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Debrincat v. Fischer, Case No. SC15-1477 (Fla. 2017).
The litigation privilege does not bar an action for malicious prosecution; *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), is overruled.

Solar Dynamics, Inc. v. Buchanan Ingersoll & Rooney, P.C., Case No. 2D15-5728 (Fla. 2nd DCA 2017).
A claim involving a patent's scope, validity, or infringement must first be brought in federal court; state courts are without jurisdiction to make those determinations even if the overall claim is a legal malpractice claim alleging negligence arising out of the patent's prosecution.

Super Products, LLC v. Intracoastal Environmental, LLC, Case No. 2D16-1979 (Fla. 2d DCA 2017).
A court may dismiss a lawsuit under Florida Statute section 605.0904(1) for a LLC's failure to hold a certificate of authority from the State of Florida to conduct business, but the better practice is to stay the lawsuit pending compliance.

Houk v. Pennymac Corp., Case No. 2D15-2583 (Fla. 2nd DCA 2017).
An order of substitution does not relieve a substituted plaintiff in a mortgage foreclosure action from the requirement to prove ownership or entitlement to enforce the note.

Integrale Investments, LLC v. Hoffman, Case No. 2D15-5757 (Fla. 2nd DCA 2017).
A partial final judgment that reserves jurisdiction to determine the remainder of the case cannot authorize execution on the partial final judgment.

SRMOF II 2012-1 Trust v. Garcia, Case No. 5D16-973 (Fla. 2nd DCA 2017).
A dismissal without prejudice does not require the listing of the *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), factors. The Fifth District aligns itself with the First and Third District Courts of Appeal.

Supreme Court of Florida

No. SC15-1477

RICHARD DEBRINCAT, et al.,
Petitioners,

vs.

STEPHEN FISCHER,
Respondent.

[February 9, 2017]

POLSTON, J.

The Fourth District Court of Appeal in Fischer v. Debrincat, 169 So. 3d 1204 (Fla. 4th DCA 2015), held that the litigation privilege did not bar the filing of a malicious prosecution claim that was based upon the act of adding a party defendant to a civil suit. We have jurisdiction because the Fourth District also certified conflict with the Third District Court of Appeal's decision in Wolfe v. Foreman, 128 So. 3d 67 (Fla. 3d DCA 2013). See art. V, § 3(b)(4), Fla. Const. For the following reasons, we approve the Fourth District's decision in Fischer and disapprove the Third District's decision in Wolfe to the extent it is inconsistent with our decision.

I. BACKGROUND

The original civil proceeding, which gave rise to Stephen Fischer's claim for malicious prosecution, was filed around November 2007 by Richard Debrincat and Jason Debrincat against a group of defendants. Stephen Fischer was later added as a party defendant in an amended complaint and was also named in a second amended complaint. In the underlying proceeding, the Debrincats sued Fischer for "defamation, defamation per se, tortious interference, and conspiracy." Fischer, 169 So. 3d at 1205. The Debrincats "later dropped [Fischer] from the underlying proceeding." Id.

On May 4, 2009, Fischer brought an action against the Debrincats for malicious prosecution, claiming that the Debrincats "acted with malice towards him in pursuing the underlying proceeding against him without probable cause." Id. The Debrincats "eventually moved for summary judgment, arguing that the litigation privilege afforded them immunity for their conduct of joining [Fischer] as a defendant in the underlying lawsuit." Id. The Debrincats relied upon the Third District's decision in Wolfe, "a case holding that the litigation privilege applies to a cause of action for malicious prosecution." Id. "The trial court granted the [Debrincats'] motion for summary judgment and later entered a final judgment in their favor." Id.

On appeal, the Fourth District reversed and held "that the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution." Id. at 1209. The Fourth District explained that "[t]he Florida Supreme Court has long recognized the viability of a cause of action for malicious prosecution" and that, "[i]n [its] view, Wolfe went too far in its application of the litigation privilege." Id. at 1207. The Fourth District reasoned as follows:

> Because the commencement or continuation of an original criminal or civil judicial proceeding is an act "occurring during the course of a judicial proceeding" and having "some relation to the proceeding," malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege. If the litigation privilege could apply to bar a malicious prosecution action, this would mean that the tort of malicious prosecution would be effectively abolished in Florida—or, at the very least, eviscerated beyond recognition.

Id.

Accordingly, the Fourth District "reverse[d] the summary judgment, remand[ed] for further proceedings, and certif[ied] conflict with Wolfe." Id. at 1209.

II. ANALYSIS

The Debrincats argue that the litigation privilege should bar Fischer's claim for malicious prosecution, which was based upon the Debrincats' act of adding

Fischer as a party defendant in a civil proceeding. We disagree.[1]

"The law has long recognized that judges, counsel, parties, and witnesses should be absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings, regardless of how false or malicious the statements may be, as long as the statements bear some relation to or connection with the subject of inquiry." DelMonico v. Traynor, 116 So. 3d 1205, 1211 (Fla. 2013); see also Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) ("[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding."). "[This] litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin." Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007). However, this Court has explained that its "recognition of the [litigation] privilege derived from a balancing of two competing interests—the public interest in allowing litigants and counsel to freely and zealously advocate for their causes in court versus protecting the rights of

1. Because this is a pure question of law, it is subject to de novo review. See Bosem v. Musa Holdings, Inc., 46 So. 3d 42, 44 (Fla. 2010).

individuals, including the right of an individual to maintain his or her reputation and not be subjected to slander or malicious conduct." DelMonico, 116 So. 3d at 1217.

Importantly, the cause of action for malicious prosecution has also long been recognized in the State of Florida. See Tatum Bros. Real Estate & Inv. Co. v. Watson, 109 So. 623, 626 (Fla. 1926). To prevail in a malicious prosecution action, this Court has explained that a plaintiff must establish the following elements:

> (1) an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding.

Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994).

Applying the litigation privilege here would eviscerate this long-established cause of action for malicious prosecution. Specifically, the first element of a claim for malicious prosecution is that "an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued." Id. (emphasis added). Certainly, the filing of a lawsuit and the joining of a party defendant is the commencement of a judicial proceeding against that party as delineated in Alamo.

Indeed, as the Fourth District cogently explained in Fischer, "[a]n action for malicious prosecution—which is based as a matter of law on causing the commencement or continuation of an original judicial proceeding—could never occur outside the context of litigation." 169 So. 3d at 1209. Therefore, "malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege." Id. at 1207.

This Court has never held that the litigation privilege protects a litigant from a claim of malicious prosecution. And other district courts have recognized that the litigation privilege does not act as a bar to a malicious prosecution claim. See Olson v. Johnson, 961 So. 2d 356, 360-61 (Fla. 2d DCA 2007); Wright v. Yurko, 446 So. 2d 1162, 1164-65 (Fla. 5th DCA 1984).

