Real Property and Business Litigation Report

Volume X, Issue 1
January 11, 2017
Manuel Farach

Fonseca v. Taverna Imports, Inc., Case Nos. 3D15-737; 3D15-382; 3D14-2506 (Fla. 3d DCA 2017).
A corporate "event or transaction [such as a recapitalization or the levying on a judgment] should not be permitted where its objective or result is the seizing of corporate control for an improper purpose."

Bayview Loan Servicing, LLC v. Del Lupo, Case No. 4D15-1088 (Fla. 4th DCA 2017).
The introduction of documents into evidence which prove damages requires the denial of a motion to dismiss for failure to prove damages, even if the documents do not clearly state the damages.

Newman v. Guerra, Case Nos. 4D15-1515 & 4D15-2588 (Fla. 4th DCA 2017).
The "significant issues" test of *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807 (Fla. 1992), applies to claims for attorneys' fees under Florida Statute section 713.29.

Jallali V. Knightsbridge Village Homeowners Association, Inc., Case No. 4D15-2036 (Fla. 4th DCA 2017).
A lis pendens filed by a first mortgagee does not bar the foreclosure of an association's subsequent lien for unpaid assessments against the owner where the association's subsequent lien was imposed under the association's declaration of covenants recorded before the first mortgagee recorded its notice of lis pendens.

Dixon v. Wells Fargo Bank, N.A., Case No. 4D15-3974 (Fla. 4th DCA 2017).
A default letter stating that acceleration has already occurred, sent only six days before the lawsuit was filed, and that fails to provide sufficient notice of default and a thirty-day opportunity to cure, does not "substantially comply" with the standard paragraph 22 condition precedent requirements.

San Matera The Gardens Condominium Association, Inc. v. Federal Home Loan Mortgage Corporation, Case No. 4D15-4400 (Fla. 4th DCA 2017).
The Fourth District joins the Fifth District and the Second District in holding that a servicer (a company authorized to collect payments under a loan) is entitled to the benefit of the safe harbor provision of Florida Statute section 718.116(1)(b).

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Sunset Beach Investments, LLC v. Kimley-Horn And Associates, Inc., Case No. 4D15-4425 (Fla. 4th DCA 2017). An "engineer intern" under Florida Statute section 471.005(6) is not a licensed engineer, and thus cannot be held liable for professional negligence.

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Third District Court of Appeal

State of Florida

Opinion filed January 4, 2017.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D15-737; 3D15-382; 3D14-2506
Lower Tribunal Nos. 07-9620; 07-43714

Maricela Fonseca and Richard Fonseca, et al.,
Appellants,

vs.

Taverna Imports, Inc., and Mario Taverna,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Sarah I. Zabel and Rosa I. Rodriguez, Judges.

Arnaldo Velez; Gutiérrez Bergman Boulris and Jennifer A. Kerr; Hicks, Porter, Ebenfield & Stein and Dinah Stein, for appellants Maricela Fonseca and Richard Fonseca; Jule Laudisio and Hans Eichmann, in proper persons.

Rosenthal Rosenthal Rasco, Eduardo I. Rasco and Steve M. Bimston, for appellees.

Before WELLS, LAGOA, and EMAS, JJ.

EMAS, J.

INTRODUCTION

In this consolidated proceeding, each party appeals from various judgments arising out of two lower court actions:

(1) *Taverna Imports, Inc. and Mario Taverna v. Maricela Fonseca, Richard Fonseca, Jule Laudisio and Hans Eichmann* (Lower Tribunal No. 07-9620) ("Case One")

In Case One, the trial resulted in a jury verdict totaling $1,896,234 in favor of plaintiffs Mario Taverna and Taverna Imports, Inc. The Defendants in Case One—Maricela Fonseca, Richard Fonseca, Jule Laudisio and Hans Eichmann (collectively, "the Defendants")—appeal from several judgments[1] arising out of that case, and assert three points on appeal, which are discussed in detail below. For the reasons that follow, we affirm the judgments in Case One with one exception, relating to an aspect of the damages awarded to Mario Taverna and against Maricela Fonseca and Richard Fonseca.

(2) *Richard Fonseca v. Taverna Imports* (Lower Tribunal No. 07-43714) ("Case Two")

In Case Two, Taverna Imports appeals from a series of post-judgment orders[2] in which the trial court awarded Richard Fonseca the right to execute on unissued stock of Taverna Imports. For the reasons that follow, we reverse the trial court's order authorizing Fonseca to execute and levy on the corporate stock, as the trial

[1] These judgments are appealed under case numbers 3D15-737 and 3D15-382.
[2] These orders are appealed under case number 3D14-2506.

court, under the unique circumstances of this case, should have applied Richard Fonseca's judgment in Case Two (in the amount of $110,309.36) as an offset against the judgment in favor of Taverna Imports in Case One (in the amount of $1,063,234).

BACKGROUND

Taverna Imports was a closely held wine distribution corporation. Upon its formation in 2002, the Board of Directors was comprised of Mario Taverna, Maricela Fonseca and Hans Eichmann.[3] By a vote of the Board of Directors, Mario Taverna was elected president, Jule Laudisio was elected vice-president, and Maricela Fonseca was elected secretary/treasurer. Maricela and Richard Fonseca contributed the capital to Taverna Imports, and Mario Taverna, together with Hans Eichmann, oversaw sales and controlled daily operations.

At the time of Taverna Imports' formation, the corporation authorized 5000 shares, but issued a total of 4500 shares, in equal amounts of 1500 shares each to Mario Taverna, Maricela Fonseca, and Jule Laudisio. In June 2005, Taverna Imports repurchased 1000 of Jule Laudisio's 1500 shares, and entered into a two-year stock-option agreement which would allow Taverna Imports to purchase Laudisio's remaining shares. As of June 2005, Mario Taverna and Maricela

[3]Annual reports from 2004 and 2005 reflect only Mario Taverna and Maricela Fonseca (and not Hans Eichmann) as directors. The 2006 annual report reflects three directors of Taverna Imports: Mario Taverna, Maricela Fonseca, and a third individual named Janelle Hertz.

Fonseca each owned forty-five percent of the shares, and Laudisio owned the remaining ten percent.

Taverna Imports was unprofitable for the first few years of its existence. In mid-2005, Richard Fonseca decided he would no longer contribute capital. Around the same time, Hans Eichmann quit. Thereafter, however, Taverna Imports began to turn a profit through Mario Taverna's efforts. Nevertheless, after Richard Fonseca declined to make further capital contributions, Mario Taverna attempted to find new revenue streams for the company.

Although most of these attempts proved unsuccessful, in early 2007 Mario Taverna entered into a wine-clearing arrangement with Metro Wine ("Metro"), an out-of-state wine distributor and wholesaler who Mario Taverna believed had the potential to alleviate Taverna Imports' cash flow concerns. Mario Taverna negotiated to permit Metro's use of a portion of Taverna Imports' warehouse in exchange for Metro's payment of essentially all of Taverna Imports' overhead expenses for the duration of its warehouse lease. Mario Taverna executed a Memorandum of Understanding ("MOU") with Metro on behalf of Taverna Imports, which memorialized the wine-clearing arrangement. When Mario Taverna broached the subject of the Metro MOU with Richard Fonseca, Fonseca deferred consideration of the issue pending a formal shareholders' meeting to be

held in February 2007. Such an event—a "formal" shareholders' meeting—was alleged to be an unprecedented event in Taverna Imports' history.

Meanwhile, in January 2007, Jule Laudisio agreed to convey her remaining ten percent stock interest back to Taverna Imports in exchange for $5,000, pursuant to a written agreement which she executed on January 26, 2007. Jule Laudisio signed a notarized letter prepared by Mario Taverna which acknowledged Taverna Imports' purchase of her ten percent interest. Mario Taverna issued two checks from Taverna Imports made out and delivered to Jule Laudisio: one for $2,500 dated January 26, 2007, and a second for $2,500, post-dated to September 30, 2007. However, three days after executing the agreement and accepting the checks in exchange for the sale of her stock, Jule Laudisio sent a letter to Mario Taverna, together with the un-negotiated checks, in an attempt to rescind the agreement.

One month later, on February 27, 2007, the "formal" shareholders' meeting took place. Because this was a shareholders' meeting, Mario Taverna expressed his surprise at the presence of Hans Eichmann (who was never a shareholder) and Jule Laudisio (from whom Taverna Imports had purchased her remaining shares a month earlier). Mario Taverna believed that he and Maricela Fonseca were the only remaining shareholders in Taverna Imports (and the only directors at the meeting), with each owning an equal number of shares. Maricela Fonseca

announced at this meeting that a shareholder vote would be conducted to elect a new president, despite the corporate bylaws which mandate that only the Board of Directors is empowered to elect or remove officers. Over Mario Taverna's objection, Jule Laudisio and Maricela Fonseca elected Maricela Fonseca to replace Mario Taverna as the new president. The minutes from the February 27 meeting (prepared by Maricela Fonseca) state that Jule Laudisio was a shareholder of Taverna Imports. The minutes also state that Taverna Imports' only directors (and thus the only individuals authorized under the bylaws to elect officers) were Mario Taverna and Maricela Fonseca. Nonetheless, based upon the votes cast by Maricela Fonseca and Jule Laudisio, Maricela Fonseca purportedly was elected to replace Mario Taverna as president of Taverna Imports. Thereafter, Maricela and Richard Fonseca, Jule Laudisio and Hans Eichmann began asserting complete control over Taverna Imports, to the exclusion of Mario Taverna.

On March 23, 2007, Maricela Fonseca issued a "Resolution of Board of Directors of Taverna Imports, Inc.," which she executed as President, Secretary and Treasurer of Taverna Imports. The document purported to ratify the February 27 board meeting as a resolution of the Board of Directors. However, the notice omits reference to any meeting at which the company's Board considered and voted on this resolution. Maricela Fonseca subsequently authored minutes of a shareholder "special meeting," dated April 1, 2007, which reflects a vote for the

purpose of electing a new board. The minutes indicate Maricela Fonseca and Jule Laudisio voted for themselves, after which Maricela Fonseca was purportedly elected as president and Jule Laudisio as vice president.

On April 1, 2007, the same day as the "special meeting" described above, Mario Taverna went to Taverna Imports' warehouse, only to discover that the Defendants had changed the locks and had rejected Metro's authority to store inventory there. When Mario Taverna returned to the warehouse the next day, a security guard hired by the Defendants denied Taverna access to the warehouse. Mario Taverna was eventually allowed in, and learned Hans Eichmann was managing the business, and that the Defendants were negotiating to assign the warehouse lease to Metro. The Fonsecas eventually terminated Mario Taverna.

In addition to the above-described events, Mario Taverna and Taverna Imports alleged a series of additional acts of misconduct, all of which culminated in the improper ouster of Mario Taverna and the wrongful takeover and mismanagement of Taverna Imports. Included among them were allegations that Maricela Fonseca, Richard Fonseca, Jule Laudisio and Hans Eichmann, together or individually:

- Forged Mario Taverna's signature on an alcoholic beverage report filed with the Florida Department of Business and Professional Regulation;

- Sold numerous cases of wine at far below cost or for no money at all, and thereafter began making payments to, or on behalf of, rival wine distributors;
- Made a wine delivery to a restaurant, during which a waiter, Pablo Monfort, overheard a conversation between Hans Eichmann and the restaurant owner. In that conversation, Hans Eichmann told the owner that if the owner paid Hans Eichmann in cash, the owner would receive a discount, and Hans Eichmann would bill future wine deliveries to the restaurant and invoice them as mineral water;
- After taking over Taverna Imports, the Fonsecas and Jule Laudisio and Hans Eichmann reused various invoice numbers for multiple transactions, thus impeding the company's ability to accurately manage and account for its inventory;
- Categorized inventory they sold off for low cost or no cost as "spoiled," though it was easy to preserve the wine in a proper storage facility, and Hans Eichmann could not explain why other wine distributors would purchase spoiled wine for resale to retail customers;
- Created false invoices and mismanaged accounts receivable by either not recording collected monies or writing them off; and

- Entered and operated side businesses used to export corporate inventory, which resulted in a profit for Hans Eichmann.

