CHAPTER XVI: INTEGRATION AND THE PAROL EVIDENCE RULE

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The question of integration is one of interpretation: is a writing the complete contract, or are there prior emails, discussions, brochures, samples, etc., that were intended to be included in the final bargain that may not have found their way into the final agreement? Many casebooks lead off with the integration question before addressing interpretation, which makes sense because it is logical to determine what is, and what is not, part of an agreement before checking for potentially ambiguous terms. However, the question of integration is one of intent, which is also one of potential ambiguity. Chapter XVII introduces a third major interpretation question. To recap, the approach has been to cover the issues in a particular order. First, Chapter XIV addresses the main category of interpretation, particularly of ambiguous terms within a contract (of which the next two are subsets). Second, this Chapter concerns the issue of integration, which is whether a contract is complete or may be supplemented by evidence of prior or contemporaneous information. Third, Chapter XVII covers a unique and highly policy-related issue whether a term that might be interpreted as a condition could instead be ambiguous enough to interpret as a covenant. The first can halt things in their tracks; the second fosters further performance with some form of compensation for damages. The policy reason is to maintain a contractual relationship in order to avoid forfeiture on the part of the breaching party. (Does this seem like a Test #3 rule of construction?) Whereas failure of a condition prevents a duty from arising or cuts it off (which
leads to forfeiture by the other party), the breach of a *covenant* may entitle the non-breacher to damages, but the rest of the contract would need to be performed.

With the addition of two key concepts, which fit best in the initial question of the parties’ intent, the five-part test introduced in Chapter XIV works fairly well with just a smidgeon of alteration. As in the case of *interpretation*, the courts determining integration issues appear not to have addressed the rules or the tests as clearly as are suggested in this casebook. If the proposed hierarchy is not exactly a perfect fit in this particular area, the law has enough opaqueness to permit it. Having a more definite hilt to grasp should make for better argument, in any event.

The subject of integration is relatively simple. The concept of integration is the idea that all of the details from discussions, emails, samples, brochures, etc., are, or are not, intended to have been fully included into the final agreement. A lot of negotiation goes on, but at some point the parties must agree on the main terms to move out of the negotiating phase and into the formation and post-formation (i.e., *performance*) phases. Stated another way, and using a word that is interchangeable with “integration,” the question is whether the parties intended for all negotiations to be completely *merged* into the final agreement such that anything not in that final agreement was in fact intended to be excluded. *Integration* or *merger* may be complete, meaning that nothing prior to or contemporaneous with the final manifestation of the agreement may be considered as part of the agreement. It is also possible that the parties, often if they have a long-standing business relationship, finalize an agreement that is not fully complete, and that the intent is to supplement it with prior agreements, discussions, emails, brochures, etc. Worthy of special caution is the fact that for this legal operation, and for the one that follows, nothing *contradictory* is allowed. This legal exercise is one of supplementation, not one of modification. There is also the possibility of a partial integration, i.e., for the *integrated* parts there can be no supplementation, but if there are some parts of an agreement that are not integrated, supplementation (but again, not contradiction) is allowed. What becomes confusing is the myriad number of facts that could go into a decision on integration. Is there an *integration* or *merger* clause? Does the agreement look so complete even without such clause that it unquestionably manifests its exclusivity? If the answer is not fully clear, which test would a court use?

**CMM Approach:** use of the following test, which is only slightly amended from the test for *interpretation*, should provide some welcomed framework to the study the sometimes complicated area of contract *integration*. With just a minimum of modification, this is the same as was set out for *interpretation* in Chapter XIV. There are two primary, further considerations for the *integration* question: *collateral agreements* and *merger clauses* (the latter of which is commonly considered as *evidence* of an intent for full integration – however its existence in a contract creates a rebuttable presumption and therefore it can be overcome with enough evidence to rebut.
Goal is to determine the intent of the parties – two additional factors:
1. Is the thing typical of a collateral agreement?
2. Is there an integration or merger clause?

Consider these two factors for their impact on the following tests

The Tests:

<table>
<thead>
<tr>
<th>RULE</th>
<th>LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Plain meaning of word or phrase (supplemented by use of a dictionary) (this is where the two questions above should be conclusive or rejected)</td>
<td>Intrinsic to the word or phrase</td>
</tr>
<tr>
<td>2 Interpreting the meaning from within the four corners of the document (inquiry into the two extra “goals” questions might spill to this test)</td>
<td>Intrinsic to the document</td>
</tr>
<tr>
<td>3 Other rules of construction (wise rules of contract law used as canons)</td>
<td>More ‘extrinsic’</td>
</tr>
<tr>
<td>4 Holistic or mélange approach (Rest. (Second) and U.C.C. Article 2)</td>
<td>Very ‘extrinsic’</td>
</tr>
<tr>
<td>5 When all else fails, let the jury decide</td>
<td>Very ‘extrinsic’</td>
</tr>
</tbody>
</table>

Note

Technically, parol evidence is a subset of the larger category of extrinsic evidence. The parol evidence rule is associated with the question of integration, i.e., whether evidence of prior or contemporaneous agreements (by discussion, by email, by brochure, by sample, etc.) is permitted to supplement but not to contradict a final agreement. Extrinsic evidence is evidence outside of the agreement in issue, the question being whether it may be used to supplement or to explain the agreement. Thus, evidence used to clarify some ambiguity other than relating to the integration issue, such as a question about performance (or delivery) date, or even the color of an item (widgets) or a service (painting of walls), would be extrinsic evidence. Whether such evidence may be considered is not to interpret, but to supplement, the agreement is the difference.

CMM Approach: it may be helpful to use the term parol evidence for the integration question, and the term extrinsic evidence for all other applications in cases of alleged ambiguity. In the case of confusion, use of extrinsic evidence in all cases would be appropriate. This may be a distinction without a difference, but there is historical precedent for distinguishing these two terms. Remember, if the question is, “What does a contract term mean?” it is a question of interpretation. If it is a question of what is or is not part of a contract, it is a question of integration.

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1 For a case that indicates that the parties’ intent is not one of the tests but is rather the goal, or the “guiding principle,” see, e.g., Harkless v. Laubhan, 219 So. 3d 900 (Fla. Dist. Ct. App. 2d 2016).
2 If the intent is to contract in separate agreements, then evidence of the other(s) is not barred; they are distinct.
3 Merger clauses are helpful, but not dispositive. Their operation must be checked and not merely presumed. See, e.g., Jenkins v. Eckerd Corp., 913 So. 2d 43, 53 (Fla. Dist. Ct. App. 1st 2005).

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I. Plain Meaning (Unambiguous)

Where the language is clear, then courts do not engage in ambiguity analysis. The case that follows bases its (unanimous, on the integration issue) decision on the fact that there was no lack of clarity. Worthy of note, however, is that this was supplemented by consideration of the two, distinct integration clauses – which as noted above are useful but not necessarily dispositive. In the below, they are used to solidify a holding based on the first, or plain meaning, test.

A. Plain Meaning Including an Integration (or Merger) Clause

TITUSVILLE ASSOCIATES, LTD. v. BARNETT BANKS TRUST CO.

Supreme Court of Florida, 1991

591 So. 2d 609

PER CURIAM.

We have for review Barnett Banks Trust Co., N.A. v. Titusville Associates, Ltd., 560 So.2d 1337 (Fla. 1st DCA 1990), based on express and direct conflict with Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

In 1985, Brevard County issued industrial revenue development bonds to finance an adult congregate living facility to be built by Titusville Associates. Under their financing agreement, the county loaned the funds to Titusville Associates, and the latter signed a promissory note secured in part by a nonrecourse mortgage in the facility and an assignment of rents and leases. The county also entered into a trust indenture agreement whereby it pledged to Barnett Banks its right to collect and receive funds under the financing agreement, for the benefit of the bondholders.

The financing agreement required Titusville Associates to deliver to Barnett Banks an operating deficit letter of credit for $511,000, which originally was set to expire on July 1, 1988, but was extended to July 3, 1989. In addition, Titusville Associates' only general partner, Michael J. Levitt, signed a personal guarantee that in pertinent part required him to cover operating deficits not to exceed $750,000. The letter of credit and guarantee are embodied in separate documents, and each contains its own integration clause specifying that the document embodies the entire agreement between the parties and cannot otherwise be modified.

The guarantee did not refer to the letter of credit and did not specify that Levitt's personal $750,000 exposure would be reduced by any amount Barnett Banks might obtain under the $511,000 letter of credit issued on behalf of the partnership. The personal guarantee stated in pertinent part only that the guarantee “shall not require Guarantor (or Borrower) to advance more than $750,000 under this Guarantee, exclusive of any amounts that may be available for operating deficits from Bond Proceeds.”

In 1987, Titusville Associates defaulted on its loan, and Barnett Banks exercised its option to accelerate the payments due. In early 1988, Barnett Banks then filed a complaint for declaratory
judgment that attempted to collect Levitt’s personal $750,000 guarantee and simultaneously draw on the partnership's $511,000 letter of credit. Barnett Banks argued that the guarantee and letter of credit were separate sources of security for the bondholders, while Titusville Associates and Levitt contended that the terms of the guarantee limited Barnett to a total recovery of no more than $750,000 including the amount from the letter of credit.

* * *

On the second issue, we agree with the court below that the terms of the letter of credit and personal guarantee were unambiguous and not subject to modification by parol evidence. This conclusion is strongly supported by the fact that both instruments contained their own integration clauses, and that the personal guarantee nowhere referred to the letter of credit or a possible offset based on the $511,000 amount of the partnership's letter of credit. Had the parties intended the $750,000 limitation to include the amount from the letter of credit, they should have done so in express language, especially in light of the integration clauses contained in these documents. Each of the relevant documents clearly can stand alone and be fully enforced without affecting the meaning of the other, nor is there any ambiguity in the way they are drafted. Accordingly, we find no error in the determination of the merits of this case.

