Real Property and Business Litigation Report

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Manuel Farach

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2017).
"Commercial speech," for purposes of liability under 15 U.S.C. § 1125(a)(1)(B) of the Lanham Act, consists of speech that is "conceded to be advertisements," contains a "reference to a specific product," and where the speaker "'has an economic motivation' for distributing the material."

In re Lunsford, Case No. 16-11578 (11th Cir. 2017).
A bankruptcy court's adoption of an arbitrator's factual finding of violation of securities law is sufficient to preclude a debtor's discharge under 11 U.S.C. § 523(a)(19)(A), and a separate factual finding by the trial court is not required.

In re Appling, Case No. 16-11911 (11th Cir. 2017).
A debtor's "statement respecting the debtor's . . . financial condition" is not dischargeable unless, under 11 U.S.C. § 523(a)(2)(B), that statement is in writing.

Patrick v. Hess, Case No. SC15-1147 (Fla. 2017).
A foreign judgment recorded under the Uniform Enforcement of Foreign Judgments Act becomes an enforceable Florida judgment upon recording, and the twenty-year statute of limitations of Florida Statute section 95.11(1) begins to run from the date of recording of the foreign judgment in Florida.

In re Amendments To The Florida Evidence Code, Case No. SC16-181 (Fla. 2017).
The Florida Supreme Court declines to adopt the "Daubert Amendment" to the Florida Evidence Code to the extent the changes are procedural.

Beltway Capital, LLC v. Lucombe, Case No. 2D16-437 (Fla. 2d DCA 2017).
Verification of a complaint pursuant to Florida Rule of Civil Procedure 1.110(b) and Florida Statute section 702.015 is not an element of the cause of action of mortgage foreclosure. Moreover, failure to verify is subject to a motion to dismiss pursuant to rule 1.420(b), but notice of hearing needs to be given and a party may not use Rule 1.140(h) to ambush a party a trial by calling up the motion without notice.

Friedman v. Mercantil Commercebank, N.A., Case No. 3D15-2352 (Fla. 3d DCA 2017).
In deficiency proceedings, the date of transfer of the property is the "valuation date" if there is no foreclosure sale.

Wheaton v. Wheaton, Case No. 3D16-490 (Fla. 3d DCA 2017).
A proposal for settlement, even though it is not filed, must be served by email under Florida Rule of Judicial Administration 2.516.

Vital Pharmaceuticals, Inc. v. Professional Supplements, LLC, Case No. 4D15-1123 (Fla. 4th DCA 2017).
Damages for a wrongfully issued injunction are limited to the bond posted, and a party is not entitled to damages for the wrongful injunction if no bond is posted.

Vitacost.Com, Inc. v. McCants, Case No. 4D16-3384 (Fla. 4th DCA 2017).
A "browsewrap agreement" on an Internet website, including an agreement to arbitrate, is not binding unless the party browsing is made aware that browsing and purchasing on the website is subject to the additionally incorporated terms and conditions.

Wilmington Savings Fund Society v. Louissaint, Case No. 5D15-3830 (Fla. 5th DCA 2017).
A copy of a note with a blank indorsement attached to the complaint, with the original filed at trial, is enough to establish standing for the party that filed the complaint, even if the note is lost after the complaint but later found by time of trial.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BELTWAY CAPITAL, LLC, Appellant, v. NIGEL LUCOMBE; CIRCLE TRUSTEE COMPANY INC.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for First Franklin, a division of National City Bank, Appellees.	)	Case No. 2D16-437

Opinion filed February 17, 2017.

Appeal from the Circuit Court for Hillsborough County; Perry A. Little, Senior Judge.

Manuel Farach of McGlinchey Stafford, Fort Lauderdale, for Appellant.

Adam J. Knight, Laura L. Whiteside, and Matthew A. Kassel of Hicks Knight, P.A., Tampa, for Appellees Nigel Lucombe and Circle Trustee Co., Inc.

No appearance for Appellee Mortgage Electronic Registration Systems, Inc.

SLEET, Judge.

Beltway Capital, LLC (the bank), appeals the trial court's order dismissing its amended complaint without prejudice for failure to contain a verification pursuant to Florida Rule of Civil Procedure 1.110(b)[1] and denying its motion for leave to amend. Because the motion to dismiss was not properly noticed and the trial court abused its discretion in denying the bank's motion to amend the complaint, we reverse.

The bank's initial complaint for foreclosure against Nigel Lucombe contained a verification pursuant to rule 1.110(b). The bank subsequently filed an amended complaint but omitted the required verification. Lucombe filed a motion to dismiss challenging, among other things, the bank's failure to comply with rule 1.110(b). The trial court denied the motion; Lucombe then filed an answer and affirmative defenses but did not again challenge the missing verification. On the morning of trial, Lucombe orally moved to dismiss arguing that by failing to attach a verification to its complaint, the bank had failed to state a cause of action for foreclosure. Lucombe contended that he could raise this motion without prior notice and on the morning of trial pursuant to rule 1.140(h)(2). The trial court granted the motion to dismiss and denied the bank's motion to amend, finding that the bank's failure to verify the amended complaint was a fatal defect not capable of being corrected by amendment. The bank now appeals from this order. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A); Valcarcel v. Chase Bank USA NA, 54 So. 3d 989, 990 (Fla. 4th DCA 2010) ("An order

[1]Rule 1.110(b)'s verification requirement was added by the Florida Supreme Court in 2010. The supreme court amended the rule in 2014, moving the verification requirement from rule 1.110(b) to rule 1.115(e). The bank filed its first amended complaint on December 30, 2011.

dismissing an action without prejudice and without granting leave to amend is a final appealable order.").

We review a trial court's ruling on the sufficiency of a complaint de novo. See Donado v. PennyMac Corp., 174 So. 3d 1041, 1042 (Fla. 4th DCA 2015) ("Because appellants' issue pertains to the sufficiency of the initial complaint, the appropriate standard of review is de novo."). The bank was required to attach a verification to its complaint pursuant to rule 1.110(b) and section 702.015, Florida Statutes (2013). While a failure to include a verification may result in a dismissal without prejudice, the verification is not an element of a cause of action to foreclose on a note and mortgage. See Kelsey v. SunTrust Mortg., Inc., 131 So. 3d 825, 826 (Fla. 3d DCA 2014) ("[F]oreclosure plaintiffs must show: (1) an agreement, (2) a default, (3) an acceleration of debt to maturity, and (4) the amount due." (citing Ernest v. Carter, 368 So. 2d 428, 429 (Fla. 2d DCA 1979))); see also Campbell v. Wells Fargo Bank, N.A., 204 So. 3d 476, 480 (Fla. 4th DCA July 6, 2016) (holding that compliance with the verification requirement is not a "mandatory condition[] precedent to suit" and that the trial court has discretion whether to dismiss the complaint for failure to comply). Accordingly, the bank's failure to include a verification pursuant to rule 1.110(b) is not a defense that may be raised at any time under rule 1.140(h).

A bank's failure to comply with rule 1.110(b) is subject to a motion to dismiss pursuant to rule 1.420(b), which provides that "[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court." Rule 1.420(b) requires that a notice of hearing on a motion to dismiss be served in accordance with rule 1.090(d), which mandates service of a copy of the motion and a notice of hearing on the motion "a

reasonable time before the time specified for the hearing." Therefore, Lucombe was required to file and properly notice a motion to dismiss based on the bank's failure to comply with rule 1.110(b). Indeed, Lucombe had filed such a motion, which the court denied. While a trial court may reconsider an earlier ruling that it had made, under the circumstances here we conclude that it was improper for the trial court to hear and grant this oral motion on the morning of trial when the bank had not been properly noticed.

We also note that Lucombe's use of the verification requirement to delay a trial on the merits overlooks the legislature's intent in enacting section 702.015. "The certification requirement of the statute was not intended to be a prerequisite to suit but was instead intended to expedite the foreclosure process." Campbell, 204 So. 3d at 479-80 (citing § 702.015(1) ("The Legislature intends that this section expedite the foreclosure process by ensuring initial disclosure of a plaintiff's status and the facts supporting that status, thereby ensuring the availability of documents necessary to the prosecution of the case.")). The verification requirement was also intended to avoid a waste of judicial resources. See In re Amendments to the Fla. Rules of Civil Procedure, 44 So. 3d 555, 556 (Fla. 2010). Allowing a defendant to ambush the plaintiff by waiting until the morning of trial to orally raise a motion to dismiss based on the verification requirement does not further this purpose; it only delays resolution of the foreclosure suit. This court has previously held that objections to a party's compliance with a statutory verification requirement can be waived if not timely raised. See, e.g., Martinez v. Abraham Chevrolet-Tampa, Inc., 891 So. 2d 579, 581 (Fla. 2d DCA 2004) (holding that a challenge to the verification of a complaint under section 760.11(1), Florida Statutes (2001), could be waived by failing to raise it at a time when the plaintiff "could have timely submitted an amended claim").

In this case, the trial court should have allowed the bank an opportunity to amend the complaint. The lack of a verification is not the kind of error that cannot be corrected by amendment. See Rivero v. Rivero, 111 So. 3d 233, 234 (Fla. 4th DCA 2013) ("The failure to verify a pleading which, by statute, is required to be verified does not constitute a jurisdictional defect; verification may be supplied by an amendment and relate back to the time the original unverified pleading was filed."). "Florida Rule of Civil Procedure 1.190(a) requires that leave to amend be freely given unless a party has abused the privilege to amend." Rohlwing v. Myakka River Real Props., Inc., 884 So. 2d 402, 406 (Fla. 2d DCA 2004) ("Because a dismissal with prejudice is the ultimate sanction in the civil justice system, it is reserved for the most aggravating circumstances."). Accordingly, we reverse and remand for the trial court to allow the bank to file an amended complaint that complies with rule 1.110(b).

Reversed and remanded with instructions.

CASANUEVA and SILBERMAN, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed February 15, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-2352
Lower Tribunal No. 11-6146

Richard N. Friedman,
Appellant,

vs.

Mercantil Commercebank, N.A.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Richard N. Friedman, in proper person.

Victor K. Rones and Jeremy S. Rones, for appellee.

Before SUAREZ, C.J., and EMAS and FERNANDEZ, JJ.

EMAS, J.

Richard N. Friedman appeals an amended final deficiency judgment entered in favor of Mercantile Commerce Bank in the amount of $364,740.56 plus interest. We affirm.

The case was originally filed as a foreclosure action against Friedman and his wife, Marjan Nini Friedman, relating to property owned by the Friedmans in Miami-Dade County. However, on the day of trial, the parties reached a settlement. Pursuant to the terms of that settlement, Mercantile agreed to accept a deed in lieu of foreclosure, and reserved the right to seek a deficiency. Friedman reserved the right to assert any defenses to, or otherwise contest, any deficiency sought by Mercantile. It was further agreed that Mercantile would seek any deficiency judgment against Friedman only, and not against his wife. When the Friedmans failed to deliver the deed to Mercantile, the trial court entered an order conveying the property and transferring all of the Friedmans' interest in the property to Mercantile. That order, rendered on June 27, 2012, was recorded by Mercantile on July 2, 2012.[1] Thereafter, Mercantile sought a deficiency judgment against Friedman, and following a bench trial, the court entered the deficiency judgment, accepting the fair market valuation of Mercantile's expert, and assessing prejudgment interest at eighteen percent.

[1] To render this transfer of real property "good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice," it was required that this order be recorded. See § 695.01(1), Fla. Stat. (2012).

Friedman asserts that the trial court erred in its determination of the proper date for assessing the fair market value of the property; in its assessment of the amount of the deficiency; and in awarding prejudgment interest of eighteen percent. We find no error.

We hold that the trial court properly concluded that the date for determining fair market value was July 2, 2012, the date of recordation of the order transferring interest in the property from the Friedmans to Mercantile. See Phillipe v. Weiner, 143 So. 3d 1086 (Fla. 3d DCA 2014).[2]

Further, the record on appeal provided by Friedman is otherwise inadequate[3] to allow for meaningful review of related errors allegedly made by the trial court in

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[2] In this case, as in Phillipe, there was no foreclosure sale, distinguishing the instant case from those decisions relied upon by Friedman. See, e.g., Morgan v. Kelly, 642 So. 2d 1117, 1117 (Fla. 3d DCA 1994); Cmty. Bank of Homestead v. Valois, 570 So. 2d 300, 303 n.1 (Fla. 3d DCA 1990); Mizner Bank v. Adib, 588 So. 2d 325 (Fla. 4th DCA 1991).

[3] Friedman retained a court reporter who recorded the trial proceedings. However, Friedman did not order the trial proceedings transcribed, asserting that he is indigent and unable to pay the costs of transcription. We reject Friedman's claim that his indigent status renders the transcripts "unavailable" under Florida Rule of Appellate Procedure 9.200(b)(4). That rule provides in pertinent part: "If no report of the proceedings was made, or if the transcript is unavailable, a party may prepare a statement of the evidence or proceedings" with the participation of the other parties, which must then be submitted to, and approved by, the lower tribunal. However, an indigent party to an appeal from a civil action has no constitutional or statutory right to a free transcript of the trial proceedings. See Alexander v. Bamash, 814 So. 2d 1211 (Fla. 4th DCA 2002). Cf. Smith v. Dep't of Health and Rehab. Servs., 573 So. 2d 320 (Fla. 1991) (holding that section 57.081 and section 120.57(1)(b)(6) Florida Statutes (1991) require the state to provide a free transcript in an appeal taken by an indigent party from an adverse

its determination of fair market value and the amount of the deficiency. Based on the record provided, we conclude that the trial court, having considered the evidence, including competing testimony from each party's expert, properly exercised its broad discretion in determining the fair market value of the property and the amount of the deficiency. Id. See also Khan v. Simkins Indus., Inc., 687 So. 2d 16, 18 (Fla. 3d DCA 1996) (observing: "It is a long standing legal principle that the granting of a deficiency decree is discretionary with the trial court; such discretion is not absolute and unbridled, but rather one which must be supported by established equitable principles as applied to the facts of the case.")

Finally, we hold that the trial court, in its amended final judgment, properly awarded prejudgment interest at the rate of eighteen percent. Mercantile, in its original foreclosure complaint, sought interest at the rate of twenty-five percent, a

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agency decision).

This court entered an order directing Friedman to provide the transcript of the trial proceedings, which Friedman failed to do. Instead, Friedman prepared and submitted a Statement of the Evidence or Proceedings pursuant to Rule 9.200(b)(4). This court eventually permitted the appeal to proceed on this Statement of the Evidence. Nevertheless, it was (and remained) incumbent on Friedman to provide the appellate court with an adequate record upon which the court can determine the merits of any properly-preserved claims of error. See Fla. R. App. P. 9.200(e) (providing that "[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant.") Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979); Corallo v. Florida Dept. of Children & Family Servs., 971 So. 2d 966 (Fla. 3d DCA 2008); Latin Am. Ben. Center, Inc. v. Johstoneaux, 257 So. 2d 86 (Fla. 3d DCA 1972).

rate which Friedman alleged was usurious. Pursuant to the express terms of the settlement, the parties agreed that "the interest rate will be 18 percent and not 25 percent," as sought by Mercantile in its complaint. Friedman was bound by the express terms of the settlement and has failed to demonstrate any error by the trial court in this regard.[4]

Affirmed.

[4] The remaining issues raised by Friedman are either without merit, not properly preserved, or cannot be determined on the merits based upon the inadequacy of the record on appeal.

Supreme Court of Florida

No. SC16-181

IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE.

[February 16, 2017]

PER CURIAM.

We have for consideration the regular-cycle report[1] of The Florida Bar's Code and Rules of Evidence Committee (Committee), concerning legislative changes to the Florida Evidence Code and to section 766.102, Florida Statutes (2012). We have jurisdiction,[2] and, as discussed below, we decline to adopt, to the extent they are procedural, any of the legislative changes addressed in the Committee's report.