Taverna Imports and Mario Taverna asserted that, as a result, Taverna Imports and Mario Taverna suffered damages, including loss of wages and commissions, and a default on corporate lines of credit for which Mario Taverna was a personal guarantor.

THE LITIGATION

Case One: Taverna Imports, Inc. and Mario Taverna v. Maricela Fonseca, Richard Fonseca, Jule Laudisio and Hans Eichmann

The first round of litigation began in April 2007, when Taverna Imports and Mario Taverna filed suit against Maricela Fonseca, Richard Fonseca, Jule Laudisio and Hans Eichmann. In Count I, Taverna sought damages and declaratory relief alleging that the corporate actions taken by the Defendants subsequent to Jule Laudisio's stock sale were invalid. Count II sought injunctive relief to preclude the Defendants from attempting to manage and control Taverna Imports in a manner contrary to its governing documents. The Defendants filed a counterclaim against Taverna Imports, as well as a third-party complaint against Mario Taverna, individually. Thereafter, Mario Taverna, individually, filed a counterclaim, and he ultimately went forward on a complaint asserting claims against the Fonsecas for breach of fiduciary duty and aiding and abetting the alleged breach of fiduciary duty.

Taverna Imports subsequently filed a motion for partial summary judgment as to Count I of its complaint, seeking a declaratory judgment as to the validity of Jule Laudisio's 2007 stock sale, as well as the invalidity of corporate acts taken by the Defendants after the stock sale. The court ultimately granted summary judgment on these issues by order entered on April 1, 2010, determining that the January 26, 2007 stock sale of Jule Laudisio's ten percent interest back to Taverna Imports was valid; that Jule Laudisio was no longer a shareholder after the date of that sale; that the shareholders' meeting of February 27, 2007 and the subsequent meetings and the votes taken, including those purporting to elect a new president of Taverna Imports, were invalid; and that Mario Taverna continued to be the lawful president of Taverna Imports.

Case One was tried in September 2014. Based on the 2010 partial summary judgment, the court instructed the jury:

> This court has already determined that: One, the January 26, 2007 stock sale of Jule Laudisio's 10 percent back to Taverna Imports was valid. Two, the shareholder's meeting on February 27, 2007 and the subsequent shareholders' and directors' meeting purporting to elect a new president of Taverna Imports, Inc. were invalid. Accordingly, Mario Taverna continued to be president of Taverna Imports, Inc. in 2007.

At trial, Mario Taverna presented the testimony of Pablo Monfort, whom the Defendants characterize as a "surprise" witness. Monfort was working as a waiter at a restaurant when he overheard a conversation between Eichmann and the

restaurant owner regarding paying invoices in cash and invoicing future sales under Eichmann's own company. The following day, Monfort sent a letter to Mario Taverna, detailing the conversation he overheard. Monfort was not included by name on the pretrial witness list,[4] nor had he been deposed before trial. However, the letter Monfort sent to Mario Taverna was listed on an exhibit list, had been produced in discovery, and its contents had been discussed during discovery depositions, including the deposition of Hans Eichmann.

The Defendants objected to the admission of the letter (based on hearsay) and further objected to Monfort testifying at trial (based upon procedural prejudice from Taverna's failure to list Monfort as a witness). The court instructed the Defendants to depose Monfort during a recess in the trial, which they did. The trial court eventually permitted Monfort to testify, and his testimony was limited to the conversation he overheard, as described in the letter he had sent to Mario Taverna. The trial court also admitted the Monfort letter.

At the close of the evidence, the jury returned a verdict in favor of Mario Taverna and Taverna Imports and against the Defendants on all claims, finding Maricela Fonseca and Hans Eichmann "wrongfully [took] corporate authority of Taverna Imports, Inc., which caused damages to Taverna Imports, Inc.," and that Richard Fonseca and Jule Laudisio aided and abetted in the wrongful taking of

[4] Taverna had listed an unidentified "records custodian" for the letter written by Monfort.

corporate authority. The jury also found Maricela Fonseca breached the fiduciary duty she owed to Mario Taverna, thereby causing him damages, and that Richard Fonseca aided and abetted in that breach.

On September 14, 2014, the jury awarded $1,063,234 to Taverna Imports, and $833,000 to Mario Taverna, individually. The Defendants claim Mario Taverna only sought $29,602.32 for his liability for corporate debt, yet the jury awarded him $285,000 on that claim, as well as $548,000 for "[l]ost wages and commissions."

The Defendants timely filed post-trial motions, seeking directed verdicts and, in the alternative, a new trial, new trial on damages, or remittitur. Following a hearing, the trial court denied all post-trial motions. The trial court entered separate judgments in favor of Taverna Imports and Mario Taverna, and against all Defendants, jointly and severally, in Case One.

In connection with Case One, the Defendants assert the following points on appeal: (1) the trial court's order granting partial summary judgment, based upon its determination that Taverna Imports validly repurchased Jule Laudisio's ten percent stock interest in Taverna Imports and that Mario Taverna was *not* validly removed as president in February of 2007; (2) the jury's verdict in favor of Taverna Imports and Mario Taverna, and the subsequent final judgments, awarded damages based on legally invalid claims and include damages that were unpled,

speculative and legally excessive; and (3) the trial court erroneously permitted Mario Taverna and Taverna Imports to present the testimony of Pablo Monfort, an unlisted witness, and to introduce his letter, which contained rank hearsay.

Case Two: Richard Fonseca v. Taverna Imports

In addition to the foregoing, there is a competing judgment in a second lower court case, arising out of the same core events leading to the litigation in Case One.

In Case Two, Bank of America filed suit against Taverna Imports in 2007 when it defaulted on its credit line. In 2008, Bank of America obtained a default judgment for $110,309.36, around the same time that Maricela Fonseca was alleged to have wrongfully taken control of Taverna Imports. For more than six years, Bank of America took no action to collect upon that judgment.

On June 16, 2014, Richard Fonseca purchased the Bank of America judgment.[5] Richard Fonseca subsequently filed a motion to be substituted as the party plaintiff in Case Two, which was granted. He then sought to execute on shares of stock that Taverna Imports had purchased from Jule Laudisio in June 2005.[6]

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[5] By this time, in Case One, the trial court had already granted partial summary judgment in favor of Mario Taverna and Taverna Imports, and a September 2014 trial date was looming to resolve the remaining aspects of Case One. As discussed, that trial concluded on September 12, 2014, with a jury verdict in favor of Mario Taverna and Taverna Imports.

[6] Richard Fonseca's motion sought to levy and execute only upon the 1000 shares

On September 16, 2014, the lower court granted Richard Fonseca's motion to execute and levy on the stock shares[7] and entered a more specific order the following day. Taverna Imports appealed both orders.

Between the August hearing date on Richard Fonseca's motion and the September order granting Richard Fonseca's motion to execute and levy on the stock shares in Case Two, Case One was tried with a resulting verdict in favor of Taverna Imports and Mario Taverna, as previously discussed. Thus, the outstanding judgments from the two cases which form the bases for these appeals, are as follows:

- **Case One:**
    - $1,063,234 in favor of Taverna Imports against Richard Fonseca, Maricela Fonseca, Jule Laudisio and Hans Eichmann, jointly and severally; and
    - $833,000 in favor of Mario Taverna, individually, against Richard Fonseca, Maricela Fonseca, Jule Laudisio and Hans Eichmann, jointly and severally
- **Case Two:**

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repurchased by Taverna Imports from Jule Laudisio in 2005, and did not seek to levy on the remaining 500 shares, given Fonseca's position throughout the litigation (and here on appeal) that Jule Laudisio never validly sold, and Taverna Imports never validly purchased, Jule Laudisio's remaining 500 shares.

[7] Only four days earlier, on September 12, 2014, the trial in Case One concluded with a jury verdict against Richard Fonseca and in favor of Taverna Imports (for $1,063,234) and Mario Taverna (for $833,000). Case One and Case Two proceeded in two different divisions, before two different judges.

- $110,309.36 in favor of Richard Fonseca against Taverna Imports; and
- $180,907.92 in favor of Richard Fonseca against Mario Taverna.[8]

On September 23, 2014, eleven days after the Case One verdict in favor of Taverna Imports and Mario Taverna, Taverna Imports filed its "Motion for Relief from Judgment and Motion for Relief from an Order and a Motion to Stay Execution of Judgments Based Upon New Evidence and Equity," in which it moved for relief from the judgments obtained by Richard Fonseca in Case Two, and from the September 16, 2014 order granting Richard Fonseca's motion to subject stock to execution and levy. Taverna Imports based its motion on Florida Rule of Civil Procedure 1.540(b), alleging that new evidence—specifically, the intervening verdict and judgment entered in Case One—should relieve it from the judgments in Case Two. Taverna Imports also sought a stay of execution of all the judgments against Taverna Imports until a transfer judge could rule on a pending motion to transfer Case Two to the division where Case One was pending

[8] In addition to purchasing the Bank of America judgment against Taverna Imports, Richard Fonseca also purchased Bank of America's judgment against Mario Taverna, in the amount of $180,907.92. However, the issue raised in the appeal of Case Two concerns only whether Richard Fonseca should be permitted to collect on the judgment against Taverna Imports by levying upon its stock. Our decision in Case Two is therefore limited to the competing judgments between Richard Fonseca and Taverna Imports. And while Mario Taverna has filed, in the trial court, a motion seeking similar offset treatment of his competing judgments for and against Richard Fonseca, such requested relief is beyond the scope of this appeal.

and until that court could rule on a motion to offset the judgments pending in Case One. These motions were denied. Taverna Imports contends on appeal that the trial court erred in permitting Richard Fonseca to subject the repurchased stock to execution and levy, and contends that the trial court should have granted the motion for relief from judgment and offset the competing judgments between Fonseca and Taverna Imports.[9]

ANALYSIS

Case One: Partial Summary Judgment

The Defendants first contend that the lower court erred in granting summary judgment as to Count I of Taverna Imports' complaint for declaratory relief. We review this issue de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000).

The issue is whether the corporate actions taken by the Defendants at the shareholders' meeting of February 27, 2007 and thereafter (which actions included removing Mario Taverna as president) were valid or invalid. The answer to this question turns upon whether Taverna Imports validly repurchased Jule Laudisio's remaining 500 shares on January 26, 2007.

[9] Taverna Imports also appealed the trial court's order denying stay of execution. However, the appeal of that order was mooted by this court's subsequent order granting a stay during the pendency of these consolidated appeals.

The Defendants first contend that there was no sale and no valid agreement because Mario Taverna never executed it. The agreement was contained in a January 26, 2007 letter written by Mario Taverna to Jule Laudisio, by which Laudisio would sell her shares back to Taverna Imports for $5,000.

The letter agreement provided:

> Dear Jule,
>
> Taverna Imports is purchasing your 10% option[10] that you are holding for purchase of Taverna Imports, Inc shares for $5000.00 on this day, Friday, January 26, 2007.

Although Mario Taverna did not sign the letter, Jule Laudisio did sign and notarize the agreement. Following Jule Laudisio's execution of the agreement, Mario Taverna, on behalf of Taverna Imports, tendered two checks to Jule Laudisio in consideration for her shares. Jule Laudisio testified in her deposition that she had agreed to the stock transaction and had accepted both checks as full consideration.

It is well established that mutuality of assent can be shown by conduct rather than signature. Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero, 827 So. 2d 338, 339 (Fla. 3d DCA 2002). In Lopez-Silvero, this Court held

> A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract. See

[10]This is a reference to the two-year stock option agreed upon by Laudisio and Taverna Imports in June of 2005 when Taverna Imports had repurchased 1000 of Laudisio's 1500 shares.

> Gateway Cable T.V., Inc. v. Vikoa Construction Corp., 253 So.2d 461 (Fla. 1st DCA 1971). As noted in Gateway Cable T.V., Inc. v. Vikoa Construction Corp., 253 So.2d at 463, "A contract may be binding on a party despite the absence of a party's signature. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties." See also Sosa v. Shearform Mfg., 784 So.2d 609 (Fla. 5th DCA 2001) (parties may be bound to the provisions of an unsigned contract if they acted as though the provisions of the contract were in force.)