* * *

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion, in which BARKETT, J., concurs.

KOGAN, Justice, concurring in part, dissenting in part (on other grounds not included in the excerpt)

B. Plain Meaning Involving a Collateral Agreement

The notion that some sets of agreements were intended to be separate is a form of partial integration. Just as was the clear from the Titusville Associates, Ltd. case, contractual dealings may contain more than one phase, or there may be reason for there to be two separate agreements. An example of the latter in a transactional setting could be an agreement with major shareholders to purchase a controlling share of a company, but to execute separate employment agreements with key employees for continued employment after the purchase concludes. The retained, key employees may not want all of the others to know the contents of their new compensation packages. Thus, this is an ideal situation to use a collateral agreement. There is no good answer to the question of which test would resolve the issue of the existence of a collateral agreement. It is argued that this question would probably be answered by the first (plain meaning) or second (four corners) tests, although in tricky cases there is no reason why this question might not require use of the more extrinsic tests. There are no straightforward Florida cases identified on this point, although the Eleventh Federal Circuit Court of Appeals, in which Florida is located, has made pronouncement on the matter (see Note below). Though the court ruled that there was no collateral
agreement, its analysis includes court discernment of intent. The opinion does not make fully clear which test was used but arguably the test used was the first, or *plain meaning* test. Like the Florida courts, the federal courts may not adhere to a clear hierarchy or identification of the test(s) used to determine the integration issue. The reason may be because courts are constrained to answer the questions as presented by counsel (or by the parties) without the ability to better organize. While the goal is always clear (i.e., reaching the intent of the parties), eventually use of the tests should be harmonized based on the clear hierarchy of least to most extrinsic evaluation. This altered paradigm may cause some consternation.

**Note**

The Florida courts have not recently addressed the collateral agreement issue, and also appear to call it an issue of “extrinsic” rather than “collateral” agreement. Nevertheless, Florida case law too recognizes that some agreements are intended to be related, even though an agreement under consideration makes absolutely no mention of this relationship. See, e.g., *Little River Bank and Trust Co. v North American Mortgage Corp.*, 186 So. 2d 203 (Fla. 2d DCA 1966), rehearing den. 192 So. 2d 487 (Fla. 1966) (parties verbally agreeing that they would share lost interest on certain construction loans when one transferred the collection rights was an extrinsic agreement that could be introduced into evidence to explain the parties’ intent despite the parol evidence rule). In *Matthews v. Drew Chemical Corp.*, 475 F.2d 146 (5th Cir. 1973), a unanimous Fifth Circuit Court of Appeals stated:

> We begin our analysis by recognizing that even though a writing declares on its face that it is “integrated,” circumstances may well exist that justify receiving parol evidence to determine what the parties intended the document to be or mean. Regarding partial integrations, for example, the law is clear:

> “The parol evidence rule does not preclude the introduction of evidence showing a prior or contemporaneous agreement if the writing, or writings, constitute only a partial integration of the agreement between the parties. That is, if the writings are but a partial integration of the agreement, the rest of the agreement, or collateral agreements, may be shown through parol.

> “It follows, therefore, that where the issue is fairly raised by the evidence, the court must preliminarily and initially determine whether the writings in question were intended to, and do, constitute a complete integration of the agreement between the parties. For the purpose of making that preliminary determination, the parol evidence rule is inapplicable. . .”

> *Walley v. Bay Petroleum Corp.*, 5 Cir. 1963, 312 F.2d 540, 543-544. See also *South Florida Lumber Mills v. Breuchard*, 5 Cir. 1931, 51 F.2d 490. (Footnote omitted)

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As a general proposition, then, there can be no error in a trial judge's allowing parol testimony into evidence in the first instance. See, e.g., Ivy H. Smith Co. v. Moretrench Corp., 5 Cir. 1958, 253 F.2d 688 (writing itself stated that it “contains all of the agreement”). Thus, we cannot say that it was improper for the judge below to have heard parol evidence regarding the intent of the parties as to whether this document was to be a total integration of Matthews' employment contract. But the matter cannot be put to rest by making that determination. The real issue in these cases is whether the parol evidence could permissibly be used during the trial in the manner in which it was employed. Here, Matthews was allowed to convince the jury that, in light of their prior oral agreement, when the parties wrote “Employment may be terminated at any time by either party to this Agreement giving notice to the other party,” they were really agreeing that “Employment may be terminated at any time by either party to this agreement giving notice to the other party, but employer shall have the power to exercise this right to terminate only if he can show good cause for terminating employee's employment.” We find that it was error to allow the parol evidence to be put to this use.

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C. Plain Meaning Rule Without a Merger Clause or Collateral Agreement

HARKLESS v. LAUBHAN

District Court of Appeal of Florida, Second District, 2016

219 So. 3d 900

BADALAMENTI, Judge.

David L. Harkless appeals the trial court's final summary judgment entered in favor of David and Susan Laubhan. The crux of this dispute is whether Mr. Harkless reserved the right to receive rent from a parcel of land that he used to own and that the Laubhans eventually came to own. We reverse the grant of summary judgment. Mr. Harkless reserved his right to receive rent in a sales contract with an intermediate purchaser. That reservation did not merge into any subsequent deed. Nevertheless, there remains a genuine issue of material fact as to whether the Laubhans were bona fide purchasers for value and without notice, rendering summary judgment inappropriate. Our reversal extends to any relief the trial court provided to the Laubhans on their counterclaim.

I. STATEMENT OF FACTS & PROCEDURAL POSTURE

Mr. Harkless owned land in DeSoto County. In 2008, he entered into a land lease agreement (the Lease) with Verizon Wireless. Under the Lease, Mr. Harkless leased a 100– by 100–foot parcel of his land (the Parcel) to Verizon, along with an accompanying easement for Verizon to build a cell tower. In return, Verizon agreed to pay Mr. Harkless $13,800 a year in rent. Verizon did not commence construction of the tower until May 2012.
In 2011, Mr. Harkless sold ten acres of his land to Reed and Beth Lolly, who planned to operate a blueberry farm. Those ten acres contained the Parcel. Paragraph 18 of the sales contract between Mr. Harkless and the Lollys (the Harkless–Lolly contract) contains a handwritten addendum entitled “Additional Terms.” The addendum states, “The Easement for the said Verizon Cell Tower location is 115 ft x 115 ft in which the seller David L. Harkless shall continue and remain owner of said easement and Verizon cell tower lease.” [Footnote omitted] However, the subsequent warranty deed from Mr. Harkless to the Lollys (April 2011 Deed) did not contain a similar provision specifically memorializing Mr. Harkless's right to receive rent.

Three months later, after deciding that market conditions for blueberries were unfavorable, the Lollys sold the ten acres to the Laubhans—retirees who owned a small ranch on adjoining land. The sales contract between the Lollys and the Laubhans (the Lolly–Laubhan contract) made no express mention of Mr. Harkless's remaining interest in the Parcel. Unlike paragraph 18 of the Harkless–Lolly contract, paragraph 18 of the Lolly–Laubhan contract provides, “Buyer is aware of Verizon tower lease and has received a copy of the survey and lease.” The warranty deed from the Lollys to the Laubhans (the July 2011 Deed) contained no language addressing Mr. Harkless's right to receive rent under the Lease.

Both the April 2011 Deed and the July 2011 Deed stated that they were “subject to a (Verizon Wireless) Easement as described in Instrument # 200814009062, DeSoto County, Florida.” That instrument, entitled “Amended Memorandum of Lease Agreement,” is essentially an abridged version of the Lease. The Amended Memorandum is silent as to Mr. Harkless retaining his right to receive rent.

Shortly before Verizon began construction of the tower in May 2012, Mr. Harkless gave Communications Capital Group, LLC, the option to purchase his interest in the Lease for $175,000. Communications Capital thereafter sent the Laubhans a letter asking them to sign and notarize documents which purported to memorialize Mr. Harkless's continued right to receive rent under the Lease. The Laubhans responded that they owned the Parcel free and clear of Mr. Harkless's right to receive rent. As a result of this claim, Communications Capital did not exercise its option.

Mr. Harkless then filed a two-count complaint against the Laubhans. He sought a declaratory judgment that he had the right to receive rent under the Lease. He also sought reformation of both the April 2011 Deed and July 2011 Deed to reflect this right. The Laubhans moved for summary judgment. They argued that the April 2011 Deed and the July 2011 Deed failed to expressly reserve Mr. Harkless's right to receive rent. Accordingly, the Laubhans maintained that the right to receive rent was presumptively conveyed from Mr. Harkless to the Lollys and ultimately from the Lollys to the Laubhans.

* * *

A. Reservation of Mr. Harkless's Right to Receive Rent

We interpret contracts in accordance with their plain and ordinary meaning when the contractual language is clear and unambiguous. See Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So.3d 638, 640 (Fla. 2d DCA 2016). Similarly, “[w]hen the language of a deed is clear and
certain in meaning and the grantor's intention is reflected by the language employed, there is no room for judicial construction of the language nor interpretation of the words used.” Rogers v. United States, 184 So.3d 1087, 1095 (Fla. 2015) (quoting Saltzman v. Ahern, 306 So.2d 537, 539 (Fla. 1st DCA 1975)).

