cost of removal, transportation, and storage" under §715.07(4).[18]

320. Norm's moved to dismiss the §715.07(2)(a)(9) count, arguing that section did not provide a civil cause of action against a towing company. Instead, Norm's argued that §715.07(2)(a)(9) is criminal in nature and provides for criminal sanctions for failure to comply with it.[19] The county court granted Norm's motion to dismiss. Dr. Mallery appealed the decision to the circuit court, which affirmed the dismissal, and subsequently appealed to the Second DCA.

321. The Second DCA was faced with this question: Does non-compliance with the one-hour requirement in §715.07(2)(a)(9) create a civil cause of action? To answer this, the Second DCA engaged in statutory interpretation. Citing a string of Florida cases, the Second DCA correctly stated:

> [i]n ascertaining the legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another.

322. The Second DCA acknowledged that for a tow to be legal, the text of §715.07 required "strict" compliance with the conditions of §715.07(2)(a) and that one such condition was the one-hour requirement of §715.07(2)(a)(9). However, the Second DCA then skipped Section (4) and jumped to Section (5), which provides that a violation of §715.07(2)(a)(9) is "punishable as a third-degree felony." Thus, the Court held, "the legislature, based on the plain language of the statute, chose a criminal penalty — a felony for that matter — to enforce a towing company's noncompliance with Subsection (a)(9)." The Second DCA also reasoned that, because a few other sections were excluded from the criminal penalties of §715.07(5), this was a "clear" indication the legislature did not intend the one-hour rule, or other acts in the criminal penalties of Section (5), to subject a tow operator to civil liability.[20]

323. *Espinal* followed *Mallery* verbatim. In *Espinal*, Leonel Espinal filed a class action complaint for violations of the same subsection at issue in Mallery (§ 715.07(2)(a)(9), albeit a different part of it: the prohibition on releases or waivers).[21] The second sentence of §715.07(2)(a)(9) provides that:

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18 *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 361 (Fla. 2d DCA 2020).

19 *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 361, 363 (Fla. 2d DCA 2020).

20 *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 364, 365 (Fla. 2d DCA 2020).

21 *Am. Towing of Miami, LLC v. Espinal*, 318 So.3d 598 (Fla. 3d DCA 2021).

> Any vehicle or vessel owner or person in control or custody has the right to inspect the vehicle or vessel before accepting its return, ***and no release or waiver of any kind which would release the person or firm towing the vehicle or vessel from liability for damages*** noted by the owner or person in control or custody at the time of the redemption may be required from any vehicle or vessel owner or person in control or custody as a condition of release of the vehicle or vessel to its owner or person in control or custody.[22]

324. The *Espinal* complaint alleged that American Towing of Miami, LLC (American Towing) forced consumers to sign releases in violation of the plain language §715.07(2)(a)(9). The circuit court granted Espinal's motion for class certification and American Towing appealed. The Third DCA relied on *Mallery* to hold:

> As the court explained in *Mallery*, a towing company's violation of Section 715.07(2)(a)(9) is punishable as a third-degree felony . . . In other words, the legislature, based on the plain language of the statute, chose a criminal penalty — a felony for that matter — to enforce a towing company's non-compliance with Subsection (a)(9). The Third DCA went further to hold that seven of the nine conditions for removal of vehicles in (2)(a) carry criminal rather than civil liability.[23]

325. In *Larsens*, like in *Espinal*, Steve Haberkorn filed a complaint alleging a violation of the subsection of the Towing Statute prohibiting releases: §715.07(2)(a)(9). The trial court granted Haberkorn's motion for summary disposition and Larsens Automotive, LLC (Larsens) appealed to the Second DCA. The Second DCA followed its own precedent to hold that "a towing company's violation of Section 715.07(2)(a)9 does not create a private civil cause of action."[24]

V. "The Plain Language of the Statute"

326. Both *Mallery* and *Espinal* support their reasoning as based on the plain language of the statute. However, does the plain language of §715.07 state that?

327. Let's dig a bit more into the statute's plain language. We already know from its legislative history that the intent of §715.07 was for it to be civil in nature.

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22 Fla. Stat. §715.07(2)(a)(9)(2021).

23 *Am. Towing of Miami, LLC v. Espinal*, 318 So.3d 601 (Fla. 3d DCA 2021); *Mallery v. Norman L. Bush Auto Sales & Serv., Inc.*, 301 So.3d 364, 365 (Fla. 2d DCA 2020).

24 *Larsens Auto., LLC v. Haberkorn,* 326 So.3d 785, 789 (Fla. 2d DCA 2021).

328. How then did the "plain language" of §715.07 come to give appellate judges the impression that a large part of §715.07(2)(a)2, (2)(a)6, (2)(a)1, (2)(a)3, (2)(a)4, (2)(a)7, and (2)(a)9 is criminal in nature? Are police departments across the State criminally enforcing the Towing Statute? The reality is that the plain language of §715.07 — including its internal structure and sequence — does not support *Mallery* and *Espinal's* criminal imprint to the statute.

