WHAT IS "AS IS" IN FLORIDA?

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The Author wishes to thank Kevin Iurato, his research assistant while teaching at Stetson, for his help in the tedious preliminary task of culling out large quantities of extraneous cases generated by a computerized search of the phrase "as is." *Infra* n. 5. This Article is dedicated to my loving wife, Rosemarie, with honorable mention to my wonderful children, Anthony and Angelina.

INTRODUCTION

The simple phrase "as is" is widely used in today's transactional society.[1] But what exactly is "as is?" More specifically, what

1. Even most lay people, especially those in business, understand "as is" to be a general disclaimer about the condition of the item sold. *Osborne v. Genevie*, 289 S.2d 21, 22 (Fla. Dist. App. 2d 1974) (explaining that "the man on the street might more nearly comprehend the legal effect of 'as is' than a repudiation of warranties"); U.C.C. § 2-316 cmt. 7 (1987), 1A U.L.A. 466 (1989) (stating that terms such as "as is" "in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved"); *Black's Law Dictionary* 108–109 (Bryan A. Garner ed., 7th ed., West 1999) ("'[A]s is' means that the property is sold in its existing condition, and use of the phrase 'as is' relieves seller from liability."); *see generally Words and Phrases* vol. 4, 540 (West 1969) (listing entries for the phrase "as is"). The common usage of "as is" language is evidenced by the inclusion of this phrase in general English dictionaries. *Random House Unabridged Dictionary* 120 (2d ed., Random H., Inc. 1993) ("'as is': in whatever condition something happens to be, especially referring to something offered for sale in a flawed, damaged, or used condition: *We bought the table 'as is'.*"); *Webster's Third New International Dictionary, Unabridged* 125 (3d ed., Merriam-Webster, Inc. 1993) ("'as is': in its present condition:

are the legal effects in Florida of including "as is" language in a contract, and how does "as is" impact different causes of action in Florida?[2] This Article answers these questions and their permutations by compiling and analyzing the numerous Florida cases that have construed "as is" provisions.

Practitioners should have an up-to-date understanding of how Florida courts have construed "as is" provisions, especially with regard to a number of recent opinions handed down addressing this topic. However, a full understanding of the construction and effect of "as is" language is often impeded by a variety of factors. These impediments include the sheer scope of the topic,[3] the facts and circumstances of each situation,[4] and the difficulty of researching the topic.[5] This Article attempts to reduce these impediments by

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without any repairs, improvements, or alterations being made: *<the car was priced at $1,000 as is>*").

2. As indicated by the title of the Article, the Author's main focus is on the burgeoning body of case law in Florida related to "as is" disclaimers. Some limited attention is given to out-of-state cases as potential persuasive precedent, but generally only when Florida courts have not addressed a particular issue. An exhaustive treatment of the "as is" topic in all jurisdictions is beyond the scope of this Article. For those interested in a national perspective, refer to the following *American Law Reports* annotations: for personal property, see for example, E.T. Tsai, *Construction and Effects of Affirmative Provisions in Contract of Sale by Which Purchaser Agrees to Take Article "As Is," in the Condition in Which It Is, or Equivalent Term*, 24 A.L.R.3d 465 (1969) (citing only four Florida cases); for real property, see for example, Frank J. Wozniak, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in Its Existing Condition*, 8 A.L.R.5th 312 (1992) (also citing only four cases from Florida). For a further look at "as is" disclaimers in out-of-state cases, see Janet L. Richards, *"As Is" Provisions — What Do They Really Mean?*, 41 Ala. L. Rev. 435 (1990).

3. The analysis of the effect of "as is" language is complicated due to the fact that it must be done as an overlay to various broad topical areas of the law, such as contract law (generally related to warranties in the context of a sales agreement or lease), property law (both personal, real, or a combination of both), and tort law (generally related to fraud and negligence).

4. For example, other contractual provisions may work in tandem with "as is" language to bolster a seller's defense against liability for the unsatisfactory condition of the property. Similarly, the sophistication of the buyer may alter the analysis. *Infra* pt. III(A) (discussing the impact of surrounding circumstances on an "as is" provision).

5. With the exception of the Uniform Commercial Code cases discussed at *infra* note 28, researching "as is" issues is often difficult due to the broad scope of the topic. *Supra* n. 3. Even assuming one has pared down the topic of law to a manageable level, a researcher is often relegated to manual research (and, even then, the research materials are not geared to the phrase "as is"). Although it might seem the phrase "as is" could easily be researched by computerized methods, any computerized search of "as is" was, until recently, impossible because the words "as" and "is" were both considered "noise words" (words that cannot be used in a computerized search query). Wozniak, *supra* n. 2, at 316. Westlaw has recently modified its system to permit a search of "as is" but, even with this capability, a Westlaw search of the phrase "as is" often produces a high percentage of irrelevant cases. For example,

providing a framework for understanding the construction and effect of "as is" provisions when utilized in Florida transactions involving the sale of property.[6]

The condition of the property to be sold, whether goods[7] or realty,[8] is often a major sticking point in the negotiation stage of the transaction. On the one hand, buyers desire assurances or warranties within the contract regarding the condition, quality, or nature of the property.[9] Sellers, on the other hand, prefer to limit their exposure regarding the condition of the property. Perhaps the easiest and most common method for a seller to limit or eliminate this liability exposure is to include a provision in the contract stating that the property is sold "as is."[10]

Once an "as is" provision is included in the contract, it may have a profound effect on the legal rights and duties of the parties to the transaction. The legal effect of an "as is" provision often becomes critical when a disgruntled buyer sues the seller after the buyer discovers defects in the property.[11] A buyer's lawsuit is based on one or more causes of action, often including breach of contract, breach of implied warranties, fraud, or negligence.[12] A seller frequently

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a Westlaw "headnote" search on the phrase "as is," limiting the search to Florida cases from January 1, 1965, to January 29, 2001, produced 349 cases, of which only 25 were relevant. Search of WL, FL-CS-ALL database (Jan. 29, 2001). A similar full-text (as opposed to headnote) Westlaw search produced 7,513 cases. *Id.*

6. This Article will consider the effect of an "as is" provision in a leasing context; however, the majority of cases involve the sale of property. For the sake of brevity, the terms "seller" and "buyer" are used in the general discussion throughout this Article, but such terms can often be substituted with the terms "lessor" and "lessee" respectively. Similarly, the term "contract" or similar terms can often be substituted with the term "lease."

7. "Goods" are basically all types of movable property. Fla. Stat. § 672.105(1) (2000) (the term "goods" also includes such things as unborn animals, growing crops, and things to be severed from realty).

8. "Realty" is a brief term for real property or real estate. *Black's Law Dictionary*, *supra* n. 1, at 1272. On occasion a transaction will involve the sale of a combination of personal and real property. *E.g. Durrance v. Horner*, 711 S.2d 135, 137 (Fla. Dist. App. 5th 1998) (buyer purchased property that included a fence).

9. Outside the contract itself, the Florida legislature and courts have created various warranties in favor of a buyer. *E.g.* Fla. Stat. §§ 672.312–672.313 (2000) (protecting buyers via warranty of title, warranty against infringement, and express warranties).

10. Similar, but less frequently used, phrases include "where is," "what is," "with all faults," "as they stand," "in its existing condition," "in its present condition," or a combination of these or other disclaimers. *See generally* Tsai, *supra* n. 2, at §§ 3, 4, 6, 7, 10; Wozniak, *supra* n. 2, at §§ 2, 10, 11, 13 (both discussing the use of "as is" provisions).

11. *Wozniak*, *supra* n. 2, at 312.

12. *E.g. Pressman v. Wolf*, 732 S.2d 356 (Fla. Dist. App. 3d 1999) (buyer claiming breach of contract, fraudulent misrepresentation, and slander of title); *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 S.2d 306 (Fla. Dist. App. 4th 1990) (buyer instituted suit on grounds of

argues that the "as is" language contained in the contract should preclude the buyer's complaint[13] about the condition of the property.

Part I of this Article examines the main purpose of "as is" language, which is to disclaim warranties. Warranty claims typically arise in transactions involving the sale or lease of either goods or real property. Part I begins by examining Florida decisions that have construed statutory provisions applicable to "as is" warranty disclaimers used in the sale of goods. This examination is followed by a discussion of how the Florida courts have interpreted "as is" warranty disclaimers used in the sale of real property. For instance, the 1999 Florida decision of *Pressman v. Wolf*[14] rejected a buyer's breach of warranty claim (among other claims) in large part, because the home was purchased "as is."[15]

Part II examines the effect of "as is" language when an aggrieved buyer sues a seller alleging fraud, negligence, or numerous other claims. Part II(A) begins by reviewing the general rule in Florida that fraud claims are not normally affected by "as is" disclaimers. Part II(A) also discusses several recent Florida decisions that may signal a gradual erosion of this general principle. In *Pressman*, for example, the buyer's claim of fraudulent nondisclosure was disallowed, because the *Pressman* court considered the "as is" property to be the equivalent of a "one-eyed horse."[16] In addition to alleging fraud, a buyer often claims the seller has negligently misrepresented the condition of the property. Part II(B) begins by examining the impact of "as is" language on the seller's duty of care in negligence claims. This Part also postulates that "as is" language

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fraudulent inducement, breach of contract, and violation of the Consumer Protection Act); *Knipp v. Weinbaum*, 351 S.2d 1081 (Fla. Dist. App. 3d 1977) (buyer alleging negligence, breach of express warranties, and breach of implied warranties).

13. The word "complaint" is used here in the primary sense of a plaintiff's complaint filed in conjunction with a lawsuit. A broader meaning of "complaint" also could apply. For example, an expression of dissatisfaction with the condition of the property is a complaint. One practical benefit of including "as is" language in a contract is that this preclusion makes a buyer less likely to complain subsequently about the condition of an item purchased "as is," not to mention taking the next, extreme step of actually filing a complaint against the seller. *Infra* n. 309 and accompanying text.

14. 732 S.2d 356, 356 (Fla. Dist. App. 3d 1999).

15. *Id.* at 362.

16. *Id.* at 360. The *Pressman* court, in considering the condition of the residence purchased "as is," referred to the *Restatement (Second) of Torts*, which states that "'if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect.'" *Id.* (quoting *Restatement (Second) of Torts* § 541 cmt. a (1976)).

may be extremely relevant when assessing the impact of comparative negligence in light of the Florida Supreme Court's recent decision in *Gilchrist Timber Company v. ITT Rayonier, Incorporated*,[17] which held that a seller's liability for negligent misrepresentations can be offset by the buyer's own comparative negligence.[18] Part II(C) focuses on an interesting group of Florida cases that has considered the effect of "as is" disclaimers in a variety of peripheral contexts. For example, the 1998 Florida decision of *Durrance v. Horner*[19] allowed a third party neighbor to prevail over a buyer in a fence dispute, in part, because the buyer had purchased the property (including the fence) "as is."[20]

Part III analyzes certain variable factors that may sometimes influence the impact of an "as is" provision. These variables include other contractual provisions, the sophistication of the buyer, and practical considerations, as well as some uncertainties inherent in the "as is" analysis. This Article concludes by assessing the sometimes subtle impact that two simple words can have on a judge's ruling. After weighing all factors, the scales of justice may ultimately tip in favor of a seller who disposes of property "as is."

I. EFFECT OF "AS IS" ON WARRANTY CLAIMS IN FLORIDA

A seller who transfers property in Florida "as is" essentially desires to exclude or limit warranty claims concerning the condition of the property.[21] The effect of "as is" language on warranty claims differs depending on whether the property involved is goods or realty.[22] "As is" warranty disclaimers related to goods are generally controlled by Florida Statutes,[23] as interpreted by the Florida courts.[24] "As is" warranty disclaimers related to real property, in

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17. 696 S.2d 334 (Fla. 1997). The *Gilchrist* court adopted Section 552, comment a, of the *Restatement (Second) of Torts*, entitled "Information Negligently Supplied for the Guidance of Others," and applied Florida Statutes Section 768.81, entitled "Comparative Fault." For a discussion of *Gilchrist*, see *infra* notes 254–260 and accompanying text.

18. 696 S.2d at 136.

19. 711 S.2d 135 (Fla. Dist. App. 5th 1998).

20. *Id.* at 137.

21. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 80 (2d ed., Oxford U. Press 1995) (stating that "[t]he purpose of the phrase 'as is,' of course, is for a seller to disclaim warranties and representations").

22. The distinction between goods and realty warranty claims is delineated *infra* in Parts I(A) and I(B).

23. *Infra* nn. 115–152 and accompanying text (discussing "as is" clauses related to sales); *infra* nn. 157–176 and accompanying text (discussing "as is" clauses related to leases).

24. Certain federal court decisions applying Florida law are included in this Article.

contrast to goods, are generally controlled solely by Florida case law.[25] Part I examines the effect of "as is" warranty disclaimers when used in Florida transactions involving the sale of goods and real property, respectively.

A. "As Is" Warranty Disclaimers When Used in the Sale or Leasing of Goods in Florida

Goods are basically movable personal property, as opposed to real property and fixtures.[26] The sale and leasing of goods in Florida, as well as the limitations of warranties by "as is" disclaimers, are governed by the Uniform Commercial Code (U.C.C.)[27] as adopted in Florida.[28]

1. Sale of Goods

The Florida courts have, on numerous occasions, interpreted the U.C.C.'s specific "as is" disclaimer of implied warranties.[29] Such judicial construction requires "as is" language to be conspicuous and

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25. *Knipp*, 351 S.2d at 1083.

26. Fla. Stat. § 672.105(1).

27. Article 2 of the U.C.C., entitled "Sales," governs the sale of goods. U.C.C. § 2-210 (1987), 1 U.L.A. 439 (1989). Article 2A of the U.C.C., titled "Leases," governs the leasing of goods. U.C.C. § 2A-103(1)(j) (1987), 1B U.L.A. 658 (1989).

28. Article 2 of the U.C.C. is codified in Chapter 672 of the Florida Statutes. Fla. Stat. §§ 672.101–672.724 (2000) (Adopted in 1965, this chapter is applicable to transactions entered into after January 1, 1967.). Article 2A of the U.C.C. is codified in Chapter 680 of the Florida Statutes. Fla. Stat. §§ 680.1011–680.532 (2000) (Originally adopted in 1990, this chapter is applicable to transactions entered into after January 1, 1991.). The numbering of the official text of the U.C.C. and the Florida Statutes generally correspond. The editorial note preceding Section 672.101 shows this numbering. Fla. Stat. ch. 672 (2000). For the most part, the official text of the U.C.C. matches the text of corresponding provisions of the Florida Statutes. *See* U.C.C. Rep. Serv. *Comparative Index* (West 2000) (showing the differences between the Official U.C.C. text and the Florida Statutes). Since all states have adopted most provisions of U.C.C. Article 2, case precedent from sister jurisdictions can be persuasive when tackling issues undecided in Florida. David J. Marchitelli, *Causes of Action Governed by Limitations Period in U.C.C. § 2-275*, 49 A.L.R.5th 1, 67 (1997); *see generally* U.C.C. §§ 1-101 to 2-210, 1 U.L.A. 6 (1989); U.C.C. §§ 2-301 to 2-515, 1A U.L.A. 9 (1989); U.C.C. §§ 2-601 to 2A-531, 1B U.L.A. 6 (1989); U.C.C. Rep. Serv. § 2 (West 1999) (all showing variations from the official language of the U.C.C.). For more background information relating to the sale of goods under the U.C.C., see Bradford Stone, *Uniform Commercial Code in a Nutshell* §§ 1, 6 (4th ed., West 1995) and James J. White & Robert S. Summers, *Uniform Commercial Code* ch. 1-12 (3d ed., West 1988).

29. *E.g. Masker v. Smith*, 405 S.2d 432 (Fla. Dist. App. 5th 1981); *Knipp*, 351 S.2d at 1084; *Osborne*, 289 S.2d at 23 (all interpreting the effect of "as is" provisions on implied warranties in Florida).

to be intended as a disclaimer of warranties.[30] The effect of these decisions can often blindside unsuspecting sellers who think they have complied literally with the U.C.C.'s statutory structure for selling goods "as is."[31]

a. The U.C.C.'s "As Is" Disclaimer of Implied Warranties

Chapter 672 of the Florida Statutes, Florida's version of U.C.C. Article 2, governs the purchase and sale of goods.[32] More specifically, Article 2 of the U.C.C. stipulates how various types of warranties are created, including warranties of title,[33] warranties against infringement,[34] express warranties,[35] and implied warranties. Implied warranties created under the U.C.C. may include an implied warranty of merchantability,[36] an implied warranty of fitness for a particular purpose,[37] or other implied warranties that arise from a course of dealing or usage of trade.[38] In addition to addressing the creation of warranties, certain other U.C.C. provisions control the manner in which a seller may limit, modify, or eliminate warranties.[39]

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30. *Masker*, 405 S.2d at 434; *Knipp*, 351 S.2d at 1084–1085; *Osborne*, 289 S.2d at 22–23.

31. *E.g. Pinellas C. Bank & Trust Co. v. Intl. Aerodyne, Inc.*, 233 S.2d 872 (Fla. Dist. App. 3d 1970) (illustrating a seller who was assessed damages for selling an airplane with missing parts despite the buyer's ability to inspect the plane prior to purchase).

32. Fla. Stat. §§ 672.101–672.274.

33. *Id.* § 672.312(1).

34. *Id.* § 672.312(2).

35. *Id.* § 672.313. Express warranties may be created by a seller's affirmation of a fact or promise by description of goods or by sample or models. *Id.* However, Florida takes a fairly conservative view of the application of post sale express warranties. Michael Flynn, *Uniform Commercial Code Express Warranties: Florida's "Basis," — Less Bargain,* 60 Fla. B.J. 52, 53–54 (July/Aug. 1992).

36. Fla. Stat. § 672.314(1), (2).

37. *Id.* § 672.315.

38. *Id.* § 672.314(3).

39. Disclaimers of the warranty of title are governed by Section 672.312(2). Fla. Stat. § 672.312(2). Note that an "as is" disclaimer will not negate the warranty of title, because the warranty of title created under Section 672.312(1) is not an implied warranty. *Id.* § 672.312(1); U.C.C. § 2-312 cmt. 6, 1A U.L.A. 89; *cf. Maroone Chevrolet, Inc. v. Nordstrom*, 587 S.2d 514, 517 (Fla. Dist. App. 4th 1991) (finding that an exclusion of warranty of title is possible by circumstances as well as by specific language); *Lawson v. Turner*, 404 S.2d 424, 425 (Fla. Dist. App. 1st 1981) (holding that an express exclusion of warranty of title must be precise and unambiguous). Limitations on the warranty against infringement are governed by Section 672.312(3). Fla. Stat. § 672.312(3). Exclusion or modification of express and implied warranties are discussed throughout the remainder of Part I(A).