Id.

The Defendants also contend that one of the checks was post-dated, thereby altering the terms of the agreement. However, Jule Laudisio never objected to, nor voiced any concerns about, the post-dated check. A party's failure to object to the manner of acceptance as being inconsistent with the terms of the agreement, operates as a waiver. Caldwell v. Snyder, 949 So. 2d 1048 (Fla. 3d DCA 2006); Bush v. Ayer, 728 So. 2d 799, 802 (Fla. 4th DCA 1999).

Further, the fact that Jule Laudisio sent the un-negotiated checks back to Mario Taverna did not serve to invalidate the agreement. See Carman v. Gunn, 198 So. 2d 76 (Fla. 2d DCA 1967)(reversing trial court's denial of specific performance notwithstanding that seller refused to cash buyer's monthly checks tendered pursuant to contract). We find Defendants' remaining arguments on this issue unavailing, and hold that the trial court properly concluded that there were no genuine issues of material fact and that, as a matter of law, Jule Laudisio had validly sold her shares of Taverna Imports back to Taverna Imports.

We further conclude that the trial court properly determined that Jule Laudisio was not a director of Taverna Imports, a finding necessary to the trial court's ultimate determination that Mario Taverna was not validly removed as president of Taverna Imports, an act which requires a majority vote of its Board of Directors. The only directors of Taverna Imports present and voting at the shareholders' meeting on February 27, 2007 were Mario Taverna and Maricela Fonseca.[11] The minutes of the February 27 meeting (prepared by Maricela Fonseca) do not list Jule Laudisio as a director, instead listing her only as a shareholder. Jule Laudisio herself testified at her deposition that the only position she ever held for Taverna Imports was that of vice president. There was no genuine issue of material fact in this regard. As Taverna Imports' bylaws mandate that officers may be elected and removed only by a majority vote of the Board of Directors, none of the corporate acts undertaken at that meeting can be deemed valid as none of the acts was supported, as required, by a majority vote of the Board. Therefore, we affirm the lower court's entry of partial summary judgment on the claim for declaratory relief in Case One.

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[11] Taverna Imports' 2007 annual report lists Janelle Hertz as a third director. She was not present at the meeting nor did she cast a vote. The Defendants contend Hertz was never validly selected as a director. Even if this is true, it is also irrelevant. Under the bylaws, Maricela Fonseca could not be elected to replace Mario Taverna as president except by a majority vote of the Board of Directors. Whether there were two directors or three directors at the time of the vote, two votes were required to be cast in favor of his removal as president, and only one valid vote in favor was cast.

Case One: Mario Taverna's individual claims against Maricela Fonseca and Richard Fonseca

The jury returned a verdict in favor of Mario Taverna (and against Maricela Fonseca and Richard Fonseca) in a total amount of $833,000. This amount was comprised of damages for "lost wages and commissions" ($548,000) and "personal liability for corporate debt" ($285,000). Judgment was entered in the total amount. The verdict reflects that the jury found Maricela Fonseca breached a fiduciary duty she owed to Mario Taverna and that Richard Fonseca aided and abetted Maricela Fonseca's breach of that fiduciary duty, resulting in the damages set forth above.

a) Breach of Fiduciary Duty by Maricela Fonseca

We find that Mario Taverna sufficiently pleaded that Maricela Fonseca owed a fiduciary duty to Mario Taverna and "deliberately, willfully, intentionally and maliciously, without justification, privilege or authority, improperly and wrongfully" breached her fiduciary duty. See § 607.0830, Fla. Stat. (2007) (providing that a director shall discharge his or her duties as a director in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the corporation); § 607.0831 (providing, inter alia, that a director is not personally liable for monetary damages to the corporation or any other person unless the director breached or failed to perform her duties and the breach or failure to perform constitutes recklessness or an act or omission which

was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property) (emphasis added). A review of the record establishes that there was competent substantial evidence to support the jury's determination that Maricela Fonseca's malicious and willful misconduct constituted a breach of her fiduciary duty, resulting in individual losses suffered by Mario Taverna, for which Maricela and Richard Fonseca were liable. See Camper Corral, Inc., v. Perantoni, 801 So. 2d 990 (Fla. 2d DCA 2001).

b) Aiding and Abetting Breach by Richard Fonseca

The pleading and the proof at trial also supported the jury's determination that Richard Fonseca aided and abetted Maricela Fonseca's breach of fiduciary duty. Florida law recognizes a cause of action for aiding and abetting the breach of a fiduciary duty. See Ft. Myers Dev. Corp. v. J.W. McWilliams Co., 122 So. 264 (Fla. 1929); NHB Advisors, Inc. v. Czyzyk, 95 So. 3d 444 (Fla. 4th DCA 2012); Nerbonne, N.V. v. Lake Bryan Intern. Props., 689 So. 2d 322 (Fla. 5th DCA 1997); AmeriFirst Bank v. Bomar, 757 F. Supp. 1365 (S.D. Fla. 1991). A cause of action for aiding and abetting the breach of a fiduciary duty requires a plaintiff to establish: 1) a fiduciary duty on the part of a primary wrongdoer; 2) a breach of that fiduciary duty; 3) knowledge of the breach by the alleged aider and abettor; and 4) the aider and abettor's substantial assistance or encouragement of the

wrongdoing. Arbitrajes Financieros, S.A. v. Bank of America, N.A., 605 Fed. Appx. 820, 824 (11th Cir. 2015); Hearn v. McKay, 642 F. Supp. 2d 1330 (S.D. Fla. 2008), aff'd 603 F. 3d 897 (11th Cir. 2010). The jury's determination that Richard Fonseca aided and abetted his wife, Maricela Fonseca, in her breach of fiduciary duty, is supported by competent substantial evidence presented at trial. By aiding and abetting Maricela Fonseca's breach, Richard Fonseca was likewise liable for the resulting damages. Nerbonne, N.V., 689 So. 2d at 325.

c) Damages Caused by the Breach of Fiduciary Duty

We reject the Fonsecas' argument that Mario Taverna's claim for damages for lost wages and commissions should have been sought against Taverna Imports rather than against the Fonsecas. Mario Taverna's cause of action sounded in tort and not in contract, and the evidence at trial supported Mario Taverna's claim that the willful and malicious misconduct of Marisela Fonseca and of Richard Fonseca (as aider and abettor), in improperly usurping corporate control and ousting Mario Taverna, caused these damages. We affirm the jury's award of $548,000 to Mario Taverna, as damages suffered by him individually as a result of the breach of fiduciary duty. Perantoni, 801 So. 2d at 990.

However, the jury also awarded Mario Taverna, as damages caused by the breach of fiduciary duty, $285,000 for "personal liability for corporate debt." We agree with the Defendants that this amount of damages is not supported by

competent substantial evidence. The $285,000 total purportedly represented two judgments obtained against Mario Taverna, after Taverna Imports defaulted on two separate lines of credit, for which Mario Taverna signed personal guaranties. One judgment was in favor of Wachovia Bank ($29,602.32) and the other in favor of Bank of America ($180,907.92). The evidence at trial established damages only for the Wachovia judgment, in the amount of $29,602.32. There was no evidence supporting Mario Taverna's entitlement to damages for the Bank of America judgment. Indeed, Mario Taverna's own counsel, during closing argument, requested damages only for the Wachovia judgment, and did not ask the jury to award damages for the Bank of America judgment. Furthermore, the trial court's instruction, given without objection by Mario Taverna, advised the jury that the only damages it could consider in this regard was "the personal liability for the corporate debt with Wachovia Bank." (Emphasis added.) Nevertheless, the jury awarded damages well in excess of the Wachovia judgment, and those damages inarguably included the Bank of America judgment. We reverse and remand on this portion of the judgment for entry of an amended judgment. [12]

[12] We recognize that the combined amount of the two judgments equals only $210,510.24, which is substantially less than the total amount of damages awarded by the jury for personal liability for corporate debt ($285,000). However, the only competent substantial evidence introduced at trial on this aspect of the damages supports an award solely for the amount of the Wachovia judgment ($29,602.32). Therefore, on remand, the trial court shall enter an amended judgment reflecting a reduction of $255,397.68 in the total judgment ($285,000- $29,602.32).

Case One: Admission of Monfort Letter and Testimony

The lower court did not abuse its discretion in admitting the testimony of Pablo Monfort and in admitting the letter he had written and sent to Mario Taverna. Monfort was an employee of a restaurant that did business with Taverna Imports. The thrust of Monfort's testimony was limited to describing a 2007 conversation he overheard between the owner of the restaurant and defendant Hans Eichmannn. The day after Monfort overheard this conversation, he sent a letter to Mario Taverna, describing the conversation.[13] Although Taverna had not listed Monfort as a witness, Monfort's letter was listed as an exhibit and was produced during discovery. The Monfort letter and its contents were well known to the Defendants and had been addressed during discovery depositions, including the deposition of Hans Eichmannn.[14]

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[13] Monfort's testimony regarding the statements he overheard Hans Eichmann make to the restaurant owner were admissible as statements of a party opponent. See § 90.803(18) (authorizing admission of a statement "that is offered against a party and is. . . [t]he party's own statement in either an individual or a representative capacity").

[14] Monfort's letter to Mario Taverna read:

> Dear Mr. Taverna:
>
> Yesterday, October 18, [2007] while I was working at Vito's Restaurant in Key Biscayne something wrong happened that you should know. I believe someone is delivering your wine and taking your money. This is what happened, Hans (I do not remember his last name, but I meet him in your office at Taverna Imports), he was making deliveries when Vito's was going to pay, he suggested to Vito if he pay cash, he will give him a discount, Vito agreed but told him

Sometime after 2007, Monfort left Miami and was in Ecuador, and Taverna was no longer able to contact him. Believing that Monfort would not be within the jurisdiction or available for trial, he was not listed as a witness. Shortly before trial, however, Taverna discovered Monfort had returned to Miami and, during trial, Taverna indicated he intended to call Monfort as a "records custodian" seeking admission of this 2007 letter.

Prior to making a decision regarding admission of Monfort's testimony, the trial court instructed the Defendants to depose Monfort, which they did. The trial court properly followed the guidelines established in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981).[15] There was no evidence of bad faith or intentional

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> that because he did not have enough cash he could write him a check to cash if it was ok with him, Hands [sic] agreed and Vito wrote the check #4655 (Citybank) for $189.00 to cash, after this Hans told Vito to destroy and throw away the invoice.
>
> After this, I overhear Hans telling Vito from now on "I will invoice your wine as Mineral Water under my own company."
>
> Mr. Taverna you have problems and you should look into this for your own good. Any question about this feel free to contact me at my cellular phone [phone number redacted].
>
> Sincerely,
> Pablo Monfort

[15] In Binger, 401 So. 2d at 1314, the Florida Supreme Court held:

> [A] trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in

noncompliance on the part of Taverna. Any procedural prejudice was minimal, especially in light of the fact that Monfort's testimony was limited to a single conversation, the contents of which were detailed in a letter which had been disclosed to Defendants and utilized by the parties during pretrial discovery. Further, the Defendants were given an opportunity to depose Monfort before he testified at trial. We find no abuse of discretion in the trial court's determinations or in its decision to permit Monfort to testify. Given that the trial court properly permitted Monfort to testify to this conversation, we find that any error[16] in admission of the letter itself, over a hearsay objection, was harmless.

> this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

[16] We note, however, that the letter appears to be admissible as non-hearsay, to rebut an implied charge of improper influence, motive, or recent fabrication. See § 90.801(2)(b), Fla. Stat. (2014) (providing that a statement is not hearsay "if the declarant testifies at trial or hearing and is subject to cross-examination and the statement is. . . [c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication. . . ."); Fleitas v. State, 3 So. 3d 351 (Fla. 3d DCA 2008). On cross-examination, Defendants questioned Monfort's ability to recall the details of a conversation he ostensibly overheard seven years earlier. Also during cross-

As to the remaining issues raised by the Defendants in Case One, we find them to be without merit and warrant no further discussion.

