October 21, 2020

Florida Computer and Technology Law Update

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Why It's Important

"Copyright law and technology is another area that we focus quite a bit on. I think I had one witness say that our current laws are '*Myspace laws in a Tik Tok world*.' There are a lot of changes that have occurred, and we feel like there is a need for us to move forward with some clarity and protections."

- Senator Thom Tillis, October 14, 2020

Malwarebytes, Inc. v. Enigma Software Group USA, LLC

No. 19-1284, Supreme Court of the United States (10/13/2020)

Thomas, J. Statement respecting denial of Certiorari:

- 47 U.S. §230 "gives internet platforms immunity from some civil and criminal claims."
- "When Congress enacted the statute, most of today's major Internet platforms did not exist."

Malwarebytes, Inc. v. Enigma Software Group USA, LLC
No. 19-1284, Supreme Court of the United States (10/13/2020)

Thomas, J. Statement respecting denial of Certiorari:

- "Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "Rather arcane issue … of who decides whether a dispute is subject to a contract's arbitration provision: an arbitrator or a judge."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "A clickwrap agreement has been defined as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an 'I agree' box."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "The agreement did not quote or specify any particular provision or rule, such as the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement."
  - »Original Opinion:
    - "It does not appear from our record that an operative link to the AAA Rules was even provided with the online clickwrap agreement."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. Which strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "In the case at bar we have … conferral of an adjudicative power to an arbitrator, found within a body of rules that were neither attached **nor linked** to an agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened.... We may quibble over what the precise measure of the Supreme Court's "clear and unmistakable evidence" standard should entail, but it surely means evidence of intent that is not ambiguous. Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- "[A] contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability [does not] clearly and unmistakably supplant[] a court's power to rule on the issue of arbitrability."

Doe v. Natt

299 So.3d 599 (Fla. 2d DCA 2020)

- Vilanti Dissent:
  - "When paper is eliminated in favor of speed and convenience, it should come as no surprise that contracting parties resort **to incorporating material by reference**—which in this instance includes the AAA rules and specifically Rule 14(a), which allows the arbitrator to decide arbitrability in the first instance."

Doe v. Natt

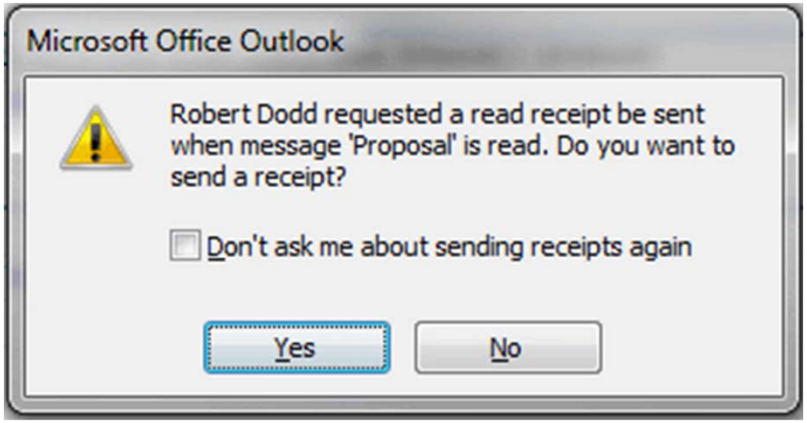
299 So.3d 599 (Fla. 2d DCA 2020)

- To be Continued?
  - »Florida Supreme Court Jurisdictional Briefing is pending.

Megacenter US LLC v. Goodman Doral 88th Court LLC
273 So.3d 1078 (Fla. 3d DCA 2019)

- "Under Florida law, strict compliance with a notice provision is not required if one of the parties … has actual notice."

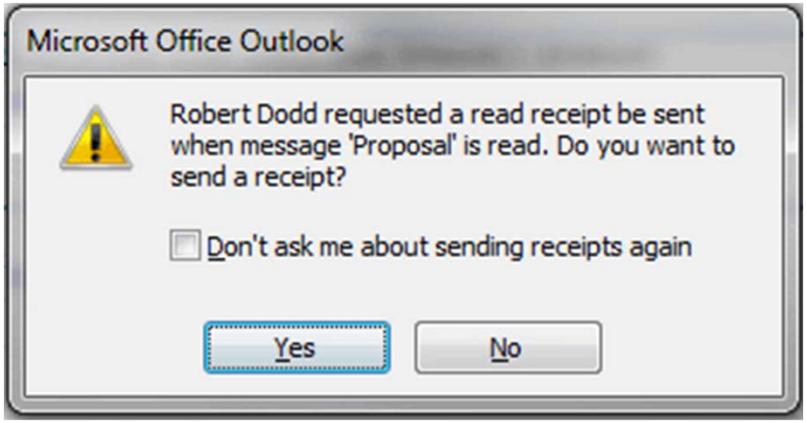
- [O]nly substantial and not strict compliance [is sufficient], where notice is required under contracts and statutes."



Megacenter US LLC v. Goodman Doral 88th Court LLC
273 So.3d 1078 (Fla. 3d DCA 2019)

- "The record is clear that Goodman's counsel received Megacenter's timely email written notice of termination. There is no dispute on this issue."

- "[A] party cannot claim it never received notice, … where [it] accepted … written notice [sent via email] and … had actual notice of … termination."



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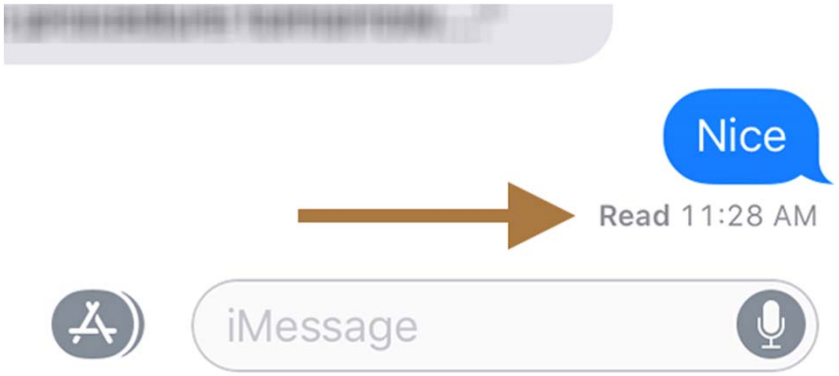

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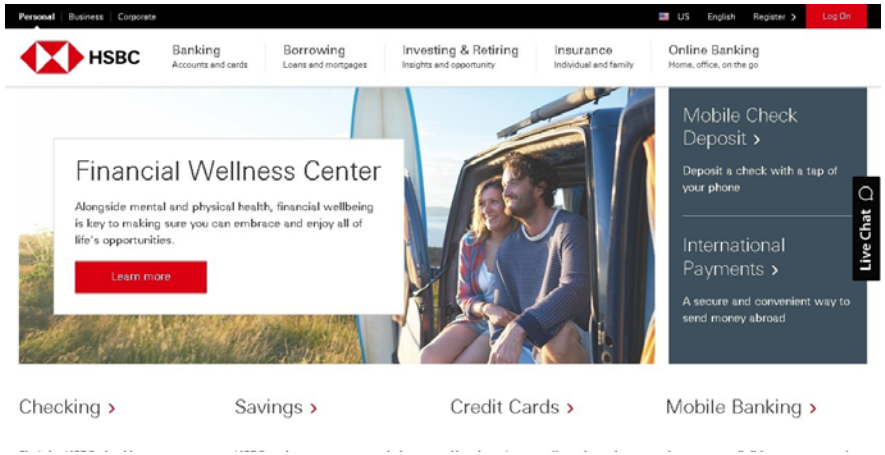
Jackson v. HFC III

298 So.3d 531 (Fla. 2020)

- Testimony of "years of experience with the bank" and "familiar[ity] with the company's business practices" is "direct evidence … [of] familiar[ity] with relevant business practices, including how the bank records and tracks monetary transactions, and was sufficient to make a prima facie showing that [the witness] was qualified to give the testimony that followed, authenticating the documents and laying the foundation for their admission as business records."

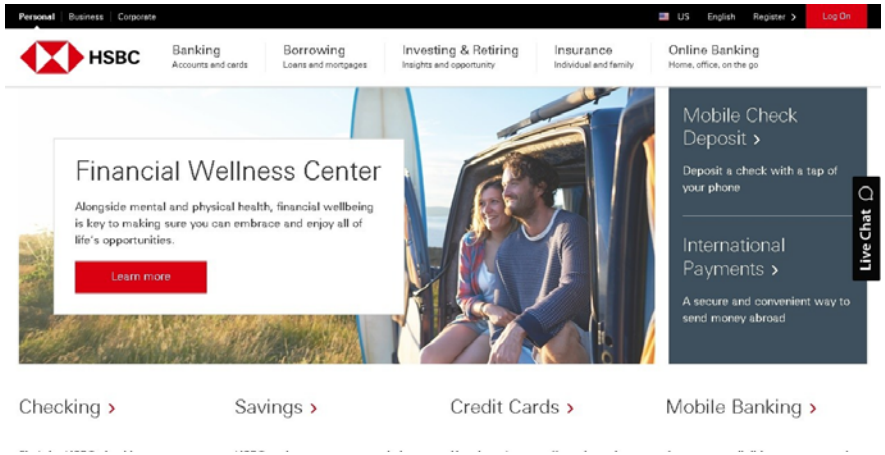


Jackson v. HFC III

298 So.3d 531 (Fla. 2020)

- Polston dissenting, in which Labarga concurs:

  "When the business records sought to be admitted are 'in the form of computer or electronic records, such as a computerized loan transaction history, the foundational witness ought to possess knowledge of the record-keeping system.'"



Law Offices of Herssein and Herssein, P.A. v. USAA
271 So.3d 889 (Fla. 2018)

- Issue: "[W]hether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit."

Law Offices of Herssein and Herssein, P.A. v. USAA
271 So.3d 889 (Fla. 2018)

- "A Facebook 'friend' may or may not be a 'friend' in the traditional sense of the word. But Facebook 'friendship' is not—as a categorical matter—the functional equivalent of traditional 'friendship.'"

Law Offices of Herssein and Herssein, P.A. v. USAA
271 So.3d 889 (Fla. 2018)

- "[T]he mere existence of a Facebook 'friendship' between a judge and an attorney appearing before the judge, **without more**, does not reasonably convey to others the impression of an inherently close or intimate relationship."

Law Offices of Herssein and Herssein, P.A. v. USAA
271 So.3d 889 (Fla. 2018)

- Labarga, concurring:

  Wrote "to strongly urge judges not to participate in Facebook. For newly elected or appointed judges who have existing Facebook accounts, I encourage deactivation of those accounts."

Law Offices of Herssein and Herssein, P.A. v. USAA
271 So.3d 889 (Fla. 2018)

- Pariente, dissenting, in which Lewis and Quince concur:
  "Judges, unlike the general public and even other elected officials, accept the responsibility when they … don their black robes that many prior activities may have to be limited …. One of these activities should include the use of social media to communicate, either actively or passively, with attorneys who appear before them. Because public trust in the impartiality and fairness of the judicial system is of the utmost importance, this Court should err on the side of caution."

Arko Plumbing Corp. v. Rudd
230 So.3d 520 (Fla. 3d DCA 2017)

- "Here, too, Rudd accessing Arko's MotoMon account on his law firm computer was a noncommunicative act. Just as sneaking into an old friend's house to look at the books in his library doesn't communicate anything to the friend, accessing the account using Collucci's password did not communicate information to another person."

Arko Plumbing Corp. v. Rudd
230 So.3d 520 (Fla. 3d DCA 2017)

- "Without a communicative act, [the] actions fall outside what the Florida Supreme Court has held as protected by the litigation privilege. We conclude that … sitting at [a] computer and accessing Arko's MotoMon account was not a communication subject to the privilege."

La Galere Markets, Inc. v. State

289 So.3d 553 (Fla. 1st DCA 2020)

- "Residents would need to use biometric data, such as a fingerprint, to complete a purchase from the [Automated Dispensing Machine]."

La Galere Markets, Inc. v. State

289 So.3d 553 (Fla. 1st DCA 2020)

- "Section 561.702(1) expresses the Legislature's intent to eliminate alcohol sales to and alcohol consumption by underaged persons."
- "Section 562.11(1)(a)1 makes the sale or service of alcohol to underaged persons a second-degree misdemeanor."

La Galere Markets, Inc. v. State

289 So.3d 553 (Fla. 1st DCA 2020)

- "[N]othing in either statute addresses whether sales of alcohol require face-to-face transactions or prohibit sales through ADMs."

State v. Espinoza

264 So.3d 1055 (Fla. 3d DCA 2019)

- Considered whether an individual exchanging bitcoins for cash was a "money services business" as defined in Fla. Stat. §560.103(22), requiring him to register as a money transmitter or authorized vendor under Fla. Stat. §560.125.

State v. Espinoza

264 So.3d 1055 (Fla. 3d DCA 2019)

- The court determined that "there is no plausible interpretation of 'monetary value' or 'payment instruments,' as those terms are used in Chapter 560 that would place bitcoins outside of the statute's ambit."

Lewis v. Mercedes-Benz USA, LLC

19-cv-81220-RAR (S.D. Fla.)

- European data privacy law compliance can serve as undue burden:
  - "Lastly, and perhaps most importantly, Defendants have identified—in a specific and tangible way—the unreasonable discovery burdens they will face absent a stay. Given that two out of the three Defendants are foreign entities, the nature and scope of discovery in this action necessitates information located in Germany, which will require compliance with European data privacy laws and other foreign rules and regulations."

Brown v. Vivant Solar, Inc.
8:18-cv-2838-T-24 JSS (M.D. Fla.)

- "Computer generated business records are admissible [under Rule 803(6)] under the following circumstances:
  - '(1) [t]he records must be kept pursuant to some routine procedure designed to assure their accuracy,
  - (2) they must be created for motives that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and
  - (3) they must not themselves be mere accumulations of hearsay or uninformed opinion.'"

Garcia v. State

45 Fla. L. Weekly D 2053 (Fla. 5th DCA 2020)

- "Distilled to its essence, the revealing of the passcode is a verbal communication of the contents of one's mind."
- "We agree … that the order under review requires that he utilize the contents of his mind and disclose specific information regarding the passcode that will likely lead to incriminating information that the State will then use against him at trial. We therefore conclude that the compelled disclosure of his passcode is testimonial and is protected by the Fifth Amendment."
- Question was one of two certified to Florida Supreme Court.

State v. Worsham

227 So.3d 602 (Fla. 4th DCA 2017)

- "Although electronic data recorders do not yet store the same quantity of information as a cell phone, nor is it of the same personal nature, the rationale for requiring a warrant to search a cell phone is informative in determining whether a warrant is necessary to search an immobilized vehicle's data recorder. These recorders document more than what is voluntarily conveyed to the public and the information is inherently different from the tangible 'mechanical' parts of a vehicle."

State v. Worsham

227 So.3d 602 (Fla. 4th DCA 2017)

- Forst Dissent:

  "The data was not personal to Appellee, was not password protected by Appellee, and was not being collected and maintained solely for the benefit of Appellee."

Thanks!

SUPREME COURT OF THE UNITED STATES

MALWAREBYTES, INC. *v.* ENIGMA SOFTWARE GROUP USA, LLC

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–1284. Decided October 13, 2020

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

This petition asks us to interpret a provision commonly called §230, a federal law enacted in 1996 that gives Internet platforms immunity from some civil and criminal claims. 47 U. S. C. §230. When Congress enacted the statute, most of today's major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.

This case involves Enigma Software Group USA and Malwarebytes, two competitors that provide software to enable individuals to filter unwanted content, such as content posing security risks. Enigma sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct by reconfiguring its products to make it difficult for consumers to download and use Enigma products. In its defense, Malwarebytes invoked a provision of §230 that states that a computer service provider cannot be held liable for providing tools "to restrict access to material" that it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." §230(c)(2). The Ninth Circuit relied heavily on the "policy" and "purpose" of §230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct.

The decision is one of the few where courts have relied on purpose and policy to *deny* immunity under §230. But the court's decision to stress purpose and policy is familiar. Courts have long emphasized nontextual arguments when interpreting §230, leaving questionable precedent in their wake.

I agree with the Court's decision not to take up this case. I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.

I

Enacted at the dawn of the dot-com era, §230 contains two subsections that protect computer service providers from some civil and criminal claims. The first is definitional. It states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." §230(c)(1). This provision ensures that a company (like an e-mail provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content. The second subsection provides direct immunity from some civil liability. It states that no computer service provider "shall be held liable" for (A) good-faith acts to restrict access to, or remove, certain types of objectionable content; or (B) giving consumers tools to filter the same types of content. §230(c)(2). This limited protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal.

Congress enacted this statute against specific background legal principles. See *Stewart* v. *Dutra Constr. Co.*, 543 U. S. 481, 487 (2005) (interpreting a law by looking to the "backdrop against which Congress" acted). Traditionally, laws governing illegal content distinguished between

publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew (or constructively knew) that content was illegal. See, *e.g., Stratton Oakmont, Inc.* v. *Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. NY, May 24, 1995); Restatement (Second) of Torts §581 (1976); cf. *Smith* v. *California*, 361 U. S. 147, 153 (1959) (applying a similar principle outside the defamation context).

The year before Congress enacted §230, one court blurred this distinction. An early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board. The company contended that it merely distributed the defamatory statement. But the company had also held itself out as a family-friendly service provider that moderated and took down offensive content. The court determined that the company's decision to exercise editorial control over some content "render[ed] it a publisher" even for content it merely distributed. *Stratton Oakmont*, 1995 WL 323710, *3–*4.

Taken at face value, §230(c) alters the *Stratton Oakmont* rule in two respects. First, §230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content. Second, §230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by §230(c)(1); and if it takes down certain

third-party content in good faith, it is protected by §230(c)(2)(A).

This modest understanding is a far cry from what has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, see *Baxter* v. *Bracey*, 590 U. S. —— (2020) (THOMAS, J., dissenting from denial of certiorari), courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms. *E.g.,* 1 R. Smolla, Law of Defamation §4:86, p. 4–380 (2d ed. 2019) ("[C]ourts have extended the immunity in §230 far beyond anything that plausibly could have been intended by Congress); accord, Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342–343 (2005) (similar). I address several areas of concern.

A

Courts have discarded the longstanding distinction between "publisher" liability and "distributor" liability. Although the text of §230(c)(1) grants immunity only from "publisher" or "speaker" liability, the first appellate court to consider the statute held that it eliminates distributor liability too—that is, §230 confers immunity even when a company distributes content that it *knows* is illegal. *Zeran* v. *America Online, Inc.,* 129 F. 3d 327, 331–334 (CA4 1997). In reaching this conclusion, the court stressed that permitting distributor liability "would defeat the two primary purposes of the statute," namely, "immuniz[ing] service providers" and encouraging "selfregulation." *Id.,* at 331, 334. And subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts. See, *e.g., Universal Communication Systems, Inc.* v. *Lycos, Inc.*, 478 F. 3d 413, 420 (CA1 2007); *Shiamili* v. *Real Estate Group of NY, Inc.*, 17 N. Y. 3d 281, 288–289, 952 N. E. 2d 1011, 1017 (2011); *Doe* v. *Bates*, 2006 WL 3813758, *18 (ED Tex., Dec. 27, 2006).

To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as "primary publishers" and "secondary publishers or disseminators," explaining that distributors can be "charged with publication." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 799, 803 (5th ed. 1984).

Yet there are good reasons to question this interpretation.

First, Congress expressly imposed distributor liability in the very same Act that included §230. Section 502 of the Communications Decency Act makes it a crime to "knowingly . . . display" obscene material to children, even if a third party created that content. 110 Stat. 133–134 (codified at 47 U. S. C. §223(d)). This section is enforceable by civil remedy. 47 U. S. C. §207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.

Second, Congress enacted §230 just one year after *Stratton Oakmont* used the terms "publisher" and "distributor," instead of "primary publisher" and "secondary publisher." If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, *e.g., FTC* v. *Accusearch Inc.*, 570 F. 3d 1187, 1195 (CA10 2009), one might expect Congress to use the same terms *Stratton Oakmont* used.

Third, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in §230(c)(1): No provider "shall be held liable" for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. §230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful. *Russello* v. *United States*, 464 U. S. 16, 23 (1983); cf. *Doe* v. *America Online, Inc.*, 783

So. 2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (relying on this rule to reject the interpretation that §230 eliminated distributor liability).

B

Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is "provided by *another* information content provider." (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. See *Fair Housing Council of San Fernando Valley* v. *Roommates.Com, LLC*, 521 F. 3d 1157, 1165 (CA9 2008). And an information content provider is not just the primary author or creator; it is anyone "responsible, *in whole or in part*, for the creation or development" of the content. §230(f)(3) (emphasis added).

But from the beginning, courts have held that §230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content." *E.g., Zeran*, 129 F. 3d, at 330 (emphasis added); cf. *id.,* at 332 (stating also that §230(c)(1) protects the decision to "edit"). Only later did courts wrestle with the language in §230(f)(3) suggesting providers are liable for content they help develop "in part." To harmonize that text with the interpretation that §230(c)(1) protects "traditional editorial functions," courts relied on policy arguments to narrowly construe §230(f)(3) to cover only substantial or material edits and additions. *E.g., Batzel* v. *Smith*, 333 F. 3d 1018, 1031, and n. 18 (CA9 2003) ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted").

Under this interpretation, a company can solicit thousands of potentially defamatory statements, "selec[t] and edi[t] . . . for publication" several of those statements, add

commentary, and then feature the final product prominently over other submissions—all while enjoying immunity. *Jones* v. *Dirty World Entertainment Recordings LLC*, 755 F. 3d 398, 403, 410, 416 (CA6 2014) (interpreting "development" narrowly to "preserv[e] the broad immunity th[at §230] provides for website operators' exercise of traditional publisher functions"). To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product, even in part, is dubious.

C

The decisions that broadly interpret §230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that "in good faith . . . restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Taken together, both provisions in §230(c) most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or remove third-party content, §230(c)(1), and when they *decide* to exercise those editorial functions in good faith, §230(c)(2)(A).

But by construing §230(c)(1) to protect *any* decision to edit or remove content, *Barnes* v. *Yahoo!, Inc.*, 570 F. 3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, see *e-ventures Worldwide, LLC* v. *Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that §230(c)(1) protects removal decisions because it would "swallo[w] the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, §230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice,*

Inc. v. *Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff'g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that "'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune'" under §230(c)(1)).

D

Courts also have extended §230 to protect companies from a broad array of traditional product-defect claims. In one case, for example, several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for "Escorts" deliberately structured its website to facilitate illegal human trafficking. Among other things, the company "tailored its posting requirements to make sex trafficking easier," accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe No. 1* v. *Backpage.com, LLC*, 817 F. 3d 12, 16–21 (CA1 2016). Bound by precedent creating a "capacious conception of what it means to treat a website operator as the publisher or speaker," the court held that §230 protected these website design decisions and thus barred these claims. *Id.,* at 19; see also *M. A.* v. *Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1048 (ED Mo. 2011).

Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force* v. *Facebook, Inc.*, 934 F. 3d 53, 65 (CA2 2019), cert. denied, 590 U. S. —— (2020). The court first pressed the policy argument that, to pursue "Congress's objectives, . . . the text of Section 230(c)(1) should be construed broadly in favor of immunity." 934 F. 3d, at 64. It then granted immunity, reasoning that recommending content "is an essential result of publishing." *Id.,* at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by §230(c)(1), it "strains the English language to say that in

targeting and recommending these writings to users . . . Facebook is acting as 'the *publisher* of . . . information provided by another information content provider.'" *Id.,* at 76–77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting §230(c)(1)).

Other examples abound. One court granted immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features to prevent harassment and impersonation. *Herrick* v. *Grindr LLC*, 765 Fed. Appx. 586, 591 (CA2 2019), cert. denied, 589 U. S. —— (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a feature that encouraged reckless driving. *Lemmon* v. *Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (CD Cal. 2020).

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable "as the publisher or speaker" of third-party content. §230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. §230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant's own misconduct. Cf. *Accusearch*, 570 F. 3d, at 1204 (Tymkovich, J., concurring) (stating that §230 should not apply when the plaintiff sues over a defendant's "*conduct* rather than for the *content* of the information"). Yet courts, filtering their decisions through the policy argument that "Section 230(c)(1) should be construed broadly," *Force*, 934 F. 3d, at 64, give defendants immunity.

II

Paring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them

more appropriate for an Internet-driven society.

Extending §230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for "knowingly host[ing] illegal child pornography," *Bates*, 2006 WL 3813758, *3, or for race discrimination, *Sikhs for Justice*, 697 Fed. Appx., at 526, we should be certain that is what the law demands.

Without the benefit of briefing on the merits, we need not decide today the correct interpretation of §230. But in an appropriate case, it behooves us to do so.

Arko Plumbing Corp. v. Rudd

Court of Appeal of Florida, Third District

October 18, 2017, Opinion Filed

No. 3D16-1689

Reporter
230 So. 3d 520 *; 2017 Fla. App. LEXIS 14752 **; 42 Fla. L. Weekly D 2195; 2017 WL 4654904

Arko Plumbing Corp., a Florida Corporation, Appellant, vs. Michael P. Rudd, Esq. and Rudd & Diamond, P.A., Appellees.

Subsequent History: Review denied by *Rudd v. Arko Plumbing, 2018 Fla. LEXIS 572, 2018 WL 857420 (Fla., Feb. 13, 2018)*

Writ denied by *Arko Plumbing Corp. v. Rudd, 251 So. 3d 889, 2018 Fla. App. LEXIS 8789 (Fla. Dist. Ct. App. 3d Dist., May 31, 2018)*

Motion denied by, Writ denied by *Arko Plumbing Corp. v. Rudd, 251 So. 3d 879, 2018 Fla. App. LEXIS 9694 (Fla. Dist. Ct. App. 3d Dist., June 11, 2018)*

Writ denied by *Arko Plumbing Corp. v. Rudd, 254 So. 3d 378, 2018 Fla. App. LEXIS 12927 (Fla. Dist. Ct. App. 3d Dist., Aug. 16, 2018)*

Decision reached on appeal by *Arko Plumbing Corp. v. Rudd, 2020 Fla. App. LEXIS 2761, 2020 WL 1049358 (Fla. Dist. Ct. App. 3d Dist., Mar. 4, 2020)*

Decision reached on appeal by *Arko Plumbing Corp. v. Rudd, 2020 Fla. App. LEXIS 2766, 2020 WL 1049402 (Fla. Dist. Ct. App. 3d Dist., Mar. 4, 2020)*

Prior History: **[**1]** An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Judge. Lower Tribunal No. 13-19894.

Counsel: Weil Quaranta, P.A., Ronald P. Weil, John M. Quaranta, and Marguerite Snyder, for appellant.

Rumberger, Kirk, & Caldwell, P.A., M. Stephen Smith, and Michael R. Holt, for appellees.

Judges: Before ROTHENBERG, C.J., and SCALES and LUCK, JJ.

Opinion by: LUCK

Opinion

[*522] LUCK, J.

Under Florida's absolute litigation privilege, a defendant can slander the plaintiff and lie to her and the court, and still be absolutely immune from a later lawsuit for defamation, tortious interference with a business relationship, and even violations of federal consumer protection statutes, as long as the slander and lies were made in the courtroom or during the formal discovery process and had some relation to the case. The trial court in this case extended the absolute privilege to (1) the defendants accessing the plaintiff's password-protected vehicle tracking system, and (2) their questions to the plaintiff's customers during an examination under oath, and granted summary judgment for the defendants. We agree with the plaintiff that the absolute privilege cannot be stretched that far, reverse summary judgment, and remand to the trial **[**2]** court.

BACKGROUND FACTS AND PROCEDURAL

HISTORY

In 2010, plaintiff Arko Plumbing Corporation was providing homeowners with "video colonoscopies" of their cast-iron drain pipes to locate cracks in the damaged pipes. Arko would identify the cracks, assist homeowners in filing claims under their insurance policies, and then replace the damaged cast-iron pipes (an expensive fix which required digging through a home's flooring into the concrete pad to remove the old, damaged pipes).

Bascuas v. Citizens Property Insurance Corp. Defendants Michael Rudd and his law firm, Rudd & Diamond, P.A., represented insurance companies on claims that they breached homeowner's insurance policies by not covering Arko's repairs to the homeowners' damaged pipes. In 2013, Rudd and his firm were defending Citizens Property Insurance Corporation in the breach of property insurance case brought by the Bascuases. On February 26 and 27, 2013, Rudd and his firm, with the help of a former Arko employee, John Collucci, used Collucci's still-active password to access Arko's MotoMon Global Positioning System account. MotoMon is an internet-based computer program which provided historical and real-time access to the location **[**3]** of Arko's service vans. On the MotoMon program, Rudd and his firm, with Collucci's password, accessed the historical location information for eighteen Arko clients, including the Bascuases. Rudd and his firm then issued subpoenas to Arko for its Motomon information, including information related to location of Arko service vans at the Bascuas residence.

Calejo v. State Farm Florida Insurance Co. In March 2013, Rudd and his firm also defended State Farm Florida Insurance Company in the breach of homeowner's policy claim filed by the Calejos. The Calejos **[*523]** insurance policy with State Farm required that they answer the company's questions at an examination under oath. The examination was held on March 8, 2013, and included the following exchange:

> Rudd: Did you have any kind of — and I think we talked about this, but you never met with anybody at Arko at any time before this loss, right?
> Ms. Calejo: No sir, not that I recall. I know I've called plumbers before but I don't think that he was one of the ones that ever came to my house.
> Rudd: So, he didn't come out to y'all about a year in advance and say you need to clean this house up before we can make an insurance claim?
> Ms. Calejo: Oh, my God, **[**4]** no.
> Rudd: He did not do that?
> Ms. Calejo: No . . .
> Rudd: And you never met with Joe or anybody associated with Arko at any time in advance of this loss to discuss committing insurance fraud?
> Ms. Calejo: Oh, no.

The complaint. Arko filed its fifth amended complaint against Rudd and his firm, and various other defendants, including Citizens, State Farm, Stephen Andris (a State Farm employee), former Arko employee Collucci, and Maria Fonnegra (Collucci's girlfriend). The complaint alleged that Rudd and his firm engaged in: a civil conspiracy with the other defendants (count one); deceptive and unfair trade practices (counts four and five); theft of trade secrets (counts nine and ten); defamation (counts fifteen and sixteen); and intentional interference with business relationships (counts twenty-two and twenty-three).

Summary judgment. By the time of the summary judgment motion in this case, Arko's claims against Rudd and his firm were focused on accessing the MotoMon account in the *Bascuas* case, and the questions during the examination under oath in the *Calejo* case. Rudd and his firm moved for summary judgment based, in part, on the litigation privilege and because the information on the MotoMon **[**5]** program was not a trade secret under Florida law. The trial court granted the motion for summary judgment, explaining:

> Okay. As to both Rudd and Rudd & Diamond I do find that whether it's the litigation privilege or the qualified privilege, that it absolutely does apply, including under the facts and circumstances in this case and, therefore, I grant summary judgment across the board for Rudd and Rudd & Diamond in this case.

Arko moved for rehearing on the summary judgment for Rudd and his firm. In denying the rehearing motion, the trial court, again, explained:

> Under the facts of this case, the way the complaint is framed, [Arko's] customer list is not a trade secret. Absolute litigation privilege applies; even if it were only qualified privilege, Arko didn't carry its burden of proving malice as to these defendants.

STANDARD OF REVIEW

"The standard of review of a summary judgment order is de novo and requires viewing the evidence in the light most favorable to the non-moving party." Sierra v.

Shevin, 767 So. 2d 524, 525 (Fla. 3d DCA 2000). Whether the litigation privilege applies to Rudd and his firm's conduct is a pure question of law, and is also reviewed de novo. DelMonico v. Traynor, 116 So. 3d 1205, 1211 (Fla. 2013).

DISCUSSION

Florida's litigation privilege affords absolute immunity "to any **[**6]** act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." Echevarria, ***[*524]*** McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (omission in original) (quoting Levin, Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So.2d 606, 608 (Fla.1994)). The absolute privilege does not apply "where an attorney steps outside of both the courtroom and the formal discovery process to investigate a claim." DelMonico v. Traynor, 116 So. 3d 1205, 1218 (Fla. 2013). Instead, a "qualified privilege" applies "to statements made by attorneys as they undertake informal investigation during pending litigation and engage in ex-parte, out-of-court questioning of nonparty witnesses, 'so long as the statements are relevant to the subject of inquiry' in the underlying suit." *Id.* (quoting Levin, 639 So. 2d at 607). If the court determines that the qualified privilege applies, the burden is on the plaintiff to "prove the additional element of express malice." Id. at 1219.

Arko contends the trial court erred in granting summary judgment for Rudd and his firm because: the litigation privilege did not apply to accessing Arko's MotoMon account and the examination under oath; even if it did, Rudd and the firm acted with express malice, thereby overcoming the qualified privilege; and the information in Arko's MotoMon account was a trade secret, and thus, subject to Florida's trade secret act. Arko's **[**7]** appeal raises three issues: (1) does the litigation privilege extend to Rudd and his firm's accessing Arko's MotoMon account (no); (2) does the absolute or qualified privilege apply to Rudd's questions at the examination under oath (qualified); and (3) was the information on Arko's MotoMon account a trade secret (yes).

1. *Does the litigation privilege extend to Rudd and his firm's accessing Arko's MotoMon account*?

While the absolute and qualified litigation privilege applies to statements and acts that have some relation to a judicial proceeding, a review of the Florida Supreme Court's litigation privilege decisions shows that the statements and acts must be communicative. Every Florida Supreme Court decision that has applied the privilege has done so where the statement was made or act was done while communicating during a pending case or as part of an investigation.

In Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907), the Florida decision adopting the litigation privilege, the privilege was applied to a civil complaint alleging the president of a corporation was "a tricky, dishonorable, unscrupulous and conscienceless man." Id. at 358 (quoting from the complaint). In Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992), the privilege was applied to statements made to law enforcement officers, **[**8]** so the officers would falsely charge a family member with murder. Id. at 66. In Levin, the Court applied the privilege to an insurance company's attorney who falsely certified that opposing counsel would be a witness in the case. Levin, 639 So. 2d at 607. In Echevarria, the Court applied the privilege to letters sent by a law firm to defendants in foreclosure cases that falsely represented the amount of money the defendants owed for title searching services. Echevarria, 950 So. 2d at 381. And in *DelMonico*, the Court applied the qualified privilege to false statements about one of the parties made during informal interviews with potential witnesses in an ongoing litigation. DelMonico, 116 So. 3d at 1209.

In each of these litigation privilege cases, the privilege was applied to communications made to another (the court, parties, law enforcement officers, and witnesses) during an investigation or as part of judicial proceedings. Whatever the **[*525]** cause of action (defamation, consumer protection act violations, tortious interference), the litigation privilege protected communications that had some relationship to a pending case.

While the Florida Supreme Court has not explicitly distinguished between communicative and noncommunicative acts in discussing the litigation privilege, the **[**9]** distinction is reflected in the Court's stated purpose for the privilege.

> [I]t is to the interest of the public that great freedom should be allowed in complaints and allegations with a view to have them inquired into; and that parties and counsel should be indulged with great latitude in the freedom of speech in the conduct of their causes in courts and in asserting their rights, because in this way the purposes of justice will be subserved . . . .

Id. at 1212 (quoting Myers, 44 So. at 361). The privilege

derived in part from "the public interest in allowing litigants and counsel to freely and zealously advocate for their causes in court." *Id. at 1217*. The litigation privilege's purpose, that is, is to protect courtroom speech and advocacy — the communicative tools lawyers, litigants, and witnesses use to search for the truth in our adversarial justice system.

Other states have explicitly distinguished between communicative and noncommunicative conduct. The California Supreme Court has explained that "the litigation privilege protects only publications and communications," and the "threshold issue in determining the applicability of the privilege is whether the defendant's conduct was communicative or noncommunicative." *Rusheen v. Cohen, 37 Cal. 4th 1048, 39 Cal. Rptr. 3d 516, 128 P.3d 713, 719 (Cal. 2006)* (quotation **[**10]** omitted). Other states also have stressed that the litigation privilege applies only to acts or statements that are "communications." *See, e.g., Greenberg Traurig v. Frias Holding Co., 331 P.3d 901, 902 (Nev. 2014)* ("[T]he litigation privilege immunizes from civil liability communicative acts occurring in the course of judicial proceedings, even if those acts would otherwise be tortious."); *Morgan & Pottinger, Attorneys, P.S.C. v. Botts, 348 S.W.3d 599, 602 (Ky. 2011)* (as modified on rehearing) ("A communication must fulfill two requirements in order to fall within the ambit of the judicial statements privilege. First, the communication must have been made preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding. Second, the communication must be material, pertinent, and relevant to the judicial proceeding." (quotation and citations omitted)); *Hawkins v. Harris, 141 N.J. 207, 661 A.2d 284, 289 (N.J. 1995)* ("The absolute privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (quotation omitted)); *Hopkins v. O'Connor, 282 Conn. 821, 925 A.2d 1030, 1037 (Conn. 2007)* ("[C]ommunications uttered or published in the course of judicial proceedings are absolutely privileged so long as **[**11]** they are in some way pertinent to the subject of the controversy." (quotation omitted)); *Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166 S.W.2d 909, 912 (Tex. 1942)* ("Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot constitute the basis of a civil action in damages for slander or libel.").