Prominent among these provisions is Section 672.316, titled "Exclusion or Modification of Warranties."[40] Subsections (1) and (2) of Section 672.316 provide precise mechanisms for excluding express warranties[41] and implied warranties of merchantability and fitness.[42] In contrast, Section 672.316(3) provides a seller with a method of excluding all implied warranties by use of a simple "as is" provision.[43] Section 672.316(3)(a) provides in pertinent part,

> Unless the circumstances indicate otherwise, all *implied* warranties are excluded by expressions like "as is" or "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.[44]

Despite the seemingly clear-cut language of this statute, the U.C.C. imposes some limits on the seemingly broad scope of the U.C.C.'s "as is" disclaimer. The U.C.C. contains a number of provisions that could impact "as is" disclaimers. First, a court might find an "as is" provision unconscionable.[45] Second, a seller's violation

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40. Fla. Stat. § 672.316.

41. *Id.* § 672.316(1); *infra* nn. 85–92 and accompanying text (relating to the exclusion of express oral warranties by "as is").

42. Fla. Stat. § 672.316(2).

43. *Id.* § 672.316(3).

44. *Id.* § 672.316(3)(a) (emphasis added). In addition to subsection (3)(a), subsection (3)(b) provides that implied warranties are excluded for defects that an examination might have revealed, and subsection (3)(c) provides for exclusion or modification of implied warranties by course of dealing, course of performance, or usage of trade. Fla. Stat. § 672.316(3)(a), (b), (c). Revisions to Article 2 of the U.C.C. are currently under consideration. If these revisions are adopted, the U.C.C.'s "as is" disclaimer will read as follows:

> SECTION 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES
> (b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all implied warranties are excluded by expressions such as "as is" or "with all faults" or similar language or conduct that in common understanding make it clear to the buyer that the seller assumes no responsibility for the quality or fitness of the goods. In a consumer contract evidenced by a record, the requirements of this subsection must be satisfied by conspicuous language in the record.

U.C.C. Revised Article 2 (Draft Nov. 2000).

45. Fla. Stat. § 672.302 (permitting a court to disregard any clause in a contract for the sale of goods if the court determines the clause to be unconscionable). No court in Florida has applied unconscionability principles to an "as is" clause, although out-of-state courts have done so. *E.g. Bernstein v. Sherman*, 497 N.Y.S.2d 298, 301 (N.Y. Sm. Cl. 1986) (explaining that an "as is" provision in automobile bill of sale is not effective because enforcement would be unconscionable). Note that unconscionability is difficult to prove and is almost never successfully argued in a commercial context. Certain courts have discussed Section 672.302. *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1300 (11th Cir. 1980) (applying Florida law on unconscionability); *Meeting Makers, Inc. v. Am. Airlines, Inc.*, 513 S.2d 700, 701 (Fla.

of the U.C.C.'s good faith requirement might preclude the effectiveness of an "as is" disclaimer.[46] Third, a seller may not use an "as is" disclaimer to exclude or limit warranties in favor of third party beneficiaries.[47] Finally, a seller may limit a buyer's remedy for breach of warranty only in accordance with certain constraints set forth in the U.C.C.[48] Other than the general constraints imposed by the U.C.C., a seller logically might presume that including the U.C.C.'s "as is" disclaimer in a contract will automatically eliminate all implied warranties.[49] However, several Florida courts have overlaid certain other limitations on the U.C.C.'s "as is" disclaimer provision.

Dist. App. 3d 1987) (finding that the lessee of a computer system failed to meet the burden of proof necessary to establish that disclaimers of all warranties were unconscionable when the parties had equal bargaining power).

46. Fla. Stat. § 671.201(19) (2000) (defining good faith); Fla. Stat. § 671.203 (2000) (stating that "[e]very contract or duty within this code imposes an obligation of good faith in its performance or enforcement"). *Id.* § 672.103(b) (presenting an additional requirement of fair dealing applicable only to merchants). No Florida court has limited the effectiveness of an "as is" clause under a lack of good faith rationale. *Richardson v. Car Lot Co.*, 462 N.E.2d 459 (Ohio Mun. 1983) (finding that a violation of the U.C.C. good faith requirements precluded the effectiveness of the "as is" clause).

47. Fla. Stat. § 672.318.

48. *Id.* § 672.316(4). Technically, limitations on warranties and limitations on remedies for breach of warranties are separate issues. U.C.C. § 2-316 cmt. 2, 1A U.L.A. 465. However, an "as is" disclaimer would be prima facie unconscionable if construed as an automatic absolution from consequential damages for injury to the person in the case of consumer goods. *Knipp*, 351 S.2d at 1084 (see *infra* notes 63–72 and accompanying text for a further discussion of *Knipp*). In addition to the limitations imposed by other U.C.C. provisions, certain consumer protection laws may place limitations on the use of an "as is" warranty disclaimer. For example, a warranty given in conjunction with a consumer product sale is subject to the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (1994), and related regulations found in 16 C.F.R. §§ 700–703 (2000). The Act prohibits any disclaimer of implied warranties applicable to a consumer product if the seller makes a written warranty with respect to the consumer product. *Frank Griffin Volkswagen, Inc. v. Smith*, 610 S.2d 597, 615–616 (Fla. Dist. App. 1st 1992) (Ervin, J., concurring in part and dissenting in part) (explaining why the Magnuson-Moss Act should have overridden the "as is" language contained in a car sales agreement).

49. *David v. Davenport*, 656 S.2d 952, 953 (Fla. Dist. App. 3d 1995) (illustrating that an "as is" disclaimer, together with an extremely limited written warranty, established the sole parameters of the seller's responsibility in the sale of a used car); *Frank Griffin Volkswagen*, 610 S.2d at 598–601 (explaining that an "as is" disclaimer, coupled with a disclaimer of all express and implied warranties, precluded a finding that a car dealer was cowarrantor of the manufacturer's warranty); *cf. Meeting Makers*, 513 S.2d at 701 (demonstrating that a claim for breach of warranty was dismissed because liability was controlled entirely by contractual disclaimers that fully complied with all statutory requirements).

b. Conspicuous Requirement

One limitation Florida courts have placed on the U.C.C.'s "as is" disclaimer is that the "as is" language must be conspicuous.[50] In *Osborne v. Genevie*,[51] the parties entered into a sales contract that contained an "as is" disclaimer.[52] However, the "as is" language was not distinguishable from the rest of the contract, because it was written in the same size, color, and type as the balance of the contract.[53] Despite the fact that no conspicuousness requirement exists under Section 672.316(3)(a),[54] the *Osborne* court implied that the conspicuous requirement of Section 672.316(2) was applicable to the U.C.C.'s "as is" disclaimer.[55] The *Osborne* court assumed that the drafters of the U.C.C. intended all warranty disclaimers, including "as is" disclaimers, to be conspicuous.[56] Because the instant "as is" language was not conspicuous, it did not exclude all implied warranties.[57] The reasoning in *Osborne* is based on the premise that a seller can disclaim implied warranties only if the

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50. The term "conspicuous" is defined in Section 671.201(10) and requires a printed heading in capitals or language in the body of the form that is larger than the surrounding print or contrasting in type or color. Fla. Stat. § 671.201(10). For a good discussion of the conspicuousness requirement for disclaimers of warranties, see *Rudy's Glass Construction Company v. E.F. Johnson Company*, 404 S.2d 1087, 1089 (Fla. Dist. App. 3d 1981), which demonstrates that disclaimers of implied warranties of merchantability and fitness under Section 672.316(2) were held to be conspicuous despite the fact they were located on the reverse side of the contract.

51. 289 S.2d 21 (Fla. Dist. App. 2d 1974).

52. *Id.*

53. *Id.*

54. Fla. Stat. § 672.316(3)(a).

55. 289 S.2d at 22–23. Section 672.316(2) provides that written exclusions of the implied warranties of merchantability and fitness must be conspicuous. Fla. Stat. § 672.316(2).

56. 289 S.2d at 23. Two factors lend weight to this assumption in *Osborne*. First is official comment one to U.C.C. Section 2-316, which states that a primary reason for the section is "to protect a buyer from unexpected and unbargained for language of disclaimer by . . . permitting *the exclusion of implied warranties only by conspicuous language* or other circumstances which protect the buyer from surprise." U.C.C. § 2-316 cmt. 1, 1A U.L.A. 465 (emphasis added). Second is the fact that the conspicuousness requirement for "as is" disclaimers in a leasing context has been expressly incorporated in the later-adopted U.C.C. Article 2A, codified in Florida in Section 680.214(3)(a). *Infra* n. 96 and accompanying text. However, in construing the language of statutory warranties of fitness in the sale of a new condominium, the Florida Supreme Court in *Leisure Resorts, Incorporated v. Frank J. Rooney, Incorporated*, stated, "When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." 654 S.2d 911, 914 (Fla. 1995).

57. *Osborne*, 289 S.2d at 21–23.

buyer reasonably understands this is intended.[58] The *Osborne* decision, by requiring "as is" language to be conspicuous, illustrates the tendency of Florida courts to limit the effectiveness of the U.C.C.'s "as is" disclaimer to those instances in which the parties actually intended the "as is" language to eliminate all implied warranties.

c. Intent of the Parties

Under Florida law, the parties actually must intend that the goods were sold "as is" for the seller later to raise the "as is" language as a defense against the buyer's lawsuit. In *Pinellas Central Bank and Trust Company v. International Aerodyne, Incorporated*,[59] the seller delivered to the buyer an airplane missing certain customary and necessary equipment.[60] The *Pinellas Central Bank* court dismissed the seller's assertion that the plane was sold "as is," because the parties did not specify in their contract that the transaction was an "as is" sale.[61] As evidenced by the *Pinellas Central Bank* decision, the parties must understand the item is indeed sold "as is."[62] This cognitive aspect becomes more contentious when the sales document specifies the item is sold "as is," but the buyer later urges the "as is" language was intended to eliminate only certain warranties.

Knipp v. Weinbaum[63] is the first case in which a Florida court has addressed the intent aspect of the U.C.C.'s "as is" disclaimer. In *Knipp*, a buyer purchased a used, custom three-wheeled motorcycle from the seller.[64] Within hours of the purchase, the buyer was

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58. *Id.* at 23. Interestingly, a warranty disclaimer not meeting the conspicuousness requirement imposed by *Osborne* goes beyond the intent issue. If not conspicuous, the "as is" language is basically per se ineffective, despite the fact a buyer has read it and fully understands its intended effect. *Rehurek v. Chrysler Credit Corp.*, 262 S.2d 452, 454 (Fla. Dist. App. 2d 1982) (The purchaser of new automobile who specifically read the disclaimer clause could still bring a claim for breach of implied warranty, because the disclaimer was not conspicuous.).

59. 233 S.2d 872 (Fla. Dist. App. 3d 1970).

60. *Id.* at 879.

61. *Id.* at 878–879.

62. Although not referred to in the *Pinellas Central Bank* opinion, the language of Section 672.316(3)(a) supports the general proposition that "as is," to be effective, must be expressly stated. Fla. Stat. § 672.316(3)(a).

63. 351 S.2d 1081 (Fla. Dist. App. 3d 1977).

64. 351 S.2d at 1083. The tricycle was originally constructed by a young motorcycle enthusiast, and the title passed through three other owners before reaching the defendant's shop. *Id.*

severely injured due to a mechanical failure.[65] The buyer sued the seller on grounds of negligence and breach of express and implied warranties,[66] despite the fact that he signed a bill of sale that prominently stated the motorcycle was sold "as is."[67] The buyer argued that neither party intended the "as is" provision to operate as a disclaimer of all implied warranties.[68] The seller, on the other hand, contended that the parties' intent should not affect the applicability of U.C.C.'s "as is" disclaimer.[69] The *Knipp* court disagreed with the seller's position, because the introductory clause of the U.C.C.'s "as is" disclaimer under Section 672.316(3)(a) precludes a per se finding that all implied warranties are disclaimed.[70] The *Knipp* court opined,

> It is the clause *"unless the circumstances indicate otherwise"* which precludes a finding that automatic absolution can be achieved in the sale of used consumer goods merely by the inclusion in a bill of sale of the magic words *"as is."* This is not to say that a seller of used goods may not absolve himself from responsibility for defects in the goods sold when both he and the buyer understand this to be the intended meaning of the phrase *"as is."* . . . But a disclaimer, to be effective, must be a part of the basis of the bargain between the parties.[71]

The *Knipp* holding stands for the proposition that circumstances may indicate the "as is" language means something other than a blanket disclaimer of all implied warranties.[72]

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65. *Id.* The buyer alleged his accident was caused when a defective weld on the rear axle gave way. *Id.*

66. *Id.* A buyer's lawsuit over defects in purchased property often entails multiple counts. *E.g. id.* (The *Knipp* plaintiffs' complaint was based on several theories including breach of warranty, negligence, and strict liability.).

67. *Id.*

68. *Id.* Depositions of the seller indicated that he may have intended the term "as is" to apply only to minor defects that would have rendered the motorcycle incapable of passing inspection. *Id.* at 1085.

69. *Id.* at 1084.

70. *Id.*

71. *Id.* at 1084–1085 (emphasis added) (citations omitted). The *Knipp* court's statement that a disclaimer must be part of the basis of the bargain is analogous to the requirement that express warranties created by a seller's affirmation of fact or promise must be a basis of the bargain. Flynn, *supra* n. 35, at 52 (discussing express warranties in Florida).

72. *McNamara Pontiac, Inc. v. Sanchez,* 388 S.2d 620, 621 (Fla. Dist. App. 5th 1980) (holding that a purchaser of a used car was not bound by an "as is" disclaimer because it was not part of the sales bargain between the parties).

However, the facts and circumstances of many cases do not call into question the effectiveness of an "as is" disclaimer. For instance, in *Masker v. Smith*,[73] the buyer purchased an automobile from a used car dealer.[74] The brakes on the vehicle failed within two weeks, causing an accident that injured the buyer.[75] The buyer sued for breach of warranty, notwithstanding the fact the sales agreement contained an "as is" disclaimer.[76] The buyer argued that summary judgment for the seller was precluded, because the *Knipp* decision created an issue of fact regarding whether the "as is" clause eliminated all warranties.[77] However, the *Masker* court limited the application of *Knipp* to those cases in which a buyer presented conflicting evidence about the meaning of "as is."[78] The *Masker* court upheld the statutory effect of the U.C.C.'s "as is" disclaimer, because the buyer failed to present any evidence that the parties understood "as is" to mean something less than a total disclaimer of all implied warranties.[79]

d. Express Warranties

A seller of goods often urges that "as is" language negates not only all implied warranties, but also all express warranties.[80] This argument rarely succeeds, particularly with regard to written express warranties, for several reasons. Initially, the specific language of Section 672.316(3)(a) limits the application of the U.C.C.'s "as is" disclaimer to implied warranties.[81] Conversely, any

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73. 405 S.2d 432 (Fla. Dist. App. 5th 1981).

74. *Id.* at 433.

75. *Id.*

76. *Id.* at 433–434. The buyer also sued on negligence and strict liability theories; both claims were dismissed. *Id.*

77. *Id.* at 434.

78. *Id.*

79. *Id.* The *Masker* opinion states that "[t]he record thus shows the ["as is"] disclaimer in the sales agreement and nothing else. Without more, we are constrained to give the intended effect to the disclaimer as required by statute, because there is nothing in the record to create an issue of fact that 'the circumstances indicate otherwise.'" *Id.* In the third footnote, the *Masker* court distinguished the facts from those in *McNamara Pontiac*, stating that the circumstances in *McNamara Pontiac* raised an issue of fact as to what the parties intended by using an "as is" provision. *Id.* at 434 n. 3.

80. See *supra* note 35 for information regarding the creation of express warranties. Sellers often attempt to eliminate all warranties, both express and implied, by the use of "as is" language in conjunction with other disclaimers. U.C.C. § 2-316 cmt. 1, 1A U.L.A. 465; *infra* nn. 301–303 and accompanying text.

81. Fla. Stat. § 672.316(3)(a) (providing that "all *implied* warranties are excluded by expressions like 'as is'" (emphasis added)).

limitation of express warranties is governed by Section 672.316(1).[82] Section 672.316(1) provides that express warranties, and limitations on the same, must be construed as consistent whenever reasonable.[83] To the extent that a written express warranty is given, a general "as is" clause in the contract normally will not control, because the two cannot reasonably be construed together.[84]

Oral express warranties may negate "as is" language for the same reasons.[85] On the other hand, an "as is" disclaimer may eliminate oral warranties,[86] particularly when combined with other

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82. *Id.* at § 672.316(1).

83. Specifically, Section 672.316(1) provides,

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but, subject to the provisions of this chapter on parol or extrinsic evidence (s. 672.202), negation or limitation is inoperative to the extent that such construction is unreasonable.

See *infra* note 86 for a discussion concerning the impact of the parol evidence rule on warranties and disclaimers.

84. Fla. Stat. § 672.316(1); *Frank Griffin Volkswagen*, 610 S.2d at 604 n. 4 (stating "[a]n 'as is' disclaimer means that goods are sold with all faults and has the effect of excluding all implied warranties, but not express warranties created in the same transaction"). This situation is quite different when a seller gives a limited warranty and disclaims all other warranties. *David*, 656 S.2d at 953 (An "as is" provision with a thirty-day limited warranty established the parameters of the seller's responsibilities.); *infra* pt. III(A)(1).

85. *See generally* White & Summers, *supra* n. 28, at § 12.3; *cf. McNamara Pontiac*, 388 S.2d at 621 (A written "as is" disclaimer signed by a buyer was held ineffective in light of the fact that the salesman orally represented to buyer that the car was still under the original manufacturer's warranty.); *Bernstein*, 497 N.Y.S.2d at 301 (An oral express warranty was upheld although inconsistent with "as is" disclaimer.).