III. CONCLUSION

Accordingly, we hold that the litigation privilege does not bar the filing of a claim for malicious prosecution that was based on adding a party defendant to a civil suit. We approve the Fourth District's decision in Fischer and disapprove the Third District's decision in Wolfe to the extent it is inconsistent with this decision.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and CANADY, JJ., concur.
LAWSON, J., did not participate.

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

Application for Review of the Decision of the District Court of Appeal – Certified Direct Conflict of Decisions

Fourth District - Case No. 4D14-1855

(Palm Beach County)

Paul Morris of the Law Offices of Paul Morris, P.A., Miami, Florida,

for Petitioners

John Marshall Jorgensen and Stephen Brian Bull of Scott, Harris, Bryan, Barra & Jorgensen, P.A., Palm Beach Gardens, Florida,

for Respondent

Franklin Lewis Zemel, Susan Eileen Trench, and Ariel Rebecca Deray of Arnstein & Lehr LLP, Fort Lauderdale, Florida,

for Amicus Curiae American Federated Title Corporation

Philip Mead Burlington of Burlington & Rockenbach, P.A., West Palm Beach, Florida,

for Amicus Curiae Florida Justice Association

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LANE A. HOUK, Appellant, v. PENNYMAC CORP., substituted as party plaintiff for CitiMortgage, Inc.; SHANNON HOUK; BELLE MEADE OWNERS ASSOCIATION, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Appellees.	)	Case No. 2D15-2583

Opinion filed February 10, 2017.

Appeal from the Circuit Court for Lee County; Thomas S. Reese, Senior Judge.

Mark P. Stopa of Stopa Law Firm, Tampa, for Appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee; William P. Heller and Marc J. Gottlieb of Akerman LLP, Fort Lauderdale; and Kathryn B. Hoeck of Akerman LLP, Orlando, for Appellee, PennyMac Corp.

No appearance for remaining Appellees.

WALLACE, Judge.

Lane A. Houk challenges a final summary judgment of foreclosure entered in favor of PennyMac Corp., an entity that was substituted as the party plaintiff in place of CitiMortgage, Inc., during the pendency of the litigation in the circuit court. Because a genuine issue of material fact exists regarding PennyMac's standing to foreclose, we reverse.

I. THE FACTUAL AND PROCEDURAL BACKGROUND

On September 27, 2005, Mr. Houk executed a note for $584,800 in favor of Cherry Creek Mortgage Co., Inc. Mr. Houk and his wife executed a mortgage on real property in Lee County to secure payment of the note on the same day. A stamp with a signature appearing on a copy of the note indicates that Cherry Creek indorsed the note to the order of CitiMortgage.

On January 11, 2008, CitiMortgage filed a two-count complaint against Mr. and Mrs. Houk and other defendants. Count I of the complaint sought the foreclosure of the note and mortgage. Count II requested the reestablishment of the note that CitiMortgage alleged had been lost. In an affidavit of lost note that was subsequently filed in the case, a document control officer for CitiMortgage stated that the note had been lost or destroyed while it was in the possession of the law firm that was responsible for filing the foreclosure action.[1]

On May 20, 2013, CitiMortgage filed an unsworn motion to substitute party plaintiff seeking the substitution of PennyMac as plaintiff. The motion stated, in pertinent part: "Subsequent to the filing of the present action, the underlying note and mortgage were transferred." A copy of a recorded assignment of mortgage from

[1]Counsel for PennyMac had no involvement in the loss of the note.

CitiMortgage to PennyMac was attached to the motion. The circuit court entered an order granting the motion on the same day that it was filed.

After the entry of the order of substitution, PennyMac filed a second amended verified complaint seeking both foreclosure and reestablishment of the lost note. In Count I, PennyMac alleged, in pertinent part:

> 4. CitiMortgage, Inc. subsequently transferred all rights in the note and mortgage to PennyMac Corp.
>
> 5. PennyMac Corp. is entitled to enforce the mortgage and mortgage note pursuant to Florida Statutes § 673.3011(3) as a person not in possession of the instrument who is entitled to enforce the instrument. PennyMac Corp. is entitled to enforce the instrument, but has lost the Mortgage Note pursuant to Florida Statutes § 673.3091.

In paragraph 25 of Count II, PennyMac alleged, in pertinent part: "Plaintiff was in possession of the Note and entitled to enforce it when loss of possession occurred or Plaintiff has been assigned the right to enforce the Note."

Mr. Houk filed an answer to the second amended complaint. In his answer, Mr. Houk generally denied the material allegations of the complaint. He also raised ten affirmative defenses, including the defense that PennyMac lacked standing and that CitiMortgage lacked standing to enforce the note when it filed the action.

PennyMac filed a motion for summary judgment with supporting affidavits. It subsequently filed an amended motion for summary judgment. In its motion, PennyMac sought both foreclosure of the mortgage and reestablishment of the note. On February 25, 2015, the circuit court held a hearing on the amended motion for summary judgment. There is no transcript of this hearing, and the parties have not prepared a statement of the proceedings in accordance with Florida Rule of Appellate

Procedure 9.200(b)(4). At the conclusion of the hearing, the circuit court entered a final judgment of foreclosure. Strangely, the final judgment does not include a provision reestablishing the lost note. Mr. Houk filed a motion for rehearing that was denied. This appeal followed.

II. THE ISSUES ON APPEAL

On appeal, Mr. Houk raises two issues. First, he argues that the circuit court erred in entering the summary judgment because PennyMac failed to refute his affirmative defenses in its amended motion for summary judgment. Second, Mr. Houk contends that the entry of the summary judgment was error because PennyMac failed to establish its standing to foreclose. We need address only Mr. Houk's second issue.

III. THE APPLICABLE LAW

Before considering the parties' arguments regarding the issue of standing, it is appropriate to review what PennyMac was required to demonstrate in order to establish its entitlement to enforce the note. PennyMac had to establish that CitiMortgage had standing when the complaint was filed and its own standing when the final judgment was entered. See Lamb v. Nationstar Mortg., LLC, 174 So. 3d 1039, 1040 (Fla. 4th DCA 2015). Section 673.3011, Florida Statutes (2012), addresses the question of how one may qualify as a person entitled to enforce an instrument:

> The term "person entitled to enforce" an instrument means:
>
> (1) The holder of the instrument;
>
> (2) A nonholder in possession of the instrument who has the rights of a holder; or

> (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4).
>
> A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

In this case, PennyMac's claim was that the note had been lost after it had been indorsed by Cherry Creek to the order of CitiMortgage. Therefore, PennyMac had to satisfy the requirements outlined in section 673.3091 in order to prevail. See Federal Nat'l Mortg. Ass'n v. McFadyen, 194 So. 3d 418, 420 (Fla. 3d DCA 2016).

Section 673.3091 provides, in pertinent part, as follows:

> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. 673.3081 applies to the case as if the person seeking enforcement had produced the instrument.