In California, for example, the privilege has not been extended to the unlawful recording of telephone conversations because recording another person without that person's permission is noncommunicative **[*526]** conduct. *See Kimmel v. Goland, 51 Cal. 3d 202, 271 Cal. Rptr. 191, 793 P.2d 524, 527-30 (Cal. 1990)*. For the same reason, the privilege has not been applied to hang-up telephone calls and slashed tires because they were not communications. *See Martel v. Litchfield, No. C068425, 2013 Cal. App. Unpub. LEXIS 8756, 2013 WL 6260376, at *4-5 (Cal. Ct. App. Dec. 4, 2013)*.

Here, too, Rudd accessing Arko's MotoMon account on his law firm computer was a noncommunicative act. Just as sneaking into an old friend's house to look at the books in his library doesn't communicate anything to the friend, accessing the account using Collucci's password did not communicate information to another person. Rudd didn't write pleadings (*Myers* and *Levin*) or letters (*Echeverri*); and he didn't make false statements to the police (*Fridovich*), defendants (*Echeverri*), or during an interview of potential witnesses (*DelMonico* ***[**12]***). Rudd, according to the summary judgment evidence, was looking for information about Arko to use against homeowners in pending insurance cases. Rudd and his firm were gathering information from the MotoMon system — they were not trying to communicate a thought, idea, or issue to another person.

Without a communicative act, Rudd and his firm's actions fall outside what the Florida Supreme Court has held as protected by the litigation privilege. We conclude that Rudd's sitting at his computer and accessing Arko's MotoMon account was not a communication subject to the privilege.

2. *Does the absolute or qualified privilege extend to Rudd's questions at the examination under oath*?

Rudd's questions to Ms. Calejo during the examination under oath were communications. Rudd contends they should be considered part of the formal discovery process, and therefore, subject to the absolute litigation privilege. Arko responds that the examination under oath is not part of the formal discovery process, and the qualified privilege should apply. The difference matters because under the qualified privilege Arko must show a genuine issue of material fact that Rudd asked the questions with express malice, **[**13]** that is, Rudd's primary motive in asking the questions was to injure Arko's reputation. *DelMonico, 116 So. 3d at 1219*. For the absolute privilege, there's no need to prove malice because "the formalized judicial process . . . serve[s] to counteract the occurrence and consequences of

defamatory statements or abuse." *Id. at 1217*.

Rudd analogizes examinations under oath to witness depositions authorized by the rules of civil procedure. Because the Florida Supreme Court has described civil procedure depositions to be inside the formal discovery process, and examinations under oath are deposition-like, the argument goes, they too should be considered part of the formal discovery process. True, the Florida Supreme Court cited "depositions properly noticed under the Florida Rules of Civil Procedure" as an example of a judicial proceeding having "safeguards in place that served to provide real and immediate checks to abusive and overzealous practice." *Id. at 1217*. Civil procedure depositions, the Court explained, have "protections of the formalized judicial process" because:

> • they are "adversarial in nature and the opposing side has an opportunity to immediately object to any untrue statements";
>
> • "if statements are falsely made, the harmed **[**14]** party may seek to impose sanctions against the offending party in an expeditious way, with the transcript of the deposition providing a clear record of proof"; and
>
> **[*527]** • "the trial court can thereafter strike the defamatory matter from the record."

Id. Also, civil procedure depositions are limited to relevant information as defined by the rules of civil procedure, and the trial court has discretion to videotape the deposition and appoint a special master to preside over it as protections to the parties. *See Fla. R. Civ. P. 1.280(b)(1)* ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . ."); *id. R. 1.280(c)(2)* ("Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including . . . that the discovery may be had only on specified terms and conditions . . . .").

To be sure, an examination under oath has some of these protections, including having opposing counsel present at the examination, but even then "an insured's **[**15]** counsel plays a different role during examinations under oath than during depositions." *Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300, 305 (Fla. 4th DCA 1995)*. An examination under oath does not have a mechanism for a defamed party to seek to impose sanctions in an expeditious way, and there is no process to strike the defamatory matter from the record. There is no legal limitation on the scope of the examination, and a party concerned about harassment cannot get protection in advance like at a civil procedure deposition. The safeguards that protect a party from harm in a civil deposition are not there for an examination under oath.

The absolute privilege, the Florida Supreme Court has explained, is part of a tradeoff. The absolute privilege was created to encourage zealous representation and the free and full discovery of facts between the parties and the court. *See DelMonico, 116 So. 3d at 1216* ("This absolute immunity resulted from the balancing of two competing interests: the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings."). In exchange, the parties subject themselves to the consequences if they cross the line: striking from the **[**16]** record scurrilous accusations; sanctions; and even criminal contempt. The civil procedure deposition fits snuggly within this balance.

Examinations under oath do not. There is no judge or neutral third-party to strike defamatory statements; there is nowhere to seek sanctions for abusive conduct at the examination; and there is no threat of contempt with the power of the state behind it. There are not the "real and immediate checks to abusive and overzealous practices" that the Florida Supreme Court requires in exchange for the full protections of the absolute privilege. *Id. at 1217*. We conclude that an examination under oath is outside the formal discovery process, and therefore, does not support an extension of the absolute privilege.

But that doesn't end the inquiry. While the absolute privilege does not apply, the qualified privilege does because Rudd's questions to Ms. Calejo were part of the informal investigation during pending litigation and had some relation to the Calejos lawsuit against the insurance company. *See id at 1218* ("Without the aforementioned protective measures, we conclude that only a qualified privilege should apply to statements made by attorneys as they undertake informal investigation **[**17]** during pending litigation and engage in ex-parte, out-of-court questioning of nonparty **[*528]** witnesses, so long as the statements are relevant to the subject of inquiry in the underlying suit." (quotation omitted)). The Calejos' breach of insurance policy claim was pending at the same time as the

examination under oath, and Arko's alleged fraud was part of the insurance company's defense.

The trial court found that even if the qualified privilege applied to Rudd and his firm's conduct, Arko presented no summary judgment evidence that Rudd acted with express malice. We disagree.

Rudd's questions to Ms. Calejo about Arko committing fraud were based on the information provided by Arko's former employee Collucci. Arko presented summary judgment evidence that public records showed Collucci was a heroin addict and on probation; Rudd knew that Collucci had been fired for taking illegal public adjuster commissions and wanted revenge against Arko and its management; Rudd knew that former employee Collucci used his password to access Arko's MotoMon account and gave the password to Rudd to use; Rudd knew that Collucci lied under oath about accessing the MotoMon account; attorneys representing insurance **[**18]** companies paid Collucci for investigating Arko and testifying against them in homeowners insurance cases; and Rudd sued Arko for racketeering.

Rudd argues that this evidence shows he was motivated to gather information for his firm's defense of its insurance company clients. That is certainly one inference, and it may be the correct one. But at the summary judgment stage, all reasonable inferences from the evidence are made in favor of the non-moving party — in this case, Arko. A reasonable juror could also infer that Rudd's reliance on a former employee with an ax to grind against Arko, who lied under oath, had a knowable drug problem, and was paid for his testimony, was circumstantial evidence of express malice.

Express malice "may be established indirectly, i.e., 'by proving a series of acts which, in their context or in light of the totality of surrounding circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive.'" *McCurdy v. Collis, 508 So. 2d 380, 382 (Fla. 1st DCA 1987)* (quoting *S. Bell Tel. & Tel. Co. v. Roper, 482 So. 2d 538, 539 (Fla. 3d DCA 1986)*). "Where," as here, "the circumstances surrounding the statement are in dispute, the question of qualified privilege is **[**19]** a factual determination for resolution by the jury." *Id.; see also id. at 385* ("Since we recognize the difficulties involved in determining whether malice was the [primary] motivating factor in this interference case, we conclude the qualified privilege issue should be resolved by the trier of fact.").

In *McCurdy,* the Exxon Corporation relied on the testimony of a doctor to tell an employee's supervisor that the employee was not safely able to work on Exxon property. *Id. at 381-82*. Exxon, when sued (as Arko did) for tortious interference with a business relationship, claimed the qualified privilege applied to its statements to the supervisor. The first district concluded that there was evidence of Exxon's express malice because "the record indicate[d] that Exxon personnel based their decision that [the employee] was a safety risk on the basis of third party reports concerning Dr. Johnson's trial testimony," the company "conducted no independent investigation of [the employee's] job performance, and in fact his employers advised Exxon that [the employee] was doing a good job." *Id. at 384*; *see also Corp. Fin., Inc. v. Principal Life Ins. Co., 461 F. Supp. 2d 1274, 1294 (S.D. Fla. 2006)* ("Plaintiffs have produced **[*529]** sufficient circumstantial evidence . . . from which a reasonable jury could find that Castrillon **[**20]** was the source of the altered information, [and] that he was motivated by an intent to injure Plaintiffs . . . ."). There was a factual dispute about Exxon's motive because it had contrary information about the employee's ability to work and did not investigate.

Here, too, Rudd and his firm based their examination under oath questions on what Collucci shared with them. Rudd, as did Exxon, knew of conflicting information about Collucci's credibility, including that he left Arko on bad terms, had lied under oath, and had been promised payment for his testimony, and did not investigate Collucci's criminal background, including that he was on probation and had abused heroin. Still, Rudd used Collucci's information to ask an Arko client about Arko's fraud. Because the surrounding circumstances of the examination under oath lead to competing inferences about Rudd's motive, as in *McCurdy*, the question of express malice was a genuine disputed fact for the jury.

3. *Was the information Rudd accessed on the MotoMon account Arko's trade secrets?*

The trial court also granted summary judgment for Rudd and his firm on Arko's trade secret act claim because the information that was accessed on the MotoMon **[**21]** account was not a protected trade secret. A trade secret is

> information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and

> not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 688.002(4), Fla. Stat. (2017). Arko's summary judgment evidence created a genuine issue of material fact that the information on the MotoMon account was a trade secret.

Customer information has been held to be a trade secret. *See, e.g.*, *Sea Coast Fire, Inc. v. Triangle Fire, Inc., 170 So. 3d 804, 808 (Fla. 3d DCA 2014)* ("Examples of trade secrets include confidential business information such as a customer list, when the list is not just a compilation of information readily available to the public, but rather acquired or compiled through the owner's industry."); *Delucca v. GGL Indus., Inc., 712 So. 2d 1186, 1187 (Fla. 4th DCA 1998)* ("[W]e find competent substantial evidence that some of the information given out by appellant, which included information about customers which was not available from other sources, constitutes trade secrets under Chapter 688."). Here, the summary **[**22]** judgment evidence showed that Arko had a GPS tracking device on each of its trucks. The MotoMon program linked up to the GPS tracking devices to capture in real time the customers and potential customers that Arko trucks visited to provide plumbing services and video colonoscopies. Customer addresses, the date Arko trucks visited the customer, and the length of time the truck was at the customer's home was available on the MotoMon program.

This information, according to the summary judgment evidence, would have been valuable to Arko competitors because with it they could have solicited Arko customers and offered plumbing services that undercut Arko's prices. To avoid that from happening, Arko kept this information from its competitors and the public by requiring a password to access the MotoMon program. **[*530]** Only two Arko managers had passwords (one of which was Collucci). And Arko signed an agreement with MotoMon that it would not provide information to third persons about the location of Arko vehicles. These are the sorts of reasonable efforts to maintain secrecy required by the trade secret statute. *See* *Heralds of the Gospel Found. Inc. v. Varela, No. 17-22281-CIV, 2017 U.S. Dist. LEXIS 98513, 2017 WL 3868421, at *5 (S.D. Fla. June 23, 2017)* (concluding under Florida's **[**23]** trade secret act that "Plaintiffs have also likely taken more than reasonable measures towards safeguarding the confidentiality of their Trade Secret Information, including but not limited to, requiring the recipients of digital files containing the Videos to execute NDAs, restricting access to these digital files with password encryption, and limiting exposure of the Videos to distinct members of the Association and the Heralds."); *Infinite Energy, Inc. v. Chang, No. 1:07-CV-23-SPM/AK, 2008 U.S. Dist. LEXIS 128104, 2008 WL 11344672, at *2 & n.1 (N.D. Fla. Jan. 9, 2008)* (finding customer lists protected trade secrets under Florida's trade secret act in part because "Plaintiff did maintain the lists on password protected computers, maintained a secure computer network, and contracted with Defendant to maintain confidentially regarding trade secrets").

CONCLUSION

For these reasons, we reverse the summary judgment entered in favor of Rudd and his firm, and remand for further proceedings consistent with this opinion. We express no opinion on other grounds raised in Rudd and his firm's summary judgment motion that were not addressed by the trial court in its orders, and the parties in this appeal.

Reversed and remanded.

End of Document

Brown v. Vivant Solar, Inc.

United States District Court for the Southern District of New York

September 8, 2020, Decided; September 8, 2020, Filed

20-cv-6900 (JSR); 20-cv-6926 (JSR); 20-cv-7051 (JSR)

Reporter
2020 U.S. Dist. LEXIS 168748 *

WAKEEN BROWN, Plaintiff, v. VIVANT SOLAR, INC., DAVID BYWATER, DAVID F. D'ALESSANDRO, BRUCE MCEVOY, JAY D. PAULEY, TODD R. PEDERSEN, ELLEN S. SMITH, JOSEPH S. TIBBETTS, JR., AND PETER F. WALLACE, Defendants.HASSAN ALANAZI, Plaintiff, v. VIVANT SOLAR, INC., DAVID BYWATER, DAVID F. D'ALESSANDRO, BRUCE MCEVOY, JAY D. PAULEY, TODD R. PEDERSEN, ELLEN S. SMITH, JOSEPH S. TIBBETTS, JR., AND PETER F. WALLACE, Defendants.HERBERT SILVERBERG, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. VIVANT SOLAR, INC., DAVID BYWATER, DAVID F. D'ALESSANDRO, BRUCE MCEVOY, JAY D. PAULEY, TODD R. PEDERSEN, ELLEN S. SMITH, JOSEPH S. TIBBETTS, JR., AND PETER F. WALLACE, Defendants.In re VIVANT SOLAR, INC. SECURITIES LITIGATION

Counsel: **[*1]** For Wakeen Brown, Plaintiff (1:20cv6900): Joshua M. Lifshitz, Lifshitz Law Firm, P.C., Garden City, NY USA.

For Hassan Alanazi, Plaintiff (1:20cv6926): Miles Dylan Schreiner, Monteverde & Associates PC, New York, NY USA; Juan Eneas Monteverde, Monteverde & Associates, New York, NY USA.

For Herbert Silverberg, individually and on behalf of all others similarly situated, Plaintiff (1:20cv7051): Michael Jason Klein, Abraham, Fruchter & Twersky, LLP New York, NY USA.

Judges: JED S. RAKOFF, UNITED STATES DISTRICT JUDGE.

Opinion by: JED S. RAKOFF

Opinion

ORDER

JED S. RAKOFF, U.S.D.J.

With the consent of all parties, as stated during an initial pretrial conference this morning (See Tr., Sept. 8, 2020), the three above-captioned actions are consolidated for all pretrial purposes. While the actions remain consolidated, parties shall file all filings on the docket of the first-filed class action, 20-cv-7051 (JSR), and should include the caption In re Vivant Solar, Inc. Securities Litigation. Parties may file papers on the other dockets only if they relate exclusively to one action, and even so, parties must also file a copy of each such filing on the primary docket, 20-cv-7051 (JSR).

As further stated during the conference, the **[*2]** Court adopts the following schedule:

- By September 14, 2020, plaintiff's counsel in the Silverberg action will cause a notice to be published, pursuant to *15 U.S.C. § 78u-4*, of the pendency of the action and of class members' eligibility to apply to serve as lead plaintiff.
- Any member of the putative class who seeks to serve as lead plaintiff must so move by November 13, 2020.

- If more than one person so moves, then the Court will hold a hearing on November 19, 2020, at 4pm by teleconference, using the same dial-in

information used for today's conference. No later than 48 hours prior to this hearing, each applicant for lead plaintiff must submit, ex parte, the retainer agreement between herself and her counsel.

• Counsel for lead plaintiff may file a consolidated, amended complaint no later than November 30, 2020.

• Defendants may move to dismiss all actions by a single motion filed no later than December 18, 2020. Plaintiffs may respond by January 8, 2021. Defendants may reply by January 15, 2021.

• The Court will hold oral argument on January 27, 2021 at 4pm. The parties should prepare for an in-person argument but should jointly call Chambers by January 20, 2021 to confirm this.

SO ORDERED.

Dated: New **[*3]** York, NY

September 8, 2020

/s/ Jed S. Rakoff

JED S. RAKOFF, U.S.D.J.

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Doe v. Natt

Court of Appeal of Florida, Second District

July 10, 2020, Opinion Filed

Case No. 2D19-1383

Reporter
2020 Fla. App. LEXIS 9921 *; 45 Fla. L. Weekly D 1661; 2020 WL 3885714

JOHN DOE and JANE DOE, Appellants, v. WAYNE NATT and AIRBNB, INC., Appellees.

Prior History: [*1] Appeal from the Circuit Court for Manatee County; Charles Sniffen, Circuit Judge.

Doe v. Natt, 2020 Fla. App. LEXIS 3857 (Fla. Dist. Ct. App. 2d Dist., Mar. 25, 2020)

Counsel: Thomas J. Seider of Brannock & Humphries, Tampa, and Damian Mallard and Alan L. Perez of Mallard Law Firm, P.A., Sarasota, for Appellants.

Charles E. Stoecker and William L. Grimsley of McGlinchey Stafford, PLLC, Fort Lauderdale, for Appellee Airbnb, Inc.

No appearance for remaining Appellee.

Judges: LUCAS, Judge. SLEET, J., Concurs. VILLANTI, J., Dissents with opinion.

Opinion by: LUCAS

Opinion

LUCAS, Judge

This appeal requires us to delve into the "rather arcane" issue in arbitration[1] of who decides whether a dispute is subject to a contract's arbitration provision: an arbitrator or a judge. As we will explain, the contract's provision in this case did not provide clear and unmistakable evidence that only the arbitrator could decide the issue of arbitrability. Therefore, we must reverse the circuit court's order which held to the contrary.

I.

A Texas couple, who will be referred to as John and Jane Doe to preserve their confidentiality, decided to vacation in Longboat Key. Through a business, Airbnb, Inc. (Airbnb), they located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's **[*2]** website, Mr. and Mrs. Doe rented the unit for a three-day stay in May of 2016.

The condominium unit was owned by Wayne Natt. Unbeknownst to the Does, Mr. Natt had installed hidden cameras throughout the unit. The Does allege that Mr. Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Mr. Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Mr. Natt and Airbnb as defendants. Their complaint included claims of intrusion against Mr. Natt, constructive intrusion against Airbnb, and loss of consortium against both Mr. Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through

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[1] *See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)* ("[T]he former question—the 'who (primarily) should decide arbitrability' question—is rather arcane.").

Airbnb. They also alleged that Airbnb failed to ensure that Mr. Natt's property did not contain electronic recording devices.

In response to the Does' complaint, Airbnb filed a motion to compel arbitration. Airbnb argued that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound to pursuant to a "clickwrap" agreement **[*3]** [2] they had entered when they first created their respective Airbnb accounts online.

Specifically, Airbnb's motion relied upon the following language that appears near the end of the twenty-two-page clickwrap agreement:

> **Dispute Resolution**
> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services of use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration . . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury . . . .
>
> *Arbitration Rules and Governing Law*. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Airbnb's motion argued that the Does' complaint's **[*4]** allegations "that Airbnb failed to do what [the Does] alleged should have been done, or otherwise breached certain duties alleged to be owed to them, are claims for negligence, which have been held to be within the scope of broad arbitration provisions, such as the one here." But according to Airbnb, the circuit court should not even consider whether the Does' claims were arbitrable because the scope of what is or is not arbitrable had to be decided by American Arbitration Association's (AAA) arbitrator, not the circuit court. Issues about the scope of arbitrability had been contractually assigned to the arbitrator, according to Airbnb, by virtue of the clickwrap agreement's reference to the American Arbitration Association's Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes ("AAA Rules"). Although the AAA Rules were not reproduced within the clickwrap agreement, the clickwrap agreement did direct the Does to a AAA website (and telephone number) through which, Airbnb contended, they would have found AAA Rule 7, which states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, **[*5]** scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."

A hearing was held before the circuit court on Airbnb's motion on February 6, 2019. On March 7, 2019, the court issued an order granting Airbnb's motion to compel arbitration. The order is noteworthy in two respects. First, the court seemed to be persuaded by the Does' argument that their claims would have been outside the scope of the clickwrap agreement's arbitration provision. However, the circuit court went on to conclude that it was powerless to make that determination because the issue of arbitrability had to be decided by the arbitrator, not the court. The circuit court held "that the parties entered an express agreement which incorporated the AAA rules, and that this court is therefore bound to submit the issue of arbitrability to the arbitrator." In so holding, the circuit court distinguished this court's prior holding in *Morton v. Polivchak, 931 So. 2d 935, 939 (Fla. 2d DCA 2006)*, as a case that was "fact-specific" and confined to the "particular provision" before that panel and instead relied upon the cases of *Reunion West Development Partners, LLLP v. Guimaraes, 221 So. 3d 1278 (Fla. 5th DCA 2017)*; *Younessi v. Recovery Racing, LLC, 88 So. 3d 364 (Fla. 4th DCA 2012)*; and *Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005)*, to stay the proceedings and order the parties to proceed to arbitration.

The Does have appealed the circuit court's **[*6]** order

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[2] A clickwrap agreement has been defined as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an "I agree" box. *See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016)*. In its motion to compel arbitration, Airbnb styled its agreement with the Does as "a modified click-wrap presentation" of Airbnb's terms of service, while the Does refer to it simply as a "clickwrap agreement." Inasmuch as Airbnb's different nomenclature does not appear to encompass any substantive definitional distinction, we will use the more widely understood term clickwrap agreement in this opinion.

pursuant to *Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv)*.

II.

Generally, we review an order on a motion to compel arbitration de novo. *Hernandez v. Crespo, 211 So. 3d 19, 24 (Fla. 2016)*; *Wilson v. AmeriLife of E. Pasco, LLC, 270 So. 3d 542, 545 (Fla. 2d DCA 2019)*. Issues of contract interpretation are also subject to de novo review. *Bethany Trace Owners' Ass'n v. Whispering Lakes I, LLC, 155 So. 3d 1188, 1191 (Fla. 2d DCA 2014)*. The particular arbitration provision before us is governed by the *Federal Arbitration Act (FAA)*,[3] which can be applied in both federal and state court proceedings. *Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 396-97 (Fla. 2005)*.

A.

When a question over arbitrability arises, who should decide the answer—the arbitrator or the court—can pose something of an analytical challenge. However, the United States Supreme Court provided a framework to resolve that first order issue in *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*. In *First Options*, a plaintiff firm brought an arbitration proceeding against a husband, his wife, and his wholly owned corporation. In connection with a "workout agreement," the husband's corporation had signed a contract with the plaintiff that contained an arbitration provision, but neither the husband nor his wife had ever executed an agreement with a similar provision. The arbitrators determined they had the power to rule on all the issues before them, including the husband and wife's objections to arbitration, and their award was confirmed by the district court. After the Third Circuit **[*7]** reversed the district court's confirmation, the case came before the Supreme Court. *Id. at 940-41*.

The *First Options* Court began its analysis by highlighting the importance of the "who decides" arbitrability question under the FAA:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

Id. at 942 (citations omitted). The *First Options* Court then went on to explain how to go about deciding the "who decides" question of arbitrability and the practical concerns that inform that analysis:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties **[*8]** agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? . . .
>
> . . . .
>
> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. . . .
>
> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: **Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so**. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the **[*9]** presumption.
>
> But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the

[3] *See generally 9 U.S.C. §§ 1-307 (2018)*.

> other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 943-45 (fourth and fifth alterations **[*10]** in original) (bold emphasis added) (citations omitted). The Court concluded that there was no clear and unmistakable evidence that either the husband or wife had agreed to submit the issue of arbitrability to an arbitrator and affirmed the judgment of the Third Circuit. *Id. at 946-47*; *cf. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 86, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* (characterizing *First Options*' clear and unmistakable evidence standard as an "interpretive rule" and a "strong pro-court presumption" that applies "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate").

In a more recent term, the Supreme Court made it a point to repeat *First Options* "'who decides" arbitrability test under the FAA: "This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019)* (quoting *First Options, 514 U.S. at 944*). Thus, as the Supreme Court has repeatedly instructed, under the FAA **[*11]** there must be clear and unmistakable evidence that the parties agreed to have the arbitrator decide threshold questions about arbitrability; short of that, the assumption remains that such disputes are to be decided by a court.

Our district applied *First Options* in a case that holds certain similarities to the case at bar. In *Morton, 931 So. 2d at 938*, a dispute arose between a seller and a buyer of a residential property over drainage problems that were later discovered on the property. Pursuant to the purchase contract, the buyer filed a demand for arbitration alleging fraud against the seller, to which the seller responded with various counterclaims. *Id.* Both parties sought punitive damages, but the arbitration panel concluded it did not have the authority to award punitive damages. *Id.* Apparently dissatisfied with that ruling, the buyer filed a separate complaint in the circuit court. *Id.* When he attempted to assert a claim for punitive damages in the civil proceeding, the trial court agreed with the seller that it did not have the authority to review the arbitration panel's ruling that the arbitration panel had no power to award punitive damages. *Id.* The buyer appealed, arguing that the circuit court, **[*12]** not the arbitration panel, should have decided the scope of arbitrability for his claim of punitive damages. *Id.*

Like the Does' clickwrap agreement, the real estate contract in *Morton* did "not expressly address the question of who decides issues of arbitrability." *Id.* And, like the clickwrap agreement here, the contract before the *Morton* court stated that a set of AAA rules would apply in an arbitration proceeding under the contract. *Id.* There, however, the similarities between the cases appear to diminish.

From what is reported in the *Morton* opinion, the AAA rules that were adopted in the parties' real estate contract contained a section that generally addressed the timing of raising objections to the arbitrability of a claim; but the rule section did not explicitly state who could decide those objections. *Id. at 939*. Although one could fairly infer that that section likely contemplated the arbitrator hearing such objections (it was, after all, found within a body of rules promulgated by an arbitration business for use by its arbitrators and customers), the *Morton* court held otherwise. We explained:

> "[D]ecisions regarding arbitrability are to be made by the trial court, unless the parties have **[*13]** entered an agreement stating otherwise." *Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997)* (relying on *Thomas W. Ward & Assoc. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1991)*); *see also Royal Prof'l Builders, Inc. v. Roggin, 853 So. 2d 520, 523 (Fla. 4th DCA 2003)*; *Premier Med. Mgmt., Ltd. v. Salas, 830 So. 2d 959, 961 n.2 (Fla. 1st DCA 2002)*. "Contractual silence or ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators." *Romano, 700 So. 2d at 64*. "If . . . the parties did *not* agree to submit the

> arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id. at 944, 115 S. Ct. 1920* (quoting *AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)*).

Id. at 938-39 (alterations in original).

The *Morton* court found "no merit" in the seller's argument that the circuit court could not decide arbitrability of the punitive damages claim because the AAA rule, we observed, "only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding when the arbitration panel has the authority to decide issues of arbitrability. The provision does not itself grant the arbitration panel that authority." *Id. at 939* (emphasis omitted).

The question we did not answer in *Morton*—and which we must now decide—is whether a **[*14]** contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability clearly and unmistakably supplants a court's power to rule on the issue of arbitrability. In this case, we hold it does not.

B.

Arbitration provisions are creatures of contract and must be construed as "a matter of contract interpretation." *See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)* (citing *Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982)*; *R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 632 (Fla. 5th DCA 1982)*); *4927 Voorhees Road, LLC v. Mallard, 163 So. 3d 632, 634 (Fla. 2d DCA 2015)*. "[C]ourts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)* (citations omitted) (first citing *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)*; and then citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)*). "'When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent.' . . . 'Intent unexpressed will be unavailing . . . .'" *Beach Towing Servs., Inc. v. Sunset Land Assocs., 278 So. 3d 857, 860 (Fla. 3d DCA 2019)* (first quoting *Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017)*; and then quoting *Moore v. Stevens, 90 Fla. 879, 106 So. 901, 903 (Fla. 1925)*). It is often observed that if there is a dispute over the scope of arbitrability in a contract, courts will generally resolve the dispute in favor of arbitration. *See Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013)*. The question we are faced with, though, is not *what* the scope of arbitration is under the clickwrap agreement, but *who* should decide that issue. That question is answered from a different perspective: "[C]ourts should not assume **[*15]** that the parties agreed to submit issues concerning arbitrability to the arbitrator, unless there is a clear and unmistakable agreement to do so[,]" and furthermore, contractual ambiguity "is insufficient to give that authority to the arbitrators." *Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997)* (citing *First Options, 514 U.S. at 944*)); *see also Henry Schein, 139 S. Ct. at 530*; *Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)*

With that in mind, we will begin by pointing out what is conspicuously missing in the clickwrap agreement's language. The agreement itself is silent on the issue of who should decide arbitrability. *Cf. Romano, 700 So. 2d at 64*. And although the circuit court concluded that the AAA Rules had been "incorporated" into the parties' clickwrap agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules (a point we will turn to shortly), those rules were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." Plainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is **[*16]** necessarily conditional on there being an arbitration. If a claim is arbitrated, then the AAA Rules apply. But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a

very helpful answer and not at all clear.

Moreover, the reference to the AAA Rules was broad, nonspecific, and cursory: the clickwrap agreement simply identified the entirety of a body of procedural rules. The agreement did not quote or specify any particular provision or rule, such as the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement.[4] Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. Which strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court.

Assuming the clickwrap agreement's passing **[*17]** reference to AAA and the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability, there is then the added uncertainty of whether the AAA Rules, in fact, *did* so. Again, the pertinent arbitration rule Airbnb relies upon states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim." And, again, we find something missing. This rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction. *See* Ajamian v. CantorCO2e, L.P., 203 Cal. App. 4th 771, 137 Cal. Rptr. 3d 773, 790 (Cal. Ct. App. 2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction . . . . This tells the reader almost nothing, since a court *also* has the power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or **[*18]** has *exclusive* authority to do so . . . ."). Indeed, in most interpretive contexts, the statement, "shall have the power," does not even constitute a mandatory directive. *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) (concluding that the phrase "Congress shall have the power" is permissive (citing Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530, 92 S. Ct. 1700, 32 L. Ed. 2d 273 (1972))); People ex rel. Oak Supply & Furniture Co. v. Dep't of Rev., 62 Ill. 2d 210, 342 N.E. 2d 53, 55 (Ill. 1976) (construing state statute that authorized state's department of revenue to issue subpoenas, concluding that "the word 'shall' is to be read as permissive—'shall have the power to' or 'may'"); Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820, 825 (Ky. 1942) (observing that the statutory phrase "shall have the power and the authority" is equivalent to "the permissive word, 'may'")

In our view, the parties'"manifestation of intent," *see* Rent-A-Center, 561 U.S. at 69 n.1 (emphasis omitted), in the clickwrap agreement fell short of the clear and unmistakable evidence of assent that First Options requires.

C.

We recognize that our decision may constitute something of an outlier in the jurisprudence of arbitration. Several federal circuit courts of appeal have concluded that an arbitration rule that confers a general authority on an arbitrator to decide questions of arbitrability, when incorporated into an agreement, evinces a sufficiently clear and unmistakable intent to withdraw the issue from a court's consideration. *See, **[*19]** e.g.,* Belnap v. Iasis Healthcare, 844 F.3d 1272, 1290 (10th Cir. 2017) ("[A]lthough this is a question of first impression in our court, a majority of our sister circuits have concluded that a finding of clear and unmistakable intent to arbitrate arbitrability—which may be inferred from the parties' incorporation in their agreement of rules that make arbitrability subject to arbitration—obliges a court to decline to reach the merits of an arbitrability dispute regarding the substantive claims at issue."); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. . . . We see no reason to deviate from the prevailing view . . . ." (citations omitted)); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); Terminix Int'l Co., 432 F.3d at 1332 ("By incorporating the AAA Rules, including Rule

[4] In their brief, the Does also suggested that the hyperlink to the AAA Rules in the clickwrap agreement was inoperative, but the record appears to be silent on this point (no one proffered any evidence below as to whether or not the link worked).

8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); *Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005)* ("We have held that when, as here, parties **[*20]** explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989)* ("By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.").

Two of our sister district courts of appeal have followed this trend. *See Reunion W. Dev. Partners, LLLP, 221 So. 3d at 1280* ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." (alterations in original) (quoting *Contec Corp., 398 F.3d at 208*)); *Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 251 (Fla. 3d DCA 2016)* ("In so holding, we note that the parties are in agreement that the majority of federal courts considering similar circumstances where the AAA's arbitration rules have been incorporated by reference into a contract likewise have found that the parties sufficiently **[*21]** evidenced their intent to have arbitrators, not a court, hear and decide issues of arbitrability.").

We respectfully disagree with these holdings because we do not believe they comport with what *First Options* requires. As the Does point out, none of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us (which the *Belnap* court candidly likened to "inferring" assent, *844 F.3d at 1290*) satisfies the heightened standard the Supreme Court set in *First Options*, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. *See Howsam, 537 U.S. at 86*. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same. Both parties identify the principal case (from which all these holdings appear to have derived) as the First Circuit's *Apollo* decision. But *Apollo* was issued years before the Supreme Court's *First Options* opinion, and so the *Apollo* court could not have had *First Options*' instructions in mind when it issued its opinion. Moreover, *Apollo*'s analysis on this point was quite limited, comprising of (1) identifying an arbitration rule that conferred a generalized **[*22]** power to decide arbitrability to the arbitrator, (2) observing that the rule had been incorporated into the parties' agreement, and (3) stating "[t]hese provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate." *886 F.2d at 473*.[5] Apparently, the court simply deemed the requisite clarity to have been self-evident.[6]

If it was, we confess our failure to see it here. In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous. We may **[*23]** quibble over what the precise measure of the Supreme Court's "clear and unmistakable evidence" standard should

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[5] *Apollo* also cited to the First Circuit's prior case of *Societe Generale de Surveillance, S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 869 (1st Cir. 1981)*, as authority for its conclusion. However, the *Societe Generale* case was not a dispute over whether a court or an arbitrator should decide arbitrability but rather one about *which arbitrator*, in Massachusetts or in Switzerland, was authorized to preside over a commercial dispute between a French corporation and a Massachusetts corporation. The First Circuit simply concluded that a district court acted "well within its discretion" to allow the Swiss arbitrator to decide the question of its jurisdiction because the applicable rules empowered that arbitrator to do so and "[s]ince the arbitrators there are more likely to be familiar with commercial dealings in this area and with French law." *Societe Generale, 643 F.2d at 869*.

[6] Airbnb's argument for affirmance runs the same course. In its brief, Airbnb dismisses the absence of a more in-depth consideration of this question in *Apollo* because "no further analysis was required of the court in *Apollo*. The parties in *Apollo* agreed to be bound by the ICC Rules. The ICC Rules contained a delegation clause. The [c]ourt's analysis properly ended there."

entail,[7] but it surely means evidence of intent that is not ambiguous. *Cf.* Romano, 700 So. 2d at 64. Otherwise, we will be treating the "who decides" issue of arbitrability no differently than any other issue of arbitration, when the Supreme Court has instructed, repeatedly, that it is a qualitatively different inquiry with a different analysis. *See* First Options, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable . . . for in respect to this latter question the law reverses the presumption. But, this difference in treatment is understandable." (citations omitted)).

III.

We hold that the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in themselves, arise to "clear and unmistakable" evidence that the parties intended to remove the court's **[*24]** presumed authority to decide such questions. The evidence on what these parties may have agreed to about the "who decides" arbitrability question was ambiguous; therefore, the court retained its presumed authority to decide the arbitrability dispute. The circuit court did not have the benefit of our decision today and so was bound to rely upon the Fifth District's Reunion decision and the Fourth District's Younessi opinion when it entered the order below. *See* Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 43 (Fla. 2d DCA 1994) ("[I]f this court has not spoken on a subject but another district has, the trial courts of this district must follow that decision." (citing Chapman v. Pinellas County, 423 So. 2d 578 (Fla. 2d DCA 1982)). Because we disagree with the conclusion those courts appeared to reach concerning what constitutes sufficient clarity and unmistakability of intent to have an arbitrator, rather than a court, resolve questions of arbitrability, we certify conflict with Reunion and Younessi to the extent they are inconsistent with our decision today.

Reversed; remanded with instructions; conflict certified.

SLEET, J., Concurs.

VILLANTI, J., Dissents with opinion.

Dissent by: VILLANTI

Dissent

VILLANTI, Judge, Dissenting.

I respectfully dissent from the majority's outlier determination that the clickwrap agreement used by Airbnb **[*25]** did not exhibit an unmistakable intent to assign the issue of arbitrability to the arbitrator. For better or worse, we, as a society, have decided to choose the speed and convenience of the Internet over more traditional modes of communication. A fully electronic stream of commerce is now firmly embedded in our society, and we have long since crossed the point of no return. When paper is eliminated in favor of speed and convenience, it should come as no surprise that contracting parties resort to incorporating material by reference—which in this instance includes the AAA rules and specifically Rule 14(a),[8] which allows the

[7] *Cf.* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable"*, 17 Am. Rev. Int'l Arb. 545, 571-72 (2006) ("Courts can stop misreading arbitral institutional rules. The doctrine that has resulted is a judicial creation and judicial action could readily resolve it. If that step alone were taken, the question of party intent would be dealt with as the matter of fact it is and not a matter of law to be determined by a factitious inference from institutional rules. It might then prove to be the rare case where it would be found as a fact that the parties actually intended that the arbitrators' decision as to their jurisdiction should constitute the final and determinative decision of that issue." (footnote omitted)).