86. Even without an "as is" disclaimer, the parol evidence rule may limit a buyer's claim of oral representations and warranties if the contract states that the seller has made no express warranties. Fla. Stat. § 672.316(1) ("subject to the provisions of this chapter on parol or extrinsic evidence (s. 672.202)"); U.C.C. § 2-316 cmt. 2, 1A U.L.A. 465. Section 672.202 (the U.C.C.'s Parol Evidence Rule) excludes extrinsic (oral) evidence that contradicts a writing intended by the parties as a final expression of their agreement. Fla. Stat. § 672.202. While an in-depth discussion of the parol evidence rule in Florida is clearly beyond the scope of this Article, two quick comments may help demonstrate the polarity of views on this topic. For the liberal construction perspective, see U.C.C. Section 2-202, official comment 3 (stating that additional oral terms should be excluded only if: (a) the court determines the writing was intended as a complete and exclusive statement of all terms and (b) the offered additional oral terms, if they had been agreed upon, would certainly have been included in the document). For the strict construction perspective, see *J.C. Penney Company v. Koff*, 345 S.2d 732, 736 (Fla. Dist. App. 4th 1977) (upholding the long-standing strict interpretation of the parol evidence rule in Florida that bars extrinsic evidence to explain or vary the express terms of a contract unless the contract is ambiguous). The question of whether a contract is ambiguous is often unclear. *3679 Waters Ave. Corp. v. Water St. Ovens, Ltd.*, 2000 WL 192134 at *2 (Fla. Dist. App. 2d Feb. 18, 2000).

disclaimer language, a merger clause, or both.[87] Even without other disclaimers or a merger clause, at least one Florida court has held that an "as is" disclaimer eliminated all oral representations.[88] *Sokoloff v. Corinto Steamship Company*[89] involved the sale of a vessel.[90] The *Sokoloff* court held that the sale of the vessel "'as is, where is' . . . clearly excluded any oral representation or warranties as to the performance capabilities of the vessel."[91] A more balanced approach is to consider the facts and circumstances of each case, in light of the statutory structure of U.C.C. Article 2, to determine how

87. For a discussion of how the effect of an "as is" disclaimer often is bolstered by other contractual language, see *infra* notes 301–304 and accompanying text. A "merger clause," sometimes referred to as an "integration clause," can be defined as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." *Black's Law Dictionary*, *supra* n. 1, at 1003. A typical merger clause often recites that the "[c]ontract sets forth the entire understanding of the parties." *Deluxe Motel, Inc. v. Patel*, 727 S.2d 299, 300 (Fla. Dist. App. 5th 1999) (The entire text of *Deluxe Motel*'s merger clause is set forth in note 304.). Inclusion of a merger clause in a contract is perhaps the best evidence of full integration, i.e., the contract is the full and final expression of the parties' intent. *Restatement (Second) of Contracts* §§ 209–210 (1982). The persuasive value of a merger clause typically thwarts the buyer's attempt to introduce oral representations or warranties to vary, much less contradict, the terms of the agreement. *U.S.B. Acq. Co. v. Stamm*, 660 S.2d 1075, 1079–1080 (Fla. Dist. App. 4th 1995). However, a merger clause does not bar all express warranty claims. *State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami, Inc.*, 557 S.2d 107, 109 (Fla. Dist. App. 3d 1990) (Despite a merger clause in the final contract, the buyer was allowed to proceed with a breach of express warranty claim based on the seller's advertising, which stated that the shutters would prevent breakins.). Instead, a merger clause is only evidence (albeit usually quite persuasive) of the parties' intent. *Bird Lakes Dev. Corp. v. Meruelo*, 626 S.2d 234, 238 (Fla. Dist. App. 3d 1993) (stating that the prevailing view is that integration can never be determined by the words of the contract itself); *see generally* E. Allan Farnsworth, *Farnsworth on Contracts* § 7.3, 436 (3d ed., Aspen L. & Bus. 1999) (discussing the legal effects of integration and merger clauses); White & Summers, *supra* n. 28, at § 12-4 (discussing disclaimers and other contractual language). However, merger clauses will not normally prevent a claim of fraudulent inducement. *Deluxe Motel*, 727 S.2d at 300–301 (an "as is" clause and an integration clause in the contract did not preclude relief for the buyers under theory of fraudulent misrepresentation); *contra Hillcrest P. Corp. v. Yamamura*, 727 S.2d 1053, 1056 (Fla. Dist. App. 4th 1999) (A merger clause precluded recovery in fraud, because the alleged oral misrepresentations contradicted the written contract.).

88. *Sokoloff v. Corinto Steamship Co.*, 225 S.2d 554, 555 (Fla. Dist. App. 3d 1969).

89. 225 S.2d 554 (Fla. Dist. App. 3d 1969).

90. *Id.*

91. *Id.* at 555 (emphasis added). It should be noted that the *Sokoloff* court did not discuss whether the U.C.C. applied to the facts of this case; it is conceivable the facts occurred prior to the effective date of Chapter 672. For a discussion on Chapter 672, see *supra* note 28.

an "as is" disclaimer affects oral express warranties given in connection with the sale or leasing of goods.[92]

2. Leasing of Goods

Although "as is" disclaimers used in the sale of goods are governed by U.C.C. Article 2, "as is" disclaimers used in the leasing of goods are governed by Article 2A.[93] U.C.C. Article 2A is codified in Florida Statutes Chapter 680.[94] The provisions governing the leasing of goods under Article 2A (Chapter 680) are in large part borrowed from Article 2 (Chapter 672).[95] In fact, the U.C.C.'s "as is" disclaimer for leases under Section 680.214(3)(a) is virtually identical to its counterpart for sales under Section 672.316(3)(a).[96] This close nexus between the U.C.C.'s sales and leasing articles allows for analogies between factual situations involving the leasing of goods and case law involving the sale of goods.[97] Such analogies

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92. *Knipp*, 351 S.2d at 1085. In responding to a seller's claim that an "as is" disclaimer negated any inference of an alleged oral warranty, the *Knipp* court stated that "[t]he most prominent principle in the construction of warranties is the ascertainment of the intentions of the parties in light of the surrounding circumstances." *Id.*

93. *Supra* n. 27; *see generally* Stone, *supra* n. 28, at § 6 (discussing the leasing of goods); White & Summers, *supra* n. 28, at ch. 9 (discussing warranties).

94. Fla. Stat. §§ 680.1011–680.1095 (2000).

95. U.C.C. § 2A-101 off. cmt. (1987), 1B U.L.A. 653 (1989). Also, certain provisions of Article 2A were borrowed from U.C.C. Article 9 dealing with Secured Transactions. Each section of Article 2A provides information about its source (usually Article 2) and changes made from the source.

96. Similarities can be seen by comparing Florida Statutes Section 672.316(3)(a), found in the text accompanying *supra* note 44, to Florida Statutes Section 680.214(3)(a), which provides as follows:

> Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is" or "with all faults" or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous.

One obvious difference is the addition of a statutory requirement under Section 680.214(3)(a) that "as is" disclaimers be conspicuous, as opposed to the conspicuousness requirement judicially mandated in conjunction with the sale of goods. *Osborne*, 289 S.2d at 23; *supra* nn. 50–58 and accompanying text (discussing the judicially implied conspicuousness requirement).

97. Indeed, the basic concept of a lease is often the same as an absolute transfer, the most meaningful distinction being a lease grants a present possessory interest only for a term of years. Ashbel Green Gulliver, *Cases and Materials on the Law of Future Interests* 60–61 (Erwin N. Griswold ed., West 1959). The definition of "lease" under U.C.C. Article 2A reinforces this distinction. "'Lease' means a transfer of the right to possession . . . for a term." Fla. Stat. § 680.1031(1)(j). Prior to the adoption of Article 2A, courts routinely applied the provisions of Article 2 to lease transactions. *Januse v. U-Haul Co.*, 399 S.2d 402, 403 (Fla. Dist. App. 3d 1981) (applying the Article 2 statute of limitations provision to a complaint

are particularly useful in jurisdictions, such as Florida, where the courts have had few opportunities to construe "as is" disclaimers in a leasing context.[98]

However, a few courts have interpreted Florida law as it relates to "as is" disclaimers in a lease financing context. In the somewhat cryptic case of *Faro Blanco Marine Resort, Incorporated v. Key Leasing, Incorporated*,[99] the lessor leased certain equipment to the lessee "as is."[100] The lessee sued for breach of implied and express warranties after the equipment proved defective.[101] The *Faro* court dismissed the lessee's claims on the grounds that the lessor, as a lease financier, was under a contractual duty only to deliver the equipment "as is."[102]

Borg-Warner Leasing v. Doyle Electric Company[103] also involved an "as is" lease financing transaction. In *Borg-Warner*, an electric company desired to obtain a B-80 computer from a leasing corporation.[104] The electric company acquired the computer by having the leasing corporation purchase the computer and then lease it to the company with an option to purchase.[105] The B-80 computer never functioned properly, so the electric company lessee stopped making its lease payments to the lessor.[106] The lessor sued for nonpayment under the lease contract, and the electric company counterclaimed for rescission.[107] Applying Florida law, the United States Court of Appeals for the Eleventh Circuit summarily rejected the counterclaim because "[the lessor] rented the computer 'as is' [to the lessee] and disclaimed all warranties, express and implied. Thus, [the lessee] remained obligated to pay rent even though the computer

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arising from the leasing of a truck); *cf. Meeting Makers*, 513 S.2d at 701 (dismissing a claim based on breach of warranty in conjunction with a combined lease and purchase because the warranty disclaimers fully complied with statutory requirements of Article 2).

98. For example, the *Knipp* holding demonstrated that circumstances may indicate the "as is" language means something other than a disclaimer of implied warranties. 351 S.2d at 1086. This should apply with equal logic to a leasing context. *Id.* at 1084, 1085. For analogous cases that may have addressed leasing of goods issues still undecided in Florida, consult the sources cited at *supra* note 28.

99. 510 S.2d 1055 (Fla. Dist. App. 3d 1987).

100. *Id.* at 1056.

101. *Id.*

102. *Id.* The court in *Faro* also noted that the lease provided that any claims for defects would be against the manufacturer or supplier of the equipment. *Id.*

103. 733 F.2d 833 (11th Cir. 1984).

104. *Id.* at 834.

105. *Id.*

106. *Id.*

107. *Id.*

failed to operate properly."[108] Because the lessor was the functional equivalent of a lender who had disclaimed all warranties under the "as is" lease, summary judgment dismissing lessee's breach of warranty claim was affirmed.[109] This case represents another variation on how warranty claims can be impaired when goods are sold or leased "as is." Related but somewhat different issues arise when realty is sold or leased "as is."

B. "As Is" Warranty Disclaimers When Used in the Sale or Leasing of Realty in Florida

"As is" warranty disclaimers used in the sale or leasing of realty differ from "as is" disclaimers used in the sale or leasing of goods. The U.C.C.'s "as is" warranty disclaimer, as interpreted by the Florida courts, controls the impact of an "as is" provision when used in a Florida transaction involving goods.[110] In contrast, "as is" provisions used in Florida transactions involving realty are not governed by the U.C.C.[111] or any other statutory provision.[112]

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108. *Id.* at 837.

109. *Id.* The *Borg-Warner* court saw "no functional difference between the purchase-option lease involved in this case and a direct purchase from a manufacturer financed by a mortgage." *Id.* The court supported its lease finance/mortgage loan analogy with two factors. *Id.* First, the lease financier had assigned all warranty rights against the original seller to the lessee. *Id.* Second, the lessee had originally selected the computer and therefore was in a better position to understand its potential defects. *Id.*

110. For a discussion of the use of an "as is" provision in a transaction involving goods, see *supra* Part I(A)(1).

111. Disclaimers of real property warranties are not governed by the U.C.C., because real property and the improvements thereon are not "goods" under Section 672.105(1), and a seller is not a "merchant" under Section 672.104. *Hesson v. Walmsley Constr. Co.*, 422 S.2d 943, 946 (Fla. Dist. App. 2d 1982); *Ga.-P. Corp. v. Squires Dev. Corp.*, 387 S.2d 986, 992 (Fla. Dist. App. 4th 1980) (determining that a developer of a condominium office in which defective wood paneling was installed was not a "merchant" under the U.C.C.); *Gable v. Silver*, 258 S.2d 11, 13 n. 1, 17 (Fla. Dist. App. 4th 1972), *aff'd*, 264 S.2d 418 (Fla. 1972); *see generally Schoeneweis v. Herrin*, 443 N.E.2d 36, 40 (Ill. App. 5th Dist. 1982) (stating that the U.C.C.'s "as is" disclaimer is not applicable to contracts for the sale of real estate); *Partrich v. Muscat*, 270 N.W.2d 506 (Mich. App. 1978) (holding that the phrase "as is" when used in the sale of goods has no similarly accepted meaning when used in the sale of realty).

112. The National Conference on Uniform State Laws adopted a model act for real estate, the Uniform Land Transactions Act (ULTA) in 1975. Section 2-311(b) of the ULTA contains a provision similar to the U.C.C.'s "as is" disclaimer, which states in pertinent part,

> (b) implied warranties of quality:
>
> . . .
>
> (2) are excluded by expressions of disclaimer such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

Although Florida courts often look to the U.C.C. for guidance,[113] Florida common law controls the ramifications of using "as is" language to disclaim warranties when selling or leasing Florida real estate.[114] The remainder of Part I examines various Florida cases that have considered "as is" disclaimers and their effect on express and implied warranties in conjunction with the sale and leasing of realty.

1. Sale of Realty

Many issues that surface with "as is" disclaimers found in a real estate contract correlate to issues that often surface with "as is" disclaimers in a sale of goods contract.[115] While an "as is" disclaimer used in the sale of goods mainly impacts implied warranties, "as is" language used in a contract for the sale of realty has the greatest impact on express warranties.[116]

Neither Florida nor any other state has adopted the ULTA, and in 1990 the ULTA was withdrawn by the National Conference on Uniform State Laws. Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 Nova L. Rev. 1037, 1038–1039 (1996); John B. Neukamm & Charles H. Carver, *Model and Uniform Acts Committee Report*, 21 ActionLine J. 15 (Jan./Feb. 1998). A few Florida statutes address the issue of implied warranties in a real estate context, but none of these statutory provisions touches on "as is" disclaimers (or even warranty disclaimers in general). Fla. Stat. §§ 718.203, 718.618 (2000) (involving implied warranties in the sale of condominiums).

113. *E.g. Belle Plaza Condo. Assn. v. B.C.E. Dev., Inc.*, 543 S.2d 239, 240 (Fla. Dist. App. 3d 1989) (citing two Florida U.C.C. cases for the proposition that the use of a bold and conspicuous "as is" disclaimer in condominium conversion sales documents eliminated all express and implied warranties).

114. *Infra* nn. 115–176 and accompanying text. As previously mentioned in *supra* note 8, realty means more than just the dirt itself and includes structures and fixtures. Indeed, these items are often at a heart of the breach of warranty dispute. *Conklin v. Hurley*, 428 S.2d 654, 658 (Fla. 1983). "[A]lthough the contract may be couched in terms of the sale of realty, the purchaser sees the transaction primarily as the purchase of a house, with the land incident thereto." *Id.* (quoting *De Roche v. Dame*, 430 N.Y.S.2d 390 (1980)); *Pressman*, 732 S.2d at 360 (demonstrating that most items in controversy involved improvements, fixtures, or appliances).

115. For a discussion of the impact of "as is" disclaimers in conjunction with the sale of goods, see *supra* Part I(A)(1). *Cf. Hobco, Inc. v. Tallahassee Assoc.*, 807 F.2d 1529, 1533 (11th Cir. 1987) (holding that the buyer of an office building had no claim for breach of express warranty under Florida law because the seller's alleged representations of possible marketing use were not a basis of the bargain). Note that "as is" disclaimers of express warranties, as opposed to those used to disclaim implied warranties, can arise in all types of real estate transactions, whether residential or commercial, new or used buildings. For a discussion of implied warranties in real estate (which apply only to new residential structures), see *infra* notes 146 and 153.

116. *Supra* pt. I(A)(1)(a)-(c) (discussing that the focus of "as is" language is usually its impact on implied warranties).

a. Express Warranties

"As is" language in a real estate contract can substantially diminish or eliminate a disgruntled buyer's claim that the seller has breached an oral or written express warranty. The 1999 Florida case of *Pressman*[117] is indicative of the growing number of judicial decisions in Florida in which "as is" disclaimers have significantly impacted breach of warranty claims in real estate transactions.[118] In *Pressman*, a buyer of residential property sued based on various warranties and representations allegedly made by the seller.[119] The *Pressman* court punctuated the exculpatory importance of "as is" language in the real estate contract by referring to the "as is" provision throughout its opinion. The court in *Pressman* began its opinion by emphasizing that "[t]he transaction closed 'as is' for $500,000, with no warranty provisions."[120] In its conclusion, the *Pressman* court dismissed the buyer's breach of contract claim as a matter of law mainly because "the contract clearly provided what was being sold was a home in 'as is' condition."[121] The *Pressman*

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117. 732 S.2d at 356.

118. *Belle Plaza*, 543 S.2d at 240; *infra* nn. 139–147 and accompanying text.

119. The buyer claimed that the seller made the following warranties and representations: (1) all repairs could be made for $100,000; (2) the view would be improved when an obstacle was torn down and a park extended; (3) the air conditioner ran cool; (4) there were no termites; (5) the pool was in perfect condition; (6) the home's appliances were in working order; and (7) there were no facts known to seller materially affecting the value of the real property that were not readily observable by buyer or that had not been disclosed to buyer. *Pressman*, 732 S.2d at 357–359. Note item seven in the list was in the form of an express warranty, derived from disclosure obligations imposed by the seminal Florida Supreme Court case of *Johnson v. Davis*, 480 S.2d 625, 629 (Fla. 1985). *Infra* nn. 178, 198 and accompanying text (discussing a seller's duty to disclose known facts materially affecting the property value if the facts are not readily observable to the buyer). Item seven seems to be straight from paragraph "W" of the Standard Contract for Sale and Purchase promulgated by the Florida Association of Realtors and The Florida Bar (Far/Bar Contract). Fla. Assn. of Realtors & Fla. B., *FAR/BAR Contract for Sale and Purchase* ¶ W (unpublished contract) (copy on file with Author). Although apparently not used in the contract in *Pressman*, the Comprehensive Rider to the Far/Bar Contract contains an "as is" paragraph, stating that, except for standard paragraph "W," "Seller extends and intends no warranty and makes no representation of any type, either express or implied, as to the physical condition or history of the Property." *Id.* at comprehensive rider.

120. 732 S.2d at 357.

121. *Id.* at 362.

decision demonstrates how a seller in Florida benefits when an "as is" disclaimer is inserted in a real estate contract.[122]

A buyer in one reported Florida case argued that the "as is" language in a real estate contract actually benefited the buyer, not the seller.[123] In *J.C. Penney Company v. Koff*,[124] the buyer and seller entered into a contract for the purchase and sale of approximately ten acres of vacant land.[125] The contract contained an "as is" provision that referred to the date of the contract.[126] After a change in the zoning laws,[127] the buyer claimed, by noting the date of the contract, that the "as is" provision actually benefited him by creating an ambiguity among certain contract provisions.[128] This ambiguity, according to the buyer, should have permitted him to introduce parol evidence to prove that his obligation to purchase the property was contingent on the zoning being the same at closing as it was on the contract date (in other words, zoning "as is" the contract date).[129] The *Koff* court rejected the buyer's creative argument that an "as is" provision can benefit the buyer.[130] Instead, it held that an "as is" provision "is obviously a clause inserted to protect the seller by the limitation of representations for which he will be held responsible."[131] Florida courts have followed this general proposition with varying degrees of force and clarity.