BACKGROUND

Prior Amendments to the Florida Evidence Code

1. See Fla. R. Jud. Admin. 2.140(b).

2. See art. V, § 2(a), Fla. Const.

It has been this Court's policy to adopt, to the extent they are procedural, provisions of the Florida Evidence Code as they are enacted and amended by the Legislature.[3] However, on occasion the Court has declined to adopt legislative changes to the Evidence Code because of significant concerns about the amendments, including concerns about the constitutionality of an amendment.[4] In addition, the Court has declined to follow the Committee's recommendation to adopt, to the extent it may be procedural, legislation creating section 766.102(12),

3. See In re Amends. to Fla. Evidence Code, 782 So. 2d 339, 342 (Fla. 2000) (recognizing Court's policy to adopt amendments to the Code to the extent they are procedural, but following Committee's recommendation not to adopt one amendment) (citing In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979) (adopting Evidence Code enacted by Legislature to the extent it is procedural), clarified, In re Fla. Evidence Code, 376 So. 2d 1161 (Fla. 1979)); see also In re Amends. to Fla. Evidence Code, 53 So. 3d 1019 (Fla. 2011); In re Amends. to Fla. Evidence Code, 960 So. 2d 762 (Fla. 2007); In re Amends. to Fla. Evidence Code—Section 90.104, 914 So. 2d 940 (Fla. 2005); Amends. to Fla. Evidence Code, 891 So. 2d 1037 (Fla. 2004); In re Amends. to Fla. Evidence Code, 825 So. 2d 339 (Fla. 2002); In re Fla. Evidence Code, 675 So. 2d 584 (Fla. 1996); In re Fla. Evidence Code, 638 So. 2d 920 (Fla. 1993); In re Amend. of Fla. Evidence Code, 497 So. 2d 239 (Fla. 1986); In re Amend. of Fla. Evidence Code, 404 So. 2d 743 (Fla. 1981).

4. See, e.g., In re Amends. to Fla. Evidence Code, 144 So. 3d 536 (Fla. 2014) (declining to follow the Committee's recommendation to adopt section 90.5021, Florida Statutes (2014), which establishes a fiduciary lawyer-client privilege); In re Amends. to Fla. Evidence Code, 782 So. 2d at 341-42 (declining to adopt amendments to section 90.803(22), Florida Statutes (1997), which allows the admission of former testimony although the declarant is available as a witness, in part because of concerns about its constitutionality).

Florida Statutes, which is not a part of the Florida Evidence Code. See In re Amends. to Fla. Evidence Code, 144 So. 3d 536, 537 (Fla. 2014).

Legislative Changes at Issue

The legislative changes at issue in this case are those enacted since this Court considered the Committee's 2013 regular-cycle report. See In re Amends. to Fla. Evidence Code, 144 So. 3d at 536. In this case, by a vote of 16-14, a majority of the Committee recommends that the Court not adopt, to the extent it is procedural, chapter 2013-107, sections 1 and 2, Laws of Florida (Daubert Amendment), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes (2012), of the Evidence Code to replace the Frye[5] standard for admitting expert opinion evidence with the Daubert[6] standard. In addition to a separate majority report on the Daubert Amendment, the Committee provides a minority report urging the Court to adopt the Daubert Amendment. The Committee also recommends, by a vote of 24-0-1, that the Court not adopt, to the extent it is procedural, chapter 2013-108, section 2, Laws of Florida (Same Specialty Amendment), which amended section 766.102

5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Bundy v. State, 471 So. 2d 9 (Fla. 1985) (adopting Frye standard); Stokes v. State, 548 So. 2d 188 (Fla. 1989) (same).

6. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

(Medical negligence; standards of recovery; expert witness), Florida Statutes (2012), to require a standard-of-care expert witness in a medical malpractice action to specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered. Finally, the Committee recommends, by a vote of 24-0-1, that the Court adopt, to the extent it is procedural, chapter 2014-200, section 1, Laws of Florida, which amended section 90.803(24), Florida Statutes (2013) (Hearsay exceptions; availability of declarant immaterial; Hearsay exception; statement of elderly person or disabled adult) of the Evidence Code, the hearsay exception relating to reports of abuse by elderly persons or disabled adults. The Board of Governors of The Florida Bar approved the Committee's recommendations.

Consistent with Florida Rule of Judicial Administration 2.140(b)(2), before filing its report with the Court, the Committee published its recommendations for comment. According to the Committee's report, the Committee received eighty-one comments in support of the recommendation not to adopt the Daubert Amendment. The Committee received twenty-nine comments opposing that recommendation. The Committee also received two comments supporting the recommendation not to adopt the Same Specialty Amendment and no comments against that recommendation. The Committee did not receive any comments

addressing its recommendation to adopt the changes to section 90.803(24) of the Evidence Code.

After the Committee filed its report, the Court published the Committee's recommendations for comment. The Court received fifty-six comments in favor of the Committee's recommendation not to adopt the Daubert Amendment and one hundred thirty-one comments in opposition to the Committee's recommendation.[7] All nine comments filed with the Court addressing the Committee's recommendation not to adopt the Same Specialty Amendment support that recommendation. No comments were filed with the Court concerning the amendments to section 90.803(24). The Committee filed a response to the comments filed with the Court. The Court also heard oral argument in this case.

After considering the numerous filings in this case, and having had the benefit of oral argument, for the reasons discussed below, we follow the Committee's recommendation and decline to adopt, to the extent they are procedural, the changes to sections 90.702 and 90.704 of the Evidence Code made by the Daubert Amendment. Also, as recommended by the Committee, we decline

7. Of those one hundred thirty-one comments, seventy-seven are form emails from "small business owners" repeating the same request that the Court "retain the Daubert expert witness standard that the Florida legislature passed in 2013."

to adopt, to the extent they are procedural, the amendments to section 766.102, Florida Statutes, made by the Same Specialty Amendment. However, as further explained below, we decline to follow the Committee's recommendation to adopt the changes made to section 90.803(24).

DISCUSSION

Daubert Amendment

The Daubert Amendment amended sections 90.702 and 90.704, Florida Statutes (2012), to change the standard of admissibility for scientific expert evidence from the Frye standard to the Daubert standard and the standard found in Federal Rule of Evidence 702. See ch. 2013-107, §§ 1 - 2, Laws of Fla. The Frye test only applies to expert testimony based upon new or novel scientific evidence, and "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).[8] In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that the Federal Rules

8. The Court is aware that on October 20, 2016, the District of Columbia Court of Appeals, in Motorola Inc. v. Murray, 147 A.3d 751 (D.C. 2016), rejected application of the Frye standard for the admissibility of scientific testimony in favor of Federal Rule of Evidence 702.

of Evidence superseded Frye's general acceptance test for the admissibility of scientific evidence. Id. at 586-87. In addition, in interpreting Federal Rule of Evidence 702, Daubert provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589. Federal Rule of Evidence 702, as currently promulgated, intends to ensure reliability of scientific opinion evidence with the following requirements:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In 2013, Florida's Legislature rejected the longstanding Frye standard and adopted the Daubert standard and Federal Rule of Evidence 702 with two amendments to the Evidence Code. First, the Legislature amended section 90.702 to mirror Federal Rule of Evidence 702 as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining

> a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case~~; however, the opinion is admissible only if it can be applied to evidence at trial~~.

Ch. 2013-107, § 1, Laws of Fla. Next, the Legislature amended section 90.704 as follows:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Ch. 2013-107, § 2, Laws of Fla.

The Committee recommends the Court not adopt the Daubert Amendment, to the extent it is procedural. In support of its recommendation, both the Committee and commenters who support the recommendation raised what we consider "grave constitutional concerns." Those concerns include undermining the right to a jury trial and denying access to the courts. While the Court does not address the constitutionality of a statute or proposed rule within the context of a

rules case,[9] the fact that there may be "grave concerns about the constitutionality of the amendment" has been a basis previously for the Court not adopting an amendment to the Evidence Code to the extent it is procedural. See In re Amends. to Fla. Evidence Code, 782 So. 2d 339, 342 (Fla. 2000). Accordingly, having heard oral argument and carefully considered the Committee's recommendation and the numerous comments both submitted to the Committee and filed with the Court, we decline to adopt the Daubert Amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy.

Same Specialty Amendment

The Same Specialty Amendment amended section 766.102(5)(a), Florida Statutes (2012), to require a standard-of-care expert witness in a medical malpractice action to specialize in the same specialty, rather than the same or similar specialty,[10] as the health care provider against whom or on whose behalf

9. See, e.g., In re Amends. to Fla. Evidence Code, 144 So. 3d at 538 (Pariente, J., concurring in part and dissenting in part); In re Amend. to Fla. Evidence Code, 825 So. 2d at 341; In re Amends. to Fla. Evidence Code, 782 So. 2d at 341; In re Amends. to Fla. Rules of Crim. Pro.—Final Arguments, 957 So. 2d 1164, 1167 (Fla. 2007).

10. Prior to the Same Specialty Amendment, section 766.102(5)(a), Florida Statutes, required an expert testifying about the prevailing standard of care in a medical malpractice action to (1) specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered, or (2) specialize in a similar specialty that includes the evaluation, diagnosis, or treatment

the testimony is offered. See ch. 2013-108, § 2, Laws of Fla. The amendment also repealed section 766.102(14), Florida Statutes (2012), which recognized a trial court's authority to disqualify or qualify an expert witness on grounds other than the qualifications in that section.[11] See ch. 2013-108, § 2, Laws of Fla. The Committee, the Board of Governors, and all those who commented on the Same Specialty Amendment urge the Court not to adopt that legislation, to the extent it is procedural. Consistent with the Committee's recommendation, we decline to adopt the Same Specialty Amendment, for the same reasons we declined to adopt section 766.102(12), which requires a standard-of-care expert witness to hold the same state license as the health care provider against whom, or on whose behalf, the expert is testifying or to have a valid expert witness certificate. See In re Amends. to Fla. Evidence Code, 144 So. 3d at 537 (declining to adopt chapter 2011-233, section 10, Laws of Florida, creating section 766.102(12), because of concerns that the statute "is unconstitutional, [has] a chilling effect on the ability to obtain expert witnesses, and is prejudicial to the administration of justice").

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of the medical condition that is the subject of the claim and have the prior experience treating similar patients. The Same Specialty Amendment removed the similar specialty option for qualifying a standard-of-care expert witness from the statute.

11. Before its repeal, section 766.102(14), Florida Statutes, provided that section 766.102 did "not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications in this section."

The Committee and commenters in this case contend that requiring a standard-of-care expert witness to specialize in the same specialty, rather than the same or similar specialty, as the health care provider against whom or on whose behalf the testimony is offered has "a chilling effect on the ability to obtain expert witnesses," making it more difficult for a victim of medical negligence to bring a medical malpractice action. This raises concerns that, like the same-license requirement of section 766.102(12), the same-specialty requirement limits access to courts and is prejudicial to the administration of justice. See id.; cf. Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996) (recognizing that "medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses").

In addition to the concerns raised by the Committee and the commenters, the section 766.102(5)(a) same-specialty requirement and the various other section 766.102 expert-witness requirements[12] are not part of chapter 90, Florida Statutes,

12. See, e.g., § 766.102(5)(b), Fla. Stat. (2016) (providing requirements for expert witnesses testifying on the standard of care for general practitioners); § 766.102(6), Fla. Stat. (providing the requirements for expert witnesses testifying on the standard of care for nurses and other medical support staff); § 766.102(7), Fla. Stat. (providing the requirements for expert witnesses testifying on the standard of care as to administrative and other nonclinical issues in actions against hospitals or other medical facilities); § 766.102(9), Fla. Stat. (providing the

the Florida Evidence Code. See In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979) (adopting, as the Court's rules of evidence, the Evidence Code enacted by the Legislature, in part, to ensure that rules of evidence were codified in one place and were no longer "derived from multiple sources," including case law, rules adopted by the Court, and statutes enacted by the Legislature), clarified, In re Fla. Evidence Code, 376 So. 2d 1161 (Fla. 1979).[13] Rather, the section 766.102 requirements, none of which this Court has adopted,[14] are part of the legislative scheme for medical malpractice actions codified in chapter 766, Florida Statutes.

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requirements for expert witnesses testifying on the standard of care for emergency room physicians).

13. See also Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 102.1 (2016 ed.) (recognizing that Court adopts, to the extent procedural, provisions of the Evidence Code as they are adopted and amended by the Legislature "to avoid having the evidence rules scattered in piece-meal fashion in various statutes and rules of procedures" and to have "a single comprehensive set of rules").

14. Prior to the Committee's 2013 recommendation to adopt section 766.102(12), see In re Amends. to the Fla. Evidence Code, 144 So. 3d at 536, the Committee had only made recommendations to the Court concerning legislative changes to the Evidence Code. The Committee had never made recommendations concerning any of the section 766.102 expert-witness requirements. See Ehrhardt, supra, at § 102.1 (as reporter and primary drafter of the Florida Evidence Code and first chair of the Committee, recognizing that Committee's recommendation concerning the section 766.102(12) expert-witness requirement "was unique" because "[s]ince its inception, the Committee believed its jurisdiction was limited to provisions of the Evidence Code" and noting that, for example, "the many amendments to the accident report privilege in section 316.066 and the rape shield statute in section 794.022 were never within scope of the [C]ommittee's recommendations").

It is likewise significant that this Court also has never adopted, to the extent it may be procedural, the section 766.102(14), Florida Statutes (2012), recognition of a trial court's authority to qualify or disqualify an expert witness in a medical malpractice case on grounds other than those specified in section 766.102. Therefore, there is no reason for this Court to now adopt the repeal of that legislation to the extent that repeal might impact court procedure. Finally, we do not address the substantive/procedural issue raised here because whether the Legislature's amendments to section 766.102(5)(a) and repeal of section 766.102(14) somehow run afoul of the trial court's inherent power or this Court's rule-making authority must be left for a proper case or controversy and not decided in this rules case. See In re Amends. to Fla. Evidence Code, 782 So. 2d at 341.

Amendments to Section 90.803(24)

Chapter 2014-200, section 1, Laws of Florida, amended section 90.803(24) (Hearsay Exceptions; availability of declarant immaterial; Hearsay exception; statement of elderly person or disabled adult), Florida Statutes, the hearsay exception relating to reports of abuse by elderly persons or disabled adults. The amendment to section 90.803(24) removes the alternative requirement that an elderly person or disabled adult testify, only requiring that such individuals be unavailable to do so. The Committee recommends that the Court adopt that legislation, to the extent it is procedural.

Notwithstanding its recommendation, the Committee notes in its report that the statutory change raises constitutional issues: "The amended statute would remain unconstitutional as to testimonial[15] statements in criminal cases where there has been no opportunity for prior cross-examination while it eliminates (potentially) constitutionally permissible application to nontestimonial[16] statements in the criminal context and all applicable statements in civil cases." While the Committee concludes that case law, including Crawford v. Washington, 541 U.S. 36 (2004), and State v. Hosty, 944 So. 2d 255 (Fla. 2006), imposes the requirement of an opportunity for cross-examination regarding testimonial statements in criminal cases, we decline to adopt this amendment, to the extent it is procedural, in light of constitutional concerns. See In re Amendments to Fla. Evidence Code, 782 So. 2d at 342 (declining to adopt chapter 98-2, section 1, Laws of Florida, amending section 90.803(22), Florida Statutes, which allows the

15. "Testimonial" statements include but are not limited to "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" as well as extrajudicial statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Crawford v. Washington, 541 U.S. 36, 51-52 (2004).

16. "Nontestimonial" statements include those that, objectively considered, were given to, for example, police or a 911 operator describing what was actually happening at the time and to enable police assistance to meet an ongoing emergency. See Davis v. Washington, 547 U.S. 813, 826-27 (2006).

admission of former testimony although the declarant is available as witness, in part because of concerns about its constitutionality).

CONCLUSION

Accordingly, for the forgoing reasons, we decline to adopt, to the extent they are procedural, chapters 2013-107, sections 1 and 2; 2013-108, section 2; and 2014-200, section 1, Laws of Florida.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, J., concurs.
LAWSON, J., did not participate.

POLSTON, J., concurring in part and dissenting in part.

I respectfully dissent because, unlike the majority, I would adopt the Daubert standard as the Legislature amended the Florida Evidence Code in 2013.[17] The majority rejects replacing the Frye standard with the Daubert standard and gives its reason for doing so as "grave constitutional concerns" about the Daubert standard, including undermining the right to a jury trial and denying access to courts. However, the United States Supreme Court decided Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), in 1993, and the standard has been

17. I agree with the majority's decision to decline to adopt the same specialty and hearsay exception amendments.

routinely applied in federal courts ever since. The clear majority of state jurisdictions also adhere to the Daubert standard. See 1 McCormick on Evidence § 13 (7th ed. June 2016 Supp.). In fact, there are 36 states that have rejected Frye in favor of Daubert to some extent. See Charles Alan Wright & Victor Gold, 29 Federal Practice and Procedure § 6267, at 308-09 n.15 (2016). Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not.