[8] When the Does originally signed up with Airbnb, when they made their reservation, and when they stayed at the condo in Naples, the Airbnb clickwrap agreement incorporated the AAA "Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes" and required that disputes would be handled under the rules in effect at the time of the dispute. Under the Commercial Arbitration Rules, the jurisdictional provision was in Rule 7. Subsequently, after the Does stayed in Naples but before they filed suit, Airbnb amended its Terms of Service because the AAA had amended and renamed the Supplementary Procedures for Consumer Related Disputes to be the AAA Consumer Arbitration Rules. Under those rules, the jurisdictional provision is in Rule 14(a). See https://adr.org/sites/default/files/Consumer_Rules_Web_0.pdf. Hence, when the Does filed their complaint on May 15, 2018, the applicable rules were the Consumer Arbitration Rules. Regardless of which set of rules is reviewed, however, the relevant language of the two provisions is the same.

arbitrator to decide arbitrability in the first instance. Cf. *ADP, LLC v. Lynch, Nos. 2:16-01053, 2:16-01111, 2016 U.S. Dist. LEXIS 85636, 2016 WL 3574328, at *4 (D.N.J. June 30, 2016)* ("[C]lickwrap agreements that incorporate additional terms by reference will generally provide 'reasonable notice' that the additional terms apply."); Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, *22 Berkeley Tech. L.J. 577, 579 (2007)* ("[T]he courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998.").

As an initial point, I take issue with the majority's assertion that "[p]lainly, the agreement's **[*26]** reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration." With respect to the application of Rule 14(a), this is illogical: The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, Rule 14(a) can only apply at the outset of a claim, not after the arbitration has already commenced.

I also take issue with the majority's statement, "Like the Does' clickwrap agreement, the real estate contract in *Morton* did 'not expressly address the question of who decides issues of arbitrability.'" (Quoting *Morton, 931 So. 2d at 938*). This is misleading. The rule at issue in *Morton* came from the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Mediation and Arbitration Rules. In that case, the rule at issue said only, "[O]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration." *931 So. 2d at 939*. But, as we observed in *Morton*, "This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding *when **[*27]** the arbitration panel has the authority to decide issues of arbitrability*. The provision does not itself grant the arbitration panel that authority." *Id.* (underline emphasis added). Thus, *Morton* is distinguishable from the instant case because in *Morton*, the question of who had the authority to decide issues of arbitrability was not addressed in the cited provisions of the CAMCA rules at all; whereas the referenced provision at issue in this case does address the question. Although the majority admits that *Morton* is distinguishable, the premise that the contract in *Morton* was similar to the contract in this case in that it failed to "expressly address the question of who decides issues of arbitrability" is, in my view, a false premise.

Most importantly, I take issue with the majority's attempt to minimize the scope of Rule 14(a) because, the majority says, it does not give the arbitrator the exclusive power to decide arbitrability. This ignores the obvious: the power to decide is the power to decide. To contend that the absence of the term "exclusive" (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio to make that decision is, in my view, **[*28]** a stretch too far. Indeed, the word "exclusive," emphasized by the majority, does not appear at all in *First Options*, the Supreme Court case upon which the majority hangs its hat, or in *Howsam*, *Henry Schein*, *Morton*, *Petrofac*, *Terminix*, *Reunion*, or *Glasswall*. Although the term is used in Rent-A-Center and *Ajamian*, that is only because the contracts at issue in those cases employed the word. The word is also used in *Oracle America*—but that case provides a particularly on-point object lesson which I think supports my view. In *Oracle America*, the contract provided, "Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive)." *724 F.3d at 1071* (emphasis added). However, the contract also incorporated by reference the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), which contained a clause that provided either that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration **[*29]** clause or of the separate arbitration agreement" (1976 version), or that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (2010 version).[9] *Id. at 1073*. Either version of the provision, concluded the court, "vest[ed] the arbitrator with the apparent authority to decide questions of arbitrability" and therefore "constitute[d] clear and unmistakable evidence that the parties intended to arbitrate arbitrability." *Id.* Thus, the arbitration rules incorporated into the contract by reference—although not containing the word "exclusive" or words to that effect—constituted clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, despite the provision that a court would have "exclusive" jurisdiction over disputes relating to

[9] The parties disagreed as to whether the 1976 or 2010 version of the rules applied. The Ninth Circuit held that the difference in the wording between the two versions was immaterial. *Oracle America, 724 F.3d at 1073*.

intellectual property rights or the software license at issue in that case.

In sum, the rule expressed in *First Options* and the other cited opinions is "clear and unmistakable," not "exclusive." These words do not mean the same thing. Here, the majority has created a new requirement that the contract must confer an "exclusive" power upon **[*30]** the arbitrator or arbitration panel to determine the arbitrability of an issue. This result is at odds with a substantial body of law; and I think the analysis leading to this outlier result is both hypertechnical and an unnecessary exercise in legal polemics.

I conclude that the incorporation by reference of AAA Consumer Arbitration Rule 14(a) into a contract comprises "clear and unmistakable evidence" of the parties' agreement to arbitrate arbitrability and is fully consistent with the principles announced in *First Options*. For this reason, I would follow our sister courts' decisions in *Reunion* and *Glasswall*, as well as the long line of federal cases aptly cited by the majority that are in accord, and would affirm.

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Garcia v. State

Court of Appeal of Florida, Fifth District

August 28, 2020, Opinion Filed

Case No. 5D19-590

Reporter
2020 Fla. App. LEXIS 12232 *; 45 Fla. L. Weekly D 2053; 2020 WL 5088056

JOHNATHAN DAVID GARCIA, Petitioner, v. STATE OF FLORIDA, Respondent.

Notice: NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

Prior History: [*1] Petition for Certiorari Review of Order from the Circuit Court for Orange County, Gail A. Adams, Judge.

Counsel: Robert Wesley, Public Defender, and Robert Adams and Marie Taylor, Assistant Public Defenders, Orlando, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Kaylee D. Tatman, Assistant Attorney General, Daytona Beach, for Respondent.

Judges: LAMBERT, J. HARRIS and GROSSHANS, JJ., concur.

Opinion by: LAMBERT

Opinion

LAMBERT, J.

Johnathan David Garcia petitions this court for certiorari relief. He requests that we quash the trial court's order compelling him to provide to the State the passcode to his smartphone so that the State can unlock and thereafter search the phone pursuant to a search warrant that it had previously obtained from the court. Garcia argues that the order violates his privilege under the *Fifth Amendment of the United States Constitution* not to be compelled to be a witness against himself in his pending criminal case.

BACKGROUND—

The alleged victims in this case are Garcia's former girlfriend, Ana Diaz, and Diaz's present boyfriend, Terrell Collins. Diaz was at Collins's home one evening when she heard a loud noise and immediately noticed that a bedroom window had shattered. Neither Diaz nor Collins saw who broke the window, but Diaz **[*2]** heard a vehicle leaving the area that she believed sounded similar to Garcia's vehicle.

Law enforcement was called to Collins's home. During a search of the perimeter of the residence, the officers found a black Samsung Galaxy Note 8 smartphone, approximately four to five feet from the broken window. Diaz identified the phone as belonging to Garcia and confirmed this fact for the investigating officers by calling Garcia's phone number. The Samsung phone in question began to ring, and Diaz's name and phone number were displayed on the phone screen. The phone was thereafter retained by law enforcement as potential evidence.

Approximately one month later, Diaz discovered that a GPS tracker had been placed on her vehicle that

allowed her car to be tracked through a cell phone.

Garcia was eventually charged with throwing a deadly missile at, within, or into a building, two counts of aggravated stalking with a credible threat regarding his actions towards Diaz (count two) and Collins (count three), criminal mischief with damage of more than $200 pertaining to the broken window, and a separate count for criminal mischief for damage to Diaz's car tires that the officers had also discovered during **[*3]** their initial investigation. Subsequently to Garcia's arrest and the filing of the initial information, law enforcement applied to the court for a search warrant to search Garcia's smartphone seized at the crime scene. The affidavit filed in support of the warrant asserted that there was probable cause that Garcia's phone contained evidentiary data regarding the aggravated stalking with credible threat charges, and sought "contact/phone lists, call logs, SMS (Simple Message Service, a/k/a text) messages, MMS messages, and/or graphic or video files and/or other relevant data which are stored within the phone device." A circuit judge issued the requested search warrant of Garcia's smartphone.

Because Garcia's smartphone was passcode protected, law enforcement was unable to unlock the phone to conduct the search. The State then moved to compel Garcia to provide the passcode, alleging in its motion that the contents of Garcia's phone "are relevant to how the events occurred and whether [Garcia] is guilty," and that providing the passcode would "involve no unreasonable intrusions upon the body of [Garcia]." The State represented to the court that Garcia objected to providing his passcode **[*4]** to unlock the phone.

The trial court held a very brief hearing on the State's motion to compel. Garcia was not personally present at the hearing; however, his counsel argued that under *G.A.Q.L. v. State, 257 So. 3d 1058 (Fla. 4th DCA 2018)*, the disclosure of the passcode would be a "testimonial communication" and thus Garcia's *Fifth Amendment* privilege against self-incrimination would be violated by the compelled disclosure. The State countered that pursuant to the Second District Court's decision in *State v. Stahl, 206 So. 3d 124 (Fla. 2d DCA 2016)*, the disclosure of Garcia's passcode would not violate the *Fifth Amendment* because, first, it was not a testimonial communication, and second, even if it was testimonial, the "foregone conclusion" doctrine applied and would provide an exception to the *Fifth Amendment* privilege.

The trial court granted the State's motion. It orally found that providing the passcode was non-testimonial and thus, "the *Stahl* decision is controlling here."[1] The trial court directed Garcia "to turn over the passcode," but thereafter stayed its ruling pending our review.

JURISDICTION—

We first address our jurisdiction to review this order. To obtain certiorari relief, a petitioner must establish that the order entered constitutes a departure from the essential requirements of the law that results in material injury **[*5]** for the remainder of the case that cannot be corrected on postjudgment appeal. *G.A.Q.L., 257 So. 3d at 1060* (citing *Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)*).

Here, Garcia invoked his privilege under the *Fifth Amendment* to preclude the disclosure of his passcode. The *Fifth Amendment* protects a person from being "compelled in any criminal case to be a witness against himself." *Amend. V, U.S. Const*. A witness is generally entitled to invoke his *Fifth Amendment* privilege against self-incrimination whenever there is a reasonable possibility that his answer to a question can be used in any way to convict him of a crime. *See Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)*.

The issue that we determine in this case is whether the *Fifth Amendment* protects a person from the compelled disclosure of a passcode to a passcode-protected smartphone. If it does, then the order in question compels Garcia to forfeit his *Fifth Amendment* privilege against self-incrimination. As certiorari lies in civil cases to review an order compelling discovery over an objection asserting that the order violates the *Fifth Amendment*, *Appel v. Bard, 154 So. 3d 1227, 1228 (Fla. 4th DCA 2015)* (quoting *Boyle v. Buck, 858 So. 2d 391, 392 (Fla. 4th DCA 2003)*), we similarly conclude that we have certiorari jurisdiction to review the instant order to compel. Notably, and as specifically asserted by the State in its motion, by Garcia essentially answering the question of what the passcode to his smartphone is, this would provide the State **[*6]** with information that would lead to a conclusion as to "whether [he] is guilty."

IS THE DISCLOSURE OF THE PASSCODE TESTIMONIAL UNDER THE *FIFTH AMENDMENT*?—

While the *Fifth Amendment* protects a person from being compelled in a criminal case to be a witness

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[1] The court contemporaneously entered an unelaborated written order granting the State's motion.

against himself, it "does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher v. United States, 425 U.S. 391, 408, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)*. Although the passcode here, in and of itself, may not be incriminating, the *Fifth Amendment's* protection also encompasses compelled statements that lead to the discovery of incriminating evidence. *See United States v. Hubbell, 530 U.S. 27, 37, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000)* ("It has, however, long been settled that [the *Fifth Amendment's*] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.").

The parties appear to concede that the information contained in Garcia's phone will lead to incriminating evidence against him. As the order under review is "compelling" Garcia to provide the State with information, we must therefore determine whether providing a passcode to a smartphone constitutes a "testimonial communication." **[*7]** If not, then there is no *Fifth Amendment* violation.

Initially, and to be clear, not all compelled productions of incriminating evidence are protected by the *Fifth Amendment*. For example, "acts like furnishing a blood sample, providing a voice exemplar, wearing an item of clothing, or standing in a line-up are not covered by this particular *Fifth Amendment* protection, for they do not require the suspect to 'disclose any knowledge he might have' or 'speak his guilt.'" *G.A.Q.L., 257 So. 3d at 1061* (quoting *Doe v. United States, 487 U.S. 201, 211, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988))*. For a communication to be "testimonial" and thus protected under the *Fifth Amendment*, "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe, 487 U.S. at 210* (footnote omitted). Garcia argues here that by compelling him to produce his passcode, the trial court is requiring that he "disclose the contents of his mind," namely, his knowledge of the passcode, and as a result, he is being ordered to provide a testimonial communication in violation of the *Self-Incrimination Clause of the Fifth Amendment*. *See Doe, 487 U.S. at 210-11* (recognizing that it is the "extortion of information from the accused," the attempt to force a defendant "to disclose the contents of his own mind," that implicates the *Self-Incrimination Clause of the Fifth Amendment* (internal citations **[*8]** omitted)).

The trial court here held that the providing of the passcode was non-testimonial, but it gave no explanation for its conclusion or ruling other than "the *Stahl* decision is controlling here." In *Stahl*, law enforcement obtained a warrant to search the defendant's locked phone, but the defendant refused to provide them with his passcode. *206 So. 3d at 128*. The State filed a motion to compel production of the passcode, which the trial court denied, finding the production of the passcode to be testimonial. *Id.* The Second District Court quashed the order, holding that compelling the defendant to reveal his passcode was not testimonial because the passcode was "sought only for its content and the content has no other value or significance." *Id. at 134*.

We respectfully disagree with the Second District Court. Distilled to its essence, the revealing of the passcode is a verbal communication of the contents of one's mind. *Commonwealth v. Davis, 220 A.3d 534, 548 (Pa. 2019)* ("As a passcode is necessarily memorized, one cannot reveal a passcode without revealing the contents of one's mind."). We agree with Garcia that the order under review requires that he utilize the contents of his mind and disclose specific information regarding the passcode that will likely **[*9]** lead to incriminating information that the State will then use against him at trial. We therefore conclude that the compelled disclosure of his passcode is testimonial and is protected by the *Fifth Amendment*. This, however, does not end our analysis.

FOREGONE CONCLUSION DOCTRINE—

The State separately argues that even if the disclosure of a passcode is testimonial, the "foregone conclusion" exception to the *Fifth Amendment* applies and supports the compelled disclosure or production of Garcia's passcode. Under this exception, an act of production does not violate the *Fifth Amendment*—even if it conveys a fact—if the State can demonstrate with reasonable particularity that, at the time it sought to compel the act of production, it already knew of the material sought, thereby making any testimonial aspect of the production a foregone conclusion. *G.A.Q.L., 257 So. 3d at 1063* (citing *In re Grand Jury Subpoena Duces Tecum Dated March 15, 2011, 670 F.3d 1335, 1346 (11th Cir. 2012))*.

The foregone conclusion exception emanates from the United States Supreme Court's decision in *Fisher*. In

that case, two taxpayers were under investigation for possible civil or criminal liability under the federal income tax laws. *Fisher, 425 U.S. at 393-94*. They obtained from their accountants copies of certain documents used by the accountants in **[*10]** the preparation of their tax returns and then provided these documents to their attorneys to assist them in defending against the ongoing investigations. *Id. at 394*. The Internal Revenue Service attempted to compel the production of these financial documents through summonses served on the taxpayers' attorneys. *Id.* The attorneys refused to turn over the documents, asserting their clients' *Fifth Amendment* privilege against self-incrimination. *Id. at 395*.

The Court found against the taxpayers, holding that requiring the production of the accountants' documents in these cases involved no incriminating testimony within the protection of the *Fifth Amendment*. *Id. at 414*. Specifically, the Court reasoned that although compelling a taxpayer to comply with a subpoena to produce an accountant's work papers in the taxpayer's possession would undoubtedly involve substantial compulsion, the *Fifth Amendment* was not implicated because the subpoena "does not compel oral testimony, nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Id. at 409*. The Court then addressed the foregone conclusion doctrine:

> Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or **[*11]** his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris, 221 U.S. 274, 279, 31 S. Ct. 557, 558, 55 L. Ed. 732 (1911)*.

Id. at 411 (internal citation omitted).

To date, *Fisher* is the only United States Supreme Court decision to apply the foregone conclusion exception to compel testimony; however, contextually, it was applied to already known and existing business or financial documents, not to "compel oral testimony." *Id. at 409*. Judge Kuntz, in his concurring opinion in *G.A.Q.L.*, noted that, under *Fisher*, the foregone conclusion doctrine or exception was one of limited scope or application and was inapplicable to the compelled oral testimony of the defendant's passcode, such as the State is similarly seeking in the present case. *257 So. 3d at 1066* (Kuntz, J., concurring); *see also Eunjoo Seo v. State, 148 N.E.3d 952, 962 (Ind. 2020)* (declining to apply the foregone conclusion exception to compel the production of a passcode to a cellphone, explaining that "[n]ot only was the [foregone conclusion] exception crafted for **[*12]** a vastly different context, but extending it further would mean expanding a decades-old and narrowly defined legal exception to dynamically developing technology that was in its infancy just a decade ago" and that "it would also result in narrowing a constitutional right").

We agree with Judge Kuntz and conclude that it would be imprudent to extend the foregone conclusion exception beyond its application as described in *Fisher*. To compel a defendant, such as Garcia, to disclose the passcode to his smartphone under this exception would, in our view, sound "the death knell for a constitutional protection against compelled self-incrimination in the digital age." *See Commonwealth v. Jones, 481 Mass. 540, 117 N.E.3d 702, 724 (Mass. 2019)* (Lenk, J., concurring). For example, other than in those limited circumstances when a defendant's ownership of the smartphone was in question, it would necessarily be a "foregone conclusion" that a defendant, as the owner of the passcode-protected phone, would have knowledge of or have otherwise memorized his or her passcode. To summarily compel the oral production of the passcode from a defendant in such circumstances would contravene the protections afforded under the *Fifth Amendment*. *See Davis, 220 A.3d at 549* ("[T]o apply the foregone conclusion rationale **[*13]** in these circumstances would allow the exception to swallow the constitutional privilege.").

In summary, we hold that compelling a defendant, such as Garcia, to provide orally the passcode to his smartphone is a testimonial communication protected under the *Fifth Amendment* and that the foregone conclusion exception or doctrine does not apply to compelled oral testimony.[2] Accordingly, we grant

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[2] In its response to Garcia's petition, the State points out that in its motion to compel, it requested that Garcia be compelled to provide the passcode or, alternatively, his fingerprint to unlock his phone. The State asserts that irrespective of whether the oral production of the passcode violates the *Fifth Amendment*, compelling Garcia to place his finger on the phone to unlock it would not be protected. *See Stahl, 206 So. 3d at 135*

Garcia's petition for writ of certiorari and quash the trial court's order compelling him to provide his passcode to the State. We certify conflict with the Second District Court's decision in *Stahl* to the extent that *Stahl* holds that the oral disclosure of a passcode to a passcode-protected cell phone or smartphone is non-testimonial and therefore not protected under the *Fifth Amendment*.

Finally, we certify the following questions to the Florida Supreme Court as being of great public importance:

> 1. MAY A DEFENDANT BE COMPELLED TO DISCLOSE ORALLY THE MEMORIZED PASSCODE TO HIS OR HER SMARTPHONE OVER THE INVOCATION OF PRIVILEGE UNDER THE *FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION*?
>
> 2. IF ORALLY PROVIDING THE PASSCODE TO A PASSCODE-PROTECTED SMARTPHONE IS A "TESTIMONIAL COMMUNICATION" PROTECTED UNDER THE *FIFTH AMENDMENT*, CAN THE DISCLOSURE OF THE PASSCODE NEVERTHELESS BE COMPELLED UNDER **[*14]** THE FOREGONE CONCLUSION EXCEPTION OR DOCTRINE WHEN THERE IS NO DISPUTE THAT THE DEFENDANT IS THE OWNER OF THE PASSCODE-PROTECTED PHONE?

PETITION GRANTED; ORDER QUASHED; CONFLICT CERTIFIED; QUESTIONS CERTIFIED.

HARRIS and GROSSHANS, JJ., concur.

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("Compelling an individual to place his finger on the iPhone would not be a protected act; it would be an exhibition of a physical characteristic, the forced production of physical evidence, not unlike being compelled to provide a blood sample or provide a handwriting exemplar.").

We decline to address this argument. No evidence was presented at the hearing below to show that Garcia's smartphone could be unlocked by his fingerprint, nor did Garcia concede that his phone could be unlocked in this fashion.

Jackson v. Household Fin. Corp. III

Supreme Court of Florida

July 2, 2020, Decided

No. SC18-357

Reporter
298 So. 3d 531 *; 2020 Fla. LEXIS 1137 **; 45 Fla. L. Weekly S 205; 2020 WL 3580036

CYNTHIA L. JACKSON, et al., Petitioners, vs. HOUSEHOLD FINANCE CORPORATION III, et al., Respondents.

Prior History: [1]** Application for Review of the Decision of the District Court of Appeal — Certified Direct Conflict of Decisions. Second District - Case No. 2D15-2038. (Manatee County).

Jackson v. Household Fin. Corp. III, 236 So. 3d 1170, 2018 Fla. App. LEXIS 1251, 2018 WL 627078 (Fla. Dist. Ct. App. 2d Dist., Jan. 31, 2018)

Counsel: Nicole M. Ziegler of Emerson Straw, PL, St. Petersburg, Florida, for Petitioner.

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Robert R. Edwards of Choice Legal Group, P.A., Fort Lauderdale, Florida; David Rosenberg of Robertson, Anschutz & Schneid, P.L., Boca Raton, Florida; Marissa M. Yaker of Padgett Law Group, Tallahassee, Florida; and Andrea R. Tromberg of Tromberg Law Group, P.A., Boca Raton, Florida, for Amicus Curiae American Legal and Financial Network.

Judges: LAWSON, J. CANADY, C.J., and MUÑIZ and COURIEL, JJ., concur. POLSTON, J., dissents with an opinion, in which LABARGA, J., concurs.

Opinion by: LAWSON

Opinion

[*533] LAWSON, J.

This case is before the Court for review of the decision of the Second District Court of Appeal in *Jackson v. Household Finance Corp. III, 236 So. 3d 1170 (Fla. 2d DCA 2018)*. The district court certified that its decision directly conflicts with *Maslak v. Wells Fargo Bank, N.A., 190 So. 3d 656 (Fla. 4th DCA 2016)*, on the same question of law, giving us jurisdiction. *See art. V, § 3(b)(4), Fla. Const.* For the reasons explained below, we approve *Jackson*, disapprove *Maslak*, and hold that the proper predicate for admission of records into **[**2]** evidence under the business records exception to the hearsay rule can be laid by a qualified witness testifying to the foundational elements of the exception, as held by the Second District. *Jackson, 236 So. 3d at 1175*.

BACKGROUND

On April 25, 2006, Cynthia Jackson executed a loan agreement to obtain a residential loan in the amount of $146,841.79 from Household Finance Corp III (HFC).[1] Jackson and her husband (Petitioners) also executed a mortgage for the same amount with HFC. The Second District explained:

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[1] The mortgagee's name is designated in some parts of the record as "Household Finance Corporation III" and in other parts as "Household Finance Corp III." Petitioners did not challenge HFC's standing to foreclose on any basis, including this discrepancy.

[*534] Household Finance Corp III is the originating lender and the plaintiff below. In 2002, well before the Jacksons executed the mortgage, Household was purchased by HSBC Holdings and became a wholly-owned subsidiary of HSBC.

Id. at 1172.

On June 23, 2014, HFC filed a foreclosure complaint against Petitioners and other defendants, alleging that Petitioners defaulted under the terms of the note and the mortgage. Petitioners did not challenge the default.

At the bench trial, HFC called a twenty-five-year employee of HSBC, Assistant Vice President David Birsh, to establish the foundation for admission of records under the business records exception to the hearsay rule. Counsel for HFC asked Birsh if he has "access to the records **[**3]** maintained by HSBC with respect to the mortgage loan account which is the subject of this instant action," to which he answered, "Yes, I do." Counsel then asked Birsh the following questions:

> Q. So are you familiar with the business practice of HSBC?
> A. Yes, I am.
> Q. And is it the regular business practice of HSBC to record acts, transactions, payments, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?
> A. Yes, it is.
> Q. And are these business records prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts, transactions, payments, communications, escrow account activity, disbursements and analyses?
> A. Yes.
> Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events and analyses occur?
> A. Yes.
> . . . .
> Q. And are these records maintained by HSBC in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?
> A. Yes, they are[.]
> Q. Did HSBC prepare and maintain these records with respect to the subject loan?
> A. Yes.

Counsel then moved the documents, including **[**4]** the original note, mortgage, and loan payment history, into evidence. Counsel for Petitioners objected on grounds of "hearsay," explaining that Birsh had not "laid a foundation upon which to testify as to these as business records or to authenticate any of these documents based on personal knowledge." The trial judge overruled the objection and admitted the records into evidence.[2]

[*535] HFC rested its case, and counsel for Petitioners did not introduce any evidence. The trial court entered final judgment of mortgage foreclosure in favor of HFC, and the Second District affirmed the judgment. *Jackson, 236 So. 3d at 1171*.

ANALYSIS

We review a trial court's decision to admit evidence for an abuse of discretion. *Tundidor v. State, 221 So. 3d 587, 598 (Fla. 2017)*. "However, the question of whether a statement is hearsay is a matter of law and is subject to de novo review on appeal." *Id. at 598-99* (quoting *Cannon v. State, 180 So. 3d 1023, 1037 (Fla. 2015)*).

Florida's Evidence Code sets forth the general rule that "hearsay" is not admissible except as provided by statute, *§ 90.802, Fla. Stat. (2014)*, and defines hearsay

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[2] In addition to challenging the foundation laid for the business records exception to the hearsay rule set forth in *section 90.803(6)(a), Florida Statutes (2014)*, counsel for Petitioner also objected that Birsh did not properly "authenticate any of these documents," which we read as an objection based upon *section 90.901, Florida Statutes (2014)* ("Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). As is typically the case with any custodian of business records, Birsh was required to both authenticate the documents and lay a foundation for their admission as business records. *See* Charles W. Ehrhardt, *Florida Evidence*, § 901.1, at 1288-89 (2019 ed.) (explaining that authentication of an item of evidence does not make it "automatically admissible" and that "after a document has been authenticated," a witness must then "lay the foundation for the admission of a document under a hearsay exception"). However, all of Petitioner's arguments on appeal relate to the hearsay objection, thereby waiving any argument that the documents were not properly authenticated under *section 90.901*. *See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997)* (stating that the failure to fully brief and argue points on appeal "constitutes a waiver of these claims").

as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," § 90.801(1)(c), Fla. Stat. (2014). The Evidence Code defines some categories of evidence **[**5]** as non-hearsay, and therefore generally admissible, *see* § 90.801(2), Fla. Stat. (2014), and also lists a number of "exceptions," which constitute categories of admissible hearsay, *see* §§ 90.803(1)-(24), 90.804(1)-(2), Fla. Stat. (2014). The business records exception to the hearsay rule provides for the admission of "records of regularly conducted business activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 90.803(6)(a). As explained by the Second District,

> A party can lay **[**6]** a foundation for the [admission of documents pursuant to the] business records exception in three ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility. Yisrael v. State, 993 So. 2d 952, 956-57 (Fla. 2008).

Jackson, 236 So. 3d at 1172 (footnote omitted).

This case obviously involves the first method—testimony at trial of a records custodian. With respect to this method, the Second District explained,

> If the party offers the testimony of a records custodian to lay the foundation, it is not necessary that the testifying witness be the person who created the business records. *Channell [v. Deutsche* ***[*536]*** *Bank Nat'l Tr. Co.*], 173 So. 3d [1017,] 1019 [(Fla. 2d DCA 2015)]; Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988). The witness may be any qualified person with knowledge of each of the elements. Channell, 173 So. 3d at 1019; Specialty Linings, 532 So. 2d at 1121.

Id.; *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 1109-10 (2019 ed.) (A witness must be able to "show that each of the foundation requirements is present," but "[i]t is not necessary to call the person who observed the matter recorded or actually made the entry."). A qualified witness, therefore, is anyone with personal knowledge of the organization's regular business practices relating to creating and retaining the record(s) at issue. *Id.* § 803.6, at 1111. This **[**7]** knowledge will necessarily come from the witness's training or experience, or, most likely, a combination of both.[3] The foundation requirements are:

> (1) that the record was made at or near the time of the event, (2) that it was made by or from information transmitted by a person with knowledge, (3) that it was kept in the ordinary course of a regularly conducted business activity, and (4) that it was a regular practice of that business to make such a record.

Jackson, 236 So. 3d at 1172 (quoting Channell, 173 So. 3d at 1019).

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[3] The "level of training or amount of experience necessary . . . depends wholly on the subject of the testimony." Bell v. State, 179 So. 3d 349, 357 (Fla. 5th DCA 2015). Even with respect to expert testimony, oftentimes, the amount of training or experience required is minimal. *See id.* (explaining that, in the context of the typical probation officer field test testimony, "very little" training or experience is necessary "before a person can reliably interpret . . . preliminary drug tests" and that "any person with the minimal training, experience, or both, needed to understand these tests and how to read and explain their results would qualify to testify to the results under section 90.702, Florida Statutes"). Likewise, we generally observe that it should not take a new bank employee hired for an entry-level position much time or training to become familiar with how the bank records and keeps track of monetary transactions—a core function basic to the operation of any financial institution. Because making and keeping records of loan and deposit account transactions is the quintessential banking activity, it hardly seems possible that someone could work in and then manage multiple departments at a bank over a twenty-five-year period without learning how the bank makes a record of the loan payments that it receives.

Here, the proponent presented the testimony of a twenty-five-year employee and executive vice president who testified that he was "familiar with the business practices of the company" and that it was the company's "regular business practice" to "record acts, transactions, payments, communications, escrow account activity, disbursements, events and analysis with respect to the mortgage loan account." He further testified that the documents met each of the other foundational requirements set forth in section 90.803(6), using the language of the statute or a close approximation of it, as detailed above. No additional foundation is required by the statute or by any case from this Court, and we reject the notion that the witness must **[**8]** also detail the basis for his or her familiarity with the relevant business practices of the company or give additional details about those practices as part of the initial foundation because this would be inconsistent with the plain language of the statute. *See* Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984))).

[*537] Rather, once the proponent lays the predicate for admission of documents set forth in the statute and reflected in our case law, "the burden shifts to the opposing party to prove that the records are untrustworthy," Jackson, 236 So. 3d at 1172 (citing Love v. Garcia, 634 So. 2d 158, 160 (Fla. 1994)), or that they should not be admitted for some other reason. This would necessarily need to be done prior to admission of the documents into evidence—so that the opponent can timely raise a proper objection to admission of the documents—and could include questioning of the witness as to the basis for his or her knowledge of the company's business practices.

In this case, the opponent waited until after the documents were admitted to question **[**9]** the witness about the basis for his knowledge. Even then, although the witness's answer does not inspire confidence in his preparation for the opponent's question, neither does it reveal any disqualifying deficiency in his relevant knowledge. Birsh explained that during his twenty-five years with the company he had "been in the various departments" and "managed various departments" such that he had "basically become really familiar with a lot of the different questions." He also mentioned "cross-training and what have you." Additionally, on cross-examination, Birsh testified that he first became familiar with the Jackson file and documents "a couple of months ago." Birsh explained that "upon [his] review of the documents," he personally "went into [HSBC's] imaging system and reviewed those documents and compared them to the ones that were printed today." Birsh stated that "they have not been changed," and that "[t]hey are the same that have been imaged in our system from the beginning." These responses demonstrate a working knowledge of HSBC's relevant record-keeping practices and system. The opponent accepted Birsh's responses and did not press the witness for further details about **[**10]** the basis for his knowledge of his company's relevant business practices.

We also note that the opponent did not question Birsh's assertion that the documents were HSBC records. Although one might expect related companies to have independent business practices and separate record-keeping systems, Birsh's uncontradicted testimony was that the documents were maintained by HSBC as HSBC business records. And, the documents relating to the Jackson loan are consistent with this testimony. For example, a screenshot of the computerized account record relating to Jackson's loan has a prominent HSBC logo at the top and, under the HSBC logo, reads "HFC & Beneficial Members HSBC." Additionally, copies of correspondence to Jackson from HFC include a prominent "HFC" logo that includes "Member HSBC Group" as part of that logo.

Because Birsh testified to his familiarity with the business practices of his company and to each foundational requirement, we agree with the trial judge and the Second District that Birsh's testimony was "sufficient to satisfy [HFC's] initial burden to lay the predicate for the business records exception." Jackson, 236 So. 3d at 1175; *see also* United States v. Langford, 647 F. 3d 1309, 1327 (11th Cir. 2011) (finding a proper foundation laid for the admission of business **[**11]** records where the records custodian testified that "she had personal knowledge of the process involved in gathering the documents, that the documents had been gathered from ongoing businesses at the bank, that the documents were not made in response to a subpoena, and that the documents were part of, or appeared to be part of, documents routinely held in the normal course of business"); United States v. Atchley, 699 F. 2d 1055, 1058 ***[*538]*** (11th Cir. 1983) (finding a proper foundation laid for the admission of business records where the records custodian testified that the records "were kept in the ordinary course of business, that it was the ordinary course of her business to make and keep

such records, [and] that the records were made on or about the time of the transactions reflected in the records").

By contrast, the Fourth District in *Maslak* held that despite a bank employee's testimony describing her job duties and familiarity with the bank's loan servicing practices, she "was not qualified to lay a foundation for [the] admission" of the loan servicing documents moved into evidence. *190 So. 3d at 658*. *Maslak* does not elaborate on what deficiency it found with respect to the witness's qualification to lay the foundation for admission of the documents, and we find **[**12]** her testimony to be sufficient, as a matter of law, to demonstrate her qualification to testify as a records custodian, and to shift the burden to the opponent to establish otherwise. Additionally, the Fourth District held that despite the witness's testimony that the proffered documents met all prerequisites for admission under section 90.803(6), the foundation was lacking because the witness did not testify as to specific details of the bank's "procedures for inputting payment information into their systems and how the payment history was produced." *Id. at 659*. Again, we disagree and hold that a qualified witness who has "testified as to each element of the business records exception for the admission of" a business record, *id.*, has laid the proper predicate for admission of the document such that the document should be admitted unless the opponent establishes it to be untrustworthy, *Love, 634 So. 2d at 160*; *Jackson, 236 So. 3d at 1172*. This is why the Second District disagreed with *Maslak*, and why we disapprove it.

The dissent argues that we are "tak[ing] away the records proponent's burden to lay a proper foundation for admission" of business records. Dissenting op. at 38. Our ruling in this case does not subtract from that burden, which is set by the plain **[**13]** words of the statute. A contrary ruling would, indeed, add to the burden by requiring "factual specificity . . . [as to] how the records were compiled, maintained, or utilized." *Id.* at 28. The statute does not require this detail, and we see no reason why it should be required as part of the proponent's prima facie case. The dissent seems to be arguing that in the absence of testimony explaining details of a company's relevant record-keeping practices, a records custodian cannot "demonstrat[e] his personal knowledge" of the company's record-keeping policies and procedures. *Id.* This lack of detail seems to be the basis for the dissent's conclusion that Birsh's testimony did "not demonstrate that [he] had any personal knowledge or actual familiarity with the business practices regarding HFC III's mortgage loan accounts." *Id.* However, after Birsh testified to his years of experience with the bank, he then testified that he was familiar with the company's business practices. That testimony is direct evidence that Birsh was familiar with the relevant business practices, including how the bank records and tracks monetary transactions, and was sufficient to make a prima facie showing that Birsh was **[**14]** qualified to give the testimony that followed, authenticating the documents and laying the foundation for their admission as business records pursuant to the express requirements of section 90.803(6)(a).

The dissent also wrongly relies on Ehrhardt's *Florida Evidence* to support its argument that our opinion changes Florida law by creating "a special rule for foreclosure actions." Dissenting op. at 41 & n.8 **[*539]** (quoting Ehrhardt, *Florida Evidence* § 803.6, at 1113-14, for the proposition that "[s]ome District Courts of Appeal have expanded the records admissible under 90.803(6) in mortgage foreclosure cases" where "multiple companies [are] involved in servicing an individual loan as a result of a loan portfolio being sold or acquired by another entity").

Unlike the cases Ehrhardt references, however, this case does not involve records from a prior servicer. Although the dissent does argue that because Birsh worked for HSBC, and not HFC, he was not qualified to lay a foundation for the records admitted into evidence (claiming that there "certainly was no connection established between HFC III and HSBC"), dissenting op. at 30-31, this assertion is incorrect. Birsh testified that HSBC acquired HFC prior to origination of **[**15]** the loan at issue and that the records "with respect to the mortgage loan account which is the subject of this instant action" were "maintained by HSBC." This testimony was uncontradicted.

