IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

GENTLEAIR,INC.,*

DCA Case No.: 5D000000

Appellant,

vs.

GERRY GAROTTE and his wife,
KELLEY GAROTTE, and
LANCE EVERMORE,

Appellees.

BRIEF OF APPELLEES GERRY GAROTTE AND KELLEY GAROTTE

On Appeal from the Circuit Court of the Fifth Judicial Circuit
In and for Marion County, Florida
Case No. 02-0000-CA-G

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Gerry Garotte and Kelley Garotte

*Names, numbers, and addresses have been changed to protect privacy.

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STATEMENT OF THE CASE AND OF THE FACTS

Gentleair appeals from the April 3, 2006 Declaratory Judgment entered by the Honorable George Sagebrush, Circuit Court Judge of the Fifth Judicial Circuit of Marion County, Florida.

On October 31, 2002, Gentleair, Inc.,[1] Plaintiffs in the lower court, *Gentleair Inc. v. Gerry Garotte, Kelley Garotte & Lance Evermore*, filed a complaint seeking Declaratory Judgment. Gentleair sought clarification as to the property rights and responsibilities of the parties to an Agreement Regarding Ownership of Land and Settlement of Disputes, the "1989 Agreement."

The issues on appeal are whether the trial court properly found that the 1989 Agreement was ambiguous, and whether the court's finding that Gentleair's extending the easement, created in the 1989 Agreement, to include adjacent land that was not involved in the 1989 Agreement, was proper and supported by substantial and competent evidence. The parties have differing interpretations of the language contained in the 1989 Agreement. Gentleair contends that the easement which was created by the 1989 Agreement extends to all lands owned by

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1Appellant Gentleair, Inc., shall be referred to as "Gentleair." Appellees Gerry and Kelley Garotte shall be referred to as "Garotte." Appellee Lance Evermore shall be referred to as "Evermore." Citations to transcripts shall be designated by "Tr. Vol. x:x" (Volume of the Transcript, designated by a Roman numeral, and page number). Citations to the Appendix shall be designated by "A:x" (the letter "A" and page number). Citations to Documents including Trial Exhibits and pleadings, shall be designated by the abbreviation "R. x:x" (referencing the Index to the Amended Record on Appeal, with volume number and page number).

the parties on the date of execution of the agreement, and to any lands subsequently acquired. This is contrary to the express language of the 1989 Agreement defining the land involved in the Agreement. Gentleair urges this Court to find, as a matter of law, that the easement created in the 1989 Agreement extends to adjacent land which was not involved in the 1989 Agreement, and which was not "subdivided from the dominant estate."

In the instant case, the dominant and servient estates are, pursuant to the express language of the 1989 Agreement, solely and exclusively "the land lying under the north/south runway and the land lying under the east/west runway." Garotte's and Evermore's interpretation of the language of the 1989 Agreement is based upon the express language of the 1989 Agreement, which states that the land involved in the Agreement is that land lying under the runways. The 1989 Agreement states:

> "any and all land forming a part of an airport named 'Bluelight Airport', consisting of a paved runway running approximately north to south for a length of 7,550 feet and a grass runway running approximately east to west that crosses the paved runway. Named airport being situated in Marion County, Florida."

Based upon the substantial and competent evidence, and consistent with the express language of the 1989 Agreement, the court found that the land "involved in the 1989 Agreement" and upon which an easement was granted, was exclusively the land lying under the paved north/south runway and the east/west runway at

Bluelight Airport. The court found that the easement created by the 1989 Agreement did not extend to all land owned by either party on the date of the execution of the 1989 Agreement, nor to land subsequently purchased.

The court found that there was merit in both parties' interpretations, and, based upon substantial and competent evidence presented at trial, that ambiguity existed as to the lands involved, as well as in the character and scope of the easement.

The parties agree that the terms of the 1989 Agreement allow Gentleair, Garotte, and Evermore free use of both runways for normal and legal activity in line with state and federal regulations regarding the operations of airports. However, disagreement exists as to the right to extend the easement to adjacent lands, the scope of the easement, the character of use of the easement, and whether the easement is restricted. The easement is restricted by its plain language to aviation use, as to the land involved in the agreement, and as to the parties, their heirs, and any parties holding title to any part of the land involved in the Agreement, specifically, the land lying under the paved and grass runway.

The court found that Gentleair, Garotte, and Evermore had free use of the runways, based upon their *ownership of lands lying under the runways at Bluelight Airport*, and that this free aviation use extended to the business and personal invitees of both parties. (R. 2:332-351.) The court also found that the scope of the

easement did not allow Gentleair to extend this easement to owners of land located adjacent to Bluelight Airport (which land was not involved in the 1989 Agreement), subsequently developed into Gentleair Eagle's Nest. This finding is consistent with the facts in evidence and with the determination that the intent of the parties and the plain language of the 1989 Agreement limit the easement to the land under the runways.

In 1980, Gerry Garotte purchased real property in Marion County, Florida, and sought and obtained a Florida Department of Transportation (FDOT) private airport license for Bluelight Airport. (R. 4:688-700.) Garotte was the sole owner and founder of Bluelight Airport, which was, at that time, a single grass airstrip running approximately east and west. Andrew Jackson owned lands adjacent to Bluelight Airport, and by verbal agreement with Garotte, he built an asphalt runway running approximately north/south, intersecting and crossing over the grass airstrip, and running over a portion of Garotte's property. At Jackson's request, Garotte made application to the FDOT to have the north/south runway annexed into, and made a part of, Bluelight Airport. The annexation was granted by FDOT, and, as a result, the north/south runway became part of Bluelight Airport. Garotte testified: "[T]he Florida Department of Transportation agreed to allow the annexation of the north-south runway onto Bluelight Airport." (Tr. Vol. II:166, 224.)

In 1988, a dispute arose, and legal action was filed between Jackson and

Garotte regarding the ownership of the land at the intersection of the north/south and east/west runways. The parties settled their differences in that case with the instrument which the court was called upon to address in the instant action, the same having been executed on July 17, 1989 and filed in the public records of Marion County, Florida, in Official Records Book X, at pages 0001 and 0002. From the date that Garotte founded Bluelight Airport, in 1980, to the present, he has been and remains the sole owner, sole operator, sole manager, and sole FDOT license holder of Bluelight Airport. Garotte has filed documents with the FAA which are merely informational, acknowledging that Jackson owned the land under the majority of the paved runway, and Jackson acknowledged that Garotte owned the land under the paved runway at the intersection of the grass runway.