As a note to the federal rule of evidence explains, "[a] review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. "Daubert did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.' " Id. (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)).

Furthermore, I know of no reported decisions that have held that the Daubert standard violates the constitutional guarantees of a jury trial and access to courts. To the contrary, there is case law holding that the Daubert standard does not violate the constitution. See, e.g., Junk v. Terminix Int'l Co., 628 F.3d 439,

450 (8th Cir. 2010) (rejecting legal merit of the constitutional claim "that the district court violated [appellant's] Seventh Amendment right to a jury trial by improperly weighing evidence in the course of its Daubert rulings" and explaining that "Junk does not cite any case for the notion that a proper Daubert ruling violates a party's right to a jury trial"); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995) (rejecting claim "that allowing the trial judge to assess the reliability of expert testimony violates [the parties'] federal and state constitutional rights to a jury trial by infringing upon the jury's inherent authority to assess the credibility of witnesses and the weight to be given their testimony"); see also Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142-43 (1997) (rejecting "argument that because the granting of summary judgment in this case was 'outcome determinative,' it should have been subjected to a more searching standard of review" and explaining that, while "disputed issues of fact are resolved against the moving party[,] . . . the question of admissibility of expert testimony is not such an issue of fact").

Accordingly, the majority's and the committee's "grave constitutional concerns" regarding the Daubert standard are unfounded. We should adopt the Daubert standard as amended in the Florida Evidence Code by the Legislature in 2013.

CANADY, J., concurs.

Original Proceedings – Florida Bar Code and Rules of Evidence Committee

Gregory Paul Borgognoni, Chair, Code and Rules of Evidence Committee, Borgognoni Law, PL, Coral Gables, Florida; Peter Anthony Sartes, II, Past Chair, Code and Rules of Evidence Committee, Law Offices of Tragos, Sartes & Tragos, Clearwater, Florida; Perry Michael Adair, Vice-Chair, Code and Rules of Evidence Committee, Becker & Poliakoff, P.A., Coral Gables, Florida; Patricia M. Dodson, Vice-Chair, Code and Rules of Evidence Committee, Ponte Vedra, Florida; James Norcross Floyd, Vice-Chair, Code and Rules of Evidence Committee, City Attorney's Office, Tallahassee, Florida; John Wayne Hogan, Code and Rules of Evidence Committee, Terrell Hogan, Jacksonville, Florida; Andrew Hamilton, Code and Rules of Evidence Committee, Andrew Hamilton, P.A., Tampa, Florida; Judge Claudia Rickert Isom, Thirteenth Judicial Circuit, Code and Rules of Evidence Committee, Tampa, Florida; and John F. Harkness, Jr., Executive Director, and Krys Godwin, Bar Staff Liaison, The Florida Bar, Tallahassee, Florida,

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Washington, District of Columbia, on behalf of American Insurance Association; The Honorable Larry Metz, The Florida House of Representatives, Tallahassee, Florida; David E. Bright, Washington, District of Columiba, on behalf of Alliance of Automobile Manufacturers and Charles H. Haake, Washington, District of Columbia, on behalf of Association of Global Automakers; Bryan Scott Gowdy of Creed & Gowdy, P.A., Jacksonville, Florida; Carlos Jesus Martinez, Public Defender, and John Eddy Morrison, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida, on behalf of The Florida Public Defender Association, Inc.,

Responding with Comments

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11911

D.C. Docket Nos. 3:15-cv-00031-CAR; 3:13-bkc-03042-JPS

In re: R. SCOTT APPLING,

Debtor.

R. SCOTT APPLING,

Plaintiff - Appellant,

versus

LAMAR, ARCHER & COFRIN, LLP,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(February 15, 2017)

Before WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and MARTINEZ,* District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal presents a question that has divided the federal courts: Can a statement about a single asset be a "statement respecting the debtor's . . . financial condition"? 11 U.S.C. § 523(a)(2). Ordinarily, a debtor cannot discharge any debt incurred by fraud, *id.* § 523(a)(2)(A), but a debtor can discharge a debt incurred by a false statement respecting his financial condition unless that statement is in writing, *id.* § 523(a)(2)(B). R. Scott Appling made false oral statements to his lawyers, Lamar, Archer & Cofrin, LLP, that he expected a large tax refund that he would use to pay his debt to the firm. After Lamar obtained a judgment against Appling for the debt, Appling filed for bankruptcy and Lamar initiated an adversary proceeding to have the debt ruled nondischargeable. The bankruptcy court and the district court ruled that Appling's debt could not be discharged under section 523(a)(2)(A) because it was incurred by fraud. But we disagree. Because Appling's statements about his tax refund "respect[] [his] . . . financial condition," *id.* § 523(a)(2)(B)(ii), and were not in writing, *id.* § 523(a)(2)(B), his debt to Lamar can be discharged in bankruptcy. We reverse and remand.

* Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

I. BACKGROUND

R. Scott Appling hired the law firm Lamar, Archer & Cofrin, LLP, to represent him in litigation against the former owners of his new business. Appling agreed to pay Lamar on an hourly basis with invoices for fees and costs due monthly. Appling became unable to keep current on the mounting legal bill and as of March 2005, owed Lamar $60,819.97. Lamar threatened to terminate the firm's representation and place an attorney's lien on all work product unless Appling paid the outstanding fees.

Appling and his attorneys held a meeting in March 2005. The bankruptcy court found that during this meeting Appling stated he was expecting a tax refund of "approximately $100,000," which would be enough to pay current and future fees. Lamar contends that in reliance on this statement, it continued its representation and did not begin collection of its overdue fees.

When Appling and his wife submitted their tax return, they requested a refund of only $60,718 and received a refund of $59,851 in October. The Applings spent this money on their business. They did not pay Lamar.

Appling and his attorneys met again in November 2005. The bankruptcy court found that Appling stated he had not yet received the refund. Lamar contends that in reliance on this statement, it agreed to complete the pending litigation and forego immediate collection of its fees but refused to undertake any additional

representation. In March 2006, Lamar sent Appling his final invoice for a principal amount due of $55,303.66 and $6,185.32 in interest.

Five years later, Lamar filed suit against Appling in a superior court in Georgia. In October 2012, Lamar obtained a judgment for $104,179.60. Three months later, the Applings filed for bankruptcy.

Lamar initiated an adversary proceeding against Appling in bankruptcy court. The bankruptcy court ruled that because Appling made fraudulent statements on which Lamar justifiably relied, Appling's debt to Lamar was nondischargeable, 11 U.S.C. § 523(a)(2)(A). The district court affirmed. The district court rejected Appling's argument that his oral statements "respect[ed] . . . [his] financial condition," 11 U.S.C. § 523(a)(2)(B), and should have been dischargeable. The district court ruled that "statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition." The district court agreed with the bankruptcy court that Appling made material false statements with the intent to deceive on which Lamar justifiably relied.

II. STANDARD OF REVIEW

When we sit as the second appellate court to review a bankruptcy case, *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996), we "assess the bankruptcy

court's judgment anew, employing the same standard of review the district court itself used," *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009). "Thus, we review the bankruptcy court's factual findings for clear error, and its legal conclusions *de novo*." *Id.*

III. DISCUSSION

The Bankruptcy Code gives a debtor a fresh start by permitting him to discharge his pre-existing debts. But there are many exceptions to discharge. And some of those exceptions protect victims of fraud.

Section 523(a)(2) creates two mutually exclusive exceptions to discharge:

> **(a)** A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
>
> **(2)** for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> **(A)** false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*;
>
> **(B)** use of a *statement in writing*—
>
> (i) that is materially false;
> (ii) *respecting the debtor's or an insider's financial condition*;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive; . . .

11 U.S.C. § 523(a)(2) (emphasis added).

The Code treats debts incurred by a statement "respecting the debtor's . . . financial condition" differently from other debts. *Id.* All fraud "other than a statement respecting the debtor's . . . financial condition" is covered by subsection (A). *Id.* § 523(a)(2)(A). Under subsection (A), a debtor cannot discharge a debt obtained by any type of fraudulent statement, oral or written. *Id.* A creditor also need prove only justifiable reliance. *Field v. Mans*, 516 U.S. 59, 61 (1995). But if a statement is made "respecting the debtor's . . . financial condition," then subsection (B) governs. 11 U.S.C. § 523(a)(2)(B)(ii). To avoid discharge of a debt induced by a statement respecting the debtor's financial condition, a creditor must show reasonable reliance and that the statement was intentional, materially false, and in writing. *Id.* § 523(a)(2)(B). Thus, a debt incurred by an oral, fraudulent statement respecting the debtor's financial condition can be discharged in bankruptcy.

We must determine whether Appling's statements about a single asset are "statement[s] respecting [his] . . . financial condition." *Id.* § 523(a)(2). The bankruptcy court found that Appling made false oral statements about his anticipated tax refund to receive an extension of credit from Lamar. If these statements *do not* respect his financial condition, Appling can discharge his debt to Lamar in bankruptcy only if he disproves an element of fraud. *Id.* § 523(a)(2)(A). But if the statements *do* respect his financial condition, Appling can discharge his debt to Lamar because the statements were not in writing. *Id.* § 523(a)(2)(B).

The circuits and other federal courts are split on this question. The Fourth Circuit has held that a "debtor's assertion that he owns certain property free and clear of other liens is a statement respecting his financial condition." *Engler v. Van Steinburg*, 744 F.2d 1060, 1061 (4th Cir. 1984). Several bankruptcy courts—including one in this Circuit, *In re Aman*, 492 B.R. 550, 565 & n.47 (Bankr. M.D. Fla. 2010)—have agreed. *See, e.g.*, *In re Carless*, No. 10-42988, slip op. at *3–4 (Bankr. D.N.J. Jan. 6, 2012); *In re Nicolai*, No. 05-29876, slip op. at *1 (Bankr. D.N.J. Jan. 31, 2007); *In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005); *In re Priestley*, 201 B.R. 875, 882 (Bankr. D. Del. 1996); *In re Kolbfleisch*, 97 B.R. 351, 353 (Bankr. N.D. Ohio 1989); *Matter of Richey*, 103 B.R. 25, 29 (Bankr. D. Conn. 1989); *In re Rhodes*, 93 B.R. 622, 624 (Bankr. S.D. Ill. 1988); *In re Howard*, 73 B.R. 694, 702 (Bankr. N.D. Ind. 1987); *In re Panaia*, 61 B.R. 959, 960–61 (Bankr. D. Mass. 1986); *In re Roeder*, 61 B.R. 179, 181 n.1 (Bankr. W.D. Ky. 1986); *In re Prestridge*, 45 B.R. 681, 683 (Bankr. W.D. Tenn. 1985). But the Fifth, Eighth, and Tenth Circuits have held that a statement about a single asset does not respect a debtor's financial condition because it "says nothing about the overall financial condition of the person making the representation or the ability to repay debt." *In re Bandi*, 683 F.3d 671, 676 (5th Cir. 2012); *see also In re Lauer*, 371 F.3d 406, 413–14 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700, 706 (10th Cir. 2005). And some bankruptcy courts in other circuits have agreed. *See, e.g.*, *In re*

Feldman, 500 B.R. 431, 437 (Bankr. E.D. Penn. 2013); *In re Banayan*, 468 B.R. 542, 575–76 (Bankr. N.D.N.Y. 2012); *In re Campbell*, 448 B.R. 876, 886 (Bankr. W.D. Penn. 2011).

"[I]nterpretation of the Bankruptcy Code starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989)). Because the Code does not define the relevant terms, we look to "their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012); *see also In re Piazza*, 719 F.3d 1253, 1261 (11th Cir. 2013) (applying this canon to the Bankruptcy Code). The text and context establish that a statement about a single asset can be a "statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2).

"Financial condition" likely means one's overall financial status. Elsewhere in the statute, the Bankruptcy Code defines "insolvent" as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property." *Id.* § 101(32)(A). In this context, the statute uses "financial condition" to describe the overall state of being insolvent, not any particular asset on its own. Because "[a] word or phrase is presumed to bear the same meaning throughout a text," Scalia & Garner, *supra*, at 170, we should interpret "financial condition" in

section 523(a)(2) in the same way. Whether by its ordinary meaning or as a term of art, "financial condition" likely refers to the sum of all assets and liabilities.

But even if "financial condition" means the sum of all assets and liabilities, it does not follow that the phrase "statement *respecting* the debtor's . . . financial condition," *Id.* § 523(a)(2) (emphasis added), covers only statements that encompass the entirety of a debtor's financial condition at once. Read in context, the phrase "statement *respecting* the debtor's . . . financial condition," *id.*, includes a statement about a single asset. We must not read the word "respecting" out of the statute. *See* Scalia & Garner, *supra*, at 174 ("If possible, every word . . . is to be given effect.").

"Respecting" is defined broadly as "[w]ith regard or relation to; regarding; concerning." *Respecting*, *Webster's New International Dictionary* 2123 (2d ed. 1961); *see also Respecting*, *Oxford English Dictionary* (online ed.) ("With respect to; with reference to; as regards."). For example, documents can "relate to" or "concern" someone's health without describing their entire medical history. Articles can "reference" the Constitution without quoting its entire text. Likewise, a statement can "respect" a debtor's "financial condition" without describing the overall financial situation of the debtor. The Supreme Court has interpreted "with respect to" in a statute to mean "direct relation to, or impact on." *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 506 (1992). And the Court has interpreted

"respecting" in the First Amendment to include any partial step toward the establishment of religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A statement about a single asset "relates to" or "impacts" a debtor's overall financial condition. And knowledge of one asset or liability is a partial step toward knowing whether the debtor is solvent or insolvent.

If the statute applied only to statements that expressed a debtor's overall financial condition, Congress could have said so. Lamar argues that "the preposition 'respecting' has no magic, expansive effect in the statute, it is simply a required grammatical device necessary to connect two related terms." Perhaps this argument would have more sway if the statute said "statement *of* the debtor's financial condition." But Congress did not use this language. Congress also did not say "statement indicating" or "revealing" or "disclosing" or "encompassing" the debtor's financial condition, phrases that would connote a full or complete expression of financial condition.

Lamar dismisses the focus on the word "respecting" as "nothing more than a game of semantics," but judges have a responsibility to interpret the whole text. And "[s]ometimes the canon [of ordinary meaning] governs the interpretation of so simple a word as a preposition." Scalia & Garner, *supra*, at 71. A statement about a single asset is still a statement *respecting* a debtor's financial condition.

Lamar argues that because the legislative history often used "financial statement" in place of "statement respecting the debtor's . . . financial condition," 11 U.S.C. § 523(a)(2), we should read the statute to apply only to financial statements, but the word "statement" should also be given its ordinary meaning. Mere proximity of "statement" to "financial condition" is not enough to limit the meaning of the text. "Statement" is defined as "[t]hat which is stated; an embodiment in words of facts or opinions; a narrative; recital; report; account." *Statement*, *Webster's New International Dictionary* 2461 (2d ed. 1961). The definition of financial statement is technical and would exclude a statement about a single asset: "A balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities." *Financial Statement*, *Black's Law Dictionary* (10th ed. 2014). Setting aside the problems with legislative history, Lamar's argument works against it. Precisely because "[t]he term 'financial statement' has a strict, established meaning," *Joelson*, 427 F.3d at 709, we should expect the statute to say "financial statement" if it conveys that meaning. But the statute instead says "statement." To limit the definition to only "financial statements," Congress need only say so. *Cf.* 11 U.S.C. § 1125 (using the term "disclosure statement"); *Id.* § 101(49)(A)(xii) ("registration statement").

The surplusage cannon supports our determination that "statement" should be given its ordinary meaning. "If possible, every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Scalia & Garner, *supra*, at 174; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In subsection (B), the statute says "use of a statement in writing." 11 U.S.C. § 523(a)(2)(B). Because a formal financial statement is almost always a written document (it is hard to imagine an oral recitation of all assets and liabilities), reading the statute to cover only financial statements would render the writing requirement surplusage.