It was CitiMortgage—not PennyMac—that was entitled to enforce the note when it was lost. Therefore, PennyMac had to establish that it had directly or indirectly acquired ownership of the note from CitiMortgage. See § 673.3091(1).

In the Lamb case, the Fourth District outlined what a substituted plaintiff seeking to enforce an instrument indorsed to the original plaintiff must establish as follows:

> "When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." § 673.2051(1), Fla. Stat. (2013). Where a bank is seeking to enforce a note which is specially indorsed to another, it may prove standing " 'through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.' " Stone v. BankUnited, 115 So. 3d 411, 413 (Fla. 2d DCA 2013) (quoting BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 939 (Fla. 2d DCA 2010)); see also Hunter v. Aurora Loan Servs., LLC, 137 So. 3d 570, 573 (Fla. 1st DCA), review denied, 157 So. 3d 1040 (Fla. 2014); Dixon [v. Express Equity Lending Grp., LLLP], 125 So. 3d [965, 967 (Fla. 4th DCA 2013)] (" '[T]he plaintiff must submit the note bearing a special [i]ndorsement in favor of the plaintiff, an assignment from payee to the plaintiff or an affidavit of ownership proving its status as holder of the note.' ") (quoting Rigby v. Wells Fargo Bank, N.A., 84 So. 3d 1195, 1196 (Fla. 4th DCA 2012)). "A witness who testifies at trial as to the date a bank became the owner of the note can serve the same purpose as an affidavit of ownership." Sosa v. U.S. Bank Nat'l Ass'n, 153 So. 3d 950, 951 (Fla. 4th DCA 2014).

Lamb, 174 So. 3d at 1040-41. With these principles in mind, we turn to the parties' arguments about whether PennyMac established the nonexistence of a material fact about its entitlement to enforce the note.

IV. DISCUSSION

A. Introduction

Mr. Houk concedes that the affidavit of lost note with the copy of the note attached was sufficient to establish CitiMortgage's entitlement to enforce the note when the complaint was filed. Instead, Mr. Houk contends that PennyMac failed to establish its entitlement to enforce the note at the time of the entry of the summary judgment of foreclosure. In response to Mr. Houk's challenge to its entitlement to enforce the note, PennyMac raises five arguments. First, the absence of a transcript of the hearing on the motion for summary judgment "demands affirmance." Second, the order substituting PennyMac as the party plaintiff was sufficient to give it standing to enforce the lost note. Third, the assignment of mortgage was sufficient to establish its standing to foreclose. Fourth, the allegations of the motion to substitute and the verified second amended complaint were sufficient to establish its entitlement to enforce the lost note. Finally, PennyMac had standing to foreclose as the servicer of the loan. We will consider PennyMac's arguments separately below.

B. The Absence of a Transcript

PennyMac correctly notes that the record on appeal does not include a transcript of the hearing on the amended motion for summary judgment or a statement of the proceedings prepared in accordance with Florida Rule of Appellate Procedure 9.200(b)(4). "However, hearing transcripts ordinarily are not necessary for appellate review of a summary judgment." Shahar v. Green Tree Servicing LLC, 125 So. 3d 251, 254 (Fla. 4th DCA 2013). We join the Fourth District in agreeing with the Third District, which has addressed this question as follows:

> It is the burden of the appellant to bring up a proper record for consideration of the issues presented on appeal. Where the appeal is from a summary judgment, the appellant must bring up the summary judgment record, that is, the motion, supporting and opposing papers, and other matters of record which were pertinent to the summary judgment motion. Those are the portions of the record essential to a determination whether summary judgment was properly entered. However, the hearing on a motion for summary judgment consists of the legal argument of counsel, not the taking of evidence. Consequently, it is not necessary to procure a transcript of the summary judgment hearing, although it is permissible and often helpful to do so.

Seal Prods. v. Mansfield, 705 So. 2d 973, 975 (Fla. 3d DCA 1998) (citations omitted); see also Inglis v. Casselberry, 200 So. 3d 206, 212 (Fla. 2d DCA 2016) (citing Mansfield for the foregoing proposition with approval).

In this case, the record includes the operative complaint, Mr. Houk's answer and affirmative defenses, the motion and the order for substitution of the plaintiff, the amended motion for summary judgment, and the supporting and opposing affidavits, including the affidavit of lost note. Thus we have all of the portions of the record necessary for us to determine whether the summary judgment was properly entered. Under these circumstances, a transcript of the hearing on the motion for summary judgment is not critical to a determination of this appeal.

C. The Sufficiency of the Order of Substitution

PennyMac asserts that it "became entitled to enforce the lost note when it was substituted as party plaintiff." According to PennyMac, its standing derives from CitiMortgage, the holder of the note when it was lost or destroyed.

Mr. Houk concedes that CitiMortgage had standing to enforce the note when it filed the original complaint. But PennyMac also had to establish its standing to

enforce the note at the time of the entry of judgment. See Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 642 (Fla. 2d DCA 2015). Here, the lost note had been specially indorsed to CitiMortgage. In order to establish its entitlement to enforce the lost note, PennyMac could establish standing "through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer." BAC Funding Consortium, 28 So. 3d at 939. PennyMac's filings in support of its motion for summary judgment did not present evidence of any of these things. In the absence of such evidence, the order of substitution standing alone was ineffective to establish PennyMac's entitlement to enforce the lost note. See Geweye v. Ventures Trust 2013-I-H-R, 189 So. 3d 231, 233 (Fla. 2d DCA 2016); Creadon v. U.S. Bank, N.A., 166 So. 3d 952, 953-54 (Fla. 2d DCA 2015); Sandefur v. RVS Capital, LLC, 183 So. 3d 1258, 1260 (Fla. 4th DCA 2016); Lamb, 174 So. 3d at 1040-41.

In support of its argument that it has standing to enforce the lost note derived from CitiMortgage through the order of substitution, PennyMac relies on the decision in Brandenburg v. Residential Credit Solutions, Inc., 137 So. 3d 604 (Fla. 4th DCA 2014). We find the decision in Brandenburg to be distinguishable because its facts are substantially different from the facts in this case. In Brandenburg, the Fourth District affirmed a final judgment of foreclosure in favor of Residential Credit Solutions, Inc. (RTS). Id. at 606. The original plaintiff in the action and prior holder of the note was Amtrust Bank (Amtrust). Id. at 605. During the course of the litigation, RTS was substituted as the party plaintiff in place of Amtrust. Id. The issue before the Fourth District in Brandenburg was whether Amtrust had standing at the inception of the foreclosure action. Id. The Fourth District concluded that the evidence established that

Amtrust had standing to foreclose when it filed the complaint. Id. at 605-06. In affirming the final summary judgment of foreclosure, the Fourth District specifically noted that RTS had standing because it had "acquired the note and mortgage from the prior holder." Id. at 605. In Brandenburg, it was RTS's acquisition of the note and mortgage from the prior holder—coupled with the order substituting it as party plaintiff—that enabled RTS to pursue the foreclosure to judgment. In the case before us, PennyMac failed to make a sufficient showing that it had acquired the note from the prior holder, CitiMortgage. Thus, unlike in Brandenburg, the order of substitution was unavailing to give PennyMac standing to enforce the note. It follows that PennyMac's reliance on Brandenburg is misplaced.