Finally, we address the Fourth District's articulated justification for concluding that a qualified witness must do more than testify to each foundational element set forth in section 90.803(6) to satisfy the proponent's initial burden of demonstrating admissibility under the business records exception. The Fourth District stated that the witness's "parroting" of the statutory elements of the business records exception was inadequate, *Maslak, 190 So. 3d at 660*, because holding otherwise would transform Florida's business records exception into a "magic words" test contrary to the Fourth District's case law. *Id. at 659*. The Fourth District does not explain why more should be required, and we will explain why a minimal testimonial foundation is both appropriate in this context and desirable in terms of fairness and the

efficient administration of justice.

First, it is important to consider that what the Fourth District impugns as "magic words" is the clear-cut foundation that we have said a party must make to secure admission of a business record:

> To secure **[**16]** admissibility under [Florida's business-records] exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008). It would be odd if a party could not make this required showing with straightforward testimony that each of the criteria is met. Because the records custodian testimony is relevant only to the collateral issue of essentially authenticating relevant documents, there is no reason to prolong a trial and clutter a record with irrelevant details of those practices and procedures. To do so would add unnecessary inefficiency into the process.

Second, it is important to understand the objectives and policy issues surrounding evidentiary requirements for the authentication and admission of a document by its proponent. "Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is what its proponent claims." Ehrhardt, *Florida Evidence* § 901.1, at 1287. In this context, a party calls **[**17]** a records custodian to authenticate the documents needed to prove its allegations and to lay a foundation confirming that the proffered documents are in fact business records. The word "confirming" is appropriate because documents proffered at trial are what they purport to be "in 99 out of 100 cases." 2 ***[*540]*** *McCormick on Evidence* § 221 (7th ed. 2013).[4]

As explained in *McCormick*, the "principal justification" for imposing authentication requirements in the rules of evidence is to create "a necessary check on the perpetration of fraud." *Id. McCormick* notes that "requiring proof of what may be correctly assumed in 99 out of 100 cases is at best time-consuming and expensive." *Id. McCormick* also notes that although "[t]raditional requirements of authentication admittedly furnish some guarantee against fraudulent or mistaken attribution of a writing. . . . it has frequently been questioned whether this benefit is not outweighed by the time, expense, and occasional untoward results entailed by the traditional skeptical attitude toward authenticity of writings." *Id.* § 221 (7th ed. Supp. 2016). Courts have historically attempted to ameliorate the time and expense required to prove this particular collateral **[**18]** matter (that is almost always self-evident and true) by making it simple to do. *See, e.g., Lexington Ins. Co. v. W. Pennsylvania Hosp., 423 F.3d 318, 328 (3d Cir. 2005)* ("We have repeatedly noted that '[t]he burden of proof for authentication is slight.'") (quoting *McQueeney v. Wilmington Trust Co., 779 F.2d 916, 928 (3d Cir. 1985)*). Again, this is consistent with the efficient administration of justice. The company's record-keeping practices are not on trial or otherwise relevant to any issue framed by the pleadings. Adding complexity to the foundation requirement in this context, as the Fourth District did, is inconsistent with the appropriate objective of making litigation as simple and sensible as reasonably possible.

Examining the payment history in a mortgage foreclosure case, such as this one, is illustrative. We know that every commercial lender will necessarily have a "regular practice" of making a record of payments and will necessarily keep that record "in the ordinary course of business." That record of payments will also of necessity be "made at or near the time" that the payment is received by a "person with knowledge" of the payment amount and date of receipt. In other words, it is *extraordinarily* unlikely in any mortgage foreclosure case that records meeting the business records exception to the hearsay rule **[**19]** will not exist or that the proffered records are not exactly what they purport to be. In this case, as in most, the debtor does not even dispute the accuracy of the payment history as reflected in the records admitted. Rather, she simply argues for reversal on the theory that her lender should have been required to prove additional collateral facts before it could introduce records to establish material facts that she does not contest. We should not impose that additional burden on litigants. Of course, a litigant is free to contest the genuineness of the documents, as

[4] The dissent argues that our opinion makes "the mistake of conflating the evidentiary concepts of authentication and admissibility" and that "this fundamental legal error is at the root of the majority's erroneous decision in this case." Dissenting op. at 36. We are not confused. We understand that a party seeking to admit a document as a business record must both authenticate the document and lay a proper "foundation" for admission with evidence demonstrating that the document meets the criteria for admission as a business record. Our point here is that these tasks are both related and similar in purpose, and that the same policy considerations apply equally to both evidentiary requirements.

business records or otherwise, if he or she has a basis to do so. This would be true irrespective of the quantum of detail we require as part of the threshold showing to establish a document as a business record—meaning that requiring the showing detailed in the plain language of the statute, and not more, will in no way prejudice any party that has a legitimate basis to challenge admissibility of the document in question.

[*541] CONCLUSION

For the foregoing reasons, we resolve the certified conflict by holding that the testimony of a qualified witness confirming the presence of each foundation requirement of the business records **[**20]** exception constitutes a sufficient predicate for the admission of records under this exception to the hearsay rule. Accordingly, we approve the Second District's decision and disapprove the Fourth District's decision.

It is so ordered.

CANADY, C.J., and MUÑIZ and COURIEL, JJ., concur.

POLSTON, J., dissents with an opinion, in which LABARGA, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Dissent by: POLSTON

Dissent

POLSTON, J., dissenting.

I agree with the Jacksons' evidentiary objection that the records proponent's witness in this case failed to lay "a foundation upon which to testify as to these as business records." Only records identified as from HSBC[5] were admitted under the business records exception to the hearsay rule, and none from the plaintiff, Household Finance Corporation III. Moreover, the records proponent's witness, who was an employee of HSBC, made only general statements parroting the statutory elements of the business records exception without any identified basis of how the records were generated, what they were used for, or how they were maintained. And there was no connection established between the plaintiff and HSBC. As a result, the witness **[**21]** did not demonstrate personal knowledge of the records at issue or personal knowledge sufficient to affirm the statutory elements of the business records exception. Therefore, I respectfully dissent from the majority's decision, which transforms Florida's business records exception into a magic-words test only requiring the recitation of the statute.

I. BACKGROUND

At the bench trial in this mortgage foreclosure case, the originating lender and plaintiff, Household Finance Corporation III (HFC III), sought to admit several documents related to the mortgage account pursuant to the business records exception, *section 90.803(6), Florida Statutes*. Specifically, the documents in HFC III's composite exhibit were identified as records maintained by HSBC, including the following: a merger announcement from 2002 indicating that HSBC Holdings, PLC, planned to acquire Household International, Inc., by the first quarter of 2003, which was printed from the Securities and Exchange Commission (SEC) Edgar website in 2015; the loan agreement listing HFC III as the lender and Cynthia Jackson as the borrower; the mortgage executed by Petitioners listing HFC III as the mortgagee; a printout of Petitioners' loan payment history with an "HFC **[**22]** Member HSBC Group" logo; snapshots from HSBC's computer database; breach letters sent to Petitioners from HFC III with an "HFC Member HSBC Group" logo in the right hand corner; and a screenshot reflecting when the breach letters were sent with no indication of what entity generated the screenshot.

HFC III offered the testimony of one witness, David Birsh,[6] an employee of HSBC, to lay the foundation for the admission of the documents as business records. Birsh stated that he was an Assistant Vice President at HSBC, was familiar with HSBC's business practices, and had access **[*542]** to the Jacksons' mortgage loan account. Then, in response to HFC III counsel's recitation of the elements of the business records exception, Birsh responded that "yes" each of the statutory requirements was met. Birsh testified that "yes" he was familiar with HSBC's business practices, "yes"

[5] "HSBC" was identified in the admitted records as HSBC Holdings, PLC.

[6] The witness' name was spelled phonetically by the court reporter.

these records are prepared by people with knowledge, "yes" the records are made near the time of the acts, "yes" the records are maintained by HSBC in the ordinary course of its business, and "yes" HSBC prepared and maintained these records.

Counsel for HFC III then moved to admit the records into evidence. The Jacksons' counsel **[**23]** objected that the records were hearsay and that Birsh "hasn't laid a foundation upon which to testify as to these as business records or to authenticate any of these documents based on personal knowledge."[7] The trial judge overruled the Jacksons' objection and admitted the documents.

On cross-examination, the Jacksons' counsel asked Birsh when he became familiar with the file, and he replied that the first time was "a couple of months ago." Birsh explained that he "went into our imaging system and reviewed those documents and compared them to the ones that were printed today, and they have not changed. They are the same that have been imaged in our system from the beginning." He then testified as follows:

> Q. And you testified that you're familiar and I forget the exact language, with the recordkeeping procedures of HSBC. How did you gain that familiarity?
> A. Well, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become really familiar with a lot of the different questions. Like cross-training and what have you.

II. ANALYSIS

The Florida Evidence Code provides that hearsay is inadmissible except as provided by **[**24]** statute. *See* § 90.802, Fla. Stat. (2014). Section 90.801, Florida Statutes (2014), defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." And the business records exception to the hearsay rule provides for the admission of "records of regularly conducted business activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with **[*543]** knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all *as shown by the testimony of the custodian or other qualified witness*, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 90.803(6)(a), Fla. Stat. (2014) (emphasis added). "The **[**25]** rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." Bank of New York v. Calloway, 157 So. 3d 1064, 1070 (Fla. 4th DCA 2015) (quoting Timberlake Constr. Co. v. U.S. Fid. & Guar. Co., 71 F.3d 335, 341 (10th Cir. 1995)).

To lay a proper foundation for the admission of business records, the proponent must show that "(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a

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[7] The Jacksons were not required to raise multiple, repeated, or more explanatory objections to the admission of the documents under the business records exception to the hearsay rule based upon the failure to lay a proper foundation. *See, e.g.,* Carter v. State, 951 So. 2d 939, 943 (Fla. 4th DCA 2007) ("[W]hen the state moved the police report/affidavit into evidence under the business records hearsay exception, appellant objected on relevancy, hearsay, and foundation grounds. He makes the same argument on appeal that the document should not have come in as a business record; that it was hearsay. Thus, appellant's hearsay objection was sufficient to preserve for appellate review his arguments regarding admission of the police report/affidavit."); Richardson v. State, 875 So. 2d 673, 676 (Fla. 1st DCA 2004) ("Appellant correctly cites Andrews v. State, 261 So. 2d 497 (Fla. 1972), for the proposition that an objection to a question on hearsay grounds is sufficient to preserve for appellate review the failure of the proponent of the testimony to lay a proper predicate [for admission under the business records exception].").

And to be clear, I address the validity of the Jacksons' hearsay objection in this dissent, not the validity of the Jacksons' authentication objection that was not pursued on appeal.

record." *Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008)*. The records proponent can present that information in one of three ways: (1) provide a witness—either the records custodian or other qualified witness—to testify under oath at trial to the statutory requirements; (2) present a certification or declaration from the records custodian or other qualified person that complies with *sections 90.803(6)(c)* and *90.902(11), Florida Statutes*; or (3) stipulate with the opposing party to the admissibility of the documents as business records. *Id. at 956-57*. This case involves the first method.

When using witness testimony to lay the foundation for the admission of business records,

> it is necessary to call a witness who can show that each of the foundational **[**26]** requirements set out in the statute is present. It is not necessary to call the person who actually prepared the document.

Twilegar v. State, 42 So. 3d 177, 199 (Fla. 2010) (quoting *Forester v. Norman Roger, Jewell & Brooks Int'l, Inc., 610 So. 2d 1369, 1373 (Fla. 1st DCA 1992)*); *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 1109-10 (2019 ed.) (A witness must be able to "show that each of the foundation requirements is present," but "[i]t is not necessary to call the person who observed the matter recorded or actually made the entry.").

Importantly, such a witness must have requisite knowledge of the business procedures used to make the record. *See Twilegar, 42 So. 3d at 199* ("The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation." (quoting *Forester, 610 So. 2d at 1373*); *Hunter v. Aurora Loan Servs., LLC, 137 So. 3d 570, 573 (Fla. 1st DCA 2014)* (finding testimony from witness insufficient to lay the proper foundation when the witness lacked "personal knowledge" of the record-keeping procedures).

Professor Charles Ehrhardt has explained that the witness must have "personal knowledge" of how a business record was made. Ehrhardt, *Florida Evidence* § 803.6, at 1111. Specifically, Professor Ehrhardt states that "*[s]ection 90.803(6)(a)* provides that a custodian or otherwise qualified witness who has *personal knowledge* **[*544]** of the method employed by the business establishes **[**27]** that each of the foundation requirements is present with respect to the record can lay the foundation for the admission of the record." *Id.* at 1110-11 (emphasis added).

Stated otherwise, "a qualified person to introduce business records, other than the records custodian, must be a person, who by the very nature of that person's job responsibilities and training, knows and understands the records sought to be introduced." *Lassonde v. State, 112 So. 3d 660, 663 (Fla. 4th DCA 2013)*. When the business records sought to be admitted are "in the form of computer or electronic records, such as a computerized loan transaction history, the foundational witness ought to possess knowledge of the record-keeping system." *Channell v. Deutsche Bank Nat'l Tr. Co., 173 So. 3d 1017, 1019 (Fla. 2d DCA 2015)*; *see also Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988)*. Further, "[i]n the context of a foreclosure action, a representative of a loan servicer testifying at trial . . . must be familiar with and have knowledge of how the 'company's data [is] produced,'" *Sanchez v. Suntrust Bank, 179 So. 3d 538, 541 (Fla. 4th DCA 2015)* (second alteration in original) (quoting *Glarum v. LaSalle Nat'l Ass'n, 83 So. 3d 780, 783 (Fla. 4th DCA 2011)*), and be "familiar with the bank's record-keeping system and [have] knowledge of how the data was uploaded into the system," *id.* (quoting *Weisenberg v. Deutsche Bank Nat'l Tr. Co., 89 So. 3d 1111, 1112-13 (Fla. 4th DCA 2012)*).

If the records proponent does not lay the proper foundation, the records are not admissible under *section 90.803(6)*. *Yisrael, 993 So. 2d at 956* ("[T]he evidentiary proponent . . . ha[s] the burden of supplying **[**28]** a proper predicate to admit this evidence under an exception to the rule against hearsay."); *Caldwell v. State, 137 So. 3d 590, 591-92 (Fla. 4th DCA 2014)* (holding evidence inadmissible under *section 90.803(6)* when the State failed to lay the proper foundation); Ehrhardt, *Florida Evidence* § 803.6, at 1111-12 ("If a party does not lay the necessary foundation, the document is not admissible under *section 90.803(6)*."). However, if (and only if) the records proponent lays the necessary foundation for the admissibility of business records, the burden shifts to the opposing party to show their untrustworthiness. *Love v. Garcia, 634 So. 2d 158, 160 (Fla. 1994)* ("Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence as a business record."); *see also* Ehrhardt, *Florida Evidence* § 803.6, at 1109 ("If the trial court finds pursuant to *90.105* that each [of] the [foundational] requirements has been proven by a preponderance of the evidence, then the burden shifts to the opposing party to show the lack of trustworthiness

of the record.").

Additionally, this Court has made clear that evidence admitted under an exception to the hearsay rule "must be offered in *strict* compliance with **[**29]** the requirements of the particular exception." *Yisrael, 993 So. 2d at 957* (quoting *Johnson v. Dep't of Health & Rehab. Servs., 546 So. 2d 741, 743 (Fla. 1st DCA 1989)*).

Here, Birsh testified that he was an Assistant Vice President of HSBC and that he had "access to the records maintained by HSBC with respect to the mortgage loan account which is the subject of this instant action." He then said "yes" as HFC III's counsel recited the statutory elements of the business records exception. On cross-examination, Birsh testified that he had "been there for 25 years" and **[*545]** "in the various departments, managed the various departments" and that he first became familiar with the file "a couple of months ago."

However, this testimony does not demonstrate that Birsh had any personal knowledge or actual familiarity with the business practices regarding HFC III's mortgage loan accounts or personal knowledge of the method employed to make the records at issue. He only testified that the printed documents were the same as what the HSBC computer system showed. This testimony, his job title, and length of employment do not provide any details regarding his training or experience that could possibly demonstrate that he knew how the records were prepared and maintained. In addition, Birsh's agreement with HFC III's **[**30]** counsel's recitation of the statutory elements of the business records exception lacked any factual specificity demonstrating his personal knowledge of how the records were compiled, maintained, or utilized.

In other words, "the witness simply 'regurgitated the magic words,' but was unfamiliar with, and had no knowledge of, how the records were created and kept." *Maslak v. Wells Fargo Bank, N.A., 190 So. 3d 656, 659 (Fla. 4th DCA 2016)*. "What is missing here is testimony about [the] procedures for inputting payment information into their systems and how the payment history was produced." *Id.* "[Birsh] failed to testify about how payments were received and processed, [the] procedures for inputting payment information, or the computer system [utilized]." *Id. at 660*; *see also Miller v. Bank of America, N.A., 201 So. 3d 1286, 1288 (Fla. 5th DCA 2016)* (holding that the witness had not laid the proper foundation, even though she gave "affirmative answers to the business record foundation questions," because her testimony "was not based on personal knowledge"); *Sanchez, 179 So. 3d at 541* (holding that the witness did not have "sufficient knowledge to lay the foundation for the admission of the screenshot into evidence" because the witness "did not know anything about the process by which [the records] were created").

The majority belittles the complexity of banking records **[**31]** and assumes it would be easy for any "new bank employee hired for an entry-level position" to learn a banking system since keeping track of transactions is "the core function . . . of any financial institution"; therefore, a 25-year employee would obviously know the ins and outs of all of the banking records. Majority op. at 7 n.3. The majority is ill informed. Just because someone works at a bank for 25 years does not demonstrate that the employee knows the correct documentation that a particular entity uses for specific information or how a system works. Different banks use different types of records that are processed differently and are shown in different ways. That is a lot of difference. There is no dispute that Birsh could learn the system at least as quickly as a new banking employee, but there was no evidence to demonstrate he had yet done so.

Moreover, a parent relationship of HSBC to HFC III was not established. The majority quotes the Second District's decision when stating that the parent relationship exists, but nowhere in the record was such a relationship established. The document improperly introduced into evidence under the business records exception does not do that **[**32]** as it is simply a merger announcement from 2002 indicating that HSBC Holdings, PLC, was planning to acquire Household International, Inc., by the first quarter of 2003. The merger announcement mentions that Household International, Inc., is the parent company **[*546]** of Household Financial Corporation, but Household Financial Corporation is a different legal entity and business than the plaintiff here, Household Financial Corporation III. When introducing the merger announcement, counsel for HFC III asked Birsh to identify it, and Birsh stated that "[t]his is the merger announcement which indicates that HSBC merged — purchased Household Finance Corporation III" and answered in the affirmative that the agreement is maintained as part of HSBC's business records. But, it bears repeating, the announcement actually discussed an anticipated merger between HSBC and Household International (the parent of Household Financial Corporation), not one that had already taken place

between HSBC and the plaintiff in this case, Household Financial Corporation III (HFC III). In fact, the merger announcement, which appears to have been filed with and maintained by the SEC, does not mention HFC III at all. The **[**33]** majority, the Second District, and HFC III appear to be merely relying on the fact that HFC and HFC III have similar names; but they are different legal entities with no connection established between them in this record. There certainly was no connection established between HFC III and HSBC, the company that was at some point contemplating the purchase of the similarly named Household International. And no servicing agreement was mentioned or produced. Without an established connection between the two entities, Birsh's testimony that he personally "went into [HSBC's] imaging system" could not possibly demonstrate any personal knowledge regarding HFC III's loan documents or HFC III's record-keeping system. Further, a comparison of what is on a computer screen to a printout to see if there were any changes is certainly not a demonstration of working knowledge of business record practices and systems. Someone totally unfamiliar with any business records from anywhere could do that. That is not sufficient under the statute to admit hearsay documents.

To summarize, in this case, there were general statements that are a recitation of the statute without any identified basis of how the business **[**34]** records at issue were generated, what they were used for, or how they were maintained. These general statements were from an employee of HSBC, a different company than the plaintiff, who identified the records as records of HSBC even though some of the records only have the plaintiff's name on them, and no connection was established between HSBC and the plaintiff. These general statements do not demonstrate that the employee of HSBC had sufficient personal knowledge to affirm the statutory elements of the business records exception with respect to the records relating to HFC III's loan. Accordingly, HFC III failed to meet its burden of laying a proper foundation for the admission of the records relating to its loan. The burden never shifted to the Jacksons to prove the untrustworthiness of the records, and the trial court erred in admitting the documents without a proper foundation. *Cf.* *CitiMortgage, Inc. v. Hoskinson, 200 So. 3d 191, 192 (Fla. 5th DCA 2016)* (holding that a witness was qualified to lay the foundation for a letter as a business record because she testified as to when and how the letters were created and mailed and that she had "trained side-by-side with someone in that department and had observed the entire process"); *Wells Fargo Bank, N.A. v. Balkissoon, 183 So. 3d 1272, 1276-77 (Fla. 4th DCA 2016)* (holding that proper **[**35]** foundation was laid because the witness "demonstrated he had personal **[*547]** knowledge concerning the accuracy of Bank of America's records," and he testified that "[t]he AS400 system contains basic loan information, including the payment history, escrow information, and property address[, that] Bank of America applies payments it receives to the interest and principal on the loan and then to tax and insurance[, and that t]he payment center records the allocation of funds in the AS400 system"); *Lindsey v. Cadence Bank, N.A., 135 So. 3d 1164, 1168 (Fla. 1st DCA 2014)* (holding that an assistant vice president had sufficient understanding to lay the foundation for the admission of computer printouts as business records because she explained that the computer loan processing system automatically creates account balances, that the bank's loan processing employees enter each received payment into the system, that loan payments are entered into the system when the transaction happens, and that loan records are updated within a day); *Cooper v. State, 45 So. 3d 490, 492-93 (Fla. 4th DCA 2010)* (holding that trial court did not err in admitting records as the witness had "training and experience" in records processing, customer support, billing, and data servicing and testified how the business maintained and prepared its records); **[**36]** *see also* *Noble v. Ala. Dep't of Envtl. Mgmt., 872 F.2d 361, 366-67 (11th Cir. 1989)* (requiring a foundational witness to give testimony "that he had personal knowledge of the circumstances under which the [records] were prepared" rather than "simply testif[ying] that he had seen the letter before and that it was prepared in the 'ordinary course' of ADEM's business"); *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040, 1042-45 (9th Cir. 2009)* (holding that the claims manager laid the proper foundation because the witness explained the details of how employees input records of payments into the database, explained how the database was queried, testified about the computer used to compile and search records, and detailed how the summaries matched with the "backup documentation"); *United States v. Jenkins, 345 F.3d 928, 934-36 (6th Cir. 2003)* (determining that a U.S. Postal Inspector laid the proper foundation for admission of mailing labels because he "testified that he was familiar with these labels through his training and experience and that he commonly dealt with these records"); *Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 545-46 (D. Md. 2007)* ("It is necessary, however, that the [foundational] witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and

preserved without alteration or change, or the process by which it is produced if the result of a system or process that **[**37]** does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception to the hearsay rule . . . .").

The majority complains about the Fourth District's description of "magic words." When I refer to the majority only requiring a recitation of the statutory elements as a magic-words test, it is because the recitation serves as a mere illusion, meaning that simply saying the words is intended to make something appear to be present when it is not. It makes it appear that the records proponent has actually proven what the statute requires even though the witness has only repeated the words of the statute. Unfortunately, the majority's holding only involves saying the statutory elements without concern over what the response is, who is giving it, and whether the records custodian or person testifying actually has personal knowledge sufficient to demonstrate that the documents should be admitted into evidence. Business records are admissible as an exception **[*548]** to the hearsay rule because they are considered reliable since businesses have an incentive to keep accurate records. *See, e.g.,* Bank of New York, 157 So. 3d at 1070; Timberlake Constr. Co., 71 F.3d at 341; *see also* Ehrhardt, *Florida Evidence* § 803.6, at 1097 ("The **[**38]** evidence is reliable because it is of a type that is relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of the business activities."); 2 *McCormick on Evidence* § 286 (7th ed. 2013) ("Reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. The regularity and continuity of the records are calculated to train the recordkeeper in habits of precision; if of a financial nature, the records are periodically checked by balance-striking and audits; and in actual experience, the entire business of the nation and many other activities function in reliance upon records of this kind."). But documents should only be admitted as reliable business records if the proponent's witness provides testimony actually demonstrating personal knowledge and establishing that these are the type of documents that fall into the category of reliable business records.

Moreover, I strongly disagree with the majority's contention that, because the foundational witness' testimony is "relevant only to the collateral issue of essentially authenticating relevant documents, there is no reason to **[**39]** prolong a trial and clutter a record with irrelevant details of those practices and procedures." Majority op. at 15. This contention (as well as the majority's out-of-place policy discussion regarding authentication and lender records) demonstrates that the majority, notwithstanding its protest to the contrary, is making the mistake of conflating the evidentiary concepts of authentication and admissibility. And this fundamental legal error is at the root of the majority's erroneous decision in this case.

Section 90.901, Florida Statutes (2014), of the Florida Evidence Code provides the following regarding authentication:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.

However, as Professor Ehrhardt explains, "[i]f an item of evidence has been authenticated, it is not automatically admissible." Ehrhardt, *Florida Evidence* § 901.1, at 1288. "When a document is authenticated, there has only been evidence introduced, or an agreement by counsel, that the document or writing is what it purports to be." *Id.* at 1288-89. But "[t]he hearsay rule, **[**40]** or other exclusionary rule may still exclude the evidence." *Id.* at 1289. Professor Ehrhardt continues, "In other words, after document is authenticated, a witness must lay the foundation for the admission of a document under a hearsay exception; for example, the business record or public record exception." *Id.*; *see also* United States v. Browne, 834 F.3d 403, 415, 65 V.I. 425 (3d Cir. 2016) ("Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception enumerated under Federal Rule of Evidence 802."); 2 *McCormick on Evidence* § 227, at 102-03 ("Again, it must be emphasized that authentication does not secure admissibility of electronic documents into evidence. As with more traditional forms of written evidence, if the electronic or computer-generated writing is used to prove the truth of its contents, the hearsay rule must be satisfied."). Professor Ehrhardt also explains that, "[a]lthough **[*549]** the term authenticate is sometimes used to refer to whether a proper foundation has been laid for a document, this usage is imprecise and can be misleading." Ehrhardt, *Florida Evidence* § 901.1, at 1289; *see also* Arce v. Wackenhut Corp., 40 So. 3d 813, 816 (Fla. 3d DCA 2010) ("It appears that Arce believes either that **[**41]** a federal

authentication of the [hearsay] document will *ipso facto* make the document admissible, or that Arce may be able to persuade the FBI to include something additional in the certification that will make the document admissible into evidence. Arce again errs, first by making the common legal error of conflating authenticity of a document with admissibility . . . .); *Friedle v. Bank of New York Mellon, 226 So. 3d 976, 978 (Fla. 4th DCA 2017)* (explaining that "[w]hile it was certified by the Securities and Exchange Commission ("SEC") as being filed with that agency, and thus was self-authenticating, there is a difference between authentication and admissibility" and holding that "[t]he Bank did not present sufficient evidence through its witness to admit this unsigned document as its business record").

Accordingly, while the majority's conflating of authentication and admissibility is a common mistake, it has misled the majority into reducing the requirements for laying a proper foundation for the admission of documents under the business records exception into a mere formality, which is contrary to the Florida Evidence Code. Simply stated, the majority is increasing the likelihood that inadmissible documents will be admitted into evidence simply because **[**42]** they were authenticated.

The majority counters that a litigant would still be "free to contest the genuineness of the documents . . . irrespective of the quantum of detail we require as part of the threshold showing," majority op. at 18, but this flips the burden of laying the foundation for admission of records from the records proponent to the party against whom they are to be admitted. Such a flip in the burden of proof is contrary to the Florida Evidence Code. *See § 90.803(6)(a), Fla. Stat.*; *Yisrael, 993 So. 2d at 956* ("[T]he evidentiary proponent . . . ha[s] the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay."). Of course, the majority's willingness to take away the records proponent's burden to lay a proper foundation for admission most likely arises from the majority's legal error of confusing admissibility with authentication. *Compare* Ehrhardt, *Florida Evidence* § 901.1, at 1287-88 ("Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is what its proponent claims. The finding of authenticity does not mean that the trial judge makes a finding that the proffered evidence is genuine. The judge only determines whether prima facie **[**43]** evidence of its genuineness exists. Once the matter has been admitted the opposing party may challenge its genuineness. The jury then determines as a matter of fact whether the evidence is genuine.") (footnotes omitted) *with* Ehrhardt, *Florida Evidence* § 803.6, at 1103-04 ("While the trial judge has the duty under *section 90.105(1)* to make a factual determination that the proponent of the document has demonstrated the necessary foundation for the admission of a business record, the opponent has the burden of showing sufficient lack of trustworthiness. The record is inadmissible if the trial court makes the *section 90.105(1)* determination that the opponent has shown that the record is not trustworthy. Even if the court rules that the record is admissible under *section 90.803(6)*, opposing counsel can offer the same evidence of lack of trustworthiness to the weight and credibility that should be given the record.") **[*550]** (footnote omitted). In other words, the majority conflates the question of whether a document is genuine with the question of whether a document is an admissible business record, which leads it to confuse the burdens of proof specific to each question.

Finally, I disagree with the majority's characterization of requiring the records **[**44]** proponents to satisfy the foundational requirements for the admission of business records as requiring "irrelevant details" of a business' "practices and procedures." To belabor the point, these details that "clutter the record" are needed to demonstrate that records at issue are in fact business records that should be admitted into evidence. Like the majority, I have no doubt that most commercial lenders can produce witnesses who can lay the proper foundation for the admission of their records under the business records exception. But the particular lender in this particular case did not, and this Court should not change the rules that help ensure the reliability of evidence that is admitted as an exception to the general bar against hearsay simply because the details may seem tedious to some and most lenders can meet the requirements anyway. Mistakes with records that are used to establish large judgments happen. We should not eliminate foundational requirements that safeguard the reliability and accuracy of evidence.

III. CONCLUSION

To lay the proper foundation for the admission of records under the business records exception to the hearsay rule, the records proponent's witness must **[**45]** do more than merely echo the statutory elements of the exception and identify employment and familiarity with a different company. The witness must demonstrate that he personally has the sufficient

knowledge to affirm the statutory elements of the business records exception by demonstrating personal knowledge of the methods utilized by the business regarding the records at issue, such as how the records were created, what they were used for, and how they were maintained. Otherwise, the business records exception to the hearsay rule becomes a magic-words test rather than a requirement that the records proponent demonstrate the reliability of the business records.

At worst, with general application, the majority's opinion seriously undermines the propriety of the business records exception to hearsay. At best, it creates a special rule for foreclosure actions.[8] Accordingly, I **[*551]** would quash the Second District's decision in *Jackson v. Household Finance Corp. III, 236 So. 3d 1170 (Fla. 2d DCA 2018)*, and approve the Fourth District's decision in *Maslak v. Wells Fargo Bank, N.A., 190 So. 3d 656 (Fla. 4th DCA 2016)*. I respectfully dissent.

LABARGA, J., concurs.

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[8] *Cf.* Ehrhardt, *Florida Evidence* § 803.6, at 1113-14 ("Some District Courts of Appeal have expanded the records admissible under *90.803(6)* in mortgage foreclosure cases. In many cases, there are multiple companies involved in servicing an individual loan as a result of a loan portfolio being sold or acquired by another entity. In order to establish the loan payment history, an employee of the current servicer frequently has no knowledge of the record-keeping system or process used by prior servicers and therefore cannot lay the foundation under *90.803(6)* for the records maintained by the prior servicer. These decisions have determined that the testimony of an employee of a current servicer can lay the foundation for the records of a former servicer if the testimony establishes that the current servicer independently verified the accuracy of the former servicer's records regarding the payment history and details the procedure used to verify the accuracy of the payment histories. Presumably, this verification goes beyond confirming that the amount due on the former servicer's records is the same as the amount entered in the current servicer's records. While the decisions seem to focus on records in the mortgage servicing industry, which are plagued by inaccuracies, its rationale extends to all records offered under *90.803(6)* which are records of a prior business and are presently located in the records of the current business. While records acquired from another business and incorporated into the record of the acquiring business can fairly be treated as being made by the acquiring business, the acquired records should be admissible only if the other requirements of *section 90.803(6)* are satisfied. The decisions are a significant change in Florida law and inconsistent with many other Florida decisions.")

La Galere Mkts., Inc. v. State Dep't of Bus. & Prof'l Regulation

Court of Appeal of Florida, First District

January 31, 2020, Decided

No. 1D18-375

Reporter
289 So. 3d 553 *; 2020 Fla. App. LEXIS 1180 **; 45 Fla. L. Weekly D 251; 2020 WL 501740

LA GALERE MARKETS, INC., Appellant, v. STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, BEER INDUSTRY OF FLORIDA, FLORIDA BEER WHOLESALERS ASSOCIATION, INC., and FLORIDA INDEPENDENT SPIRITS ASSOCIATION, Appellees.

Notice: NOT FINAL UNTIL DISPOSITION OF ANY TIMELY AND AUTHORIZED MOTION UNDER *FLA. R. APP. P. 9.330* OR *9.331*.

Prior History: **[**1]** On appeal from a Final Order of the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco. Thomas R. Philpot, Director.

Counsel: Louis J. Terminello and Michael Martinez of Greenspoon Marder, LLP, Miami, for Appellant.

Raymond Treadwell, General Counsel; Beth Miller, Chief Attorney; and Daniel J. McGinn, Deputy Chief Attorney, Florida Department of Business and Professional Regulation, Tallahassee, for Appellee.

Donna E. Blanton of Radey Law Firm, Tallahassee, for Florida Beer Wholesalers Association, Inc. and Florida Independent Spirits Association, Appellees.

No appearance for the Beer Industry of Florida.

Judges: Ray, C.J., and Roberts, J., concur.

Opinion by: Rowe

Opinion

[*555] ROWE, J.

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco issued a statement declaring that La Galere Markets' (LGM) plan to sell alcoholic

beverages through automated dispensing machines (ADMs) violated Florida's Beverage Law. LGM appeals that ruling and the Division's order allowing the Beer Industry of Florida, Florida Beer Wholesalers Association, Inc., and Florida Independent Spirits Association to intervene. We affirm the intervention order without further comment. **[**2]** But we reverse the Division's declaration that Florida's Beverage Law bars the sale of alcoholic beverages through ADMs because nothing in the plain language of the statutes cited by the Division prohibits the sale of alcoholic beverages through ADMs.

Background

LGM operates gourmet mini-market stores that use self-checkout technology. The stores are in large residential buildings and only building residents can access the stores. Because the stores use self-checkout,

employees are rarely present. LGM uses surveillance equipment to monitor store activity. It sells food items, non-alcoholic beverages, personal care items, and household goods. LGM would like to expand its offerings to include beer and wine.

LGM developed a plan to sell beer and wine through ADMs that it contends complies with Florida's Beverage Law and preventing sales to underaged persons. LGM included three layers of security in its plan. First, the stores with ADMs would be in residential buildings and could be accessed only by building residents. Second, residents would need a key fob to enter the store. Third, residents would have to qualify to make purchases from the ADMs by registering, verifying their age and identity, **[**3]** and providing biometric data. Valid government-issued identification would be required to prove that the resident was at least twenty-one years old. Once LGM verified age and identity, LGM would add the resident to a list of persons authorized to make purchases from the ADMs. Residents would need to use biometric data, such as a fingerprint, to complete a purchase from the ADM. LGM would monitor and digitally record purchases through twenty-four-hour surveillance. Payments for purchases from the ADMs would be electronic, and LGM would maintain records of all transactions.

Procedural History

LGM sought guidance from the Division concerning whether its plan would qualify for licensure and requested a declaratory statement. LGM asked the Division:

> Whether the proposed business model outlined herein generally conforms to the Florida Beverage Law and relevant sections of the Florida Administrative Code and specifically conforms to *Sections 561.01(9)*, *561.01(11)*, *561.17*, *562.06*, *562.14*[,] Florida Statutes and Rule *61A-3.017, Florida Administrative Code*.

In support of its plan, LGM pointed out that the Division allows hotels to sell alcoholic beverages through "mini bars" inside hotel rooms. Hotel employees do not supervise mini-bar sales, and age verification occurs only at **[**4]** check-in. LGM asserted that the Division should license its plan because it was superior to both hotel minibars and convenience stores in deterring the sale of alcoholic beverages to underaged persons. LGM argued that its three layers of security would effectively eliminate the risk of sales to underaged persons. LGM asked the Division to declare that its plan complied with Florida's Beverage Law.

[*556] The Florida Independent Spirits Association, the Beer Industry of Florida, and the Florida Beer Wholesalers Association, Inc. opposed LGM's petition and moved to intervene in the proceedings. The Division allowed the associations to intervene, and after a public hearing, issued a final order on LGM's petition. The Division framed LGM's petition as seeking two separate declarations: Does LGM's plan comply with *sections 561.01(9)*, *561.01(11)*, and *561.17, Florida Statutes*? And does LGM's plan comply with the Beverage Law?

First, the Division considered whether LGM's plan complied with *sections 561.01(9)*, *561.01(11)*, and *561.17, Florida Statutes* (2017). *Section 561.01(9)* defines what constitutes the sale of alcoholic beverages under the Beverage Law. The Division found that LGM's plan contemplated the sale of alcoholic beverages and would require licensure. The Division then considered the definition of "licensed **[**5]** premises" in *section 561.01(11)*. Because LGM did not provide specific information about the location, layout, or property rights for any potential store it sought to license, the Division declined to issue a declaratory statement on whether LGM's plan qualified for licensure. The Division next considered *section 561.17*, which provides the requirements to apply for a license to sell alcoholic beverages. Because the statute does not address the requirements for approval of a license, the Division declined to declare whether it would approve LGM's plan for licensure. The Division found that LGM's failure to identify a specific location, failure to describe the contents of its potential license application or corporate structure, and its silence on where it intended to file its application did not allow the Division to determine whether LGM's plan conformed to the requirements of the applicable statutes.

