

## SOME JUDICIAL OPINIONS SINCE 2015 AFFECTING FLORIDA LLCs

### **Actions by Members Against Other Members; Preeminence of Operating Agreement over Florida LLC Act**

Ferk Family, LP v. Frank, 2018 Fla. App. LEXIS 2860 (Fla. 3<sup>rd</sup> DCA February 28, 2018).

Under Section 605.0105(2), (3)(a) and (3)(k), F.S., an LLC member may bring a direct, not only a derivative, action against another LLC member if the operating agreement so provides notwithstanding the LLC member's failure to satisfy the requirements of Section 605.0801, F.S. that the member plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the LLC.

This court similarly held in Dinuro Investments, LLC v. Camacho, 141 So. 3d 731, 739-740 (Fla. 3<sup>rd</sup> DCA 2014), under the predecessor Florida LLC Act, Ch. 608, F.S., that a member may bring a direct, not only a derivative action, against another LLC member "when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates" even if that member does not satisfy its burden of proof that (1) there is a direct harm to the members such that the alleged injury does not flow subsequently from an initial harm to the LLC, and (2) there is a special injury to the member separate and distinct from those sustained by the other LLC members.

### **Indemnification by LLC Other Than of Members of Member Managed LLC or Managers**

MVW Management, LLC v. Regalia Beach Developers LLC., 230 So. 3d 108 (Fla. 3<sup>rd</sup> DCA September 6, 2017), rehearing denied, 2017 Fla. App. LEXIS 19408 (Fla. 3<sup>rd</sup> DCA October 11, 2017).

Generally, in Florida, indemnity provisions apply only to third-party claims. Florida law disfavors contracts that shift the cost of a party's misconduct from the perpetrator to the injured party. Accordingly, agreements for direct indemnification or advancement of expenses in first-party actions, like exculpatory clauses, are not inferred and are enforceable if and only if the wording is so clear, unambiguous, and understandable that an ordinary and knowledgeable person will know what he or she is contracting away. The court in MVW Management relies on the provisions of applicable agreements, not Section 605.0408, F.S.

Contrast Section 607.0850, F.S. in the Florida Business Corporation Act, which expressly authorizes indemnification of attorneys' fees and costs by a corporation to its director in a derivative action against that director. See Wendt v. La Costa Beach Resort Condo Association, Inc., 64 So. 3d 1228, 1230 (Fla. 2011).

## **Lawsuits in Florida by Foreign LLCs Transacting Business in Florida**

Super Products, LLC v. IntraCoastal Environmental, LLC, 210 So. 3d 240, 241-2 (Fla. 2<sup>nd</sup> DCA February 8, 2017), followed in Spa Creek Services, LLC v. S.W. Cole, Inc., 2017 Fla. App. LEXIS 15536, n. 6 (Fla. 5<sup>th</sup> DCA October 27, 2017), rehearing denied, 2017 Fla. App. LEXIS 19709 (Fla. 5<sup>th</sup> DCA November 29, 2017).

Section 605.0904(3), F.S., authorizes a court to stay an action or proceeding commenced by a foreign limited liability company or its successor or assignee until the court determines whether that plaintiff is required to obtain a certificate of authority to transact business in Florida in order to maintain that action or proceeding and, if so, until that plaintiff obtains that certificate of authority. Alternatively, this statute authorizes the court to continue the proceedings, order that plaintiff transacting business in Florida to obtain a certificate of authority, and dismiss the complaint if that plaintiff fails to do so. A certificate of authority is required by this statute as a condition for a foreign limited liability company transacting business in Florida to maintain, not for it to file, a lawsuit. This statute does not authorize a court to dismiss, even without prejudice, the complaint filed by a foreign limited liability company transacting business in Florida and lacking a certificate of authority.

The court in Spa Creek Services further held that maintaining, defending, or settling a court proceeding or winding up affairs of a foreign limited liability company does not constitute its transacting business in Florida for the purposes of Section 605.0904(1), F.S., citing Sections 605.0905(1)(a), F.S. and Selepro, Inc. v. Church, 17 So. 3d 1267, 1270 (Fla. 4<sup>th</sup> DCA 2009).