329. The answer to this misunderstanding lies on an incorrect application of the "expressio unius est exclusio alterius" principle; it is possible that sometimes there is no "exclusio alterius" intended, and that a statute can provide for both civil and criminal liability without excluding one or the other. In §715.07, the plain language, before mention of criminal liability in Subsection (5), speaks unambiguously of civil liability in Subsection (4).

330. A closer look at the structure of §715.07 is essential. *Espinal* and *Mallery* failed to read §715.07 as a whole and consider what comes first and what comes second within it. *Espinal* and *Mallery* also failed to consider the nature of each subsection of §715.07. Section 715.07 has five subsections. Subsection (1) contains the definitions. Subsection (2) — the heart of it — defines the conditions that render a tow non-compliant. Subsection (3) makes an exception for tows in the context of policing, fire rescue, emergency or tows of property owned by a governmental entity. Subsection (4) is the liability section: when a person "improperly causes" a tow, that person is "liable to the owner or lessee of the vehicle or vessel for the cost of removal, transportation, and storage; any damages resulting from the removal, transportation, or storage of the vehicle or vessel; attorney's fees; and court costs." The last part, Subsection (5), states that some violations in Subsection (2) (the ones containing the substantive provisions of §715.07, also subject the violator to criminal penalties.

331. These five sections are not all created equal, and this is easy to prove. For example, a tow operator cannot be liable for a violation of Subsection (1), as that subsection simply defines terms and does not describe any prohibited conduct. Similarly, a tow operator cannot be liable for a violation of Subsection (4)— the liability subsection — in a vacuum. In order for liability to be present under Subsection (4), there has to be an "improper tow." To know what an "improper tow" is, one has to look at whether or not there has been compliance with Subsection (2), which provides nine conditions operators have to comply with.

332. The internal structure of §715.07 is simple and easy to follow. It defines at Subsection (1). It then provides the rules of the game in Subsection (2). It exempts certain tows in Subsection (3). It states in Subsection (4) the consequences of not following the rules in Subsection (2). And finally, it provides additional penalties (criminal) in Subsection (5) for certain parts of Subsection (2).

333. When the Towing Statute imposes liability in Subsection (4) on a person that "improperly causes a vehicle . . . to be removed," it never states that "impropriety" is only related to two of the nine conditions in the statute: Subsections (2)(a)(5) and (a)(8). Impropriety of a tow is naturally defined by what preceded subsection (4). After all, if the majority of the conditions described in subsection (2)(a) were criminal in nature, why would the "criminal" portion of the statute have been left for last, as a sort of add-on section? The more natural reading of the words and structure of §715.07, especially when one understands its history, is that it is civil in nature, and that it provides a cause of action for civil liability to consumers for non-compliance with its conditions. It would be a stretch to argue that the Florida Legislature would have had to list, specifically, each of the nine conditions in Subsection (2)(a) in Subsection (4) for there to be civil liability for all of the conditions of Subsection (2)(a). *Mallery* and *Espinal* de facto ruled that §715.07 requires compliance with only two of the nine conditions for a proper tow: Subsection (2)(a)(5) and (a)(8). Such reading is inconsistent with the plain language of the statute, the organization of the provisions in §715.07, the nature of each paragraph in §715.07, and the legislative intent of §715.07.

334. A statute's structure is not irrelevant in statutory interpretation. Courts generally favor a reading of statutes that "accords more coherence" to disputed statutory provisions.[25] In *Abramski*, the U.S. Supreme Court held that courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose."[26] The structure, history, and purpose of §715.07 — but most importantly, its words — show it to be a civil liability statute that protect consumers. Yale Law Professor William Eskridge recommends avoiding interpreting a provision "in a way that is inconsistent with the overall structure of the statute or with another provision."[27] *Mallery* and *Espinal's* reading of §715.07 makes Subsection (5) inconsistent with Subsection (4), which is in turn intrinsically connected to Subsections (1), (2), and (3). One can't make sense of Subsection (4) fully without looking at the overall structure. *Mallery* and *Espinal* de facto shrank §715.07 to 22% of its provisions, inconsistent with its intent, purpose, and the very words in it.

VI. What's Left for Victims of Illegal Tows?

335. Consumers, already with scarce options for representation, will have even less alternatives after *Mallery* and *Espinal*. The statute designed to protect them has been reduced to a minimum. The already complex and unattractive world of towing litigation

25 *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

26 *Abramski v. United States*, 573 U.S. 169, 179 (2014).

27 William N. Eskridge, Jr. et al., *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy*, WEST ACADEMIC PUBLISHING at 1198 (2014).

has additional obstacles: appellate rulings in two Districts that will likely doom most cases brought under §715.07.