Neither the April 2011 Deed nor the July 2011 Deed contains language specifically reserving Mr. Harkless's right to receive rent pursuant to the Lease. Yet, in their Statement of Undisputed Facts, the Laubhans concede that Mr. Harkless and the Lollys “specifically agreed that Harkless was to receive the Verizon lease payments.” We likewise agree that the “Additional Terms” section of the Harkless–Lolly contract reserved Mr. Harkless's right to receive rent. See Gray v. Callahan, 143 Fla. 673, 197 So. 396, 398–99 (1940) (“The transferor of [a] reversion may ... in the transfer expressly reserve the rent for part [or] all of the term granted by the lease ....” (quoting 16 Ruling Case Law, Landlord and Tenant § 128 (William M. McKinney & Burdett A. Rich eds., 1917))); 1 Herbert Thorndike Tiffany, The Law of Real Property and Other Interests in Land § 53(a) (1920) (explaining that, when a lessor uses language referring to the “transfer of a lease,” they are ordinarily referring to transfer of the right to receive rent, as opposed to the transfer of some reversionary interest).

B. Extrinsic Evidence, Merger by Deed, and the Intent of the Parties

Because Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, we must reckon with the Laubhans' arguments concerning ambiguity and merger by deed. At the hearing on their summary judgment motion, the Laubhans asserted that even if Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, that right merged into the April 2011 Deed without specific reservation and was then conveyed to the Laubhans in the July 2011 Deed. Accordingly, the Laubhans believe that the Harkless–Lolly contract is inadmissible parol evidence and cannot be used to construe the otherwise unambiguous language of conveyance in the April 2011 Deed and July 2011 Deed.

It is axiomatic that preliminary agreements concerning the sale of property merge into the deed executed pursuant to the sale. Morton v. Attorneys' Title Ins. Fund, Inc., 32 So.3d 68, 72 n.3 (Fla. 2d DCA 2009) (quoting Engle Homes, Inc. v. Jones, 870 So.2d 908, 910 (Fla. 4th DCA 2004)). This axiom encompasses real estate sales contracts. See Stephan v. Brown, 233 So.2d 140, 141 (Fla. 2d DCA 1970).

The doctrine of merger by deed, however, is an extension of the general principle of integration in written contracts. Whether discussing merger into a deed or integration of a prior agreement into a subsequent contract, our guiding principle is the intent of the parties. See Jenkins v. Eckerd Corp., 913 So.2d 43, 53 (Fla. 1st DCA 2005) (“The concept of integration is based on a presumption that the parties to a written contract intended that writing ‘to be the sole expositor of their agreement.’” (quoting Everglade Lumber Co. v. Nettleton Lumber Co., 111 Fla. 333, 149 So. 736, 738 (1933))). If it is undisputed that none of the parties to a real estate transaction intended for certain provisions of their real estate sales contract to merge into a subsequent deed, then no merger takes place as to those provisions. See Milu, Inc. v. Duke, 204 So.2d 31, 33 (Fla. 3d DCA 1967) (“The rule that acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes...
the covenants and stipulations contained in the contract does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed ....”).

Although the April 2011 Deed does not expressly reserve Mr. Harkless's right to receive rent, all of the parties to that deed—Mr. Harkless and the Lollys—patently testified in their depositions that they intended for Mr. Harkless to retain the right to receive rent under the Lease and that they understood paragraph 18 of the Harkless–Lolly sales contract to effectuate this retention. Moreover, the Laubhans stipulated to the same construction of paragraph 18 in their Statement of Undisputed Facts. Because all parties to the Harkless–Lolly sales contract agree that paragraph 18 was intended to reserve Mr. Harkless's right to receive rent, that right did not merge into the April 2011 Deed as a matter of law. And because Mr. Harkless and the Lollys do not dispute that paragraph 18 never merged into the April 2011 Deed, it is irrelevant whether or not the April 2011 Deed is unambiguous on its face. See Milu, Inc., 204 So.2d at 33; see also Providence Square Ass'n v. Biancardi, 507 So.2d 1366, 1371 (Fla. 1987) (“In a reformation action in equity ... parol evidence is admissible for the purpose of demonstrating that the true intent of the parties was something other than that expressed in the written instrument.”).

* * *

We reverse the trial court's grant of summary judgment to the Laubhans and remand for proceedings consistent with this opinion. Mr. Harkless reserved his right to receive rent in the Harkless–Lolly contract, which did not merge into any subsequent deed. Genuine issues of material fact remain as to whether the Laubhans were bona fide purchasers for value and without notice. Our reversal also extends to any relief the trial court afforded to the Laubhans on their counterclaim. We express no opinion on the merits of reformation as to one or both of the Deeds in this case.

Reversed; remanded for further proceedings.

LaROSE, J., Concurs.

BLACK, J., Concurs in result only with opinion.

BLACK, Judge, concurring with opinion. (cont.-)

In my opinion, the majority makes findings of fact and reaches conclusions of law that exceed the scope of our review of a final summary judgment inappropriately granted. I would reverse and remand for further proceedings, concluding only that the intent of the parties was an issue of material fact in dispute which precluded summary judgment. See Fiore v. Hilliker, 170 So.3d 147, 151 (Fla. 2d DCA 2015) (reversing summary judgment where the intent of the parties was a disputed material fact which was to be considered by the trier of fact below); Hervey v. Alfonso, 650 So.2d 644, 646 (Fla. 2d DCA 1995) (“[A] motion for summary judgment is not a substitute for a trial on the merits. Hence, a trial court is precluded from resolving disputed issues of fact when considering such a motion. Thus, when a defendant moves for summary judgment, neither the trial court nor this court determines whether the plaintiff can prove the cause of action alleged. The function of the court is solely to determine whether the appropriate record presented in support

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of summary judgment conclusively shows that the plaintiff cannot prove the claim alleged as a matter of law.” (citation omitted)).

The trial court granted summary judgment in favor of the Laubhans but made no express findings of fact or conclusions of law. Upon review of the hearing transcript and the arguments made, and in the absence of findings by the trial court, it appears that the only basis upon which the trial court could grant summary judgment in favor of the Laubhans was the determination that the deeds and Lease Agreement, the subjects of Mr. Harkless's complaint, unambiguously did not reserve Mr. Harkless's right to rent under the Lease—the argument raised by the Laubhans at the hearing. In opposition to the Laubhans' motion and arguments, Mr. Harkless contended that the “subject to” language in the deeds rendered them ambiguous and that in order to resolve that ambiguity, the trial court was required to consider the language of the Harkless–Lolly contract and the intent of the parties—extrinsic evidence.

“[A] trial court may not weigh the evidence or judge the credibility of witnesses in arriving at summary judgment; instead, the moving party must conclusively show the absence of any genuine issues of material fact.” Plantation Key Office Park, LLLP v. Pass Intern., Inc., 110 So.3d 505, 508 (Fla. 4th DCA 2013) (citing Craven v. TRG–Boynton Beach, Ltd., 925 So.2d 476, 480–81 (Fla. 4th DCA 2006)). “A summary judgment motion will be defeated if the evidence by affidavit or otherwise demonstrates the existence of a material factual issue.” Harvey Bldg., Inc. v. Haley, 175 So.2d 780, 782 (Fla. 1965).

Florida law holds that “[t]he words ‘subject to’ in a deed or contract generally create an ambiguous deed or contract.” Hastie v. Ekholm, 199 So.3d 461, 464 (Fla. 4th DCA 2016) (citing Procacci v. Zacco, 324 So.2d 180, 182 (Fla. 4th DCA 1975)); see also Cook v. Tradewinds W. Condo., Inc., 636 So.2d 591, 592 (Fla. 3d DCA 1994). As applied in this case, if the trial court were inclined to accept the Laubhans' argument that no material issues of fact were in dispute based on the language of the deed, Mr. Harkless sufficiently “demonstrate[d] the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented” through the deposition testimony and evidence on record. See Harvey Bldg., 175 So.2d at 783. As a result, summary judgment was inappropriate. See Mac–Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC, 915 So.2d 657, 659–60 (Fla. 2d DCA 2005) (“[W]hen an agreement contains a latent ambiguity ... the issue of the correct interpretation of the agreement is an issue of fact which precludes summary judgment.” (quoting Griffin v. Fed. Deposit Ins. Corp., 532 So.2d 1358, 1360 (Fla. 2d DCA 1988)).

Because on the record before us there is no way to conclusively determine on what basis the trial court granted summary judgment, I would apply the general rule that where a contract or writing is ambiguous, “the parties' intent becomes a question of fact for the fact-finder, precluding summary judgment,” rather than the exception that “a contract may be interpreted as a matter of law when the ambiguity can be resolved by undisputed parol evidence of the parties' intent.” Life Care Ponte Vedra, Inc. v. H.K. Wu, 162 So.3d 188, 191–92 (Fla. 5th DCA 2015); see also Centennial Mortg., Inc. v. SG/SC, Ltd., 772 So.2d 564, 566 (Fla. 1st DCA 2000) (“Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of construction to situations in which the parol evidence of the parties' intentions is undisputed or
non-existent.” *(quoting Land O'Sun Realty Ltd. v. REWJB Gas Inv., 685 So.2d 870, 872 n.3 (Fla. 3d DCA 1996), review dismissed sub nom. Lennar Fla. Partners, I v. REWJB Gas Inv., 710 So.2d 978 (Fla. 1998))*. 

**Note**

The concept of an executory contract was introduced in Chapter IV. Contracts for the purchase or sale of real estate are excellent examples because they begin with a contract that calls for quite a few further activities to be accomplished. Examples include home inspections, survey of the land, the securing of financing, etc. It is only after all of these things are accomplished, in the *executory phase*, that the ultimate closure is reached, i.e., that thing that evidences transfer of title from seller to buyer: the deed. Using the same logic as is being considered in this Chapter, the general rule is that all contractual matters “merge into the deed,” i.e., if contractual things do not show up in the deed, they were quite possibility (but no always) intended to be left out. Clearly this follows the same logic as the parol evidence rule. The way for a party to ensure the continued existence of an important contract right expressed in the contractual phase is to ensure that it is included in the deed or to establish it as a *collateral agreement* which was intended to survive the *merger by deed* operation. See, e.g., *American Nat. Self Storage, Inc. Lopez-Aguiar*, 521 So. 2d 303, 305-06 (Fla. Dist. Ct. App. 3d 1988); but c.f. *Goodall v. Whispering Woods Center, L.L.C.*, 990 So. 2d 695 (Fla. Dist. Ct. App. 4th 2008) (stating that in equitable proceedings requesting reformation, even the existence of a merger clause did not exclude evidence of agreement not included in a deed). The collateral agreement exception to the merger doctrine in the case of real estate sales does not, however, apply to easements and other encumbrances where the deed warrants that title is unencumbered. See *American Nat. Self Storage*, 521 So. 2d at 306. The relation of this concept to real property law should be obvious, as should soon be the Florida Bar Examiners’ penchant for asking essay questions that involve more than one area of law in the same question.