Second, the Division determined that LGM's plan did not comply with ten provisions of the Beverage Law. The Division found that the Beverage Law was a comprehensive regulatory framework designed to prevent the sale of alcoholic beverages to underaged persons. The Division noted that the Legislature had not authorized **[**6]** alcohol sales through ADMs. The Division viewed the lack of express statutory authority as the Legislature's prohibition of ADMs for alcohol sales. LGM appeals the final order.

Standard of Review

Before the passage of *Article V, section 21 of the Florida Constitution*, reviewing courts had to defer to "an agency's interpretation of statutes it implemented unless such interpretation was clearly erroneous." *S. Baptist Hosp. of Fla. v. Agency for Health Care Admin., 270 So. 3d 488, 502 (Fla. 1st DCA 2019)*. After the amendment passed, judicial deference to an agency's interpretation was no longer required. *Id.* Instead, the de novo standard applies. *Id.* Though the order appealed here was rendered before the effective date of the amendment, we need not decide whether the amendment applies. When the agency's view conflicts with the plain meaning of the statute, judicial deference is not required. *Id.* Our review is de novo. *Id.*

Analysis

In the first part of the final order, the Division determined that it did not have enough information to issue a declaratory statement about whether LGM's plan complied with *sections 561.01(9)*, *561.01(11)*, and *561.17*. The Division did not err in making this determination, and we affirm this portion of the final order without elaboration. *See Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n & Utilities, Inc., 164 So. 3d 58, 63 (Fla. 1st DCA 2015)* (holding that a **[*557]** declaratory statement was authorized where petitioner "alleged a particular set of **[**7]** circumstances in its petition giving rise to an actual, present need for a declaratory statement"); *see also Apthorp v. Detzner, 162 So. 3d 236, 240 (Fla. 1st DCA 2015)* ("[I]t is well settled that, Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.") (quoting *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1995)*.

Even so, we reverse the Division's conclusion in the second part of the final order—declaring that LGM's plan did not comply with the comprehensive regulatory framework set forth in the Beverage Law.

We begin by addressing the Division's conclusion that the Legislature did not intend to authorize alcoholic beverage sales through ADMs because it has not expressly authorized such sales. The Division noted that the Legislature expressly authorized the sale of other age-restricted products from automated machines. *See § 569.007(1)(b), Fla. Stat.* (authorizing the sale of tobacco products from vending machines in limited circumstances);[1] *§ 24.112(15), Fla. Stat.* (authorizing the sale of lottery tickets from vending machines if the machine is in the direct line of sight of an employee). **[**8]** [2] Examination of statutes relating to the sale of other age-restricted products would be relevant to our analysis of the Beverage Law only if we concluded that the statutes cited by the Division were ambiguous. "Established rules of statutory construction demand that when interpreting a statute, courts should give terms their plain meaning. When the plain meaning of a statute is clear, a court should look no further than the language of the statute." *Srygley v. Capital Plaza, Inc., 82 So. 3d 1211, 1212 (Fla. 1st DCA 2012)* (internal citations omitted). Because the statutes cited by the Division are not ambiguous, we confine our analysis to their plain language. *See Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 301 (Fla. 2017)* ("'When the statute is clear and unambiguous,' we use the plain language of the statute and avoid rules of statutory construction to determine the Legislature's intent.") (quoting *Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005)*.

The Division declared that LGM's plan would not comply with the Beverage Law. The Beverage Law is defined as "this chapter [chapter 561] and chapters 562, 563, 564, 565, 567, and 568." *§ 561.01(6), Fla. Stat.* (2017). These seven chapters span seventy-five pages of the Florida Statutes. The Division cited just ten provisions in concluding that the Beverage Law bars LGM's plan to sell alcohol through ADMs. As explained below, the statutes cited **[**9]** by the Division do not support the Division's declaration.

First, the Division cited *section 561.02, Florida Statutes* (2017), which authorizes the Division to "supervise the conduct, management, and operation of the manufacturing, packing, distribution, and sale within the

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[1] The Legislature authorized such sales as an exception to the line-of-sight requirement for the sale of tobacco. *§ 569.007(1)(a), Fla. Stat.* (2017).

[2] Sales of lottery tickets from automated machines were once expressly prohibited. *§ 24.105(10)(a)3., Fla. Stat.* (1987). The current statute authorizing vending machine sales of lottery tickets was enacted in response to the prior statutory prohibition.

state of all alcoholic beverages." **[*558]** But nothing in the statute prevents the Division from supervising LGM's distribution or sale of alcohol from ADMs. *Anderson Columbia v. Brewer, 994 So. 2d 419, 421 (Fla. 1st DCA 2008)* (holding "courts are not to 'add, subtract, [or] distort the words' the Legislature has written") (quoting *State v. Byars, 804 So. 2d 336, 338 (Fla. 4th DCA 2001)*).

The next two statutory provisions cited by the Division concern the prohibition against and the criminalization of alcohol sales to underaged persons. *§§ 561.702(1)*; *562.11(1)(a)1.*, *Fla. Stat. (2017). Section 561.702(1)* expresses the Legislature's intent to eliminate alcohol sales to and alcohol consumption by underaged persons. *Section 562.11(1)(a)1.* makes the sale or service of alcohol to underaged persons a second-degree misdemeanor. But nothing in either statute addresses whether sales of alcohol require face-to-face transactions or prohibit sales through ADMs. *State v. Jett, 626 So. 2d 691, 693 (Fla. 1993)* ("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.") Thus, the Division erred **[**10]** in relying on these two provisions to conclude that LGM's plan violates the Beverage Law.

Third, the Division concluded that LGM's plan conflicted with portions of *Florida's Responsible Vendor Act (RVA)*. *§§ 561.701-561.706, Fla. Stat.* (2017). To qualify as a responsible vendor, a vendor must train its employees how to recognize and deal with underaged customers. *§ 561.705(1)(d), Fla. Stat.* (2017). The RVA requires vendors to train managers of alcohol servers and to develop standards for dealing with underaged customers. *§ 561.705(2)(b), Fla. Stat.* (2017). It also requires vendors to post signs informing customers of the vendor's policy against the sale or service of alcoholic beverages to underaged persons. *§ 561.705(9), Fla. Stat.* (2017). Voluntary compliance with the RVA protects vendors from administrative penalties when the vendor's employee makes an unlawful sale to an underaged person. *§ 561.706(2), Fla. Stat.* (2017). But even though the Division instructs vendors to comply with the requirements of the RVA, compliance with the Act is not mandatory. *Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde, 199 So. 3d 333, 338 (Fla. 4th DCA 2016)* ("The RVA is a voluntary statute that imposes no duties on any vendor. Instead, the RVA serves to protect a vendor from certain administrative penalties resulting from serving an underage person."). Because vendors need not comply with the **[**11]** RVA, it means that "it is impossible to 'violate' or 'not comply' with the RVA." *Id.* Likewise, because vendors need not comply with the RVA, the Division erred in concluding the LGM's plan would violate the RVA.

Fourth, the Division cited *sections 562.11(1)(c)* and *562.11(1)(d), Florida Statutes* (2017), which provide a complete defense to a licensee charged with selling alcohol to an underaged person when the licensee carefully checked a particular form of identification at the time of sale. Both statutes offer protection for licensees engaging in in-person sales. Because LGM's sales would be unmanned, the defense provided under these statutes would not be available to LGM against a charge of sale of alcohol to a minor. Even though LGM would not be entitled to the protection offered by these statutes, nothing in these statutes prohibits the sale of alcoholic beverages through ADMs. *See Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005)* ("When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction **[*559]** to ascertain intent."). Thus, the Division erred in concluding that LGM's plan violated these provisions of law.

Next, the Division cited *section 562.12(1), Florida Statutes* (2017), which prohibits the unlicensed sale of **[**12]** alcoholic beverages. LGM never expressed an intent to sell alcohol without a license. Rather, the very purpose of LGM's petition for a declaratory statement was to determine whether its plan for selling alcoholic beverages through ADMs would qualify for licensure. Because LGM has not applied for a license or made unlicensed sales, the Division erred in finding that *section 562.12(1)* restricted or prohibited the sale of alcoholic beverages through ADMs. *See Steinbrecher v. Better Constr. Co., 587 So. 2d 492, 493 (Fla. 1st DCA 1991)* (holding that courts cannot "construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications").

Finally, the Division cited its right to inspect the premises of a licensee when open for business as another reason that the sale of alcoholic beverages through ADMs violated the Beverage Law. *§ 562.41(5), Fla. Stat.* (2017). LGM assured the Division that its personnel would be granted access to LGM's stores by the personnel in the residential buildings where the stores were located. And nothing in LGM's proposed plan interferes with the Division's right to inspect licensed premises. Thus, the Division erred in

concluding that *section 562.41(5), Florida Statutes*, bars alcoholic beverage sales through ADMs. *McCloud v. State, 260 So. 3d 911, 914 (Fla. 2018)* ("If the statute is 'clear **[**13]** and unambiguous,' then this Court does not look beyond the plain language or employ the rules of construction to determine legislative intent—it simply applies the law.").

In sum, nothing in the plain language of the statutes cited by the Division prohibits the sale of alcoholic beverages through ADMs. We, therefore, reverse the portion of the final order declaring that LGM's plan violates these specific provisions of the Beverage Law.[3]

AFFIRMED in part; REVERSED in part; and REMANDED.

RAY, C.J., and ROBERTS, J., concur.

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[3] Although we reverse the Division's declaration that LGM's plan violates the ten cited statutes, we do not suggest that other provisions of the Beverage Law would not prohibit or restrict the sale of alcoholic beverages in the manner described by LGM.

Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n

Supreme Court of Florida

November 15, 2018, Decided

No. SC17-1848

Reporter
271 So. 3d 889 *; 2018 Fla. LEXIS 2209 **; 2018 WL 5994243

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., etc., et al., Petitioners, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Respondent.

Subsequent History: Rehearing denied by *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, 2018 Fla. LEXIS 2439 (Fla., Dec. 12, 2018)*

Prior History: [1]** Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Third District - Case No. 3D17-1421. (Miami-Dade County).

Law Offices of Herssein v. United Servs. Auto. Ass'n, 229 So. 3d 408, 2017 Fla. App. LEXIS 12035 (Fla. Dist. Ct. App. 3d Dist., Aug. 23, 2017)

Counsel: Reuven T. Herssein of Herssein Law Group, North Miami, Florida; and Maury L. Udell of Beighley, Myrick, Udell & Lynne, P.A., Miami, Florida, for Petitioners.

Suzanne Youmans Labrit, Frank A. Zacherl, and Amy M. Wessel of Shutts & Bowen, LLP, Tampa, Florida, for Respondent.

Christina Paylan, St. Pete Beach, Florida, for Amicus Curiae Christina Paylan, M.D.

Judges: CANADY, C.J. POLSTON, LABARGA, and LAWSON, JJ., concur. LABARGA, J., concurs with an opinion. PARIENTE, J., dissents with an opinion, in which LEWIS and QUINCE, JJ., concur.

Opinion by: CANADY

Opinion

[*891] CANADY, C.J.

In this case, we consider an issue regarding the legal sufficiency of a motion to disqualify a trial court judge on the basis of a Facebook "friendship." This Court granted jurisdiction to review the decision of the Third District Court of Appeal in *Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Ass'n, 229 So. 3d 408 (Fla. 3d DCA 2017)*, which held that the existence of a Facebook "friendship" was not a sufficient basis for disqualification and which expressly and directly conflicts with the decision of the Fourth District Court of Appeal in *Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012)*. We have jurisdiction. *See art. V, § 3(b)(3), Fla. Const.*

We hold **[**2]** that an allegation that a trial judge is a Facebook "friend" with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification. We therefore approve the decision of the Third District in *Herssein* and disapprove the decision of the Fourth District in *Domville* on the conflict issue.[1]

[1] The Petitioners have presented certain other issues that we decline to address.

BACKGROUND

In the case on review, the Law Offices of Herssein and Herssein, P.A., and attorney Reuven Herssein "filed a motion to disqualify the trial judge." *Herssein, 229 So. 3d at 409*. After the trial judge denied the disqualification motion as legally insufficient, the Herssein Firm and attorney Herssein "petition[ed the Third District] for a writ of prohibition to disqualify the trial court judge." *Id.* On review of the petition, the Third District explained the basis for the motion to disqualify that is relevant here:

> The motion [to disqualify] is based in part on the fact that [Israel] Reyes[—an attorney appearing before the trial judge on behalf of a potential witness and potential party in the pending litigation—]is listed as a "friend" on the trial judge's personal Facebook page. In support of the motion, Iris J. Herssein and Reuven Herssein, president and vice president **[**3]** of the Herssein Firm, signed affidavits in which they swore, "[b]ecause [the trial judge] is Facebook friends with Reyes, [the executive's] personal attorney, I have a well-grounded fear of not receiving a fair and impartial **[*892]** trial. Further, based on [the trial judge] being Facebook friends with Reyes, I . . . believe that Reyes, [the executive's] lawyer has influenced [the trial judge]."

Id. (some alterations in original).

The Third District expressly acknowledged that "Petitioners raise[d] three grounds" for disqualification on review. *Id.* But the Third District "wr[ote] only to address the petitioners' argument that the trial court judge should be disqualified because the judge is a Facebook 'friend' with a lawyer representing a potential witness and potential party in the pending litigation." *Id.* The Third District framed the issue as "whether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit." *Id.*

At the outset, the Third District cited authority from this Court and the First District Court of Appeal supporting the longstanding **[**4]** general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification. *Id. at 409-10* (citing *MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1338 (Fla. 1990)*; *Smith v. Santa Rosa Island Auth., 729 So. 2d 944, 946 (Fla. 1st DCA 1998)*).

The Third District acknowledged that "this authority does not foreclose the possibility that a relationship between a judge and a lawyer may, under certain circumstances, warrant disqualification." *Id. at 410*. The Third District noted that the Fourth District in *Domville* "held that recusal was required when a judge was a Facebook 'friend' with the prosecutor" based on "a 2009 Judicial Ethics Advisory Committee Opinion." *Id.* (citing Fla. JEAC Op. 2009-20 (Nov. 17, 2009)). The Florida Judicial Ethics Advisory Committee ("JEAC") advised in its 2009 opinion that judges were prohibited from adding lawyers who appear before them as "friends" on their Facebook pages or from allowing lawyers who appear before them to add them as "friends" on the lawyers' Facebook pages based on the JEAC's conclusion that "a judge's selection of Facebook 'friends' necessarily 'conveys or permits others to convey the impression that they are in a special position to influence the judge'" in **[**5]** violation of *Canon 2(B) of the Florida Code of Judicial Conduct. Id. at 412* (quoting Fla. JEAC Op. 2009-20 (Nov. 17, 2009)). In support of its conclusion, the JEAC zeroed in on the "selection and communication process" of Facebook "friendship." *Id. at 410* (quoting Fla. JEAC Op. 2009-20 (Nov. 17, 2009)). The JEAC reaffirmed its advice in 2010. *Id.* (citing Fla. JEAC Op. 2010-06 (Mar. 26, 2010)).

The Third District went on to explain that the Fifth District in *Chace v. Loisel, 170 So. 3d 802 (Fla. 5th DCA 2014)*, subsequently "signaled disagreement" with *Domville. Herssein, 229 So. 3d at 410*. *Chace* expressed "serious reservations about the court's rationale in *Domville*" in part because "[a] Facebook friendship does not necessarily signify the existence of a close relationship." *Id.* (quoting *Chace, 170 So. 3d at 803-04*).

The Third District agreed with *Chace* on this point for three reasons. *Id. at 411*. "First, as the Kentucky Supreme Court noted, 'some people have thousands of Facebook "friends."'" *Id.* (quoting *Sluss v. Commonwealth, 381 S.W.3d 215, 222 (Ky. 2012)*). "Second, Facebook members often cannot recall every person they have accepted as 'friends' or who have accepted them as 'friends.'" *Id.* And "[t]hird, many Facebook 'friends' are selected based upon Facebook's data-mining technology [suggestions] rather than personal interactions." **[*893]** *Id.* Thus the Third District concluded that "a 'friend' on a social networking website is not **[**6]** necessarily a friend in the traditional sense of the word[—i.e., a person attached to another person by feelings of affection or personal regard]." *Id. at 412*. The Third District further concluded that "[a]n

assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking." *Id.*

The Third District ultimately "h[eld] that the mere fact that a judge is a Facebook 'friend' with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook 'friend.'" *Id.* Accordingly, the Third District denied the petition for writ of prohibition. *Id.* The Third District acknowledged that its holding was "in conflict" with *Domville* but did not certify conflict. *Id.*

ANALYSIS

The conflict issue presents a pure question of law that is subject to de novo review. *See* Daniels v. State, 121 So. 3d 409, 413 (Fla. 2013). In considering this question of law, we first discuss the general standard governing disqualification and review the case law addressing the specific issue of judicial disqualifications based **[**7]** on a friendship relationship. We then apply the established principles of law to the context of Facebook "friendships." Finally, we explain that our conclusion that Facebook "friendship," standing alone, is insufficient to warrant disqualification is consistent with the majority view in the other states.

A. Legal Standard for Disqualification

"A motion to disqualify is governed substantively by section 38.10, Florida Statutes . . . and procedurally by *Florida Rule of Judicial Administration 2.330*." Gregory v. State, 118 So. 3d 770, 778 (Fla. 2013) (quoting Gore v. State, 964 So. 2d 1257, 1268 (Fla. 2007)). "The statute requires that the moving party file an affidavit in good faith 'stating fear that he or she will not receive a fair trial . . . on account of the prejudice of the judge' as well as 'the facts and the reasons for the belief that any such bias or prejudice exists.'" Peterson v. State, 221 So. 3d 571, 581 (Fla. 2017) (quoting § 38.10, Fla. Stat. (2014)). The rule provides that "[t]he judge against whom an initial motion to disqualify . . . is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged." *Pasha v. State, 225 So. 3d 688, 703 (Fla. 2017)* (quoting *Fla. R. Jud. Admin. 2.330(f)*). "The disqualification [statute and] rules are designed to keep the courts free from bias and prejudice." Tableau Fine Art Group, Inc. v. Jacoboni, 853 So. 2d 299, 301 (Fla. 2003). "[T]he disqualification statute and rules are [also] designed to ensure confidence in the judicial system, 'as well as to prevent the **[**8]** disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding.'" *Id.* (quoting Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983)).

"The standard of review of a trial judge's determination on a motion to disqualify is de novo." Parker v. State, 3 So. 3d 974, 982 (Fla. 2009). "A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." Braddy v. State, 111 So. 3d 810, 833 (Fla. 2012) (quoting Correll v. State, 698 So. 2d 522, 524 (Fla. 1997)). "Whether the motion **[*894]** is legally sufficient is a question of law." Mansfield v. State, 911 So. 2d 1160, 1170 (Fla. 2005). The standard for determining the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, "would place a reasonably prudent person in fear of not receiving a fair and impartial trial." MacKenzie, 565 So. 2d at 1335 (quoting Livingston, 441 So. 2d at 1087). "A mere 'subjective fear[]' of bias [or prejudice] will not be legally sufficient; rather, the fear must be objectively reasonable." Arbelaez v. State, 898 So. 2d 25, 41 (Fla. 2005) (first alteration in original) (quoting Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986)).

B. Traditional "Friendship"

In the traditional sense, a "friend" is a person attached to another person by feelings of affection or esteem. *See, e.g., Webster's Third New International Dictionary* 911 (1993 ed.) (defining **[**9]** the term "friend" as "one that seeks the society or welfare of another whom he holds in affection, respect, or esteem"); *The American Heritage Dictionary* 703 (5th ed. 2011) (defining the term "friend" as "[a] person whom one knows, likes, and trusts"); *Shorter Oxford English Dictionary* 1035 (6th ed. 2007) (defining the term "friend" as "[a] person joined by affection and intimacy to another").

But "friendship" in the traditional sense of the word does not necessarily signify a close relationship. It is commonly understood that friendship exists on a broad spectrum: some friendships are close and others are not. *See, e.g., Black's Law Dictionary* 667 (6th ed. 1990) (defining the term "friend" as "[v]arying in degree from greatest intimacy to acquaintance more or less casual");

Black's Law Dictionary 600 (5th ed. 1979) (same); *Black's Law Dictionary* 795 (4th ed. 1951) (same); *see also* Clark v. Campbell, 82 N.H. 281, 133 A. 166, 170 (N.H. 1926) ("Friendship is a word of broad and varied application."). Thus the mere existence of a friendship, in and of itself, does not inherently reveal the degree or intensity of the friendship.

It follows that the mere existence of a friendship between a judge and an attorney appearing before the judge, without **[**10]** more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are friends of an indeterminate nature. It is for this reason that Florida courts—including this Court—have long recognized the general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification. *See, e.g.,* MacKenzie, 565 So. 2d at 1338 ("There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification."); Ervin v. Collins, 85 So. 2d 833, 833-34 (Fla. 1956) (allegations of friendship between three supreme court justices and the governor, who was a party, were "not sufficient to constitute a legal basis for disqualification"); **[**11]** *Ball v. Yates, 158 Fla. 521, 29 So. 2d 729, 735 (Fla. 1946)* (allegation of friendship between a supreme court justice and an attorney previously employed by the prevailing party was "in fact and in law . . . inadequate and insufficient in substance" for disqualification); *see also* Smith, 729 So. 2d at 946; **[*895]** Adkins v. Winkler, 592 So. 2d 357, 360-61 (Fla. 1st DCA 1992); Raybon v. Burnette, 135 So. 2d 228, 230-31 (Fla. 2d DCA 1961).[2]

With this legal framework in mind, we now turn to address the Facebook "friendship" issue.

C. Facebook "Friendship"

Facebook was officially "launched on February 4, 2004." Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 23 N.Y.S.3d 173, 175 (N.Y. App. Div. 2015). Facebook is a social media and social networking service with approximately "1.79 billion active users." Packingham v. North Carolina, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). Facebook "permits registered users to do a host of things, among them: posting and reading comments, events, news, and, in general, communicating with . . . others." United States v. Jordan, 678 F. App'x 759, 761 n.1 (10th Cir. 2017); *see, e.g.,* Elonis v. United States, 135 S. Ct. 2001, 2004-07, 192 L. Ed. 2d 1 (2015).

> Facebook provides users with several means of communicating with one another. Users can send private messages to one or more users. Users can also communicate by posting information to their Facebook "wall," which is part of each user's Profile Page. A Facebook "wall post" can include written comments, photographs, digital images, videos, and content from other websites.

Shaw v. Young, 199 So. 3d 1180, 1188 n.6 (La. Ct. App. 2016) (quoting Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659, 662 (D.N.J. 2013)).

"Facebook users [primarily] create online profiles to share information about themselves with other Facebook users." Sublet v. State, 442 Md. 632, 113 A.3d 695, 698 n.5 (Md. 2015). "To create **[**12]** a profile, a person must go to www.facebook.com, enter his or her full name, birth date, and e-mail address, and register a password. Facebook then sends a confirmation link to the registered e-mail, which the person must click on to complete registration." Smith v. State, 136 So. 3d 424, 432 (Miss. 2014). "Thereafter, the profile may be accessed on any computer or mobile device by logging into Facebook's website using the same e-mail address and password combination." State v. Buhl, 321 Conn. 688, 138 A.3d 868, 874 n.2 (Conn. 2016). "Once registered, a Facebook user can . . . customize her profile by adding personal information, photographs, or other content. A user can [also] establish connections with other Facebook users by 'friending' them; the connected users are thus called 'friends.'" *Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1063 (9th Cir. 2016)*; *see* Ehling, 961 F. Supp. 2d at 662 ("A Facebook user can connect with

[2] Of course, this general rule of law does not suggest that a friendship between a judge and an attorney of a determinate nature cannot constitute a close or intimate relationship that warrants disqualification. Nor does it foreclose the possibility that a friendship between a judge and an attorney of an indeterminate nature may, in conjunction with some additional factor, constitute legally sufficient grounds for disqualification.

other users by adding them as 'Facebook friends.'").

A Facebook user's "friend" list appears on his profile page. *See* Strunk v. State, 44 N.E.3d 1, 5 (Ind. Ct. App. 2015); Commonwealth v. K.S.F., No. 2497 EDA 2011, 2013 Pa. Super. Unpub. LEXIS 2732, 2013 WL 11266159, at *1 n.3 (Pa. Super. Ct. Apr. 12, 2013). In order to "select" a Facebook "friend," a user must either (1) send a Facebook "friend" request to another user to accept or (2) accept a Facebook "friend" request sent by another user; a Facebook "friendship" is officially established by the acceptance of a previously sent "friend" request. *See* Fla. JEAC Op. 2009-20 (Nov. 17, 2009).

[*896] In general, **[**13]** "Facebook users may opt to make all or part of their Facebook information private . . . ." Sluss, 381 S.W.3d at 227 n.12. But even if a Facebook user generally opts to make the user's profile private, others may still be able to view the user's list of Facebook "friends" on the user's profile page. *See* Chaney v. Fayette County Pub. Sch. Dist., 977 F. Supp. 2d 1308, 1315 (N.D. Ga. 2013); State v. Eleck, 130 Conn. App. 632, 23 A.3d 818, 820 n.1 (Conn. App. Ct. 2011). Moreover, even if the Facebook user specifically opts to make the user's Facebook "friend" list private, the user may still appear as a Facebook "friend" on another's profile page. *See* United States v. Meregildo, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012); State v. Gaps, 316 P.3d 172, 2014 Kan. App. Unpub. LEXIS 25, 2014 WL 113465, at *2 (Kan. Ct. App. 2014). In this way, it could be said that a Facebook user publicly "communicates" the existence of the user's Facebook "friendships" to others. *See* Fla. JEAC Op. 2009-20 (Nov. 17, 2009).

We now come to the crux of the matter: what is the nature of Facebook "friendship?" "The word 'friend' on Facebook is a term of art." Chace, 170 So. 3d at 803. In its most basic sense, a Facebook "friend" is a person digitally connected to another person by virtue of their Facebook "friendship." *See, e.g., Power Ventures, 844 F.3d at 1063*; Ehling, 961 F. Supp. 2d at 662.

A Facebook "friend" may or may not be a "friend" in the traditional sense of the word. But Facebook "friendship" is not—as a categorical matter—the functional equivalent of traditional "friendship." The establishment of a Facebook "friendship" does not objectively signal **[**14]** the existence of the affection and esteem involved in a traditional "friendship." Today it is commonly understood that Facebook "friendship" exists on an even broader spectrum than traditional "friendship." Traditional "friendship" varies in degree from greatest intimacy to casual acquaintance; Facebook "friendship" varies in degree from greatest intimacy to "virtual stranger" or "complete stranger." Chace, 170 So. 3d at 803; *see, e.g.,* United States v. Tsarnaev, 157 F. Supp. 3d 57, 67 n.16 (D. Mass. 2016) ("Over a billion people use Facebook and connect with other users as 'friends.' Some may be friends in the traditional sense, but others are no more than acquaintances or contacts or in some cases may even be complete strangers."); In re Air Crash Near Clarence Ctr., N.Y., No. 09-CV-769S, 2013 U.S. Dist. LEXIS 163926, 2013 WL 6073635, at *5 (W.D.N.Y. Nov. 18, 2013) (noting that "one can be [Facebook] 'friends' with people known to them, with strangers, with celebrities, with animals, and even with inanimate objects").

So it is regularly the case that Facebook "friendships" are more casual and less permanent than traditional friendships. *See, e.g.,* Williams v. Scribd, Inc., No. 09CV1836-LAB WMC, 2010 U.S. Dist. LEXIS 90496, 2010 WL 10090006, at *6 (S.D. Cal. June 23, 2010) ("[It is] no secret that the 'friend' label means less in cyberspace than it does in the neighborhood, or in the workplace, or on the schoolyard, or anywhere else that humans interact as real people."); Quigley Corp. v. Karkus, No. 09-1725, 2009 U.S. Dist. LEXIS 41296, 2009 WL 1383280, at *5 n.3 (E.D. Pa. May 15, 2009) ("Indeed, 'friendships' **[**15]** on Facebook may be as fleeting as the flick of a delete button."); Herssein, 229 So. 3d at 411 ("'[S]ome people have thousands of Facebook "friends."' . . . Facebook members often cannot recall every person they have accepted as 'friends' or who have accepted them as 'friends.' . . . [M]any Facebook 'friends' are selected based upon Facebook's data-mining technology [suggestions] rather than personal interactions." (quoting Sluss, 381 S.W.3d at 222)); State v. Smith, No. M2014-00059-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 5, 2015 WL 100452, at *8 (Tenn. Crim. App. Jan. 7, 2015) ("Facebook 'friendships' frequently **[*897]** exist between those who are indifferent to one another.").

It is therefore undeniable that the mere existence of a Facebook "friendship," in and of itself, does not inherently reveal the degree or intensity of the relationship between the Facebook "friends." Since the creation of a Facebook "friendship" in itself does not signal the existence of a traditional "friendship," it certainly cannot signal the existence of a close or intimate relationship. *See* McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013) ("It is now common knowledge that merely being friends on Facebook does

not, *per se*, establish a close relationship . . . ."); *Sluss, 381 S.W.3d at 222* ("'[F]riendships' on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships **[**16]** or relationships in the community . . . ."); *Kirby v. Wash. State Dep't of Emp't Sec., 185 Wn. App. 706, 342 P.3d 1151, 2014 WL 7339610, at *1 (Wash. Ct. App. 2014)* ("The words 'post,' 'friend,' and 'friending' used in [the Facebook] context merely refer to individuals communicating with those listed on a social networking website and do[] not, necessarily, imply any more significant relationship between those individuals.").

In short, the mere fact that a Facebook "friendship" exists provides no significant information about the nature of any relationship between the Facebook "friends." Therefore, the mere existence of a Facebook "friendship" between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook "friends" with a relationship of an indeterminate nature.

As we now explain, our holding is in line with the majority of state judicial discipline bodies and judicial ethics advisory committees—which we refer to collectively as state ethics committees—that **[**17]** have considered whether Facebook "friendship" between a judge and an attorney appearing before the judge creates the appearance of impropriety under their respective states' judicial codes of conduct.

D. State Ethics Committees

The clear majority position is that mere Facebook "friendship" between a judge and an attorney appearing before the judge, without more, does not create the appearance of impropriety under the applicable code of judicial conduct. *See, e.g.*, Ariz. JEAC Op. 14-01, at 4 (Aug. 5, 2014); Ky. Jud. Ethics Comm. Op. JE-119, at 2-3 (Jan. 20, 2010); Md. Jud. Ethics Comm. Op. 2012-07, at 5 (June 12, 2012); Mo. Ret., Removal, & Discipline Comm'n Op. 186, at 1 (Apr. 24, 2015); N.M. Jud. Conduct Adv. Comm. Op. Concerning Soc. Media, at 13-14 (Feb. 15, 2016); N.Y. JEAC Op. 13-39 (May 28, 2013); Ohio Bd. of Comm'rs on Grievances & Discipline Op. 2010-7, at 1-2, 8-9 (Dec. 3, 2010); Utah JEAC Op. 12-01, at 4-7 (Aug. 31, 2012). In other words, the majority position is that the mere existence of a Facebook "friendship" between a judge and an attorney appearing before the judge, without more, does not reasonably convey or permit others to convey the impression that they are in a special **[**18]** position to influence the judge in violation of the applicable code of judicial conduct.

The minority position is that Facebook "friendship" between a judge and an attorney appearing before the judge, standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct. *See, e.g.*, Cal. **[*898]** Judges Ass'n Jud. Ethics Comm. Op. 66, at 1, 10-11 (Nov. 23, 2010); Conn. Jud. Ethics Comm. Op. 2013-06 (Mar. 22, 2013); Fla. JEAC Op. 2009-20 (Nov. 17, 2009); Mass. Jud. Ethics Comm. Op. 2011-6 (Dec. 28, 2011); Okla. Jud. Ethics Adv. Pan. 2011-3 (July 6, 2011).

Florida's JEAC was one of the first to advise that judges were prohibited from adding attorneys who appear before them as "friends" on their Facebook page or from allowing attorneys who appear before them to add them as "friends" on the attorneys' Facebook pages based on the JEAC's conclusion that a judge's selection of Facebook "friends" necessarily "conveys or permits others to convey the impression that they are in a special position to influence the judge" in violation of **[**19]** *Canon 2(B) of the Florida Code of Judicial Conduct.* Fla. JEAC Op. 2009-20 (Nov. 17, 2009).[3] The JEAC has since reaffirmed its support of the minority position and extended the reasoning of the minority position to other social media and social networking services including LinkedIn and Twitter. *See* Fla. JEAC Op. 2013-14 (July 30, 2013) (extending the reasoning of the minority position to Twitter); Fla. JEAC Op. 2012-12 (May 9, 2012) (extending the reasoning of the minority position to LinkedIn); Fla. JEAC Op. 2010-06 (Mar. 26, 2010) (reaffirming its support of the minority position).

The overarching concern of the JEAC is that a reasonably prudent person would fear that he or she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook "friends" of an

[3] ***Canon 2(B) of the Florida Code of Judicial Conduct*** provides that a judge shall not "convey or permit others to convey the impression that they are in a special position to influence the judge."

indeterminate nature. For the reasons we have explained, we conclude that concern is unwarranted. The correct approach is that taken by the majority position, which recognizes the reality that Facebook "friendship," standing alone, does not reasonably convey to others the impression of an inherently close or intimate relationship that might warrant disqualification.

In its 2009 Opinion, the JEAC relied on the **[**20]** "selection and communication process" of Facebook "friendship" in support of its conclusion that Facebook "friendship" between a judge and an attorney appearing before the judge reasonably "convey[s] or permit[s] others to convey the impression that they are in a special position to influence the judge." Fla. JEAC Op. 2009-20 (Nov. 17, 2009) (quoting *Fla. Code Jud. Conduct, Canon 2(B)*). But by focusing on the public nature of Facebook "friendship," the JEAC missed the intrinsic nature of Facebook "friendship." It is commonly understood that traditional "friendship" involves a "selection and communication process," albeit one less formalized than the Facebook process. People traditionally "select" their friends by choosing to associate with them to the exclusion of others. And people traditionally "communicate" the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension. Nevertheless, this Court has consistently recognized that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient **[**21]** basis for disqualification. *See, e.g.*, MacKenzie, 565 So. 2d at 1338; Ervin, 85 So. 2d at 833-34; *Ball, 29 So. 2d at 735*. If traditional "friendship," without more, does not reasonably convey or permit others to convey the impression that they are in a special position **[*899]** to influence the judge, then surely Facebook "friendship"—which exists on an even broader spectrum than traditional "friendship" and is regularly more casual and less permanent than traditional "friendship"—does not reasonably convey such an impression. The JEAC's position simply cannot be reconciled with this Court's longstanding treatment of disqualification motions based on mere allegations of traditional "friendship."

CONCLUSION

In some circumstances, the relationship between a judge and a litigant, lawyer, or other person involved in a case will be a basis for disqualification of the judge. Particular friendship relationships may present such circumstances requiring disqualification. But our case law clearly establishes that not every relationship characterized as a friendship provides a basis for disqualification. And there is no reason that Facebook "friendships"—which regularly involve strangers—should be singled out and subjected to a per se rule of disqualification.

We approve *Herssein* ***[**22]*** and disapprove *Domville*.

It is so ordered.

POLSTON, LABARGA, and LAWSON, JJ., concur.

LABARGA, J., concurs with an opinion.

PARIENTE, J., dissents with an opinion, in which LEWIS and QUINCE, JJ., concur.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION.

Concur by: LABARGA

Concur

LABARGA, J., concurring.

I concur with the majority opinion. However, I write to strongly urge judges not to participate in Facebook. For newly elected or appointed judges who have existing Facebook accounts, I encourage deactivation of those accounts.[4] As explained by the majority, "friendship" on Facebook, without more, does not create a legally sufficient basis for disqualification. Rather, the unique facts and circumstances of each case, in addition to the

[4] When a person assumes the significant responsibility of serving as a member of the judiciary, they must "accept restrictions on [their] conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." ***Fla. Code Jud. Conduct, Canon 2(A)*** cmt. The dissent is absolutely correct that "public trust in the impartiality and fairness of the judicial system is of the utmost importance." Dissenting op. at 31.

base fact of "friendship," are what will determine whether disqualification is required.

Nevertheless, as noted by the dissent, participation in Facebook by members of the judiciary "is fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter." Dissenting op. at 24. This is **[**23]** deeply concerning because judges are to decide cases solely upon the facts presented to them and the law. The public and the parties expect nothing less. Therefore, judges must avoid situations that could suggest or imply that a ruling is based upon anything else. Facebook "friendships" fall across a broad spectrum, from virtual stranger to close, personal friend. Because the relationships between judges and attorneys can fall anywhere on that spectrum, judges who elect to maintain Facebook "friendships" with attorneys who have any potential to appear before them are, quite simply, inviting problems. The Honorable Catherine Shaffer, a superior court judge in Washington State and current president of the American Judges Association, aptly states that while judges must decide for themselves whether to participate in social media "with a careful eye to the ethical requirements **[*900]** of their own jurisdiction," she "steer[s] clear" of it because "misperception is all too easy." *Are Facebook Friends Really Friends*? National Center for State Courts (Aug. 29, 2018), available at https://content.govdelivery.com/accounts/USNCSC/bulletins/209842b.[5]

I recognize that **[**24]** in this day and age, Facebook may be the primary means some judges use to stay in touch with family members, actual friends, or people with whom they have reconnected after many years. If this is the case, then at the very least, judges should carefully review their Facebook accounts and limit their "friendships" to cover only such individuals. However, I agree with Judge Shaffer that the safest course of action is to not participate in Facebook at all.