D. The Assignment of Mortgage

PennyMac relies on the copy of the recorded assignment of mortgage that was attached to its motion to substitute plaintiff as being sufficient to establish its standing. According to PennyMac, "[t]he assignment of mortgage showed the mortgage was assigned 'with all rights due or to become due thereon.' This would include monies owed on the note. See § 701.01, Fla. Stat. [(2012)]." This argument falls short of the mark for several reasons.

First, the assignment transferred only the mortgage, not the note. "The mortgage follows the assignment of the promissory note, but an assignment of the mortgage without an assignment of the debt creates no right in the assignee." Tilus v. AS Michai LLC, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015) (citing Bristol v. Wells Fargo Bank, Nat'l Ass'n, 137 So. 3d 1130, 1133 (Fla. 4th DCA 2014)). PennyMac did not acquire standing to foreclose based on an assignment of only the mortgage. See

Eaddy v. Bank of America, N.A., 197 So. 3d 1278, 1280 (Fla. 2d DCA 2016); Caballero v. U.S. Bank Nat'l Ass'n ex rel. RASC 2006-EMX7, 189 So. 3d 1044, 1046 (Fla. 2d DCA 2016); Geweye, 189 So. 3d at 233; Lamb, 174 So. 3d at 1041.

Second, the only evidence of the assignment of the mortgage was the copy attached to the unsworn motion for substitution. Mr. Houk's pleadings did not admit the genuineness of the assignment. The copy of the assignment was not a certified copy, and none of the affidavits filed by PennyMac attested to the authenticity of the document. "Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in [Florida Rule of Civil Procedure] 1.510(e)." Bifulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997). In the absence of an admission or appropriate proof of the authenticity of the assignment, it could not properly be considered as evidence in support of PennyMac's amended motion for summary judgment. See DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439-40 (Fla. 2d DCA 2013); Bryson v. Branch Banking & Trust Co., 75 So. 3d 783, 786 (Fla. 2d DCA 2011); Toyos v. Helm Bank, USA, 187 So. 3d 1287, 1290 (Fla. 4th DCA 2016); Rodriguez v. Tri-Square Const., Inc., 635 So. 2d 125, 126-27 (Fla. 3d DCA 1994).

E. The Motion to Substitute and the Verified Complaint

PennyMac points out that "[b]oth the motion to substitute plaintiff and the verified [second] amended complaint stated CitiMortgage transferred its interest in the note and mortgage to PennyMac." PennyMac contends that the allegations in these papers were sufficient to establish its entitlement to enforce the lost note. We disagree for several reasons.

First, the motion to substitute was unsworn. Therefore, it was plainly insufficient as a basis for supporting a motion for summary judgment. See Fla. R. Civ. P. 1.510(e). However, PennyMac's second amended complaint was verified. With regard to the sufficiency of a verified complaint to support a motion for summary judgment, this court has said:

> We acknowledge that "[a] verified complaint may serve the same purpose as an affidavit supporting or opposing a motion for summary judgment." "However, in order to be so considered, the allegations of the verified complaint must meet the requirements of the rule governing supporting and opposing affidavits." Rule 1.510(e), in turn, provides that affidavits must be based on personal knowledge and shall "show affirmatively that the affiant is competent to testify to the matters stated therein." A verification which is improperly based on information and belief is insufficient to entitle the verifying party to relief because the verification is qualified in nature.

Ballinger v. Bay Gulf Credit Union, 51 So. 3d 528, 529 (Fla. 2d DCA 2010) (citations omitted). In this case, the verification of the complaint in accordance with Florida Rule of Civil Procedure 1.110(b) stated: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief." Where, as in this case, a verification of a complaint is based on knowledge and belief and fails to show that the affiant had personal knowledge of the matters stated in the complaint, the trial court cannot consider the verified complaint as a basis for the entry of summary judgment. See Ballinger, 51 So. 3d at 530; Colon v. JP Morgan Chase Bank, N.A., 162 So. 3d 195, 199 (Fla. 5th DCA 2015); see also Lindgren v. Deutsche Bank Nat'l Trust Co., 115 So. 3d 1076, 1076 (Fla. 4th DCA 2013) (finding a verification based on "information and belief" to be insufficient for purposes of summary judgment).

Second, the allegations of the second amended complaint regarding PennyMac's standing to enforce the note were conclusory in nature. The pertinent allegations did not state any facts regarding PennyMac's claim that CitiMortgage had "transferred all rights in the note and mortgage to PennyMac Corp." This conclusory statement was insufficient to sustain PennyMac's burden for summary judgment. See Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc., 793 So. 2d 978, 980 (Fla. 2d DCA 2001) (holding that an affidavit containing "only conclusory statements of ultimate fact [was] insufficient to sustain the movant's burden of demonstrating the absence of any genuine issue of material fact"); Seinfeld v. Commercial Bank & Trust Co., 405 So. 2d 1039, 1041 (Fla. 3d DCA 1981) (stating that general statements in an affidavit, which are framed only in conclusions of law, do not satisfy the movant's burden on a motion for summary judgment).

Third, the allegations of the second amended complaint regarding PennyMac's claim to entitlement to enforce the note are in hopeless conflict with one of the affidavits that PennyMac itself filed in support of its amended motion for summary judgment. PennyMac filed an Affidavit of Indebtedness sworn to by a "default specialist" for PennyMac Loan Services, LLC, the alleged servicer of the loan for PennyMac. In this affidavit, the default specialist stated that PennyMac "is the holder of said Note and Mortgage."[2] Thus PennyMac's own affidavit undercut and contradicted

[2]Because the note had been lost long before the alleged transfer from CitiMortgage, it would be a physical impossibility for PennyMac to be a holder of the note. " 'Holder' means: (a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. . . ." § 671.201(21)(a), Fla. Stat. (2012). "To hold a note under the Uniform Commercial Code ordinarily connotes possession of the document itself." Phan v. Deutsche Bank

the theory advanced in the complaint that it qualified under section 673.3011(3) as a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 673.3091. Unquestionably, PennyMac could not meet its burden to establish the nonexistence of a material fact regarding its standing when the affidavit that it filed in support of its motion was in express and irreconcilable conflict with the theory of standing alleged in its operative complaint.