Case Two: Richard Fonseca's Attempt to Execute and Levy Upon Shares Repurchased by Taverna Imports

The appeal from Case Two is centered upon Richard Fonseca's motion to subject certain Taverna Import stock to execution and levy. After buying Bank of America's judgment and being substituted as the party plaintiff in the instant case, Richard Fonseca moved to execute and levy upon the 1000 shares that Taverna Imports repurchased from Jule Laudisio in 2005.

Taverna Imports contends that Richard Fonseca should not be permitted to execute or levy upon these shares for the singular and improper purpose of seizing majority control of the corporation, thereby giving Richard Fonseca (together with his wife, Maricela Fonseca) the power to extinguish Taverna Imports' million-dollar judgment obtained in Case One against Maricela and Richard Fonseca, which is the only significant corporate asset.[17] We agree, and hold that, in light of

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examination, Monfort was asked about his relationship with Mario Taverna, and Monfort acknowledged that he had recently contacted Mario Taverna, asking for Taverna's help in getting Monfort a job at a restaurant in Miami where Taverna's brother was employed. On redirect, Taverna sought to introduce the Monfort letter, which was admitted over a hearsay objection. The letter served to rebut the implication created during cross-examination, by establishing that Monfort had made a prior consistent statement "before the existence of a fact said to indicate bias, interest, corruption or other motive to falsify the prior consistent statement." Taylor v. State, 855 So. 2d 1, 23 (Fla. 2003).

[17] Taverna Imports also contends that, upon its repurchase of Laudisio's stock,

the circumstances presented in this case, the trial court abused its discretion in permitting the shares to be levied and executed upon, as executing on this stock would serve no other purpose than permitting the Fonsecas to seize majority control of Taverna Imports, as a means of extinguishing their status as judgment debtors of Taverna Imports. The trial court, under the circumstances and conditions presented, should have denied Richard Fonseca's motion to execute and levy, and should have instead applied Richard Fonseca's judgment against Taverna Imports in Case Two (in the amount of $110,309.36) as an offset to Taverna Imports' judgment against Richard Fonseca in Case One ($1,063,234).

The timeline of events is important to our consideration of this issue:

2007: Bank of America sues Taverna Imports after Taverna Imports defaults on its credit line (Case Two);

September 2008: Bank of America obtains a final judgment against Taverna Imports in Case Two for $110,309.36;

2008: During the same time, Maricela Fonseca was alleged to have wrongfully taken control of Taverna Imports, aided and abetted by her husband, Richard Fonseca;

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those 1000 shares became "authorized but unissued" corporate stock and, as such, were not a corporate asset and were not subject to execution and levy. See § 607.0631(1), Fla. Stat. (2007) (providing in pertinent part that "[a] corporation may acquire its own shares. . . and. . . shares so acquired constitute authorized but unissued shares of the same class but undesignated as to series") (emphasis added). Given our disposition of the issue on alternative grounds, we decline to reach the issue of whether the shares repurchased by Taverna Imports constitute an asset of the corporation subject to execution and levy.

September 2008- June 2014: Bank of America takes no record action to collect upon the judgment in Case Two;

June 16, 2014: Richard Fonseca purchases the Bank of America judgment entered against Taverna Imports in Case Two;

June 26, 2014: The trial court grants Richard Fonseca's motion to be substituted as the party plaintiff in Case Two;

August 8, 2014: Richard Fonseca files a motion in Case Two to authorize execution on the stock shares that Taverna Imports had repurchased from Jule Laudisio;

September 8, 2014: Trial begins in Case One (Taverna Imports, et al. v. Maricela and Richard Fonseca, et al.);

September 12, 2014: Jury returns a verdict in Case One in favor of Taverna Imports and against Maricela and Richard Fonseca (and others) for $1,063,234;

September 16, 2014: Trial court in Case Two grants Richard Fonseca's motion to execute and levy on the stock shares;

September 23, 2014: Eleven days after the Case One verdict in favor of Taverna Imports and against Maricela and Richard Fonseca, Taverna Imports files in Case Two its "Motion for Relief from Judgment and Motion for Relief from an Order and a Motion to Stay Execution of Judgments Based Upon New Evidence and Equity." Taverna Imports contended that, under the circumstances, it would be inequitable to permit Richard Fonseca to collect on this judgment by levying on the shares repurchased from Jule Laudisio, and that the court should instead order an offset of the competing judgments. Mario Taverna joins in this motion. The trial court subsequently denies the motion.[18]

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[18] It should be noted that a similar motion for relief from judgment under rule 1.540(b) was filed in Case One. That motion was set for hearing on March 12, 2015, after the appeals from these judgments were already pending in this court. At the March 12 hearing, the trial court indicated its intent to grant the motion for relief, which would have offset the competing judgments, but would have necessarily resulted in a modification of the underlying judgments. The Fonsecas

The corporate viability of Taverna Imports during this time period is also significant: at the time that Richard Fonseca purchased the Bank of America judgment, and during the time he sought to levy upon the shares repurchased from Jule Laudisio, Taverna Imports was no longer an ongoing concern. It was generating no revenue, had no inventory, and its only asset of significance was the $1,063,234 judgment it had secured in Case One against Richard Fonseca, Maricela Fonseca and others, jointly and severally. Richard Fonseca offered no legitimate business purpose for seeking to satisfy his $110,309.36 judgment against Taverna Imports by executing on these shares of Taverna Imports. But if successful in doing so, Richard Fonseca and his wife, Maricela Fonseca, would together own a majority of the shares of Taverna Imports, and through their majority control would have the power to negate their status as judgment debtors of Taverna Imports by extinguishing the million-dollar judgment which Taverna Imports had obtained against the Fonsecas.

In Rowland v. Times Publishing Co., 35 So. 2d 399 (Fla. 1948), stockholders of a corporation disagreed on whether to convert the building they

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filed a petition with this court, (3D15-912) asserting that the trial court was without jurisdiction to modify judgments which were the subject of a pending appeal. We granted the petition for writ of prohibition. See Fonseca v. Taverna Imports, Inc., 193 So. 3d 92 (Fla. 3d DCA 2016). And while we have, by this opinion, ultimately determined that the intended action by the trial court would have been the sound and proper one, even the most well-intended act cannot validly be effectuated in the absence of jurisdiction.

owned into a department store. The corporation's directors (the minority shareholders), were in favor of this effort and, to resolve the dispute, they issued and delivered 325 previously unissued shares of the corporation to a third party who was favorable to their interests and intentions. The trial court framed the relevant question as whether the "transfer of so-called unissued stock or trustees' stock made under such circumstances and conditions" rendered the transaction invalid or illegal. Id. at 401. It found the actions invalid and cancelled the transfer of the unissued stock. The Supreme Court affirmed, citing to a decision from the Wisconsin Supreme Court in Luther v. C.J. Luther Co., 94 N.W. 69 (Wis. 1903), which involved a similar question:

> The directors as minority stockholders caused to be sold 'unissued stock' of the corporation for the purpose of placing in friendly hands the power to vote the shares favorable to the corporate policy advocated by them and thereby render the opposite faction a minority group of stockholders in the corporation. The 'unissued stock' was considered as subject to the control of the directors, like other property or assets of the corporation, and to sell at prices most favorable to all the stockholders of the corporation, in the honest exercise of the discretion and trust vested in them. Their duty with reference thereto is fiduciary; they are bound to act in the best of faith for all stockholders. To dispose of or manage property of the corporation to the end or for the purpose of giving to one part of the cestuis que trustent a benefit or advantage over, or at the expense of, another part, is a breach of duty, especially when the directors belong to the benefited class.

Rowland, 35 So. 2d at 402 (quoting Luther, 94 N.W. at 73). See also Biltmore Motor Corp. v. Roque, 291 So. 2d 114 (Fla. 3d DCA 1974)(finding that the

purpose for recapitalizing a company was to oust the plaintiff as a stockholder, and holding "no legitimate business purpose for the directors' action was shown and . . . their action constitutes an abuse of discretion and a violation of their fiduciary duty to the plaintiff.")

Though the *means* employed here may differ from those employed in Rowland (sale of unissued shares) the ends remain the same: such an event or transaction should not be permitted where its objective or result is the seizing of corporate control for an improper purpose. As the Rowland court observed: "It cannot matter how this result is accomplished, nor what the form of the undue benefits conferred or acquired." Rowland, 35 So. 2d at 402. The trial court's order subjecting the shares to levy and execution would undeniably enable Richard and Maricela Fonseca to seize majority ownership and control of Taverna Imports. As such, they would have the power to wipe out Taverna Imports' million-dollar judgment against the Fonsecas, the only substantial asset of a now-defunct corporation. Such an improper and inequitable purpose should not be sanctioned; this is especially true in the instant case, given the equitable alternative of offsetting Richard Fonseca's judgment in Case Two against Taverna Imports' judgment in Case One.

We therefore reverse the trial court's order denying Taverna Imports' motion for relief from the order authorizing execution and levy, and remand with

directions that Richard Fonseca's judgment in Case Two ($110,309.36) be applied as an offset against Taverna Imports' judgment in Case One ($1,063,234).

Affirmed in part, reversed in part, and remanded with directions.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BAYVIEW LOAN SERVICING, LLC,
Appellant,

v.

LUCIANO DEL LUPO, et al.,
Appellees.

No. 4D15-1088

[January 4, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen D. Ireland, Senior Judge; L.T. Case No. CACE09064971 (11).

Mark Morales of Florida Foreclosure Attorneys, PLLC, Boca Raton, and Marjorie H. Levine of Clarfield, Okon, Salomone & Pincus, West Palm Beach, for appellant.

Jonathan H. Kline and Gregory Light of Jonathan Kline, P.A., Weston, for appellees.

KLINGENSMITH, J.

Bayview Loan Servicing, LLC ("Bayview") brought a foreclosure action against appellees. At the conclusion of Bayview's presentation of evidence, appellees moved for dismissal, claiming Bayview failed to prove damages. The trial court agreed and entered an order of involuntary dismissal. This was error and we reverse.

At trial, Bayview presented witnesses who testified that appellees were in default on their payments. The court also admitted into evidence a copy of appellees' payment history showing that the principal balance due on the note was $300,000. Based on the payment history, another witness testified that there was an uncured breach of payment on appellees' account. After Bayview rested its case, the court granted appellees' motion for dismissal and provided the following justification:

> Okay. Here's your issue for appeal, sir. Because here's why I'm ruling on it. Is it appropriate just to place documents

> into evidence without substantiating what's in the document to the court or having anyone testify to it? I think it is not.
>
> And, **therefore, I'm saying that even though the evidence is there, I cannot ferret out what the amount owed is**, what the – I can maybe – I can read a note and I can tell what the original mortgage was, that the document that you have that I did allow in, over much objection, doesn't have a defining document that says here's – here's the principal, here's the interest, here's the – in it.
>
> So, as far as I'm concerned, sir, you did not prove your damages and I'm granting his motion to dismiss.

(Emphasis added).

The standard of review for an order granting a motion for involuntary dismissal is *de novo*. *Deutsche Bank Nat'l Tr. Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014). "An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a *prima facie* case on the non-moving party's claim." *McCabe v. Hanley*, 886 So. 2d 1053, 1055 (Fla. 4th DCA 2004) (quoting *Hack v. Estate of Helling*, 811 So. 2d 822, 825 (Fla. 5th DCA 2002)). This is true even if the evidence of damages involved inadmissible hearsay erroneously admitted at trial. *See Beauchamp v. Bank of N.Y.*, 150 So. 3d 827, 829 n.2 (Fla. 4th DCA 2014).

In an analogous case from this court, *Wachovia Mortgage, F.S.B. v. Goodwill*, 199 So. 3d 346, 348 (Fla. 4th DCA 2016), the bank introduced a payment history at trial that clearly showed the principal balance due on the note. The bank's witness also testified that "the payment history accurately reflected all payments received and disbursed, along with the total amount due and owing on the loan." *Id.* The trial court nonetheless dismissed the bank's case for failure to prove damages. *Id.* at 347. On appeal, we reversed and remanded for further proceedings because "[t]he payment history and testimony of [the bank]'s witness were sufficient to present a prima facie case on damages and withstand involuntary dismissal." *Id.* at 348; *see also Lasala v. Nationstar Mortg., LLC*, 197 So. 3d 1228, 1230 (Fla. 4th DCA 2016) (explaining that the dismissal of a foreclosure action for failure to prove damages was inappropriate because an admitted loan payment history provides "some evidence the trial court can use to support a judgment on the principal amount owed").