In March 1993, Jackson removed the lighting system from the north/south runway at Bluelight Airport. Garotte objected, and, after negotiation, Jackson gave the lighting system to Garotte in exchange for Garotte's agreement to pay for the reinstallation of the lights, to bear the burden of maintaining the lighting system, and to bear the cost of its operation. Garotte has honored this contract continuously from 1993 to the present. The agreement transferring ownership of the lighting system was memorialized in a writing dated September 28, 2003, which was filed in the case at bar.[2]

2The September 28, 2003 letter states that Jackson offered Garotte all of the airport lights and equipment. Garotte would then pay to install and maintain the

The second legal action was filed in October 1996 by Garotte, seeking to enjoin Gentleair, Inc., and Sadie Jackson Player[3] from removing all or any portion of the asphalt runway, in violation of the 1989 Agreement. A settlement was reached in this case, which resulted in no change to the north/south runway, and the parties entered into a three-year option to purchase all of the real property comprising Bluelight Airport, the runway lights, and the airport license from Garotte. In July 2000, the option was extended for one year, which ultimately expired without purchase.

In 1999, during the term of the option agreement, the Players began development of a residential aviation development, platted as Gentleair Eagle's Nest,[4] extending the easement created in the 1989 Agreement to Gentleair Eagle's Nest Homeowners Association, and then to the individual property owners in the subdivision, with access to the north/south runway through common-area taxiways

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lights, and would pay for the electricity. On or about March 3 to May 20, 1993, Garotte reinstalled the runway lights and has been paying the electric and maintenance since. An April 12, 1993 receipt for delivery of the lights verifies that the lights were delivered to Garotte.

3Andrew Jackson and Justine S. Jackson, also known as "Sadie Jackson," were officers and 50% shareholders of Gentleair, Inc. After their divorce in 1992, in 1996 Sadie Jackson purchased Andrew Jackson's 50% of Gentleair, Inc.; thereafter, she married George Player and is referred to as "Sadie Jackson Player."

4Gentleair Eagle's Nest is merely the name of the residential subdivision developed by Gentleair, Inc. Gentleair Eagle's Nest Homeowners Association, Inc., is a nonprofit corporation, which was not a party to this lawsuit. Sadie Jackson Player and George Player are the officers of Gentleair, Inc., as well as the officers of Gentleair Eagle's Nest Homeowners Association, Inc.

within the subdivision. This extension was documented in the Master Record of Covenants. There is no evidence in the record that Gentleair, Inc., sold, transferred, or conveyed title to the land involved in the 1989 Agreement to Gentleair Eagle's Nest Homeowners Association, Inc. Gentleair, Inc., urges this Court to find that Gentleair can expand, extend, and broaden the intent, character, and use of the easement created in 1989 Agreement to land adjacent to Bluelight Airport, located at the multiphase Aviation Community named Gentleair Eagle's Nest, where the land upon which Gentleair Eagle's Nest was built was not part of the land involved in the 1989 Agreement, and where neither Gentleair Eagle's Nest Homeowners Association, Inc., nor the property owners in that subdivision own any portion of the land (dominant or servient estates) involved in the 1989 Agreement.

The Master Record of Covenants, Conditions and Restrictions of Gentleair Eagle's Nest Homeowners Association, Inc., purports to grant an easement to a north/south runway. The Master Record does not grant an easement to "Bluelight Airport." In fact, nowhere in the Master Record is "Bluelight Airport" or the 1989 Agreement named, referred to, or referenced. Article 3 of the Master Record is entitled "Airport," and purports to grant an easement to use of a north/south paved runway, which is defined in Exhibit "B" to the Master Record. Exhibit "B"provides the legal description of the north/south runway, and refers to the runway as "Gentleair Airport Runway." (R. 13:944-1014.) There is no FDOT license for

Gentleair Airport.[5] Garotte explained that Jackson wanted the north/south runway annexed as part of Bluelight Airport "because you can't have two airports that close to one another." (Tr. Vol. II:226.) Gentleair failed to enter any document of licensure.

In 2001, Garotte sold 10 acres of land to Lance Evermore. A portion of Evermore's land lies beneath the north/south runway. In the contract for purchase of the property, Evermore received an easement allowing airplane access on the grass runway and the paved runway. Additionally, in 2001, Evermore filed a legal action against Gentleair, Inc., seeking injunctive relief as a result of Gentleair's constructing a fence to block Evermore's access to the north/south runway, and later, when Evermore removed the fence, Gentleair blocked access with a dump truck. The dispute was eventually resolved, and the action was voluntarily dismissed in 2002.

In 2001, Garotte and Gentleair Eagle's Nest entered into written "Bluelight Airport Operating Procedures," signed by Gerry Garotte for Bluelight Airport and George Player for Gentleair Eagle's Nest. Lance Evermore did not sign. The Bluelight Airport Operating Procedures were intended to define the operating procedures and functions of the intersecting runways at Bluelight Airport and included basic rules governing the Airport. The Bluelight Airport Operating

5There is no evidence contained in the record that an FDOT private airport exists for Gentleair Airport.

Procedures do not amend or modify the 1989 Agreement as a matter of law or fact, were not signed by Gentleair, Inc., or by Evermore, and were not considered relevant by the trial court. The Bluelight Airport Operating Procedures were signed by George Player for Gentleair Eagle's Nest, not Gentleair, Inc., a separate and distinct corporation.

In this case, as a result of the 1989 Agreement, Garotte and Gentleair each became the owners of a mutual reciprocal easement to the land involved in the 1989 Agreement. The express language of the Agreement defined the land involved in the Agreement as "any and all land forming a part of an airport named 'Bluelight Airport,' consisting of a paved runway . . . and a grass runway." The land under the paved runway, owned in large part by Gentleair, and the land under the paved runway, owned in part by Garotte, where it intersects and crosses the grass runway, as well as the remainder of the grass runway, owned 100% by Garotte, each became the dominant and servient estates. Each parcel benefited from the easement, and each parcel was burdened by the easement.

Based upon substantial and competent evidence, the trial court found that the 1989 Agreement was ambiguous, and upon examination of extrinsic evidence, the court found that the 1989 Agreement created reciprocal easements to Gentleair, Inc., Gerry Garotte, and Larry Evermore as the owners of land lying beneath the runways at Bluelight Airport. The court properly found that the 1989 Agreement did not

contemplate the transformation, broadening, or extension of the use of the easement which Gentleair, Inc., was seeking, and that such an extension resulted in overburdening of the easement. The court found that the intention of the parties in 1989, and the easement which the parties contemplated, was a low-density, low-air-traffic usage of Bluelight Airport's asphalt-paved runway for Gentleair's and Garotte's then-existing business and private purposes. The court found that the parties did not contemplate the multiphased "Eagle's Nest," with the resulting heavier air and ground traffic now envisioned by Gentleair. (R. 2:332-351.) The court's findings were based upon substantial and competent evidence that fully supports the Declaratory Judgment entered in this matter.