And in the context of a statute about fraud, the ordinary meaning of the word "statement" makes sense. Section 523(a)(2) creates two similar exceptions to discharge for debts incurred by fraud. Subsection (A) references specific common-law torts. *See Field*, 516 U.S. at 69 ("'[F]alse pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. . . . [T]hey imply elements that the common law has defined them to include." (quoting 11 U.S.C. § 523(a)(2)(A))). Subsection (B) enumerates its own elements which are analogous, but not identical to the common law elements. For example, where the common law requires justifiable reliance, section 523(a)(2)(B)(iii) requires reasonable reliance. *Field*, 516 U.S. at 72–75. Similarly, where the common law requires either an affirmative representation or an intentional omission, section

523(a)(2)(B) requires a "statement," as opposed to an omission. True, if Congress wanted to exclude omissions from subsection (B), it could have used the term "representation" and avoided the confusion with the term "financial statement." But Congress would not have said "false representation" without implying the common law term of art. *See Field*, 516 U.S. at 69. Accordingly, "statement" means an expression or embodiment in words, as opposed to a nonactionable omission.

Lamar also argues that the "only way to give Section 523(a)(2)(A) meaning is to interpret it to provide a distinction between oral and written representations," but this argument reveals a fundamental misunderstanding of the statute. Section 523(a)(2)(A) covers most fraud. But section 523(a)(2)(B) covers statements respecting financial conditions. Lamar states that "certain oral misrepresentations must be non-dischargeable." They are. Any debt incurred by an oral misrepresentation that is not "respecting the debtor's financial condition" is nondischargeable under subsection (A). Appling provides a list of examples, including false representations about job qualifications and lies about the purpose and recipient of a payment. The question is how broadly to define the phrase "statement respecting the debtor's . . . financial condition," not whether allowing discharge of debts incurred by oral misrepresentations about finances is a good idea. The statute allows the discharge of debts incurred by oral statements so long

as they "respect" the debtor's "financial condition." Lamar's argument is based on policy, not statutory structure.

When the language of the statute is clear, we need not look any further. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (When "the statute's language is plain," "that is also where the inquiry should end." (internal quotations omitted)); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932) ("[W]e have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."). A distaste for dishonest debtors does not empower judges to disregard the text of the statute. Because the text is not ambiguous, we hold that "statement[s] respecting the debtor's . . . financial condition" may include a statement about a single asset.

This result is also perfectly sensible. The requirement that some statements be made in writing promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose. Lamar refers to our interpretation as a "giant fraud loophole." But the requirement of a writing is not at all unusual in the history of the law. From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief. This requirement may seem harsh after the fact, especially in the case of fraud, but it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision. In the

context of a debt incurred by fraud, a lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit. Lamar, a law firm, could have required Appling to put his promise to spend his tax return on their legal fees in writing before continuing to represent him.

This rule strikes a reasonable balance between the "'conflicting interests' of discouraging fraud and of providing the honest but unfortunate debtor a fresh start." *In re Vann*, 67 F.3d 277, 284 (11th Cir. 1995) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)). The code does not unfairly reward dishonest debtors, but instead imposes different requirements of proof for different kinds of statements. A statement respecting a debtor's financial condition must be in writing, which helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty. And providing an incentive for creditors to receive statements in writing may reduce the incidence of fraud. Because a statement about a single asset can be a "statement respecting the debtor's . . . financial condition," and because Appling's statements were not in writing, his debt can be discharged under section 523(a)(2)(B).

IV. CONCLUSION

We **REVERSE** the order ruling that Appling's debt to Lamar is nondischargeable and **REMAND** for further proceedings consistent with this opinion.

ROSENBAUM, Circuit Judge, concurring:

Sometimes things are not as they seem. Today we conclude that the phrase "statement respecting . . . the debtor's financial condition" in 11 U.S.C. § 523(a)(2) warrants a broad reading. As a result, Appling, the debtor in this case, will receive a discharge of the debt he incurred by lying about how he would pay for the legal services he dishonestly obtained. That certainly seems to frustrate a "primary purpose" of the Bankruptcy Act to provide relief to only the "honest debtor." *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (citation and internal quotation marks omitted).

But in actuality, the broad reading we give to the phrase "statement respecting . . . the debtor's financial condition" better promotes congressional intent to give a fresh start to only the "honest debtor" than does a narrow construction of the same phrase. This is so because the very same phrase appears in both §§ 523(a)(2)(A) and (B), and it must have the same meaning in both subsections. Though a narrow construction of the phrase in subsection (A) seems to further congressional intent to protect only the "honest debtor," a broad interpretation of the phrase in subsection (B) better comports with congressional intent. And the reality is that a broad construction of the phrase "statement respecting . . . the debtor's financial condition" in subsection (B) advances

congressional intent to provide relief for only the "honest debtor" more than a narrow interpretation of the same phrase in subsection (A).

Because the words of the phrase alone are ambiguous, we must construe the phrase with an eye towards congressional intent in enacting the Bankruptcy Act. When we do that, it is clear that "statement respecting . . . the debtor's financial condition" must have the broad meaning that the panel attributes to it.

I.

There's no getting around it. Standing alone, the words of the phrase "statement respecting . . . the debtor's financial condition" are not unambiguous. True, the panel seems to think they are and argues that the words clearly mean any statement about any finance, asset, or liability that the debtor may have. But other courts have concluded that the language "statement respecting . . . the debtor's financial condition" refers to only statements about a debtor's overall financial circumstances—which do not include statements about only a single asset or liability.

Among the courts that appear to have understood the phrase to mean the opposite of what we conclude today is the Supreme Court, though the Supreme Court has not expressly addressed the meaning of the language. In *Field v. Mans*, 516 U.S. 59 (1995), the Court held that a creditor need show only justifiable reliance on a fraudulent misrepresentation in order to except the debt incurred as a

result of that reliance, from discharge under § 523(a)(2)(A). In reaching this conclusion, the Supreme Court discussed § 523(a)(2)(A) and (B)'s references to "a statement respecting the debtor's . . . financial condition" and conveyed its understanding that the words "financial condition" in § 523(a)(2) are a prohibition on excepting from discharge under both subsections (A) and (B) "debts traceable to . . . a materially false *financial statement*," *id.* at 64 (emphasis added), apparently meaning "financial statement" as a term of art referring to a statement of net worth, not a statement about a single asset or liability. So at least at the time it decided *Field*, the Supreme Court appeared to have a different understanding of the phrase "a statement respecting the debtor's . . . financial condition" than we embrace today.

To be sure, I do not suggest that *Field*'s discussion of the meaning of "a statement respecting the debtor's . . . financial condition" purports to instruct courts on the proper meaning of § 523(a)(2)(A). But the Supreme Court's understanding as conveyed in *Field* demonstrates that the language of the phrase is fairly susceptible of more than one meaning.

Three other circuits have likewise concluded that the phrase "a statement respecting the debtor's . . . financial condition" must be construed narrowly, to refer to only those statements about a debtor's overall net worth—though they do not appear to have determined the language of the phrase to have an unambiguous

meaning. *See, e.g.*, *In re Bandi*, 683 F.3d 671 (5th Cir. 2012); *In re Lauer*, 371 F.3d 406 (8th Cir. 2004); *In re Joelson*, 427 F.3d 700 (10th Cir. 2005).

But while the language itself of the phrase in question may not be unambiguous, that doesn't mean that § 523(a)(2) is ambiguous in the overall statutory scheme. When we construe a statute, we must do so not only by looking to the language itself, but also by reference to "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 125 S. Ct. 1074, 1081-82 (2015) (citation and quotation marks omitted). And when we do that, it is clear that we must give the phrase "a statement respecting the debtor's . . . financial condition" a broad construction.

The Supreme Court has repeatedly emphasized that the Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Hunt*, 292 U.S. at 244). For this reason, only honest debtors receive the benefit of the general policy that exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor. *In re St. Laurent*, 991 F.2d 672, 680 (11th Cir. 1991). Indeed, we have said that "the malefic debtor may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct." *Id.* at 680-81.

So to the extent that the language "statement respecting . . . the debtor's financial condition" is fairly and reasonably susceptible of a construction that better furthers congressional intent to protect only the honest debtor, we are obliged to apply that interpretation. When it comes to § 523(a)(2), a broad construction is reasonable and better accomplishes this purpose than a narrow one.

As the panel notes, the phrase "statement respecting . . . the debtor's financial condition" appears in both subsections (A) and (B). We therefore presume it to have the same meaning in both subsections. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[W]e cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute.").

But though the words have the same meaning in both subsections (A) and (B), they have opposite effects on whether a debtor may discharge a debt for something obtained through the use of a "statement respecting . . . the debtor's financial condition." Under subsection (A), which refers to oral statements, if a statement falls within the meaning of "statement respecting . . . the debtor's financial condition," the debt incurred as a result of that statement is dischargeable. Meanwhile, under subsection (B), which refers to written statements, if a statement comes within the meaning of "statement respecting . . . the debtor's financial

condition," the debt incurred as a result of that statement is not dischargeable, provided that the other conditions in subsection (B) are satisfied.

So if the phrase has a broad meaning, more false oral statements will have the effect of exempting a debt incurred as the result of a misrepresentation, from the exception to discharge (meaning that such debts will be discharged), than if we construe the phrase narrowly. But fewer false written statements will result in excusing a debt for a fraudulently obtained asset, service, or loan. And since it seems likely that, at least in arm's length transactions, most significant debts are obtained as the result of written representations about finances, as opposed to oral ones, a broader interpretation of the phrase is less likely to benefit dishonest debtors than a narrow construction of it.

II.

For these reasons, I agree with the panel that we must construe the phrase "statement respecting . . . the debtor's financial condition" broadly. To be sure, doing so has the effect of allowing Appling's debt for legal services, which the bankruptcy court concluded he obtained by lying to Lamar about the tax refund, to be discharged. But in the overall statutory scheme, the broad interpretation better promotes Congress's concern to provide relief to "honest debtors" only.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11578

D.C. Docket Nos. 1:15-cv-02323-SCJ; 12-bkc-80136-CRM

In re: JON E. LUNSFORD, SR.,

Debtor.

JON E. LUNSFORD, SR.,

Plaintiff - Appellant,

versus

PROCESS TECHNOLOGIES SERVICES, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(February 15, 2017)

Before WILIAM PRYOR and ROSENBAUM, Circuit Judges, and UNGARO,[*] District Judge.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether a bankruptcy court made a finding of fact that a debtor violated state securities laws. After a business venture went awry, Process Technologies obtained a judgment in state court against Jon Lunsford for violations of state securities laws. Lunsford then filed for bankruptcy. A debtor ordinarily may discharge debts in bankruptcy, 11 U.S.C. § 727, but not if the debt "is for the violation of . . . securities laws" and results from a court judgment, § 523(a)(19)(A)–(B). Process Technologies filed an adversary proceeding in which it complained that section 523(a)(19)(A) barred Lunsford from discharging the debt. Lunsford answered that his liability arose from a third party's violation of securities laws and that the bar under section 523(a)(19)(A) from a discharge applies only when the debtor violates securities laws. Lunsford also sought leave to amend his answer to assert that Process Technologies fraudulently obtained the judgment. Lunsford's arguments fail: the bankruptcy court made a finding of fact that Lunsford violated securities laws; alternatively, section 523(a)(19)(A) applies irrespective of debtor conduct; and Lunsford is

[*] Honorable Ursula Ungaro, United States District Judge for the Southern District of Florida, sitting by designation.

estopped from arguing that the award was procured by fraud. We affirm the order that excepted the debt from discharge and denied leave to amend.

I. BACKGROUND

In 2009, Process Technologies Services, LLC, met with MIPCO, LLC, and its president, Jon Lunsford, to discuss purchasing securities in MIPCO. MIPCO sent Process Technologies documents that stated that MIPCO maintained $1.2 million in tangible assets and $500,000 in intangible assets. Not knowing that title problems plagued the tangible assets and that MIPCO had not acquired the intangible assets, Process Technologies invested $300,000.

After discovering the asset problems, Process Technologies sued in a chancery court in Mississippi to rescind the sale. The chancery court ordered the parties to arbitrate the dispute. Lunsford filed for bankruptcy, but the bankruptcy court stayed the action pending the arbitration. The arbitrator ruled in favor of Process Technologies and awarded the company $606,892. The chancery court confirmed the award and entered a final judgment against Lunsford, MIPCO, and another individual as jointly and severally liable. Lunsford neither objected to the confirmation nor appealed to the Supreme Court of Mississippi.

The bankruptcy court then lifted the stay of its proceeding, and Process Technologies filed an adversary proceeding, complaining that Lunsford could not discharge the debt because the debt was "for the violation" of securities laws, 11

U.S.C. § 523(a)(19)(A). After Lunsford filed an answer, he sought leave to amend that answer to assert that Process Technologies fraudulently obtained the arbitrator's award. The bankruptcy court then directed Lunsford to pursue that argument in the chancery court. Lunsford filed a motion for relief from judgment in the chancery court, but the chancery court declined to set aside its judgment.

Lunsford's motion for relief from judgment having been resolved, the bankruptcy court ruled that section 523(a)(19)(A) prohibited Lunsford from discharging the debt. The bankruptcy court determined that the arbitrator "found that [Lunsford] violated the [Mississippi Securities] Act. More specifically, the Arbitrator found that [Lunsford] violated the Act by offering and selling an unregistered security. The Arbitrator also found that [Lunsford] violated the Act by making an offer that contained untrue statements." The bankruptcy court ruled that the arbitration award constituted a judgment "for a violation" of securities laws against Lunsford because "there is a determination outside the Bankruptcy Court that [Lunsford] violated securities laws" and because the state courts confirmed the arbitration award.

Lunsford appealed to the district court on the ground that section 523(a)(19)(A) bars discharge only when the debtor committed a securities violation, not when his liability arose from a third-party's violation. The district

court held that section 523(a)(19)(A) applies irrespective of debtor conduct and that Lunsford is not entitled to amend his complaint.

II. STANDARD OF REVIEW

This court is the second appellate court to review decisions from the bankruptcy court. *In re Glados, Inc.*, 83 F.3d 1360, 1362 (11th Cir. 1996). We "assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used." *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009). "Thus, we review the bankruptcy court's factual findings for clear error, and its legal conclusions *de novo*." *Id.*

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Lunsford cannot discharge his debt because the bankruptcy court made a finding of fact that Lunsford violated securities laws and, in the alternative, section 523(a)(19)(A) applies irrespective of whether Lunsford violated securities laws. Second, we explain that Lunsford is not entitled to leave to amend his complaint.

A. Lunsford Cannot Discharge the Debt.

Section 523(a)(19)(A) provides that a person cannot discharge a debt in bankruptcy if the debt "is for the violation of securities laws":

> (a) A [bankruptcy] discharge . . . does not discharge an individual debtor from any debt—
>
> . . .

> (19) *that*—
>
> (A) *is for*—
>
> (i) *the violation of* any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State *securities laws*, or any regulation or order issued under such Federal or State securities laws; or
>
> (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; *and*
>
> (B) results, before, on, or after the date on which the petition was filed, from—
>
> (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
>
> (ii) any settlement agreement entered into by the debtor; or
>
> (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19) (emphases added).

Lunsford argues that the bankruptcy court and the arbitrator never found that he violated securities laws, only that he is liable for a third party's violation of securities laws. Relying on this premise, Lunsford argues that the bar under section 523(a)(19)(A) from a discharge applies only if he violated securities laws. We reject both arguments.

1. The Bankruptcy Court Made a Finding of Fact That Lunsford Violated Securities Laws.

Lunsford concedes that section 523(a)(19)(A) prohibits discharge if the bankruptcy court found that Lunsford violated securities laws, but he argues that the bankruptcy court "adopted the arbitrator's award" and applied collateral estoppel only to determine that it was "possible" to conclude that Lunsford violated securities laws. He maintains that the bankruptcy court never made a specific finding of culpability. We agree that the district court "adopted" the findings of the arbitrator, but by adopting those findings, the bankruptcy court determined that Lunsford violated securities laws.

The bankruptcy court stated that it "should focus not on the underlying facts but on the nature of the judgment at issue" to avoid "the need to re-litigate the matter [of culpability] in bankruptcy court," but the bankruptcy court did not, as Lunsford contends, fail to make findings of fact. Instead, by precluding relitigation of facts, "the bankruptcy court utilized issue preclusion to reach *conclusions about facts* that the court would then consider as 'evidence of nondischargeability.'" *In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987) (emphasis added). In adopting the arbitrator's award, the district court adopted the facts that the arbitrator found. The bankruptcy court could not have applied section 523(a)(19)(A) without first finding a violation because the section applies only if there exists a "violation" of securities laws that a "debt . . . is for."