Here, although Bayview's witnesses failed to confirm or interpret appellees' loan payment history, the payment history showing the principal amount due was admitted into evidence. When considered in the light most favorable to Bayview, this evidence was sufficient to establish a *prima facie* case on damages. Having admitted Bayview's proof of damages, albeit in a form not easily comprehensible, the trial court should not have granted appellees' motion for involuntary dismissal. Although we sympathize with the trial court's frustration when faced with this situation, less drastic methods than dismissal are available for dealing with such an issue.

Accordingly, we reverse the involuntary dismissal and remand for a new trial.

Reversed and Remanded.

TAYLOR and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SCOTT NEWMAN,
Appellant,

v.

LEONARDO GUERRA, individually, **YOLANDA GIHA,** individually, and **SONY CONSTRUCTION, INC.,**
Appellees.

Nos. 4D15-1515 & 4D15-2588

[January 4, 2017]

Consolidated appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jaimie R. Goodman, Judge; L.T. Case No. 502009CA026785XXXXMB.

Ronald M. Gaché and Kimberly N. Hopkins of Shapiro, Fishman & Gaché, LLP, Boca Raton, for appellant.

Kamlesh B. Oza of Oza Law, P.A., Delray Beach, and Lynne S. K. Ventry of Lynne S. K. Ventry, P.A., Delray Beach, for appellees.

TAYLOR, J.

The homeowner, Scott Newman, appeals an amended final judgment in favor of a general contractor. He argues that the trial court reversibly erred in denying his motion for attorney's fees and costs incurred in obtaining the discharge of a fraudulent lien placed on his property by the contractor. The trial court denied the homeowner's motion for fees and costs after determining that the contractor was the prevailing party on the significant issues in the litigation.

The contractor, Sony Construction, cross-appeals the trial court's order discharging its lien as fraudulent and order denying its request for attorney's fees. We have consolidated the homeowner's appeal of the final judgment on costs with this appeal. We affirm on all issues in the main and cross-appeal.

This case arises out of a dispute between the homeowner and general contractor. The contractor was hired to construct an addition and outdoor

kitchen to a home that the homeowner purchased from the contractor's principal, Leonardo Guerra, and Mr. Guerra's girlfriend. The parties entered into the contract for construction of the addition and outdoor kitchen in March 2008.

The contractor worked on the addition for several months, but stopped work on December 18, 2008, due to the homeowner's failure to pay. On December 29, 2008, the contractor recorded a Claim of Lien against the property in the amount of $133,645.60. After retaining counsel, the contractor recorded a Partial Release of Lien, reducing the amount of its Claim of Lien to $99,444.18.

The contractor filed suit against the homeowner, asserting claims for foreclosure of the construction lien, breach of contract, and quantum meruit. The contractor sought to recover a judgment for the unpaid amount of $99,444.18.

The homeowner answered the complaint and raised counterclaims against the contractor for fraudulent lien and breach of contract. The parties agreed to a bifurcated proceeding whereby the trial court would first determine whether the contractor's lien was fraudulent before holding a trial on the remaining issues.

Following an evidentiary hearing, the trial court entered an order striking the lien as fraudulent. The court found that many of the charges used to support the lien were not lienable. Overall, the court concluded that the contractor's claim of lien "was compiled with such willful and gross negligence that it amounted to a willful exaggeration and should be deemed a fraudulent lien under Fla. Stat. § 713.31." The court discharged the lien, but reserved jurisdiction on the issue of the award of attorney's fees and costs, noting that other issues remained to be determined by the court.

Several months after the court discharged the contractor's lien as fraudulent, the court held a bench trial on the contractor's claims for breach of contract and quantum meruit. After trial, the court entered a net final judgment for the contractor in the amount of $58,985.58. The court later issued an amended final judgment in the amount of $81,641.08, which included pre-judgment interest.

Both sides sought an award of attorney's fees and costs. The homeowner sought an award of attorney's fees and costs pursuant to section 713.31, Florida Statutes (2008), arguing that he was the prevailing party in the fraudulent lien action. However, the trial court denied the

homeowner's motion, finding that the contractor prevailed on the significant issues in the case.

The contractor also moved for attorney's fees and costs. The contractor's request for attorney's fees was based upon a proposal for settlement. The trial court denied the contractor's request for attorney's fees, ruling that the proposal for settlement was untimely and ambiguous. However, the trial court awarded the contractor $9,985.98 in costs.

The Homeowner's Appeal

On appeal, the homeowner argues that the trial court reversibly erred in denying his motion for attorney's fees and costs incurred from obtaining the discharge of the contractor's fraudulent lien. He contends that where a party seeks attorney's fees and costs as damages pursuant to section 713.31(2)(c), the "significant issues" test does not apply. He argues that, because the trial court discharged the contractor's lien as fraudulent, he was entitled to an award of his attorney's fees and costs as damages under section 713.31(2)(c), regardless of the fact that the contractor prevailed on the remaining counts for breach of contract and quantum meruit.

The contractor counters that the trial court properly denied the homeowner's request for attorney's fees under section 713.31(2)(c), because the trial court ruled that the contractor was the prevailing party under the "significant issues" test. The contractor argues that section 713.31(2)(c) allows an owner to recover attorney's fees only if the lienor who filed the fraudulent lien is not the prevailing party. Noting that the Florida Supreme Court has applied the "significant issues" test to statutory construction lien matters under section 713.29, the contractor contends that the "significant issues" test also applies to section 713.31.

"A party's entitlement to an award of attorneys' fees under a statute or a procedural rule is a legal question subject to de novo review." *Nathanson v. Morelli*, 169 So. 3d 259, 260 (Fla. 4th DCA 2015).

"[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992). Although *Moritz* was a common law breach of contract action, the Florida Supreme Court later held that the "significant issues" test of *Moritz* applies in determining which party, if any, is the prevailing party entitled to an award of fees in construction lien actions brought under section 713.29, Florida Statutes. *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1196 (Fla. 2009); *Prosperi v. Code, Inc.*, 626 So. 2d 1360, 1363 (Fla. 1993).

The Florida Supreme Court recognized the equitable nature of attorney's fees awards under section 713.29 and explained that "under most circumstances it would be unfair to require a contractor who recovers the bulk of its claim to pay attorney's fees for failure to meet the technical requirements of the mechanic's lien law." *Prosperi*, 626 So. 2d at 1363. In light of *Moritz's* requirement of a "more flexible" approach, the Florida Supreme Court explained that "the trial judge must have the discretion to consider the equities and determine which party has in fact prevailed on the significant issues." *Id.* "[I]t was obviously not the intent of the legislature to award attorneys' fees to a defendant in a mechanics' lien foreclosure merely because he successfully defends against the impression of a lien yet is nevertheless found liable in damages, in the same case, for labor and/or materials furnished for his benefit." *Id.* at 1362 (quoting *Emery v. Int'l Glass & Mfg., Inc.*, 249 So. 2d 496, 500 (Fla. 2d DCA 1971)).

Under the "significant issues" test, the determination of the prevailing party should be made at the conclusion of the case, when all pending counts are resolved. *GMPF Framing, LLC v. Villages at Lake Lily Assocs., LLC*, 100 So. 3d 243, 245 (Fla. 5th DCA 2012). However, a trial court has the discretion to make a determination that neither party prevailed on the significant issues in the litigation so as to be entitled to an award of attorney's fees under the construction lien law. *Trytek*, 3 So. 3d at 1203.

The case before us presents the question of whether the "significant issues" test of *Moritz* and *Prosperi* applies to section 713.31.

Section 713.31(2)(c), Florida Statutes (2008), states:

> An owner against whose interest in real property a fraudulent lien is filed, or any contractor, subcontractor, or sub-subcontractor who suffers damages as a result of the filing of the fraudulent lien, shall have a right of action for damages occasioned thereby. The action may be instituted independently of any other action, or in connection with a summons to show cause under s. 713.21, or as a counterclaim or cross-claim to any action to enforce or to determine the validity of the lien. *The prevailing party in an action under this paragraph may recover reasonable attorney's fees and costs. If the lienor who files a fraudulent lien is not the prevailing party, the lienor shall be liable to the owner or the defrauded party who prevails in an action under this subsection in damages*, which shall include court costs, clerk's fees, a reasonable attorney's fee and costs for services

> in securing the discharge of the lien, . . . and punitive damages in an amount not exceeding the difference between the amount claimed by the lienor to be due or to become due and the amount actually due or to become due.

§ 713.31(2)(c), Fla. Stat. (2008) (emphasis added).

Notably, section 713.31(2)(c) was amended in 2007 to include a "prevailing party" standard in the fraudulent lien context. Under the previous version of section 713.31(2)(c), there was no reference to a "prevailing party," and a lienor who filed a fraudulent lien was automatically liable for damages, including attorney's fees. The pre-2007 version of section 713.31(2)(c) states in relevant part: "The lienor who files a fraudulent lien shall be liable to the owner or the defrauded party in damages, which shall include court costs, clerk's fees, a reasonable attorney's fee . . . ." § 713.31(2)(c), Fla. Stat. (2006).

Here, the trial court properly applied the "significant issues" test of *Moritz* and *Prosperi* in denying the homeowner's claim for attorney's fees under the current version of section 713.31. First, under the plain language of section 713.31(2)(c), an "owner against whose interest in real property a fraudulent lien is filed" may recover attorney's fees only "[i]f the lienor who files a fraudulent lien is not the prevailing party." Thus, the plain language of the statute contemplates that a lienor who files a fraudulent lien could still be the prevailing party.

Second, the 2007 amendment to section 713.31(2)(c) indicates that the legislature intended to eliminate a lienor's automatic liability for attorney's fees where the lienor files a fraudulent lien. "It is a well-established presumption that the legislature intends to change the law when it amends a statute." *Hill v. State*, 143 So. 3d 981, 986 (Fla. 4th DCA 2014). Moreover, the legislature is presumed to know the existing law, including judicial decisions, when it enacts or amends a statute. *Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 918 (Fla. 2005).

The homeowner's argument relies on case law applying the pre-2007 version of section 713.31(2)(c). *See Sharrard v. Ligon*, 892 So. 2d 1092, 1099–1100 (Fla. 2d DCA 2004) (under the pre-2007 version of section 713.31, the contractor's damages for breach of contract were subject to a setoff for any amounts that may be determined to be due to the owners on their claim for damages for the filing of a fraudulent lien); *Delta Painting v. Baumann*, 710 So. 2d 663, 664 (Fla. 3d DCA 1998) (under the pre-2007 version of section 713.31, homeowners who prevailed on a fraudulent lien counterclaim against the contractor were entitled to attorney's fees, even

though the contractor prevailed on its breach of contract claim).

The 2007 amendment, however, must have been intended to change the law. Here, the purpose of the 2007 amendment was to replace a rigid rule of automatic liability for attorney's fees with *Prosperi's* flexible standard of awarding attorney's fees to the prevailing party on the significant issues.

Third, the equitable nature of section 713.31 counsels in favor of applying the flexible "significant issues" test of *Prosperi* in deciding entitlement to "prevailing party" attorney's fees under section 713.31.

In sum, the trial court properly applied the "significant issues" test of *Moritz* and *Prosperi* in denying the homeowner's claim for attorney's fees under section 713.31. Even if a party prevails on a fraudulent lien claim, the party must be the prevailing party in the case as a whole to be entitled to attorney's fees under section 713.31. *See Wells v. Halmac Dev., Inc.*, 189 So. 3d 1015, 1016–22 (Fla. 3d DCA 2016). Because the trial court did not abuse its discretion in determining that the homeowner was not the prevailing party on the significant issues in this case, we affirm the trial court's order denying the homeowner's motion for attorney's fees and costs. We also affirm the award of costs to the contractor in the consolidated case (4D15-2588), because the contractor was adjudicated to be the prevailing party in the litigation.