F. Standing as the Loan Servicer

Finally, PennyMac asserts that it "had standing as the loan servicer." This argument is without merit. We recognize that "[a] servicer that is not the holder of the note may have standing to commence a foreclosure action on behalf of the real party in interest, but it must present evidence, such as an affidavit or a pooling and servicing agreement, demonstrating that the real party in interest granted the servicer authority to enforce the note." Rodriguez v. Wells Fargo Bank, N.A., 178 So. 3d 62, 63 (Fla. 4th DCA 2015) (citing Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC, 87 So. 3d 14, 17 (Fla. 4th DCA 2012)). But in this case, two of the affidavits filed in support of the amended motion for summary judgment recite that the servicer for Mr. Houk's loan is PennyMac Loan Services, LLC, not the plaintiff, PennyMac Corp. In making the argument about its purported standing as the loan servicer, PennyMac seems to have forgotten or ignored its own affidavits.

Nat'l Trust Co., ex rel. First Franklin Mortg. Loan Trust 2006-FF11, 198 So. 3d 744, 747 (Fla. 2d DCA 2016).

V. CONCLUSION

For the foregoing reasons, PennyMac failed to meet its burden of showing the nonexistence of a genuine issue of material fact regarding its entitlement to enforce the lost note. Accordingly, we reverse the final summary judgment of foreclosure and remand this case to the circuit court for further proceedings.

Reversed and remanded.

MORRIS and ROTHSTEIN-YOUAKIM, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

INTEGRALE INVESTMENTS, LLC, a Florida limited liability company; and KEITH KNUTSSON, an individual, Petitioners, v. MATTHEW P. HOFFMAN, an individual; and PCGL, LLC, a Florida limited liability company, Respondents.	)	Case No. 2D15-5757

Opinion filed February 10, 2017.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Stephen Scott Stephens, Judge.

Steven L. Brannock, Ceci Culpepper Berman, and Joseph T. Eagleton of Brannock & Humphries, Tampa; and G. Wrede Kirkpatrick of Hines Norman Hines, P.A., Tampa, for Petitioners.

Ginger Barry Boyd of Broad and Cassel, Destin; and Kenneth G.M. Mather of Gunster, Yoakley & Stewart, P.A., Tampa, for Respondent Matthew P. Hoffman.

No appearance for Respondent PCGL, LLC.

LaROSE, Judge.

Pursuant to East Avenue, LLC v. Insignia Bank, 136 So. 3d 659, 665 (Fla. 2d DCA 2014), we quash the trial court's partial final judgment.

The trial court issued an order granting partial final judgment. The order reserves jurisdiction to decide an interrelated claim in the complaint. Yet, the order allows execution to issue.

"Permitting execution prior to completion of the litigation before the trial court has long been characterized as improper by the appellate courts." Id. Because the order is a nonfinal, nonappealable order but authorizes execution, it departs from the essential requirements of law. Id.

Petition for writ of certiorari granted; judgment quashed.

WALLACE and LUCAS, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SOLAR DYNAMICS, INC., Appellant, v. BUCHANAN INGERSOLL & ROONEY, P.C., and CHRISTOPHER E. PARADIES, Appellees.	)	Case No. 2D15-5728

Opinion filed February 8, 2017.

Appeal from the Circuit Court for Sarasota County; Rochelle Curley, Judge.

Roger L. Young of the Law Office of Roger L. Young, P.A., Sarasota, for Appellant

Mark D. Tinker, Frank H. Gassler, and Scott S. Amitrano of Banker Lopez Gassler, P.A., St. Petersburg; and Hala A. Sandridge of Buchanan Ingersoll & Rooney, P.C., Tampa, for Appellees

LaROSE, Judge.

Solar Dynamics, Inc. (Solar), appeals the trial court's order dismissing, without prejudice, its legal malpractice action against Buchanan Ingersoll & Rooney,

P.C. (Buchanan), and Christopher E. Paradies.[1] We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). After careful review of the record, and with the benefit of oral argument, we affirm.

Introduction

Solar hired Buchanan and Mr. Paradies to seek a patent for Solar's fastening shade system for playground structures.[2] Allegedly, the issued patent was inadequate to protect Solar's idea and design from infringement by competitors. In response to Solar's legal malpractice lawsuit, Buchanan and Mr. Paradies moved to dismiss the complaint. The trial court granted the motion and dismissed the case, concluding that it lacked subject matter jurisdiction.[3] See 28 U.S.C. § 1338(a) (2015) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents . . . .").

Solar argues that the trial court erred. According to Solar, the malpractice claim is a pure state law matter that does not raise a substantial question of federal law. Buchanan and Mr. Paradies insist otherwise. They contend that before any malpractice claim can proceed, a federal court must necessarily decide the scope, validity, or

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[1]At all times pertinent to the allegations in Solar's complaint, Mr. Paradies was a shareholder at Fowler White Boggs, P.A., which later merged with Buchanan before Solar filed its complaint.

[2]Solar's fastening shade system consists of a demountable wind-resistant canopy "removably secured over a support structure" and "comprised of hip beams supported by columns mounted on the support structure" in which the "hip beams extend upwardly and inwardly toward an apex." U.S. Patent No. 7,316,237 (filed Apr. 27, 2006).

[3]The trial court did not address Buchanan's and Mr. Paradies' alternative theories that the cause of action was not ripe or was time-barred.

infringement of the patent. Those determinations, they tell us, can only be made in an action by Solar in federal court against an alleged patent infringer. See 35 U.S.C. § 271 (2015) (creating a cause of action for patent infringement). Only against that tableau, they say, can a state court determine whether the lawyers committed malpractice that caused Solar damage. As we will see, Buchanan and Mr. Paradies have the better argument. The trial court correctly found that it lacked subject matter jurisdiction.

Background[4]

Solar retained Mr. Paradies in the spring of 2006 to obtain a patent for its fastening shade system. The United States Patent and Trademark Office issued a patent, '237 Patent, in January 2008. Shortly thereafter, Solar began negotiations with another company, Playcore, concerning the grant of an exclusive license for Playcore to use, or practice, the patented invention. By the summer of 2008, negotiations stalled. Playcore objected to a proposed license agreement prepared by Mr. Paradies, claiming that the patent was "too weak." Playcore proceeded to design and market its own shading system.

After learning that other companies also were selling a similar shade system, Solar sought further legal advice from Duane A. Stewart, III, another Buchanan lawyer. Mr. Stewart advised that "the patent that [Buchanan and Mr. Paradies] had obtained for [Solar] had failed to adequately protect the company's idea and function, and that the patent provided no protection."

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[4]The facts relevant for this appeal are taken from Solar's complaint and deemed to be true. See Fla. Bar v. Greene, 926 So. 2d 1195, 1199 (Fla. 2006) ("For the purposes of a motion to dismiss . . . allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." (quoting Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983))).

Without first filing a federal patent infringement suit against any of its competitors, Solar sued Buchanan and Mr. Paradies in state court. They alleged that Buchanan and Mr. Paradies "were negligent in failing to protect [Solar's] idea and design from infringement, and by failing to properly patent the fastening system." After the trial court dismissed the case, this appeal ensued.