For example, *Weaner v. Bullard and Walling, Incorporated*[132] involved a somewhat unusual application of the general proposition

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122. *Id.* Although the case of *Carrero v. Porterfield*, 752 S.2d 699 (Fla. Dist. App. 2d 2000), is in the context of fraudulent nondisclosure, the court upheld the dismissal of a buyer's complaint alleging breach of contract. Br. of Appellee at 3, *Carrero v. Porterfield*, 752 S.2d 699. Interestingly, the dissent in *Carrero* does not seem to disagree with the fact that the "as is" language of the contract negated the buyer's claim of breach of contract. 752 S.2d at 699–700 (Altenbernd, J., dissenting).

123. *Koff*, 345 S.2d at 734–736.

124. 345 S.2d 732 (Fla. Dist. App. 4th 1977).

125. *Id.* at 734.

126. *Id.* at 735. Paragraph six of the contract stated that the seller disclaimed all representations, warranties, etc., and that the "Purchaser agree[d] to accept the Premises *'as is' as of the date hereof.*" *Id.* (emphasis added).

127. *Id.* Between the date of the contract and the date of closing, the city of Lauderdale Lakes revised the definition of the R-4A zoning classification from allowing a density of twenty-eight condominium units per acre down to twelve units per acre. *Id.*

128. *Id.* at 734–736.

129. *Id.* at 735.

130. *Id.* at 736.

131. *Id.* The effect of the court's ruling in *Koff* was to prevent the buyer's attempted introduction of parol evidence to explain or vary the express terms of an unambiguous contract. *Id.* at 735.

132. 342 S.2d 86 (Fla. Dist. App. 2d 1977).

that an "as is" disclaimer limits a seller's exposure for representations, warranties, and covenants.[133] In *Weaner*, the buyer purchased a partially completed house "as is."[134] Upon completion of the house, the contractor sued the buyer to foreclose a construction lien.[135] The buyer subsequently filed a third party indemnity action against the seller alleging breach of the seller's covenant against encumbrances contained in the warranty deed.[136] The *Weaner* court stated that the buyer was precluded from claiming breach of the covenant against encumbrances, "because this was a matter which was washed out by the ['as is'] contract."[137]

A prime example of a Florida case that held that "as is" language in a real estate transaction effectively can disclaim warranties is *Belle Plaza Condominium Association v. B.C.E. Development, Incorporated.*[138] The real property in *Belle Plaza* was an apartment building that the developer had converted into condominiums.[139] Each sales contract (as well as other sales documents) contained a boldly printed disclaimer of warranties that the property was being sold "as is."[140] The unit owners later claimed the building was not as represented.[141] As a result, the condominium association, on behalf of the unit owners, sued the developer for breach of express warranties.[142] In upholding the trial court's dismissal of the association's claim for breach of express warranties, the *Belle Plaza* court held that it was "clear that [the developer] *properly* disclaimed by a bold and conspicuous disclaimer any and all express or implied warranties."[143] A seller of Florida real estate

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133. *Id.* at 87–88.

134. *Id.* at 87.

135. *Id.*

136. *Id.*

137. *Id.* at 88. This statement by the *Weaner* court was a secondary reason for dismissing the case. The primary reason was that the contractor's suit against the buyer alleged only the amounts due for labor, services, and materials furnished to buyer, not to seller, thereby precluding any liability on the part of the seller. *Id.*

138. 543 S.2d 239 (Fla. Dist. App. 3d 1989).

139. *Id.* at 240. The condominium in *Belle Plaza* was converted prior to the effective date of the Roth Act, which amended the Florida Condominium Act to address the conversion of existing buildings into condominiums. Fla. Stat. §§ 718.604–718.621 (2000); *infra* n. 146 (relating to a discussion of the possibility of disclaiming statutory warranties under the Roth Act and other provisions of the Florida Condominium Act).

140. *Belle Plaza*, 543 S.2d at 240. Although the *Belle Plaza* opinion clearly sets forth the "as is" disclaimer language, it is not clear what other disclaimer language, if any, the developer included in its sales documentation.

141. *Id.*

142. *Id.*

143. *Id.* (emphasis added).

might cite *Belle Plaza* for the proposition that a bold and conspicuous "as is" clause effectively should disclaim all express and implied warranties.[144] However, the reference to implied warranties in *Belle Plaza* appears to be dicta.[145] A question then remains: To what extent can a seller of Florida real property use "as is" language to disclaim implied warranties?[146]

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144. The *Belle Plaza* opinion does not conclusively state that "as is" language alone is sufficient to "properly" disclaim any and all express and implied warranties. Although the *Belle Plaza* decision clearly placed emphasis on the fact that the property was sold "as is," it seems likely that a sophisticated condominium developer would include other specific disclaimers of express and implied warranties. If this were the situation, the *Belle Plaza* case would not stand for the proposition that the "as is" language on its own will have the effect of a total disclaimer in the sale of real property. *Id.* Note that developers converting existing buildings to condominiums are likely to include an "as is" disclaimer in their sales contracts. David St. John & Rodney L. Tennyson, *Construction Defects in Condominium Conversions — The Legal Issues*, 55 Fla. B.J. 127, 128 (Feb. 1981). "In an attempt to avoid warranty liability for statements made in the documents, most conversion sales agreements state that the purchase is 'as is' or have other disclaimer language." *Id.* Interestingly, the *Belle Plaza* court cites two Florida U.C.C. cases with regard to establishing the conspicuousness requirements for warranty disclaimers. 543 S.2d at 240 (citing *Meeting Makers*, 513 S.2d at 700 and *Rudy's Glass Constr. Co.*, 404 S.2d 1087). It appears that the court in *Belle Plaza* cited these U.C.C. cases with regard to conspicuous requirements, which easily carries over to the real property context. On the other hand, the U.C.C.'s "as is" disclaimer gives statutory credence to its effect, but at the same time deals only with implied warranties. Fla. Stat. §§ 671.101–671.109. "As is" in real estate could therefore have a greater or lesser scope than "as is" in the sale of goods, because it is up to the individual court to decide the impact of the "as is" language contained in a real estate contract.

145. The association's claim against the developer was for breach of *express* warranties only. *Belle Plaza*, 543 S.2d at 240.

146. Note that all of the cases discussed so far in Part I(B) of this Article have involved a breach of express, not implied, warranties. Implied warranties in real estate have existed in Florida since the decision rendered in *Gable*, 258 S.2d at 18. *Gable* abrogated the common law rule of caveat emptor in Florida and implied a warranty of fitness and merchantability from builders to first purchasers of residential homes and condominiums. *Id.* at 18. *Gable* also discussed the nonapplicability of the U.C.C. to realty, the concept of fixtures and realty, and disclaimers of warranties. *Id.* at 14, 18. The progeny of *Gable* have applied, and sometimes expanded or clarified, this implied warranty of fitness and merchantability (sometimes also known as an implied warranty of habitability, reasonable or sound workmanship, or proper construction). *E.g. Conklin*, 428 S.2d at 656–658 (refusing to extend implied warranties to seawalls because it was not considered part of the completed residential structure and also providing a detailed analysis of the history and reasoning behind implied warranties); *Hesson*, 422 S.2d at 945 (showing that an implied warranty of habitability applies to both a house and lot sold as a package); *Drexel Props., Inc. v. Bay Colony Club Condo., Inc.*, 406 S.2d 515, 517–519 (Fla. Dist. App. 4th 1981) (setting forth a concise summary of the history of implied warranties in the sale of Florida realty); *Ga.-P.*, 387 S.2d at 986; *Parliament Towers Condo. v. Parliament H. Realty, Inc.*, 377 S.2d 976, 978 (Fla. Dist. App. 4th 1979) (holding that no implied warranty extended to remote purchasers); *Strathmore Riverside Villas Condo. Assn. v. Paver Dev. Corp.*, 369 S.2d 971, 972 n. 2 (Fla. Dist. App. 2d 1979) (stating that an implied warranty also includes compliance with applicable building codes); *Simmons v. Owens*, 363

S.2d 142, 143 (Fla. Dist. App. 1st 1978) (holding that no implied warranty exists from builder to remote purchaser, although remote purchaser could still sue under a negligence theory); *B & J Holding Corp. v. Weiss*, 353 S.2d 141, 142 (Fla. Dist. App. 3d 1977) (explaining that implied warranties of fitness are breached when one substitutes inferior features for those set forth in the documents); *Putnam v. Roudebush*, 352 S.2d 908, 909–910 (Fla. Dist. App. 2d 1977) (clarifying the parameters of an implied warranty of habitability in a case involving an alleged noisy air conditioner and adopting the test of "whether the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality"); *David v. B & J Holding Corp.*, 349 S.2d 676 (Fla. Dist. App. 3d 1977) (expanding implied warranties to include construction in accordance with building plans and specifications); *Imperial Towers Condo., Inc. v. Brown*, 338 S.2d 1081, 1082 (Fla. Dist. App. 4th 1976) (allowing a class action suit by a condominium association and four unit owners alleging breach of contract and implied warranty); *Wittington Condo. Apartments, Inc. v. Braemar Corp.*, 313 S.2d 463, 468 (Fla. Dist. App. 4th 1975) (illustrating that a condominium association may bring suit in its individual capacity). In addition to judicially-created implied warranties being applicable to sales of Florida real estate, the Florida legislature has created certain statutory implied warranties for the benefit of condominium purchasers. For example, Section 718.203, dealing with new condominium sales, provides in part that

> (1) The developer shall be deemed to have granted to the purchaser of each unit an *implied warranty of fitness and merchantability for the purposes or uses intended as follows:*
>
> (2) The contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit *implied warranties of fitness as to the work performed or materials supplied by them* as follows:

Fla. Stat. § 718.203 (emphasis added); *see Leisure Resorts, Inc.*, 654 S.2d at 914 (distinguishing between the statutory implied warranties imposed on developers pursuant to Section 718.203(1) and the statutory implied warranties imposed on contractors, subcontractors, and suppliers pursuant to Florida Statutes Section 718.203(2)); Mark Somerstein, *The Application of Florida's Statutory Warranty to Commercial Condominiums*, 56 Fla. B.J. 579, 580 (June 1982). Section 718.618 deals with conversion of existing buildings into condominiums and provides in part,

> (1) When existing improvements are converted to ownership as a residential condominium, the developer shall establish reserve accounts for capital expenditures and deferred maintenance, *or give warranties as provided by subsection (6).*
>
> . . .
>
> (6) when a developer fails to establish the reserve accounts in accordance with this section, the developer shall be deemed to have granted to the purchaser of each unit an *implied warranty of fitness and merchantability for the purposes or uses intended.*

Fla. Stat. § 718.618 (emphasis added.) For a further discussion on implied warranties in a condominium conversion, see St. John & Tennyson, *supra* n. 144, at 128. Note that all of the cases discussed thus far in Part I(B) of this Article have involved a claim of breach of express, not implied, warranty.

b. Implied Warranties

While *Belle Plaza* touches on this specific question,[147] several other Florida decisions give general guidance on the criteria for disclaiming implied warranties in a real estate transaction. The landmark Florida case of *Gable v. Silver*,[148] which first established an implied warranty in the sale of Florida real estate,[149] casts disclaimers of implied warranties in a negative light by stating, "Florida has a liberal policy of allowing litigants their day in court on suits involving breaches of implied warranty of fitness and merchantability."[150] In contrast, the court in *Hesson v. Walmsley Construction Company*[151] saw no reason why a seller of Florida realty could not disclaim implied warranties so long as the disclaimer is clear and unambiguous and reflects the expectations of both parties as to what items are not warranted.[152] A disclaimer contained in a real estate contract that excludes all warranties except as provided in the contract, but does not specifically reference implied warranties, will not exclude a claim for breach of implied warranty.[153] Whether a Florida court would consider "as is" language by itself a clear and unambiguous disclaimer of all implied warranties in the sale of real estate remains an open question.[154] If

147. *Belle Plaza* arguably stands for the proposition that an "as is" disclaimer eliminates all express as well as implied warranties in the sale of Florida real estate. 543 S.2d at 240. However, the *Belle Plaza* court may have considered other disclaimer language. *Id.* Additionally, the statement as it relates to implied warranties is dicta. *Id.*

148. 258 S.2d 11 (Fla. Dist. App. 4th 1972).

149. *Id.* at 18.

150. *Id.* at 14. The court also stated that warranty "disclaimers will be restrictively upheld." *Id.* at 13.

151. 422 S.2d 943 (Fla. Dist. App. 2d 1982).

152. *Id.* at 946.

153. *In re Barrett Home Corp.*, 160 B.R. 387, 389–390 (Bankr. M.D. Fla. 1993) (holding that the limited warranty provided in a contract for sale of a new home "in exclusion of, and in lieu of, all other guarantees or warranties, written or oral" was insufficient to properly disclaim implied warranties); *Rapallo S., Inc. v. Jack Taylor Dev. Corp.*, 375 S.2d 587 (Fla. Dist. App. 4th 1979). In *Rapallo*, the real estate contract stated that after completion of the condominium unit, "[the] seller's obligations to the [p]urchaser and to the condominium association shall, except as hereinafter provided, cease and come to an end." 375 S.2d at 588. The *Rapallo* court held that this disclaimer was a "mere statement of time limitation on an express warranty" and did not amount to an express "repudiation or denunciation" of implied warranties. *Id. Barrett* and *Rapallo* raise the question of whether the use of an "as is" disclaimer in a Florida real estate contract is an ineffective disclaimer of implied warranties, because it fails to specifically mention *implied* warranties.

154. For a discussion of cases outside of Florida that express a split of opinion on this issue, see Wozniak, *supra* n. 2, at 353–360.

a court were to look to the U.C.C. for guidance, this question would probably be answered in the affirmative.[155] The question of whether "as is" language constitutes a clear and unambiguous disclaimer of implied warranties when selling Florida real estate is somewhat academic, however, because "as is" disclaimers are rarely used in conjunction with the sale of new homes.[156]

2. *Leasing of Realty*

"As is" disclaimers are used frequently in the leasing of realty.[157] However, sparse Florida case law exists on a landlord's ability to use "as is" language to disclaim warranties, whether express or implied.[158] Issues relative to a landlord's ability to disclaim express warranties in Florida by means of "as is" language are similar to issues relative to a seller's ability to disclaim express warranties with an "as is" provision.[159] However, a landlord's ability to disclaim implied warranties and duties with "as is" language is not as easily compared to the ability of a seller of goods to disclaim implied warranties.[160]

An implied warranty of habitability for leased premises was first established in Florida with the enactment of the Florida Residential Landlord and Tenant Act.[161] Section 83.51 places certain

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155. "[A]ll implied warranties are excluded by expressions like 'as is'" Fla. Stat. § 672.316(a); U.C.C. § 2-316(3)(a), 1A U.L.A. 465. In *Osborne*, when addressing the conspicuous issue, the court indicated that a bold and conspicuous "as is" disclaimer actually might be clearer and less ambiguous than a statement to the effect that "all implied warranties are hereby disclaimed." 289 S.2d at 23.

156. New home purchasers are the only parties in Florida who benefit from implied real estate warranties. *K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp.*, 367 S.2d 1078, 1079 n. 2 (Fla. Dist. App. 3d 1979); *Parliament*, 377 S.2d at 978; *Simmons*, 363 S.2d at 143; *Gable*, 259 S.2d at 18; Frona M. Powell, *Disclaimers of Implied Warranties in the Sale of New Homes*, 34 Vill. L. Rev. 1123, 1129 (1989).

157. *Marquez-Gonzales v. Perera*, 673 S.2d 502, 503 (Fla. Dist. App. 3d 1990). When drafting leases on behalf of landlords, the Author has found that landlords often desire that an "as is" disclaimer be included in the lease.

158. For a discussion of the only Florida case on this topic, see *infra* notes 171–176.

159. *Supra* nn. 117–143 and accompanying text (discussing the impact of "as is" language on disclaiming *express* warranties in a sale of Florida real property).

160. *Supra* nn. 146–156 and accompanying text (discussing the impact of "as is" language on disclaiming *implied* warranties in a sale of Florida real property).

161. Fla. Stat. §§ 83.40–83.681 (2000); *see generally* John J. Boyle, *The Landlord's Warranty of Habitability: A Plea for Statutory Reform*, 58 Fla. B.J. 509, 511 (Oct. 1984) (providing a historical perspective of the implied warranty of habitability, beginning in 1066 with the Norman Conquest of England).

requirements on a landlord to maintain residential premises.[162] Because the express language of this statutory provision permits the parties to modify some of the landlord's statutory obligations, it seems reasonable to assume that a landlord could disclaim such duties.[163] However, the one Florida case construing this statutory provision of the Florida Residential Landlord and Tenant Act evidenced a strong reluctance to abrogate any of the landlord's statutorily mandated duties without very explicit language in the lease to the contrary.[164] A Florida court following this line of

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162. Section 83.51 reads in part as follows:

83.51 Landlord's obligation to maintain [residential] premises.

(1) The landlord at all times during the tenancy shall:

(a) Comply with the requirements of applicable building, housing, and health codes; or

(b) Where there are no applicable building, housing, or health codes, maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition. However, the landlord shall not be required to maintain a mobile home or other structure owned by the tenant.

The landlord's obligations under this subsection may be altered or modified in writing with respect to a single-family home or duplex.

(2)(a) Unless otherwise agreed in writing, in addition to the requirements of subsection (1), the landlord of a dwelling unit other than a single-family home or duplex shall, at all times during the tenancy, make reasonable provisions for:

1. The extermination of rats, mice, roaches, ants, wood-destroying organisms, and bedbugs.
2. Locks and keys.
3. The clean and safe condition of common areas.
4. Garbage removal and outside receptacles therefor.
5. Functioning facilities for heat during winter, running water, and hot water.

163. *Id.* For example, the last sentence of Section 83.51(1) permits the landlord's obligations to be altered or modified with respect to a single-family home or duplex. *Id.* Additionally, Section 83.51(2)(a) begins by prefacing all of a landlord's requirements with the phrase "[u]nless otherwise agreed in writing." *Id.*

164. *Ray v. Tampa Windridge Assoc.*, 596 S.2d 676, 677–678 (Fla. Dist. App. 2d 1991). In *Ray*, the tenant executed a document entitled "Apartment Security Acknowledgement and Release" that contained exculpatory language in favor of the landlord regarding door locks. *Id.* at 677. The tenant alleged that inadequate locks proximately caused her rape. *Id.* The *Ray* court held that the document signed by the tenant did not relieve the landlord of his duty to make a reasonable provision for locks. *Id.* Additionally, the court held that the type of release signed by the tenant was rendered unenforceable by Section 83.47, which reads in part as follows:

83.47 Prohibited provisions in [residential] rental agreements.

(1) A provision in a rental agreement is void and unenforceable to the extent that it:

(a) Purports to waive or preclude the rights, remedies, or requirements set forth in this part.