**II. Four Corners Rule**

The *integration* question is still one of interpretation. The Florida courts have addressed this issue at least once, although the court did not mention the *four corners* rule. Rather, the court insisted that inquiry on the completeness of an agreement (i.e., the *integration* question) required “a look at the balance of the entire agreement to see what the intent of the parties were.” This is merely a restatement of the *four corners* rule. This is not to say that there are no cases finding for full integration that are decided in the absence of a merger clause based on the overall comprehensiveness of an agreement. Stated another way, in the absence of an integration or merger clause, a finding of full integration is still appropriate where review of the entire agreement indicates, on balance, that it is full and complete, and without any latent ambiguities. (In fact, to be completely honest, the test used in the case that follows looks like an amalgamation of the *plain meaning* (no ambiguities) and the *four corners* (full and complete in the balance) tests). The authors advocate rulings on a single basis rather than a balancing of multiple tests.
CARLTON, Associate Judge.

Appellant, J. C. Penney, Inc., a Delaware corporation authorized to do business in the State of Florida, appeals a final judgment entered by the trial court denying the appellant's claim for specific performance and for damages and granting appellee's counter-claim for rescission of a sale and purchase agreement and awarding damages pursuant thereto.

On December 17, 1973, appellant, J. C. Penney Company, Inc., entered into a sale and purchase agreement with appellee, Richard Koff, for the sale of certain land totalling 9.615 acres in the City of Lauderdale Lakes, Broward County, Florida. Negotiations had been conducted over a 25 month period prior to this. At the time the sale and purchase agreement was entered into, the zoning applicable to the subject property was R-4A which allowed 28 condominium units per acre. On March 26, 1974, prior to closing, the City of Lauderdale Lakes revised its description of R-4A zoning and provided that such development could not have more than 12 condominium units per acre. Thus making the venture less profitable to appellee. The closing was scheduled to take place April 23, 1974. Shortly before the closing appellee Koff delivered notice of rescission relying on the fact that the zoning had been changed.

Appellant Penney filed a complaint for specific performance and damages on the sale and purchase agreement between it and the appellee Koff. Appellee filed his answer denying appellant's right to specific performance and for damages and filed a counter-claim for the return of funds it deposited under the sale and purchase agreement as well as for the reimbursement of certain other funds spent under a collateral agreement between appellee and the City of Oakland Park, Florida. At the termination of the non-jury trial, the court entered a final judgment denying appellant Penney's request for specific performance, denying appellant's claim for damages and finding for appellee Koff on the counterclaim for the rescission of the sale and purchase agreement. The trial court further awarded appellee the sum of $65,000 in damages. This sum represented $10,000 as a deposit on the sale and purchase agreement and $55,000 for the sum appellee paid on the collateral agreement with the City of Oakland Park, Florida.

Appellee's primary case in the trial court consisted of attempting to show an ambiguity in the sale and purchase agreement and utilizing various parol testimony and prior correspondence in an attempt to support his position for denial for specific performance. The trial court over objections of appellant held that certain provisions in the sale and purchase agreement were ambiguous and allowed into evidence parol testimony and certain prior correspondence between the parties.

The substance of the parol evidence was to establish that appellee because of the change of density requirements between the execution of the contract and the scheduled closing would have a less profitable business venture and that appellee did not intend to be bound by the sale and purchase agreement if there was a change in the density.
Paragraph 1A, 1C and 6 of the sale and purchase agreement must be examined for ambiguities. They are as follows:

‘1. AGREEMENT TO SELL AND PURCHASE.
Seller shall sell and Purchaser shall purchase good and marketable fee simple title to the Premises described on Exhibit ‘A’ subject to the following:

‘A. Applicable building laws, zoning ordinances, laws and other regulations of any governmental body, subdivision, or agency having jurisdiction existing at the date of closing of title, provided the same do not prohibit the construction of residential type units As permitted under zoning ordinance category R-4A of the zoning ordinance of the City of Lauderdale Lakes, Florida including an apartment complex and recreational amenities including tennis courts, swimming pools and a health club.’ . . . (Emphasis added)

‘C. All covenants, agreements, restrictions and easements of records; provided the same do not prohibit the construction of residential type units as provided under zoning ordinance category R-4A of the zoning ordinance of Lauderdale Lakes, Florida including an apartment complex and recreational amenities including tennis courts, swimming pools and a health club.’ (Emphasis added)

6. NO REPRESENTATIONS BY SELLER
‘Seller makes and has made no representation, statement, warranty or guarantee as to the conditions, fitness or value of the Premises. The execution of this Agreement has not been procured by any representation, statement, warranty or guarantee not herein contained and Purchaser agrees to accept the Premises ‘as is' as of the date hereof.’ (Emphasis added)

Appellee contends that the phrases ‘as permitted’ under Paragraph 1A, ‘as provided’ under Paragraph 1C and ‘as is as of the date hereof’ under Paragraph 6 were ambiguous and therefore, parol evidence should be received by the court to determine what was meant by these phrases.

In reviewing the contract in an attempt to determine its true meaning, the court must review the entire contract without fragmenting any segment or portion. Royal American Realty, Inc., v. Bank of Palm Beach and Trust Company, Fla.App., 215 So.2d 336; International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service, 400 F.2d 465. In Ross v. Savage, 66 Fla. 106, 63 So. 148 the Supreme Court held:

‘The entire instrument must be considered in order to gather the real intent and to determine the true design of the makers thereof. To that end all the different provisions of such instrument must be looked to, and all construed so as to give the effect to each and every of them, if that can reasonably be done . . .’

‘When parties deliberately put their engagement into writing, in such terms as import a legal obligation without any uncertainty as to the object or extent of
engagement, it is, as between them, conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. . . . No other language is admissable to show what they meant or intended, and for the simple reason that each of them has made that to be found in the instrument the agreed text of his meaning and intention.'

In the case of Perry v. Woodberry, 26 Fla. 84, 7 So. 483, this principle was stated over seventy years ago and continues to be the law of Florida and does bar the consideration of any extensive evidence to explain or vary the express terms of a contract unless an ambiguity of a contract is first found to fairly appear. See Dimension Four International, Ltd. v. Huskey Realty, Fla.App., 325 So.2d 34; Black v. Clifton, Fla.App., 284 So.2d 465; Graham v. Graham, Fla.App., 277 So.2d 540; Hamilton Construction Co. v. Board of Public Instruction, Fla., 65 So.2d 729; Parkleigh House, Inc. v. Wahl, 97 So.2d 714. The above stated cases taken together adhere to the principle that the courts are allowed to consider extrinsic evidence only when confronting an ambiguous contract provision, and they are barred from using evidence to create an ambiguity to rewrite a contractual provision, or to vary a party's obligation under a contract.

It is necessary to look to the balance of the entire agreement to see what the intent of the parties were. The last clause of Paragraph 6 where ‘purchaser agrees to accept the premises ‘as is' as of the date hereof can logically be read in conjunction with Paragraph 1A without ambiguity. There is under Paragraph 1A language specifically relating to the zoning question in that appellant agreed to convey good and marketable title subject to zoning ‘existing at date of closing of title’. The court cannot interpret a general clause, the last phrases of Paragraph 6, in a manner directly contrary to a specific clause, Paragraph 1A. However, there must be an attempt made to give the last phrase in Paragraph 6 a reasonable meaning. Paragraph 6 is obviously a clause inserted to protect the seller by the limitation of representations for which he will be held responsible. There is no ambiguity in that portion of Paragraph 1A or of Paragraph 6 sufficient to justify the admission of parol evidence.

* * *

This cause is hereby reversed and remanded to the court below with direction to enter an order for specific performance in behalf of appellant Penney containing such provisions that are not inconsistent herewith.

Reversed.

III. Rules of Construction

It is hard to imagine a merger or integration clause that would be ambiguous to the degree that it would permit resort to a rule of construction such as construction against the drafter. This question would almost certainly be answered in one of the prior two stages of testing, i.e., via the plain meaning test or the four corners test. Review of Florida case law indicates a lack of precedent on this question. This does, however, provide an opportunity to more fully consider the role of rules of construction in contract interpretation. Please note that this concept applies to any interpretation
issue and not just on the question of integration, and therefore it applies as well to the material covered in Chapter XIV, Subsection III. As the excerpted opinion below and the cases cited therein indicate, rules of construction should be used only as a last resort. Worthy of note is the legal statement and citations that follow, however. Realistically, the last legal statement in the following case excerpt would appear to favor use of the holistic test (Test #4) by resort to the parties’ statements and conduct. As has been alluded to before, the Florida courts have not made particularly clear which rules take precedence in the hierarchy. The tests set out at the beginning of both this Chapter and Chapter XIV suggest a hierarchy based on the degree to which a possible source of evidence is extrinsic to the potentially ambiguous term(s).

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**DSL INTERNET CORP. v. TIGERDIRECT, INC.**

District Court of Appeal of Florida, Third District, 2005

907 So. 2d 1203

RAMIREZ, J.

DSL Internet Corporation appeals the trial court's final judgment entered in favor of defendant TigerDirect, Inc., ratifying and approving the General Master's report. We affirm because the General Master's findings and conclusions are supported by competent and substantial evidence in the record concerning the parties' intentions when they entered into the subject marketing agreements.