Lunsford contends that the bankruptcy court could not have found that Lunsford violated securities laws because the arbitrator did not find as much, but the findings of the bankruptcy court rest on ample support from the arbitrator's award. On the first page of its award, the arbitrator stated that "the use of 'MIPCO' will include Mr. Lunsford . . . unless . . . referenced individually." Later, the arbitrator determined that section 75-71-401 of the Mississippi Code, part of the Mississippi Securities Act, "makes it unlawful for any person to offer or sell a security unless it is registered, an exempt transaction, or a federal security." The arbitrator found that "MIPCO" violated securities laws because "the securities were unregistered and MIPCO has not established that the . . . transactions were exempt from registration," and nobody disputes that the securities were not federal. The arbitrator did not limit these findings to MIPCO, so the bankruptcy court had sufficient reason to determine that the arbitrator made a specific finding that Lunsford violated securities laws. Because Lunsford agrees that section 523(a)(19)(A) prohibits discharge of debts where a debtor violated securities laws, Lunsford cannot discharge his debt.

2. Alternatively, Section 523(a)(19)(A) Applies Irrespective of Debtor Conduct.

Even if the bankruptcy court had not made a finding that Lunsford violated securities laws, we would reject his argument that the Bankruptcy Code prohibits discharge of a debt that is for the violation of state securities laws only when the

debtor violated the securities laws, not when the debtor's liability arises from securities violations committed by a third party. The text of section 523(a)(19)(A) makes no such distinction; the statute applies irrespective of debtor conduct.

The text and structure of section 523(a)(19)(A) unambiguously prevent discharge of debts "for the violation" of securities laws irrespective of debtor conduct. The term "for" in section 523(a)(19)(A) denotes causation. The Supreme Court has interpreted the term "debt for" to mean "'debt as a result of,' 'debt with respect to,' 'debt by reason of,' and the like." *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (citing *American Heritage Dictionary* 709 (3d ed. 1992); *Black's Law Dictionary* 644 (6th ed. 1990)). Although section 523(a)(19)(A) includes the slightly different phrase "debt that is for," this alteration only serves as a drafting tool to enable the division found in section 523(a)(19). Section 523(a)(19)(A) employs the phrase "debt that is for," and section 523(a)(19)(B) employs the phrase "debt that . . . results . . . from." But "debt for" is used in similar but undivided subparts of 523(a). § 523(a)(1)–(2), (4)–(6), (9), (12)–(13), (16)–(17). Congress did not materially alter the phrase "debt for" when it inserted a pronoun and a linking verb, so "debt that is for" retains the same meaning as "debt for" and refers to debt caused by a violation of securities laws. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012).

Because Congress also did not restrict section 523(a)(19)(A) to subsets of causation, we should not construct such a limit. If Congress had wanted to limit section 523(a)(19)(A) based on debtor conduct, it could have done so as it did with other provisions in the statute. Even within section 523(a)(19), the text considers debtor conduct, but it considers debtor conduct in a provision not pertinent to this appeal. For a debt to be excepted from discharge, it must be "for" a violation of securities laws, § 523(a)(19)(A), but it must also "result[] . . . from" a court order or "any settlement agreement entered into *by the debtor*," § 523 (a)(19)(B)(i)–(ii) (emphasis added). Other subsections similarly limit application based on debtor conduct. Debts cannot be discharged if they are "for willful and malicious injury *by the debtor* to another entity," § 523(a)(6) (emphasis added), or "for death or personal injury *caused by the debtor's* operation of a motor vehicle," § 523(a)(9) (emphasis added). Nor can debts be discharged if they are "obtained by use of a statement in writing . . . that *the debtor caused* to be made or published," § 523(a)(2)(B)(iv) (emphasis added), or are "for a tax or a customs duty with respect to which the *debtor made* a fraudulent return," § 523(a)(1)(C) (emphasis added). Because Congress rendered discharge in some subsections dependent on debtor conduct but never did so for section 523(a)(19)(A), we infer that the limit does not extend to section 523(a)(19)(A). *See* Scalia & Garner, *supra*, at 107; *Russello v. United States*, 464 U.S. 16, 23 (1983). The whole text establishes that

section 523(a)(19)(A) precludes discharge regardless of whether the debtor violated securities laws as long as the securities violation caused the debt.

The Tenth Circuit arrived at a contrary conclusion, but even if we found its reasoning persuasive, its decision involved circumstances inapplicable here. After Oklahoma obtained judgments for unjust enrichment against investors in a Ponzi scheme, the Tenth Circuit held that the debtors could discharge their debts because "[t]he judgments at issue [we]re not 'for a violation' of securities laws but for unjust enrichment resulting from someone else's violation of those statutes." *Okla. Dep't of Sec., ex. rel. Faught v. Wilcox*, 691 F.3d 1171, 1173, 1175 (10th Cir. 2012). In contrast, Lunsford's debt does not arise from a judgment against him for unjust enrichment. Lunsford was a party to the same decision in which the state courts entered a judgment against MIPCO for a violation of securities laws.

The Ninth Circuit also arrived at a contrary decision, but it too is unpersuasive. In that decision, a client had pre-paid an attorney with funds derived from violations of securities laws. By the time the matter settled, the attorney had not billed enough work to justify all the pre-paid funds, but after a receiver ordered the attorney to disgorge those funds, the attorney filed for bankruptcy to shield the funds. *In re Sherman*, 658 F.3d 1009, 1010 (9th Cir. 2011), *abrogated on other grounds by Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013). The Ninth Circuit acknowledged that the plain language of section 523(a)(19)(A) did not limit

application based on debtor conduct, but determined that the text was ambiguous in the light of circuit precedent that had held that similar portions of section 523 required inquiry into debtor conduct. To further the supposed "purpose" of the Bankruptcy Code to allow a "fresh start" and to protect "the honest but unfortunate debtor," the Ninth Circuit limited section 523(a)(19)(A) to debts caused by the debtor. *In re Sherman*, 658 F.3d at 1013–15 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). We depart from the Ninth Circuit because it grounded its decision on precedent that does not bind us and followed prescriptions of general statutory purpose over the text.

B. Lunsford Is Not Entitled to Leave to Amend His Complaint.

Lunsford argues that Process Technologies fraudulently obtained the arbitration award. He maintains that because "the bankruptcy court is not obligated to recognize a judgment procured by fraud and perjury," he should be granted leave to amend. We disagree.

Lunsford is not entitled to leave to amend his complaint because Mississippi law precludes him from relitigating the claim of fraud. We "give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered." *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989). In Mississippi, collateral estoppel precludes Lunsford "from relitigating a specific issue actually litigated, determined by, and essential to the

judgment in a former action, even though a different cause of action is the subject of the subsequent action." *Dunaway v. W.H. Hopper & Assoc., Inc.*, 422 So. 2d 749, 751 (Miss. 1982). Twice, state courts rebuffed Lunsford's claim of fraud. And because his argument, if successful, would have defeated the complaint against him, the decision of the state court as to the claim of fraud was essential to the judgment against Lunsford. Lunsford is not entitled to leave to amend his complaint to allege a futile claim barred by an earlier judgment. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

IV. CONCLUSION

We **AFFIRM** the judgment against Lunsford.

ROSENBAUM, Circuit Judge, concurring:

Sometimes one reason is enough. That's the case here. As Judge Pryor ably demonstrates, Lunsford cannot discharge the debt of $606,892 under 11 U.S.C. § 523(a)(19)(A) because the bankruptcy court correctly determined that the arbitration award found that he violated securities laws. This is not a close question; the answer is clear. I would have stopped there.

The panel opinion, however, goes on to reach an alternative holding—concluding that "section 523(a)(19)(A) precludes discharge regardless of whether the debtor violated securities laws as long as the securities violation caused the debt." Maj. Op. at 11. That alternative holding may or may not prove to be correct, but by reaching it in this case, where we do not need to do so, we have needlessly created confusion about how that holding should be applied in cases where an innocent third party has a judgment against it that results from someone else's securities fraud.

The panel suggests that we might not apply § 523(a)(19)(A)'s discharge preclusion if the situation that arose in *Oklahoma Department of Securities, ex. rel. Faught v. Wilcox*, 691 F.3d 1171 (10th Cir. 2012), presented itself in our Circuit. *See* Maj. Op. at 11. But this suggestion creates confusion as to how our alternative holding should be applied in cases involving innocent third parties.

In *Wilcox*, a Ponzi schemer defrauded investors of millions of dollars and pled guilty to various crimes related to her activities. *Wilcox*, 691 F.3d at 1173. The scheme also violated Oklahoma's securities laws. *Id.* Following the schemer's conviction, the Oklahoma Department of Securities sued more than 150 investors—including several who were entirely innocent—to recover the funds distributed in the Ponzi scheme. *Id.* The Oklahoma trial court granted summary judgment for the Department on grounds of unjust enrichment and ordered return of the investors' profits.[1] *Id.* Some of the investors filed for bankruptcy and sought to discharge the debt from the Department's judgment against them. *Id.* Because the bankruptcy and district courts concluded that these debts fell under § 523(a)(19)(A), they declined to discharge them. *Id.*

The Tenth Circuit reversed. Though it noted that the investors "were not charged with securities violations," *id.* at 1175 (citation and quotation marks omitted), the Tenth Circuit nonetheless observed that the valid state-court judgment against them "require[d] them to repay profits distributed to them *as a result of* [the schemer's] Ponzi scheme," *id.* at 1174 (emphasis added)—in other words, as a result of a third party's securities violations.

[1] Though the Oklahoma lower court ordered return of all profits without exception, the Oklahoma Supreme Court determined that innocent investors had to return profits only to the extent that they had received an unreasonable rate of return. *Wilcox*, 691 F.3d at 1173 n.3.

So under the Majority's reasoning, though the judgments that were the cause of the debts at issue in *Wilcox* were for unjust enrichment, they nonetheless also seem to be "debt as a result of," *see* Maj. Op. at 9 (citations and quotation marks omitted), a securities-fraud violation and therefore non-dischargeable under § 523(a)(19)(A). Yet the panel suggests that § 523(a)(19)(A)'s preclusion did not apply to the *Wilcox* investors' situation because "'[t]he judgments at issue [in *Wilcox*] [we]re not 'for a violation' of securities laws but for unjust enrichment resulting from someone else's violation of those statutes.'" *Id.* at 9 (quoting *Wilcox*, 691 F.3d at 1175). This internal inconsistency in the panel's reasoning will no doubt create confusion about how courts and litigants in this Circuit are to construe and apply our alternative holding.

Maybe the panel reaches this conclusion because the judgment against the *Wilcox* investors was not, in name, a judgment for securities violations, though this interpretation would seem to require us to construe the meaning of "judgment" in § 523(a)(19)(B)'s language:

> (b) A [bankruptcy] discharge . . . does not discharge an individual debtor from any debt—
>
> . . .
>
> (19) that—
>
> . . .
>
> (B) results, before, on, or after the date on which the petition was filed, from—
>
> (i) any *judgment*, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

> (ii) any settlement agreement entered into by the debtor; or
> (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19)(B) (emphasis added). That issue, of course, is not before us. So we have not had the benefit of briefing on it. And if we reached out and grabbed the issue, anyway, our analysis on that question would be mere dicta, since Lunsford's case, in fact, does involve a decision against him for securities fraud and therefore does not require us to resolve the question of whether the judgment must, on its face, find securities violations.

Plus, if the panel's alternative holding is implicitly based on the conclusion that the judgment must actually be on a securities-violation cause of action (as opposed to unjust enrichment or other non-securities-violation causes of action), that would create significant potential for uneven application of § 523(a)(19)'s discharge preclusion—particularly when it comes to innocent third parties. Under those circumstances, whether an innocent debtor could discharge his debt would depend on the way in which the state or private party chose to prosecute its claim against the innocent debtor.

And if, contrary to its distinguishing of *Wilcox*, the panel intends for all judgments that ultimately result from securities violations—including judgments against entirely innocent investors—to be subject to § 523(a)(19)'s discharge

preclusion, that interpretation appears to be at odds with "a central purpose" of the Bankruptcy Code to provide "a completely unencumbered new beginning to the honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (citation and quotation marks omitted).

These matters raise some difficult questions, and we would, no doubt, benefit from advocacy on these issues by parties with an actual interest in them. We don't have that here. For these reasons, I concur in only our holding that the bankruptcy court correctly concluded that the arbitration award found that Lunsford violated securities laws, so § 523(a)(19)(A)'s preclusion applies to the debt at issue in this case. I would leave the issue addressed by the alternative holding to a case where it is better developed.

Supreme Court of Florida

No. SC15-1147

JOHN PATRICK,
Petitioner,

vs.

RICHARD HESS, et al.,
Respondents.

[February 16, 2017]

PER CURIAM.

John Patrick seeks review of the decision of the Second District Court of Appeal in Hess v. Patrick, 164 So. 3d 19 (Fla. 2d DCA 2015), on the ground that it expressly and directly conflicts with Haigh v. Planning Board, 940 So. 2d 1230 (Fla. 5th DCA 2006), and New York State Commissioner of Taxation & Finance v. Friona, 902 So. 2d 864 (Fla. 4th DCA 2005). We have jurisdiction. See art. V, § 3(b)(3), Fla. Const. For the reasons provided below, we hold that the twenty-year statute of limitations found in section 95.11(1), Florida Statutes (2012), is applicable to the enforcement of a foreign judgment after it is recorded under the Florida Enforcement of Foreign Judgments Act (FEFJA). We therefore approve

the decision of the Second District in Hess and disapprove the conflict cases to the extent they are inconsistent with this opinion.

FACTS

In December 2003, Richard Hess, Meredith Hess, and Lucre, Inc., (collectively the Hesses) obtained an amended judgment against John T. Patrick (hereinafter Patrick) from a federal district court in Arizona in the amount of $1,600,000. Hess, 164 So. 3d at 19. On April 26, 2006, the Hesses registered the Arizona judgment in Florida under FEFJA. Id. at 20. Because the Hesses failed to renew the judgment prior to the expiration of Arizona's five-year statute of limitations, the judgment became unenforceable in Arizona in 2008. Id. On September 12, 2012, the Hesses obtained a writ of execution in Florida, and Patrick filed a motion to quash the writ. Id. The trial court determined that the Arizona judgment was not enforceable in either Arizona or Florida because Arizona's five-year statute of limitations continued to control after domestication of the Arizona judgment in Florida under the Act. Id. Accordingly, the trial court granted Patrick's motion and quashed the writ with prejudice. Id. The Hesses appealed the trial court's order.

On appeal, the Second District held that "by domesticating the Arizona judgment under FEFJA, Florida's twenty-year statute of limitations [contained in section 95.11(1)] applie[d] and beg[an] to run from the date of the Arizona

judgment." Id. at 22. In reaching this conclusion, the Second District reasoned that "a domesticated foreign judgment is to be treated like a Florida judgment" under section 55.503(1), Florida Statutes (2012). Id. The Second District further found that a domesticated judgment is not subject to the five-year statute of limitations in section 95.11(2)(a) because "recording a foreign judgment and seeking to enforce it under FEFJA is not an action on a foreign judgment" and "as worded, section 55.502(4) applies to Florida's five-year statute of limitations applicable to actions to enforce a foreign judgment referenced in subsection (2) of the same section, not the varied statutes of limitation in states around the country." Id. at 20, 22. The district court reversed the trial court order and remanded the case so that the Hesses could proceed with the writ of execution against Patrick. Id. at 22.

DISCUSSION

The question under review involves a determination of the applicable statute of limitations for the enforcement of a foreign judgment after it is recorded under FEFJA.[1] This Court reviews the interpretation of a statute de novo. See Polite v. State, 973 So. 2d 1107, 1111 (Fla. 2007). The goal of this statutory interpretation

1. The question on review does not involve a determination of the applicable statute of limitations for recording a foreign judgment under FEFJA. In other words, the timeliness of recording a foreign judgment under FEFJA is not at issue here.

"is to determine legislative intent." Crews v. State, 183 So. 3d 329, 332 (Fla. 2015). To do so, we first consult the plain meaning of the text of the statute. W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 9 (Fla. 2012). "When the statute is clear and unambiguous," we look no further than the statute's plain language to determine the Legislature's intent and to avoid rules of statutory construction. Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005).

Where the statutory "language is unclear or ambiguous," we apply rules of statutory construction to determine legislative intent. Polite, 973 So. 2d at 1111. One such rule is "[t]he doctrine of in pari materia . . . [which] requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008) (quoting Fla. Dep't of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005)). In following this rule, we endeavor to give each clause of the statute effect and to accord harmony among all the statute's parts. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001) (quoting Acosta v. Richter, 671 So. 2d 149, 153-54 (Fla. 1996)).