SUMMARY OF ARGUMENT

The 1989 Agreement unambiguously created reciprocal runway easements at Bluelight Airport. However, there is a latent ambiguity as to the scope of the runway easement rights. Extrinsic evidence clearly establishes that, at the time of the 1989 Agreement, the parties thereto neither intended nor reasonably contemplated the use of Bluelight Airport by the permanent residents of a large aviation community. Moreover, the evidence convincingly demonstrates that Gentleair's intended use of Bluelight Airport will constitute an impermissible burden not reasonably contemplated at the time the reciprocal runway easements were created.

The trial court did not hold that Gentleair was equitably estopped from taking the position that the 1989 Agreement permits it to convey a permanent right to use of the runway at Bluelight Airport by the residents of Gentleair Eagle's Nest. However, Gentleair's prior inconsistent positions, as well as other inequitable conduct by its principals, were properly considered by the trial court in determining whether and to what extent the parties may grant access to or use of Bluelight Airport runway easements.

On the other hand, the doctrine of equitable estoppel cannot be invoked against Garotte, based on his purported "acquiescence" in, or agreement to, Gentleair's use of the Airport. The principals of Gentleair encouraged and initiated the conduct upon which they rely to invoke estoppel. The Gentleair principals were fully cognizant of Garotte's reciprocal easement rights and knew that he never intended to forfeit or surrender those rights. In short, Gentleair was never misled by any purported act or omission by Garotte.

The trial court properly acknowledged the fact that Garotte is the only person licensed to operate and manage Bluelight Airport.

Further, the one-year delay in issuing the Declaratory Judgment was not unreasonable so as to warrant a new trial, since the trial court's findings were supported by substantial evidence and were wholly consistent with Judge Sagebrush's statements during the nonjury trial of this matter. Finally, the trial

court's refusal to grant a mistrial based on the FCIC Report constituted a proper exercise of its discretion. Judge Sagebrush fully apprised all parties that he had seen the FCIC Report, and he clearly and articulately explained that he did not consider the report relevant, and that it did not, and would not, prejudice him against George Player.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN RULING THAT THE LANGUAGE OF THE 1989 AGREEMENT CREATING THE RECIPROCAL RUNWAY EASEMENTS IS AMBIGUOUS.

While the parties to the above-entitled action are in accord that the 1989 Agreement created reciprocal runway easements, a sharp dispute exists with respect to the scope of the easements. Gentleair is adamant that the clear and unambiguous language of the 1989 Agreement created easement rights which permit all present and future homeowners in Gentleair Eagle's Nest to enjoy unrestricted use of the airport's two runways. The Garottes and Lance Evermore are equally adamant that, while the 1989 Agreement created reciprocal runway easements, the language therein is ambiguous and, when properly construed, does not permit Gentleair to convey its easement rights to the Eagle's Nest homeowners. The trial court properly resolved this dispute in favor of the Garottes and Evermore.

A. The 1989 Agreement Is Ambiguous.

The extent of an easement created by express language in a document depends upon a proper construction of the language of the document. The intention of the parties thereto is paramount. *Robinson v. Fetus*, 68 So. 2d 815 (Fla. 1953). When construing an express easement, a court must attempt to fulfill the parties' intentions. *Meadows Country Club v. Unnever*, 702 So. 2d 586, 588 (Fla. 2d DCA

1977). Documents that contain language which purports to create an express easement "are subject to the same rules of construction as other contracts and should be interpreted using contract principles." *One Harbor Fin. Ltd. Co. v. Hynes Props.*, 884 So. 2d 1039, 1045 (Fla. 5th DCA 2004). Thus, this Court has recognized that "in reviewing the documents creating an easement, if the language is clear, concise, and unambiguous, we must give effect to the terms as stated without resort to other rules of construction to ascertain their meaning." *Am. Quick Sign, Inc. v. Reinhardt*, 899 So. 2d 461, 465 (Fla. 5th DCA 2005). On the other hand, "[i]f the provisions are ambiguous, extrinsic evidence may be examined to determine the intent of the parties at the time the document establishing the easement was created." *Id.*; *see Gelfand v. Mort. Invs. of Wash.*, 453 So. 2d 897, 898-99 (Fla. 4th DCA 1984) ("In determining the scope of the easement, the court may, if it concludes the words of the instrument the least ambiguous, resort to extraneous matters to arrive at the probable intent of the parties.").

With respect to the construction of language set forth in a contract or instrument, courts in Florida have long recognized that an ambiguity may be either patent or latent. A "patent" ambiguity is one which appears on the face of a contract and arises from the use of defective, obscure, or insensible language. *Beach Street Bikes, Inc. v. Bourgett's Bike Works, Inc.*, 900 So. 2d 697 (Fla. 5th DCA 2005); *Schwartz v. Greico*, 901 So. 2d 297, 299 (Fla. 2d DCA 2005). On the other hand, a

"latent" ambiguity is "one where the language in a contract is clear and intelligible and suggests a single meaning, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two possible meanings." *Bunnell Med. Clinic, P.A. v. Barrera*, 419 So. 2d 681, 683 (Fla. 5th DCA 1982). A latent ambiguity is thus brought to light when extraneous circumstances reveal an insufficiency in the contract not apparent from the face of the document. *Mac-Grey Servs. v. Savannah Assocs. of Sarasota*, 915 So. 2d 657, 659 (Fla. 2d DCA 2005); *accord Kirsch v. Kirsch*, 933 So. 2d 623, 626 (Fla. 4th DCA 2006) (latent ambiguity exists where a contract fails to specify the rights and duties of the parties in certain situations, and extrinsic evidence is necessary for interpretation or a choice between two possible meanings); *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52-53 (Fla. 1st DCA 2005) (same).

The distinction thus drawn between a latent and a patent ambiguity is recognized in the context of construing the language of an express easement in an instrument. *See Blazina v. Crane*, 670 So. 2d 981, 982 (Fla. 2d DCA 1996) (easement document contained ambiguity that was latent, rather than patent); *see also Hillsborough County v. Kortum*, 585 So. 2d 1029, 1031 (Fla. 2d DCA 1991) (although phrase "state road right-of-way" appeared clear in reservation of easement, court concluded that the phrase was ambiguous in light of changes in Florida's public road system since instrument was executed).

B. The 1989 Agreement's Easement Language Is Latently Ambiguous.

The 1989 Agreement between Garotte and Jackson was executed for the purpose of settling a legal dispute (Case Number 88-000-CA-C), and to clarify the mutual rights and obligations arising out of the ownership of Bluelight Airport's intersecting runways. Reciprocal runway easements were created by the following language:

> [A]ll parties agree that the use of both runways will be freely available to all parties for any normal and legal activity in line with state and federal regulations regarding the operation of airports.

(Tr. Ex. 2; Tr. Vol. V:840; A:3.) It is not the existence but, rather, the scope of the easements thereby created with which we are concerned.