DSL is an internet service provider that sells high speed digital subscriber line services to companies and individuals. TigerDirect is a corporation that markets goods and services provided by others in exchange for commission payments to TigerDirect. TigerDirect's services offered to DSL included the placement of DSL's information on TigerDirect's website and DSL's ads in TigerDirect's catalogs. During the parties' business relationship, TigerDirect provided DSL advanced drafts of the ads to be placed in the catalog issues and on the website, and DSL would approve the placement and format. TigerDirect placed the DSL advertisements in its catalogs and website pursuant to various agreements, two of which were written agreements entered into in August and October of 2000 that contained a specific duration period.

Mario Bustamante, DSL's President and CEO, actively participated with Kevin Hamann, TigerDirect's Marketing Manager, in initial contract negotiations. Demitrio Rico, DSL's Sales Vice-President, actively participated in subsequent contract negotiations, and Bruce Matthews, TigerDirect's Vice-President of Business Development, similarly participated in contract negotiations. At issue in this case is the amount DSL owes TigerDirect under a written agreement entered into in January of 2001 which Hamann negotiated with Rico. In this agreement, TigerDirect agreed to include a full-page advertisement in its catalog “Issue 02-04, 2001” and on its website. The agreement lists various conditions, including $15,000.00 as the minimum guaranteed revenue.

The General Master issued his Report and Recommendation in favor of TigerDirect in the amount of $15,210.00, plus interest and an award of attorney's fees. The General Master determined that DSL's minimum payment obligation under the January 2001 agreement covered a period of three
months and required a minimum payment of $36,000.00. The General Master found that the terms of the agreements were ambiguous with respect to DSL's minimum guaranteed payment, but found that the general rule which requires that contracts be construed in favor of the non-drafter did not apply because the individuals who negotiated the agreements were sophisticated parties.

We find that there is competent substantial evidence to support the General Master's finding that the January 2001 agreement covered three months, February through April 2001, and required DSL to compensate TigerDirect in excess of $15,000.00. Florida law requires that a contract be interpreted against the drafter when the contract contains ambiguous terms. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla.1979). The construction-against-the-drafter principle is a rule of last resort and is inapplicable when there is evidence of the parties' intent at the time they entered into the contract. See Child v. Child, 474 So.2d 299 (Fla. 3d DCA 1985). See also The School Bd. v. Great Am. Ins. Co., 807 So.2d 750, 752 (Fla. 4th DCA 2002). Parol evidence is admissible to determine the meaning of ambiguous terms through the parties' own statements and conduct. See Berry v. Teves, 752 So.2d 112, 114 (Fla. 2d DCA 2000); First Capital Income and Growth Funds, Ltd.-Series XII v. Baumann, 616 So.2d 163, 165 (Fla. 3d DCA 1993).

* * *

IV. The Holistic Approach: Corbin, Restatement (Second) Contracts, & U.C.C. Article 2

A. Common Law

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CENTENNIAL MORTG., INC. v. SG/SC, LTD.

District Court of Appeal of Florida, First District, 2000

772 So. 2d 564

WEBSTER, J.

In these three consolidated appeals, Centennial Mortgage, Inc., seeks review of a final judgment which, among other things, held that it had breached an option contract relating to the sale and purchase of an apartment complex, and granted the request of SG/SC, Ltd., for specific performance. Because we conclude that the trial court erroneously excluded parol evidence proffered by Centennial, we reverse and remand for further proceedings.

At the non-jury trial, a major point of dispute involved which party had breached the written option contract. Centennial contended that SG/SC had breached the contract by failing to fund its portion of cost overruns attributable to renovation of the apartment complex. SG/SC maintained that it had no obligation to contribute to cost overruns, and that Centennial had breached the contract by failing to close the transaction. The parties agreed that the option contract did not address the topic of renovation-cost overruns. Centennial contended that this omission constituted a latent ambiguity, and that, therefore, parol evidence was admissible to assist the trial court in determining
what the parties would have included in the contract had they anticipated the possibility of cost overruns. The trial court agreed with SG/SC that the contract was not ambiguous and, accordingly, refused to consider the parol evidence proffered by Centennial. This was error.

It is clear from the evidence presented at trial that neither party contemplated the possibility of renovation cost overruns when they executed the contract. Given this undisputed fact, we find the following discussion from *Hunt v. First National Bank of Tampa*, 381 So.2d 1194 (Fla. 2d DCA 1980), instructive:

If a contract is clear, complete and unambiguous, there is no need for judicial construction.... But even the most cautious drafting, and the most exhaustive imagination, rarely covers every possible contingency. If a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document. This insufficiency is called a latent ambiguity, and ... courts ... are frequently called upon to determine what the parties would have included in their contract had they anticipated an occurrence which they in fact overlooked.... In so doing, the function of the court is to ascertain, insofar as possible, the intent of the parties.... Extrinsic evidence is not only admissible on that issue, but is frequently required where the instrument itself does not provide sufficient insight into intent.

*Id.* at 1197 (footnote and citations omitted).

SG/SC contends that the parol evidence proffered by Centennial is barred by the parol evidence rule, the statute of frauds (§ 725.01, Fla.Stat.(1995)) and an integration clause contained in the contract. We disagree. As Hunt demonstrates, parol evidence is admissible to resolve latent ambiguities such as the one at issue here. The statute of frauds does not come into play for the simple reason that the contract at issue is in writing. As we said in *Outlaw v. McMichael*, 397 So.2d 1009, 1011 (Fla. 1st DCA 1981), the purpose of integration clauses “is to affirm the parties' intent to have the parol evidence rule applied to their contracts.” However, we also said that “[t]he modern trend ... is for the courts to allow parol evidence, even in cases where a contract contains an integration clause, in order ... to explain an ambiguity in the contract.” *Id.* (citation omitted).

Professor Corbin's treatise supports such an approach:

No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means.... Even if a written document has been assented to as the complete and accurate integration of the terms of the contract, it must still be interpreted; and all those factors that are of assistance in this process may be proved by oral testimony.


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Accordingly, exercising our power of de novo review, we hold that the trial court erred when it concluded that the contract was not ambiguous regarding responsibility for renovation-cost overruns. However, the parties' intent regarding that topic is a question of fact. Id. See also Land O'Sun Realty Ltd. v. REWJB Gas Inv., 685 So.2d 870, 872 n. 3 (Fla. 3d DCA 1996) (“Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is totally unambiguous, or when any ambiguity may be resolved by applying the rules of construction to situations in which the parol evidence of the parties' intentions is undisputed or non-existent”), review dismissed sub nom. Lennar Florida Partners, I v. REWJB Gas Inv., 710 So.2d 978 (Fla.1998). Accordingly, we reverse, and remand. On remand, the trial court shall reconsider this case, taking into account the parol evidence proffered by Centennial, including that of the parties' conduct regarding responsibility for renovation-cost overruns. See, e.g., Russell v. Gill, 715 So.2d 1114, 1116 (Fla. 1st DCA 1998) (noting the importance of conduct of the parties to a contract in determining intent). This remand does not contemplate the presentation of additional evidence. In light of this resolution, we consider it unnecessary to address the other issues raised by Centennial.

REVERSED and REMANDED, with directions.

B. Sale-of-Goods Contracts

FLA. STAT. § 672.202 (2017) provides as follows:

Final written expression; parol or extrinsic evidence.—Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(1) By course of dealing or usage of trade (§ 671.205) or by course of performance (§ 672.208); and

(2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The following case concerns sale of an automobile and related financing arrangements. It also deals with a matter that has often proved problematic in contract law – the requirement of arbitration instead of taking disputes to an appropriate court of law. The distinction between parol and extrinsic evidence is emphasized, and there is an interesting twist: whether agreements signed contemporaneously, which are often read in conjunction, are excluded parol evidence where there is a merger or integration clause. Note that the following case also addresses the related concept of a collateral agreement.
LEWIS, J.

Duval Motors Company d/b/a Duval Ford, Appellant, seeks review of an order denying its motion to compel arbitration of several claims filed by Cassandra and Alton Rogers, Appellees. Appellant contends that the parties have a valid agreement requiring arbitration of Appellees' claims. For the reasons explained below, we disagree with Appellant and affirm the trial court's decision.

On June 19, 2009, the parties signed multiple documents related to a vehicle purchase transaction. One of those documents is the Retail Installment Sales Contract (“RISC”). The RISC identifies Appellees as the Buyer and Co–Buyer and Appellant as the Seller–Creditor. It then sets forth the following terms:

You, the Buyer (and Co–Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Seller—Creditor (sometimes “we” or “us” in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below.

The RISC identifies the vehicle being purchased and provides the financial terms of the purchase, including the down payment, the total sale price, the total amount financed, the annual percentage rate, the total finance charge, and a payment schedule. The RISC also contains a warning that state law does not provide a “cooling off” period for the transaction and that Appellees are not entitled to cancel the contract simply because they change their minds. Additionally, the RISC provides that Appellant “may assign this contract.” Finally, and most importantly, the RISC contains the following merger clause:

HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding.

The RISC does not contain an arbitration agreement.

The arbitration agreement appears in a separate document, the Retail Buyer's Order (“RBO”), which was signed the same day. The RBO identifies the vehicle being purchased and lists the vehicle's price and the fees associated with the purchase. Additionally, the RBO provides that “[t]he retail installment sales contract (“RISC”) to be entered between Dealer and Customer, unless otherwise indicated in writing by Dealer, shall be immediately assigned by Dealer to a bank / finance company (at face value or greater) which shall then be the creditor to whom Customer shall be obligated under the RISC.” It then states that the dealer has the right to terminate “this Order,” i.e. the RBO, if the dealer cannot obtain credit approval for the customer or if the dealer...
is unable to sell the RISC to a financial institution on terms of no less than face value. The RBO states that if the customer takes delivery of the vehicle before the dealer obtains financing approval, then delivery “serves as a convenience to Customer only and Customer does not have, nor will acquire, any rights or interests in the Vehicle by such delivery except Dealer's permission to use it, which permission can be revoked, requiring the Vehicle's immediate return to Dealer in the same condition as it existed when delivered to Customer.” Finally, the RBO purports to make financing approval a condition subsequent to the enforcement and validity of the RISC.