Standard of Review

"[T]he issue of whether a court has subject matter jurisdiction involves a question of law that is reviewed de novo." Nissen v. Cortez Moreno, 10 So. 3d 1110, 1111 (Fla. 3d DCA 2009) (citing Sanchez v. Fernandez, 915 So. 2d 192 (Fla. 4th DCA 2005)); see also Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd., 752 So. 2d 582, 584 (Fla. 2000) ("A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review.").

Analysis

This case involves the confluence of federal and state law. Specifically, we must determine whether a Florida trial court has subject matter jurisdiction to decide, *vel non*, issues related to a patent's scope, validity, or infringement; the resolution of such issues necessarily would form the basis for a legal malpractice action.

The United States Constitution empowers Congress to enact laws relating to patents in order to "promote the Progress of . . . useful Arts." Art. I, § 8, cl. 8, U.S. Const. Indisputably, federal courts exercise exclusive jurisdiction over "any civil action arising under any Act of Congress relating to patents." § 1338(a); see 28 U.S.C. § 1295(a)(1) (2015) (providing that the United States Court of Appeals for the Federal Circuit possesses exclusive jurisdiction "of an appeal from a final decision of a district

court of the United States . . . in any civil action arising under . . . any Act of Congress relating to patents"). And yet, that jurisdiction does not necessarily extend to "all questions in which a patent may be the subject-matter of the controversy." New Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473, 478 (1912). Finding the line of demarcation, however, is bedeviling. In framing the contours of the "slim category" of cases in which a legal malpractice claim confers § 1338 "arising under" jurisdiction, the jurisprudence resembles a "canvas [that] looks like one that Jackson Pollock got to first."[5] Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013).

The parties before us rely heavily on Gunn, a legal malpractice claim involving a patent. Of course, each side draws a different conclusion as to how Gunn applies. We are not convinced, however, that Gunn is dispositive. The underlying facts of Gunn are simple. Gunn represented Minton in a federal court patent infringement suit. The federal court ultimately found Minton's patent invalid. Id. at 1062. Minton then sued Gunn for legal malpractice in a Texas state court. Allegedly, Gunn's failure to raise a particular argument cost Minton the lawsuit, and his patent. Id. at 1063. The Texas trial court rejected Minton's argument. On appeal, Minton argued that his legal malpractice claim was based on an alleged error in a patent case; thus, only a federal district court had exclusive jurisdiction over the action under § 1338(a). The intermediate appellate court affirmed. But the Texas Supreme Court reversed, concluding that the case belonged in federal court because the success of Minton's

[5]Jackson Pollock, a well-known abstract expressionist, pioneered the "drip" technique, in which paint is dripped from sticks, trowels, and knives onto a canvas tacked to a wall or floor. See Jackson Pollock and His Paintings, Jackson Pollock Biography, Paintings, and Quotes, http://www.jackson-pollock.org (last visited November 28, 2016).

malpractice claim relied upon a question of federal patent law. The United States Supreme Court reversed, holding that Minton's state law legal malpractice claim did not "arise under" federal patent law, and, thus, § 1338(a) did not deprive the state court of subject matter jurisdiction over the lawsuit.[6] Id. at 1065.

In deciding whether a federal court must decide a state law legal malpractice claim involving a patent, the Court relied on the test it announced in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005). Id. The Court observed that federal jurisdiction over such a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Id. (citing Grable, 545 U.S. at 314). Given Solar's allegations, if Gunn is our guide, as the parties urge, we conclude that prongs one and two are easily satisfied here. Only prongs three and four, the parties tell us, are relevant in the case before us.

We acknowledge that, generally, in the context of a legal malpractice claim, even if a state court must address patent issues, nothing the state court decides will necessarily set a precedent or affect patent law as a whole. That is because in the "case within a case" framework of legal malpractice claims, an adverse legal determination has already been made against the malpractice plaintiff. Thus, on the record before it, the Supreme Court noted in Gunn that "there is no 'serious federal interest in claiming the advantages thought to be inherent in a federal forum.' " Id. at

[6]We do not understand Buchanan and Mr. Paradies to argue that Solar's malpractice claim belongs in federal court. Rather, they urge that any malpractice claim must await an adverse result for Solar in a federal patent infringement suit.

1068 (quoting Grable, 545 U.S. at 313). Whatever happened in Minton's lawsuit against Gunn, Minton's patent was, and would continue to be, invalid. Id. at 1067. Apparently, under such circumstances, the Court was reluctant to federalize run-of-the-mill state legal malpractice claims. On the other hand, we must also recognize that questions of a patent's scope, validity, or infringement are quintessential federal issues arising under federal patent laws. Id. at 1064.

Solar contends that Gunn compels a state court to exercise subject matter jurisdiction over a legal malpractice claim, even though the underlying claim involves patent issues. State courts, in the first instance, are certainly suited to assess the standard of care owed by lawyers to their clients. See id. at 1064 (observing that "indisputably" Minton's legal malpractice claim "f[ound] its origins in state rather than federal law"). Typically, in a patent-related malpractice claim, resolution of patent issues are incidental to the core issues of duty, causation, and damages. And, as Gunn observed, the patent matter has already been decided adversely to the malpractice plaintiff. For several reasons, however, we conclude that Gunn does not reach as far as Solar would hope.

Notably, unlike Gunn, we are not faced with the question of whether Solar's legal malpractice claim belongs in federal court. See n.6, supra. Under Gunn, for a typical "case within a case" claim of malpractice, a state court is competent to proceed. Certainly, Gunn rejected the notion that Congress intended to move all state legal malpractice claims related to patents into federal court. Yet, it does not necessarily follow that state courts, in the first instance, have jurisdiction to decide core issues of patent law. After all, Gunn involved a legal malpractice claim that followed on

the heels of an unsuccessful federal patent infringement suit. Minton's legal malpractice action stemmed directly from that suit. Recall that Minton claimed that Gunn committed malpractice by not raising an argument in a federal case concerning the patent's validity. That alleged failure created the "case" that a state trial court could address in the subsequent legal malpractice case.

In contrast, by proceeding directly with a malpractice case, Solar effectively asks the state trial court to rule in the first instance upon the scope, validity, or infringement of its patent. As framed, Solar's complaint for malpractice necessarily requires a decision in the state court that the patent was inadequate to protect Solar from infringement by competitors. Solar avoids a critical step; it fails to create the first "case" needed to provide the context for a subsequent legal malpractice claim. And the unfortunate result for federal oversight of patent law, if Solar is correct, is that a state court will make core decisions related to a federally-issued patent. Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 136 S. Ct. 1562, 1570 (2016) (stating that under Grable, federal courts "typically" have jurisdiction over a state law claim where "a state-law cause of action is 'brought to enforce' a duty created [under federal law] because the claim's very success depends on giving effect to a federal requirement").