(b) Purports to limit or preclude any liability of the landlord to the tenant or

reasoning might easily find an "as is" disclaimer insufficient to alter or modify Florida's statutory warranty of habitability.[165]

Mansur v. Eubanks[166] judicially established a warranty of habitability in Florida residential tenancies.[167] As a caveat to this newly established duty, the *Mansur* court stated that "defects [may be] waived by the tenant. This duty may be modified by agreement of the parties."[168] Similar to its statutory counterpart, the Florida courts have not decided whether an "as is" disclaimer can be a clear "agreement of the parties" and negate the implied warranty of habitability for a residential tenancy.[169]

A Florida commercial tenancy, on the other hand, generally carries no implied warranties.[170] Even in this less restrictive

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of the tenant to the landlord, arising under law.

Fla. Stat. § 83.47.

165. This is analogous to the low probability that a seller in Florida can disclaim all implied warranties in a contract for sale of a new home by use of an "as is" disclaimer. *Supra* nn. 147–156 and accompanying text. Also, the duties imposed by Section 83.51 are prospective, an aspect that "as is" language does not really address. Finally, an "as is" disclaimer could be rendered ineffective if a court were to determine that it was unconscionable. Fla. Stat. § 83.45; *cf. supra* n. 45 (explaining that some out-of-state courts, but no Florida courts, have applied unconscionability principles to an "as is" provision); *Fuentes v. Owen*, 310 S.2d 458, 459 (Fla. Dist. App. 3d 1975) (stating that exculpatory language in a residential lease is not looked upon with favor and must be clear and unequivocal to be effective).

166. 401 S.2d 1328 (Fla. 1981).

167. In overruling the long-standing doctrine of caveat lessee in Florida, the *Mansur* court held that a landlord of residential property "has a duty to reasonably inspect the premises before allowing the tenant to take possession, and to make repairs necessary to transfer a reasonably safe dwelling unit to the tenant." *Id.* at 1329–1330; *see* T. Edward Berger, *The Implied Warranty of Habitability Comes Home*, 21 Stetson L. Rev. 537, 538 (1982) (detailing the holding in *Mansur*).

168. *Mansur*, 401 S.2d at 1330. The concept that a landlord and tenant can modify a landlord's implied warranty obligation also is found in the statutory implied warranties for residential leases. For an analysis of these statutorily implied warranties, see *supra* note 163 and accompanying text.

169. *Supra* n. 159 and accompanying text; *cf. Fair v. Negley*, 390 A.2d 240, 245 (Pa. 1978) (holding that "as is" language is not effective to waive the implied warranty of habitability).

170. The *Mansur* opinion is specifically limited to residential leases. 401 S.2d at 1329–1330. Other Florida courts have refused to expand the scope of *Mansur* to commercial leases. *E.g. Craig v. Gate Mar. Props., Inc.*, 631 S.2d 375, 377 (Fla. Dist. App. 1st 1994) (stating that the doctrine of caveat lessee applies to the lease of commercial real property, except to the extent that the landlord maintains control over the premises);*Veterans Gas Co. v. Gibbs*, 538 S.2d 1325, 1327–1328 (Fla. Dist. App. 1st 1989) (holding that *Mansur* abrogated the common law doctrine of caveat lessee as to residential leases only, not commercial leases, which is also consistent with the organization of Chapter 83 (Florida's Landlord/Tenant statutes), that clearly distinguishes residential tenancies from commercial tenancies); *cf. Olson v. Scholes*, 563 P.2d 1275, 1281 (Wash. App. Div. 1 1977) (holding that no implied warranty of habitability exists in an "as is" commercial lease). Most jurisdictions agree with

context, however, the "as is" language in certain circumstances may have little or no effect. Consider the 1996 Florida case of *Marquez-Gonzalez v. Perera*.[171] In *Perera*, the landlord leased a dilapidated commercial building to the tenant.[172] The tenant specifically agreed to lease the premises "as is."[173] The tenant subsequently discovered that a portion of the premises was an illegal structure built without proper permits.[174] The *Perera* court held that this structural violation was a matter that the landlord, not the tenant, was obligated to correct.[175] In so doing, the *Perera* court essentially disregarded the "as is" disclaimer. If the *Perera* court's disregard of "as is" language in a commercial leasing context is any indication of how other Florida courts may treat an "as is" clause in a lease of realty, "as is" language likely would be insufficient to disclaim implied warranties in Florida residential tenancies.[176]

II. EFFECT OF "AS IS" ON OTHER CLAIMS IN FLORIDA

Aside from making a breach of warranty claim, an aggrieved buyer often sues a seller based on fraud, negligence, or numerous other claims. Part II examines the effect of "as is" language on all these various types of claims.

Florida on this point. Thomas M. Fleming, *Implied Warranty of Fitness or Suitability in Commercial Leases — Modern Status*, 76 A.L.R.4th 928, 933 (1989). However, if the parties enter into a build-to-suit lease whereby the landlord agrees to construct a commercial building for the tenant, an implied warranty arises that the structure will be suitable for lessee's intended use. *Levitz Furniture Co. v. Continental Equities, Inc.*, 411 S.2d 221, 223 (Fla. Dist. App. 3d 1982). In *Levitz*, the court ruled that the tenant had a cause of action against the landlord for breach of implied warranty when the roof over the store, constructed by the landlord, collapsed after one year. *Id.* at 222. Although the *Levitz* court acknowledged that the parties were free to negate or modify this implied warranty, the court also inferred that the landlord's implied warranty of fitness of a completed building was a nondelegable duty. *Id* at 223; *cf. Gaska v. Exxon Corp.*, 558 S.2d at 457, 458 (Fla. Dist. App. 4th 1990) (holding that an "as is" provision does not negate a seller's nondelegable duties).

171. 673 S.2d 502, 502 (Fla. Dist. App. 1990).

172. *Id.* at 503.

173. *Id.* The tenant also agreed to make certain repairs to the structure. *Id.* An "as is" clause is often found in a commercial lease. *See e.g. 3679 Waters Ave. Corp.*, 2000 WL 192134 at *1 (providing an example of an "as is" provision in a commercial lease).

174. *Perera*, 673 S.2d at 503.

175. *Id.*

176. This would involve a somewhat expansive reading of the holding in *Perera*, which arguably is limited to factual circumstances involving an illegal structure built without proper permits. *Id.* The tenant could not have discovered this condition even with a reasonable inspection. *Id.*

A. Effect of "As Is" on Fraud Claims in Florida

Claims of fraud, in addition to claims of breach of warranty, are often made by disgruntled buyers.[177] "As is" language, although often quite effective in deflecting claims of breach of warranty, is not nearly as effective in shielding a seller from claims of fraud.[178] Fraud claims, whether in the context of the sale of goods or real property, are often alleged in the form of either fraudulent misrepresentation or fraudulent nondisclosure.[179]

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177. *E.g. Pressman*, 732 S.2d at 357 (stating that the buyer alleged breach of contract and fraudulent misrepresentation); *David*, 656 S.2d at 953 (stating that the buyer sued the seller for fraud and breach of warranty); *Tinker v. DeMaria Porsche Audi, Inc.*, 459 S.2d 487, 489 (Fla. Dist. App. 3d 1984) (involving a suit for fraud and breach of express and implied warranties). The elements of fraud can be generally stated as follows:

> (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party.

Hillcrest, 727 S.2d at 1055; *Lance v. Wade*, 457 S.2d 1008, 1011 (Fla. 1984). Claims of fraud also differ from claims of breach of warranty in several other respects. First, punitive damages are available. *Lou Bachrodt Chevrolet*, 570 S.2d at 308; *Tinker*, 459 S.2d at 493. An "as is" clause, if nothing else, might help to avoid an award of punitive damages. Additionally, fraud claims differ from warranty claims in that some Florida courts require a plaintiff to prove fraud by clear and convincing evidence. *Lou Bachrodt Chevrolet*, 570 S.2d at 308; *but see In re Interair Servs., Inc.*, 44 B.R. 899, 903 (Bankr. M.D. Fla. 1984) (acknowledging that there is a split of authority in Florida on the appropriate standard of proof and holding that the better view is that only a preponderance of the evidence is required to establish fraud).

178. *David*, 656 S.2d at 953 (holding that fraud is the exception to the general rule that an "as is" disclaimer, combined with a limited warranty, establishes the parameters of the seller's responsibility); *Lou Bachrodt Chevrolet*, 570 S.2d at 307–308 (permitting a claim of fraud to proceed although the buyer's warranty claim was precluded by "as is" language); *cf. Tinker*, 459 S.2d at 491–492 (holding that an otherwise valid warranty disclaimer was ineffective to negate a seller's liability for fraud in the inducement).

179. *E.g. In re Interair*, 44 B.R. at 903 (buyer of used helicopter sued seller for fraudulent and negligent misrepresentation). The court in *In re Interair* described the most common types of fraud, including (1) intentional misrepresentations (and also misrepresentations with no knowledge of truth or falsity); and (2) nondisclosure of material fact when the other party does not have equal knowledge to discover the material information. *Id.* Fraud cases, whether in the context of the sale of goods or realty, typically fall into these two categories of either misrepresentation or nondisclosure. Fraudulent misrepresentation is basic "garden variety" fraud requiring the plaintiff to prove all the elements set forth in *supra* note 177. Fraudulent nondisclosure, on the other hand, is a type of constructive fraud and is normally alleged in conjunction with a seller's failure to disclose known latent material defects based on *Johnson*, 480 S.2d at 628–629. "[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." *Id.* at 629; *see generally* Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, 68 Fla. B.J. 28 (Feb. 1994) (discussing disclosure). There is

1. Fraudulent Misrepresentation and Nondisclosure

A number of Florida courts have considered the effect (or lack thereof) of an "as is" disclaimer on claims of fraudulent misrepresentation and fraudulent nondisclosure.[180] Generally speaking, these Florida decisions are aligned with the majority of other jurisdictions in holding that an "as is" disclaimer will not preclude a buyer's claim of fraud by the seller.[181] For example, in the recent Florida case of *Deluxe Motel, Incorporated v. Patel*,[182] a buyer's claim of fraudulent misrepresentation by the seller was not precluded by a clear and conspicuous "as is" disclaimer in the contract.[183] The court in *Deluxe Motel* disregarded the "as is" language, as well as an integration clause, under the theory that the "fraudulent misrepresentation vitiated every part of the [agreement]."[184] While *Deluxe*

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basically no distinction between a sale of goods and a sale of realty when dissecting fraud claims (compared to warranty claims where the distinction is marked). *Supra* pts. I(A), I(B). This is mainly because fraud under the U.C.C. is governed by principals of common law. Fla. Stat. § 671.103 (2000). Section 671.103 states that "principles of law and equity, including . . . the law relative to . . . fraud [and] misrepresentation . . . shall supplement [the U.C.C.'s] provisions." *Id.*

180. *E.g. Wasser v. Sasoni*, 652 S.2d 411, 412 (Fla. Dist. App. 3d 1995) (involving both fraudulent misrepresentations and nondisclosure); *Lou Bachrodt Chevrolet*, 570 S.2d at 307–308 (involving fraudulent misrepresentation); *Levy v. Creative Constr. Servs. of Broward, Inc.*, 566 S.2d 347, 347 (Fla. Dist. App. 3d 1990) (involving fraudulent nondisclosure).

181. *E.g. Wagner v. Rao*, 885 P.2d 174, 178 (Ariz. App. Div. 2 1994) (holding that a claim of fraud is not precluded by an "as is" clause); *see generally* Tsai, *supra* n. 2, at 482–488; Wozniak, *supra* n. 2, at 336–342 (both discussing "as is" lawsuits in Florida).

182. 727 S.2d 299 (Fla. Dist. App. 5th 1999).

183. *Id.* at 301. *Deluxe Motel* involved the purchase and sale of a motel building and related business operation. *Id.* at 299. The "as is" provision also contained other extensive disclaimers. *Id.* at 300. The entire clause reads as follows:

> BUYER AGREES THAT HE IS PURCHASING THE PROPERTY, REAL AND PERSONAL, IN ITS AS-IS CONDITION, AND THAT ALL WARRANTIES OF ANY NATURE WITH REGARD TO THE PHYSICAL CONDITION OF THE PROPERTY, WHETHER ORAL OR WRITTEN, EXPRESSED OR IMPLIED, AND WHETHER OF HABITABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OF ANY OTHER NATURE WHATSOEVER, INCLUDING BUT NOT LIMITED TO ANY EXPRESSED OR IMPLIED WARRANTIES AGAINST CONDITIONS NOT READILY APPARENT, ARE HEREBY WAIVED BY BUYER AND DISCLAIMED BY SELLER.

Id. (emphasis omitted).

184. *Id.* at 301. While the *Deluxe Motel* court discounted the effect of the "as is" clause as well as the integration clause, the court's opinion focuses on the fact that an integration clause will not bar a claim of fraud. For the text of the integration clause, see *infra* note 303. The *Deluxe Motel* court based its decision on the rationale of *Oceanic Villas, Inc. v. Godson*, 4 S.2d 689 (Fla. 1941), a case involving a ninety-nine-year lease of property "in its present condition." 727 S.2d at 301. However, the court in *Deluxe Motel* did note that the *Oceanic*

Motel demonstrates that a seller cannot depend on "as is" language to be an effective shield against fraud claims, a close reading of a number of other Florida cases suggests that "as is" language might at least parry the main thrust of a buyer's claim of fraud.

The case of *Lou Bachrodt Chevrolet, Incorporated v. Savage*[185] is instructive on this point. The buyer in *Lou Bachrodt Chevrolet* purchased a used Porsche "as is."[186] The buyer, claiming the vehicle's condition was not as it was represented to be, brought suit on grounds of breach of contract and fraudulent inducement.[187] The *Lou Bachrodt Chevrolet* court stated that "as is" language, that presupposes repairs are needed, is "usually effective in negating a seller's liability for fraud in the inducement."[188] The *Lou Bachrodt Chevrolet* court nevertheless allowed the buyer's fraud claim to proceed because the seller's representations went beyond "puffing."[189] This end result casts doubt on the *Lou Bachrodt Chevrolet* court's general proposition that "as is" disclaimers will usually preclude a buyer's fraud claim.[190]

Villas case seemed to leave open the possibility that fraudulent misrepresentations can be waived. *Id.* at 301; *Coble v. Lekanidis*, 372 S.2d 506, 508–509 (Fla. Dist. App. 1st 1979) (stating that the buyer waived his rights by purchasing the property "as is"). For a discussion of *Coble*, consult *infra* Part II(C)(3). Although the parol evidence rule often operates to limit a buyer's ability to prove oral representations with extrinsic evidence, it is not applicable in a case of fraud. *Lou Bachrodt Chevrolet*, 570 S.2d at 308 (holding that an "as is" disclaimer did not prevent the introduction of parol evidence to prove fraudulent inducement). For a discussion of the parol evidence rule's effect on a lawyer's ability to prove oral representations with extrinsic evidence, see *Tinker*, 459 S.2d at 491–492 (holding that the fraud exception to the parol evidence rule was applicable despite the existence of a general disclaimer).

185. 570 S.2d 306, 306 (Fla. Dist. App. 4th 1990).

186. *Id.* at 307.

187. *Id.* The buyer also sued for violation of the Consumer Protection Act, Florida Statutes, Chapter 501. *Id.*

188. *Id.*

189. *Id.* at 308. It is very difficult to determine whether a seller's statements are merely puffing, an express warranty, or rise to the level of fraudulent misrepresentation. Puffing, which does not create a warranty, is an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods. Fla. Stat. § 672.313(2); *David*, 656 S.2d at 953 n. 1 (citing *Carter Hawley Hale Stores, Inc. v. Conley*, 372 S.2d 965, 969 (Fla. Dist. App. 3d 1979), in stating that "certain affirmations of seller amount only to 'puffing' and do not give rise to warranties"); *Lou Bachrodt Chevrolet*, 570 S.2d at 307–308 (stating that the seller's representations went beyond "puffing," thereby permitting the buyer to proceed in fraud, although the contract warranty claim was prevented by an "as is" disclaimer). "Puffing" can also occur outside the context of the sale of goods. *Wasser*, 652 S.2d at 412 (determining that in the sale of a commercial building, a seller's "puffing," or statements of opinion, did not constitute fraudulent misrepresentations).

190. The *Lou Bachrodt Chevrolet* court seems to be saying, in essence, that if the seller's statements were merely "puffing," no fraud or warranty claim could exist, but if the seller's statements went beyond "puffing," a fraud claim could exist (although the "as is" language

Another Florida decision indicated that "as is" disclaimers are effective against claims of fraud. In *Wasser v. Sasoni*,[191] a buyer purchased a sixty-seven year-old apartment building.[192] The contract, in addition to containing standard inspection and integration clauses, clearly stated that the apartment building was being sold "as is."[193] After inspections revealed structural problems, the buyer sued the seller on grounds of fraudulent misrepresentation as well as fraudulent nondisclosure.[194] The *Wasser* court, in dismissing the buyer's claims, stated that the buyer "agreed to the 'as is' and integration clauses, which are recognized as *valid defenses to claims of fraud.*"[195] The precedential weight of this broad-brush generalization regarding the effect of "as is" provisions on fraud may be somewhat limited because it appears to be dicta.[196] However, the *Wasser* court indicated that the "as is" disclaimer was important to its decision by ending its opinion as follows:

> In conclusion, a sophisticated purchaser of commercial property *who agreed to an "as is" purchase contract*, had ample opportunity to conduct inspections, and could have discovered

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would still operate to preclude the breach of warranty claim). 570 S.2d at 307–308. An "as is" disclaimer might, nevertheless, influence a court's decision to characterize a seller's statement as "puffing." *David*, 656 S.2d at 953 (determining that a buyer who purchased a used sports car "as is" had no claim for fraud because the seller's statements were only "puffing" and not fraudulent misrepresentations).

191. 652 S.2d 411, 412 (Fla. Dist. App. 3d 1995).

192. *Id.* at 412.

193. *Id.*

194. *Id.* The distinction between fraudulent misrepresentation and fraudulent nondisclosure is discussed at *supra* note 179.

195. *Id.* at 413 (emphasis added).