Florida enacted the Uniform Enforcement of Foreign Judgments Act, or Florida Enforcement of Foreign Judgments Act (FEFJA), in 1984. In re Goodwin, 325 B.R. 328, 330 (Bankr. M.D. Fla. 2005); see §§ 55.501-.509, Fla. Stat. (2012). The Act creates an alternative simplified procedure for domesticating foreign

judgments. N.Y. State Comm'r of Taxation & Fin. v. Hayward, 902 So. 2d 309, 310 (Fla. 4th DCA 2005). FEFJA gives Florida courts a procedure by which "out-of-state foreign judgments will be given full faith and credit." Hess, 164 So. 3d at 20; see § 55.502(1) Fla. Stat. ("As used in ss. 55.501-55.509, the term 'foreign judgment' means any judgment, decree, or order of a court of any other state or of the United States if such judgment, decree, or order is entitled to full faith and credit in this state.").

FEFJA was intended to provide an efficient method of enforcing foreign judgments without undue cost and difficulty associated with filing a new, separate action to domesticate a foreign judgement. Pratt v. Equity Bank, N.A., 124 So. 3d 313, 315-16 (Fla. 5th DCA 2013) (quoting Archbold Health Services, Inc. v. Future Tech Bus. Sys., Inc., 659 So. 2d 1204, 1206 (Fla. 3d DCA 1995)). Before Florida's adoption of FEFJA in 1984, creditors seeking creation of a valid lien had to file an action to domesticate the judgment and record the judgment in Florida. Michael v. Valley Trucking Co., 832 So. 2d 213, 215 (Fla. 4th DCA 2002). A foreign judgment domesticated under FEFJA has the same effect as a Florida judgment and is subject to the same legal and equitable defenses and rules of procedure. Desert Palace, Inc. v. Wiley, 145 So. 3d 946, 947 (Fla. 1st DCA 2014).

FEFJA provides the following:

> **55.501 Florida Enforcement of Foreign Judgments Act; short title.**—Sections 55.501-55.509 may be cited as the "Florida Enforcement of Foreign Judgments Act."
>
> **55.502 Construction of act.**—
>
> (1) As used in ss. 55.501-55.509, the term "foreign judgment" means any judgment, decree, or order of a court of any other state or of the United States if such judgment, decree, or order is entitled to full faith and credit in this state.
>
> (2) This act shall not be construed to impair the right of a judgment creditor to bring an action to enforce his or her judgment instead of proceeding under this act.
>
> (3) This act shall be interpreted and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.
>
> (4) Nothing contained in this act shall be construed to alter, modify, or extend the limitation period applicable for the enforcement of foreign judgments.
>
> **55.503 Recording and status of foreign judgments; fees.**—
>
> (1) A copy of any foreign judgment certified in accordance with the laws of the United States or of this state may be recorded in the office of the clerk of the circuit court of any county. The clerk shall file, record, and index the foreign judgment in the same manner as a judgment of a circuit or county court of this state. A judgment so recorded shall have the same effect and shall be subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating, or staying judgments, and it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state.

§§55.501-55.503(1), Fla. Stat. (emphasis added). Section 55.502(4) is a non-uniform provision added by the Florida Legislature, and no other state's version of the Act contains this provision. This Court has only discussed FEFJA in one case,

where we briefly acknowledged both section 55.503(1) and section 55.502(4). See Nadd v. Le Credit Lyonnais, S.A., 804 So. 2d 1226, 1229 n.7 (Fla. 2001).

Patrick argues that the limitations period applicable to the enforcement of a foreign judgment recorded under FEFJA is the limitations period applicable in the state where the judgment was originally rendered under section 55.502(4). We cannot agree. With respect to the statute of limitations question here, FEFJA does not contain its own statute of limitations. We conclude, as did the Second District, that "as worded, section 55.502(4) applies to Florida's five-year statute of limitations applicable to actions to enforce a foreign judgment referenced in subsection (2) of the same section, not the varied statutes of limitation in states around the country." Hess, 164 So. 3d at 22. Accordingly, we turn to Florida's general statutory provisions to determine a limitations period.

Section 95.11, Florida Statutes (2012), provides the following statute of limitations:

> Actions other than for recovery of real property shall be commenced as follows:
>
> (1) WITHIN TWENTY YEARS.—An action on a judgment or decree of a court of record in this state.
>
> (2) WITHIN FIVE YEARS.—
>
> (a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

Enforcement of judgments within the state must be conducted within "the time constraints of section 95.11," Florida Statutes. Nadd, 804 So. 2d at 1232.

Patrick alternatively argues that the limitations period applicable to the enforcement of a foreign judgment recorded under FEFJA is five years under section 95.11(2)(a). We disagree. We do not believe the Legislature intended to subject a foreign judgment recorded under FEFJA to the enforcement limitations set forth in section 95.11(2)(a) because, once recorded pursuant to the act, a foreign judgment is treated as a Florida judgment. Nadd, 804 So. 2d at 1229 n.7; see § 55.503(1), Fla. Stat.

The language of FEFJA, when read in pari materia with section 95.11(1), demonstrates that the Legislature intended to apply the twenty-year limitations period contained in section 95.11(1) to the enforcement of a foreign judgment after its recording and domestication under FEFJA. FEFJA specifically requires that after a foreign judgment is recorded under the Act, it "shall have the same effect and shall be subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating, or staying judgments, and it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state." § 55.503(1), Fla. Stat. Therefore, we hold that the twenty-year statute of limitations found in section 95.11(1) applies to the enforcement of a foreign judgment after it is recorded under FEFJA. This interpretation gives full

effect to the legislative intent to treat a foreign judgment recorded under FEFJA as a judgment of this state by subjecting it to the same enforcement limitations applicable to domestic judgments. See § 55.503(1), Fla. Stat.; Nadd, 804 So. 2d at 1229 n.7.[2]

Moreover, this interpretation is consistent with this Court's reasoning in Nadd. In Nadd, this Court addressed the statute of limitations applicable to a foreign judgment under Florida's codification of the Uniform Foreign Money Judgment Recognition Act (UFMJRA)—a similar uniform law—and explained that "[s]ection 95.11(1) provides that an action to enforce a judgment of a court of record of this state must be commenced within twenty years." Nadd, 804 So. 2d at 1232. This Court held that the twenty-year statute of limitations applies to actions brought to enforce a judgment once it has become domesticated under the Uniform Foreign Money Judgment Recognition Act. Id. at 1233. Similarly, once a judgment is recorded and domesticated under FEFJA, it is treated as a judgment of this state and thus subject to the twenty-year limitations period contained in section 95.11(1).

CONCLUSION

2. The Second District in Hess also determined the limitations period begins to run when the judgment is rendered in the foreign jurisdiction. We do not address this issue as it is not necessary for a resolution of this case.

The Second District's decision in Hess expressly and directly conflicts with the Fifth District's decision in Haigh and the Fourth District's decision in Friona on the same question of law. Hess correctly concluded that the twenty-year limitations period contained in section 95.11(1) applies to the enforcement of a foreign judgment after it is domesticated under FEFJA. In contrast, Haigh erroneously concluded that a foreign judgment domesticated under FEFJA is subject to the limitations period in the jurisdiction in which the judgment was originally rendered because the proceedings under FEFJA are derivative of the original judgment. Haigh, 940 So. 2d at 1234. Friona erroneously concluded that "[o]nce domesticated [under FEFJA], a foreign judgment will be effective for a period no longer than the original forum's statute of limitations or twenty years, whichever comes first." Friona, 902 So. 2d at 866.

For the reasons stated above, we approve the decision of the Second District and disapprove Haigh and Friona.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.
LAWSON, J., did not participate.

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

CANADY, J., dissenting.

Because I conclude that the decision of the Second District in Hess v. Patrick, 164 So. 3d 19 (Fla. 2d DCA 2015), does not expressly and directly conflict with the decision of the Fifth District in Haigh v. Planning Board, 940 So. 2d 1230 (Fla. 5th DCA 2006), or the decision of the Fourth District in New York State Commissioner of Taxation & Finance v. Friona, 902 So. 2d 864 (Fla. 4th DCA 2005), I would dismiss this case for lack of jurisdiction under article V, section 3(b)(3) of the Florida Constitution.

In Hess, the Second District addressed the statute of limitations applicable to the enforcement of a foreign judgment after it is recorded under FEFJA and held that "by domesticating the Arizona judgment under FEFJA, Florida's twenty-year statute of limitations [contained in section 95.11(1)] applie[d] and beg[an] to run from the date of the Arizona judgment." Hess, 164 So. 3d at 22 (emphasis omitted). In contrast, the Fifth District in Haigh addressed the statute of limitations applicable to a common law action upon a foreign judgment. Haigh held that the underlying suit was a common law "action upon a foreign judgment" rather than a proceeding to record and enforce a foreign judgment under FEFJA, and thus time-barred under section 95.11(2)(a). Haigh, 940 So. 2d at 1234. The rule of law announced in Hess addresses the limitations period for enforcing a foreign judgment domesticated under FEFJA while the rule of law announced in Haigh

addresses the limitations period for filing an action upon a foreign judgment. Haigh thus provides no basis for the Court to exercise conflict jurisdiction over Hess.

In dicta, Haigh commented that under FEFJA, "proceedings to enforce a foreign judgment are derivative of the original judgment and are therefore subject to the limitations period in the jurisdiction where the judgment was originally rendered." Id. Such comments do not establish binding legal precedent[3] and therefore do not create conflict. See Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958) ("A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."); see also Ciongoli v. State, 337 So. 2d 780, 781-82 (Fla. 1976) (review discharged where "the conflicting language is mere obiter dicta").

Moreover, Hess does not expressly and directly conflict with Friona. As explained previously, Hess addressed the statute of limitations applicable to the enforcement of a foreign judgment after it is recorded under FEFJA, and the Second District held that Florida's twenty-year statute of limitations applied to a

3. See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation, 276 So. 2d 823, 826 (Fla. 1973) ("The statement of the District Court of Appeal in its opinion . . . was not essential to the decision of that court and is without force as precedent."); Pell v. State, 122 So. 110, 112 (Fla. 1929) (explaining that "mere obiter dictum [is] without force as a precedent").

foreign judgment domesticated under FEFJA. Hess, 164 So. 3d at 22. In contrast, the Fourth District in Friona addressed the statute of limitations applicable for recording a foreign judgment under FEFJA and held that "[s]ince the time period to enforce the tax warrant under New York law had not expired, NYS should have been permitted to domesticate the judgment [under FEFJA] in this state." Friona, 902 So. 2d at 867. The rule of law announced in Hess addresses the limitations period for enforcing a foreign judgment domesticated under FEFJA, while the rule of law announced in Friona addresses the limitations period for domesticating a foreign judgment under FEFJA. There is no express and direct conflict with Hess.

In dicta, Friona commented that "[o]nce domesticated [under FEFJA], a foreign judgment will be effective for a period no longer than the original forum's statute of limitations or twenty years, whichever comes first." Id. at 866. However, such comments do not establish binding legal precedent and therefore do not create conflict.

This Court lacks jurisdiction under the Florida Constitution to review Hess. I therefore dissent.

POLSTON, J., concurs.

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

Second District - Case No. 2D13-3355

(Lee County)

Robert L. Donald of Law Office of Robert L. Donald, Fort Myers, Florida,

for Petitioner

Elisa Stehl Worthington of Elisa S. Worthington, P.A., Pineland, Florida,

for Respondents

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14889

D.C. Docket No. 9:14-cv-80781-RLR

EDWARD LEWIS TOBINICK, MD,
a medical corporation, d.b.a the Institute of Neurological Recovery,
INR PLLC,
a Florida professional limited liability company, d.b.a. Institute of Neurological Recovery,
M.D. EDWARD TOBINICK,
an individual,

Plaintiffs - Appellants,

versus

STEVEN NOVELLA,
an individual,
SOCIETY FOR SCIENCE-BASED MEDICINE, INC.,
a Florida Corporation,
SGU PRODUCTIONS, LLC,
a Connecticut limited liability company, et al.,

Defendants - Appellees,

YALE UNIVERSITY,
a Connecticut corporation, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(February 15, 2017)

Before HULL and MARTIN, Circuit Judges, and RESTANI,[*] Judge.

RESTANI, Judge:

Appellants Edward Lewis Tobinick, MD ("INR CA"), INR PLLC ("INR FL"), and M.D. Edward Tobinick ("Dr. Tobinick") (collectively, the "Tobinick Appellants") appeal the district court's orders striking INR CA's state law claims pursuant to California's anti-SLAPP statute, twice denying amendment of the Tobinick Appellants' complaint, denying relief pursuant to Federal Rules of Civil Procedure ("Rule") 37, 56(d), and 60 due to potential discovery-related abuses, and granting summary judgment against the Tobinick Appellants on their Lanham Act claim. We affirm the district court in all respects.

BACKGROUND

This case concerns a dispute between two doctors regarding the medical viability of a novel use for a particular drug.

I. The Parties

[*] Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Dr. Tobinick is certified in internal medicine and dermatology, and he is licensed in both California and Florida. He has two clinics that conduct business as The Institute of Neurological Recovery: INR CA in Los Angeles, California, and INR FL in Palm Beach County, Florida. Dr. Tobinick has developed an unorthodox use for the drug etanercept by delivering it through perispinal administration, which involves a needle injection near particular spinal ligaments. Dr. Tobinick claims that this new use of etanercept is effective at treating spinal pain, post-stroke neurological dysfunctions, and Alzheimer's disease. Etanercept is the generic name of Enbrel, which was first approved by the United States Food and Drug Administration ("FDA") in November 1998 to treat rheumatoid arthritis. Notably, Enbrel has not been FDA approved for the purposes which Dr. Tobinick seeks to use the drug.

Steven Novella ("Dr. Novella") is a neurologist at Yale New Haven Hospital in the Botulinum Program and treats patients with a variety of conditions, including headaches, back pain, Alzheimer's disease, dementia, and seizures. Dr. Novella also engages in endeavors apart from these professional obligations. For instance, he is on the board of the non-profit Society for Science-Based Medicine, Inc. ("Society"). In addition, in May 2005, Dr. Novella began working with his brother, Jay Novella ("Jay"), to produce and broadcast a podcast that discusses a variety of scientific issues. This podcast, "The Skeptics Guide to the Universe," is hosted on

a website (www.theskepticsguide.org) owned by the for-profit company SGU Productions, LLC ("SGU"). Also, Dr. Novella is the executive editor of and contributor for the Science-Based Medicine ("SBM") blog (www.sciencebased medicine.org), which examines issues related to science and medicine, and is operated by a non-profit entity, the New England Skeptical Society.[1]

II. Factual Background

In response to a May 5, 2013, Los Angeles Time article discussing Dr. Tobinick's novel treatments, Dr. Novella published an article "Enbrel for Stroke and Alzheimer's" in SBM's blog on May 8, 2013 (the "first article"). In this six-page article, Dr. Novella explains that he learned of the Los Angeles Time article, the typical characteristics of "quack clinics" or "dubious health clinics," the key features of Dr. Tobinick's clinic, and lastly the plausibility of and the evidence supporting Dr. Tobinick's allegedly effective use of etanercept. Particularly relevant to this case, Dr. Novella also quotes a portion of the Los Angeles Time article, which reported that "[Dr. Tobinick's] claims about the back treatment led to an investigation by the California Medical Board, which placed him on probation for unprofessional conduct and made him take classes in prescribing practices and

[1] The Society is a separate entity from the SBM blog. The Society has its own website that was first made available to the public on January 1, 2014.

ethics." Am. Compl. Ex. 1 at 3, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. Aug. 1, 2014), ECF No. 55 ("Am. Compl.").