## **Service of Process on Florida LLCs**

The following cases reference the alternative statutorily prescribed procedures for serving process on Florida limited liability companies:

- by service on a registered agent at the registered office of the limited liability company maintained in accordance with Sections 48.031, 48.062, and 605.0113(1), F.S., a member of a member-managed limited liability company, a manager of a manager-managed limited liability company, or a designated employee of the limited liability company available during regular business hours to accept service on its behalf: Mid-Continent Casualty Company v. Distinctive Finishes, LLC, 2016 U.S. Dist. LEXIS 104715 (U.S.D.C. for M.D. Fla., Fort Myers Division 2016); Solomon v. Westlake Services, LLC dba Westlake Financial Services, 2016 U.S. Dist. LEXIS 104719 and 2016 U.S. Dist. LEXIS 143724 (U.S.D.C. for M.D. Fla., Fort Myers Division 2016), the former opinion followed in LG Capital Funding, LLC v. Volt Solar Systems, Inc., 2016 U.S. Dist. LEXIS 108779 (U.S.D.C. for E.D.N.Y. 2016), adopted and judgment entered by 2016 U.S. Dist. LEXIS 122438 (U.S.D.C. for E.D.N.Y. 2016); Bennett v. JDC Ventures, LLC and Cook, 2016 U.S. Dist. LEXIS 163263 (U.S.D.C. for M.D. Fla., Fort Myers Division 2016), motion granted 2017 U.S. Dist. LEXIS 31761 (U.S.D.C. for M.D. Fla. 2017); Cornerstone Technical Sales, LLC v. Chassis Plans, LLC, 2016 U.S. Dist. LEXIS 168028 (U.S.D.C. for M.D. Fla., Orlando Division 2016); United States of America v. Windland, Newline Holdings, LLC,

DABTLCS, LLC, and the State of Florida, 2017 U.S. Dist. LEXIS 53586 (U.S.D.C. for M.D. Fla., Fort Myers Division April 7, 2017). See Robinson v. American Consumer Credit, LLC, 2017 U.S. Dist. LEXIS 8798 (U.S.D.C. for M.D. Fla., Fort Myers Division January 23, 2017); API Microscopic, LLC v. Corporate American Solutions, LLC and Cariola Group, LLC, 2017 U.S. Dist. LEXIS 186337 (U.S.D.C. for S.D. Fla., Miami Division November 9, 2017).

- by substitute service on the Secretary of State of Florida under Sections 48.062, 48.181, and 605.0117(3), F.S. and communicating that substitute service under either 48.151, F.S. or 48.161, F.S. (the latter requiring plaintiff to send notice of service by registered or certified mail to defendant, file defendant's return receipt, and file an affidavit of compliance) in addition to filing the return of service, albeit Section 605.0117(5) and (6), F.S. does not provide a method to communicate the substitute service upon the Secretary of State to defendant: Jupiter House, LLC v. Deutsche Bank National Trust Co. 198 So. 3d 1122, 1123-4, (Fla. 4<sup>th</sup> DCA 2016), followed in Green Emerald Homes, LLC [sic.] v. Nationstar Mortgage, LLC, 210 So. 3d 263, 264-5 (Fla. 2<sup>nd</sup> DCA February 17, 2017), Green Emerald Homes, LLC [sic.] v. Fannie Mae, 224 So. 3d 799, 802-3 (Fla. 2<sup>nd</sup> DCA August 2, 2017), and Green Emerald Homes LLC v. Green Tree Servicing LLC, 230 So. 3d 607, 608 (Fla. 4<sup>th</sup> DCA November 15, 2017).

**Opinions Distinguishing Olmstead v. Federal Trade Commission, 44 So. 3d 76 (Fla. 2010) (describing application of charging orders to interests in Florida limited liability companies) after amendments to former Florida Limited Liability Company Act, Chapter 608, F.S.**

Abukasis v. MTM Finest, Ltd., et al., 199 So. 3d 421 (Fla. 3<sup>rd</sup> DCA 2016).