Dissent by: PARIENTE

Dissent

PARIENTE, J., dissenting.

I dissent. I would adopt the view of the Fourth District Court of Appeal in *Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012)*, that having a lawyer as a Facebook "friend" not only "may undermine confidence in the judge's neutrality" but in this case warranted the judge's recusal based on a "well-founded fear of not receiving a fair and impartial trial." *Id. at 186*. Even more pointedly, as Judge Gross explained in his concurring specially opinion in granting the motion for certification in *Domville*:[6]

> Judges do not have the unfettered social freedom of teenagers. Central to the public's confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements **[**25]** and relationships that compromise that appearance. *Unlike face to face social interaction, an electronic blip on a social media site can become eternal in the electronic ether of the internet. Posts on a Facebook page might be of a type that a judge should not consider in a given case. The existence of a judge's Facebook page might exert pressure on lawyers or litigants to take direct or indirect action to curry favor with the judge*. As we recognized in the panel opinion, a person who accepts the responsibility of being a judge must also accept limitations on personal freedom.

Domville, 125 So. 3d at 179 (emphasis supplied) (Gross, J., concurring specially). I wholeheartedly agree.

While Facebook and other social media sites have become more sophisticated, recent history has shown

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[5] Judge Shaffer also expressed the belief that "it is extraordinarily difficult to prevent improper ex parte contacts." *Are Facebook Friends Really Friends*? National Center for State Courts (Aug. 29, 2018), available at https://content.govdelivery.com/accounts/USNCSC/bulletins/209842b.

[6] Following its opinion in *Domville*, the Fourth District certified the following question of great public importance:

> Where the presiding judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook "friend," would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant's motion for disqualification should be granted?

Domville v. State, 125 So. 3d 178, 179 (Fla. 4th DCA 2013). However, this Court declined review. *State v. Domville, 110 So. 3d 441 (Fla. 2013)*.

that a judge's involvement with social media is fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter. For these **[**26]** reasons, I would adopt a strict rule requiring judges to recuse themselves whenever an attorney with whom they are Facebook "friends" appears before them. This rule does little to limit the judge's personal liberty, while advancing the integrity of the judicial **[*901]** branch as the one branch of government that is above politics.

Regardless of the appropriate parameters for a future amendment to the Code of Judicial Conduct relating to use of Facebook and other social media, it is clear that the judge in this case should have recused herself because, at the time of the recusal motion, the only binding opinion was the Fourth District's in *Domville. Domville* expressly required judges to recuse themselves from cases where they were Facebook friends with the lawyer, *103 So. 3d at 185*, and the trial judge was required to follow that opinion. *See* *Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992)*.

More importantly and most respectfully, in my view, any attempt to equate Facebook "friendship" with traditional friendship ultimately fails. The fact that both are called "friendship" does not mean they are comparable or can be evaluated in the same manner. Further, obtaining the information required to establish a good faith basis to file a motion for recusal would require **[**27]** discovery that is both impractical and potentially invasive of both the judge's and attorney's privacy.

The premise of the majority opinion is that Facebook friendships and traditional friendships are analogous. But, equating friendships in the real world with friendships in cyberspace is a false equivalency. The existence of a Facebook "friendship" may reveal far more information regarding the intimacy and the closeness of the relationship than the majority would assign it. For example, as the majority explains, once a person becomes "friends" with another Facebook user, that person gains access to all of the personal information on the user's profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public. Majority op. at 10-12; *see also* Daniel Smith, *When Everyone is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard*, 3 Case W. Res. J. L. Tech. & Internet 183, 200-06 (2011). Additionally, the ease of access to the "friend's" information allows **[**28]** Facebook "friends" to be privy to considerably more information, including potentially personal information, on an almost daily basis.

Social media communication is quickly replacing other modes of casual communication. *See* Smith, *supra*, at 200-06. Moreover, information conveyed on social media can range from the frivolous—gossip and what someone ate for dinner—to the meaningful—updates on family, friends, or even world events.

> Facebook also gives the public a new way to scrutinize public figures. Politicians, for instance, have become painfully aware of the downsides of maintaining an Internet persona. Numerous candidates have been forced to deal with unbecoming photographs coming to the public's attention through either their own Facebook use or postings by other users. One candidate even found himself apologizing for his college-aged son's unremarkable underage drinking.

Id. at 188-89 (footnotes omitted).

Instead of attempting to compare social media communication and friendship to traditional communication and friendship when determining the appropriate social media policy for the judiciary, this Court should consider the elusive and public nature of Facebook "friendship," as both the Fourth District and the Florida **[**29]** Judicial Ethics Advisory Committee (JEAC) did. *See* *Domville, 103 So. 3d at 185-86*; Fla. JEAC Op. 2010-06 (Mar. 26, 2010); Fla. JEAC Op. 2009-20 (Nov. 17, 2009). As **[*902]** those opinions correctly concluded, when those differences are taken into account, it is clear that judges' Facebook "friendships" with attorneys who appear in their courtrooms can easily cause an appearance of impropriety.

Florida's Code of Judicial Conduct requires that judges "avoid impropriety and the appearance of impropriety in all of the judge's activities." *Fla. Code of Jud. Con. Canon 2*. Additionally, *Canon 2(B)* states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; *nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge*." *Fla. Code Jud. Conduct, Canon 2(B)* (emphasis supplied). The commentary to *Canon 2(A)* explains:

> A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and

should do so freely and willingly.

As the JEAC concluded:

> The Committee notes, in coming to this conclusion, that social networking sites are broadly **[**30]** available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for *Canon 2(B)* is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates *Canon 2(B)*.

Fla. JEAC Op. 2009-20 (Nov. 17, 2009).

This dissent should not be viewed as an attack on the responsible use of social media. I emphasize, as did the JEAC, that the selection and rejection function is what causes the potential for the appearance of impropriety, after the judge has established the social networking profile that affords the judge **[**31]** the ability to accept or reject "friends." As the JEAC explained,

> With regard to a social networking site, in order to fall within the prohibition of *Canon 2(B)*, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates *Canon 2(B)*, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.

Id.

Clearly, social media plays an important role in today's society. For **[**32]** example, this **[*903]** Court and The Florida Bar as well as many other groups have public Facebook pages that are useful to disseminate information and enhance the role of judges, lawyers, and the judiciary in the public domain. Significantly, individuals may only "follow" these pages, but cannot become Facebook "friends" with either organization. This allows the general public to be privy to any and all information posted on the page without the appearance of impropriety that accompanies self-selection. Judges could, likewise, create pages that follow this model.[7]

As a practical matter, it is unrealistic to require discovery into the extent of social media "friendship" as a prerequisite to recusal before a valid motion may be filed. An individual judge's social media, whether it is Facebook, LinkedIn, Instagram, or any other site, is fraught with concerns for the average litigant because it is difficult and intrusive for a litigant to determine with whom the judge has connected, with whom the judge has declined to connect, and what type of communication the judge engages in on these platforms.

If the Court is declining to follow the JEAC advisory opinions, then I urge that it at least **[**33]** adopt parameters for judges to follow when engaging with social media, similar to those adopted in California.[8]

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[7] "Following" does not involve or require acceptance by the person; it only allows you to see what that person decides to post on his or her public "Wall." If you choose to follow someone, that person's public posts will be automatically delivered to your daily feed. Conversely the person being followed will not see what the followers post (unless he or she follows them back), and the followers will not be able to access anything else that the person keeps on his or her private page. *See Follow*, Facebook Help Ctr., https://www.facebook.com/help/382751108453953/?ref=u2u (last visited Aug. 30, 2018).

[8] The California Judicial Ethics Committee considers the following factors in determining whether the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial:

> 1) The nature of the social networking site The more personal the nature of the page, the greater the likelihood that including an attorney would create the appearance that the judge would be in a special position to influence

And even if the majority does allow judges to continue to use social media, then it should institute a rule similar to that espoused by Connecticut, which concluded that when new judicial officials wish to return to electronic social media following investiture, the judicial official must

> terminate permanently the existing account and start anew. If this course of action cannot be accomplished, the Judicial Official should edit his/her profile page upon reactivation to ensure that it is in compliance with the conditions of this opinion in every respect. This includes, but is not limited to, removing inappropriate contacts, photos, links, comments, petitions, "friending," and "Check In" postings. A Judicial Official **[*904]** should monitor closely new developments with respect to the [electronic social media] and keep abreast of applications instituted by the site managers. The Judicial Official also should monitor his/her participation with respect to maintaining appropriate dignity as well as insuring the precedence of the judicial office.

See Conn. Jud. Ethics Comm. Op. 2013-06 (Mar. **[**34]** 22, 2013).

Judges in Florida are non-partisan and held to the strictest compliance with the Code of Judicial Conduct **[**35]** to avoid even the appearance of impropriety. Judges, unlike the general public and even other elected officials, accept the responsibility when they take the oath of office and don their black robes that many prior activities may have to be limited for the purpose of maintaining the integrity of our justice system. One of these activities should include the use of social media to communicate, either actively or passively, with attorneys who appear before them. Because public trust in the impartiality and fairness of the judicial system is of the utmost importance, this Court should err on the side of caution.

CONCLUSION

The bottom line is that because of their indeterminate nature and the real possibility of impropriety, social media friendships between judges and lawyers who appear in the judge's courtroom should not be permitted. Under this rule, the opposing litigant would not be required to delve into how close the Facebook friendship may be, the judge avoids any appearance of impropriety, and Florida's courts are spared from any unnecessary questions regarding the integrity of our judiciary. Regardless, in this case, the judge was required to recuse herself because of binding precedent. **[**36]** Thus, I would quash the Third District Court of Appeal's decision in *Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Ass'n, 229 So. 3d 408 (Fla. 3d DCA 2017)*, and approve the Fourth District's decision in *Domville*.

Accordingly, I dissent.

LEWIS and QUINCE, JJ., concur.

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the judge, or cast doubt on the judge's ability to act impartially.

2) The number of "friends" on the page The greater the number of "friends" on the judge's page the less likely it is one could reasonably perceive that any individual participant is in a position to influence the judge.

3) The judge's practice in determining whom to include As with the number of people on the page, the more inclusive the page the less likely it is to create the impression that any individual member is in a special position to influence the judge.

4) How regularly the attorney appears before the judge If the likelihood that the attorney will actually appear before the judge is low, the more likely it is that the interaction would be permissible. On the other hand, if the attorney appears frequently before the judge the interaction is less likely to be permissible.

See Cal. Jud. Ethics Comm. Op. 66, at 8 (Nov. 23, 2010).

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Lewis v. Mercedes-Benz United States

United States District Court for the Southern District of Florida

March 25, 2020, Decided; March 25, 2020, Entered

CASE NO. 19-CIV-81220-RAR

Reporter
2020 U.S. Dist. LEXIS 153990 *

TIMOTHY LEWIS, TERESA MASSA, LINDA GAZIE, STEVEN WALLACH, ANA SCHWARTZ, JOSEPH MONOPOLI, JAMES FITZPATRICK, and SYNTHIA PRAGLIN, on behalf of themselves and all others similarly situated, Plaintiffs, v. MERCEDES-BENZ USA, LLC, DAIMLER AG and GRAMMER AG, Defendants.

Counsel: **[*1]** For Timothy Lewis, Teresa Massa, Linda Gazie, Steven Wallach, Ana Schwartz, Joseph Monopoli, James Fitzpatrick, Synthia Praglin, Plaintiffs: Alissa Del Riego, LEAD ATTORNEY, Podhurst Orseck P.A., Suite USA; John Gravante, III, LEAD ATTORNEY, Podhurst Orseck, P.A., Miami, FL USA; Matthew Weinshall, LEAD ATTORNEY, Podhurst Orseck, Suite USA; Peter Prieto, LEAD ATTORNEY, Podhurst Orseck, P.A., Miami, FL USA; Gail Ann McQuilkin, Harley Shepard Tropin, Kozyak Tropin & Throckmorton, Coral Gables, FL USA; George Franjola, Law Office of George Franjola, Ocala, FL USA; John Scarola, Searcy Denney Scarola Barnhart & Shipley, West Palm Beach, FL USA; Michael A. Burger, Santiago Burger, LLP, Rochester, NY USA; Rachel Sullivan, Robert J Neary, Kozyak, Tropin & Throckmorton, P.A., Coral Gables, FL USA; Benjamin Jacobs Widlanski, Kozyak Tropin Throckmorton LLP, Miami, FL USA.

For Sawntanaia Harris, Plaintiff: Benjamin Jacobs Widlanski, Kozyak Tropin Throckmorton LLP, Miami, FL USA.

For Mercedes-Benz USA, Llc, Daimler AG, Defendants: W Randall Bassett, LEAD ATTORNEY, King and Spalding, Atlanta, GA USA; Adam Reinke, Madison H. Kitchens, Rania Kajan, Stephen B. Devereaux, PRO HAC VICE, King & Spalding **[*2]** LLP, Atlanta, GA USA.

For Grammer AG, Defendant: Anthony Peter Strasius, Wilson Elser, Bank Of America, Miami, FL USA; Debra Ann Tama, Frederick W. Reif, Nathan T. Horst, PRO HAC VICE, Wilson Elser Moskowitz Edelman & Dicker LLP, New York, NY USA; Steven Craig Jones, Wilson Elser Moskowitz Edelman & Dicker, Miami, FL USA.

Judges: RODOLFO A. RUIZ II, UNITED STATES DISTRICT JUDGE.

Opinion by: RODOLFO A. RUIZ II

Opinion

ORDER GRANTING DEFENDANTS' JOINT MOTION FOR TEMPORARY STAY OF DISCOVERY

THIS CAUSE comes before the Court on Defendants' Joint Motion for Temporary Stay of Discovery [ECF No. 34] ("Motion"), filed on January 6, 2020. Having reviewed the Motion, as well as Plaintiffs' Response in Opposition [ECF No. 44] ("Response") and Defendants' Reply in Support of the Motion [ECF No. 45] ("Reply"), and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Joint Motion for Temporary Stay of Discovery [ECF No. 34] is **GRANTED**, as explained herein.

BACKGROUND

This class action suit alleges that headrests installed in vehicles manufactured by Defendants Mercedes-Benz USA, LLC ("MBUSA") and Daimler AG ("Daimler," and together with MBUSA, "Mercedes"), contain a defective safety mechanism **[*3]** known as "Active Head Restraint" ("AHR") manufactured by Defendant Grammer AG ("Grammer"). *See generally* First Am. Class Action Compl. ("FAC") [ECF No. 22]. Each Plaintiff is alleged to have owned a Mercedes vehicle equipped with headrests containing the defective AHR ("Class Vehicles"). *Id.* ¶¶ 19-54. According to Plaintiffs, because of this alleged defect, "Plaintiffs and Class members paid more for their Class Vehicles than they would have and suffered other actual damages, including but not limited to out-of-pocket expenses and the diminished value of their vehicles." *Id.* ¶ 128. Plaintiffs seek to recover on behalf of a putative nationwide class and putative Florida, New York, and North Carolina subclasses. *Id.* ¶ 211.

Plaintiffs maintain that AHR—branded by Mercedes as "NECK-PRO"—is defective because although it is designed to "spring forward in the event of a rear-end collision . . . and prevent whiplash[,]" it can deploy "without warning or any external force from a collision[,]" causing "serious bodily harm to the head and neck" as well as the "risk of collision when the headrest deploys . . . while the vehicle is being driven." *Id.* ¶¶ 1-2. The defect is purportedly a result of **[*4]** "the use of an inexpensive, inferior, and inappropriate plastic material for key components of the AHR in the headrests." *Id.* ¶ 118. Mercedes and Grammer allegedly "had exclusive and superior knowledge that the cheap plastic...would fail under ordinary use but failed to disclose this to Plaintiffs and the Class members." *Id.* ¶ 119. Indeed, Plaintiffs allege efforts undertaken by Grammer and Mercedes to affirmatively conceal the defect "by, among other things, notifying [the National Highway and Traffic Safety Administration ("NHTSA")] and dealers that the issue is a 'short circuit' in the wiring." *Id.* ¶ 166.

Based on the foregoing allegations, the FAC sets forth sixteen counts, including violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(c)*, the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), *Fla. Stat. § 501.201, et seq.*, and numerous state statutes in New York, California, and North Carolina, as well as counts for Fraud by Concealment, Violation of the Magnuson-Moss Warranty Act, and Unjust Enrichment. *Id.* ¶¶ 226-438. In their Motion, Defendants have moved for a temporary stay of discovery, pursuant to *Federal Rule of Civil Procedure 26(c)* and *S.D. Fla. L.R. 7.1*, pending this Court's ruling on their Motion to Dismiss [ECF No. **[*5]** 46].[1]

ANALYSIS

District courts enjoy broad discretion in deciding how to best manage the cases before them. *See Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1269 (11th Cir. 2001)*; *see also Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358, 1360 (11th Cir. 2002)*. Defendants urge the Court to exercise its discretion and stay discovery pending resolution of their Motion to Dismiss. *See In re Winn Dixie Stores, Inc. v. ERISA Litigation*, No. 3:04-cv194-J-33-MCR, 2007 WL 1877887, at *1 (M.D. Fla. June 28, 2007) (explaining motions to stay discovery may be granted pursuant to *Rule 26(c)*, provided the moving party demonstrates a showing of good cause and reasonableness).

"In deciding whether to stay discovery pending resolution of a motion to dismiss, the court must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery." *Koock v. Sugar & Felsenthal, LLP*, No. 8L09-CV-609-T-17EAJ, *2009 WL 2579307 (M.D. Fla. Aug. 19, 2009)* (citation omitted). This necessarily entails taking a "preliminary peak at the merits of the dispositive motion to see if it appears to be clearly meritorious and truly case dispositive." *Id.* (internal quotations and citations omitted); *see also McCabe v. Foley, 233 F.R.D. 683, 685 (M.D. Fla. 2006)* (holding "[a] request to stay discovery pending a resolution of a motion is rarely appropriate unless resolution of the **[*6]** motion will dispose of the entire case."); *Nankvil v. Lockheed Martin*

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[1] The Motion to Dismiss is not yet ripe for review. On February 13, 2020, the Court granted the parties' Joint Motion for Extension of Time [ECF No. 48] and extended the briefing schedule for the Motion to Dismiss. The parties filed a second Joint Motion for Extension of Time [ECF No. 55] on March 18, 2020 to facilitate the completion of jurisdictional discovery. Jurisdictional discovery has been complicated by the current public health emergency caused by COVID-19, especially considering that Defendants Daimler and Grammer are based in Germany. Considering these challenging circumstances, the Court granted the motion and extended the briefing schedule for the Motion to Dismiss, contingent on the parties' ability to conduct depositions in Germany. *See* Order [ECF No. 56]. Assuming Grammer's declarants can be deposed as scheduled, Plaintiffs' response is due on May 11, 2020 and Defendants' reply is due on June 1, 2020. *Id.* at ¶¶ 2-3.

Corp., 216 F.R.D. 689, 692 (M.D. Fla. 2003)" ("courts have held good cause to stay discovery exists wherein resolution of a preliminary motion may dispose of the entire action") (internal quotations and citations omitted).

Here, a "preliminary peek" of the pending Motion to Dismiss reveals that Defendants have challenged the viability of all sixteen claims based on jurisdictional grounds under Rules 12(b)(1) and 12(b)(2), as well as substantive grounds under Rules 12(b)(6) and 9(b). *See generally* Mot. to Dismiss. Numerous significant questions exist regarding personal jurisdiction alone, as Defendants assert that Plaintiffs have failed to satisfy the requirements of Florida's Long-Arm Statute and due process. *Id.* at 5-11. Notable pleading deficiencies have also been raised regarding Plaintiffs' claims for breach of implied warranty of merchantability and fraud by concealment, as well as Plaintiffs' RICO, FDUPTA, and state law claims. *Id.* at 13-30. Thus, if the Motion to Dismiss were granted—even in part—it would substantially impact the viability of claims against one or more Defendants and drastically alter the scope of discovery.

Plaintiffs respond that at best, Defendants' Motion to Dismiss would dispose of only certain claims; therefore, it would **[*7]** be improper to stay discovery pending resolution of said Motion. Response at 4-7; *see also Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, at *2 (S.D. Fla. July 24, 2008) (declining to stay discovery where motion to dismiss "could not possibly resolve the entire case"); *S.K.Y. Management LLC v. Greenshoe, Ltd.*, No. 06-21722-CIV, 2007 WL 201258, at *2 (S.D. Fla. Jan. 24, 2007) (denying stay where "good reason to question whether Defendant will prevail on its motion to dismiss"). However, as instructed by the Eleventh Circuit in Chudasama v. Mazda Motor Corporation, 123 F.3d 1353 (11th Cir. 1997), dismissal of nonmeritorious claims before discovery begins is necessary to minimize undue burdens on litigants and the court system. As explained in *Chudasama*:

> Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion.

123 F.3d at 1367 (footnote and citation omitted); *see also* Cotton v. Massachusetts Mut. Life Ins. Co., 402 F.3d 1267, 1292 (11th Cir. 2005) (noting the importance of resolving facial challenges before discovery begins, "especially when the **[*8]** challenged claim will significantly expand the scope of allowable discovery.") (citing Chudasama, 123 F.3d at 1368); Moore v. Potter, 141 F. App'x 803, 807 (11th Cir. 2005) (same).

Plaintiffs maintain that Defendants' reliance on *Chudasama* is misplaced, and caution against misapplication of the case to the facts at hand. *See* Response at 8-9. The Court agrees with Plaintiffs that *Chudasama* "does not indicate a broad rule that discovery should be deferred or stayed whenever there is a pending motion that is potentially dispositive." *Mimbs v. J.A. Cambece Law Office, P.C.*, No. 12-62200, 2013 WL 11982063, at *1 (S.D. Fla. June 13, 2013); *see also Miller's Ale House, Inc. v. DCCM Restaurant Group, LLC*, No. 6:15-cv-1109-Orl-22TBS, 2015 WL 6123984, at *2 (M.D. Fla. Oct. 16, 2015) (noting *Chudasama* and its progeny "stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount.") (internal quotations and citations omitted). But when faced with legitimate jurisdictional challenges like those present in Defendants' Motion to Dismiss, discovery should not commence until such challenges are resolved. *See, e.g., Gillier v. Servicios Agecom, LLC*, No. 17-23155-Civ, 2017 WL 6994217, at *3-5 (S.D. Fla. Nov. 27, 2017) (entering brief stay of discovery given "strong likelihood" that motion to dismiss based in part on lack of personal jurisdiction would be granted, in which case "proceeding in this **[*9]** forum . . . would be improper."); *McCullough v. Royal Caribbean Cruises, Ltd.*, No. 16-CV-20194, 2017 WL 6372619, at *1 (S.D. Fla. Jan. 11, 2017) (staying merits-based discovery given Defendants' motion to dismiss for lack of personal jurisdiction); *Anderson v. Bullard*, No. 8:18-cv-901-T-35AAS, 2018 WL 5920476, at *1 (M.D. Fla. Nov. 13, 2018) (granting temporary stay of discovery where motion to dismiss presented nonfrivolous challenge to court's personal jurisdiction over defendant); *Jackson-Bear Group, Inc. v. Amirjazil*, No. 2:10-CV-332-FTM-29, 2011 WL 720462, at *1 (M.D. Fla. Feb. 22, 2011) (staying discovery where motion to dismiss indicated valid challenges to personal jurisdiction).

In addition to jurisdictional challenges, the legal deficiencies asserted in Defendants' Motion to Dismiss also support the entry of a temporary stay. For example, Defendants argue that Plaintiffs' Fraud by Concealment and RICO claims fail to satisfy the heightened pleading

standard under Rule 9(B). *See* Motion to Dismiss at 13; 23-24.[2] Addressing these types of facial challenges before permitting discovery lessens unnecessary costs, especially since a ruling on legal sufficiency in this case may "alter the geographic scope of the class, thereby limiting the corresponding scope of discovery to sales and marketing activity in one state as opposed to the entire country." Reply at 8; *see also Khan v. Bankunited, Inc.* ***[*10]*** , No. 8:15-CV-2632-T-23TGW, 2016 WL 4718156, at *1 (M.D. Fla. May 11, 2016) ("While discovery generally should not be stayed pending resolution of a motion to dismiss, a stay may be appropriate when its resolution will potentially narrow the scope of discovery in a case of this complexity and size."). Thus, given the presence of jurisdictional and facial challenges to all of Plaintiffs' claims, a temporary stay of discovery would save the court, counsel, and the parties significant time and effort. *See James v. Hunt, 761 F. App'x 975, 981 (11th Cir. 2018)* (affirming stay of discovery until ruling on "motions to dismiss, especially in light of the fact the Plaintiffs' fraud-based claims would have substantially enlarged the scope of discovery and were largely unpersuasive."); *Chevaldina v. Katz*, No. 17-22225-CIV, 2017 WL 6372620, at *3 (S.D. Fla. Aug. 28, 2017) ("Defendants should not be required to suffer monetary burdens or expenses when it appears that Plaintiff's claims may fail for several reasons as a matter of law[,]" including lack of subject matter jurisdiction).

Lastly, and perhaps most importantly, Defendants have identified—in a specific and tangible way—the unreasonable discovery burdens they will face absent a stay. Given that two out of the three Defendants are foreign entities, the nature and scope of discovery in this **[*11]** action necessitates information located in Germany, which will require compliance with European data privacy laws and other foreign rules and regulations. Reply at 9-10. Further, Defendants will be forced to incur significant costs if they must respond to discovery about claims and vehicles that are not properly part of this case. Mot. at 15-16. Additionally, Plaintiffs have not identified any undue prejudice resulting from a temporary stay. The Court has yet to set this case for trial and Defendants' Motion to Dismiss is not ripe.[3] *See supra* n.1. Plaintiffs' case is not prejudiced by a temporary stay of discovery.

CONCLUSION

"Ultimately, the proponent of the stay bears the burden of demonstrating its necessity, appropriateness, and reasonableness." *Ray v. Spirit Airlines, Inc.*, No. 12-61528-*Civ, 2012 WL 5471793, at *2* (citing *McCabe, 233 F.R.D. at 685*). Here, Defendants have met their burden, and should not be forced to expend substantial resources answering discovery given the jurisdictional and facial challenges pending before the Court. Temporarily staying discovery at this juncture will not create case management obstacles or delay the prosecution of this case. Indeed, such a stay is merely designed to prevent extensive and **[*12]** expensive discovery from going forward until the Court is able to effectively determine the validity of Plaintiffs' claims. Accordingly, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendants' Joint Motion for Temporary Stay of Discovery [ECF No. 34] is **GRANTED**.

2. General discovery is **STAYED** until this Court issues an order on Defendants' Motion to Dismiss [ECF No. 46].

DONE AND ORDERED in Fort Lauderdale, Florida, this 25th day of March, 2020.

/s/ Rodolfo A. Ruiz II

RODOLFO A. RUIZ II

UNITED STATES DISTRICT JUDGE

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[2] In analyzing Defendants' pending Motion to Dismiss, the Court does not offer any substantive opinion on the merits of said Motion. Instead, the Court has only taken a "preliminary peek" to determine whether Defendants' Motion to Dismiss is meritorious and may be case dispositive.

[3] Moreover, any assertion that a temporary stay will put "class members' safety at risk" is unfounded. Response at 18. None of the Plaintiffs appear to have ever stopped driving their respective vehicles due to the alleged defect, and they all seek "to recover economic losses . . ." *Id.* at 1; *see also* FAC ¶ 183-187.

Megacenter US LLC v. Goodman Doral 88th Court LLC

Court of Appeal of Florida, Third District

April 24, 2019, Opinion Filed

No. 3D18-519

Reporter
273 So. 3d 1078 *; 2019 Fla. App. LEXIS 6239 **; 44 Fla. L. Weekly D 1045; 2019 WL 1781107

Megacenter US LLC, etc., Appellant, vs. Goodman Doral 88th Court LLC, etc., Appellee.

Subsequent History: Rehearing denied by *Megacenter US LLC v. Goodman Doral 88th Court LLC, 2019 Fla. App. LEXIS 9354 (Fla. Dist. Ct. App. 3d Dist., May 9, 2019)*

Prior History: **[**1]** An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Jr. and Jacqueline Hogan Scola, Judges. Lower Tribunal No. 17-9607.

Counsel: Duane Morris, LLP, Alvin D. Lodish and Richard D. Shane, for appellant.

Weiss Serota Helfman Cole & Bierman, P.L. and Edward G. Guedes and Eric P. Hockman, for appellee.

Judges: Before EMAS, C.J., and SALTER, and FERNANDEZ, JJ.

Opinion

[*1079] PER CURIAM.

Megacenter US, LLC., ("Megacenter") appeals the trial court's order on Megacenter's motion for rehearing as to the trial court's corrected summary final judgment dated January 3, 2018, and corrected summary final judgment. On the issue of notice, we find that Florida law supports Megacenter's position that it substantially complied with the notice requirement in the subject Purchase and Sale Agreement. We find further that the purchase and sale agreement at issue in this case provided for automatic termination on the record **[*1080]** presented. We thus reverse and remand for entry of summary judgment in Megacenter's favor.

On January 26, 2017, Goodman Doral 88th Court, LLC., ("Goodman"), the seller, entered into a contract with Megacenter, the purchaser, for the purchase of real property located in the City of Doral, Florida ("City"). **[**2]** Megacenter made a $250,000.00 initial deposit, as required by the parties' purchase and sale agreement ("Agreement"). The purchase price for the property was $10,500,000.00. Megacenter delivered the initial deposit to an escrow agent, as required by paragraph 3 of the Agreement.

Megacenter's intention was to use the property for a self-storage facility, so it notified Goodman of its intent. Megacenter let Goodman know that if the property could not be used as a self-storage facility, it would not purchase the property. When the parties entered into the Agreement, the parties did not know if the City's zoning allowed the property to be used as a self-storage facility. On March 10, 2017, Megacenter requested that the City issue Megacenter a zoning verification letter letting Megacenter know if the subject property could be used for this purpose.

In the Agreement between Goodman and Megacenter, the parties negotiated the provisions by which Megacenter could terminate the Agreement and recover its deposit. Paragraph 3 of the Agreement stated:

> 3. ***Deposit***. To secure the performance of Purchaser's obligations under this Agreement,

> within two (2) Business Days after the Effective Date of this **[**3]** Agreement, Purchaser shall deliver by wire transfer to Chicago Title Insurance Company, as escrow agent ("**Escrow Agent**"), an initial deposit ("**Initial Deposit**") in the amount of TWO HUNDRED FIFTY THOUSAND and 00/100 DOLLARS ($250,000.00), the proceeds of which shall be held in trust as an earnest money deposit by Escrow Agent, and disbursed only in accordance with the terms of this Agreement. On or before the expiration of the Inspection Period, if Purchaser does not terminate (or is not deemed to have terminated) this Agreement pursuant to the provisions hereof, Purchaser shall deliver to Escrow Agent, an additional deposit ("**Additional Deposit**") in the amount of SEVEN HUNDRED FIFTY THOUSAND and 00/100 DOLLARS ($750,000.00).... In the event that Purchaser does not deliver the Additional Deposit to Escrow Agent on or before the expiration of the Inspection Period, the same shall be deemed a termination of this Agreement within the Inspection Period and the Agreement shall be terminated, whereupon all parties shall be released from all further obligations under this Agreement, except for obligations that expressly survive termination of this Agreement. The Initial Deposit and the Additional **[**4]** Deposit (as, if and when made) shall collectively be referred to herein as the "**Deposit**". ... Seller and Purchaser have entered into a separate escrow agreement with Escrow Agent with respect to the Deposit.

(emphasis in original). Thus, the Agreement would terminate automatically if Megacenter did not provide the $750,000.00 Additional Deposit on or before the end of the "Inspection Period" as defined within the Agreement.

Paragraph 7 of the Agreement, which governs Megacenter's right to inspect the property, stated:

> 7. ***Inspection Period/AS IS Purchase***. Purchaser shall have until 5:00 p.m. on the forty-fifth (45th) day following the Effective Date (the "Inspection Period") to make such physical, structural, legal, zoning, title, survey, land use, environmental, **[*1081]** topographical and other examinations, inspections and investigations of the Property which Purchaser, in Purchaser's sole discretion has determined to make. In the event Purchaser is not satisfied with the Property, in Purchaser's sole discretion, Purchaser may cancel this transaction by written notice of cancellation given to both Seller and the Escrow Agent prior to the expiration of the Inspection Period, in which event, the **[**5]** Escrow Agent shall return the Deposit and all interest earned thereon to Purchaser, whereupon both parties shall be released from all further obligations under this Agreement except those that expressly survive. In the event Purchaser has not so timely delivered written notice of cancellation, then the foregoing condition precedent shall automatically be deemed to be satisfied in full and Purchaser's right of termination shall be deemed waived. ... In electing to enter into this Agreement, Purchaser shall purchase the Property in its "AS IS" condition and situation as of the Effective Date, including the physical, legal, and environmental condition and status of the Property. Purchaser expressly agrees that the Property will be conveyed by Seller without any representations, warranties or guarantees of any nature whatsoever, express or implied, except to the extent of any representations expressly set forth herein or in any document delivered by Seller in connection with the Closing. ... The provisions of this paragraph shall survive Closing and the early termination of this Agreement.

Accordingly, this provision allowed Megacenter to terminate the Agreement, at Megacenter's sole discretion, **[**6]** if it was not satisfied with the subject property, by providing written notice of cancellation to Goodman by the end of the inspection period.

Paragraph 17 of the Agreement addressed "Notices" and stated:

> 17. ***Notices***. Any notices required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been given if delivered (i) by registered or certified mail, return receipt requested, postage prepaid, (ii) by hand delivery, (iii) by recognized overnight courier (such as Federal Express), or (iv) by facsimile with confirmed receipt, and addressed as follows: ..."

The Agreement stated that notices to the seller must be sent to Goodman's physical address with a copy to its counsel. Paragraph 17 further noted:

> Notice shall be deemed given when delivered or upon refusal to accept delivery, and may be given on behalf of any party by its respective counsel. A copy of any written notice sent by either party to the other shall also be sent to all parties above via electronic mail at the addresses set forth above simultaneously with the sending of such notice via the delivery methods described above.

Under the Agreement, the "Inspection Period" expired at 5:00 p.m. **[**7]** on March 13, 2017. On Friday, March 10, 2017, the last business day before the expiration of the inspection period, Megacenter still did not know if the City would permit the property to be used as a self-storage facility. Megacenter thus requested an extension of the inspection deadline. Consequently, Megacenter and Goodman executed the "First Modification to Purchase and Sale Agreement." This First Modification extended the Inspection Period by four extra days, so the deadline was now March 17, 2017 at 5:00 p.m., allowing Megacenter the additional time to obtain the zoning letter from the City. The First Modification stated:

> Seller has agreed to extend the Inspection Period until 5:00 PM on March 17, **[*1082]** 2017 to permit Purchaser the opportunity to obtain the Zoning Letter" . [sic] If Purchaser is unable to obtain a Zoning Letter that is reasonably satisfactory to Purchaser and provides evidence of such rejection to Seller, Purchaser shall have the right to terminate the Agreement during the Inspection Period pursuant to the provisions of Section 7 of the Original Agreement.

The First Modification further stated: "Purchaser has requested an extension to the Inspection Period for the sole purpose **[**8]** of obtaining Zoning Letter[.]" The First Modification also outlined that "[i]n the event of inconsistency between the provisions of this Modification and the provisions of the Original Agreement, the terms of this Modification shall govern and control." The First Modification provided: "Except as hereby modified, all of the provisions of the Original Agreement are hereby ratified and confirmed and shall be and remain in full force and effect, and the same are enforceable in accordance with their terms."

It is undisputed that on March 17, 2017, at 4:23p.m., Megacenter representative Pablo Wichman emailed Goodman's counsel, Joseph Hernandez, Esq., advising Goodman that Megacenter had not received the zoning letter from the City. The email further notified Goodman that if Megacenter did not receive a signed second modification to the Agreement by 5:00 p.m. that day, then Megacenter would terminate the Agreement. The email contained an attachment, a proposed "Second Modification to Purchase and Sale Agreement" to extend the deadline to March 22, 2017. Mr. Wichman stated in the email: "I apologize for the short notice, but if we have not received a response by 5 PM we will terminate the **[**9]** contract with the firm intention to reinstate once we receive the letter." Neither Goodman nor his counsel responded to Megacenter's email before the deadline. At 5:00 p.m., Megacenter emailed Goodman with formal notice of termination. At 5:07 p.m., Goodman's counsel responded to Mr. Wichman, acknowledging receipt of Mr. Wichman's notice of termination and indicating he would review the correspondence and discuss it with Goodman. Megacenter did not make the "Additional Deposit" of $750,000.00 before the end of the Inspection Period (as extended by the First Modification).

Thereafter, also on March 17, 2017, at 6:55pm, Goodman's representative, Alan Cockburn, responded to Megacenter's request for a second extension of the deadline by stating: "Please would you send us a copy of your request for a zoning verification. We will then be happy to extend until 22 April. Roger and Joe, please advise whether we can do so by signing the second modification or if a reinstatement agreement is required."