On June 9, 2014, the Tobinick Appellants filed a complaint against Appellees Dr. Novella, the Society, SGU (collectively, the "Novella Appellees"), and also Yale University ("Yale"), challenging Dr. Novella's first article. In response to the lawsuit and on July 23, 2014, Dr. Novella published another article in SBM's blog entitled "Another Lawsuit To Suppress Legitimate Criticism – This Time SBM" (the "second article"). In the second article, Dr. Novella details the lawsuit filed by the Tobinick Appellants and provides Dr. Novella's view that the lawsuit is designed to silence his public criticism of Dr. Tobinick's practices. He also restates in large part his same criticisms of Dr. Tobinick's practices as set forth in the first article. In doing so, Dr. Novella again mentions the Medical Board of California ("MBC")'s investigation into Dr. Tobinick's practices, explains that the MBC "filed an accusation in 2004, amended in 2005 and 2006," and lists in detail the different allegations made in the 2004 Accusation against Dr. Tobinick. Am. Compl. Ex. 5 at 3–4.[2]

[2] The Society's website also contains a short entry about Dr. Tobinick's use of etanercept. The entry discusses the MBC's 2006 Second Amended Accusation and subsequent settlement and Dr. Novella's criticism of Dr. Tobinick. The entry also links to Dr. Novella's entire article on the SBM blog.

III. Course of Proceedings

As stated above, the Tobinick Appellants filed their initial complaint on June 9, 2014. On June 11, 2014, the Tobinick Appellants moved for a preliminary injunction to enjoin the Novella Appellees from continuing to display the articles. On August 1, 2014, the Tobinick Appellants filed an amended complaint to add allegations relating to the second article that was published just nine days prior. This operative amended complaint contests several aspects of the first article, including claims that these neurological conditions "not known to be immune mediated [can be] treated by a specific immunosuppressant,"[3] claims that Dr. Tobinick's retrospective case studies are not probative medical evidence, implications that Dr. Tobinick is committing a health fraud, statements that Dr. Tobinick's clinics are "a one-man institute," and that Florida is a "very quack-friendly state." Am. Compl. ¶¶ 54, 60, 63, 69, 71. Regarding the second article, the Tobinick Appellants' operative complaint specifically takes issue with only one new statement therein, that "there have been no double-blind placebo-controlled clinical trials of the treatment provided by [Dr. Tobinick]." Am. Compl. ¶ 102. These disputes are covered in the operative complaint by the following causes of

[3] According to Dr. Novella, his statement that the neurological conditions treated by Dr. Tobinick are "not known to be immune mediated" means "that the current consensus is not that these conditions are primarily caused by or driven by an autoimmune disease that could be modified by this treatment." Dep. of Steven Novella, M.D., at 35–36, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. Sept. 1, 2015), ECF No. 261-9. Dr. Novella identified etanercept as an example of an immunosuppressant. Id.

action: violation of the Lanham Act, 15 U.S.C. § 1125(a) (Count I); common law unfair competition (Count II); trade libel (Count III); libel per se (Count IV); and tortious interference with business relationships (Count V).

On August 8, 2014, and August 13, 2014, SGU and Yale, respectively, moved to dismiss the action as to them for lack of personal jurisdiction. On August 11, 2014, Dr. Novella moved to dismiss all claims against him for various reasons. On August 18, 2014, the Society moved to dismiss the action against it for failure to state a claim, or for summary judgment, because, inter alia, the Society did not engage in false advertising under the Lanham Act.

On September 25, 2014, pursuant to SGU's and Yale's motions to dismiss for lack of personal jurisdiction, the district court dismissed each from the case. On September 30, 2014, Dr. Novella invoked California's anti-SLAPP law[4] and moved to strike the only California plaintiff's, INR CA's, state law claims. On January 23, 2015, the district court denied Dr. Novella's motion to dismiss in nearly all respects but granted his motion to dismiss Count V of the amended complaint, i.e., the tortious interference claim, because Florida's single publication rule barred that claim. The Tobinick Appellants do not challenge this dismissal on appeal.

[4] The purpose of the anti-SLAPP law is to curb the "increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." See Cal. Civ. Proc. Code § 425.16(a). Such causes of action are subject to a special motion to strike. Id. § 425.16(b)(1).

On March 16, 2015, after converting the Society's motion to dismiss into a motion for summary judgment, the district court granted summary judgment in favor of the Society with respect to the Lanham Act (Count I) and the unfair competition (Count II) claims, explaining that the articles were not commercial speech. The district court also dismissed without prejudice the trade libel (Count III) and libel per se (Count IV) claims against the Society because the Tobinick Appellants failed to properly notice the Society of these claims as required by Florida law. The district court, therefore, dismissed the Society from the action, but it did provide the Tobinick Appellants leave to re-file their claims against the Society in a separate suit.[5] On April 2, 2015, following limited discovery, the district court denied the Tobinick Appellants' motion for a preliminary injunction.

On May 11, 2015, the deadline for amended pleadings, the Tobinick Appellants moved for leave to file a second amended complaint, adding new factual allegations some of which related to new webpages and a podcast that discussed Dr. Tobinick,[6] raising a new claim for common law civil conspiracy, re-

[5] On appeal, the Tobinick Appellants do not explicitly challenge the order granting summary judgment in favor of the Society. Their discovery-related requests for relief could be generously construed as a challenge to the validity of this summary judgment order. But, because we conclude that the district court did not abuse its discretion in denying the requests for discovery-related relief, we see no remaining challenge to the grant of summary judgment in favor of the Society.

[6] More precisely, the Tobinick Appellants add allegations regarding (1) a July 23, 2014, legal defense webpage on SGU's website, which requests donations to help defend against the Tobinick Appellants' suit, (2) a July 26, 2014, SGU podcast that discusses Dr. Tobinick's

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asserting claims against the previously-dismissed defendant SGU, and inserting two new defendants—Jay and Paul Ingraham ("Ingraham"), a co-blogger of Dr. Novella. On May 15, 2015, the Tobinick Appellants filed a corrected version of their motion for leave to amend.

On June 4, 2015, the district court granted Dr. Novella's special motion to strike INR CA's state law claims ("anti-SLAPP order"). On June 18, 2015, the district court issued an omnibus order denying the Tobinick Appellants' corrected motion for leave to file a second amended complaint. In that omnibus order, the district court also granted Dr. Tobinick's and INR FL's request for voluntary dismissal of Counts III and IV for trade libel and libel per se, respectively. Shortly thereafter, on June 25, 2015, Dr. Novella filed his answer to the operative amended complaint.

On August 18, 2015, the Tobinick Appellants again moved for leave to file another second amended complaint in order to add a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). On August 20, 2015, the district court denied the Tobinick Appellants' motion.

On August 25, 2015, Dr. Novella moved for summary judgment on all remaining claims. On September 1, 2015, the Tobinick Appellants filed two

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medical treatments, the transcript of which was published on August 7, 2014, and (3) an April 1, 2015, article in SBM's blog that provided an update on the status of the litigation against the Tobinick Appellants.

motions based on the allegation that Dr. Novella provided false deposition testimony, one motion pursuant to Rule 37 seeking sanctions and one pursuant to Rule 60(b) seeking reconsideration of the district court's anti-SLAPP order. The Tobinick Appellants argued that Dr. Novella falsely denied that he had communicated with the author of the May 5, 2013, Los Angeles Times article; denied that he had ever discussed Dr. Tobinick with Ingraham; and denied communicating with another physician, Stephen Barrett, regarding Dr. Tobinick.

On September 15, 2015, the district court denied each of the Tobinick Appellants' motions based on the alleged discovery-related abuses. On October 2, 2015, the district court found that Dr. Novella's speech is not commercial and then granted summary judgment in favor of Dr. Novella on both remaining claims. The district court reasoned that the Tobinick Appellants largely based their unfair competition claim (Count II) on their Lanham Act false advertising claim (Count I). The Tobinick Appellants now appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. We review de novo "the district court's interpretation and application of a statute" such as California's anti-SLAPP statute. Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1354 (11th Cir. 2014). We review for an abuse of discretion the district court's denial of leave to amend and the denial of requests for relief brought under

Rules 37, 56(d), and 60(b). World Holdings, LLC v. Fed. Republic of Germany, 701 F.3d 641, 649, 654–55 (11th Cir. 2012) (Rule 56(d)); Garfield v. NDC Health Corp., 466 F.3d 1255, 1270 (11th Cir. 2006) (leave to amend); Serra Chevrolet, Inc. v. Gen. Motors Corp., 446 F.3d 1137, 1146–47 (11th Cir. 2006) (Rule 37); Cox Nuclear Pharmacy, Inc. v. CTI, Inc., 478 F.3d 1303, 1314 (11th Cir. 2000) (Rule 60(b)).

Further, we review a grant of summary judgment de novo, "viewing all facts in the light most favorable to the nonmoving party and drawing all reasonable inferences in favor of that party." McCullum v. Orlando Reg'l Healthcare Sys., Inc., 768 F.3d 1135, 1141 (11th Cir. 2014). "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Id.

DISCUSSION

I. Dr. Novella's Special Motion to Strike

The Tobinick Appellants challenge the district court's anti-SLAPP order on two grounds. First, the Tobinick Appellants contend that the district court erred in adopting the anti-SLAPP expedited procedures because doing so "trampled federal procedure and constitutional rights" and violated the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Second, the Tobinick Appellants argue the district court's determination that there was no evidence of actual malice by Dr. Novella is

erroneous. Dr. Novella responds that the Tobinick Appellants waived their Erie claim and, in the alternative, that the district court did not err on the merits of that claim. Dr. Novella also avers that the Tobinick Appellants fail to point to evidence of actual malice.

A. Waiver of Erie Claim

We do not consider an issue "not raised in the district court and raised for the first time in an appeal." Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) (quoting Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994)). We have recognized exceptions to the waiver doctrine, including, inter alia, where there is a: (1) "pure question of law, and if refusal to consider would result in a miscarriage of justice[,]" or (2) "no opportunity to raise [the objection] at the district court level." Id. at 1332 (quoting Wright v. Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir. 2001)).

The Tobinick Appellants waived their challenge to the district court's application of California's anti-SLAPP statute based on the Erie doctrine. The Tobinick Appellants did not raise the Erie claim in their response to Dr. Novella's special motion to strike INR CA's state law claims, nor do the Tobinick Appellants now contend that they ever raised the issue before the district court. Moreover, when asked by the district judge "what about the issue of anti-SLAPP statutes applying in diversity cases in federal court?" the Tobinick Appellants' counsel

responded "[t]here seems to be a plethora of case law that suggests that it is allowable in diversity actions in federal court." Tr. of Mot. Hr'g, at 26, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. Nov. 20, 2014), ECF No. 113. The Tobinick Appellants, therefore, waived the issue. See, e.g., NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 753–54 (5th Cir. 2014) (deeming waived party's argument that Texas' anti-SLAPP statute conflicts with the certain federal Rules).

No exception to waiver saves the Tobinick Appellants' claim. The Tobinick Appellants have not identified any miscarriage of justice resulting from a finding of waiver, nor do we see one, given the weakness of the Tobinick Appellants' state law claims.[7] Furthermore, not only did the Tobinick Appellants squarely concede the Erie issue at the hearing, the district court nevertheless considered the argument in its anti-SLAPP order. The district court acted reasonably in applying California's anti-SLAPP statute to the state law claims, stating that "the majority of circuit courts have found anti-SLAPP special motions to strike permissible, and . . . the specific anti-SLAPP statute at issue has previously been allowed in federal court." Edward Lewis Tobinick, MD v. Novella, 108 F. Supp. 3d 1299, 1305 n.4 (S.D. Fla. 2015) ("Tobinick"). Moreover, that the Seventh Circuit's June 29, 2015,

[7] As reflected in the discussion of actual malice, infra, it seems highly unlikely that the Tobinick Appellants' state law claims would survive even without the availability of an anti-SLAPP motion.

decision in Intercon Solutions, Inc. v. Basel Action Network, on which the Tobinick Appellants rely, had not been issued until after the district court issued its June 4, 2015, anti-SLAPP order does not excuse the Tobinick Appellants' waiver. See 791 F.3d 729, 731–32 (7th Cir. 2015) (holding that Washington's anti-SLAPP statute was inapplicable in federal court after that state's highest court interpreted that anti-SLAPP statute as going beyond a summary judgment procedure and as violating the right to a trial by a jury by requiring a judge to make factual findings).

First, Intercon is obviously of limited applicability. Second, notwithstanding the date of the Intercon decision, the Tobinick Appellants explicitly conceded the Erie issue at the hearing in which Dr. Novella's counsel alerted the district court of that potential issue. Even more telling, the Tobinick Appellants did not raise the Erie issue in their September 1, 2015, motion for reconsideration of the district court's anti-SLAPP order, which was filed months after Intercon had been decided. Accordingly, we decline to consider the merits of the Tobinick Appellants' Erie-based challenge for the first time on appeal.

B. Actual Malice

In applying California's anti-SLAPP statute,[8] the district court reasoned that Dr. Tobinick was a limited public figure[9] and that he had not produced evidence of

[8] The anti-SLAPP statute provides:

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actual malice such that INR CA, Dr. Tobinick's California entity, had a probability of prevailing on its state law claims. Tobinick, 108 F. Supp. 3d at 1308, 1309; see Cal. Civ. Proc. Code § 425.16(b)(1). The Tobinick Appellants challenge only the latter holding regarding actual malice.

Actual malice is defined as "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not" and must be shown "by clear and convincing evidence." Reader's Digest Ass'n, Inc. v. Superior Court, 690 P.2d 610, 617 (Cal. 1984) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). To show reckless disregard for truth or falsity, California courts apply a subjective test in which "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of

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> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

[9] As we have explained, the Supreme Court has identified two types of public figures in this context. An all-purpose public figure is one that "occup[ies] positions of such persuasive power and influence that they are deemed public figures for all purposes." Silvester v. Am. Broad. Cos., 839 F.2d 1491, 1494 (11th Cir. 1988) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)). A limited public figure, by contrast, "ha[s] thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id. (quoting Gertz, 418 U.S. at 345). Both types of public figures must prove that the defamatory statements were made with actual malice. See Gertz, 418 U.S. at 336; Reader's Digest Ass'n, Inc. v. Superior Court, 690 P.2d 610, 615 (Cal. 1984) ("Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy.").

his publication." Id. at 617–18 (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). California courts consider factors such as "[a] failure to investigate, anger and hostility toward the plaintiff, [and] reliance upon sources known to be unreliable or known to be biased." Id. at 618–19 (citations omitted); see Christian Research Inst. v. Alnor, 55 Cal. Rptr. 3d 600, 612 (Cal. Ct. App. 2007).

The Tobinick Appellants have not presented evidence that rises to the level of actual malice. The Tobinick Appellants believe there is actual malice because (1) Dr. Novella improperly relied on the MBC's 2004 Accusation, which had been superseded by a 2006 Second Amended Accusation, (2) Dr. Novella provided false declarations to the district court because one declaration indicates that, in researching the articles, Dr. Novella relied on the MBC's 2004 Accusation and other declarations state he relied on the MBC's 2006 Second Amended Accusation, (3) the articles contained false statements, such as claiming Dr. Tobinick ran a "one-man institute," and (4) Dr. Novella's deposition included false testimony regarding communications with certain third-parties. Here, even all of the Tobinick Appellants' circumstantial evidence taken as true is insufficient to show that Dr. Novella had serious doubts as to the truth of the content contained in his two articles.

Contrary to the Tobinick Appellants' arguments, the evidence indicates that Dr. Novella consulted both the MBC's 2004 Accusation and the 2006 Second

Amended Accusation. We see no reason why the fact that Dr. Novella consulted the 2006 document precludes him from having also consulted the 2004 document. Notwithstanding the alleged discrepancy, the Tobinick Appellants are unable to point to a definitively false statement in either of Dr. Novella's articles stemming from the reliance on the 2004 Accusation.[10] Instead, Dr. Novella's second article explicitly acknowledges that the MBC's 2004 Accusation was amended in 2006, thereby laying credence to the belief that Dr. Novella had seen both documents.