The Contractor's Cross-Appeal

On cross-appeal, the contractor challenges the trial court's determination that its lien was fraudulent. We affirm, because competent substantial evidence supports the trial court's finding of a fraudulent lien. *See Delta Painting*, 710 So. 2d at 664 (holding that a trial court's finding of a fraudulent lien must be supported by competent evidence). "It is within the trial court's discretion to determine the intent and good or bad faith of the lienor, and thus, it would be inappropriate for this court to substitute its judgment for that of the lower court." *Zupnik Haverland, L.L.C. v. Current Builders of Fla., Inc.*, 7 So. 3d 1132, 1135 (Fla. 4th DCA 2009).

A fraudulent lien is one in which

> the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to impress such

> lien or in which the lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration . . . .

§ 713.31(2)(a), Fla. Stat. (2008).

Here, we find no abuse of discretion in the trial court's determination that the contractor's lien was fraudulent, where the court found that the lien was willfully exaggerated and included items not properly lienable "by any stretch of the imagination." *See Levin v. Palm Coast Builders & Constr.*, 840 So. 2d 316, 317 (Fla. 4th DCA 2003) (upholding trial court's finding that lien was fraudulent because it included items that were not lienable "by any stretch of the imagination," including pool upkeep charges, lawn maintenance charges, homeowner's association fees, and utility charges).

We further find that the trial court properly denied the contractor's motion for attorney's fees based on its invalid proposal for settlement. We need not decide whether the proposal was timely, as we find that it was ambiguous. *See Papouras v. BellSouth Telecomms., Inc.*, 940 So. 2d 479, 480–81 (Fla. 4th DCA 2006).

Affirmed on appeal and cross-appeal.

CIKLIN, C.J., and LEE, ROBERT W., Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FALLON RAHIMA JALLALI,
Appellant,

v.

KNIGHTSBRIDGE VILLAGE HOMEOWNERS ASSOCIATION, INC.,
Appellee.

No. 4D15-2036

[January 4, 2017]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael Gates, Judge; L.T. Case No. CACE 12-009353 (12).

Cyrus A. Bischoff, Miami, for appellant.

Michael J. Villarosa of Kaye Bender Rembaum, P.L., Pompano Beach, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We deny appellee's motion for rehearing and rehearing en banc, but withdraw our prior opinion and substitute the following opinion in its place.

Fallon Rahima Jallali appeals a non-final order denying her motion to vacate the final judgment of foreclosure obtained by her property's homeowners' association, Knightsbridge Village Homeowners Association ("the Association"). Jallali asserted three reasons for reversal. We affirm as to all three, but write to distinguish *U.S. Bank National Ass'n v. Quadomain Condominium Ass'n*, 103 So. 3d 977 (Fla. 4th DCA 2012).

We hold that the filing of a notice of lis pendens by a first mortgagee does not bar the foreclosure of an association's subsequent lien for unpaid assessments against the owner, although that action is inferior to the foreclosure of the first mortgage, where the association's subsequent lien

was imposed under the association's declaration of covenants recorded before the first mortgagee recorded its notice of lis pendens.

In 2007, the holder of the first mortgage on Jallali's property ("the Lender") filed a foreclosure action against Jallali and recorded its notice of lis pendens against the property. The Lender named the Association as a defendant.[1] The Association's Declaration of Covenants and Restrictions had been recorded in the public records prior to both the first mortgage and the notice of lis pendens.

In 2011, while the Lender's action was still pending, the Association recorded a claim of lien for delinquent maintenance fees against the same property. In 2012, the Association sued Jallali to foreclose that lien and obtained a default final judgment, which this Court affirmed. *See Jallali v. Knightsbridge Vill. Homeowners' Ass'n*, 185 So. 3d 1251 (Fla. 4th DCA 2014). Subsequently, the Lender's successor obtained a final judgment of foreclosure.[2]

After the mortgage foreclosure concluded, Jallali filed a motion under Florida Rule of Civil Procedure 1.540(b)(4) to vacate the Association's 2012 final judgment of foreclosure. Jallali relied on *Quadomain*, 103 So. 3d at 978-80, and section 48.23, Florida Statutes (2012). The trial court denied the motion and this appeal followed.

The question presented is whether the filing of the notice of lis pendens by the first mortgage holder constitutes a bar to the Association's foreclosure action based upon a claim of lien for unpaid assessments filed after the notice of lis pendens. Because the Declaration of Covenants, which included provisions with respect to the Association's right to lien and foreclose on the property, was a recorded "interest" at the time of the filing of lis pendens, we conclude that, even though the lien was inferior to the mortgage, section 48.23, Florida Statutes, constitutes no bar to the enforcement of the lien between the Association and Jallali.

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[1] Before the Lender sued, the Association had obtained a judgment of foreclosure against Jallali's property based on its lien for unpaid maintenance fees. The Lender alleged, and the Association acknowledged, that the Association's lien was inferior to the Lender's mortgage. The Association's judgment was satisfied in 2008 and is not relevant to this appeal.

[2] This Court recently reversed that final judgment for lack of standing of the plaintiff at the time suit was filed. *Jallali v. Christiana Tr.*, 200 So. 3d 149 (Fla. 4th DCA 2016).

A lis pendens serves two main purposes: (1) to give notice to and thereby protect any future purchasers or encumbrancers of the property; and (2) to protect the plaintiff from intervening liens. *See Fischer v. Fischer*, 873 So. 2d 534, 536 (Fla. 4th DCA 2004).

> One of several purposes underlying the doctrine of lis pendens is that, when a suit is filed that could affect title in property, some notice should be given to future purchasers or encumbrancers of that property. *DePass v. Chitty*, 90 Fla. 77, 105 So. 148 (1925). This serves the purposes of protecting those purchasers or encumbrancers from becoming embroiled in the dispute, and of protecting the plaintiff from intervening liens that could impair any property rights claimed and also from possible extinguishment of the plaintiff's unrecorded equitable lien. In sum, unlike a typical injunction, a lis pendens exists as much to warn third parties as to protect the plaintiff; and the procedural requirements associated with lis pendens should advance both of these important purposes.

Chiusolo v. Kennedy, 614 So. 2d 491, 492 (Fla. 1993) (footnote omitted).

Jallali relies on *Quadomain* as standing for the proposition that the association's foreclosure against her is barred because the association did not comply with section 48.23, Florida Statutes. In *Quadomain*, the bank holding a first mortgage on a condominium unit filed a foreclosure action, recorded a notice of lis pendens, and ultimately obtained a final judgment. 103 So. 3d at 978. Because ownership of the unit had changed before the final judgment, the bank obtained leave to supplement its complaint to foreclose on the new owners. *Id.* It also filed a supplemental notice of lis pendens. *Id.* Thereafter, the association that managed the condominium recorded a claim of lien for unpaid fees against the bank, as the bank had obtained a certificate of title during the initial foreclosure. *Id.* The association filed a foreclosure action, obtained a default judgment against the bank, and the property was sold. *Id.* The bank moved to vacate, arguing the association's lien foreclosure was barred because it was filed after the bank filed its notice of lis pendens. *Id.* The trial court denied the motion and the bank appealed. *Id.*

The issue on appeal in *Quadomain* was whether the bank's supplemental lis pendens divested the trial court of jurisdiction to adjudicate the association's lien. *Id.* This Court quoted from section

48.23, Florida Statutes. *Id.* at 979. That statute, last amended effective July 1, 2009,[3] provides in part as follows:

> (a) An action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby only if a notice of lis pendens is recorded in the official records of the county where the property is located and such notice has not expired pursuant to subsection (2) or been withdrawn or discharged.
>
> . . . .
>
> (d) Except for the interest of persons in possession or easements of use, **the recording of such notice of lis pendens**, provided that during the pendency of the proceeding it has not expired pursuant to subsection (2) or been withdrawn or discharged, **constitutes a bar to the enforcement against the property described in the notice of all interests and liens**, including, but not limited to, federal tax liens and levies, **unrecorded at the time of recording the notice** unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. If the notice of lis pendens expires or is withdrawn or discharged, the expiration, withdrawal, or discharge of the notice does not affect the validity of any unrecorded interest or lien.

§ 48.23(1), Fla. Stat. (emphasis added).

Based on that statute and similar cases, this Court concluded in *Quadomain* that the jurisdiction of the court conducting the mortgage foreclosure proceeding was exclusive:

> [T]he only way to enforce a property interest that is unrecorded at the time the *lis pendens* is recorded is by timely intervening in the suit creating the *lis pendens*—all other actions are barred.

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[3] Previously, language similar to that now appearing in section 48.23(1)(d) appeared in section 48.23(1)(b), but the period of time for intervening was only twenty days. § 48.23(1)(b), Fla. Stat. (2008).

> Therefore, the court presiding over the action which created the *lis pendens* has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the *lis pendens* is recorded to the date it enters final judgment.
>
> Accordingly, the court in the Association's lien foreclosure action did not have jurisdiction to foreclose the lien. If the Association wanted to recover its unpaid Association fees, it was statutorily required to intervene in the re-foreclosure action as prescribed in section 48.23(1)(d).

Quadomain, 103 So. 3d at 979-80 (citations omitted).

In this case, Jallali relies on the language of *Quadomain*, suggesting that the final foreclosure judgment which the Association obtained in the 2012 case was void because the trial court lacked jurisdiction at that time. Jallali contends that exclusive jurisdiction to foreclose on the property was with the circuit court conducting the Lender's foreclosure action in the 2007 case.

Quadomain is factually distinguishable from this case. First, in *Quadomain*, the association was attempting to foreclose its lien against the bank, a first mortgagee, and not the homeowner. Second, *Quadomain* did not address the effect of the association's declaration of covenants, which constitute a recorded interest and thus take the case out of the purview of section 48.23, Florida Statutes. The Association's lien in the present case was imposed under the Association's Declaration of Covenants, recorded before the Lender recorded its notice of lis pendens. Therefore, because the Declaration provided for the imposition of a lien which related back to the filing of the Declarations, it was not an "interest . . . unrecorded at the time of recording the notice" of lis pendens within the meaning of section 48.23(1)(d), Florida Statutes.

We hold that an association's declaration of covenants (or of condominium) constitutes an "interest" in property under section 48.23(1)(d), Florida Statutes. Therefore, declarations which are recorded not only prior to the filing of a notice of lis pendens by a first mortgagee, but prior to the mortgage itself, may constitute a prior recorded interest under section 48.23(1)(d), Florida Statutes. The filing of a lis pendens does not automatically preclude an association from foreclosing on a lien imposed under the declaration against parties other than a first mortgagee, although the association's foreclosure may be subordinate to the foreclosure of a first mortgage.

This is reflected in section 720.3085, Florida Statutes (2015), which controls homeowners' association liens and priority for unpaid assessments. The statute provides that the lien for unpaid assessments relates back to the recording of the declaration of community. § 720.3085(1), Fla. Stat. However, as to determining superiority over first mortgages of record, the lien is effective only from the date the claim of lien is recorded:

> When authorized by the governing documents, the association has a lien on each parcel to secure the payment of assessments and other amounts provided for by this section. Except as otherwise set forth in this section, the lien is effective from and shall relate back to the date on which the original declaration of the community was recorded. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the parcel is located.

Id.; *see also* § 718.116(5)(a), Fla. Stat. (2015) (providing similarly with regard to association assessments on condominiums).

The provisions of the Declaration of Covenants recorded by the Association operate as section 720.3085(1), Florida Statutes, contemplates. The Declaration provides for the assessment of fees by the Association for maintenance of the Association and its properties. It provides that when a lien is imposed for any unpaid fees, it relates back to the recording of the Declaration, except that the lien is subordinate to the lien of an institutional mortgage recorded prior to the time a notice of lien is recorded.

The Declaration is a covenant running with the land, thus constituting an "encumbrance or interest" in property for purposes of section 48.23(1)(d), Florida Statutes. *See Bessemer v. Gersten,* 381 So. 2d 1344 (Fla. 1980) (holding that a valid contractual lien is created when a property is purchased subject to declarations of restrictions which manifest an intent to let the property stand for security for the obligations imposed in the restrictions). Further, the filing dates of any liens incurred under the Declaration, including the lien at issue, relate back to the date of the Declaration's recording. Because the Declaration was recorded prior to the Lender's lis pendens, a foreclosure action against anyone other than a first mortgagee based upon a claim of lien filed in accordance with the Declaration is not barred by section 48.23(1)(d), Florida Statutes.