196. *Id.* The *Wasser* court's statement that an "as is" provision is a valid defense to claims of fraud seems to be dicta, because the quoted passage continues, "particularly where, as in the instant case, there are no allegations or evidence that the contract itself was induced by fraud." *Id.* In other words, it appears that the buyer's claims would have failed even without the "as is" language. The buyer failed to plead actionable specific misrepresentation of fact. *Id.* at 412. Also, fraudulent nondisclosure in the sale of commercial property is not actionable in Florida. *Id.* According to the *Wasser* court, *Johnson* abolished the doctrine of caveat emptor in Florida *residential* real estate transactions, but did not extend a duty to disclose latent material defects in Florida *commercial* real estate transactions. *Id.*; *but see Gilchrist*, 696 S.2d at 339 (reaffirming *Johnson*). Because *Gilchrist* involved a commercial contract, the Florida Supreme Court reopened the question of whether *Johnson* applied to commercial transactions when it reaffirmed its holding in *Johnson* (which involved a residential contract), and further stated, "The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." *Id.* (citing *Johnson*, 480 S.2d at 628). However, no Florida court has held that disclosure applies to a commercial transaction. *Casey v. Cohan*, 740 S.2d 59, 62 (Fla. Dist. App. 4th 1999).

> an alleged defect through the exercise of ordinary diligence, may be disgruntled, but *does not have a cause of action for fraud.*[197]

In sharp contrast to *Bachrodt* and *Wasser*, two other Florida courts flatly rejected the notion that an "as is" disclaimer vitiates a buyer's cause of action for fraud. Both cases involved fraudulent nondisclosure by sellers of residential realty for failure to disclose latent material defects as required by the landmark Florida Supreme Court case *Johnson v. Davis*.[198] In *Levy v. Creative Construction Services of Broward, Incorporated*,[199] the Third District Court of Appeal concluded its terse per curiam decision as follows:

> [W]e conclude that the defendant Gail Coba, as the seller of the subject home below, is not absolved of the duty imposed upon her by *Johnson* to disclose to the Levys, as the buyers of the said home, known defects in the home [which materially affect the value of the home and were not readily observable or known to the buyers] *merely because the contract for the sale of the home was an "as is" contract; we discern no "as is" contractual exception to the duty imposed on the seller herein by the Johnson decision.*[200]

Although the *Levy* court failed to cite any authority for its holding that an "as is" disclaimer does not absolve a seller of the duty to disclose latent material defects under *Johnson*, the *Levy* court could have cited *Rayner v. Wise Realty Company of Tallahassee*[201] for this proposition.

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197. *Wasser*, 652 S.2d at 413 (emphasis added). Although *Wasser* involved a sophisticated purchaser of commercial property, this line of reasoning also may be applicable in the context of an unsophisticated purchaser of residential property. For a discussion involving purchasers of residential property, see *infra* Part II(A)(2) and the cases discussed therein.

198. 480 S.2d 625, 628 (Fla. 1985). For more discussion of *Johnson*, see *supra* notes 179 and 196.

199. 566 S.2d 347 (Fla. Dist. App. 3d 1990).

200. *Id.* (emphasis added). This statement might be questionable, because *Johnson* did not involve a disclaimer, and thus the *Johnson* court had no reason to address whether the duty to disclose could be disclaimed. Therefore, it is not surprising that the *Levy* court could not discern an "as is" exception in *Johnson*.

201. 504 S.2d 1361 (Fla. Dist. App. 1st 1987). Note that *Rayner* was decided only two years after *Johnson*.

In *Rayner*, the sellers listed a home with a listing broker, who in turn procured a buyer.[202] The buyer contracted to purchase the house in "as is" condition for substantially below the sellers' asking price.[203] The first termite inspection obtained by the sellers and the broker indicated visible termite damage and possible infestation.[204] The sellers instructed the broker to obtain a second opinion, because they were selling the house "as is" and could not invest any more money in the property.[205] The broker obtained a more favorable "termite clearance letter" from another termite inspection company, and this letter was the only termite information provided to the buyer at closing.[206] The buyer subsequently discovered extensive termite infestation and sued the sellers and the broker for fraudulent nondisclosure, alleging failure to disclose known latent defects under the authority of *Johnson*.[207] The sellers and the broker contended that they did not have a duty to advise the buyer of the termite damage, because the buyer voluntarily contracted away the sellers' duty of disclosure by agreeing to the "as is" provision in the contract.[208] The *Rayner* court rejected the sellers' contention by noting "that generally, an 'as is' clause in a contract for sale of real property cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent nondisclosure."[209] While *Rayner* and *Levy* demonstrate that a seller cannot solely rely on an "as is" disclaimer to bar a buyer's claim of fraudulent nondisclosure, an issue still remains: To what extent will "as is" language negatively impact a buyer's ability to prove fraud, especially with regard to the element of reliance?[210]

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202. *Id.* Wise Realty (and its agent, Walter,) procured the buyer through a cooperating broker. *Id.*

203. *Id.* at 1362–1364. The "as is" provision was included as a special typewritten clause. *Id.* at 1362. For a discussion regarding the relationship between "as is" provisions and other contractual provisions, see *infra* Part III(A)(1).

204. *Rayner*, 504 S.2d at 1362.

205. *Id.* at 1363.

206. *Id.* The "termite clearance letter," according to the testimony of the inspector for the second termite inspection company, was only for the purpose of determining whether active termite infestation was present at the time of inspection and was not intended to provide information about structural damage caused by a previous infestation. *Id.*

207. *Id.* at 1363–1364.

208. *Id.* at 1364.

209. *Id.* The *Rayner* court cited as authority for this proposition the earlier version of the Wozniak ALR annotation cited at *supra* note 2.

210. See the fourth element of fraud in *Lance*, "reliance on the [false] representation to the injury of the other party." 457 S.2d at 1011.

2. Reliance and the "One-Eyed Horse"

A buyer must justifiably rely upon a seller's misrepresentation for the buyer to prevail in a claim of fraud.[211] A number of Florida courts have held generally that a buyer's reliance on a seller's false statements is not justified in light of a clear and unambiguous disclaimer.[212] A seller might cite these decisions to support the argument that an "as is" disclaimer should likewise have the effect of negating the reliance element of a buyer's fraud claim.[213] However, it is questionable whether a Florida court would hold that a general "as is" disclaimer, on its own, is enough of a clear and unambiguous disclaimer to negate a buyer's justifiable reliance on the seller's false statements.[214] On the other hand, a number of courts applying Florida law have indicated that an "as is" disclaimer may contribute to a buyer's inability to establish the element of justifiable reliance in a fraud claim.[215]

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211. *Hillcrest*, 727 S.2d at 1057.

212. *E.g. Velasquez v. College*, 738 S.2d 1007, 1007 (Fla. Dist. App. 3d 1999) (affirming final summary judgment based on the plaintiff's unjustified reliance); *FDIC v. High Tech Med. Sys., Inc.*, 574 S.2d 1121, 1123 (Fla. Dist. App. 4th 1991) (explaining that an express disclaimer contained in an accounting firm report negated justifiable reliance necessary to sustain claims of fraudulent misrepresentation and negligent misrepresentation).

213. A seller's argument would typically be as follows: (1) the "as is" disclaimer put the buyer on notice that the property had defects (*Lou Bachrodt Chevrolet*, 570 S.2d at 307, stating that "as is" language presupposes needed repairs) and (2) the buyer's reliance on the seller's statements was therefore unjustified.

214. One major hurdle for the seller is that the buyer's negligence in failing to investigate the veracity of the seller's representations is typically not a bar to the buyer's fraud claim. *Besett v. Basnett*, 389 S.2d 995, 997 (Fla. 1980); *but see Wasser*, 652 S.2d at 412–413 (indicating the rule set forth in *Besett* is an exception to the general rule that a misrepresentation is not actionable where the truth might have been discovered by the exercise of ordinary diligence). Of course, the argument would not have any merit in a claim based on the seller's nondisclosure, because the reliance essentially is implied by the courts (a buyer cannot actually rely on nondisclosure). The exception to this is the "one-eyed horse," discussed *infra* at notes 223–225 and accompanying text. For out-of-state authority that "as is" language does not preclude the buyer's justifiable reliance, see *Reilly v. Mosley*, 301 S.E.2d 649 (Ga. App. 1983) (demonstrating that the issue was not whether the "as is" language should have initiated further inquiry into statements concerning the accuracy of a vehicle's odometer and prior ownership, but whether in the exercise of common prudence and diligence the buyer was justified in relying on oral misrepresentations).

215. *In re Interair*, 44 B.R. at 904; *cf. Carrero v. Porterfield*, 752 S.2d at 699–700 (referring to the issue of reasonable reliance). See U.C.C. Section 2-316, comment 5, pertaining to "as is" disclaimers, among other disclaimer issues, which states in part "language of disclaimer may raise issue of fact as to whether reliance by the buyer occurred."

"As is" language, in addition to possibly eroding a buyer's justifiable reliance, may also influence a court to consider the defects in a home to be patent, or at least capable of discovery.[216] The net effect of this type of judicial determination would be to eliminate a seller's duty to disclose defects under *Johnson*, thereby effectively torpedoing the buyer's fraud claim.[217] In a recent Third District Court of Appeal opinion, an "as is" disclaimer seemed to influence the court's decision not only to dismiss a buyer's breach of contract claim, but also to reject her claim of fraud.[218] In *Pressman*, the buyer purchased a residence "as is."[219] The buyer closed on the purchase of the house despite several inspection reports that indicated problems with the house and related improvements.[220] The buyer then sued the seller, alleging failure to disclose latent defects as required by *Johnson*.[221] The *Pressman* court held that *Johnson* did not apply, and that reliance is unjustified, when a buyer purchases a house "as is" and fails to make a cursory examination of the property which would have revealed the defect.[222] The home in this case, the court observed, was the functional equivalent of a "one-eyed horse."[223] The *Pressman* court concluded that the buyer of this house could be likened to a buyer of a one-eyed horse.[224] Just like a buyer of a one-eyed horse, the buyer in *Pressman* had no claim

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216. *Pressman*, 732 S.2d at 361.

217. 480 S.2d at 628.

218. *Pressman*, 732 S.2d at 361. See *supra* notes 117–121 and accompanying text with regard to "as is" language precluding the buyer's breach of contract claim in *Pressman*.

219. 732 S.2d at 357–358. The *Pressman* court seemed to place a high degree of emphasis on the fact that the buyer ignored warnings contained in various inspection reports. *Id.* at 361.

220. *Id.* at 358–359.

221. The buyer's actual claims of breach of contract and fraudulent misrepresentation were closely related and, when combined, essentially sounded in nondisclosure under *Johnson*. Paragraph "W" of the contract, labeled "WARRANTIES," stated that "seller warrants that there are no facts known to seller . . . which are not readily observable by buyer or which have not been disclosed to buyer." *Id.* at 358. This contract most likely was the FAR/BAR contract (paragraph "W" of the FAR/BAR contract is identical to the quoted language). Fla. Assn. of Realtors & Fla. B., *supra* n. 119. The wording of paragraph "W" is essentially a reiteration of a seller's duty to disclose material defects as dictated by *Johnson*. 480 S.2d at 628. The buyer also claimed that the seller expressly misrepresented that an adjacent nonconforming structure would soon be removed and that the home could be repaired for $100,000. *Pressman*, 732 S.2d at 359–361. The *Pressman* court did not consider either representation to be fraudulent. *Id.*; *but see Newbern v. Mansbach*, 2001 WL 10239 (Fla. Dist. App. 1st Jan. 5, 2001) (criticizing *Pressman* with regard to the portion of the opinion dealing with off-site structure).

222. 732 S.2d at 360.

223. *Id.* (citing *Restatement (Second) of Torts* § 541 cmt. a).

224. *Id.*

under *Johnson* for fraudulent nondisclosure, because the problems with the purchased property were easily discoverable.[225] A primary reason stated by the *Pressman* court for its conclusion that the buyer had no claim for fraudulent nondisclosure was that the buyer "closed on a contract that featured a prominent 'as is' clause . . . while possessing inspections that patently warned of latent defects."[226]

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225. *Id.* at 360–361. The *Pressman* court cited one of its prior decisions as support.

> "A buyer must take reasonable steps to ascertain the material facts relating to the property and to discover them--if, of course, they are reasonably ascertainable." *Nelson v. Wiggs* (concluding that the seller had no duty to disclose seasonal flooding because the information that the property is subject to seasonal flooding was available to the buyers through diligent attention).

Id. at 361 (citation omitted). Arguably, the standard of disclosure under *Johnson* has evolved from an obligation to disclose material, latent defects to an obligation to disclose material, latent defects that are not reasonably discoverable.

226. *Id.* The *Pressman* court further stated that the buyer "freely elected to close on the ["as is"] purchase contract and is now bound by its terms." *Id.* In addition to the foregoing, the *Pressman* court held that the buyer's claim of fraudulent inducement was barred by the economic loss rule. *Id.* at 362; *but see Wassall v. Payne*, 682 S.2d 678, 681 (Fla. Dist. App. 1st 1996) (buyer's action for fraudulent misrepresentation of a property's propensity to flood was not barred by the economic loss rule). The economic loss rule was summarized by the *Wassall* court to mean that "absent a tort independent of breach of contract, remedy for economic loss lies [only] in contract law." *Id.* (quoting *Monco Enter., Inc. v. Ziebart Corp.*, 673 S.2d 491, 492 (Fla. Dist. App. 1st 1996)). This is especially true when one "has failed to bargain for adequate contractual remedies," such as with an "as is" contract. *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 S.2d 628, 630 (Fla. 1995). While a discussion of the economic loss rule is beyond the scope of this Article, it is sufficient to say that Florida courts are somewhat all over the page as to the exact interpretation and application of the economic loss rule. For recent pronouncements of the Florida Supreme Court on this topic, see *Comptech International, Incorporated v. Milan Commerce Park, Limited*, 753 S.2d 1219 (Fla. 1999) and *Moransais v. Heathman*, 744 S.2d 973 (Fla. 1999). For further reading, see Steven B. Lesser, *Chipping Away at the Economic Loss Rule: The Supreme Court Decides Moransais v. Heathman*, 73 Fla. B.J. 22 (Oct. 1999); Susan E. Trench, *The Economic Loss Rule and Fraudulent Inducement Claims*, 74 Fla. B.J. 14 (Dec. 2000); Raymond W. Valori, *Continued Revision of the Economic Loss Rule: Statutory Causes of Action Not Barred, Comptech International, Incorporated v. Milan Commerce Park, Limited*, 74 Fla. B.J. 81 (Apr. 2000); Charles R. Walker, Student Author, *Moransais v. Heathman and the Florida Economic Loss Rule: Attempting to Leash the Tort-Eating Monster*, 52 Fla. L. Rev. 769 (2000). Interestingly, the "as is" disclaimer in *Pressman* indirectly precluded the buyer's claim of fraud in the following sense: (1) the buyer's claims of fraud were dismissed, because the defects were easily discoverable and the claims were subsumed within the breach of contract claim by the economic loss rule and (2) the remaining breach of contract claim was eliminated by the "as is" disclaimer. 732 S.2d at 362. Dismissal of the breach of contract claim is discussed at *supra* notes 117–121 and accompanying text. A sale of goods can be similarly impacted by "as is" language. *David*, 656 S.2d at 953 (involving the sale of an "as is" sports car, the Third District Court of Appeal held that "a misrepresentation is not actionable where its truth might have been discoverable by the exercise of ordinary diligence").

Carrero v. Porterfield[227] indirectly expanded the scope of *Pressman* even though it reported only a dissenting opinion in an otherwise per curiam affirmed decision.[228] *Carrero*, like *Pressman*, involved an "as is" contract.[229] The cases differ, however, in that the buyer in *Pressman* ignored inspection reports of latent defects, while the buyers in *Carrero* contractually waived their right to perform inspections.[230] This waiver of inspections, coupled with the "as is" disclaimer, seems to have been critical to the buyers' defeat at the complaint stage. The *Carrero* trial court, relying on *Pressman*, dismissed the buyers' complaint alleging nondisclosure of latent defects for failure to state a cause of action under *Johnson* for fraudulent nondisclosure.[231]

Carrero arguably expands the scope of *Pressman* by creating a presumption that defects are discoverable if the contract contains an "as is" disclosure and a waiver of inspections.[232] Moreover, this presumption of discoverability seems to be conclusive because the buyers' complaint in *Carrero*, although alleging nondisclosure of latent defects, was dismissed with prejudice for failure to state a cause of action for fraudulent nondisclosure.[233] The dissenting judge in *Carrero* questioned the majority's (unwritten) position that an "as is" disclaimer, together with a waiver of inspections, negates the

227. 752 S.2d 699 (Fla. Dist. App. 2d 2000).

228. *Id.* The expansion of *Pressman* (discussed at *infra* notes 232 and 233 and accompanying text) is "indirect" in the sense that the majority affirmed the trial court's decision per curiam. *Carrero*, 752 S.2d at 699. The majority's position is therefore set forth only in the dissenting opinion. *Id.* at 699–700 (Altenbernd, C.J., dissenting). Although this somewhat unusual structure undercuts the precedential value of the case, the disposition is nonetheless indicative of how trial and appellate judges may treat similar circumstances involving "as is" disclaimers.

229. *Carrero*, 752 S.2d at 699; *Pressman*, 732 S.2d at 357–358, 361.

230. *Carrero*, 752 S.2d at 699; *Pressman*, 732 S.2d at 358–359.

231. *Carrero*, 752 S.2d at 699. For a discussion of the result that was affirmed per curiam on appeal, see *supra* note 228 and accompanying text.

232. If defects are reasonably discoverable, a claimant will have a more difficult time prevailing under a *Johnson* suit for fraudulent nondisclosure. *Supra* n. 225 (discussing the findings in *Pressman* and *Johnson*). This seems to be especially true if the property was sold "as is," as demonstrated by *Pressman*.

233. 752 S.2d at 699. Some of the latent defects alleged by the buyer were as follows: (a) termite damage hidden by paint, (b) septic tank failure, (c) repair to the septic system without permits, and (d) plugged pool deck drains. Br. of Appellant at 2, *Carrero*, 752 S.2d 699. Although the buyers' complaint was dismissed without leave to amend, the buyers essentially agreed to this result rather than amending their complaint. Br. of Appellee at 1, *Carrero*, 752 S.2d 699.

reliance element of a fraud claim.[234] The dissenting opinion, by delineating the majority's position, effectively expanded the impact an "as is" disclosure may have on fraud claims.[235] Although the *Carrero* and *Pressman* decisions do not go quite so far as to hold that an "as is" disclaimer puts a buyer on inquiry notice of potential fraud, the opinions indicate a growing tendency of Florida courts to consider "as is" disclaimers as limiting fraud claims under certain circumstances.[236] This tendency is even more pronounced when the buyer's claim sounds in negligence.

B. Effect of "As Is" on Negligence Claims in Florida

A disgruntled buyer may allege negligence on the part of a seller in lieu of, or in addition to, fraud.[237] The impact of an "as is" disclaimer on a claim of negligence is often quite different than its impact on a claim of fraud. This difference is mainly because the

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234. Judge Altenbernd, the Acting Chief Judge, explained,

> Although I agree that the Carreros could and should have bargained for better warranties and inspection rights, I do not believe that *Pressman* allows a *Johnson* cause of action to be dismissed for failure to state a cause of action when the complaint alleges latent defects.
>
> It may be that the majority is correct and the law should bar a claim in fraud when the buyer waives contractual warranties. I simply do not believe this is the current state of the law of intentional fraud concerning the issue of reasonable reliance.