According to Appellees' complaint, they took delivery of the vehicle after signing all the documents associated with the transaction. They alleged that two weeks after they took delivery, Appellant demanded an additional down payment of $5,000. According to the complaint, Appellant took the vehicle from Appellees' possession after they refused this new demand. Appellees asserted seven causes of action arising out of these events. Instead of an answer, Appellant filed a motion to compel arbitration. The motion was based on the arbitration agreement in the RBO, which Appellant contends is part of the parties' contract. Appellees argued, among other things, that the merger clause precluded consideration of the RBO. After reviewing the language of the documents at issue and considering the parties' arguments, the trial court denied Appellant's motion, concluding that no binding arbitration agreement existed with respect to the transaction at issue. Based on the merger clause, we agree with the trial court. [Footnote omitted]

In determining whether to compel arbitration, a trial court is limited to three inquiries: “(1) whether a valid written agreement exists containing an arbitration clause, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived.” Piercy v. School Bd. of Washington Cnty., Fla., 576 So.2d 806, 807 (Fla. 1st DCA 1991). In the instant case, the trial court concluded that no valid agreement to arbitrate existed relating to the transaction at issue. This conclusion was based on construction of the parties' contract. Therefore, it is subject to de novo review. Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 283 (Fla. 1st DCA 2003).

Interpretation of a contract begins with its plain language. Taylor v. Taylor, 1 So.3d 348, 350 (Fla. 1st DCA 2009). As a general rule, evidence outside the contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity. [Footnote omitted] Wheeler v. Wheeler, Erwin & Fountain, P.A., 964 So.2d 745, 749 (Fla. 1st DCA 2007); Jenkins v. Eckerd Corp., 913 So.2d 43, 52–53 (Fla. 1st DCA 2005). Parol evidence includes “a verbal agreement or other extrinsic evidence where such agreement was made before or at the time of the instrument in question.” J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So.2d 484, 485 (Fla.1957). The parol evidence rule precludes consideration of such evidence “to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change, add to, or subtract from it, or affect its construction.” Id. at 486 (citation omitted); see also Allett v. Hill, 422 So.2d 1047, 1050 (Fla. 4th DCA 1982) (finding error in “the admission of parol evidence to add a term to [a] written lease which, whether part of the preliminary negotiations or a separate subsequent condition, plainly violates ... the doctrine of merger and the parol evidence rule”).

The purpose of a merger clause is “to affirm the parties' intent to have the parol evidence rule applied to their contracts.” Centennial Mortg., Inc. v. SG/SC, Ltd., 772 So.2d 564, 565 (Fla. 1st DCA 2000) (quoting Outlaw v. McMichael, 397 So.2d 1009, 1011 (Fla. 1st DCA 1981)).
Generally, a merger clause states “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.” *Jenkins*, 913 So.2d at 53 n. 1 (*quoting* Black's Law Dictionary, 813 (7th ed. 1999)). This Court has explained the significance of a merger clause as follows:

Although the existence of a merger clause does not per se establish that the integration of the agreement is total, ... a merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parol evidence to vary or contradict the written terms.

*Id.*

Appellant argues that the merger clause at issue exists only to establish that the contract cannot be modified orally and that “if it's not in writing, it did not happen.” This interpretation is inconsistent with the plain language of the clause and the operation of the parol evidence rule, which excludes all evidence extrinsic to a fully integrated contract. See *J.M. Montgomery Roofing*, 98 So.2d at 485. The RISC's merger clause does not specifically mention prior written agreements, but it explicitly provides that “this contract” is the “entire agreement” between the parties. As a result, it is immaterial whether any prior representations sought to be excluded are oral or written; anything that does not constitute part of “this contract” is not part of the parties' agreement related to the contract. Thus, whether the RBO should be considered depends on whether it is part of “this contract” as that phrase is used in the merger clause.

Based on the language of the RISC itself, it is clear that “this contract” refers only to the RISC. By its title, “Retail Installment Sale Contract,” the RISC purports to represent the parties' contract. More importantly, the RISC does not refer to any other document as part of the contract. As a result, the natural interpretation of the phrase “this contract,” as used in the merger clause, is the document on which the merger clause appears.

Moreover, even when the language of the RBO is considered, this conclusion is supported. The RBO does not refer to itself as a contract; instead, the RBO refers to itself as “this order” throughout the document. For example, the RBO contains a warning to the buyers not to sign until they have read and understood all the terms of “this order.” Thus, the two documents together reveal that “this contract” refers to the RISC, while “this order” refers to the RBO.

Appellant contends that this Court should not consider the RISC a fully integrated document because the RISC does not contain all the essential terms of the agreement. This argument appears to be based on the general principle that “if there has been no agreement as to essential terms, an enforceable contract does not exist.” *Irby v. Mem'l Healthcare Grp., Inc.*., 901 So.2d 305, 306 (Fla. 1st DCA 2005) (citation omitted). By extension of this principle, it stands to reason that if a document does not contain all the essential terms of an agreement, it cannot be considered a fully integrated contract. See *Jenkins*, 913 So.2d at 53 (“For the parol evidence rule to apply, ‘the written agreement must appear on its face to express an agreement complete in all essential terms.’ ”) (*quoting* *Gulf Atl. Towing Corp. v. Dickerson, Inc.*, 271 F.2d 542, 546 (5th Cir.1959)). Appellant claims that only the RBO contains important terms such as the price of the vehicle, the sales tax,
the cost of a vehicle maintenance plan, a rebate to the buyers, and the amount of the down payment. To the contrary, the only item on Appellant's list that is not included in the RISC is the “cost of a vehicle maintenance plan.” [Footnote omitted] However, this item is not an essential term, as such a plan is not required to show that there was an agreement by the buyers to purchase the vehicle and an agreement by the seller to deliver the vehicle. The terms showing such an agreement indicate that there was consideration for the contract. Thus, the contract is complete without discussion of a maintenance plan.

Appellant also argues that case law requires this Court to interpret the term “this contract” as referring to all the documents signed contemporaneously with the RISC in conjunction with the sale of the vehicle. Appellant's argument is based on the general principle recognized in *Dodge City, Inc. v. Byrne*, 693 So.2d 1033, 1035 (Fla. 2d DCA 1997), that “[w]hen the parties execute two or more documents concurrently, in the course of one transaction concerning the same subject matter, the documents must be read and construed together.” This principle also requires reconciliation, if possible, of all provisions of the documents that are contemporaneously executed. See id. The Dodge City case also concerned a vehicle purchase transaction and documents similar to the ones at issue in this case. See id. However, the Dodge City opinion does not indicate that the RISC or any other document executed in conjunction with the sale contained a merger clause (or that the parties made an issue of such a clause). See generally id. The parties have not cited any Florida case specifically analyzing whether this principle applies when a document containing a merger clause is executed contemporaneously with other documents.


In *Krueger*, in conjunction with the purchase of a vehicle, the buyers signed a Retail Buyer's Order, an Arbitration Addendum to the Retail Buyer's Order, and a Retail Installment Contract. 289 S.W.3d at 638. The Retail Installment Contract set forth the terms of the agreement based on a credit purchase of the vehicle and did not reference either the Retail Buyer's Order or the Arbitration Addendum to the Retail Buyer's Order. *Id.* The issue was whether the arbitration provision of the Retail Buyer's Order and its addendum were binding. *Id.* The Krueger court held that the arbitration agreement was not binding based on the following merger clause in the Retail Installment Contract:

Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.
Based on this language, the Krueger court held that the Retail Installment Contract was intended to supersede the Retail Buyer's Order and that the Retail Installment Contract was “the only agreement controlling the sale and purchase of the vehicle.” *Id.* at 640. The Krueger court distinguished a case with similar facts based on the existence of the merger clause. *Id.*

In *Patton*, the terms of the retail installment sale contract were strikingly similar to those of the RISC in the instant case. See 608 F.Supp.2d at 908–09. The seller in *Patton* was identified as the “Creditor–Seller,” and the retail installment sale contract contained an agreement by the buyers to pay the Creditor–Seller the amount financed according to a payment schedule. *Id.* The merger clause in *Patton* was virtually identical to the merger clause at issue in the instant case. *Id.* at 909. The retail installment contract in *Patton* also contained the same warning about the lack of a “cooling off period” that the RISC in the instant case contains. *Id.* In *Patton*, the buyers also signed a separate “Purchase Spot Delivery Agreement,” indicating the buyers' understanding that financing was not finalized and that the transaction would be complete upon assignment of the retail installment contract to a third party. *Id.* This agreement was similar to language contained within the RBO in the instant case. See *id.*

One of the issues before the *Patton* court was whether the spot delivery agreement rendered certain disclosures on the retail installment contract illusory. *Id.* at 913–15. This issue turned on whether the spot delivery agreement was part of the contract. See id. The *Patton* court concluded that the retail installment contract was a fully integrated contract. *Id.* at 915. To support this conclusion, the court noted that no language in the retail installment contract made it contingent on approval by or assignment to a third-party lender and that, by its terms, it obligated the buyers to make monthly installment payments to the seller. *Id.* The court further reasoned that certain provisions of the spot delivery agreement contradicted provisions of the retail installment contract. *Id.* In particular, the court concluded that the provision in the spot delivery agreement indicating that financing had not been finalized contradicted the terms of the installment contract that identified the seller as the “Creditor–Seller” and gave due dates for payments. *Id.* Further, the court noted that, although the retail installment contract indicated that the seller “may assign this contract,” it did not make the contract contingent on assignment, as the spot delivery agreement purported to do. *Id.* The court concluded that the language in the retail installment contract providing for financing on specific terms and payments at specific times would be rendered meaningless if the language in the spot delivery agreement permitting the seller to cancel the contract were in force. *Id.* These inconsistencies, along with the merger clause, the lack of incorporation by reference of the spot delivery agreement into the retail installment contract, and the purpose of the Truth In Lending Act, which was at issue in that case, led the *Patton* court to conclude that the general rule requiring consideration of all contemporaneously executed documents did not apply to the retail installment contract. *Id.* at 915–16.