This conclusion is not undermined by the Declaration's exception with regard to first mortgages to the relation-back provision for claims of liens for assessments. This exception is relevant in determining priority of liens, not the application of section 48.23, Florida Statutes, in actions by an association to foreclose a lien against the property owner when a foreclosure proceeding is pending. From the outset, the Association has acknowledged its lien is inferior to the mortgage; its lien foreclosure action does not purport to affect the Lender's superior interest.

That a homeowners' association can proceed against the homeowner with foreclosure of its lien for unpaid assessments imposed under its declaration, recorded before the first mortgagee recorded its notice of lis pendens, while a mortgage foreclosure proceeding is pending, is further supported by section 720.3085(5)(b), Florida Statutes. Generally, a claim of lien cannot be foreclosed by a homeowners' association without providing forty-five days' notice to the homeowner. § 720.3085(5), Fla. Stat. However, the association need not provide such notice "if the parcel is subject to a foreclosure action or forced sale of another party[.]" § 720.3085(5)(b), Fla. Stat. This implies that a claim of lien can be foreclosed even where a mortgage foreclosure proceeding is pending at the time the claim of lien is filed.

Moreover, we note that, in the context of this case, a lis pendens recorded by a mortgage holder serves to protect **the mortgage holder** from liens unrecorded at the time of the filing. Although section 48.23(1)(d), Florida Statutes, creates a "bar to . . . enforcement" and provides for extinguishment of any **unrecorded interests** or liens if the case proceeds to judicial sale, the statute is not designed to protect the delinquent homeowner. Here, not only does the Association have a prior recorded interest through its Declaration of Covenants, its action was only **against the delinquent homeowner**. Unlike *Quadomain*, the Association's suit did not involve the Lender. *See Quadomain*, 103 So. 3d at 978.

Accordingly, *Quadomain* does not control the outcome of this proceeding between the Association and the delinquent homeowner. A homeowners' association has the right to proceed in a foreclosure of its lien for unpaid assessments against the homeowner in accordance with its declaration and the statutes governing such associations.

We affirm the order denying Jallali's motion to vacate the final judgment.

Affirmed.

WARNER, GROSS and KLINGENSMITH, JJ., concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LORENZO DIXON and **LAHOMA DIXON,**
Appellants,

v.

WELLS FARGO BANK, N.A., et al.,
Appellees.

No. 4D15-3974

[January 4, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Lynn Rosenthal, Judge; L.T. Case No. CACE08024246.

S. Alan Johnson of S. Alan Johnson Law LLC, Fort Myers, for appellants.

Brian S. Jacobson of Brian Jacobson Law, PL, Miami, for appellee SJ Mak LLC.

KLINGENSMITH, J.

Lorenzo and Lahoma Dixon ("Borrowers") appeal a final judgment of foreclosure entered against them. Because the initial plaintiff, Wells Fargo Bank, N.A. ("Bank"), sent a default letter to Borrowers that failed to substantially comply with paragraph 22 of the mortgage, we reverse.[1]

After Borrowers defaulted on their mortgage loan payment, Bank's law firm sent them a default letter on Bank's behalf stating that "[p]ursuant to the terms of the promissory Note and Mortgage, [Bank] has accelerated all sums due and owing, which means that the entire principal balance and all other sums recoverable under the terms of the promissory Note and Mortgage are now due." The letter notified Borrowers that although the process of filing a foreclosure complaint against them was already underway, Borrowers should contact the firm "if you wish to receive figures to reinstate (bring your loan current) or pay off your loan through a specific

[1] Wells Fargo was the initial plaintiff, but SJ Mak LLC was properly substituted as the plaintiff later in the case.

date," and that the debt would be assumed valid "[u]nless you notify this law firm within thirty (30) days after your receipt of this letter that the validity of this debt, or any portion thereof, is disputed." Eight days after this letter was sent, Bank filed its foreclosure complaint.

At the close of the non-jury trial, Borrowers moved for involuntary dismissal on multiple grounds, one of which was that the default letter failed to comply with paragraph 22 of the mortgage. Paragraph 22 of the mortgage provided, in relevant part:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

The trial court ruled that Bank substantially complied with paragraph 22, and ultimately entered final judgment against Borrowers. This appeal followed.

"[A] trial court's interpretation of a contract is a matter of law subject to a de novo standard of review." *Reilly v. Reilly*, 94 So. 3d 693, 697 (Fla. 4th DCA 2012) (quoting *Chipman v. Chipman*, 975 So. 2d 603, 607 (Fla. 4th DCA 2008)).

Paragraph 22 of a standard mortgage "sets forth a pre-suit requirement that the lender give the borrower thirty days' notice and an opportunity to cure the default prior to filing suit." *Dominko v. Wells Fargo Bank, N.A.*,

102 So. 3d 696, 698 (Fla. 4th DCA 2012). Its purpose is "to ensure that borrowers are informed before suit is filed that they are not required to take a foreclosure complaint lying down and can defend the case if so inclined." *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 16–17 (Fla. 2d DCA 2015). A bank's substantial compliance with paragraph 22 "is all that is required" to satisfy this condition precedent. *See Ortiz v. PNC Bank, Nat'l Ass'n*, 188 So. 3d 923, 925 (Fla. 4th DCA 2016).

Analogous to this case is *Kurian v. Wells Fargo Bank, National Ass'n*, 114 So. 3d 1052, 1054–55 (Fla. 4th DCA 2013), wherein this court reversed a summary judgment of foreclosure entered against the borrowers because the bank did not meet the requirements of paragraph 22 since its default letter conveyed that acceleration had already occurred, was dated six days before the filing of the complaint, and failed to provide both a sufficient notice of default and a thirty-day opportunity to cure. Likewise, the evidence here showed that Bank did not substantially comply with paragraph 22 of Borrowers' mortgage because Bank's default letter stated that acceleration had already occurred, was sent only eight days before the filing of the initial complaint, and failed to inform Borrowers of their right to assert the nonexistence of default and to provide them with thirty days to cure. *See id.*

Therefore, because Bank did not substantially comply with paragraph 22 of Borrowers' mortgage, we reverse and remand to the trial court to grant Borrowers' motion for involuntary dismissal.

Reversed and Remanded with instructions.

GERBER and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SAN MATERA THE GARDENS CONDOMINIUM ASSOCIATION, INC.,
Appellant,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION,
Appellee.

No. 4D15-4400

[January 4, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard Oftedal, Judge; L.T. Case No. 502015CA004532XXXXMB.

Jacob A. Brainard and Scott C. Davis of Business Law Group, P.A., Tampa, for appellant.

Alexzander D. Gonano of Gonano & Harrell, Fort Pierce, and Avri S. Ben-Hamo and Steven B. Greenfield of Aldridge & Pite, LLP, Boca Raton, for appellee.

LEVINE, J.

In this case, the trial court found that a servicer, which is a company that is authorized to collect payments under a loan, was entitled to the benefit of the safe harbor provision of section 718.116(1)(b), Florida Statutes (2015). The safe harbor provision limits the liability of a first mortgagee, and its successors and assignees, for past due condominium assessments. Thus, the issue presented for our review is whether a holder of the note, who is not also the owner, can qualify for the safe harbor provision. We find that the servicer, as the holder of the note, was a first mortgagee entitled to the safe harbor provision and that ownership of the note and mortgage is not required. As such, the trial court did not err in limiting appellee's liability for past due assessments as an assignee of the first mortgagee.

Bayview, acting as the servicer for the owner, Freddie Mac, obtained a final judgment of foreclosure by possessing the note endorsed in blank. Bayview later acquired title to the property at the foreclosure sale. Bayview

then executed a special warranty deed transferring title of the property to Freddie Mac. Thereafter, a dispute arose between Freddie Mac and the San Matera the Gardens Condominium Association regarding Freddie Mac's liability for past unpaid assessments. The trial court entered summary judgment in favor of Freddie Mac, finding that as the first mortgagee, Bayview was protected under section 718.116(1)(b), Florida Statutes. The trial court further found that when Freddie Mac acquired title to the property from Bayview, Freddie Mac became jointly and severally liable with any balance owed by Bayview pursuant to section 718.116(1)(b). From this order, the Association appeals.

On appeal, the Association argues that the safe harbor provision of section 718.116(1)(b) is limited to the owner of the loan. Because Bayview was not the owner, both Bayview and Freddie Mac were jointly and severally liable for the full amount claimed. Freddie Mac maintains that Bayview was a first mortgagee because it had physical possession of the note and that Bayview's status as servicer of the loan did not disqualify it from the safe harbor provision.

The standard of review for an order granting summary judgment is de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "A trial court's interpretation of a statute presents a pure issue of law subject to de novo review on appeal." *Beltway Capital, LLC v. Greens COA, Inc.*, 153 So. 3d 330, 332 (Fla. 5th DCA 2014).

Section 718.116(1)(a) provides that "a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title." However, the statute carves out a safe harbor provision that caps liability for "a first mortgagee or its successor or assignees who acquire title" by foreclosure. § 718.116(1)(b)(1), Fla. Stat. Specifically, the safe harbor provision provides:

> (b) 1. The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of:
>
> a. The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

> b. One percent of the original mortgage debt. The provisions of this paragraph apply only if the first mortgagee joined the association as a defendant in the foreclosure action.
> . . .

§ 718.116(1)(b), Fla. Stat. The statute defines "successor or assignee" as "a subsequent holder of the first mortgage." § 718.116(1)(g), Fla. Stat. Although the statute does not define "first mortgagee," courts have elucidated its meaning by relying on the rules of statutory construction.

In *Beltway Capital*, the court explained that the term "first mortgagee" is broader than the term "original lender," because "'first' refers to first in priority, not first in time." 153 So. 3d at 331. In *Brittany's Place Condominium Ass'n v. U.S. Bank, N.A.*, 41 Fla. L. Weekly D2267 (Fla. 2d DCA Oct. 5, 2016), the Second District concluded that "a first mortgagee is the holder of the mortgage lien with priority over all other mortgages." Because a "successor or assignee" is defined as a "*subsequent* holder of the first mortgage," the court reasoned that "the first mortgagee must be a *prior* holder of the priority mortgage." *Id.* A holder, in turn, means "an owner or a possessor of the instrument." *Id.* Thus, "ownership is not essential to a successor or assignee's entitlement to limited liability under section 718.116(1)(b)." *Id.* This conclusion is "bolstered by the fact that the legislature did not use the word owner to restrict limited liability to only owners of the first mortgage (or note)." *Id.* Citing *Brittany's Place*, the court in *Village Square Condominium v. U.S. Bank National Ass'n*, 41 Fla. L. Weekly D2603 (Fla. 5th DCA Nov. 18, 2016), also concluded "that ownership of the note and mortgage is not required in order for a foreclosing party to limit its liability pursuant to the safe harbor provisions of section 718.116(1)(b)."

Applying these principles to the instant case, we hold that Bayview, as the holder of the note, qualified for the safe harbor provision as the first mortgagee. Additionally, Freddie Mac, as an assignee of the first mortgagee, also qualified for the safe harbor provision. As such, we affirm the order granting final summary judgment.

Affirmed.

TAYLOR and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SUNSET BEACH INVESTMENTS, LLC, a foreign corporation,
Appellant,

v.

KIMLEY-HORN AND ASSOCIATES, INC., a foreign corporation,
MICHAEL E. KIEFER, JR., G. MARK BROCKWAY and
KEVIN M. SCHANEN,
Appellees.

No. 4D15-4425

[January 4, 2017]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Janet Carney Croom, Judge; L.T. Case No. 562013CA000383.

Benjamin A. Webster, Evan H. Frederick, and Aaron C. Garnett, West Palm Beach, for appellant.

Jon D. Derrevere and Shirley Jean McEachern of Derrevere Hawkes Black & Cozad, West Palm Beach for appellee Michael E. Kiefer, Jr.