The process employed by plaintiff MTM Finest to realize upon defendant Abukasis' membership interest in a Florida limited liability company "failed to conform with even the most rudimentary requirements of Section 605.0503 of the Florida Statutes (2015)" under Olmstead and Regions Bank v. Hyman, 2015 U.S. Dist. LEXIS 55011 (U.S.D.C. for M.D. Fla. 2015)(discussing amendments, in response to Olmstead -- known as the "Olmstead Patch" as noted in the Capstone Bank opinion cited below -- to former Section 605.0503, F.S., then denominated Section 608.433, which amendments served "to clarify the exclusive remedies available to a judgment creditor as to a judgment debtor's interest in an LLC: a charging order, or a charging order followed by a foreclosure sale").

Branch Banking and Trust Company v. Crystal Center, LLC, 2016 U.S. Dist. LEXIS 181001 (U.S.D.C. for M.D. Fla., Fort Myers Division 2016), adopted by, in part, rejected by, in part, motion granted by, in part, motion denied by, in part, without prejudice, 2017 U.S. Dist. LEXIS 1211 (U.S.D.C. for M.D. Fla. January 5, 2017).

The Section 605.0503, F.S. provision of a charging order as the exclusive remedy of a judgment creditor as to a judgment debtor's interest in a limited liability company, subject to the conditions stated in that statute, and denial of that creditor's right to execute against that interest under Section 56.061, F.S., "does not deprive a member or transferee [of a membership interest in the limited liability company] of the benefit of any exemption law applicable to the transferable interest of the

member or transferee,” such as that membership interest being held by a married couple as a tenancy by the entirety and therefore belonging to neither spouse individually but rather seized in its entirety by each spouse and not executable by a judgment creditor of only one spouse.

McClandon v. Dakem & Associates, LLC, 219 So. 3d 269 (Fla. 5th DCA May 26, 2017).

To the extent that a court order appointing a receiver for limited liability companies that were subject to a charging order under Section 605.0503, F.S. authorized the receiver to exercise managerial control over the limited liability companies, and not only control of distributions by the respective limited liability companies as and when declared by their respective management, the order exceeded its permissible scope. A charging order against a limited liability company interest entitles the judgment creditor obtaining that order to whatever distributions would otherwise be due to the member or transferee whose interest is subject to that charging order, but that judgment creditor does not acquire by that order any control of the timing or amount of those distributions.

Capstone Bank v. Perry-Clifton Enterprises, LLC, 230 So. 3d 970 (Fla. 1<sup>st</sup> DCA November 30, 2017), related proceeding at Capstone Bank v. WinSouth Credit Union, 230 So. 1266, 2017 Fla. App. LEXIS 17896 (Fla. 1<sup>st</sup> DCA November 30, 2017).

A charging order is the exclusive remedy in Florida by which a judgment creditor of a member or a member’s transferee could satisfy a judgment from the member’s interest in a multi-member Florida limited liability company or rights to distributions from that limited liability company. Therefore, a divorce judgment recorded in Florida by the former spouse of the member does not have priority over another judgment creditor’s charging order against the interest of that member in that limited liability company albeit that charging order was issued after the divorce judgment. A divorce judgment is not a *de facto* charging order under Florida law; a judgment creditor must additionally file a motion for a charging order for one to be issued. The court cited the opinion in Branch Banking and Trust Company, supra.

Gorin v. Poker Run Acquisitions, Inc., 2018 Fla. App. LEXIS 1202 (Fla. 3<sup>rd</sup> DCA January 31, 2018).

A judgment creditor’s sole and exclusive remedy against a judgment debtor’s interest in a multi-member limited liability company is a charging order against that interest. A court order maintaining “the *status quo* as to all assets of that limited liability company is effectively a permanent injunction against [that limited liability company] and beyond that allowed” by Section 605.0503, F.S. The court cited the opinion in Abukasis, supra.