As noted above, the documents at issue in this case are strikingly similar to those discussed in *Patton*. Because we agree with the *Patton* court's reasoning, we hold that the RISC in the instant case is a fully integrated document, consistent with the plain language of the merger clause.

This conclusion does not end our inquiry because Appellant argues that, even if the RISC is a fully integrated contract, the RBO constitutes a valid change to it. This argument is based on the merger
clause's statement that “any change to this contract must be in writing and [the parties] must sign it.” We do not agree that the RBO constitutes a valid change to the RBO because nothing in the RBO indicates that it was intended as a modification of a pre-existing contract, and the parol evidence rule excludes evidence of other prior or contemporaneous agreements. Rather than indicating that it is a subsequent modification to the RISC, the RBO indicates that it was signed before the RISC, as it states, “The retail installment sales contract (“RISC”) to be entered between Dealer and Customer, unless otherwise indicated in writing by Dealer, shall be immediately assigned by Dealer to a bank/finance company ... which shall then be the creditor to whom Customer shall be obligated under the RISC.” (emphasis added). Because the RBO indicates on its face that it was signed before the RISC, it cannot be considered a “change” to the contract as that term is used in the merger clause; instead, the language in the RISC indicating that the RISC constitutes the entire agreement controls.

Notably, the RBO appears to incorporate the RISC by reference. See Jenkins, 913 So.2d at 51 (“A document may be incorporated by reference in a contract if the contract specifically describes the document and expresses the parties' intent to be bound by its terms.”) (citation omitted). This factor arguably distinguishes Patton, where neither document incorporated the other by reference. 608 F.Supp.2d at 909. However, this distinction is immaterial. As explained above, the terms of the RISC indicate that the RISC is the controlling instrument. Thus, the important inquiry is whether the RISC incorporates the RBO, not whether the RBO incorporates the RISC. The RISC does not mention the RBO. As a result, the RBO is irrelevant to the disputes arising out of the transaction at issue.

In sum, we affirm the trial court's decision to deny Appellant's motion to compel arbitration. This decision was correct because of the merger clause indicating that the RISC constitutes the entire agreement between the parties related to the contract governing the vehicle purchase. Accordingly, the order on appeal is AFFIRMED.

DAVIS, and WETHERELL, JJ., Concur.

* * *

3 The parol evidence rule is often characterized as excluding evidence of an oral agreement. See, e.g., Jenkins, 913 So.2d at 53; Sears v. James Talcott, Inc., 174 So.2d 776, 778 (Fla. 2d DCA 1965). However, as indicated by the use of the phrase “extrinsic evidence” in J.M. Montgomery Roofing, 98 So.2d at 485, the evidence excluded under the rule includes any evidence outside the instrument that is considered the fully integrated contract. See also Burgan v. Pines Co. of Ga., Ltd., 382 So.2d 1295, 1296 (Fla. 1st DCA 1980) (acknowledging that “the rule precludes evidence of understandings, parol or otherwise, which preceded a final integration of the parties' contract”); Smith Eng'g & Constr. Co. v. U.S. Fid. & Guar. Co., 199 So.2d 302, 305 (Fla. 1st DCA 1967) (“[W]hen a legal act is reduced into a single writing, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.... No other language is admissible to show what they meant or intended ....”)). (citation omitted).

V. Contract Integration Questions for the Jury (Fact-Finder)

It is unlikely that a person would articulate a merger or integration clause that is so sketchy as to call for a factual inquiry into its existence. Just as to other interpretation matters, however, a court could turn over the question of integration to a jury. See supra Chapter XIV, Subsection VI. This would be particularly appropriate where there were competing accounts about whether the parties
intended for a writing to be the full and final expression of an agreement – which would entail consideration of truthfulness.

VI. Three Primary Exceptions to the Parol Evidence Rule

The parol evidence rule does not prohibit consideration of several kinds of evidence. The first is subsequent evidence, such as letters, phone calls, written contract modifications, etc., that come after formation of the agreement in question. The second is for preconditions to a contract. If someone offers to buy an automobile in writing, but the parties discussed that it would not happen if the buyer did not get a new job within two weeks, then there is no formation problem unless the condition is satisfied (conditions are addressed in Chapters XVI-XVI). The third also concerns a formation problem – i.e., when some impairment or problem supplies a defense to formation such as fraudulent misrepresentation, duress, or undue influence.

A. Subsequent Modifications

PAVOLINI v. WILLIAMS

District Court of Appeal of Florida, Fifth District, 2005

915 So. 2d 251

MONACO, J.

The appellants, Arturo Pavolini and Maria Rivera ("Borrowers"), seek reversal of the final summary judgment of foreclosure rendered against them by the trial court and in favor of the appellees, Winston Williams, et al. ("Lenders"). Because we conclude that the trial court erred in striking the affirmative defenses raised by the Borrowers, and because there were issues of fact that were not excluded by the Lenders at the time summary judgment was granted, we reverse.

Lenders loaned $72,000 to the Borrowers, secured by a mortgage on real property that was to become the home of the Borrowers. The amended complaint alleged that several mortgage payments, real estate taxes and insurance costs had not been paid, and that a $1,500 deposit had not been made, all of which were required of the Borrowers by the promissory note. The Borrowers alleged as affirmative defenses that the “course of dealing” between the parties explained the late payment of taxes and insurance, that the $1,500 deposit had been waived, and that the mortgage payments had been timely paid, but were returned by the Lenders without a legal basis. The Borrowers alleged, as well, that the Lenders were estopped to assert a breach because of the course of dealing of the parties, and that the Lenders had acted with unclean hands because of a fraud in the inducement. The fraud claim was also the basis of a counterclaim and third-party complaint [Footnote omitted] brought by the Borrowers because of a purported representation by the Lenders that the roof of the structure was in good condition, even though it had a history of leaks.

Lenders filed a verified motion for summary judgment in which they indicated that the Borrowers defaulted under the note and mortgage by failing to make certain mortgage payments, tax
payments, and insurance reimbursements, and by failing to make the $1,500 deposit. The Lenders also filed a verified motion to strike the affirmative defenses of the Borrowers. The Lenders acknowledged in the motion that they had received tendered money orders for the mortgage payments, but related that they returned the payments because they did not include late fees, or reimbursement for taxes or insurance. The legal argument concerning the affirmative defenses was essentially that there was no waiver or estoppel and that the Lenders denied that they acted with unclean hands. That's all.

The Borrowers each served an affidavit in opposition to the motion for summary judgment in which they swore that the monthly payments had been made, that the Lenders waived the $1,500, and that the parties had long-standing oral arrangements concerning the taxes and insurance. The affidavits also indicated that the Borrowers had by then paid all the insurance premiums and taxes required by the loan documents. Finally, the affidavits indicated that the Lenders had routinely accepted late payments from the Borrowers because the Borrowers are out of town for extended periods, and that the Lenders had given no notice of a change in policy in this respect.

The trial court entered an order striking the affirmative defenses without explanation, and granted a final judgment of foreclosure to the Lenders. From these orders the Borrowers appeal.

* * *

The same fate befalls the order striking the affirmative defenses. The parol evidence rule applies to verbal agreements between the parties to a written contract which are made before or at the time of execution of the contract. It does not apply to the admission of subsequent oral agreements that alter, modify, or change the former existing agreement between the parties. See Wilson v. McClenney, 32 Fla. 363, 13 So. 873 (1893), and Vorzimer v. Kaplan, 362 So.2d 451 (Fla. 3d DCA 1978). The First District noted in this connection:

And the parol evidence rule has been specifically held to be inapplicable to oral agreements made subsequent to the execution of a promissory note, as between the parties to the note, in regard to the defense-such as that asserted here-of failure of consideration. [Cite omitted]. Consequently, if the oral modifications [purchaser] allegedly made were not made before or contemporaneously with the written contract, the parol evidence rule would not preclude the admission of such extrinsic evidence.

* * *

Accordingly, we reverse the final summary judgment and the order striking affirmative defenses, and remand for further proceedings.

REVERSED and REMANDED.

SAWAYA and PALMER, JJ., concur.
B. Preconditions to Formation

RMJ ENTERPRISES OF NORTHWEST FLORIDA, INC. v. BORG WARNER ACCEPTANCE CORP.

District Court of Appeal of Florida, First District, 1989

547 So. 2d 211

BARFIELD, Judge.

We affirm the final summary judgment entered against appellants in appellee's action for breach of personal guaranty and waiver agreements. The agreements secured the full and prompt payment of a corporate line of credit extended by appellee. [Footnote omitted] We reject appellants' argument that noncompliance with an alleged oral condition precedent to the delivery and enforceability of the guaranty and waiver agreements voided the agreements “ab initio.” Throughout the lending relationship, the line of credit operated as originally contemplated. If the procedure did in fact change, it did so only at the tail end of the relationship when appellee attempted to resolve the corporation's delinquent account. In other words, appellee complied with the alleged condition precedent in every financial transaction it funded, except the final one. Under these circumstances, we construe the condition precedent exception to the parol evidence rule to be inapplicable.²

We find no merit to the other issues raised by appellants. Accordingly, we AFFIRM.