The pertinent language of the 1989 Agreement, on its face, is neither defective, obscure, nor insensible. However, it is quite clear that the pertinent language fails to specify the easement rights of homeowners in Gentleair Eagle's Nest. Indeed, the 1989 Agreement could not have specified such easement rights since Mrs. Player did not even decide to pursue the development of the Gentleair property into a residential aviation community before 1997, and preliminary development did not begin until 1998. (Tr. Vol. IV:393, 397-398.)

Even if it is conceded that a literal reading of the language of the 1989 Agreement could plausibly be construed to permit conveyance of the runway

easement rights to a future owner of land under Gentleair's paved runway, such as a member of the Eagle's Nest Homeowners Association, it is an incontrovertible fact that neither the 1989 Agreement nor the individual parties thereto contemplated a large-scale residential aviation development scheme conceived years later. Thus, it is at least equally plausible that, at the time of the 1989 Agreement, Garotte and Jackson did not intend to create easements which would give a right of passage over the runways of Bluelight Airport to large numbers of aviation enthusiasts on a daily basis. At any rate, the 1989 Agreement is ambiguous, and the trial court quite correctly considered extrinsic evidence in construing the 1989 Agreement in order to ascertain the intent of the parties thereto.

II. THE TRIAL COURT CORRECTLY FOUND THAT GENTLEAIR'S USE OF THE RUNWAY EASEMENT CONSTITUTED AN IMPERMISSIBLE BREACH.

The circuit court correctly found that Gentleair's scheme for developing a large aviation community, which conferred permanent runway easement rights to every homeowner, would impermissibly overburden the servient estates of the Appellees Garotte and Evermore. Gentleair now asserts that this finding is contrary to the evidence and applicable law. Unfortunately, Gentleair's position is not only unfounded, but it is predicated upon misrepresentations as to both the evidence and

the "controlling" law.

In Florida, it is well established that an easement "carries with it, by implication, the right to do what is reasonably necessary for the full enjoyment of the easement." *Sinclair v. Clay Elec. Coop.*, 584 So. 2d 1065, 1066 (Fla. 5th DCA 1991). However, this implied right is limited by the equally well-established principle that easement holders' exercise of this right may increase the burden on the servient estate beyond that reasonably contemplated when the easement was created. *See Crutchfield v. F.A. Sebring Realty Co.*, 69 So. 2d 328, 330 (Fla. 1954); *Am. Quick Sign*, 899 So. 2d at 468; *Perlini v. Seminole Woods Cmty. Ass'n*, 582 So. 2d 1221, 1224 (Fla. 5th DCA), *review denied*, 592 So. 2d 682 (Fla. 1991); *Fla. Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So. 2d 1149, 1150 (Fla. 5th DCA 1999); *Sinclair*, 584 So. 2d at 1066. This general principle applies to "all easements, whether acquired by user, express grant, dedication, or by implication from the circumstances of a particular transaction." *Crutchfield*, 69 So. 2d at 330.

A. Gentleair's Development Of The Residential Aviation Community Will Impermissibly Burden The Servient Holdings Of Garotte And Evermore.

Gentleair's scheme for developing its multiphase residential aviation community contemplates that every resident will be able to exercise the runway easement rights originally created by the 1989 Agreement. When Gentleair Eagle's

Nest is completed, Bluelight Airport's north-south paved runway will bear all of the aircraft traffic generated by a large permanent community of wealthy aviation enthusiasts. To give some idea of what this could entail, one neighbor, the actor Jim Tralala, the proud owner of a Boeing 707 and a midsize Gulfstream jet, uses the paved runway at Bluelight Airport approximately 200 times a year. The aviation activity of an entire community of like-minded enthusiasts should, therefore, be taken seriously, rather than dismissed as a "mere increase in traffic." (*See* Gentleair Initial Br. at 32.)

In concluding that the creation of the residential aviation community constituted an impermissible burden, the trial court found that Gentleair's conduct and actions created a "dangerous environment" at Bluelight Airport which posed safety risks to both persons flying and those on the ground. This is borne out by the record.

Although Bluelight Airport has one very large paved runway, it is, and always has been, an informally operated, private, small-scale enterprise. There are no air traffic control facilities. Takeoffs and landings, as well as the movement of planes on the ground and in the air, are largely unsupervised. Justin Time, who was occasionally employed by Gentleair to "park planes" at its monthly fly-in brunches, testified that he would use a hand-held radio to provide inbound aircraft with information about "any traffic in the pattern" *if* the inbound pilot called ahead and

asked for it. (Tr. Vol. IV:341.) Because Bluelight is "an uncontrolled airport," without a tower, Time testified that "[w]hen the pilots are coming in the area, it's their responsibility to call and let everybody else know where they are and what they're doing." (Tr. Vol. IV:344.) Inbound pilots are not obligated to contact the airport and there is "no control over what the pilot-in-command does." (Tr. Vol. IV:348-349.) Time also indicated that he relies on such discretionary contact to determine what the traffic pattern is and how many planes are in it. (Tr. Vol. IV:351.) Thus, orderly, safe operation is almost entirely dependent on whether a pilot is willing and able to contact Time at the airport, or the pilot of another plane. The inherent problem with this informal arrangement was illustrated by Time's relation of an incident, during a Sunday fly-in in February of 2005, when an aerobatic plane suddenly appeared over the airport, "cut two guys off on final approach, came in, flew a low approach over the runway, sprayed smoke all over the place . . . did some aerobatics . . . over the airport, and then flew off." (Tr. Vol. IV:342-343.) All Time could do was watch this alarming incident. During a typical Sunday fly-in, Time "parks" approximately "90 or 100 or so" planes over a four- or five-hour period. (Tr. Vol. IV:345.)

Between fly-ins, even the limited "control" which Time could provide is absent. An employee of Jim Tralala's named Donald Ducksta described the procedure followed when Tralala flew his 707 from the big runway at Bluelight.

Before takeoff, a "team" of Tralala employees inspects the runway for debris; then as the big jet taxis out, the team accompanies it in motor vehicles and, just before takeoff, Ducksta eyeballs the sky for other air traffic before giving Tralala the "all clear" for departure. (Tr. Vol. III:271-277.)[6] Once the plane is in the air, contact is established with air traffic control in Jacksonville. (Tr. Vol. III:274.) Until then, the pilot is on his own.

Other safety concerns involved the physical condition of the big north/south runway. Zane Small, a highly experienced senior pilot for ABC, testified about his personal experience and observations at Bluelight Airport. Small has kept his personal plane at the Airport since 1991 and is very familiar with the current situation there. Small expressed concern about debris on the runway,[7] as well as problems with large puddles of standing water after a rainstorm. (Tr. Vol. VI:598-600.) He testified in meticulous detail about the dangers of hydroplaning caused by standing water. At Bluelight Airport, this problem was caused by the flat, uncrowned runway surface which prevented water from properly draining. (Tr. Vol. VI:598-600, 624, 630-632.)