The omission of a first case of infringement is particularly critical to how Gunn applies here. In assessing the substantiality prong of the Grable test, the Supreme Court observed that the "federal [patent] issue carries no . . . significance" to the federal system as a whole. 133 S. Ct. at 1066. It bears repeating that the Court reasoned in Gunn that no matter how the state court resolved the malpractice case, the result of the prior federal patent litigation would not change. Id. The "backward-looking

nature of a legal malpractice claim," id. at 1066-67, is completely absent under Solar's theory. Gunn involved a prior determination that Minton's patent was invalid. Solar presents no such prior determination. See id. at 1067 ("No matter how the state courts resolve that hypothetical 'case within a case,' it will not change the real-world result of the prior federal patent litigation. Minton's patent will remain invalid." (emphasis added)). Solar presents no "backward-looking" claim. Solar wants a state court, in the first instance, to entangle itself with core concepts of patent law that will ultimately define the merits of its legal malpractice claim. See, e.g., Larson & Larson, P.A. v. TSE Indus., Inc., 22 So. 3d 36, 38 (Fla. 2009) (recounting the procedural history in which TSE brought a state legal malpractice suit against Larson & Larson following a federal court's determination that TSE's patent was invalid).

As noted earlier, federal district courts "have original jurisdiction of any civil action arising under any Act of Congress relating to patents." § 1338(a). Gunn explained that "Minton's original patent infringement suit . . . arose under federal law . . . because it was authorized by 35 U.S.C. §§ 271, 281." Gunn, 133 S. Ct. at 1064; see also 35 U.S.C. § 282(a) (providing that "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity"); Schachel v. Closet Concepts, Inc., 405 So. 2d 487, 489 (Fla. 3d DCA 1981) (Ferguson, J., specially concurring) ("Because, however, the issue of patent validity involves a right which arises under federal law, determination of which was necessary for resolution of the breach of contract issue, jurisdiction lies exclusively in the federal court.").

In assuaging concerns that state courts' case-within-a-case patent rulings would impede development of a uniform body of patent law, Gunn noted that federal

courts are not bound by such "hypothetical" state court rulings; federal courts possess "exclusive jurisdiction over actual patent cases." Gunn, 133 S. Ct. at 1067. But, Solar's complaint presents no "hypothetical" musing. Before reaching the merits of any malpractice claim, the state trial court will have to construe the claims of the Solar patent, and then assess whether the products of Playcore or any other competitor infringe the patent. These decisions will mark the merits of the malpractice claim. When we look at the proper allocation of authority to address core patent issues, it is readily apparent why Gunn was decided as it was. In Gunn, the issue of patent validity was already decided by a federal court. What remained was a determination by a state court as to whether Minton's unfortunate result was caused by Gunn's malpractice, performing below the appropriate standard of care. Only after deciding these core issues could the state trial court assess the merits of the malpractice claim.

Jurisdiction under § 1338(a) applies to all cases in which federal patent law creates the cause of action. Therefore, whether a claim arises under patent law must be determined from what appears in Solar's complaint. Cf. Boca Burger, Inc. v. Forum, 912 So. 2d 561, 568-69 (Fla. 2005) ("[W]hen a defendant asserts [a lack of subject matter] defense in a motion to dismiss, a trial court must determine the issue as a matter of law based only on the well-pleaded allegations in the complaint, assuming the truth of the facts asserted."). Although Solar's complaint is carefully couched as a matter of legal malpractice, the complaint necessarily invites the trial court to make initial determinations as to the patent's scope, validity, or infringement. These issues are best decided in a federal court lawsuit between Solar and an alleged infringer. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808-09 (1988) (holding that §

1338(a) jurisdiction inures when a complaint establishes that "federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims").

We think Schachel, 405 So. 2d at 487-88, offers prudent guidance in assessing the parties' arguments. There, the patent owner and his exclusive licensee sued an alleged patent infringer in state court, claiming that the infringer breached a settlement agreement reached in earlier federal litigation. The trial court dismissed the action for lack of subject matter jurisdiction. On appeal, the Third District announced the following test:

> [I]f the suit is founded on a breach of a right created by the patent laws, even if that right is confirmed by separate agreement, the case arises under the patent laws, and a state court is without subject matter jurisdiction. On the other hand, if the suit is founded on some right falling outside the ambit of the patent laws, then the state court has jurisdiction, even if during the course of the suit the court is called upon to determine questions involving the patent laws.

Id. at 488. Applying this test, the Third District noted that "the only possible way for Closet Concepts to breach the agreement would be to infringe the patent." Id. Because the settlement agreement neither modified nor added to any right already existent "by virtue of the patent laws . . . the complaint alleges nothing other than an action against Closet Concepts for infringement of patent rights" where the patent's validity and infringement "[w]as the central and sole issue." Id.; cf. Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So. 2d 1333, 1335 (Fla. 1993) ("[P]reemption does not bar state jurisdiction when the complaint relies on 'reasons completely unrelated to the provisions

or purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks.' " (alterations in original) (quoting Christianson, 486 U.S. at 808-09)).

Similarly, for the trial court to find that Buchanan and Mr. Paradies committed legal malpractice, Solar must show, first, that the patent was invalid or that its scope was not sufficiently broad to protect Solar from its allegedly infringing competitors. Resolution of a federal patent question, in the first instance, is necessary for Solar's legal malpractice case to survive. Cf. Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp., 969 So. 2d 962, 966 (Fla. 2007) ("A legal malpractice action has three elements: 1) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as the proximate cause of loss to the client." (quoting Sec. Nat'l Servicing Corp. v. Law Office of David J. Stern, P.A., 916 So. 2d 934, 936-37 (Fla. 4th DCA 2005))).[7]

We do not dispute that Gunn expresses solicitude for federalism. 133 S. Ct. at 1067. Yet, we cannot ignore that Solar's position, if successful, potentially will disrupt federal oversight of patent law. Under Solar's theory, a state court would be free to rule upon a patent's scope, validity, or infringement, in the first instance, in a legal malpractice claim. Rather than testing the strength of its patent against an alleged infringer in federal court, Solar attempts to recast such federal issues as legal malpractice claims by attacking the lawyer's performance. Although under Solar's

[7]Because Solar has pursued no federal court action addressing scope, validity, or infringement, its patent remains presumptively valid. See § 282(a) ("A patent shall be presumed valid."); R. Regulating Fla. Bar 6-26.2(b) ("The grant of a patent by the [United States Patent and Trademark Office] carries with it the presumption of validity . . . .").

regime, the lawyers are possibly on the hook, Solar avoids any risk that its patent will be found invalid or not infringed by a competitor. Solar would skirt federal oversight of its patent. As a broader policy issue, recasting patent issues as malpractice claims poses a risk that otherwise invalid patents will remain inviolate. See § 282(a); R. Regulating Fla. Bar 6-26.2(b). Resting the resolution of core patent issues in a state court disrupts the balance between state and federal courts anticipated by Congress for patent matters. Gunn, 133 S. Ct. at 1067 ("Congress ensured [uniformity in patent law] by vesting exclusive jurisdiction over actual patent cases in the federal district courts and exclusive appellate jurisdiction in the Federal Circuit."). Because Gunn involved a prior federal court determination of patent invalidity, Gunn presented no real federalism concern.