SHIVERS, C.J., and ZEHMER, J., concur.

2 See Cockrell v. Taylor, 122 Fla. 798, 165 So. 887 (1936), in which the supreme court held that parol evidence was admissible to show that the delivery of a written agreement, unconditional on its face and fully executed, was subject to a condition precedent. The condition precedent exception to the parol evidence rule exists in order to establish that an agreement never became operative due to the failure of a certain condition or contingency, “hence there could be no modification or variance or contradiction of it as such.” Ketchian v. Concannon, 435 So.2d 394, 395 (Fla. 5th DCA 1983). While we adhere to the principle enunciated in these cases, we distinguish them based upon the particular facts of the present case.

C. Defenses to Enforcement

OUTLAW v. McMICHAEL

District Court of Appeal of Florida, First District, 1981

397 So. 2d 1009⁵

ERVIN, Judge.

The Outlaws appeal an order granting McMichael's motion to dismiss their amended complaint with prejudice. Because the appealed order did not state any specific grounds for dismissal, the

⁵ 397 So. 2d 1009, disagreed with on other grounds, Smith v. Mayes, 851 So. 2d 765 (Fla. Dist. Ct. App. 1st 2003).
parties have argued all nine grounds raised in the appellee's motion to dismiss as points on appeal. For the reasons stated infra, we reverse and remand with instructions.

The Outlaws' complaint alleged that during negotiations leading to the purchase of certain rental property from the seller, McMichael, that the latter's real estate agent made certain misrepresentations about the character of the property to be sold, and also alleged that McMichael breached the real estate contract, which was attached to the complaint, but which did not describe the property to be conveyed; instead a space for the property description was left unfilled by the parties. The first ground for dismissal asserted that the complaint failed to state that McMichael authorized or had reason to know of the alleged misrepresentations by a representative of his realtor. The amended complaint clearly alleged that a principal-agency relationship existed between McMichael and his realtor. In the normal real estate transaction, a real estate agent should have at least implied actual authority or apparent authority to make representations concerning the description and characteristics of the property to be sold. At the minimum, we cannot hold as a matter of law that a real estate agent does not have such authority. A principal is responsible for his agent's unauthorized representations, if true representations as to the same matter were within his authority, and if the third party had no notice that the representations were unauthorized. Sun Oil Co. v. Behring Properties, Inc., 480 F.2d 310 (5th Cir. 1973).

It can be logically inferred from the allegations in the complaint that the Outlaws did not have notice that the representations made by the realtor were false until they took occupancy of the premises. Moreover, a principal can be held liable for the misrepresentations of his agent notwithstanding his lack of knowledge. See Wheeler v. Baars, 33 Fla. 396, 15 So. 584 (1894).

Points III and IV basically alleged that the complaint should have been dismissed because the warranties represented did not extend beyond the date of closing and that the Outlaws did not make a reasonable, timely inspection. Johnson v. Oliver, 249 So.2d 65 (Fla.1st DCA 1971), is to the contrary, holding that the buyer of real estate was not estopped to claim relief for alleged defects stemming from misrepresentations by the seller, although the buyer and seller had earlier made a written agreement after closing that the seller would remedy certain other minor defects. Finally, the Johnson court held that the reasonableness of a purchaser's inspection of the premises is a jury question. See also Besett v. Basnett, 389 So.2d 995, 998 (Fla.1980), in which the court reiterated the rule “that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.” As in Besett, it does not appear from the facts alleged in the complaint before us “that the (buyers) knew that the alleged misrepresentations were false....”

Point V raised the question whether the appellants' complaint adequately alleged a material misrepresentation by the seller who purportedly had advised the Outlaws that the existing tenants on the purchased property were paying their utilities. The appellee's defense was that since the appellants did not further allege the nature of the tenancies represented, the appellants had no assurance that the tenants would remain, enabling the appellants to require the tenants to pay utilities; therefore, the measure of damages was not ascertainable without pleading how long the landlord had assurance of having the tenants stay. This point also is not grounds for dismissal. The issue as to certainty of damages is an evidentiary matter. See Butler v. Mirabelli, 179 So.2d 868 (Fla.2d DCA 1965).
Points VI through IX basically involve the issue whether the alleged oral misrepresentations would have been inadmissible under the parol evidence rule because of the following language in the contract:

NO REPRESENTATIONS, guarantees, or warranties of any nature whatsoever which are not herein expressed and been made by any party hereto or their representatives.

THIS CONTRACT SUPERSEDES AND REPLACES ALL OTHER CONTRACTS.

The above quoted language has been generically referred to as an integration clause. The purpose of such clauses is to affirm the parties' intent to have the parol evidence rule applied to their contracts. The modern trend, however, is for the courts to allow parol evidence, even in cases where a contract contains an integration clause, in order (1) to show that the parties did not intend for such language to be a complete statement of their transactions, see Luther Williams, Jr., Inc. v. Johnson, 229 A.2d 163 (D.C.App.1967), or (2) to explain an ambiguity in the contract. See Blaha v. Schwartz, 7 Ohio Op.3d 234 (Ohio Com.Pl. 1977). Here the omitted description of the property in the sales contract is the central factual concern in the appellants' claim. Therefore, we hold that the parol evidence rule does not render appellants' complaint defective because the sales contract's incomplete provisions will apparently have to be clarified by parol evidence, a recognized exception to the parol evidence rule. See generally cases cited in 23 Fla.Jur.2d, Evidence, ss 344, 345 (1980).

In summary, most of the appellee's points raised in his motion for dismissal could be better characterized as affirmative defenses. Our holding does not preclude the appellee from re-raising these issues, some of which might become viable at a later stage in the proceedings.

Reversed and remanded for further proceedings consistent with this opinion.

SHAW and WENTWORTH, JJ., concur.

Problem 16-1

Buyer visited Seller at Seller’s used-car lot. As Buyer was looking over a used car, Seller began telling him about the virtues of the vehicle being considered. When Buyer became hesitant to purchase, Seller showed him a sixteen-point checklist and said, “You see this? This is the checklist that our mechanics use to verify that the main mechanics like brakes, drive train and engine are all in top shape. On this vehicle, all sixteen items in the checklist were described by the mechanic as “very good” or “excellent.”” Buyer asked Seller to sign the checklist and include it in the financing package – to which Seller said “No problem, but I have to get the mechanic to sign it too. Just sign the purchase and financing documents and I’ll be over in a minute with the checklist.” The purchase agreement contained a merger clause. Seller left for the day without giving Buyer the checklist. The vehicle that Buyer purchased broke down within days. Will discussion of the checklist or the checklist itself make its way into evidence in a lawsuit by Buyer against Seller? Why or why not?
Problem 16-2

Homeowner contracted for Painter to repaint the interior of Homeowner’s home. The contract contained a merger clause. A week into the painting, Painter wrote a note saying, “Need $200 more if you want the matte finish paint that you liked – price went up. That okay?” Homeowner wrote “Ok” on the same note and initialed it. Would the note be allowed into evidence if Painter introduced it in a suit against Homeowner for the extra $200? Why or why not?

Problem 16-3

College Student discussed the possibility of selling his favorite violin to Neighbor, telling Neighbor that he would not need it since he expected to get a new violin for his birthday in a few days. College Student then wrote out a short contract that he was “selling the violin for $400, pick-up sometime next week.” Unfortunately, College Student got a new sweater for his birthday and not a new violin. Neighbor is ready to tender the $400 and now seeks to enforce the contract of sale. In this claim, Neighbor would win or lose depending whether College Student can introduce into evidence the verbal discussion of his birthday and the possibility of receiving a new violin. What result, and why?

Problem 16-4

The preceding three questions address a different exception to the parol evidence rule but in a different order than presented in the text immediately above. Can you determine which category applies to which problem? Does calling for identification of things that are not in the outline-listed format typical of many/most study resources prevent or foster a well-rounded understanding?

Note

You may recall from Chapter III that where a sale of goods is involved, a state’s adoption of the Uniform Commercial Code’s Article 2 applies. This is, however, supplemented by the common law principles where the Code provisions do not address something. The situation of contract integration is addressed, in Fla Stat. § 672.202 (2017) and its U.C.C. counterpart, Article 2, § 2-202. In fact, the “integration” question is one of interpretation (i.e., “whether or not parol evidence may be introduced based on the intent of the parties regarding the comprehensiveness of the final written manifestation of their agreement”). There is no reason why the same rules would not apply to other questions of interpretation. Further, the provision just referenced is far from complete, and therefore requires supplementation by the common law. These are good examples of areas that the drafters of the U.C.C. left, at least in large part, to the common law. Thus, on a bar exam dealing with interpretation of a potentially ambiguous term, one could write something like “Although this is the sale of goods and therefore the state’s adoption of U.C.C. Article 2 mandatorily applies, the Code does not significantly cover interpretation issues (with the exception perhaps of the integration issue) and therefore it is supplemented by common law principles.” Almost a CMM Approach, stating up front the right laws to be applied, and why, is very good practice.
IMPORTANT CONCEPTS TO HAVE MASTERED FROM CHAPTER XVI

1. How does parol evidence (this Chapter) differ from extrinsic evidence (Chapter XIV)?
2. To what does the parol evidence apply? What are the primary exceptions to the rule?
3. What are the differences between the parol evidence rule as used in common law cases and sale-of-goods cases, if any?
4. What is meant by the idea that parol evidence/integration is a question of substantive law?

SUGGESTED EXERCISES

1. Have students research the two non-Florida cases upon which the court in Duval Motors Corp. rely (Missouri and South Dakota). Have these been cited at authority in other jurisdictions as well?
2. Have students research and to report on find Florida cases that cite Fla. Stat. § 672.202 (2017).