6Ducksta also has to deal with what he cannot see: "[I]f I hear a sound in the clouds, I'll say, 'Joe, which way do you think that guy is going? Do you hear that?'" (Tr. Vol. III:277.)

7Johnny Manson, an aircraft inspector employed by the FAA, testified that he observed debris on the runway consisting of broken pieces of the actual runway pavement; he also testified concerning damage to Jim Tralala's 707 that was determined to have been caused by debris from the big runway at Bluelight. (Tr. Vol. VII:698-700.)

More alarming than the surface of the runway was the abundant testimony concerning runway incursions by vehicles and individuals as the nearby Eagle's Nest community was being developed. Lane Small testified that he had seen incursions by many types of vehicles, including golf carts and go-carts, as well as adults, unsupervised children, and even a horse. (Tr. Vol. VI:601.) On one specific occasion, a large jet was delayed from taking off when a woman pushing a baby carriage appeared on the runway. (Tr. Vol. VI:601.) On another occasion, Lane was in his plane preparing to take off when an SUV being driven by George Player at 40-50 miles per hour suddenly appeared and drove past his wing. (Tr. Vol. VI:602.)[8] Although it was not established that actual residents of Eagle's Nest were responsible for these incursions, the incidents all occurred, and continued to occur, as the community began to take shape after 2000. In any event, it is not unreasonable to infer that such incidents will continue, even increase, as Eagle's Nest grows and expands. This is only to be expected with the establishment of a large residential community adjacent to the Airport, and where each resident will have been provided access to the runway through the profligate expansion of the runway easements originally created by the 1989 Agreement.

8Other persons described similar incidents: Ryan Leaf testified that George Player was driving on the runway *as Leaf was landing* his plane. (Tr. Vol. VI:650-652). A retired law enforcement officer from Arizona who lives near the airport testified that he had seen and videotaped, on numerous occasions, children and recreational vehicles on the runway. (Tr. Vol. VII:710-717.)

In light of the foregoing, it is, to say the least, disingenuous of Gentleair to state that the record is devoid of evidence of overburdening or, more specifically, that there was no "testimony (or any other proof) that increased usage would now or hereafter create a danger to anyone in the air or on the ground." (Gentleair Initial Br. at 35.)

B. Gentleair's Use Of The Runway Easement Interferes With The Use And Enjoyment Of Garotte And Evermore.

The safety concerns referenced by the trial court, and touched on above, have very real and problematic consequences for both Garotte and Evermore. Evermore testified about his liability concerns with respect to the increased air traffic. (Tr. Vol. VI:552.) He has been unable to get liability insurance on his Airport property. (Tr. Vol. VI:552.) Garotte faces greater risk, since he is not only an Airport landowner but is also the state licensed operator and manager of Bluelight Airport. The trial court was wholly justified in finding "that increased airport usage may result in increased hazards and liability for Garotte and Evermore."

There is, moreover, evidence in the record of more direct interference with the use and enjoyment of the Airport property of both Garotte and Evermore. For more than 20 years, Garotte has operated Bluelight Airport as a commercial endeavor from which he earned a living by renting hangar space to local pilots. He

currently has 15 such tenants. However, Gentleair, through its current principals, has systematically sought to divest Garotte of his Airport asset. The Gentleair development threatens, as the trial court observed, to turn Bluelight Airport into "a predominantly private enterprise tailored to the nearby . . . aeronautical community." Gentleair has aggressively pursued this transformation both in and out of the courts. In the present litigation, Gentleair has sought ownership of the runway lights given to Garotte by Jackson, and, despite Garotte's licensure by the State of Florida, Gentleair insists that it should be accorded the status of co-manager and co-operator of Bluelight Airport. Gentleair could have achieved its goals by exercising the option to buy the Airport from Garotte, including assignment of his state licensure. However, Gentleair let the option expire in 2001. Therefore, Gentleair went so far as to hire private security guards to physically prevent Garotte from accessing the runway easement. (*See* Tr. Vol. V:507.) Similar aggression was exercised against Evermore. During the same time period, Evermore and Gentleair entered negotiations for the latter's purchase of Evermore's property. After those negotiations failed, Gentleair sought to physically prevent Evermore's access to the runway easement by constructing a fence. Gentleair admitted to this in Case Number 01-0000-CA-00. There could be no more graphic evidence of Gentleair's interference with both Garotte's and Evermore's use and enjoyment of their property. Far from being nonexistent, the evidence of

overburdening is not only substantial, it is compelling.

C. Gentleair's Present Use Of The Runway Easement Was Not Reasonably Contemplated When That Easement Was Created In 1989.

The reciprocal runway easements were created by the Agreement dated July 17, 1989. The parties to that Agreement were Gerry Garotte and Andrew Jackson. At that time, Bluelight Airport had a low level of flight activity. Garotte rented hangar space for approximately 15 small planes. (Tr. Vol. II:158.) Airport activity was kept low-key and informal. (Tr. Vol. II:158.) This was exactly how both parties to the 1989 Agreement wanted it: The undisputed evidence in the record establishes that Jackson wanted the Airport to remain private, personal, and low-key, with limited air traffic. (Tr. Vol. II:150-154, 188.) Although the big north/south runway had been constructed in the early 1980s for the purpose of accommodating large jet aircraft owned by his company, in 1986 Jackson closed the FS aviation department and had sold the last of his Boeing 707s. (Tr. Vol. VII:695-697, 704-705, 723.) By 1989, he made only occasional use of the Airport. (Tr. Vol. II:164-165.) There is no evidence that Jackson was considering any plans to develop the Gentleair property.

The purpose of the 1989 Agreement was to amicably resolve a personal and legal dispute between Jackson and Garotte over the use and ownership of Bluelight Airport. One of the provisions of the 1989 Agreement which sought to accomplish this amicable resolution was the creation of the reciprocal runway easements. By every reasonable indication, it is fair to state that, in creating the subject easement, one of the last things that the parties would have contemplated was the opening of the north/south runway to a large resident population of nearby aviation enthusiasts.

Here, Gentleair does not seriously suggest that a large multiphase aviation development was reasonably contemplated when the runway easement was created. Instead, Gentleair ignores the question of whether its use of the runway easement was reasonably contemplated in 1989 when the easement was created. In its place, Gentleair would ask simply whether "increased future usage of the easement was reasonably foreseeable." (Gentleair Initial Br. at 24.)

Of course, Gentleair concludes that its present use is permissible because it was foreseeable in 1989. Boiled down to its essentials, the Gentleair argument is that only the "degree" of the runway easement's use has changed since 1989, and "a mere change in the degree of use is necessarily foreseeable as a matter of law." (Gentleair Initial Br. at 25). No Florida case is cited in support of the foregoing proposition. Indeed, even the two cases from other states which Gentleair cites do

not stand for the above-quoted proposition.