Carrero, 752 S.2d at 699–700 (Altenbernd, C.J., dissenting). See *supra* notes 176 and 210 regarding the reliance element of fraud.

235. In other words, without Acting Chief Judge Altenbernd writing a dissenting opinion, the result of the case (the dismissal of the buyers' *Johnson* complaint because of a waiver of inspection under an "as is" contract) would not be known to the legal community except to the lawyers and judges who were involved with the case.

236. Circumstances that may cause a court considering an "as is" contract to limit fraud claims (by, for example, characterizing defects as patent instead of latent) would be as follows: (a) when a buyer elects not to follow up on inspections which indicate potential problems; or worse yet, (b) when a buyer contracts away the right to make an inspection when an inspection would have revealed the problem. *Carrero*, 752 S.2d at 699; *Pressman*, 732 S.2d at 358–359. Although not addressed by the facts in either *Pressman* or *Carrero*, another scenario might involve a buyer electing to forego an inspection despite the fact that the buyer had a contractual right to make an inspection. Even if a buyer does make an inspection that does not reveal a latent defect, an "as is" contract might help deflect a claim of fraudulent nondisclosure if the contract also stated in broad terms that the property does (or may) contain material defects. Conceivably a contract could also state that the buyer waives the seller's obligation to disclose material, latent defects under *Johnson*.

237. *E.g. Wassall*, 682 S.2d at 679 (a buyer of real property sued a seller for fraudulent misrepresentation, negligent misrepresentation, and negligence per se); *In re Interair*, 44 B.R. at 902–903 (a buyer of a used helicopter sued the seller for fraudulent and negligent misrepresentation); *cf. FDIC*, 574 S.2d at 1122 (an accounting firm was sued for misrepresentation, negligence, and breach of contract).

elements of negligence, although in some respects similar to fraud, are quite different in other respects.[238] They are similar, for example, in that justifiable reliance is a necessary element to a claim of fraudulent misrepresentation as well as a claim of negligent misrepresentation.[239] In contradistinction, a buyer's own negligence (which might be implicated by an "as is" disclaimer), although not usually relevant to a buyer's fraud claim, could severely curtail a buyer's negligence claim.[240] An "as is" disclaimer can even affect the threshold duty of care element that is necessary to prove a claim of negligence.[241]

1. Duty of Care

Before a buyer can claim that a seller is liable in negligence, the buyer must prove that the seller had a duty of care to the buyer.[242] Assuming some duty does exist, the actual scope of the duty may vary depending on what a reasonable person would do in a similar situation.[243] The existence of an "as is" disclaimer might affect the reasonableness standard to the extent of significantly reducing, or even eliminating, the duty of care a seller owes to a buyer.[244]

The only Florida court to address how an "as is" disclaimer impacts a seller's duty of care is *Knipp*.[245] In *Knipp*, the buyer purchased a customized, three-wheeled motorcycle "as is."[246] The buyer was injured severely shortly after purchasing the vehicle and sued the seller for breach of warranties and negligence.[247] The buyer in *Knipp* alleged that the seller's negligent inspection of the trike

238. The elements of negligence can be summarized as follows: "(1) the defendant had a duty to protect the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injuries and resulting damages." *Cooper Hotel Servs., Inc. v. MacFarland*, 662 S.2d 710, 712 (Fla. Dist. App. 2d 1995). The elements of fraud are set forth in *Lance*, 457 S.2d at 1011.

239. *In re Interair*, 44 B.R. at 903.

240. *Gilchrist*, 696 S.2d at 337–339.

241. *Knipp*, 351 S.2d at 1085–1086.

242. *City of Miami Beach v. Dickerman Overseas Contracting Co.*, 659 S.2d 1106, 1107 (Fla. Dist. App. 3d 1995).

243. *Foster v. U.S.*, 858 F. Supp. 1157 (M.D. Fla. 1994); *Sprick v. N. Shore Hosp., Inc.*, 121 S.2d 682, 684 (Fla. Dist. App. 3d 1960).

244. *Knipp*, 351 S.2d at 1086.

245. *Id.* at 1085–1086.

246. *Id.* at 1083.

247. *Id.* With regard to the buyer's breach of warranty claim, the *Knipp* court held that the intent of the parties was relevant in determining whether the "as is" disclaimer negated any implied warranty. *Id.* at 1085.

failed to reveal a defective weld in the rear axle.[248] The seller contended that the "as is" disclaimer in the bill of sale relieved the seller of any duty of care to the buyer.[249] The *Knipp* court initially stated that an "as is" disclaimer does not necessarily preclude a seller's liability for negligence.[250] However, the court in *Knipp* continued by describing how an "as is" disclaimer can limit a seller's potential duty of care:

> [T]he "as is" disclaimer serves to add another dimension to the negligence claim, for its effect on the evidence presented may be substantial, *especially on the question of whether or to what degree the defendant owed a duty to the plaintiff.* The understanding of the parties as to the extent of the disclaimer is particularly relevant to a jury's determination of what was reasonable under the circumstances. There remain disputed facts as to the degree of care exercised by [the sellers] and the degree of care required of them.[251]

Although *Knipp* involved a claim of negligent inspection, a buyer of "as is" property often sues the seller alleging negligent misrepresentation with respect to the condition of the property.[252]

2. Negligent Misrepresentation

Florida courts have for some time recognized negligent misrepresentation as a valid cause of action.[253] In a purchase and sale context, a buyer sometimes alleges that the seller negligently misrepresented some relevant information regarding the property. This situation occurred in a recent Florida Supreme Court decision,

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248. *Id.* at 1083, 1085.

249. *Id.* at 1085. Seller also claimed that he had checked the trike. *Id.*

250. *Id.* at 1085–1086.

251. *Id.* at 1086 (emphasis added) (citation omitted).

252. *In re Interair*, 44 B.R. at 902–903 (the buyer of a used helicopter sued the seller alleging fraudulent and negligent misrepresentations).

253. *Fla. First Bank, N.A. v. Max Mitchell & Co.*, 558 S.2d 9, 14 (Fla. 1990) (The Florida Supreme Court, for the first time, recognized a cause of action for negligent misrepresentation, adopting the rationale of *Restatement (Second) of Torts* Section 552.). Claims of negligent misrepresentation often involve suits against parties not in privity with the plaintiff and such claims are frequently limited due to Florida's economic loss rule. *E.g. Fla. Bldg. Inspection Servs., Inc. v. Arnold Corp.*, 660 S.2d 730, 732–733 (Fla. Dist. App. 3d 1995) (explaining that under Florida's economic loss rule, a roofing company did not have a duty to a sublessee because it was not in privity with the sublessee).

Gilchrist.[254] In *Gilchrist*, the seller of a 22,000 plus acre tract of land provided the buyer with an appraisal that contained inaccurate zoning information.[255] The buyer then sued the seller claiming negligent misrepresentation.[256] The *Gilchrist* court adopted Section 552 of the *Restatement (Second) of Torts*' portion on negligent misrepresentation[257] and noted that a buyer's claim of negligent misrepresentation can be impacted negatively in two distinct ways. First, the buyer may have difficulty proving justifiable reliance if an investigation would have revealed the falsity of the negligently transmitted information.[258] Second, because negligent misrepresentation is a form of negligence, a buyer's own negligence may reduce the extent of the seller's liability under the doctrine of comparative fault.[259] The *Gilchrist* court held that the instant seller could legitimately utilize the concept of comparative negligence to reduce its liability, because the buyer failed to take reasonable steps to protect itself under the circumstances.[260]

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254. 696 S.2d at 336.

255. *Id.* The appraisal indicated that the property was zoned "agricultural," when in fact the vast majority of the property was zoned "preservation," a classification that prohibited residential use. *Id.*

256. *Id.*

257. *Restatement (Second) of Torts* Section 552 reads in part as follows:

> § 552. Information Negligently Supplied for the Guidance of Others.
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss *caused to them by their justifiable reliance upon the information*, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(emphasis added). For a further discussion on how comparative negligence principles relate to negligent misrepresentation claims, see Sonja Larsen, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation*, 22 A.L.R.5th 464, 471 (1994).

258. *Gilchrist*, 696 S.2d at 337, 339. The *Gilchrist* court distinguished the instant facts involving a claim of negligent misrepresentation from a claim of fraudulent misrepresentation in which a buyer does not usually need to investigate the falsity of the misrepresentation. *Id.* at 336; *Besett*, 389 S.2d at 998.

259. *Gilchrist*, 696 S.2d at 337–339. The doctrine of comparative negligence is codified in Section 768.81, which reads in part as follows:

> § 768.81. Comparative fault.
>
> (2) EFFECT OF CONTRIBUTORY FAULT. – any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Fla. Stat. § 768.81 (2000).

260. 696 S.2d at 339 (citing *Restatement (Second) of Torts* § 552A, entitled "Contributory Negligence"). As a practical matter, the best way for a seller to avoid liability altogether under *Gilchrist* is to insert an "as is"-type disclaimer with regard to any information the seller may

A seller of "as is" property might successfully defend against a claim of negligent misrepresentation by arguing that the "as is" language precluded the buyer's justifiable reliance on the inaccurate information supplied by the seller.[261] Alternatively, a seller could attempt to lessen the liability for negligent misrepresentation by arguing that the buyer, by agreeing to take the property "as is," was on notice that the property might have a problem. Therefore, the buyer should bear some responsibility under the doctrine of comparative fault for failing to verify the alleged misrepresentation.[262] Taken a step further, the seller could even argue that the buyer was at fault by failing to protect his own interest when he agreed to an "as is" sale in exchange for a lower price.[263] Although Florida decisions shed little light on the issue of how an "as is" disclaimer affects a claim of negligent misrepresentation,[264] Florida

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transmit to the buyer that was originally generated by a third party and also to have the buyer expressly acknowledge responsibility for verifying information.

261. *In re Interair*, 44 B.R. at 902–903 (explaining that a buyer's claim of negligent misrepresentation, in the context of purchasing a used helicopter, was precluded due to the buyer's failure to establish reliance because the sale was absolutely "as is"); *see FDIC*, 574 S.2d at 1123 (finding that there was no justifiable reliance in a claim of negligent misrepresentation in light of an express and unambiguous disclaimer); *cf. Fla. Bldg.*, 660 S.2d at 733–734 (Nesbitt, J., concurring) (buyer on discoverable inquiry demonstrates that there is no justifiable reliance to support a claim of negligent misrepresentation); *Cutler v. Bd. of Regents*, 459 S.2d 413 (Fla. Dist. App. 1st 1984) (demonstrating that reliance is a necessary element for a claim of negligent misrepresentation under *Restatement (Second) of Torts* Section 552). However, note that exculpatory provisions that attempt to release a party from his own negligence are strictly construed. *Zinz v. Concordia Props., Inc.*, 694 S.2d 120 (Fla. Dist. App. 4th 1997).

262. *Gilchrist*, 696 S.2d at 339.

263. *Palau Intl. Traders, Inc. v. Narcam Aircraft, Inc.*, 653 S.2d 412, 416 (Fla. Dist. App. 3d 1995) (a buyer who purchased an aircraft "as is" and later claimed negligent misrepresentation could have protected his interests by not accepting the aircraft "as is" and thereby foregoing warranty protection to obtain a lower price).

264. The fact that the misrepresentation was negligent rather than fraudulent should weigh heavily in the seller's favor. *Restatement (Second) of Torts*, Section 552 comment a bears this out.

> When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences. The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions.

E.g. David, 656 S.2d at 953 (In the absence of fraud, "as is" language with limited express warranties established the sole parameters of the seller's liability.). For a discussion of the impact of an "as is" disclaimer on claims of fraudulent misrepresentation, see *supra* Part II(A). Some jurisdictions outside of Florida have considered the impact of an "as is" disclaimer

courts have considered the impact of "as is" disclaimers in a variety of other peripheral contexts.

C. Effect of "As Is" in Other Peripheral Contexts in Florida

Florida courts have on occasion addressed "as is" disclaimers in contexts outside the typical claims of breach of warranty, fraud, and negligence.[265] Part II(C) examines a number of these peripheral contexts, including how an "as is" disclaimer impacts a claim of strict liability, how third parties to a contract may benefit because the contract contained an "as is" disclaimer, and how an "as is" disclaimer may trigger the concepts of estoppel and waiver.

1. Strict Liability

Gaska v. Exxon Corporation[266] illustrates how "as is" language will not relieve a party from strict liability claims related to the sale of inherently dangerous items.[267] In *Gaska*, the plaintiff's husband was killed while cutting open a gasoline storage tank removed from

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on claims of negligent misrepresentation. For cases that have held that "as is" language precluded recovery for negligent misrepresentation, see *Stonecipher v. Kornhaus*, 623 S.2d 955, 963–964 (Miss. 1993) (showing that purchasers who alleged negligent misrepresentation in the sale of a home were precluded from recovery because of a handwritten "as is" disclaimer in the contract and the fact that they were in possession five months before the accident) and *Prudential Insurance Company of America v. Jefferson Associates, Limited*, 896 S.W.2d 156, 160–162 (Tex. 1995) (showing that an "as is" agreement, freely negotiated by sophisticated parties as part of the bargain in an arm's-length transaction, negated an element of causation that was necessary to prove negligence because the buyer caused his own loss by paying too much for "as is" property). For cases that have held that an "as is" provision does not preclude recovery for negligent misrepresentation, see *Snelten v. Schmidt Implement Company*, 647 N.E.2d 1071, 1075–1077 (Ill. App. 2d Dist. 1995) (showing that an "as is" disclaimer in a contract did not insulate the seller of a used tractor from an action based in negligent misrepresentation); *Limoge v. People's Trust Company*, 719 A.2d 888, 891 (Vt. 1998) (demonstrating that "as is" language does not automatically defeat a claim of negligent misrepresentation, but finding that an "as is" clause that affected buyer's justifiable reliance is to be decided by the finder of fact), and *Wagner v. Cutler*, 757 P.2d 779, 783 (Wyo. 1988) (explaining that a buyer's cause of action for negligent misrepresentation was permitted despite an "as is" disclaimer by seller).

265. The impact of "as is" language on warranty claims is discussed in Part I, fraud claims in Part II(A), and negligence claims in Part II(B).

266. 558 S.2d 457 (Fla. Dist. App. 4th 1990).

267. The doctrine of strict liability was first adopted in Florida in *West v. Caterpillar Tractor Company*, 336 S.2d 80, 87 (Fla. 1976) (adopting *Restatement (Second) of Torts* Section 402(a), entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer"). Strict liability means negligence as a matter of law or negligence per se, the effect of which is to eliminate the need to prove specific acts of negligence. *Id.* at 90.

an Exxon station.[268] The widow sued Exxon in strict liability and negligence based on Exxon's failure to "de-gas" the gasoline tank.[269] Exxon contended that it had no duty to de-gas the tank because it sold the tank "as is, where is."[270] The *Gaska* court rejected Exxon's argument by stating, "Exxon's responsibility for this dangerous condition cannot be avoided by merely selling the tank 'as is' since its duty is nondelegable."[271] Outside the context of ultrahazardous situations, Florida courts have refused to extend the doctrine of strict liability to factual situations involving physical harm to third parties caused by used products sold "as is."[272]

2. Incidental Third Party Beneficiaries

Sometimes third parties to a sales contract benefit from an "as is" disclaimer found in a contract between a buyer and a seller. These third parties are incidental beneficiaries to the contract if the benefit bestowed was unintended, and thus, they have no enforceable rights under the contract.[273] The benefit is usually realized in this context when the third party is absolved from liability, because the buyer and the seller signed a contract for sale of the property "as is."

No-Risk Chemical Company v. El-Kerdi[274] illustrates this point. In *El-Kerdi*, the buyer contracted to purchase a home "in its

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268. 558 S.2d at 458.

269. *Id.*

270. *Id.*

271. *Id.* The *Gaska* court cited *Noack v. B.L. Watters, Incorporated*, 410 S.2d 1375 (Fla. Dist. App. 5th 1982), for the proposition that liability for inherently dangerous activities cannot be delegated. The *Gaska* court apparently felt Exxon was attempting to use the "as is" disclaimer as a delegation of its duty to de-gas the fuel storage tanks.

272. *Keith v. Russell T. Bundy & Assoc., Inc.*, 495 S.2d 1223, 1228 (Fla. Dist. App. 5th 1986). In *Keith*, a bakery worker lost a finger while operating a roll-slicing machine that the bakery had purchased "as is" from a dealer of used bakery equipment. *Id.* at 1224. The worker sued the seller based on strict liability, alleging that the seller should have known the dangerous nature of the machine and failed to make it safe. *Id.* The *Keith* court noted that the seller sold the slicer "as is" and refused to extend strict liability, under *West*, to a dealer of used goods. *Id.* at 1228. This situation is comparable to *Masker*, in which the purchaser of an "as is" automobile could not sue the seller for strict liability for latent defects. 405 S.2d at 434.

273. *Restatement (Second) of Contracts* §§ 302, 315 (1982). *Incidental* third party beneficiaries can be contrasted with *intended* third party beneficiaries, for example, those third parties who are benefitted by the contract and have rights to enforce the contract. *Id.* at §§ 302, 304.

274. 453 S.2d 482 (Fla. Dist. App. 2d 1984).

[present] condition."[275] At the closing, the buyer received a clean termite report from the third party termite inspection company.[276] The buyer was also informed that the termite company had previously treated the house for termites.[277] The buyer subsequently discovered termites and sued the termite company for breach of warranty and negligence.[278] The *El-Kerdi* court reversed the trial court's judgment against the termite company, stating that the "[Buyer] may not complain about damage from previous infestation because she purchased the property 'as is' and was informed of the previous infestation at closing."[279] The termite company, a third party to the contract, thereby benefitted from the "as is" provision in the contract between the buyer and the seller.[280]

Other third parties may also benefit from an "as is" disclaimer in a sales contract. In *Durrance*, a property owner extended a boundary line fence that was fifteen inches over his property line.[281] He did so with the permission of the adjacent property owner.[282] He then filled dirt against the fence and apparently damaged the fence.[283] Sometime later the adjacent property owner lost his home through foreclosure, and the bank in turn sold the property to a buyer in "as is" condition.[284] The buyer then sued his new neighbor in trespass and negligence, alleging damages caused to the fence by the weight of the fill.[285] In rejecting the buyer's argument that he was a bona fide purchaser without notice, the *Durrance* court dismissed the claims against the property owner in large part

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275. *Id.* at 482. The phrase "in its present condition" is usually considered to be the equivalent of "as is." *See supra* n. 10 (discussing other limiting phrases like "as is").