On March 20, 2017, Megacenter received the City's response confirming that the property in question was suitable as a self-storage facility. Thus, Megacenter did not learn if the subject property **[**10]** was suitable for its desired use until after the Agreement was terminated. Megacenter demanded the return of its $250,000.00 initial deposit, which Goodman refused. Megacenter then filed a one-count complaint for breach of contract for the return of its deposit. Goodman responded with an Answer, one affirmative defense, and a counterclaim asserting a claim for declaratory judgment and a claim for breach of contract.

Both sides moved for summary judgment, claiming there were no disputed issues of material fact. Megacenter argued that it was entitled to summary judgment because it timely and properly terminated the Agreement, and in addition, it terminated the Agreement by non-payment of the $750,000.00 Additional Deposit. Goodman's cross-motion for summary judgment **[*1083]** alleged that under the First Modification, Megacenter could only terminate the Agreement by providing the notice required by paragraph 7. Goodman alleged that Megacenter failed to provide that notice.

At the hearing on the parties' motions for summary judgment, the trial court denied Megacenter's motion for summary judgment on its breach of contract claim and granted Goodman's motion for summary judgment on its counterclaims **[**11]** for declaratory judgment and breach of contract. In its written summary judgment

order, the trial court held that:

> "[U]nder the plain language of the First Modification Agreement, Megacenter could terminate the Purchase Agreement prior to the expiration of the Inspection Period only by providing prior written [sic] in specified forms and to all individuals named, pursuant to Section 7 of the Original Agreement, that included evidence that the City of Doral rejected Megacenter's request for a Zoning Letter."

The trial court further found that Megacenter did not "deliver ... timely written notice of cancellation of the Purchase Agreement that included evidence of the City's rejection of Megacenter's request for a Zoning Letter and was NOT sent to the proper parties in the proper forms." The trial court held that Megacenter "waived its right of termination and is in default under the Purchase Agreement without default by Goodman." The trial court ordered that Goodman was entitled to $1,000,000.00 (the $250,000.00 initial deposit Megacenter had already paid and the additional $750,000.00 deposit Megacenter had not yet paid), together with pre-and post-judgment interest. Megacenter moved for rehearing, **[**12]** which the trial court denied without a hearing. This appeal followed.

On appeal, we address Megacenter's contentions that (1) it properly terminated the Agreement by timely written notice, and (2) the Agreement and First Modification automatically terminated as a result of Megacenter's non-payment of the $750,000.00 Additional Deposit before the end of the Inspection Period.

Termination Notice

We agree with Megacenter that even if we accepted Goodman's position that Megacenter could only terminate the Agreement by written notice, Megacenter's substantial compliance with the notice provision was sufficient to terminate the Agreement. The record reflects that Megacenter provided actual notice via email to Goodman of its decision to terminate the Agreement, which Goodman received. Megacenter's notice of termination was sufficient under Florida law and, accordingly, the Agreement was terminated. Thus, Megacenter's motion for summary judgment should have been granted, as it is entitled to the return of its Initial Deposit ($250,000.00) and should not be required to pay the Additional Deposit ($750,000.00).

We review an order granting summary judgment under a *de novo* standard of review. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Questions **[**13]** of law, such as contract interpretation issues, are also reviewed *de novo.* Siegel v. Tower Hill Signature Ins. Co., 225 So. 3d 974, 976 (Fla. 3d DCA 2017).

Megacenter contends that under Florida law, it gave timely actual notice to Goodman that it was terminating the Agreement, that Goodman received the notice, and that Megacenter thus substantially complied with the terms of the First Modification. The record is clear that Goodman's counsel received Megacenter's timely email written notice of termination. There is no dispute on this issue with **[*1084]** regard to receipt of the email. Furthermore, Goodman does not dispute that, under Florida law, the sufficiency of legal notice is measured by the substantial compliance standard. Lafaille v. Nationstar Mortg., LLC, 197 So. 3d 1246, 1247 (Fla. 3d DCA 2016). However, Goodman argues that the notice is technically deficient under Paragraph 17 of the Agreement, which outlined the methods under which notice was to be provided to Goodman. We disagree with Goodman, as the record reflects that Megacenter properly terminated the Agreement.

Under Florida law, strict compliance with a notice provision is not required if one of the parties (in this case, Goodman) has actual notice, as Megacenter contends. Megacenter cites to Patry v. Capps, 633 So. 2d 9, 10-11 (Fla. 1994) in support of its position. The rule set out in Patry requires only substantial and **[**14]** not strict compliance, where notice is required under contracts and statutes. Florida and federal courts follow this rule. Tim Hortons USA, Inc. v. Singh, 2017 U.S. Dist. LEXIS 52092, 2017 WL 1326285 *8 (S.D. Fla. Apr. 5, 2017); Lafaille, 197 So. 3d at 1247; Diaz v. Wells Fargo Bank, N.A., 189 So. 3d 279, 282 (Fla. 5th DCA 2016); In re Forfeiture of 2003 Chevrolet Corvette, Identification No. 1G1YY12S435100084, Tag VBA386, 932 So. 2d 623, 625 (Fla. 2d DCA 2006); Woolf v. Woolf, 901 So. 2d 905, 911 (Fla. 4th DCA 2005); Angrand v. Fox, 552 So. 2d 1113, 1114 n.4 (Fla. 3d DCA 1989).

As Megacenter argues, the purpose of delivering notice by the methods outlined in the Agreement is so that a party cannot claim it never received notice, while the other party alleges it gave notice. Phoenix Ins. Co. v. McCormick, 542 So. 2d 1030, 1032 (Fla. 2d DCA 1989). However, such is not the case here, where Goodman accepted Megacenter's written notice and Goodman had actual notice of Megacenter's termination. *See*

Torres v. K-Site 500 Assocs., 632 So. 2d 110, 112 (Fla. 3d DCA 1994). There is sufficient evidence in the record to support entry of summary judgment in Megacenter's favor and against Goodman because there are no genuine issues of material fact as to whether Megacenter properly terminated the Agreement and is entitled to the return of its Initial Deposit.

Termination Upon Failure to Make the Additional Deposit

For the sake of completeness, we also determine that Megacenter's second and independently-sufficient argument is well taken. The First Modification amended a defined term, "Inspection Period," by extending that date to March 17, 2017. Whether through inadvertence or intention, **[**15]** the parties did not specify whether the $750,000.00 Additional Deposit required by Paragraph 3 was to be due on the original Inspection Period expiration date or on the Inspection Period as extended by the parties in their First Modification. Goodman apparently argues that "Inspection Period," a defined term, meant one date for the zoning letter contingency, but something else vis-à-vis the Additional Deposit.[1]

The Agreement and the First Modification use a single term, "Inspection Period." The extension of that defined temporal period also modified the time for making the Additional Deposit. The automatic termination provision of Paragraph 3 of the Agreement used that term as the deadline for the Additional Deposit.

The pertinent provision of Paragraph 3 of the Agreement relating to the Additional Deposit is: "In the event that Purchaser **[*1085]** does not deliver the Additional Deposit to Escrow Agent on or before the expiration of the Inspection Period, **the same shall be deemed a termination of this Agreement within the Inspection Period and the Agreement shall be terminated, whereupon all parties shall be released from all further obligations under this Agreement**, except for obligations that **[**16]** expressly survive termination of this Agreement" (emphasis provided). It is undisputed that Megacenter did not deliver the Additional Deposit to the Escrow Agent on or before the expiration of the Inspection Period. That objectively-ascertainable fact is "deemed" a termination of the Agreement and is an independent basis for our reversal.

Conclusion

We thus reverse the trial court's order granting summary judgment in favor of Goodman on both counts of its counterclaim and denying Megacenter's summary judgment motion on its one-count complaint. The case is remanded to the trial court for entry of final summary judgment in Megacenter's favor on its breach of contract claim and return of its initial $250,000.00 deposit.

Reversed and remanded with instruction.

End of Document

[1] With the zoning letter contingency still open and Goodman having declined to extend the Inspection Period again before expiration of the extended deadline, Megacenter's non-payment of a further $750,000.00 is entirely consistent with its declaration that the contract was terminated when that deadline came and went.

State v. Espinoza

Court of Appeal of Florida, Third District

January 30, 2019, Opinion Filed

No. 3D16-1860

Reporter
264 So. 3d 1055 *; 2019 Fla. App. LEXIS 1133 **; 44 Fla. L. Weekly D 317; 2019 WL 361893

The State of Florida, Appellant, vs. Michell Espinoza, Appellee.

Prior History: [1]** An Appeal from the Circuit Court for Miami-Dade County, Teresa Mary Pooler, Judge. Lower Tribunal No. 14-2923.

Counsel: Ashley Brooke Moody, Attorney General, and Jeffrey R. Geldens, Assistant Attorney General, for appellant.

Prieto Law Firm, P.A., and Frank Andrew Prieto, for appellee.

Berger Singerman LLP, and Andrew M. Hinkes (Ft. Lauderdale); Greenberg Traurig P.A., and John K. Londot and Michael H. Moody (Tallahassee), for Digital Currency & Ledger Defense Coalition, as amicus curiae.

Judges: Before EMAS, C.J., and SALTER, and LINDSEY, JJ.

Opinion by: LINDSEY

Opinion

[*1057] LINDSEY, J.

The State of Florida appeals the trial court's order granting Michell Espinoza's motion to dismiss the information charging him with three counts. In Count 1, the State charged Espinoza with unlawfully engaging in the business of a money transmitter and/or a payment instrument seller without being registered with the State of Florida in violation of *section 560.125, Florida Statutes* (2013), and, in Counts 2 and 3, with money laundering in violation of *section 896.101, Florida Statutes* (2014). The trial court erred in dismissing Count 1 because Espinoza acted as both a money transmitter and a payment instrument seller and, as such, was required to register with the State of Florida as a money services business. **[**2]** The trial court erred in dismissing Counts 2 and 3 on the basis that Espinoza lacked the requisite intent to be guilty of money laundering. Intent, or lack thereof, is a factual issue that should not have been resolved at the pleading stage. Accordingly, we reverse the trial court's dismissal order and remand for further proceedings consistent with this opinion.

[*1058] I. INTRODUCTION

The instant appeal concerns the application of Florida's statutes governing money services businesses and money laundering found in chapters 560 and 896 of the Florida Statutes, respectively, to alleged illicit transactions involving the virtual currency known as Bitcoin. At all times relevant, there was no mention of virtual currency nor of Bitcoin anywhere within the Florida Statutes. Both Espinoza and the State, as well as the amici, cite to various guidelines and regulations promulgated by the United States Department of the Treasury and other federal agencies to argue for or against the application of certain defined terms under *section 560.103, Florida Statutes* (2014), to virtual currency.

In 2014, the United States Department of the Treasury closely coordinated with the Financial Action Task Force ("FATF"), of which the United States is **[**3]** a leading member nation, to develop common definitions for virtual currency terms. The following definition for "virtual currency," which informs our decision, was proposed in a June 2014 report:

> Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor is a valid and legal offer of payment) in any jurisdiction.

See Financial Action Task Force, *Virtual Currencies: Key Definitions and Potential AML/CFT Risks* 4 (2014). The FATF Virtual Currencies Report identified and explained Bitcoin as follows:

> Bitcoin, launched in 2009, was the first decentralized convertible virtual currency, and the first cryptocurrency. Bitcoins are units of account composed of unique strings of numbers and letters that constitute units of the currency and have value only because individual users are willing to pay for them. Bitcoins are digitally traded between users with a high degree of anonymity and can be exchanged (purchased or cashed out) into US dollars and other fiat or virtual currencies. Anyone can download **[**4]** the free, open-source software from a website to send, receive, and store bitcoins and monitor Bitcoin transactions. Users can also obtain Bitcoin addresses, which function like accounts, at a Bitcoin exchanger or online wallet service. Transactions (fund flows) are publicly available in a shared transaction register and identified by the Bitcoin address, a string of letters and numbers that is not systematically linked to an individual. Bitcoin is capped at 21 million bitcoins (but each unit could be divided into smaller parts).

Id. This definition comports with that alleged in the arrest affidavit, which specifically stated that Bitcoin is:

> an electronic currency with no central authority and is not backed by any government. Bitcoins do not exist as discrete and unique single coins, but rather as balances of Bitcoins and Bitcoin portions. These balances exist as unique internet Bitcoin addresses contained in a public transportation ledger, called the "block chain." This ledger is maintained and verified by computers connected to the internet running the Bitcoin software. New Bitcoins are created at a predetermined rate and distributed to owners of those computers that are maintaining **[**5]** the ledger in a process referred to as "mining." The software is open source and can be installed by anyone who wishes to "mine" Bitcoins.
>
> . . . .
>
> To transfer some amount of Bitcoins, the spender directs that amount to be debited from the balance of his or her **[*1059]** unique internet Bitcoin address and deposited to the balance of the receiver's unique Bitcoin address. This is frequently done through the use of wallet applications. The transaction is then verified by the miners to confirm that the correct keys were used and then it is added to the block chain. This prevents double spending because once the balance moves to a new unique address, a different private key becomes associated with it.
>
> Bitcoins can be transferred both in person and over the internet and are readily convertible to most world currencies. Exchanges exist that allow people to buy or sell Bitcoins with or for local currencies including United States dollars.
>
> . . . Bitcoins can also be used to purchase a variety of goods and services directly. Restaurants, coffee shops and cosmetic surgery clinics in Miami-Dade County accept Bitcoins for goods and services.

During the time leading up to the State's filing of the information, **[**6]** Espinoza was operating an unlicensed cash-for-bitcoins business. Espinoza came to the attention of law enforcement by way of an advertisement he posted on the internet for his services under the name "Michelhack." During four separate meetings with an undercover law enforcement agent, Espinoza agreed to trade bitcoins in exchange for cash. During their initial encounter, the undercover agent made clear to Espinoza his desire to remain anonymous. Espinoza agreed to engage in these transactions even though the agent intimated to Espinoza that this cash was derived from engaging in illegal activity and that he was planning to use the bitcoins to engage in further illegal activity. Against this backdrop, we apply the Florida Statutes and rules of procedure as they existed at the time of the alleged conduct to the facts of this case to determine whether the trial court erred in dismissing the information filed against Espinoza.

II. FACTUAL BACKGROUND AND PROCEDURAL

HISTORY

On December 4, 2013, Detective Arias of the Miami Beach Police Department, working in conjunction with Special Agent Ponzi from the United States Secret Service's Miami Electronic Crimes Task Force ("Task Force"), accessed **[**7]** the Internet website *https://localbitcoins.com* seeking to purchase Bitcoin. This website is a directory of buyers and sellers of bitcoins and lists the traders closest to the user's location. Users may search for sellers who will sell bitcoins online or in person for United States currency. Detective Arias discovered multiple individuals advertising the sale of bitcoins for United States currency in the Miami-Dade area including a user utilizing the username Michelhack, who was later identified as Espinoza. Michelhack's posting stated:

> Contact Hours: anytime
> Meeting preferences: Starbucks, internet café, restaurant, mall or bank
> You will need to bring your wallet in your smartphone for the address the bitcoins will be deposited to
> If you want to have localbitcoins escrow service I will have to add 1% to the final price
> You will pay with cash in person
> Call or text (XXX) XXX-8649 for further information
> I will meet you in person for this transaction

Detective Arias, acting in an undercover capacity as an interested buyer, contacted the number listed in the advertisement for Michelhack via text message and requested a meeting in Miami Beach in order to **[*1060]** exchange U.S. currency (cash) for bitcoins. **[**8]** The next day, Detective Arias met Espinoza at Nespresso Café located at 1105 Lincoln Road, Miami Beach, FL (the "first transaction"). At this meeting, which was observed and recorded by undercover supporting agents, Detective Arias paid Espinoza $500 in cash and received 0.40322580 bitcoins valued at $416.12. Espinoza earned a fee or profit of $83.67.

During the course of the first transaction, Detective Arias made clear his desire to remain anonymous and implied to Espinoza that he was involved in illicit activity. He made clear to Espinoza that he "did not want to have to provide a name or personal identification information to a bank or financial institution in order to conduct financial transactions." While not expressly representing to Espinoza that the $500 was the proceeds of an illegal transaction, Detective Arias certainly implied as much in that he told Espinoza, "since Liberty Reserve was shut down, I need a new way to 'pay for things.'" Espinoza "[a]cknowledged that he was familiar with Liberty Reserve," which "was a digital currency that was used for illicit transactions." Detective Arias further explained that "the people I do business with don't take credit cards" to **[**9]** which Espinoza replied "obviously." Based on their conversation, Detective Arias believed Espinoza was under the impression Detective Arias was himself involved in illicit criminal activity. In addition, Espinoza explained to Detective Arias how he makes money trading Bitcoin.

On January 10, 2014, Detective Arias contacted Espinoza and arranged to meet at an ice cream store in Miami Beach (the "second transaction"). During the course of the second transaction, Espinoza told Detective Arias he had multiple "Bitcoin wallets" that he used to store and transfer bitcoins. Detective Arias told Espinoza that he was in the business of buying stolen credit card numbers from Russian sellers, and that he needed the bitcoins to pay for those stolen credit card numbers. Detective Arias also told Espinoza he would be willing to trade stolen credit card numbers for bitcoins at their next transaction. Espinoza replied that he would "think about it." Espinoza then transferred one bitcoin to Detective Arias' Bitcoin address in exchange for $1000. Special Agent Ponzi calculated Espinoza's fee or profit for this second transaction to be approximately $167.56.

On January 27, 2014, Detective Arias searched **[**10]** databases for the Florida Office of Financial Regulation ("OFR") and the United States Department of the Treasury Financial Crimes Enforcement Network ("FinCEN") to determine whether Espinoza was registered as a "money services business." The search revealed that Espinoza was not registered in either database. Three days later, Detective Arias contacted Espinoza to arrange another transaction (the "third transaction"). Communicating exclusively through text messages, Detective Arias inquired of Espinoza how quickly the transaction could be completed stating, "How fast will u (sic) send me the [bitcoin] cuz (sic) my Russian buddies won't send me my [stuff] until they get the coin." Detective Arias then deposited $500 into Espinoza's Citibank bank account and provided Espinoza with Detective Arias' Bitcoin address. Espinoza then electronically transferred 0.54347826 bitcoins to Detective Arias' Bitcoin address.

After Detective Arias received the Bitcoin transfer, he texted Espinoza asking if he was able to "step it up next week." Espinoza replied, "OK. Sure. Let me know how many." Thereafter, Detective Arias negotiated the

transfer of an additional $30,000 worth of bitcoins for a new **[**11]** batch of stolen credit card numbers Detective **[*1061]** Arias represented to Espinoza to have been acquired from a recent data breach (the "fourth transaction"). On February 6, 2014, Detective Arias met Espinoza in the lobby of a Miami Beach hotel with the dual intent of conducting the fourth transaction and effectuating Espinoza's arrest. Detective Arias led Espinoza upstairs to a hotel room, which the Task Force had previously wired for audio and video surveillance to observe and record the transaction.

However, when Detective Arias produced a "flash roll" purportedly containing the $30,000 in $100 bills, Espinoza grew concerned the funds were counterfeit - which they, in fact, were. Espinoza inspected the bills and suggested either depositing a portion of the $30,000 into a bank or for Detective Arias to return with smaller denominations in order to verify the authenticity of the flash roll. Espinoza remained ready and willing to consummate the entire transaction, his only hesitation being with regard to the authenticity of the $30,000 in cash. Shortly thereafter, Detective Arias gave a signal and Espinoza was taken into custody without incident.

Just over a month following the fourth transaction, **[**12]** the State charged Espinoza, via information, with one count of unlawfully engaging "in the business of money transmitter while not being registered as a money transmitter or authorized vendor" in violation of *sections 560.125(1)* and *(5)(a)*, Florida Statutes (2013)[1] (Count 1) and two counts of money laundering, in violation of *sections 896.101(3)* and *896.101(5)(a)* and *(b)*, Florida Statutes (2014) (Counts 2 and 3). At the hearing below, the State orally amended the information to include a payment instrument seller. Espinoza moved to dismiss the information pursuant to *Florida Rule of Criminal Procedure 3.190(c)(4)* contending that the undisputed facts do not establish a prima facie case of guilt against him.

More specifically, Espinoza argued as to Count 1 that Bitcoin does not qualify as "money transmitting" under *section 560.125*, because Bitcoin is not "money" under the statute. Espinoza argued as to Counts 2 and 3 that Bitcoin does not fall under the definition of a "financial transaction" or "monetary instrument" under Florida's Money Laundering Act. In response, the State filed a traverse as to Count 1 and moved to strike Espinoza's motion as to Counts 2 and 3. After a hearing, the trial court entered an order granting Espinoza's motion to dismiss the information in its entirety. The trial court **[**13]** agreed with Espinoza that neither Bitcoin nor his conduct with respect thereto fall within the ambit of chapter 560 requiring registration as a money services business. As to Counts 2 and 3, the trial court disagreed with Espinoza and found instead that the conduct at issue qualifies as a financial transaction but, nonetheless, granted the motion on the basis Espinoza lacked the requisite intent to be guilty of money laundering. This timely appeal followed.[2]

III. JURISDICTION

Pursuant to *section 924.07(1)(a), Florida Statutes* (2016), and *Florida Rule of Appellate Procedure 9.140(c)(1)(A)*, **[*1062]** the State is permitted to appeal the trial court's order dismissing the information. *See Fla. R. App. P. 9.140(c)(1)(A)* ("The state may appeal an order [ ] dismissing an indictment or information or any count thereof . . . ."; *see also § 924.07(1)(a)* (using identical language as that found in *Rule 9.140(c)(1)(A)* to grant the State a right to appeal a trial court's order dismissing an information).

The State's appeal is timely because the notice of appeal was filed within "15 days of rendition of the order to be reviewed." *Fla. R. App. P. 9.140(c)(3)*. Accordingly, this Court has jurisdiction to review the instant appeal under *Florida Rule of Appellate Procedure 9.140(c)(1)(A)*. *See State v. Jiborn, 135 So. 3d 364, 365 n.2 (Fla. 5th DCA 2014)* (explaining that "[a]ppellate review is authorized pursuant to *Rule 9.140(c)(1)(A)*" to consider the State's appeal of the trial court's order granting the motion to **[**14]** dismiss the amended information).

IV. STANDARD OF REVIEW

[1] After Espinoza's arrest, the Legislature amended *section 560.125(1)* to include the following language: "A deferred presentment transaction conducted by a person not authorized to conduct such transaction under this chapter is void, and the unauthorized person has no right to collect, receive, or retain any principal, interest, or charges relating to such transaction." *See § 560.125(1), Fla. Stat.* (2014). Accordingly, the State charged Espinoza under the prior version of the statute.

[2] Espinoza did not cross-appeal the trial court's finding that his conduct involving Detective Arias and Bitcoin constituted a financial transaction within the ambit of *Chapter 896, Florida's Money Laundering Act*.

The standard of review for a trial court's order based on statutory interpretation is *de novo. See Mendenhall v. State, 48 So. 3d 740, 747 (Fla. 2010)*. Further, the standard of review for a trial court's order regarding a *Rule 3.190(c)(4)* motion to dismiss is *de novo. See* Knipp v. State, 67 So. 3d 376, 378 (Fla. 4th DCA 2011) (citing State v. Santiago, 938 So. 2d 603, 605 (Fla. 4th DCA 2006)); *see also* State v. Walthour, 876 So. 2d 594, 595 (Fla. 5th DCA 2004) (citing Bell v. State, 835 So. 2d 392 (Fla. 2d DCA 2003)).

V. ANALYSIS

Pursuant to *Florida Rule of Criminal Procedure 3.190(c)(4)*, an individual is permitted to file a motion to dismiss an information or indictment on grounds that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." A *Rule 3.190(c)(4)* motion to dismiss in criminal cases is treated like a summary judgment motion in civil cases and should be sparingly granted. *See* State v. Nunez, 881 So. 2d 658, 660 (Fla. 3d DCA 2004) (citation omitted); *see also State v. Bonebright, 742 So. 2d 290, 291 (Fla. 1st DCA 1998)* (explaining that a *Rule 3.190(c)(4)* motion to dismiss is "analogous to a motion for summary judgment in a civil case" and that "[b]oth should be granted sparingly" (citation omitted)).

A. Unlicensed Money Services Business (Count 1)

The issue for our determination under Count 1 is whether, based on the undisputed facts, Espinoza was acting as a payment instrument seller or engaging in the business of a money transmitter, either of which require registration as a money services business under Florida **[**15]** law. Given the plain language of the Florida statutes governing money service businesses and the nature of Bitcoin and how it functions, Espinoza was acting as both. *Section 560.125, Florida Statutes* (2013), provides, in pertinent part, as follows:

> (1) A person may not engage in the *business of a money services business* or deferred presentment provider in this state unless the person is licensed or exempted from licensure under this chapter.
> . . . .
> (5) A person who violates this section, if the violation involves:
> (a) Currency or payment instruments exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[*1063] (emphasis added). A "money services business" is defined as "any person . . . who acts as a *payment instrument seller*, foreign currency exchanger, check casher, or *money transmitter*." § 560.103(22), Fla. Stat. (2014) (emphasis added). The Florida Legislature has defined a "payment instrument seller" in this section as "a corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which sells a payment instrument." § 560.103(30). Moreover, a "payment instrument" is "a check, draft, warrant, **[**16]** money order, travelers check, electronic instrument, *or other instrument, payment of money, or monetary value whether or not negotiable*." § 560.103(29) (emphasis added). "Monetary value" means *a medium of exchange, whether or not redeemable in currency*. § 560.103(21) (emphasis added). The Legislature has further defined a "money transmitter" as:

> [A] corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which receives *currency, monetary value, or payment instruments* for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country.

§ 560.103(23) (emphasis added).

Espinoza does not dispute that he was not licensed to act as a money services business in the State of Florida. Rather, Espinoza contends his transactions with Detective Arias do not qualify as such on the grounds that (1) Bitcoin is not "money" or "monetary value" for purposes of the statutes governing money services businesses; (2) "money," "monetary value" and "funds" under chapter 560 **[**17]** should be interpreted to mean "currency" and neither Bitcoin nor bitcoins are currency; (3) because Espinoza was merely a seller of bitcoins, his conduct does not meet the statutory definition of being a money transmitter or payment instrument seller; (4) *section 560.125* requires the transmission of money to a third-party or location and that did not occur here; and, (5) applying *section 560.125* to Espinoza's conduct would violate his due process rights. These arguments ignore the plain meaning of the words used in the statutes. Inasmuch, Espinoza urges this court to apply

the statutes as he wishes they were written instead of how they actually are written. We decline to do so.

Espinoza is charged in Count 1 with engaging "in the business of money transmitter while not being registered as a money transmitter" in violation of section 560.125 governing money services businesses. Pursuant to section 560.103(22), a "'money services business' means any person . . . who acts as a payment instrument seller . . . ." We need not look beyond the plain and unambiguous language of section 560.103 to conclude Espinoza acted as a "payment instrument seller" when he transferred bitcoins from one of his online bitcoin wallets to Detective Arias' online bitcoin address in exchange **[**18]** for cash in U.S. dollars.

There is no dispute that Bitcoin does not expressly fall under the definition of "currency" found in section 560.103(11).[3] However, **[*1064]** Bitcoin *does* fall under the definition of a "payment instrument." *See* § 560.103(29). Included in the definition of a payment instrument is "monetary value," which is defined as "a medium of exchange, whether or not redeemable in currency." §§ 560.103 (21), (29). According to the arrest affidavit and the FATF Virtual Currency Report, referenced above, bitcoins are redeemable for currency. Espinoza does not argue to the contrary. Similarly, Bitcoin and bitcoins function as a "medium of exchange." *See* § 560.103(21).

The transactions at issue illustrate this point. Espinoza's own expert testified there were several restaurants in the Miami area that accept **[**19]** bitcoins as a form of payment, as well as a prominent Miami plastic surgeon, and conceded he was paid in bitcoins for his expert services in this case. Further, Espinoza was not merely selling his own personal bitcoins, he was marketing a business on *https://localbitcoins.com*. The service being marketed was the exchange of cash for bitcoins. Espinoza's posting expressly stated: "You will pay with cash in person" and "You will need to bring your wallet in your smartphone for the address the bitcoins will be deposited to."

Apart and aside from the plain language of the statute, the Florida OFR, the Florida state agency charged with regulation under chapter 560, has concluded a business offering a service "where a Coinbase user sends fiat currency to another Coinbase user to buy bitcoins" was subject to regulation thereunder. *See In re Coinbase, Inc.*, Case No. 62670 (Fla. OFR November 13, 2015) (available from the agency clerk); *see also* § 560.105, Fla. Stat. (2014) (empowering the Office of Financial Regulation to regulate money services businesses). Like the Coinbase user, Detective Arias paid cash to Espinoza to buy bitcoins. Like the Florida OFR with respect to the Coinbase user, we conclude Espinoza was **[**20]** required to register under chapter 560.

In addition to claiming he is not a payment instrument seller, Espinoza asserts Bitcoin does not qualify as "money" or "monetary value" for purposes of being a "money transmitter." He argues the Florida Legislature could not have contemplated the application of section 560.125 to virtual currencies when the statute was enacted. As such, Bitcoin cannot be considered currency because it is not legal tender on the basis that the terms "money" and "monetary value" are considered synonymous with the term "currency." They are not.

However, we need not consider legislative intent because section 560.103 is clear and unambiguous. Any assertion that "monetary value" is synonymous with "currency" overlooks the express language contained in section 560.103(21) which states that monetary value is "a medium of exchange, whether or not redeemable in currency." Espinoza's interpretation overlooks the "statutory tenet that courts should avoid readings that would render part of a statute meaningless." Koile v. State, 934 So. 2d 1226, 1233 (Fla. 2006) (citing Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992)). In addition, Espinoza's interpretation, which we decline to adopt, compelling that "monetary value" be synonymous with "currency" would render section 560.103(21) meaningless.

As a further grounds for dismissal, Espinoza **[**21]** argued, and the trial court concluded, that he did not qualify as a "money transmitter" because he did not receive **[*1065]** currency, monetary value, or payment instruments for the purpose of transmitting the same to a third party. However, nothing contained within the definition of "money transmitter" under section 560.103(23) includes, explicitly or impliedly, the words

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[3] Section 560.103(11) defines "currency" as:

> [T]he coin and paper money of the United States or of any other country which is designated as legal tender and which circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes United States silver certificates, United States notes, and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

"to a third party." The trial court reasoned that a "money transmitter" would necessarily operate like a middleman in a financial transaction, much like how Western Union accepts money from person A, and at the direction of person A, transmits it to person or entity B.

Chapter 560 defines a "money services business" as "any person" who "acts as a . . . money transmitter." § 560.103(22). "Money transmitter" is then defined as an entity "which receives currency, monetary value, or payment instruments for the purpose of *transmitting the same by any means*, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services." § 560.103(23) (emphasis added). The statute's plain language clearly contains no third party transmission requirement in order for an individual's conduct to fall under the "money transmitter" definition. **[**22]** As such, we decline to add any third party or "middleman" requirement to the money transmitter definition found in section 560.103(23). *See* Seagrave v. State, 802 So. 2d 281, 287 (Fla. 2001) ("[I]t is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'" (quoting Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999))).

In contrast, the federal definition of "money transmitter" *does* include a third party transmission requirement. *See* 31 C.F.R. § 1010.100(ff)(5)(i)(A) (2014) (outlining that a "money transmitter" under federal law means a person engaged in the "acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to *another location or person* by any means" (emphasis added)). Thus, if our Legislature had intended the unambiguous language of section 560.103(23) to include the limiting words "to a third party," it would have included them. *See* State v. Debaun, 129 So. 3d 1089, 1095 (Fla. 3d DCA 2013) ("[C]ourts may not invade the province of the legislature and add words which change the plain meaning of the statute." (citation omitted)).

Here, it is undisputed that Espinoza received currency (cash in U.S. dollars) for the purpose of transmitting monetary value or payment instruments (Bitcoin, which **[**23]** qualifies as both) by means of the Internet or other businesses that facilitate such transfer. However, the trial court imposed a bilateral limitation on the statutory definition of "money transmitter" not present in the statute. Under its reading, the phrase "transmitting the same by any means" would require Espinoza to both receive and transmit the same form of currency, monetary value or payment instrument for a transaction to fall within the ambit of section 560.103(23). In other words, if Espinoza received currency, he would have to transmit currency; if he received monetary value, he would have to transmit monetary value; and if he received a payment instrument, he would have to transmit a payment instrument. We disagree with this limitation.

The phrase "the same" modifies the list of payment methods or forms of value that includes "currency, monetary value, or payment instruments." The use of the word "or" is in the disjunctive and, as such, any of the three qualifies interchangeably on either side of the transaction. To hold otherwise, which would necessitate that the types of traditionally recognized money transmitting businesses, **[*1066]** such as the trial court's Western Union example, receive only **[**24]** cash in order to transfer cash, would insert an additional requirement into the statute that is not presently there. Inasmuch, the ability of a customer to use a credit card, personal check, or cashier's check as a means of payment for the transfer of cash using the services of a Western Union-type money transmitting business would be impermissible under the trial court's reading of section 560.103(23). The difference between the trial court's Western Union example and the conduct at issue herein is that traditional Western Union-type money services businesses are registered as such with the Florida OFR. Espinoza's bitcoins-for-cash business is not.

In United States v. Murgio, 209 F. Supp. 3d 698, 704-05 (S.D.N.Y. 2016), a case involving the Florida statutes applicable here, the United States Government alleged that the defendant, Murgio, operated and conspired to operate Coin.mx, a Bitcoin exchange, as an unlicensed money transmitting business in violation of federal and Florida law. The Government's allegations stemmed from an alleged scheme to bribe the chairman of the board of a federal credit union in order to hide the illegal nature of Coin.mx. Id. at 705. The Government alleged that "Murgio and his co-conspirators attempted to shield the true nature of his Bitcoin exchange **[**25]** business by operating through several front companies, including one known as 'Collectables Club,' to convince financial institutions that Coin.mx was just a members-only association of individuals interested in collectable items, like stamps and sports memorabilia." *Id.*

However, the district court rejected Murgio's argument that bitcoins are not covered by Florida's definition of "money transmitter" on the basis that they are not

"currency, monetary value, or payment instruments" under Florida law. *Id. at 712*. In so doing, it reasoned that because bitcoins function as a "medium of exchange, whether or not redeemable in currency," they fall within Florida's express definitions of "monetary value" and "payment instruments." *Id.* (explaining that "[b]ecause bitcoins are 'monetary value,' they are also 'payment instruments'").

The district court further rejected Murgio's invocation of the rule of lenity, as do we, as a valid basis to decline application of chapter 560's definition of "monetary value" or "payment instrument" to bitcoins "because there is no statutory ambiguity here." *Id.* It reasoned that "the rule of lenity is particularly inapt in the context of Chapter 560, given that Bitcoin's raison **[**26]** d'être is to serve as a form of payment." *Murgio, 209 F. Supp. 3d at 712 (*citing *Getting started with Bitcoin*, Bitcoin, https://bitcoin.org/en/getting-started (last visited Sept. 16, 2016)).

We agree with the district court's conclusion in *Murgio* that "there is no plausible interpretation of 'monetary value' or 'payment instruments,' as those terms are used in Chapter 560 that would place bitcoins outside of the statute's ambit." *Id. at 713*.[4] *See also United States v. Faiella, 39 F. Supp. 3d 544, 545 **[*1067]** (S.D.N.Y. 2014)* (finding that Bitcoin clearly qualifies as "money" or "funds" for purposes of the federal money transmitter statute because "Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions" (citing *SEC v. Shavers, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, 2013 WL 4028182, at *2 (E.D.Tex. Aug. 6, 2013)))*.

The defendant in *Faiella* was charged, in connection with the operation of an underground market in Bitcoin, with one count of operating an unlicensed money transmitting business in violation of *18 U.S.C. § 1960 (2012)*. *Faiella, 39 F. Supp. 3d at 545*. The defendant argued that Bitcoin did not qualify as "money" under federal law. *Id. at 545*. The district court rejected that assertion and found that Bitcoin qualifies as "money" where the plain meaning of that term is "something generally accepted as **[**27]** a medium of exchange, a measure of value, or a means of payment." *Id.* (quoting *Money*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2009)). Similarly, because Bitcoin unambiguously serves as a "medium of exchange," it necessarily qualifies as "monetary value" for purposes of *sections 560.125(1)* and *560.125(5)(a)*.

In another recent case, the United States Supreme Court examined the definition of "money remuneration" in *Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 201 L. Ed. 2d 490 (2018)*. Specifically, *Wisconsin Cent. Ltd*. concerned whether stock options qualified as "money remuneration" under the *Railroad Retirement Tax Act of 1937*. *Id. at 2070*. Looking to the ordinary meaning of the words at the time Congress enacted the statute, the United States Supreme Court ultimately concluded that stock options did not fall under the definition of "money remuneration." *Id. at 2074-75* ("The problem with the government's and the dissent's position today is not that stock and stock options weren't common in 1937, but that they were not then-and are not now-recognized as mediums of exchange."). However, the Court recognized that, although a statute's meaning is fixed at the time of enactment, "new applications may arise in light of changes in the world." *Id. at 2074*. Thus, the Court further held that "'money,' as used in this **[**28]** statute, must always mean a 'medium of exchange.' But what *qualifies* as a 'medium of exchange' may depend on the facts of the day." *Id.* Although Bitcoin did not exist at the time the registration requirements of chapter 560 were enacted, Bitcoin undoubtedly qualifies as a "medium of exchange" and Espinoza's bitcoins-for-cash business requires him to register as a payment instrument seller and money transmitter under chapter 560.