Even indulging Gentleair's conceit that its "foreseeability" standard is relevant here, the distinction it seeks to draw between the "degree" and the "nature" of easement use cannot be reconciled with actual, relevant Florida case law. Two decisions of this court are instructive. In *Tortoise Island Cmties., Inc. v. Roberts*, 394 So. 2d 568 (Fla. 5th DCA 1981), the court stated, in relevant part, as follows:

> The rights of the owners of an easement over a "servient estate" are not absolute and unlimited. They are limited so that each party may reasonably enjoy his respective property rights. *Costin v. Branch*, 373 So. 2d 370 (Fla. 1st DCA 1979), *cert. denied*, 383 So. 2d 1190 (1980). *The holder of a deeded or express easement has essentially the right of free passage over the easement to the degree and amount originally contemplated by the parties*. The owner of the servient estate may, however, use his land, including the easement, in such a way that will not interfere with the easement owner's right of passage.

Id. at 569 (emphasis added) (footnote omitted); *Hall v. City of Orlando*, 555 So. 2d 963, 966 (Fla. 5th DCA 1990) (same). Thus, stated in terms that Gentleair might appreciate, a change in the degree of use of an easement is not necessarily a use that was reasonably contemplated when the easement was created.

III. THE TRIAL COURT DID NOT ERRONEOUSLY APPLY THE DOCTRINE OF EQUITABLE ESTOPPEL.

A. The Trial Court Could Invoke Equitable Estoppel Without "Circumventing" The Doctrine Of Judicial Estoppel.

The trial court did not "circumvent the boundaries of judicial estoppel"

(Gentleair Initial Br. at 36) but, rather, acknowledged those boundaries by concluding that judicial estoppel was not applicable because the previous lawsuits were settled or voluntarily dismissed. Moreover, the doctrine of equitable estoppel may still be applicable. In other words, a position taken by a party in a case that has been settled may still equitably estop that party from asserting a contrary position in a subsequent action. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 789 So. 2d 1181 (Fla. 4th DCA 2001).

B. Detrimental Reliance Is Not Always A Critical Element Of Estoppel.

Gentleair argues that the trial court erroneously applied the doctrine of equitable estoppel because there was no evidence of reliance on Gentleair's prior inconsistent statements and no evidence of a detrimental change in position because of that reliance. (Gentleair Initial Br. at 37.) However, neither reliance nor detriment is a critical element to that species of equitable estoppel referred to as "quasi-estoppel." *See Hodkin v. Perry*, 88 So. 2d 139 (Fla. 1956). *See generally* 31 C.J.S. *Estoppel and Waiver* § 120 (2006). In *Hodkin*, a medical doctor actively supported and voted for the adoption of a hospital bylaw. Thereafter, he was refused reappointment to the hospital's staff after he became disqualified under that bylaw. The medical doctor then filed suit against the hospital to enjoin the defendant hospital to reinstate him. The trial court held that he was estopped to

question the validity of the bylaw, although there was no detrimental reliance by the hospital. In affirming, the Supreme Court of Florida stated, in relevant part, as follows:

> The clear import of plaintiff's affidavit is that he had no objection to the by-law so long as it was to be used only against other doctors coming into the area to practice, and it was not until it was enforced against him that it became illegal. *But we have the view that the plaintiff cannot now be heard to say that the by-law is invalid, merely because the 'shoe is on the other foot,' since his present position is so inconsistent with that previously assumed by him as to work a quasi-estoppel against him under the rule of Campbell v. Kauffman Milling Co.*, 1900, 42 Fla. 328, 29 So. 435, *that a party cannot either in the course of litigation or in dealings in pais, occupy inconsistent positions*. Accord: *Capital City Bank v. Hilson*, 1912, 64 Fla. 206, 60 So. 189; *Lyle v. Hunter*, 1931 102 Fla. 972, 136 So. 633.

88 So. 2d at 140 (emphasis added).

C. The Trial Court Did Not Hold That Gentleair Was Equitably Estopped From Asserting That The Runway Easement Could Be Conveyed To The Homeowners Association.

In filing the present suit, Gentleair invoked the circuit court's equity jurisdiction. Indeed, both sides sought equitable relief. Although the circuit court concluded that the doctrine of equitable estoppel was applicable because of Gentleair's "numerous misrepresentations of material fact" relative to the scope of the runway easement, the court did not estop Gentleair from asserting any position taken in the present suit. Rather, the circuit court specifically stated that "equitable estoppel, together with the construction of the intent of the makers of the 1989

Agreement, can be employed to resolve the issues as applied to the Court's equitable jurisdiction to construe the rights of the parties." (Tr. Vol. II:347; A:25.) The circuit court then properly construed the 1989 Agreement, found in favor of the Garottes and Evermore, and enjoined Gentleair's present use of the runway easement. It should be reiterated that the circuit court did not hold that Gentleair was equitably estopped from asserting the position it advocated. Rather, the circuit court clearly found that Gentleair's position with respect to the scope of the runway easement was legally and factually untenable. On the other hand, there is no doubt that the injunctive relief given to the Appellees was influenced by the court's consideration of the relative equities which tilted heavily against Gentleair, as was only proper.

In its decision, the circuit court set forth several of the findings upon which the court relied in concluding that the equities ran against Gentleair and its two principals. Whether or not those findings had "any bearings upon the elements of reliance or change of position" is simply beside the point.

In any event, it is interesting to note how Gentleair, in its Brief, chose to address, or fail to address, the second of the circuit court's enumerated equitable considerations. Gentleair omits any mention of the essential aspect of this equitable consideration, i.e., the unrebutted and persuasive testimony of Ned Jackson that Sadie Player threatened to withhold the payment of a legal obligation unless

Jackson gave false testimony in this case. (*See* Tr. Vol. II:349; A:26-27.) The circuit court judge was in the best position to observe each witness and assess his or her credibility. If Judge Sagebrush found Ned Jackson to be a credible witness, and he most certainly did, he would have been justified in suspecting the credibility of Mrs. Player. Upon consideration of this, as well as a careful balancing of all the equities, Gentleair's complaints about the applicability of the doctrine of equitable estoppel ring hollow indeed.

IV. EQUITABLE ESTOPPEL CANNOT BE INVOKED AGAINST GAROTTE OR EVERMORE.

Gentleair's desperate attempt to invoke the doctrine of equitable estoppel against Gerry Garotte and Lance Evermore cannot withstand even the most cursory scrutiny.

It is axiomatic that "estoppel will not lie unless the party seeking to assert it is misled." *Pelican Island Prop. Owners Ass'n v. Murphy*, 554 So. 2d 1179, 1181 (Fla. 2d DCA 1989). Here, the evidence is profoundly clear that the two principals of Gentleair, Inc., were never misled.