336. Other consumer statutes like FDUTPA won't save the day for consumers. Defense attorneys are already arguing that relying on §715.07 as an underlying unfair practice for purpose of a FDUTPA claim is a run around of *Espinal* and *Mallery* and cannot serve as a FDUTPA predicate.[28] Erstwhile a strong consumer protection statute with a mandatory fee provision, FDUTPA was amended in 1994 to include a discretionary fee provision that does not guarantee prevailing plaintiff attorneys' fees.[29] To complicate matters more, the Fourth DCA held in *Humane Soc. of Broward Cty., Inc.* that a FDUTPA prevailing party defendant does not have to show that a lawsuit was frivolous in order to recover attorneys' fees.[30] Rather, the Fourth DCA laid out a discretionary non-exclusive seven-factor test where frivolity is merely one of the elements to consider. Recent appellate decisions in the towing context show the application of the Humane Society seven-factor test is a rather lax undertaking, leaving consumers with high exposure to fees, should they not prevail on the merits.

337. For example, in *Forte*, Sandra Forte's vehicle was towed for parking in a parking spot that was faded, and that lacked the "permanent above-grade sign of a color and design approved by the Department of Transportation, ... placed on or at least 60 inches above the finished floor or ground," as required by §553.5041(6).[31] Forte filed a complaint with two counts, one for a violation of §715.07 and another for a FDUTPA violation. After a bench trial, the lower court entered a final judgment in favor of All County Towing Inc. (All County). All County moved for fees and costs, and at a non-evidentiary hearing, the trial court awarded All County $13,000 in fees. Forte appealed this ruling, arguing that the lower court committed error when it failed to consider the *Humane Society* factors, and it had also failed to conduct an evidentiary hearing. Although the lower court's order awarding fees expressly stated it did not believe it had to perform the *Humane Society* seven-factor analysis, the Fourth DCA was satisfied that it did because the order awarding fees stated the trial court had "considered various factors."[32] The Fourth DCA affirmed entitlement, stating "it cannot be said that the trial court abused its discretion in finding Towing Company [was] entitled to a FDUTPA attorney's fees award." Ultimately, the Fourth DCA reversed in part and remanded for a determination of the amount of attorney's fees at an evidentiary hearing.[33]

28 Motion to Dismiss, *Espinal v. American Towing of Miami, LLC*, No. 2019-010141-CA-01, 3 (Fla. 11th Cir. Ct. September 13, 2021).

29 Compare Fla. Stat. §501.2105(1) (1993) with Fla. Stat. § 501.2105(1) (2022).

30 *Humane Soc. of Broward Cty., Inc. v. Florida Humane Soc.,* 951 So.2d 968 (Fla. 4th DCA 2007).

31 *Forte v. All Cty. Towing Inc.,* 47 Fla. L. Weekly D704 (Fla. 4th DCA March 23, 2022).

32 *Forte v. Summit Palms Apartments LLC et al.*, No. COCE-20-021603 (Fla. Broward Cty. Ct. March 17, 2021).

33 *Forte v. All Cty. Towing Inc.,* 47 Fla. L. Weekly D704 (Fla. 4th DCA March 23, 2022).

338. The *Forte* decision will inevitably be a strong deterrent for a lot of consumers who, like Forte, cannot possibly afford a $13,000 fee bill in a potential loss. Plaintiff's lawyers — more than ever — have an ethical obligation to unambiguously inform their clients of the potential fee exposure should a case fail. Such disclosure will dissuade many consumers who would otherwise be willing to take a chance at a legal case in an effort to right a wrong and recover something.

339. Common law causes of action like negligence or conversion will continue to be secondary claims that cannot stand alone in low value cases. Tow claims, which rarely reach five figures, are only viable under a contingency model of payment. In fact, these types of claims are rarely attacked in motion practice because defense attorneys know that without the statutory claims, the common law no-fee claim, is virtually harmless.

VII. Conclusion

340. Before *Mallery* and *Espinal*, §715.07 attracted little interest in consumer rights attorneys. After *Espinal*, *Mallery*, *Larsen*, and *Forte*, it is hard to imagine that consumer rights lawyers will want to invest in these cases. The towing lobby has not been idle either. In 2019, it eagerly fought to change §715.07, in order to eliminate the mandatory fee provision. Although it was unsuccessful in this regard, it was able to make important changes to the statute. Most notably, the "strict" compliance standard was replaced for a more lenient "substantial" compliance. If small claim judges were already reluctant to have tow operators "strictly" comply with §715.07, one can imagine what the litigation landscape looks like in this new "substantial" compliance world. What is substantial compliance? We don't know, and the issue will likely never be litigated after the *Mallery* and *Espinal* decisions, which are now used in case after case to tell judges that §715.07 "does not create a cause of action" — even though that is not what either *Mallery* or *Espinal* hold. Until the Florida Legislature does something to clarify §715.07 — and make it unambiguous that it is a civil liability statute — consumers victim of wrongful tows are at the mercy of inefficient HOAs who will delegate tow calls to tow operators who have a financial incentive to tow first, and ask questions later.