Finally, Espinoza argues that his conduct is even farther removed from what could be contemplated by the Florida money services statutes than the final order entered in *In re Petition for Declaratory Statement Moon, Inc.*, Case No. 59166 (Fla. OFR Apr. 6, 2015) (available from agency clerk). This is not the case. Moon, Inc., sought an opinion from the Florida OFR whether its business would require licensing under Florida law. *Id.* Moon's business plan contemplated the establishment of a Bitcoin kiosk utilizing an existing

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[4] *Murgio* was decided after the trial court rendered its decision and during the pendency of this appeal and, as a result, the *Murgio* court was able to-and did-acknowledge and discuss the trial court's opinion. *209 F. Supp. 3d at 713*. It noted the trial court limited its discussion to "currency" and "payment instruments" and "did not contemplate the possibility that bitcoins qualify as "monetary value." *Id.* The district court further noted some factual differences between the conduct alleged in *Murgio* and in the instant case. *Id.* However, we do not find those differences dispositive given the standard applicable to the trial court's-and our-review of a ***Rule 3.190(c)(4)*** motion under the Florida Rules of Criminal Procedure. *Id. at 714*.

Florida licensed money services business that would process Bitcoin transactions. *Id.* A Moon customer would give U.S. dollars to the money services business in exchange for a PIN (personal identification number). *Id.* The customer would enter **[**29]** the PIN into one of Moon's kiosks. The kiosk would then initiate a transfer of bitcoins from an address owned by Moon *Id.* Once the PIN is redeemed, the money services business would then pay Moon. *Id.*

In opining that Moon's proposed business activities did not fall within Florida's **[*1068]** money transmitting licensing statutes, the Florida OFR found that Moon was not receiving currency, monetary value, or payment instruments for the purpose of transmitting same. *In re Petition for Declaratory Statement Moon, Inc*., Case No. 59166 (Fla. OFR Apr. 6, 2015) (available from agency clerk). Rather, Moon merely facilitated the transfer of bitcoins through the use of a licensed money services business. *Id.* Here, no licensed money services business was utilized in the exchange of U.S. dollars for bitcoins that occurred between Espinoza and Detective Arias. As such, we find Moon's activities patently different from those engaged in by Espinoza.

First, Moon's customers' initial contact and deposit of U.S. dollars were with a licensed money services business. Second, the PIN provided by the licensed money services business to Moon's customers provided a mechanism by which the exchange of U.S. dollars for **[**30]** bitcoins could be identifiable and traceable to a specific customer and transaction, a scenario far different from the anonymity provided by the transactions conducted between Detective Arias and Espinoza.[5]

[31] B. Money Laundering (Counts 2 and 3)**

"As this court on more than one occasion has stated, the purpose of a *Rule 3.190(c)(4)* motion is to test the legal sufficiency of the charges brought by the State, it is not to require the State to demonstrate that it will secure a conviction at trial." *State v. Yaqubie, 51 So. 3d 474, 479 (Fla. 3d DCA 2010)*. Accordingly, this Court has consistently held that a *Rule 3.190(c)(4)* "motion to dismiss should be granted only where the most favorable construction to the State would not establish a prima facie case of guilt. And if there is any evidence upon which a reasonable jury could find guilt, such a motion must be denied." *State v. Terma, 997 So. 2d 1174, 1177 (Fla. 3d DCA 2008)* (quoting *State v. McQuay, 403 So. 2d 566, 567-68 (Fla. 3d DCA 1981))*.

Further, when considering a motion to dismiss pursuant to *Rule 3.190(c)(4)*, the trial court may not make factual determinations, weigh conflicting evidence, or consider the credibility of witnesses. See *State v. Ortiz, 766 So. 2d 1137, 1142* (citing *State v. Fetherolf, 388 So. 2d 38, 39 (Fla. 5th DCA 1980))*. "Even if the trial court doubts the sufficiency of the state's evidence, it cannot grant a motion to dismiss criminal charges simply because it concludes that the case will not survive a motion for a judgment of acquittal." *Id.* (quoting *State v. Paleveda, 745 So. 2d 1026, 1027 (Fla. 2d DCA 1999))*.

On a *Rule 3.190(c)(4)* motion, the State is "entitled to the most favorable **[*1069]** construction of the evidence with all inferences being resolved against the defendant." *Ortiz, 766 So. 2d at 1142*. *Rule 3.190(c)(4)* levies no obligation on the **[**32]** State to pre-try its case; rather, the State is only required to provide sufficient facts to demonstrate that a reasonable jury could rule in its favor. *See State v. Arnal, 941 So. 2d 556, 558 (Fla. 3d DCA 2006)*. The State, in order to defeat a motion to dismiss, "need only specifically dispute a material fact alleged by the defendant or add additional material facts that meet the minimal requirement of a prima facie case." *State v. Kalogeropolous, 758 So. 2d 110, 112 (Fla. 2000)*. Thus, denial of the motion to dismiss is mandatory so long as a material fact is in dispute. *Id.* (citing *Boler v. State, 678 So. 2d 319, 323 (Fla. 1996))*.

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[5] The FATF Virtual Currency Report notes that:

> [d]ecentralised systems are particularly vulnerable to anonymity risks. For example, by design, Bitcoin addresses, which function as accounts, have no names or other customer identification attached, and the system has no central server or service provider. The Bitcoin protocol does not require or provide identification and verification of participants or generate historical records of transactions that are necessarily associated with real world identity. There is no central oversight body and no AML [anti-money laundering] software currently available to monitor and identify suspicious transaction patterns. Law enforcement cannot target one central location or entity (administrator) for investigative or asset seizure purposes (although authorities can target individual exchangers for client information that the exchanger may collect). It thus offers a level of potential anonymity impossible with traditional credit and debit cards or older online payment systems, such as PayPal."

FATF, *supra*, at 9.

The State charged Espinoza with two counts of money laundering, in violation of sections 896.101(5)(b) and (5)(a), Florida Statutes (2014).[6] Counts 2 and 3 state:

> COUNT 2
>
> And the aforesaid Assistant State Attorney, under oath, further information makes MICHELL ABNER ESPINOZA, on or about February 06, 2014, in the County and State aforesaid, did unlawfully conduct or attempt to conduct a financial transaction involving property or proceeds which an investigative or law enforcement officer, or someone acting under such officer's direction, represented as being derived from, or as being used to conduct or facilitate, specified unlawful activity, to wit: identity theft and/or credit card theft and/or violation of Chapter 817, when a person's conduct **[**33]** or attempted conduct was undertaken with the intent to promote the carrying on of said specified unlawful activity and/or avoid a transaction reporting requirement under state law, said financial transaction(s) totaling or exceeding $20,000 but less than $100,000 in the 12-month period ending February 6, 2014, in violation of s. 896.101(3) and s. 896.101(5)(b), Fla. Stat., contrary to the form of the Statute **[*1070]** in such cases made and provided, and against the peace and dignity of the State of Florida.
>
> COUNT 3
>
> And the aforesaid Assistant State Attorney, under oath, further information makes MICHELL ABNER ESPINOZA, on or between December 05, 2013 and February 01, 2014, in the County and State aforesaid, did unlawfully, conduct or attempt to conduct a financial transaction involving property or proceeds which an investigative or law enforcement officer, or someone acting under such officer's direction, represented as being derived from, or as being used to conduct or facilitate, specified unlawful activity, to wit: identity theft and/or credit card theft and/or violation of Chapter 817, when a person's conduct or attempted conduct was undertaken with the intent to promote the carrying on of said specified unlawful activity **[**34]** and/or avoid a transaction reporting requirement under state law, said financial transaction(s) exceeding $300 but less than $20,000 in the 12 month period ending February 1, 2014, in violation of s. 896.101(3) and s. 896.101(5)(a), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

In response, Espinoza filed a sworn motion to dismiss wherein he incorporated his prior arguments as to Count 1 and further averred that the sale of bitcoins does not fall within the statutory definitions of "financial transactions" or "monetary instruments" under section 896.101. As such, Espinoza argued, his sale of bitcoins to Detective Arias does not constitute money laundering. The State moved to strike on the basis that a motion to dismiss a charge of money laundering is improper because money laundering requires "intent."

Section 896.101(3)(c) provides in part:

> (3) It is unlawful for a person:
> . . . .
>
> (c) To conduct or attempt to conduct a financial transaction which involves property or proceeds which an investigative or law enforcement officer, or someone acting under such officer's direction, represents as being derived from, or as being used to conduct or facilitate, specified **[**35]** unlawful activity, *when the person's conduct or attempted conduct is undertaken with the intent*:
> 1. To promote the carrying on of specified unlawful activity;

(emphasis added). Clearly, the statute requires intent. Irrespective thereof, the trial court determined Espinoza lacked the necessary intent because, in its view, there was "no evidence that [Espinoza] did anything wrong, other than sell his Bitcoin to an investigator who wanted to make a case."[7] However, "[k]nowledge is an ultimate

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[6] The definition of "monetary instruments," which itself is used in the definition of "financial transaction," was amended by the Legislature to include the term "virtual currency" and became effective on July 1, 2017. *See* § 896.101(2)(f), Fla. Stat. (2017). However, the Legislature's subsequent amendment to this statute is irrelevant to our analysis as we are only considering the prior version that was in effect at the time of the transactions at issue here.

[7] At the May 27, 2016 hearing, the testimony of Espinoza's own expert undercut defense counsel's reliance on FinCEN guidelines promulgated on March 18, 2013, when the expert testified that the FinCEN guidance meant "if somebody wanted to buy and sell Bitcoins as a business with the public that the person should register at the federal level as a money

question of fact and thus not subject to a motion to dismiss." *See* Graves v. State, 590 So. 2d 1007, 1007 (Fla. 3d DCA 1991) (citations omitted); *see also* Yaqubie, 51 So. 3d at 480 (explaining that intent and state of mind "is usually inferred from the circumstances surrounding the defendant's actions. Since the trier of fact has the opportunity to weigh the evidence and judge the credibility of the witnesses, it should determine intent or state of mind" (quoting State v. Rogers, 386 So.2d 278, 280 (Fla. 2d DCA 1980))). Accordingly, in dismissing the information, the trial court improperly decided a factual issue regarding Counts 2 and 3 in concluding Espinoza lacked the requisite intent under section 896.101(3)(c). *See* State v. Book, 523 So. 2d 636, 638 (Fla. 3d DCA 1988) (holding that "intent or state of mind is not an issue to be decided on a motion to dismiss under *Rule 3.190(c)(4)*").

Further, the trial court made clear **[**36]** in its dismissal order that, among numerous other materials, it reviewed the arrest affidavit and depositions of Detective Arias in order to decide Espinoza's motion to dismiss. Detective Arias repeatedly told Espinoza about the illicit nature of his own activities, which formed the basis for his desire to trade the ill-gotten cash for bitcoins. This sworn testimony should have prompted the trial court to deny the motion to dismiss as to Counts 2 and 3. *See* State v. Gutierrez, 649 So. 2d 926, 928 (Fla. 3d DCA 1995) ("On a motion to dismiss, if the affidavits and depositions filed in support of or in opposition to the motion create material disputed facts, it is improper for the trial court to determine factual issues and consider the weight of conflicting **[*1071]** evidence or the credibility of witnesses." (citations omitted)).

Finally, while questioning-but stopping short of declaring unconstitutional on the basis of vagueness and/or overbreadth-Florida's money laundering statutes, the trial court concluded the State's case would not survive a motion for judgment of acquittal when it determined that there was "insufficient evidence as a matter of law that [Espinoza] committed any of the crimes as charged."[8] However, the trial court is not permitted **[**37]** to grant a motion to dismiss based on serious doubts as to whether certain charges can survive a motion for judgment of acquittal. *See* Ortiz, 766 So. 2d at 1142 ("Even if the trial court doubts the sufficiency of the state's evidence, it cannot grant a motion to dismiss criminal charges simply because it concludes that the case will not survive a motion for a judgment of acquittal." (quoting Paleveda, 745 So. 2d at 1027)).

VI. CONCLUSION

In conclusion, based on the foregoing, we reverse the trial court's order granting Espinoza's motion to dismiss the information and remand for further proceedings consistent with this opinion.

Reversed and remanded with instructions.

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transmitter."

[8] *See* Williams v. State, 154 So. 3d 426, 428 (Fla. 4th DCA 2014) ("A motion for judgment of acquittal should be granted only when it is apparent that no legally sufficient evidence has been submitted under which a jury could find a verdict of guilty.").

State v. Worsham

Court of Appeal of Florida, Fourth District

March 29, 2017, Decided

No. 4D15-2733

Reporter
227 So. 3d 602 *; 2017 Fla. App. LEXIS 4162 **; 42 Fla. L. Weekly D 711; 2017 WL 1175880

STATE OF FLORIDA, Appellant, v. CHARLES WILEY WORSHAM, JR., Appellee.

Subsequent History: US Supreme Court certiorari denied by *Fla. v. Worsham, 199 L. Ed. 2d 125, 2017 U.S. LEXIS 5793 (U.S., Oct. 2, 2017)*

Prior History: **[**1]** Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack Schramm Cox, Judge; L.T. Case No. 2013CF012609AMB.

Counsel: Pamela Jo Bondi, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellant.

Jack A. Fleischman of Fleischman & Fleischman, P.A., West Palm Beach, for appellee.

Judges: GROSS, J. KLINGENSMITH, J., concurs. FORST, J., dissents with opinion.

Opinion by: GROSS

Opinion

[*603] GROSS, J.

The state challenges an order granting appellee Charles Worsham's motion to suppress. Without a warrant, the police downloaded data from the "event data recorder" or "black box" located in Worsham's impounded vehicle. We affirm, concluding there is a reasonable expectation of privacy in the information retained by an event data recorder and downloading that information without a warrant from an impounded car in the absence of exigent circumstances violated the *Fourth Amendment*.

Worsham was the driver of a vehicle involved in a high speed accident that killed his passenger. The vehicle was impounded. Twelve days after the crash, on October 18, 2013, law enforcement downloaded the information retained on the vehicle's event data recorder. The police did **[**2]** not apply for a warrant until October 22, 2013. The warrant application was denied because the desired search had already occurred.

Worsham was later arrested and charged with DUI manslaughter and vehicular homicide. He moved to suppress the downloaded information, arguing the police could not access this data without first obtaining his consent or a search warrant. The state defended the search on the sole ground that Worsham had no privacy interest in the downloaded information, so that no *Fourth Amendment* search occurred.[1] The trial court granted Worsham's motion.

"A motion to suppress evidence generally involves a mixed question of fact and law. The trial court's factual

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[1] The state raises inevitable discovery and good faith in its brief. We do not reach these issues because they were not preserved in the circuit court. *Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005)*.

determinations will not be disturbed if they are supported by competent substantial evidence, while the constitutional issues are reviewed de novo." State v. K.C., 207 So. 3d 951, 953 (Fla. 4th DCA 2016) (internal citation omitted). An appellate court is bound by the trial court's findings of fact unless they are clearly erroneous. *Id.* The burden is on the defendant to show the search was invalid, "[h]owever, a warrantless search constitutes a prima facie showing which shifts to the State the burden of showing the search's legality." *Id.* (internal citation omitted).

In Florida, citizens are guaranteed **[**3]** the right to be free from unreasonable searches and seizures by the Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights. Smallwood v. State, 113 So. 3d 724, 730 (Fla. 2013). "The most basic constitutional rule" in the area of Fourth Amendment searches

> **[*604]** is that "*searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions*." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "*[T]he burden is on those seeking the exemption to show the need for it*."

Id. at 729 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." State v. Lampley, 817 So. 2d 989, 990 (Fla. 4th DCA 2002) (quoting Kyllo v. United States, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)). This principle has been applied "to hold that a Fourth Amendment search does *not* occur . . . unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" Lampley, 817 So. 2d at 990-91 (quoting Kyllo, 533 U.S. at 33)).

Katz v. United States explained "the Fourth Amendment protects people, not places," so "[w]hat a person knowingly exposes to the public, even in his own home or **[**4]** office, is not a subject of Fourth Amendment protection." 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). One example is a car's exterior, which "is thrust into the public eye, and thus to examine it does not constitute a 'search.'" New York v. Class, 475 U.S. 106, 114, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986); *see also* Cardwell v. Lewis, 417 U.S. 583, 592, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (permitting warrantless search of an automobile's exterior).

Nevertheless, information someone seeks to "preserve as private," even where that information is accessible to the public, "may be constitutionally protected." Katz, 389 U.S. at 351. This is why "a car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police." Class, 475 U.S. at 114-15; *see also* United States v. Ortiz, 422 U.S. 891, 896, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) ("A search, even of an automobile, is a substantial invasion of privacy.").

A car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant to search these devices. *See* Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (requiring warrant to search cell phone seized incident to arrest); Smallwood, 113 So. 3d 724 (requiring warrant to search cell phone in search incident to arrest); State v. K.C., 207 So. 3d 951 (requiring warrant to search an "abandoned" but locked cell phone).

Noting that cell phones can access or contain "[t]he most private and secret **[**5]** personal information, Smallwood, 113 So. 3d at 732, the Florida Supreme Court has distinguished these computer-like electronic storage devices from other inanimate objects:

> [A]nalogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. . . . [T]here is a far greater potential for the "inter-mingling" **[*605]** of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.*Id.* (quoting United States v. Lucas, 640 F.3d 168, 178 (6th Cir. 2011)). Because of the "very personal and vast nature of the information" they contain, cell phones are "materially distinguishable from the static, limited-capacity cigarette packet in

Robinson."[2] Smallwood, 113 So. 3d at 732. "[T]he search of a static, non-interactive container, cannot be deemed analogous to the search of a modern electronic device cell phone." *Id.* The *Smallwood* court made clear that the opinion was "narrowly limited to the legal question and facts with which [it] was presented." Id. at 741. Nonetheless, the court reiterated its desire to protect Fourth Amendment precedent "by ensuring that the exceptions to the warrant requirement remain 'jealously and carefully drawn.'" Id. at 740.

The United States Supreme Court drew a similar distinction **[**6]** between a cell phone and other tangible objects in *Riley v. California*. The Court held that the search incident to arrest exception did not apply because neither rationale—the interest in protecting officer safety or preventing destruction of evidence—justified the warrantless search of cell phone data. Riley, 134 S. Ct. at 2486-88. "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers . . . ." Id. at 2489.

Searches of these "minicomputers," with their "immense storage capacity," are far more intrusive than searches prior to the "digital age," which were "limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Id.* The capacity of these devices "allows even just one type of information to convey far more than previously possible." *Id.* The Court concluded, "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." Id. at 2495.

It is an issue of first impression in Florida whether a warrant **[**7]** is required to search an impounded vehicle's electronic data recorder or black box.[3] An event data recorder is a device installed in a vehicle to record "crash data" or technical vehicle and occupant information for a period of time before, during, and after a crash. NHTSA, Event Data Recorders, 49 C.F.R. § 563.5 (2015). Approximately 96% of cars manufactured since 2013 are equipped with event data recorders. *Black box 101: Understanding event data recorders*, CONSUMER REPORTS, http://www.consumerreports.org/cro/2012/10/black-box-101-understanding-event-data-recorders/index.htm , (published Jan. 2014).

Most of these devices are programmed either to activate during an event or record information in a continuous loop, writing over data again and again until the vehicle is in a collision. Michelle V. Rafter, *Decoding What's in Your Car's Black* Box, **[*606]** EDMUNDS, https://www.edmunds.com/car-technology/car-black-box-recorders-capture-crash-data.html (updated July 22, 2014). However, if triggered, the device can record multiple events. 49 C.F.R. § 563.9.

The National Highway Traffic Safety Administration has standardized the minimum requirements for electronic data recorders, mandating that the devices record 15 specific data inputs, including braking, stability control engagement, ignition cycle, engine rpm, steering, **[**8]** and the severity and duration of a crash. 49 C.F.R. § 563.7. Along with these required data inputs, the devices may record additional information like location or cruise control status and some devices can even perform diagnostic examinations to determine whether the vehicle's systems are operating properly. *See Decoding 'The Black Box' with Expert Advice*, AMERICAN BAR ASSOC. GP SOLO LAW TRENDS & NEWS, http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/decodingblackbox.html (May 2005); *Vehicular Data Recorder Download, Collection, and Analysis*, COLLISION RESEARCH AND ANALYSIS INC., http://collisionresearch.com/services/event-data-recorder-0 .

The information contained in a vehicle's black box is fairly difficult to obtain. The data retrieval kit necessary to extract the information is expensive and each manufacturer's data recorder requires a different type of cable to connect with the diagnostic port. Rafter, *supra*. The downloaded data must then be interpreted by a

[2] United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (permitting the warrantless search of an arrestee's person incident to arrest if the officer had probable cause for the arrest).

[3] As of this writing, 17 states have laws addressing event data recorders, which provide under what circumstances the data may be downloaded. *Privacy of Data From Event Data Recorders: State Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx (Jan. 4, 2016). Florida does not have similar legislation.

specialist with extensive training. *Id.*; *see also* Melissa Massheder Torres, *The Automotive Black Box*, 55 REV. DER. P.R. 191, 192 (2015).

The record reflects that the black box in Worsham's vehicle recorded speed and braking data, the car's change in velocity, steering input, yaw rate, angular rate, safety belt status, system voltage, and airbag warning lamp information.

Extracting and interpreting the information **[**9]** from a car's black box is not like putting a car on a lift and examining the brakes or tires. Because the recorded data is not exposed to the public, and because the stored data is so difficult to extract and interpret, we hold there is a reasonable expectation of privacy in that information, protected by the *Fourth Amendment*, which required law enforcement in the absence of exigent circumstances to obtain a warrant before extracting the information from an impounded vehicle.

Although electronic data recorders do not yet store the same quantity of information as a cell phone, nor is it of the same personal nature, the rationale for requiring a warrant to search a cell phone is informative in determining whether a warrant is necessary to search an immobilized vehicle's data recorder. These recorders document more than what is voluntarily conveyed to the public and the information is inherently different from the tangible "mechanical" parts of a vehicle. Just as cell phones evolved to contain more and more personal information, as the electronic systems in cars have gotten more complex, the data recorders are able to record more information.[4] The difficulty in extracting such information buttresses an **[**10]** expectation of privacy.

[*607] Recently enacted federal legislation enhances the notion that there is an expectation of privacy in information contained in an automobile data recorder. The Driver Privacy Act of 2015 states that "[a]ny data retained by an event data recorder . . . is the property of the owner . . . of the motor vehicle in which the event data recorder is installed." *§ 24302(a)*, *49 U.S.C. § 30101* note (2015). The general rule of the statute is that "[d]ata recorded or transmitted by an event data recorder . . . *may not be accessed by a person other than an owner . . . of the motor vehicle in which the event data recorder is installed*." *§ 24302(b)* (emphasis added). There are only five exceptions to this rule, which include authorization from a court or administrative authority or consent of the owner. *§ 24302(b)(1)-(5)*.

A state court in California has addressed the *Fourth Amendment's* application to a vehicle's data recorder. That authority is not persuasive or controlling and was decided prior to the passing of the Driver Privacy Act of 2015.

People v. Diaz, held that the defendant **[**11]** lacked a privacy interest in his vehicle's speed and braking data, obtained from the "sensing diagnostic module" after a fatal accident*213 Cal. App. 4th 743, 153 Cal. Rptr. 3d 90 (Cal. Ct. App. 2013)*. It was undisputed the search was conducted without a warrant, over a year after the accident. *Id. at 96*. There was testimony about the defendant's speed at the time of the accident, but the officer conceded this was based on the information downloaded from the vehicle's sensing diagnostic module. *Id. at 94*.

The court concluded that the defendant failed to demonstrate "a subjective expectation of privacy in the SDM's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras." *Id. at 102*. Since the diagnostic module "merely captured information defendant knowingly exposed to the public," downloading that information without a warrant was not a violation of the *Fourth Amendment*. *Id.* (citing *Smith v. Maryland 442 U.S. 735, 741-45, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)* (holding installation of a pen register did not violate the *Fourth Amendment* because it only recorded information "voluntarily conveyed . . . in the ordinary course of business.")).

Diaz is unpersuasive. It relied on *Smith v. Maryland*, which found no expectation **[**12]** of privacy in information "voluntarily conveyed" to a third party. *442 U.S. at 745*. However, when addressing digital devices, the Supreme Court has moved away from the *Smith* rationale. In *United States v. Jones*, the Court could have relied on *Smith* when considering the constitutionality of placing a GPS tracking device on a vehicle without a warrant, since the vehicle's position

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[4] *See* U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CHAIRMAN, SUBCOMM. ON PRIVACY, TECH. AND THE LAW, COMM. ON THE JUDICIARY, U.S. SENATE, (Dec. 2013), *http://www.gao.gov/assets/660/659509.pdf* ; Peter Gareffa, *Senate Committee Approves Black Box Privacy Bill*, EDMUNDS, (Apr. 18, 2014), *https://www.edmunds.com/car-news/senate-committee-approves-black-box-privacy-bill.html* .

"had been voluntarily conveyed to the public." 565 U.S. 400, 132 S. Ct. 945, 951, 181 L. Ed. 2d 911 (2012). Instead, the Court relied on a trespass theory to find that while "mere visual observation does not constitute a search," attaching a device to the vehicle or reaching into a vehicle's interior constitutes "encroach[ment] on a protected area." Id. at 952-53.

Additionally, the *Diaz* court's reliance on *Smith v. Maryland* seems misplaced because, as the opinion acknowledged, sensory diagnostic modules can record much more information than what is observable to the public, including "the throttle, steering, suspension, brakes, tires, and wheels." 213 Cal. App. 4th at 748. We disagree with Diaz that all black box data is "exposed to the public."

Although the issue was not before the Court, the majority in *Jones* acknowledged **[*608]** that acquiring data "through electronic means, without an accompanying trespass," could still be "an unconstitutional **[**13]** invasion of privacy." Id. at 953.

In his concurring opinion, Justice Alito expressed a preference for analyzing the case by "asking whether [Jones's] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." 132 S. Ct. at 958. Justice Alito observed that the *Katz* expectation-of-privacy test,

> rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the trade off worthwhile.

Id. at 962. Under Justice Alito's approach, the constant, unrelenting black box surveillance of driving conditions could contribute to a reasonable expectation of privacy in the recorded data. Considering that the data is difficult to access and not all of the recorded information is exposed to the public, Worsham had a reasonable expectation of privacy, and we agree with the trial court that a warrant was required before police could search the black box. **[**14]**

Affirmed.

KLINGENSMITH, J., concurs.

FORST, J., dissents with opinion.

Dissent by: FORST

Dissent

FORST, J., dissenting.

I respectfully dissent. There are not many court opinions addressing a warrantless search of the "black box" event data recorder ("EDR") attached to an individual's motor vehicle.[5] An opinion by a "Justice Court" in New York (similar to a circuit court in Florida)[6] and an appellate court in California[7] appear to be the only published precedent addressing the instant matter. Obviously, searches of EDRs in motor vehicles were not on the minds of the first United States Congress when the Fourth Amendment was introduced in 1789, and the United States Constitution's right to privacy sheds no light on the subject (particularly since there is no provision actually describing such a right to privacy).[8]

[*609] Thus, there is no definitive answer to the

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[5] In General Motors vehicles, the EDR is also referred to as the "Sensing Diagnostic Module (SDM)." People v. Diaz, 213 Cal. App. 4th 743, 153 Cal. Rptr. 3d 90, 92 n.2 (Ct. App. 2013); People v. Christmann, 3 Misc. 3d 309, 776 N.Y.S.2d 437, 438 (Just. Ct. 2004). "The SDM . . . has multiple functions: (1) it determines if a severe enough impact has occurred to warrant deployment of the air bag; (2) it monitors the air bag's components; and (3) it permanently records information." Bachman v. Gen. Motors Corp., 332 Ill. App. 3d 760, 776 N.E.2d 262, 271-72, 267 Ill. Dec. 125 (Ill. App. Ct. 2002).

[6] Christmann, 3 Misc. 3d 309, 776 N.Y.S.2d 437.

[7] Diaz, 153 Cal. Reptr. 3d 90. *Diaz* is discussed in this opinion. Another California appellate court decision, People v. Xinos, 192 Cal. App. 4th 637, 121 Cal. Rptr. 3d 496 (Ct. App. 2011), which held that the downloading of data from the vehicle's EDR following an accident violated the driver's Fourth Amendment rights, is not discussed as it predates *Diaz* and was ordered not to be officially published. Id. at 507-12.

[8] Appellee does not rely upon the Florida Constitution's Right of Privacy, Article I, Section 23. Further, that provision yields to Article I, Section 12 with respect to "searches and seizures," with the Florida Constitutional right "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

question posed in this case—whether the warrantless search of Appellee's car's EDR constituted a violation of his *Fourth Amendment* protection against unreasonable searches. Nonetheless, contrary to the well-reasoned majority opinion, I conclude that the "search" of the EDR attached to Appellee's vehicle was not a search or seizure protected by the *Fourth Amendment*, as Appellee did not **[**15]** have a reasonable expectation of privacy with respect to the data in this particular EDR.

Background

The relevant facts are set forth in the majority opinion.

Analysis

As noted in the majority opinion, "[a] *Fourth Amendment* search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *State v. Lampley, 817 So. 2d 989, 990 (Fla. 4th DCA 2002)* (quoting *Kyllo v. United States, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)*). The reverse is also true: "a *Fourth Amendment* search does *not* occur . . . unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" *Id. at 991* (alterations in original) (quoting *Kyllo, 533 U.S. at 33*).

In contrast to a cellular phone, an EDR does not contain "a broad array of private information" such as photos, passwords, and other "sensitive records previously found in the home." *Riley v. California, 134 S. Ct. 2473, 2491, 189 L. Ed. 2d 430 (2014)*. Significantly, the EDR in the instant case did not contain GPS information relative to the vehicle's travels, which may be subject to privacy protection. *See United States v. Jones, 565 U.S. 400, 415-17, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)* (Sotomayor, J., concurring) (expressing concern with GPS information which "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations"). As noted in the majority opinion, the EDR in **[**16]** this case was only recording speed and braking data, the car's change in velocity, steering input, yaw rate,[9] angular rate, safety belt status, system voltage, and airbag warning lamp information. Moreover, this data had not been knowingly inputted by Appellee; in fact, it is likely that Appellee did not even know that the vehicle he was driving had an EDR. Therefore, it would be quite a stretch to conclude that Appellee sought to preserve this information as "private."

The majority opinion references the United States Supreme Court's *Riley* decision as well as this Court's recent opinion in *State v. K.C., 207 So. 3d 951 (Fla. 4th DCA 2016)*. Both cases involved cell phones. As distinguished from an EDR attached to an undercarriage of a motor vehicle, cell phones are usually carried close to an individual's body, generally in a pants or shirt pocket or in a purse or belt case. The database of the EDR in this case carries extremely non-private, non-confidential information, such as the vehicle's yaw rate; a cell phone, on the other hand, "collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record." **[**17]** *Riley, 134 S. Ct. at 2489*. **[*610]** A reasonably prudent seller of his/her used cellphone or personal computer would clear the hard drive of all personal information; the seller of a used vehicle would be unlikely to take similar action with respect to the vehicle's EDR.

In our *K.C.* opinion, we emphasized that, though abandoned by the phone's owner, "[the] contents [of the cell phone] were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it." *K.C., 207 So. 3d at 955*. The private data in a cell phone is, for the most part, created by the owner and is password protected by the owner for his/her own benefit and privacy. The data on the EDR, however, was not created by the owner and was not protected by a password by or for the benefit of the owner (even though there apparently was a password-like encryption on the data). This data is collected and stored in the interest of public safety, including the safety of the vehicle's driver.

In the aforementioned New York *Christmann* decision which involved a prosecution for speeding and failing to exercise due care, the court held that the motorist had only a diminished expectation of privacy **[**18]** following

[9] "A yaw rotation is a movement around the yaw axis of a rigid body that changes the direction it is pointing, to the left or right of its direction of motion. The yaw rate or yaw velocity of a car, aircraft, projectile or other rigid body is the angular velocity of this rotation . . . ." *Yaw (rotation)*, WIKIPEDIA (Mar. 13, 2017, 2:37 PM), *https://en.wikipedia.org/wiki/Yaw_(rotation)* (emphasis omitted). Yes, I also didn't know what this was.

an accident with respect to the vehicle's mechanical areas, and therefore retrieval by law enforcement of data stored in the vehicle's SDM did not constitute an unreasonable search and seizure. *Christmann, 776 N.Y.S.2d at 441-42*; *see also People v. Quackenbush, 88 N.Y.2d 534, 670 N.E.2d 434, 439-40, 647 N.Y.S.2d 150 (N.Y. 1996)* (similar, and specifically referring to the diminished expectation of privacy yielding to the overwhelming state interest in investigating fatal accidents).

The California case of *Diaz* involved a situation similar to the instant case. *Diaz, 213 Cal. App. 4th 743, 153 Cal. Rptr. 3d 90*. There was a motor vehicle accident and, as part of their investigation, law enforcement personnel, without a warrant, downloaded the SDM. *Id. at 96*. The California Court of Appeal affirmed the trial court's ruling that there was no reasonable expectation of privacy with respect to the data in the SDM, finding the defendant failed to demonstrate "a subjective expectation of privacy in the SDM's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras." *Id. at 102*. "[T]echnology merely captured information defendant knowingly exposed to the public—the speed at which she was travelling and whether she applied her **[**19]** brakes before the impact." *Id.*

The majority opinion discounts the reasoning in *Diaz*, finding it neither "persuasive [n]or controlling." Certainly, it is not controlling. However, it is persuasive, as the trial court's decision denying the defendant's motion to suppress, quoted in the District Court's opinion, is particularly logical:

> "Assuming the defendant had such knowledge [that there was an SDM in the car] and also had an expectation of privacy, it does not seem that such expectation would be reasonable. These computer modules were placed in cars as safety devices to gather information such as braking and speed, so as to be able to deploy the air bag at an appropriate time. They were not designed to gather any personal information nor designed or developed by the government to gather incrimination evidence from a driver. One cannot record communication of any kind on them. Indeed, they are not under the control of the individual driver at all."
>
> The trial court further held: "[Defendant] had no reasonable expectation of **[*611]** privacy in her speed on a public roadway or when and if she applied her brakes shortly before the crash. If a witness observed those actions and testified to them, the evidence **[**20]** would be admitted. If an expert in accident reconstruction testified to them, that evidence would be admitted. There is no difference in an electronic witness whose memory is much more accurately preserved, both to exonerate and implicate defendants."

Id. at 97.

The majority opinion maintains that *Diaz* inappropriately relied on *Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)*, and implies that *Jones* is the operative Supreme Court precedent for this issue. Actually, the *Diaz* opinion discusses *Jones* at some length, noting that the Supreme Court decision was based "on the common law theory of trespass in placing the GPS on the defendant's personal property, combined with the police attempt to obtain information," and the "trespass theory underlying *Jones* has no relevance [in this SDM search case] and, as the trial court aptly pointed out, the purpose of the SDM was not to obtain information for the police." *Diaz, 153 Cal. Rptr. 3d at 101*. The majority in the instant case suggests that the *Jones* opinion's reliance on this trespass theory when it could have relied on the *Smith* theory means that *Smith* is no longer binding precedent. But the fact that the Supreme Court chose to resolve *Jones* on the narrower trespass grounds rather than to wade into the waters of voluntary conveyance **[**21]** of information from *Smith* means only that trespass is *a* viable *Fourth Amendment* consideration, not that trespass is the *only* consideration remaining.

Furthermore, in *Jones*, the government placed a GPS tracking device on the defendant's car to monitor the vehicle's movement *and location**Jones, 565 U.S. at 403*. By contrast, an EDR is installed on vehicles before they are sold/leased to a driver and the purpose is not to track the vehicle's location or route. Moreover, although the EDR is placed under the vehicle and most vehicle owners and drivers are unaware that there is such a black box attached to the vehicle, there is no attempt on the part of the government to secretively attach the EDR and have it record this information. Unlike the situation in *Jones*, the attachment of the EDR is not directed at any individual; as noted in the majority opinion, "[a]pproximately 96% of cars manufactured since 2013 are equipped with event data recorders" and they are installed prior to the conveyance of the vehicle to any individual.

Finally, I take issue with the majority opinion's holding that the Driver Privacy Act of 2015 "enhances the notion that there is an expectation of privacy in information contained in an automobile data recorder." What actually happened is that Congress took note that most vehicles were being sold with EDRs installed by the manufacturer; it determined that the data collected may be sensitive and/or private but not to the extent that extraction of this data by the government would be limited by the Constitution; and it thus chose to fill the void, just as seventeen state legislatures had previously done. Filling the void, where authorized by the Constitution, is a power properly delegated to the legislature, not the judiciary.

Conclusion

The data that the government extracted from the vehicle that was owned and driven by Appellee in this case was not information for which Appellee or any other owner/driver had a reasonable expectation of privacy. **[**22]** The data was not personal to Appellee, was not password protected by Appellee, and was not being collected and maintained solely for the benefit of Appellee. **[*612]** The EDR was installed by the vehicle's manufacturer at the behest of the National Highway Traffic Safety Administration and, as distinct from *Jones*, the purpose of the data collection is highway and driver safety. *See* *New York v. Class, 475 U.S. 106, 113, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986)* ("[A]utomobiles are justifiably the subject of pervasive regulation by the State [and e]very operator of a motor vehicle must expect the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy.").

Accordingly, as the extraction of data from the vehicle's EDR in the instant case was not a search or seizure protected by the *Fourth Amendment*, I would reverse the trial court's suppression of this evidence. Thus, I respectfully dissent.

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