Conclusion

Solar is not foreclosed from having its day in court. The trial court dismissed the case, without prejudice, anticipating that Solar could pursue an infringement action in federal court. A ruling in that appropriate forum could well tee-up the necessary "case within a case" properly addressed to a state court. We cannot countenance Solar's efforts to invoke a state court ruling on core federal issues relating to the scope, validity, or infringement of its patent.

Affirmed.

CASANUEVA and MORRIS, JJ., Concur.

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

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

SRMOF II 2012-1 TRUST, U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE,

Appellant,

v. Case No. 5D16-973

JOSE GARCIA A/K/A JOSE GARCIA, SR., FREDDIE GARCIA, CANDIDA CANALAS, HOUSEHOLD FINANCE CORPORATION III AND JPMORGAN CHASE BANK, N.A., AS SUCCESSOR BY MERGER TO CHASE HOME FINANCE, LLC, ETC.,

Appellees.
_____/

Opinion filed February 10, 2017

Appeal from the Circuit Court
for Volusia County,
Dawn D. Nichols, Judge.

Sonia Hernriques McDowell, of Quintairos, Prieto, Wood & Boyer, P.A., Orlando, for Appellant.

Andrew B. Greenlee, of Andrew B. Greenlee, P.A., Sanford and Mandy Pavlakos, of the Law Office of Mandy Pavlakos, P.A., Lake Mary, for Appellees.

PER CURIAM.

SRMOF II 2012-1 Trust, U.S. Bank Trust National Association, not in its Individual Capacity, but Solely as Trustee (the "Bank"), plaintiff below, appeals a final Order of

Involuntary Dismissal Without Prejudice for its failure to perfect service on one of the defendants and an order denying its motion to vacate the same. The Bank contends that the court erred in failing to consider the *Kozel*[1] factors in granting the involuntary dismissal without prejudice.

We align our position with that of the Second District in *Federal National Mortgage Ass'n v. Linner*, 193 So. 3d 1010, 1012-13 (Fla. 2d DCA 2016), and held that an involuntary dismissal without prejudice does not require a consideration of the *Kozel* factors. Accordingly, like the Second District, we certify conflict with the First District and Third District on this matter. *HSBC Bank USA v. Cook*, 178 So. 3d 548 (Fla. 1st DCA 2015); *BAC Home Loans Servicing L.P. v. Parrish*, 146 So. 3d 526 (Fla. 1st DCA 2014); *BAC Home Loans Servicing, L.P. v. Ellison*, 141 So. 3d 1290 (Fla. 1st DCA 2014); *Fed. Nat'l Mortg. Ass'n v. Wild*, 164 So. 3d 94, 95 (Fla. 3d DCA 2015). Otherwise, we find no merit to the Bank's remaining claims.

AFFIRMED. CONFLICT CERTIFIED.

COHEN, C.J., EVANDER, J., and JACOBUS, B.W., Senior Judge, concur.

[1] *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993).

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SUPER PRODUCTS, LLC, a Delaware limited liability company, Appellant, v. INTRACOASTAL ENVIRONMENTAL, LLC, a Florida limited liability company, Appellee.	)	Case No. 2D16-1979

Opinion filed February 8, 2017.

Appeal from the Circuit Court for Hillsborough County; Tracy Sheehan, Judge.

Arthur S. Weitzner of Arthur S. Weitzner, P.A., Sarasota, for Appellant.

Adam Hersh of Hunter Business Law, Tampa, for Appellee.

VILLANTI, Chief Judge.

Super Products, LLC, appeals an order denying its motion for rehearing of an order granting IntraCoastal Environmental, LLC's motion to dismiss based upon

noncompliance with section 605.0904(1), Florida Statutes (2014). Because, under the facts of this case, dismissal was inappropriate, we must reverse.

Super Products, a Delaware limited liability company transacting business in Florida, entered into an equipment rental agreement with IntraCoastal. When IntraCoastal failed to pay certain amounts allegedly due, Super Products filed a complaint. IntraCoastal filed a motion to dismiss the complaint or, alternatively, to stay the proceedings. At the hearing on the motion, IntraCoastal argued that Super Products failed to file a certificate of authority from the State of Florida to conduct business in the state and was therefore legally unable to maintain the lawsuit pursuant to section 605.0904(1). The trial court granted the motion and dismissed the action without prejudice. Thereafter, the trial court also denied Super Products' motion for rehearing which argued that dismissal was not authorized under section 605.0904(3). This appeal follows.

Section 605.0904(1) provides that "[a] foreign limited liability company transacting business in this state or its successors may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state." If a foreign limited liability company fails to acquire a certificate of authority, section 605.0904(3) provides:

> A court may stay a proceeding commenced by a foreign limited liability company or its successor or assignee until it determines whether the foreign limited liability company or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign limited liability company or its successor obtains the certificate.

The trial court believed that the statutorily required remedy for Super Products' noncompliance was dismissal. While section 605.0904(3) does in fact provide for a stay, it does not provide for dismissal. Ironically, the relief requested by IntraCoastal in its motion was dismissal or, in the alternative, a stay.

The use of the word "may" in section 605.0904(3), as permissive verbiage, is only indicative that the court may stay the proceedings or not stay the proceedings. It does not imply that the court must stay the proceedings; it could continue the proceedings and issue an order requiring technical compliance with section 605.0904(1). Dismissal may then become appropriate if the party fails to comply with the court's order. See Fla. R. Civ. P. 1.420(b); Zaccaria v. Russell, 700 So. 2d 187, 187-88 (Fla. 4th DCA 1997).

Here, the trial court gave no reason other than noncompliance for granting the much harsher remedy of dismissal, and from the record before us, we discern none. At the hearing on IntraCoastal's motion to dismiss, the trial court specifically noted that "the trigger point" for Super Products to provide a certificate of authority was December 2015, when the complaint was filed. In other words, the trial court regarded Super Product's failure to obtain the proper certificate as a condition precedent to the filing of its lawsuit. However, obtaining a certificate of authority is a condition that must be met only to maintain a lawsuit, not file one, and Super Products, as evidenced by its motion for rehearing, was not averse to a stay even though it did not initially believe it was required to obtain the certificate.

Because the remedy of dismissal is not provided for in the statute, and no rationale exists in the record to support dismissal, it was error for the trial court to

dismiss the action rather than to simply stay it. Accordingly, we reverse and remand for the trial court to vacate its order of dismissal, and if the proper certificate has not been obtained, to reconsider the issue of a stay.

Reversed and remanded with instructions.

KHOUZAM and BADALAMENTI, JJ., Concur.