KUNTZ, J.

The plaintiff, Sunset Beach Investments, LLC, appeals the circuit court's final order of summary judgment in favor of one of the defendants, Michael E. Kiefer, Jr. Sunset Beach argues the court erred in two respects: (1) by concluding that Kiefer, an "Engineer Intern," could not be liable for professional negligence; and (2) by applying the economic loss rule.

We conclude the court correctly decided that Kiefer could not be liable for professional negligence, the lone count asserted against him. In light of our conclusion as to the first argument, we do not address the second argument.

Background

Sunset Beach sought to develop a beachfront parcel on Hutchinson Island and hired Kimley-Horn and Associates, Inc. to "provide professional

design and permitting consulting services." Sunset Beach alleged that Kimley-Horn agreed to advise it as to the "development potential" of the property and "prepare a conceptual site plan consistent with all applicable permitting and land use requirements."

Kiefer was the "project manager" and worked on the Kimley-Horn team with, among other people, two licensed engineers who were also defendants below. The record testimony indicates that Kiefer's "project manager" role did not imply that he was the "boss" on the project. Instead, he coordinated the team but did not manage the licensed engineers' work product.

In actuality, it was the licensed engineers' obligation to oversee Kiefer. It is undisputed that Kiefer was not a licensed engineer. Instead, Kiefer passed the FUNDAMENTALS OF ENGINEERING exam and was certified by the State of Florida as an "engineer intern." Kiefer testified that engineer interns do not practice engineering and that they are required to work under a licensed engineer's supervision.

As a result of delays and other issues with the project, Sunset Beach filed a complaint against Kimley-Horn. Later, Sunset Beach filed an amended complaint against Kimley-Horn, Kiefer, and the two licensed engineers. The sole count against Kiefer was a professional negligence claim asserted against all four defendants.

While Sunset Beach alleged that Kiefer was responsible for various facets of the project, if not the entire project, the record evidence at the time of summary judgment was clear that Kiefer was not a licensed engineer and could not sign and seal the relevant plans. That evidence is consistent with the allegation in the amended complaint that "Sunset Beach relied upon the expertise of Brockway and Schanen, as licensed Professional Engineers, to prepare site plans and other design documents suitable to obtain the necessary permits within a reasonable period of time."

Kiefer moved for summary judgment on his affirmative defense that the complaint failed to state a cause of action for professional negligence against him. Kiefer argued that he was immune from suit for professional negligence because he was not a licensed professional and was merely an employee of Kimley-Horn. In his affidavit in support of his summary judgment motion, Kiefer stated that he had never been a professional engineer licensed in any state, is not subject to regulation by the state, and did not sign or seal any engineering plans or other documents.

The circuit court held a hearing on the motion for summary judgment and entered an order finding that Kiefer could not be subject to a claim for professional negligence. In the written order, the court stated "the undisputed record evidence establishes that at all times material Kiefer was not a licensed engineer …. [that] Kiefer was not a 'design professional' …. [and] that Kiefer was not a 'licensed professional' at any time material to the matters asserted by Sunset Beach." Further, the court concluded "the undisputed record evidence further establishes that Kiefer did not sign or seal any plans and did not use any professional designation in connection with the Sunset Beach project."

This appeal followed.

Analysis

With regard to claims for professional negligence, the Florida Supreme Court has explained that "where the negligent party is a professional, the law imposes a duty to perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances." *Moransais v. Heathman*, 744 So. 2d 973, 975-76 (Fla. 1999). The issue in this appeal turns on the definition of "professional" and, specifically, whether an engineer intern is a "professional" for purposes of a professional negligence claim.

We conclude that a licensed engineer could be subject to a claim for professional negligence, as engineering is a profession which requires special education, training, skill. But Kiefer did not satisfy the requirements to be a licensed engineer. Instead, he was an engineer intern, which the legislature classifies differently from a licensed engineer.

Notwithstanding that difference, Sunset Beach asserts that *Garden v. Frier*, 602 So. 2d 1273 (Fla. 1992), and *Rocks v. McLaughlin Engineering Co.*, 49 So. 3d 823 (Fla. 4th DCA 2010), compel us to conclude that an engineer intern may be subject to a professional negligence claim. We disagree; those cases do not support Sunset Beach's position.

In *Garden*, the Florida Supreme Court considered whether the acts of *licensed* surveyors fell under the two-year statute of limitations for professional malpractice or the four-year statute of limitations for negligence. The court answered the question by providing a two-part test. First, the court stated that a vocation is not a profession if it does not require "at a minimum a four-year college degree before licensing is possible in Florida. There can be no equivalency exception." 602 So. 2d

at 1275. Second, the court stated that "a vocation is not a profession if a state license is not required." *Id.* at 1276.

However, in *Garden*, the supreme court "limit[ed] the definition of 'professional' . . . to the context of the professional malpractice statute." *Id.* at 1277. The court reasoned that it was not in a position to address all professions nor future changes in the licensing requirements for those professions. *Id.* at 1277 n.9.

More recently, we discussed *Garden* in *Rocks v. McLaughlin Engineering Co.*, 49 So. 3d 823 (Fla. 4th DCA 2010). In *Rocks*, the plaintiff sued a company and two of its *licensed* surveyors for, among other claims, professional malpractice. *Id.* at 824-25. The plaintiff "specifically alleged that defendants were licensed surveyors under section 471.023, Florida Statutes; that all owed a duty as licensed surveyors to perform their engagement with the same level of skill and accuracy as any professional so licensed under the statute; and that they had deviated from that duty and caused damages." *Id.* After the circuit court dismissed the complaint, we rejected the surveyors' argument that they were not professionals simply because they lacked a four-year college degree. *Id.* at 827.

In rejecting the surveyors' argument, we stated that "we take the supreme court at its word. *Garden* limited the non-professional designation for surveyors to only the statute of limitations." *Id.* Notably, we also looked to the Legislature's designation of surveyors as professionals. *See id.* ("Moreover, although the surveyor regulatory and licensure statutes did not then require a four-year college degree, we note that long before the 2005 amendment adding the college degree requirement, the *Legislature* had used the term *professional* to apply to the regulation and licensure of surveyors. . . . [T]he Legislature deemed surveyors as *professionals* many years before it added the college degree requirement."). Finally, we concluded that "common law authority is in the same vein" as the Legislature's classification. *Id.* at 827.

The surveyors in *Rocks* satisfied the state's requirements to be "professional" surveyors and, for that, the state licensed them. Therefore, a professional negligence claim against the *licensed* surveyors was the plaintiff's potential remedy to address allegations that the surveyors failed to perform in a manner expected of someone with the requisite "special education, training, experience and skill" to be a licensed surveyor. *Id.* at 828.

We did not hold in *Rocks* that a license is unnecessary for a professional negligence claim to exist. That issue was not presented because the

surveyors in *Rocks* were licensed. Here, however, Sunset Beach argues that Kiefer is a "professional" under *Rocks* because Kiefer's service "is one requiring special education, training, experience and skill."

We conclude that argument lacks merit. Sunset Beach's test would require courts to decide what qualifies as "special education," what qualifies as "training," what is acceptable "experience," and related issues. That test would lead to the same confusion which the supreme court attempted to remedy in *Garden*. *See Garden*, 602 So. 2d at 1274-75 ("In light of the confusion that has arisen since *Pierce . . . .*"; "[I]n *Pierce* we created confusion by suggesting that the equivalent of a four-year college degree would suffice as a minimum licensing requirement and by suggesting that the four-year degree must be in a field relevant to the licensed vocation."). The supreme court explained that too "much imprecision and variation is created by allowing courts to second-guess what does or does not constitute the equivalent of a college degree." *Id*. at 1275. If too much imprecision and variation resulted when the test hinged solely on education, it would surely exist if the test required a balancing of education, training, experience, and skill.

At a minimum, in a profession where a license exists, the existence of a license is a valid barometer for determining whether a person is classified as a professional. *See id.* at 1276 ("[A] vocation is not a profession if a state license is not required at all."); *Bixenmann v. Dickinson Land Surveyors, Inc.*, 882 N.W.2d 910, 914 (Neb. 2016) ("[T]he requirement of a license to practice one's occupation, although not dispositive, 'strongly indicates that an occupation is a profession.' However, the requirement of a license alone does not make an occupation a profession, as the preparation and training required to procure that license are also important factors.").

In fact, Sunset Beach was unable to provide any case where an unlicensed person was held liable for professional negligence. Each of the cases which Sunset Beach cites involved a licensed professional. *See Rocks*, 49 So. 3d at 823 (licensed surveyors); *Moransais*, 744 So. 2d at 973 (licensed engineer); *Cristich v. Allen Eng'g*, 458 So. 2d 76 (Fla. 5th DCA 1984) (licensed surveyor); *Merrett v. Liberty Mut. Ins. Co.*, No. 3:10-CV-1195-J-12MCR, 2012 WL 37231 (M.D. Fla. Jan. 6, 2012) (licensed insurance adjustor). Although Sunset Beach also cites *Insurance Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295 (11th Cir. 2012), which involved an unlicensed roofer, the Eleventh Circuit issued its opinion "without reaching the issue of whether roofers are 'professionals' under Florida law." *Id*. at 1298.

When a license exists, the Legislature has decided which requirements must be satisfied for a person to work in that profession. And, until those requirements are satisfied, the person is not permitted to act as a professional in the subject field. That presumption is even more appropriate when the Legislature has chosen to specifically define who is a professional in the subject field such as with engineers. Unlike licensed surveyors and licensed engineers, the Legislature does not classify an unlicensed engineer intern as a professional. For that reason, unlike a licensed engineer, who is required to renew the engineering license every two years, no requirements exist to maintain the engineer intern designation. § 471.017, Fla. Stat. An engineer intern is neither licensed nor regulated.

Nor did the Legislature include "engineer intern" within the definition of "engineer." The Legislature defined "engineer intern" to "mean a person who has graduated from an engineering curriculum approved by the board and has passed the fundamentals of engineering examination . . . ." § 471.005(6), Fla. Stat. (2013). That is contrasted with the Legislature's definition for engineer which "includes the terms 'professional engineer' and 'licensed engineer' and means a person who is licensed to engage in the practice of engineering under this chapter." § 471.005(5), Fla. Stat. (2013).

These statutory definitions clearly indicate that being an "engineer intern" does not make a person an engineer. In fact, being an engineer intern and working under the supervision of a licensed engineer is a requirement to ultimately obtaining an engineering license. The Third District explained that "in order to practice engineering in Florida, a person is required to pass two examinations: (1) the fundamentals examination and (2) the principles and practice examination." Rizov v. State, Bd. of Prof'l Eng'rs, 979 So. 2d 979, 980 (Fla. 3d DCA 2008) (citing § 471.015(1), Fla. Stat. (2005)). Upon the passage of the fundamentals examination, the first examination listed, the person is qualified "to practice in the state as an engineer intern." *Id.* (citing § 471.013(1)(b), Fla. Stat. (2005)). An engineer intern must then have "four years of 'active engineering experience of a character indicating competence to be in responsible charge of engineering'" prior to sitting for the second examination. *Id.* (citing § 471.013(1)(a)1., Fla. Stat.).

The statute both anticipates and requires engineer interns to engage in engineering before becoming licensed. Providing services which meet the statutory definition of "engineering" under the supervision of a licensed engineer does not make an engineer intern a *de facto* licensed engineer – rather, it is a step to becoming a licensed engineer. Kiefer did not satisfy

the requirements to become a licensed engineer and, for that reason, Kiefer was not permitted to sign or seal plans and was required to work under a licensed engineer's supervision. Thus, Keifer, an engineer intern, was not a professional and was not subject to liability for professional negligence.

Sunset Beach argues that our conclusion described above will leave it without a remedy. We disagree. Sunset Beach may have a remedy for any professional negligence found to exist against Kimley-Horn and the two licensed engineers. Sunset Beach chose not to seek any other remedies against Kiefer.

Conclusion

We affirm the trial court's final order of summary judgment in Kiefer's favor. Kiefer was an unlicensed engineer intern and could not be liable for a professional negligence claim.

Affirmed.

CIKLIN, C.J., and MAY, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.