A. Equitable Estoppel Cannot Be Predicated Upon The Airport Operating Agreement.

In making this pitch for the invocation of equitable estoppel, Gentleair places

great emphasis on a document referred to as the Airport Operating Agreement. According to Gentleair, this was an agreement between Garotte and Gentleair Eagle's Nest "and constituted an acknowledgment by Garotte that the Airport and its taxiways were open to GEN." (Gentleair Initial Br. at 40.) Actually, it was something else.

Both Garotte and Evermore gave testimony concerning this Airport Operating Agreement and, especially, the curious manner in which it was presented by Sadie Player. When asked why the Agreement was entered into, Garotte stated that "Sadie said Jim Tralala was threatening to leave because she basically told Jim Tralala that she owned the whole airport and she was in kind of a bit of trouble." (Tr. Vol. I:100-101.)

The Agreement was also presented to Evermore during a conference with Sadie Player in which they had been seeking to settle their 2001 litigation. Evermore's testimony concerning this was as follows:

> A. Well, I mean, at the time that those were offered, they were offered during—and, in fact, as I recall they were offered during a settlement conference when we were trying to settle. And that settlement conference was interrupted by the introduction by those which were *posed to us as Jim Tralala is real angry and he's going to leave and may be the end of Gentleair Eagle's Nest* if we don't make some concession to him because he's worried about safety.
>
> And they were posed toward the end as can we all—in all this bickering and fighting can we at least tell the world that we want to behave in a safe manner for people like Tralala.

> And in that respect as being offered, in that confinement of offering, we all—I agreed with it, yes. I agreed with it.
>
> Later when it came time to sign it I had problems with the wording of it and *came to agree that there might be another motive for that.*

(Tr. Vol. VI:559 (emphasis added).)

Jim Tralala was a very significant figure in the history of Gentleair Eagle's Nest. His was the first home to be built, although it was not technically part of GEN. His presence was used to draw in other potential buyers. It is no overstatement that the Players would have done almost anything to keep Tralala happy and, more importantly, to keep him there. Both Garotte and Evermore were aware of this. As such, Sadie Jackson Player's "explanation" of the Operating Agreement was plausible. However, there is some doubt as to whether Tralala was really threatening to leave. In any event, Garotte did sign the Operating Agreement. As to Evermore, it is fortunate that caution stayed his hand. As to Gentleair's equitable estoppel argument, the testimony of both Garotte and Evermore seriously undermines the assertion that "the Airport Operation Agreement is unassailable evidence that [the Players were] relying to its detriment upon Garotte's acknowledgment that GEN possessed full rights to the easement." (Gentleair Initial Br. at 41.)

B. Equitable Estoppel Cannot Be Predicated Upon Garotte's

Failure To Complain About Gentleair's Eagle's Nest Development.

Gentleair complains that Garotte "sat back for years and allowed [it] to incur great expense in developing GEN." (Gentleair Initial Br. at 40.) However, Gentleair does not go so far as to allege that Garotte misled or induced the Players' continued development of the Eagle's Nest. Of course, it cannot make such a claim. The reason Garotte "allowed" them to go on with their ambitious scheme is that Gentleair was paying him for his forbearance. An option for Gentleair to purchase Garotte's entire interest in Bluelight Airport was executed in 1997. After its initial three-year term, the Option was renewed for an additional year before Gentleair finally let it lapse unexecuted. This was Gentleair's decision. Garotte wanted to sell his property interests. Gentleair bought only his forbearance, as Garotte testified in the court below. The Option "had everything to do" with his failure to complain or object to Gentleair's use of the runway easement. In any event, Gentleair was most certainly not "induced" to incur great expense on its ambitious scheme by anything Garotte did not do or did not say.

V. THE TRIAL COURT DID NOT ERR IN ACKNOWLEDGING GAROTTE'S STATUS AND AUTHORITY AS THE LICENSED OPERATOR AND MANAGER OF BLUELIGHT AIRPORT.

In its Declaratory Judgment, the trial court recognized Garotte's status as the licensed operator and manager of Bluelight Airport. The trial court did not "adjudicate" this status (*see* Gentleair Initial Br. at 41), but simply acknowledged it

(Tr. Vol. II:350; A:18, 28). Now, Gentleair asserts that the trial court erred in acknowledging Garotte's status, and suggests several "reasons" in support of this assertion. None of Gentleair's "reasons" can withstand scrutiny.

It should first be noted that Gentleair does not dispute the fact that Garotte is the FDOT licensee. Nor does Gentleair dispute the fact that Garotte has been the FDOT- licensed operator of Bluelight Airport since he founded it in 1981. And Gentleair surely does not dispute that the paved north/south runway was annexed to Bluelight Airport in 1984 and has been operated under the authority of Garotte's license continuously since the date of annexation.

A. Gentleair Does Not Share Garotte's Status As The Lawful Operator And Manager of Bluelight Airport.

Gentleair insists that it is a co-operator and co-manager of Bluelight Airport, and that the trial court should have recognized it as such. However, Gentleair offers no plausible explanation as to how a share of Garotte's status as the lawful operator and manager of Bluelight Airport came to be conferred upon Gentleair. Gentleair does suggest that "Garotte acknowledged and agreed that Gentleair, as the owner of the paved runway, . . . is an operator and manager of the Airport pursuant to the Airport Operating Agreement." (Gentleair Initial Br. at 42.) While it is agreed that Gentleair owns the majority of the land under the paved north/south runway, that ownership does not confer upon Gentleair a status as the lawful co-operator and co-

manager of Bluelight Airport. That status is conferred only by the federal and state licensing authorities. As the FAA and the FDOT have not conferred such status on Gentleair, it is difficult to understand how Garotte could acknowledge or admit that which does not exist. However, it is quite clear that Gentleair's quest for recognition as an unlicensed airport operator and manager must fail. As the trial court properly recognized, Garotte is the only licensed authority regarding Bluelight Airport.

B. The Trial Court Properly Addressed Garotte's Status As The FAA- and FDOT-Licensed Operator And Manager Of Bluelight Airport.

Gentleair disingenously complains that the issue of Garotte's status as the lawful operator and manager of the Airport "went beyond the relief requested and the two issues the trial court acknowledged were before it." (Gentleair Initial Br. at 42.) Therefore, according to Gentleair, Garotte's status was *not* an issue to be decided by the trial court. (Gentleair Initial Br. at 42.)

Again, it should be noted that the trial court did not decide or adjudicate the issue of Garotte's status, but recognized and acknowledged the undisputed fact that Garotte is the state-licensed operator and manager of Bluelight Airport. In any event, it *was* an issue that the trial court could have properly decided. *See Frank J. Rooney, Inc. v. Charles W. Ackerman of Fla., Inc.*, 219 So. 2d 110 (Fla. 3d DCA

1969). In *Frank J. Rooney*, the appellate court stated, in relevant part, as follows:

> Finally, we also recognize the maxim in equity that where a party properly invokes a court's equity powers in order to seek a declaration of his rights under a contract, *such court is fully empowered to retain jurisdiction for all purposes, decide the issues which are involved by the subject matter of the dispute, and award relief which is complete and finally disposes of the litigation*. *E.g.*, *Schupler v. Eastern Mort. Co.*, 160 Fla. 72, 33 So. 2d 586, 590. This rule is favored because it avoids piecemeal determination of the parties' rights[.]