276. *El-Kerdi*, 453 S.2d at 482.

277. *Id.*

278. *Id.* at 482–483. No-Risk actually treated the home at no charge for four years after the buyer purchased the property, but the buyer still sued, presumably for structural damage to the residence. *Id.*

279. *Id.* at 483; *cf. Hurtado v. Stewart Title of Miami, Inc.*, 664 S.2d 1081, 1082 (Fla. Dist. App. 3d 1995) (explaining that a closing agent, as a third party to the contract, was not liable to the buyer of "as is" property after the closing agent's failure to deliver the termite inspection report to the buyer at closing); *Rayner*, 504 S.2d at 1361 (discussing a third party termite inspection company that did not benefit from an "as is" disclaimer contained in a contract between a buyer and a seller when the buyer was not informed of the previous infestation at the closing).

280. *El-Kerdi*, 453 S.2d at 483.

281. 711 S.2d at 136.

282. *Id.* The fence was actually an extension of an existing fence previously constructed by the adjacent property owner, and he paid a portion of the cost of extending the fence. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

because the buyer "took the property 'as is' from the foreclosing bank."[286] The *Durrance* case demonstrates that an "as is" provision in a contract between a seller and a buyer of realty may benefit a third party neighboring property owner if the neighbor is later sued by the buyer over an encroachment.

3. Estoppel and Waiver

In another encroachment case, at least one Florida appellate court has determined that a seller can raise the defenses of estoppel and waiver against a buyer who agreed to take the property "as is."[287] In *Coble v. Lekanidis*,[288] a buyer and a seller entered into a contract for the purchase and sale of residential real property.[289] The contract contained a standard survey clause that stated that the seller's failure to eliminate an encroachment disclosed by a survey was a default on the part of the seller.[290] However, an "as is" addendum specifically stating that the "as is" provision controlled all other provisions of the contract was attached to the sales contract.[291] A survey of the property disclosed a ten foot encroachment of an adjacent property owner's pool.[292] Upon the seller's failure to eliminate the encroachment, the buyer sued for specific performance and requested the court to make an equitable reduction in the purchase price.[293] The seller counterclaimed for rescission based on mutual mistake.[294] The *Coble* court construed the seller's inartfully drafted counterclaim as an affirmative defense, thereby allowing the court to take into consideration principles of estoppel

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286. *Id.* The *Durrance* court also noted that the buyer had no right to proceed against his neighbor because he failed to secure an assignment of the claim from the seller. *Id.*

287. The essential elements of estoppel are as follows: "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State Dept. of Transp. v. FirstMerit Bank*, 711 S.2d 1217, 1218 (Fla. Dist. App. 2d 1998). In contrast, waiver is often defined as the relinquishment of a known right. *Unimed Laboratory, Inc. v. Agency for Health Care Administration*, 715 S.2d 1036, 1037 (Fla. Dist App. 3d 1998).

288. 372 S.2d 506 (Fla. Dist. App. 1st 1979).

289. *Id.* at 507. At the time of the contract, the buyer was living in an apartment on the property. *Id.* at 508.

290. *Id.* at 507.

291. *Id.* at 508.

292. *Id.*

293. *Id.*

294. *Id.*

and waiver.[295] The *Coble* court emphasized that the parties contractually agreed that the "as is" provision would control over the survey provision, and noted that the parties were privileged to contract as they desired concerning any legal subject.[296] According to the *Coble* court, the "as is" disclaimer raised "the question of the buyer's possible *estoppel* to complain as to encroachment and *waiver* of any right to demand reduction in the contract purchase price."[297] The *Coble* case is not only indicative of the type of peripheral context in which "as is" language can have an impact, but also shows how various factual variables, such as the specific wording or location of an "as is" clause, can impact a court's interpretation of a particular "as is" disclaimer.

III. EFFECT OF VARIABLES ON "AS IS"

Certain variable factors may influence the impact of an "as is" provision in any given context. These variables include surrounding circumstances such as other provisions within the contract or the buyer's sophistication. Practical considerations should also be taken into account, especially in light of some inherent uncertainties related to "as is" disclaimers.

A. Impact of Surrounding Circumstances on "As Is"

Many different circumstances can influence the impact an "as is" disclaimer may have on any given facts.[298] Often these circumstantial variables influence the ultimate disposition of a particular "as is" case.[299] Part III(A) briefly examines two variables that

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295. *Id.* (citing Fla. R. Civ. P. 1.110(d) (1979), entitled "Affirmative Defense").

296. *Id.* at 508–509.

297. *Id.* at 509. (emphasis added). The *Coble* case is distinguishable from *Levy* in that *Levy* involved fraudulent nondisclosure by a seller, which typically nullifies the seller's argument that the "as is" language precluded the buyer's claim against the seller.

298. *Prudential*, 896 S.W.2d at 162.

299. As is true in almost all areas of the law, a slight variation of facts can change the result, because the rigidity of our legal system often forces a judge to make an all or nothing decision. Other factors, such as the intent of the parties, can impact the application and construction of an "as is" disclaimer. *Knipp*, 351 S.2d at 1085. The *Knipp* court stated that "[the seller] relies on the 'as is' disclaimer to negate any inference of such a warranty. The most prominent principle in the construction of warranties is the ascertainment of the intentions of the parties *in light of the surrounding circumstances*." *Id.* (emphasis added). Usage of trade and industry standards also may have a major impact on a court's ultimate determination as to whether an "as is" disclaimer relieves the seller of liability. *In re Interair*, 44 B.R. at 904 (a buyer precluded from asserting claims of fraud and misrepresentation in

frequently appear in Florida cases, namely the interrelationship of other contractual provisions to "as is" disclaimers and the sophistication of the buyer who contracts to purchase property "as is."

1. Other Contractual Provisions

Other contract provisions may have a significant impact on the application and interpretation of an "as is" clause. A court's decision regarding whether an "as is" disclaimer will control over other conflicting provisions within a contract is usually dependent on the specific language of the contract and various rules of construction.[300] Even in a case in which the rules of construction favor an "as is" provision, assessing the overall influence of the "as is" disclaimer may be difficult if the contract also contains other disclaimers that the seller intended to work in tandem with the "as is" disclaimer.[301] In such cases, the judicial opinions do not always specify which of the disclaimers the court considered most relevant to its holding.[302] Another contract variable that tends to complicate the "as is"

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purchase of used aircraft in part because the *custom* in the used retail aircraft market was to sell absolutely "as is"); *but see Gaska*, 558 S.2d at 458 (Defendant Exxon could not avoid liability for an explosion of a gasoline storage tank sold "as is, where is" because the issue of whether industry standards required Exxon to de-gas the tank remained unresolved.).

300. The language of a contract may specifically state that the "as is" language controls over all other provisions. *Coble*, 372 S.2d at 508 (For example, an "as is" addendum was used in body of the *Coble* contract with the following language: "SPECIAL CLAUSES: *TO CONTROL ALL CLAUSES: SEE ADDENDUM ATTACHED HERETO.*"). "As is" provisions found in an addendum might be given similar preference, especially if attached to a form contract, under the rule of construction that favors specific language over general and typewritten provisions over preprinted ones. *Pressman*, 732 S.2d at 360 (concluding that it was the obvious intention of the sellers to sell the home in "as is" condition, and stating, "Individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general"); *Knipp*, 351 S.2d at 1045 (showing that the construction of an "as is" provision is heavily dependent on the intentions of the parties in light of the surrounding circumstances). However, when fraud is alleged, a court is less likely to permit an "as is" disclaimer to override the language of other provisions found in the body of the contract. *Rayner*, 504 S.2d at 1364–1365 (showing that a typewritten "as is" disclaimer did not supersede a preprinted termite inspection clause where the seller and the broker failed to deliver the first termite inspection report that disclosed termite damage).

301. For example, see the "as is" disclaimer reproduced from the *Deluxe Motel* decision in note 183, where the provision begins by stating that the buyer is purchasing all property "as is," but continues by disclaiming all warranties, oral or written, expressed or implied.

302. *E.g. David*, 656 S.2d at 953 (demonstrating that an "as is" disclaimer coupled with thirty-day limited warranty established the sole parameters of the seller's responsibility); *Belle Plaza*, 543 S.2d at 240 (showing that it was factually unclear whether an "as is" disclaimer operated alone or together with other warranty disclaimers to prompt the court to hold that the seller properly disclaimed any and all express and implied warranties).

analysis is the inclusion in the contract of an integration clause, especially in a case in which the buyer alleges that oral misrepresentations were made by the seller.[303] Aside from the uncertainties other contractual provisions may cause, the sophistication of the buyer can also influence the "as is" analysis.[304]

2. Sophistication of the Buyer

Occasionally, a court will consider the sophistication and experience of a buyer when deciding whether an "as is" disclaimer should preclude the buyer's claim against the seller. The sophistication of the buyer in *Wasser* was cited several times as one of the reasons for denying the buyer's claim of fraud in an "as is" purchase of commercial property.[305] A buyer might be deemed sophisticated, and thereby more negatively impacted by an "as is" disclaimer, if the buyer is experienced in commercial transactions or is a professional buyer in his field.[306] A buyer who also happens to be a lawyer can be particularly prejudiced by an "as is" disclaimer. The court in *In re*

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303. For a discussion on integration clauses, see *supra* note 86. Sometimes a court will focus on the integration clause to the exclusion of the "as is" disclaimer. For instance, in the *Deluxe Motel* case, the court set forth in its opinion the text of the "as is" disclaimer as well as the integration clause, which reads as follows:

> OTHER AGREEMENTS. This Contract sets forth the entire understanding of the parties hereto and there are no other agreements or representations, prior or present, which shall be binding on Seller or Buyer unless specifically included in this Contract. Any prior or present representations, negotiations or agreements between the parties which are not specifically set forth herein are deemed to have merged herein and are extinguished hereby to the extent not contained herein. This Contract may not be amended in any manner other than by written instrument signed by all parties hereto, and no other modification (whether oral, by course of conduct or otherwise) shall be binding on any party.

727 S.2d at 170–172. Even without an integration clause, parol evidence will be admitted in the case of fraud. *Lou Bachrodt Chevrolet*, 570 S.2d at 308. For a discussion of the parol evidence rule, see *supra* note 86.

304. *E.g. Wasser*, 652 S.2d at 413 (citing the sophistication of the buyer as one of the reasons the court denied the buyer's claim of fraud in an "as is" purchase).

305. *Id.* Additionally, other factors influenced the *Wasser* court's decision. *Id.* at 412–413.

306. For a discussion regarding the sophisticated purchaser of "as is" commercial property, see the quoted language in the text at *supra* note 197. For specific examples see *Hillcrest*, 727 S.2d at 1057 (regarding a sophisticated buyer investing millions of dollars in commercial property, but failing to allege inducement or justifiable reliance in his fraud claim); U.C.C. Section 2-316 comment 8, 1A U.L.A. 466 (discussing professional buyers); *Restatement (Second) of Torts* Section 541 comment a (regarding the fact that experienced horsemen are held to higher standard when examining a horse with defects that would be obvious to other persons experienced with horses); and Wozniak, *supra* note 2, at Section 20 (discussing the effect a vendee's experience may have on a court's decision).

Interair Services, Incorporated, after remarking that the contract made it clear that the used helicopter was sold absolutely "as is," stated, "Inasmuch as [buyer] is an attorney, there can be no doubt that he was aware of the significance of the terms of the contract and cannot now be heard to assert claims of fraud and misrepresentation."[307] Florida practitioners should consider the effect of surrounding circumstances, such as other contract provisions and the sophistication of the buyer, when advising their clients on both the legal and practical implications of using an "as is" disclaimer.

B. Practical Considerations and Unresolved Issues When Using "As Is" in Florida

This Article has attempted to analyze the impact in Florida of "as is" language in a variety of contexts. The focus now shifts to examining some practical aspects of using an "as is" disclaimer. The Article concludes by exploring a variety of uncertain factors that can hinder a full understanding of the meaning of "as is" in Florida.

1. Practice Practicalities

Even if one is well-informed as to how Florida courts have construed "as is" disclaimers, a practitioner should also consider practical aspects of inserting an "as is" disclaimer in any particular context. On the one hand, an "as is" disclaimer favors the seller from a number of different perspectives. Foremost, an "as is" disclaimer eliminates, or at least reduces, certain breach of warranty claims against the seller.[308] In addition, buyers who purchase "as is" property are usually more reticent even to bring a claim, although the "as is" language might not be a legal bar to such a claim.[309] On the other hand, "as is" language does have some negative characteristics from a seller's perspective. For instance, an "as is" disclaimer might dissuade some potential buyers, and other buyers might offer

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307. 44 B.R. at 904.

308. *Supra* pt. I (discussing "as is" warranty claims in Florida).

309. Buyers, and possibly even attorneys representing buyers, incorrectly might assume that "as is" language conclusively bars all claims of buyers. Buyers are even more hesitant to bring suit if the contract contains both an "as is" disclaimer and an attorney's fee provision for fear that the "as is" provision may cause them to lose, thereby triggering their responsibility to pay for the seller's attorney's fees. Practically speaking, a seller is less likely to be sued when the property is sold "as is." "In today's litigious society, even selling a house that's in excellent condition 'as is' can be a good way to avoid a lawsuit." Robert J. Bruss, *How to Avoid a Lawsuit When Selling Your Residence*, 75 Sarasota Herald-Trib. 3-I (Dec. 19, 1999).

a lower price in return for purchasing the property "as is." Also, a buyer who agrees to purchase "as is" property is more likely to inspect the property closely, which might reveal otherwise undetected faults with the property.[310] If the seller ultimately does decide to include an "as is" disclaimer in the contract,[311] the attorney for the seller should remember to draft the "as is" language in a bold and conspicuous manner.[312] A seller should always consider bolstering the effect of the "as is" language with other disclaimers and a merger clause.[313] The advantages of an "as is" disclaimer, when properly used, seem to outweigh the disadvantages, although this result is far from certain.[314]

2. Certain Uncertainties

The effect of an "as is" disclaimer in a Florida contract is clear in certain contexts, yet uncertainties linger as to the exact impact of "as is" language in other contexts. For example, Florida case law gives clear guidance on how an "as is" disclaimer in a contract to sell goods negates implied warranties, but questions remain as to how implied warranties are affected by an "as is" clause in a contract to

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310. Of course, a seller of residential property is still required under the *Johnson* decision to disclose all known latent defects, regardless of an "as is" disclaimer. 480 S.2d at 628–629.

311. The seller, after appropriate consultation with his or her attorney, should make the ultimate decision on whether to include an "as is" disclaimer in the contract. In some contexts, such as a sale by an institutional trustee or personal representative, it is customary to sell the property "as is."

312. *Belle Plaza*, 543 S.2d at 240; *Hesson*, 422 S.2d at 946; *supra* pt. I(A)(1)(b).

313. *Supra* nn. 301–303 and accompanying text. For a discussion of how the use of additional disclaimers combined with an integration clause often avoids issues of whether an "as is" disclaimer by itself eliminates all express and implied warranties, see *supra* notes 95, 154 and accompanying text. Of course, even an "as is" disclaimer coupled with other extensive disclaimers and an integration clause usually will not protect a seller from a claim of fraud. *Supra* nn. 182, 183, 303; *contra supra* nn. 191–196 and accompanying text (showing that "as is" and integration clauses are recognized as valid defenses to claims of fraud); *see generally* White & Summers, *supra* n. 28, at § 12-4 (discussing disclaimers of express warranties). For a discussion of how the use of additional disclaimers of all implied warranties also avoids the argument by a buyer that the parties intended the "as is" language to apply to only some minor aspect of the property, see *supra* note 68 and accompanying text.

314. Numerous Florida courts have held in favor of a seller on facts that could have indicated a favorable outcome for the buyer if it were not for the "as is" disclaimer. *Supra* nn. 14, 138, 263, 272, 281. One might even expect juries to give more credence to "as is" language because they, like some buyers, might consider "as is" to be a bar to most claims. *Supra* nn. 1, 309.

sell realty.[315] Florida courts compound this uncertainty because their reported opinions frequently refer to the "as is" language in a contract, but then do not clearly hold that the "as is" disclaimer was essential to the final disposition of these cases.[316] Uncertainties may also exist as to the precise scope of any given "as is" disclaimer.[317] Finally, uncertainty always exists if no reported Florida decision addresses how an "as is" disclaimer impacts a specific set of facts.[318] For instance, a Florida practitioner handling a case involving the "as is" sale of a haunted house would need to look to precedent outside Florida for guidance.[319] A practitioner should understand the practicalities and uncertainties surrounding "as is" disclaimers prior to advising clients on their use in the sale of goods or realty in Florida.

CONCLUSION

This Article has attempted to address the legal effects of including an "as is" disclaimer in a contract for the sale of property in Florida. A seller often includes an "as is" provision in a sales contract to limit or eliminate exposure related to the condition of the property sold. Numerous Florida decisions, especially in recent years, have addressed the effect of "as is" disclaimers on various types of claims brought by buyers who are dissatisfied with some aspect of the property they purchased. The "as is" analysis in these cases varies depending on the type of property sold and the various causes of action brought by the buyers. For instance, an "as is" disclaimer is particularly effective in negating implied warranties in the sale of goods in Florida. In contrast, an "as is" disclaimer used in a contract to sell Florida realty is most effective in eliminating express warranty claims. An "as is" disclaimer may also have a

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315. See *supra* Part I(A)(1)(a) for the effect of "as is" language on implied warranties in the sale of goods, and Part (I)(B)(1)(b) for the effect of "as is" language on implied warranties in the sale of realty.

316. *In re Interair*, 44 B.R. at 899; *Durrance*, 711 S.d at 135; *Hurtado*, 664 S.2d at 1081; *Keith*, 495 S.2d at 1223; *El-Kerdi*, 453 S.2d at 482; *Weaner*, 342 S.2d at 86.

317. *Knipp*, 351 S.2d at 1085 (showing that the buyer in *Knipp* contended that the scope of the "as is" language was meant to apply only to minor defects).

318. This statement assumes one can even locate a case on point, a task which is often hindered by the difficulties in researching "as is" issues. *Supra* n. 5 and accompanying text.

319. *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 674, 676–677 (App. Div. 1st Dept. 1991) (showing that the seller of a house possessed by poltergeists was unable to prevent rescission by the buyer based on an "as is" provision and integration clause that only disclaimed representations made respecting the physical condition of the property).

negative impact on a buyer's claim of fraud or negligence, although the impact is often minor in the case of fraud. A practitioner with a solid working knowledge of "as is" issues in Florida should also take into account surrounding circumstances and other practical considerations when advising a client as to the overall implications of inserting an "as is" provision into the contract. After weighing all relevant factors, the scales of justice in Florida may tip in favor of a seller who disposes of property "as is."[320]

320. Due to the difficulty of researching the phrase "as is," this Article is published "as is."