Id. at 113 (emphasis added).

In the present case, the parties properly invoked the trial court's equity jurisdiction seeking a declaration of their rights with respect to the runway easements created by the 1989 Agreement. As the record makes clear, this present dispute is all about the parties' rights as they pertain to the operation, use, and control of Bluelight Airport. Thus, the trial court properly addressed the status of Garotte as the licensed operator and manager of Bluelight Airport.[9]

C. Neither The FAA Nor The FDOT Was A Necessary Party.

9Gentleair is again disingenuous where it weakly suggests that had it "known that the issue of ownership or management of the Airport was going to be tried, it would have introduced additional documents filed by the parties with the FAA and/ or FDOT showing joint status." (Gentleair Initial Br. at 43 n.15.) Of course, management, operation, use, and control is what this case, as well as every other previous case between these parties, has been all about. It is also observed that, in view of Gentleair's pathetic attachment to its Airport Operation Agreement, if Gentleair actually had any such proof, Mrs. Player would have been waiting on the courthouse steps before the doors opened on the first day of trial, waving it.

Gentleair's reliance on *Dawson v. Jones*, 512 So. 2d 311 (Fla. 2d DCA 1987), is misplaced. That case would be relevant only if the trial court had ruled that Gentleair or Garotte could apply for or renew a license. However, that is not the issue here. Garotte's licenses are established fact and matters of public record.

VI. THE TRIAL COURT'S "CLARIFICATION" RULING IS ILLOGICAL ONLY TO GENTLEAIR.

Gentleair's argument complaining of the trial court's "clarification" ruling needs some clarifying of its own. The trial court's clarification occurred during a hearing held with respect to a Motion for Contempt against Gentleair. It sought to clarify its Order denying that Motion. That Order is not a subject of the present appeal. Moreover, if Gentleair found that ruling incomprehensible or illogical, or if it merely required further clarification, Gentleair should have raised the issue at that time, which would have been appropriate since the very purpose of the proceeding was, after all, to clarify the Contempt Order. At this point, Gentleair is merely beating the proverbial dead horse.

VII. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL.

A. There Exists No Rational Basis To Conclude That The FCIC Report Prejudiced The Trial Court Against George Player.

Gentleair's contention that the FCIC Report had a prejudicial effect is most easily rebutted by a fair consideration of the trial judge's expressed reasons for refusing to grant a mistrial. As is to be expected, Gentleair has quoted only two sentences, taken out of context, while omitting the essential part of the trial court's explanation. The following excerpts from the transcript are instructive:

> Bearing in mind that a judge and a court reporter had recently been murdered the Court felt that that was important to know since it had been brought to the Court's attention by spontaneous declarations in open court, or at least that there was criminal involvement.
>
> Normally, you know, it could be said that the Court would simply just look at it and throw it out and not say anything to anybody about it because it didn't have any relevance to the case. But, it's the Court's practice to reveal everything to Counsel, and in this case you as the pro se party, to give you an opportunity to assess and determine whether or not to do anything about it.
>
> . . . .
>
> I represented to you, and I represent to you now, that I believe that the—that what I learned bears no relationship to this case, it is probative of nothing. If anything, it demonstrates that one of the parties had once made some significant errors in judgment, paid his debt to society, and has not re-offended, which speaks highly—which speaks well of his character.
>
> I don't know of anybody that's made a mistake—and except for perhaps one, and for that we murdered him. You know, he was faultless and we murdered him for it. That's not politically correct but I happen to believe in God.
>
> MR. BATSEL: That's okay with me.
>
> MR. HOPSON: Me too.

MR. EVERMORE: Me too.

THE COURT: Christ is the intercessor.

Nevertheless, those were—I completely disregard any of the information and will not factor in my consideration whatsoever. And I can make that representation without any hesitation because it's true.

I understand your motion. I respect your motion, and I understand you need to make it. I respectfully decline to grant it.

(Tr. Vol. VII:829-831.)

Garotte would submit that the above-quoted remarks by Judge Sagebrush manifest a most fair-minded lack of prejudice. At the very least, reasonable men could differ as to the propriety of Judge Sagebrush's review of the FCIC Report, and, as such, there was no abuse of discretion. *See Castillo v. Bush*, 902 So. 2d 317, 319-20 (Fla. 5th DCA 2005).

B. There Was No Unreasonable Delay Requiring A New Trial.

Pursuant to Fla. R. Jud. Admin. 2.215(f), "[e]very judge has a duty to rule upon and announce an order or judgment on every matter submitted to that judge *within a reasonable time*" (emphasis added).

Under this Rule, there is no bright-line demarcation of what is a reasonable time. *B.S. v. Dep't of Children & Families*, 860 So. 2d 1038 (Fla. 5th DCA 2003). The purpose of the Rule "is to allow the trier of fact to recall the testimony and demeanor of the witnesses as well as the dynamics of the trial." *Falabella v.*

Wilkins, 656 So. 2d 256, 257 (Fla. 5th DCA 1995); *see Donn v. Donn*, 733 So. 2d 581 (Fla. 4th DCA 1999) (key factor is whether or not there is any conflict or inconsistency between the trial judge's statements or findings at the time of the trial and the final judgment entered later, or if there is a factual finding in the trial judgment that is not supported by the evidence).

Applying these Rules, this Court has held that where there was no such conflict or inconsistency between the judge's trial statements or findings and the final judgment, and the factual findings are supported by evidence, a 15-month delay between a nonjury trial and the court's final judgment was not unreasonable and would not warrant a new trial. *Fla. Air Acad. v. McKinley*, 688 So. 2d 359, 360 (Fla. 5th DCA 1997); *see also Duva v. Duva*, 674 So. 2d 774 (Fla. 5th DCA 1996) (10-month delay did not unduly prejudice plaintiff and did not warrant new trial, where inconsistencies in final judgment were minor or marginal).

In light of the foregoing, the 12-month delay in this case was not unreasonable, as the findings of Judge Sagebrush's Declaratory Judgment were supported by the evidence and consistent with his statements during the trial. As such, no new trial is warranted.

CONCLUSION

For all of the aforesaid reasons, the Appellees Gerry Garotte and Kelley Garotte would request that this Honorable Court affirm the Declaratory Judgment entered in the circuit court on April 3, 2006.

Dated: December _____, 2006

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been served upon opposing counsel by depositing same in the United States mail, first-class postage prepaid, on December ___, 2006, to the following addresses:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with Fla. R. App. P. 9.210 in that it was produced using Times New Roman 14-point font.

_____

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