Similarly, the allegedly false statements in Dr. Novella's articles and the inconsistencies in his deposition testimony are insufficient to demonstrate actual malice. Neither speaks to whether Dr. Novella was "aware of any erroneous statements or [was] in any way reckless in that regard" when he wrote the articles. Sullivan, 376 U.S. at 286. The mere existence of a false statement does not, on its own, demonstrate Dr. Novella's knowledge of its falsity. Tellingly, the Tobinick Appellants are unable to show that many of Dr. Novella's statements are actually

[10] The Tobinick Appellants do state that both the 2004 Accusation and the 2006 Second Amended Accusation were superseded by an MBC 2007 Decision adopting a Stipulated Settlement and Disciplinary Order, which recognized that "studies . . . have provided evidence that perispinal etanercept is effective for treatment of disc-related pain." Pls.' Corrected Rule 60(b) Mot. for Relief from June 4, 2015 Order and Sanctions and Incorporated Mem. of Law Ex. 29, at 4, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. Sept. 1, 2015), ECF No. 261. The Tobinick Appellants do not identify which of Dr. Novella's statements is in conflict with this settlement; instead, they seems to imply that Dr. Novella's articles are misleading as to existence of these studies incorporated in the MBC's 2007 Decision. Not only is this implication on its own insufficient to rise to the level of actual malice, but Dr. Novella's second article appears to reference these very studies. The second article admits that "[t]here are small studies for disc herniation showing conflicting results." Am. Compl. Ex. 5 at 3.

false or that they are anything more than medical or personal opinion. As an example, the Tobinick Appellants rely on Dr. Novella's characterization of Florida as a "very quack-friendly state," Am. Compl. ¶ 71, but this statement is plainly Dr. Novella's opinion and cannot be proven as true or false. The Tobinick Appellants, instead, point to isolated statements, which do not pertain to the article's essential criticism of Dr. Tobinick's medical practices, as evidence that Dr. Novella recklessly included falsities in the article. But, this evidence at most demonstrates mere negligence and does not raise to the level of reckless disregard needed to prove actual malice. See Sullivan, 376 U.S. at 271–72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive[.]'"). For instance, the Tobinick Appellants allege that Dr. Novella "falsely implies" that Dr. Tobinick's clinics "have committed a health fraud insomuch as the [first article] was placed into a category identified as 'Health Fraud.'" Am. Compl. ¶ 63. The article itself, however, never states that Dr. Tobinick is committing or has committed health fraud. And, placement in a category on a website is insufficient here where there is no evidence that Dr. Novella decided in which category the article would be included. Furthermore, regarding the "one-man institute" comment, the Tobinick Appellants have failed to rebut Dr. Novella's statement that he looked at the websites for Dr. Tobinick and his clinic and "Dr. Tobinick [was] the only

physician named and profiled on the websites." Def. Dr. Steven Novella's Mot. to Dismiss Ex. 1, ¶ 30, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. July 23, 2014), ECF No. 36. Dr. Novella's statement is reasonably held, as the name of Dr. Tobinick's California clinic, "Edward Lewis Tobinick, MD," further supports his belief that "Dr. Tobinick was a solo practicioner[.]" Id. Instead, as the district court acknowledged, Dr. Novella's articles contain "a more nuanced discussion of the issues than [INR CA's] pleading admits." Tobinick, 108 F. Supp. 3d at 1311.

As to the allegedly false statements in the deposition testimony, they relate primarily to Dr. Novella's communications with certain third-parties after the first article had been published and do not speak to Dr. Novella's knowledge of the accuracy of the statements made in either of his articles. In any event, as discussed infra, the Tobinick Appellants' challenges to Dr. Novella's allegedly false deposition testimony are based on mere conjecture and, if true, at most demonstrate ill will towards Dr. Tobinick, likely based on differing views on medical matters. See Reader's Digest Ass'n, 690 P.2d at 619 ("[M]ere proof of ill will on the part of the publisher may . . . be insufficient [to prove actual malice].").

Moreover, although "[t]he failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice," id. at 619, we conclude that the evidence of Dr. Novella's investigation, in which he looked to

trustworthy sources, demonstrates his lack of subjective belief that the articles contained false statements. Before writing, Dr. Novella consulted the Los Angeles Times article, many of Dr. Tobinick's case studies, the MBC's accusations, and the Tobinick Appellants' own websites. See Tobinick, 108 F. Supp. 3d at 1310. Accordingly, because the Tobinick Appellants have not demonstrated a probability of success on the actual malice issue, the district court did not err in granting Dr. Novella's special motion to strike the state law claims pursuant to California's anti-SLAPP statute.

II. The Tobinick Appellants' Motion for Leave to Amend

The Tobinick Appellants argue that the district court erred in twice denying them leave to amend the operative complaint because there would not have been prejudice to the Novella Appellees.

Rule 15 provides that "[a] party may amend its pleading once as a matter of course . . . ." Fed. R. Civ. P. 15(a)(1). And "[i]n all other cases, a party may amend its pleading only with . . . the court's leave. The court should freely give leave when justice so require." Id. 15(a)(2). The Supreme Court has explained that a district court may properly deny leave to amend for reasons "such as undue delay." Foman v. Davis, 371 U.S. 178, 182 (1962).

The district court did not abuse its discretion in twice denying leave to amend the operative complaint. Both motions for leave to amend were sought

approximately a year after the Tobinick Appellants filed the original complaint. By the time the Tobinick Appellants sought amendment, the course of proceedings had been markedly advanced—the district court had dismissed SGU and Yale for lack of personal jurisdiction, dismissed Count V of the operative complaint, granted summary judgment in favor of the Society, and denied the Tobinick Appellants' motion for preliminary injunction. The Tobinick Appellants filed the first motion for leave to amend on the deadline for amended pleadings and sought extensive changes to the operative complaint: they alleged new factual allegations, added a civil conspiracy claim, reinserted previously-dismissed SGU back into the case, and added two new defendants. The second motion to amend also sought to supplement the complaint with the new FDUTPA cause of action.

In denying the first motion, the district court reasonably concluded that allowing amendment "would essentially reset the case." Omnibus Order, at 2, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. June 18, 2015), ECF No. 202. The district court noted the "aggressively litigated" course of proceedings, the extent of the amendments sought by the Tobinick Appellants, and the fact that the Tobinick Appellants "could only identify a limited number of recent statements incorporated into the proposed" complaint. Id. at 1–2. Indeed, many of the new factual allegations added by the Tobinick Appellants related to the legal defense webpage and the SGU podcast, which were both

initially published in July 2014, nearly a year before the Tobinick Appellants filed their first motion for leave to amend. Similarly, the district court denied the second motion, which was filed after the deadline for amended pleadings, in a docket entry "for all of the reasons previously stated on the record at the Court's Status Conference on June 18, 2015, as well as the timing of the Motion in relation to the dispositive motion deadline, which is imminent, and trial, which is two months hence." Paperless Order, Edward Lewis Tobinick, MD v. Novella, No. 9:14-cv-80781-RLR (S.D. Fla. Aug. 20, 2015), ECF No. 245. Thus, even though Dr. Novella had not yet filed his answer, the district court did not abuse its discretion because it properly sought to prevent an undue delay caused by the Tobinick Appellants' last-minute attempts to amend their complaint.

III. The Tobinick Appellants' Discovery-Related Requests for Relief

The Tobinick Appellants argue that the district court abused its discretion in not granting relief under Rules 37, 56(d), and 60(b) because Dr. Novella misled the Tobinick Appellants and the district court through his deposition testimony, thereby prejudicing the Tobinick Appellants by an unfavorable summary judgment ruling.

Under Rule 60(b), a party may move for relief from a final judgment or order, for reasons including fraud. Fed. R. Civ. P. 60(b).[11] The moving party must show "by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct." Cox Nuclear Pharmacy, 478 F.3d at 1314 (quoting Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1287 (11th Cir. 2000)).

Under Rule 37(b)(2), a party may move for sanctions for failure to comply with a discovery order. Fed. R. Civ. P. 37(b)(2). A district court has broad discretion in applying these sanctions, and "a default judgment sanction," as requested by the Tobinick Appellants, "requires a willful or bad faith failure to obey a discovery order." Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542 (11th Cir. 1993).

Rule 56(d) provides: "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

[11] Because the Tobinick Appellants did not specify the grounds on which they were moving, the district court reasonably construed the basis as for "fraud . . . , misrepresentation, or misconduct by an opposing party." Edward Lewis Tobinick, M.D. v. Novella, No. 9:14-cv-80781, 2015 WL 11254727, at *1 (S.D. Fla. Sept. 15, 2015) (quoting Fed. R. Civ. P. 60(b)(3)). On appeal, the Tobinick Appellants do not challenge the district court's construction.

First, to support his requests for Rules 37 and 60(b) relief, the Tobinick Appellants allege a scheme to ruin Dr. Tobinick perpetrated by Dr. Novella and other co-conspirators, but none of his claims are sufficient to demonstrate bad faith or fraud justifying sanctions or reconsideration. Dr. Novella explained each of the alleged false statements in his deposition. As to his communications with the author of the Los Angeles Times article, Dr. Novella testified that at the time of the deposition he did not remember a brief email conversation that had occurred more than two years prior. And, Dr. Novella explained that he truthfully answered his reasonable interpretation of the questions regarding his communications with Ingraham and Barrett.[12] The Tobinick Appellants' conjecture of an elaborate conspiracy is not sufficient to controvert Dr. Novella's reasonable explanations and certainly is insufficient to demonstrate bad faith or fraud. It, consequently, was not an abuse of discretion for the district judge to deny the motions under Rules 37 and 60(b).

Second, the district court did not abuse its discretion on the Rule 56(d) issue as the Tobinick Appellants never made a proper motion for Rule 56(d) relief. "A request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1).

[12] Specifically, Dr. Novella's declaration provided that his deposition did not contain false statements because (1) as to Ingraham, he was asked if he discussed the topic of Dr. Tobinick with Ingraham, but the emails show one-sided emails from Ingraham to Dr. Novella, but did not contain responses from Dr. Novella, and (2) as to Barrett, he answered that he could not recall whether or not an email exchange took place and therefore never falsely denied the existence of such emails in his deposition.

Instead, the Tobinick Appellants requested Rule 56(d) relief in their brief responding to Dr. Novella's motion for summary judgment. The district court did not issue an order regarding Rule 56(d), likely because it was not moved to do so. Indeed, the Tobinick Appellants had once before sought relief pursuant to Rule 56(d) by motion pending the close of discovery, and the district court both considered and ultimately granted the motion. To the extent that the Tobinick Appellants' request for Rule 56(d) relief is premised on the same discovery-related abuses as their other two motions, their claim fails because for the reasons already stated the district court did not abuse its discretion. Thus, the district court did not abuse its discretion in denying each of the Tobinick Appellants' discovery-related requests for relief.

IV. The Tobinick Appellants' Lanham Act Claim

The Tobinick Appellants argue that the district court erred in granting summary judgment against them on their Lanham Act claim because there are material facts in dispute regarding the commercial nature of Dr. Novella's speech, chiefly as it relates to his economic motivations. The Tobinick Appellants further contend that Dr. Novella's statements are false and misleading and that the Tobinick Appellants have satisfied the remaining elements of a Lanham Act claim.

The Lanham Act prescribes liability for false advertising to "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). Commercial advertising or

promotion includes "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services[;]" and (4) "the representations . . . must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." Suntree Techs., Inc. v. Ecosense Int'l, Inc., 693 F.3d 1338, 1349 (11th Cir. 2012) (quoting Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994)).

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). The "core notion" of commercial speech extends to speech that proposes a commercial transaction. Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 66 (1983). The Supreme Court has identified three factors in looking beyond the core notion of commercial speech: (1) that the material was "conceded to be advertisements," (2) it contained a "reference to a specific product," and (3) the speaker "has an economic motivation" for distributing the material. Id. No one factor is dispositive. See id. at 67. "The combination of all three characteristics, however, provides strong support for the . . . conclusion that the [material is] properly characterized as commercial speech." Id. at 62, 67. But, "speech is not rendered commercial by the mere fact that it

relates to an advertisement." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973).

There is no genuine dispute of material fact regarding whether Dr. Novella's articles are commercial speech. A plain reading of the first and second articles makes clear that they do not fall within the core notion of commercial speech as they do not propose a commercial transaction. Instead, Dr. Novella's articles evoke many characteristics of noncommercial speech. The articles "communicate[] information, express[] opinion, [and] recite[] grievances, ..." See Sullivan, 376 U.S. at 266. Dr. Novella, who posted the articles on SBM's blog, states in his second article that the purpose of the SBM blog is to "provide an objective analysis of questionable or controversial medical claims so that consumers can make more informed decisions . . . ." Am. Compl. Ex. 5 at 1. The content of the articles corroborates this stated educational purpose, as the articles discuss the plausibility of Dr. Tobinick's practices in relation to the different medical conditions treated, the way etanercept works, and the shortage of medical studies supporting Dr. Tobinick's position. These articles, which conclude that Dr. Tobinick's perispinal administration of etanercept is ineffective, add to the public debate regarding the viability of a non-FDA approved medical treatment and are clearly of import to the public.

We turn next to the three factors outlined by the Supreme Court in Bolger with regard to non-core commercial speech and conclude that these factors do not save the Tobinick Appellants' Lanham Act claim. First, the Novella Appellees do not concede that the articles are advertisements, nor can they reasonably be construed as such. The first article makes no mention of Dr. Novella's practice or medical services. Although the second article does make such a mention, it was authored in response to the Tobinick Appellants' filing of their lawsuit, criticizes the lawsuit as an attempt to suppress Dr. Novella's critiques, and mentions Dr. Novella's medical practice only to provide context regarding the lawsuit. In addition, Dr. Novella clarifies in his second article that he primarily treats headaches, thereby distancing the types of medical services he provides from the services marketed by Dr. Tobinick, who does not claim to treat headaches.

Second, the articles do not discuss any products for sale by Dr. Novella, and, as discussed, only briefly mention his practice for context. The articles' sole reference to a product is found in their discussion of Dr. Tobinick's medical treatments. But, these references to Dr. Tobinick's medical treatments are, by themselves, insufficient to subject Dr. Novella's otherwise protected speech to Lanham Act liability. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976) (explaining that speech that includes content on commercial topics is not automatically commercial speech). In Gordon

& Breach Sci. Publishers S.A., the district court explained that "a restaurant or movie review or a . . . product report" on its own is not commercial speech under the Lanham Act, 15 U.S.C. § 1125(a), but can be transformed into commercial speech when, for instance, a restaurant "posts the . . . review in its window." 859 F. Supp. at 1544. Dr. Novella's discussion of Dr. Tobinick's use of etanercept, which resembles a medical peer review of a treatment's viability, therefore, does not render the articles commercial speech.

Third, the Tobinick Appellants have not demonstrated economic motivation sufficient to transform Dr. Novella's speech into commercial speech. As a preliminary matter, there is no factual dispute as to where the articles were displayed online, how the websites were set up, and whether the websites generated revenue through advertisements and membership subscriptions. The Tobinick Appellants describe a complex "funneling" scheme to generate profit for Dr. Novella, in which the Tobinick Appellants claim that the two articles are connected to other websites through hyperlinks in a way that readers are directed to websites that generate revenue for Dr. Novella, such as through advertising or membership subscriptions.[13] This funneling theory, which attempts to connect the

[13] The Tobinick Appellants argue that the court should consider the "full context" of the "interrelated websites, promotion and links that funnel money directly to [Dr.] Novella." But, much of the "full context" the Tobinick Appellants implore us to now consider are merely the websites and factual allegations that the Tobinick Appellants sought to add to their complaint by moving for leave to amend. Because we determined above that the district court did not abuse its

(continued . . .)

articles to revenue sources, relies on such a level of attenuation that it fails to demonstrate economic motivation in the commercial speech context.

The Tobinick Appellants' reliance on World Wrestling Federation Entertainment, Inc. v. Bozell is misplaced. 142 F. Supp. 2d 514, 525 (S.D.N.Y. 2001). There, a wrestling organization sued a council comprising concerned parents who had initiated a public attack campaign about the risk to children of portraying violence in wrestling television programs. Id. at 521. The district court denied a motion to dismiss the complaint and held that the allegations were sufficient to demonstrate that the council engaged in commercial speech because it featured the attacks "prominently in a fundraising video," in "fundraising letters," and in order "to raise the profile of [the council]." Id. at 525, 526. Unlike the speech in Bozell, Dr. Novella's articles are neither featured prominently in fundraising efforts[14] (or other similar solicitations for money), nor have the Tobinick Appellants shown that these articles are the central content driving advertising or membership-based revenue.

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discretion in denying leave to amend, we limit our review, as we must, to the allegations included in the operative amended complaint.

[14] To the extent that the Tobinick Appellants argue that SGU's legal defense webpage sought donations, as discussed, the allegations regarding that webpage are not under review as they were not made in the operative amended complaint.

To be sure, neither the placement of the articles next to revenue-generating advertising nor the ability of a reader to pay for a website subscription would be sufficient in this case to show a liability-causing economic motivation for Dr. Novella's informative articles. Both advertising and subscriptions are typical features of newspapers, whether online or in-print. But, the Supreme Court has explained that "[i]f a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." Pittsburgh Press, 413 U.S. at 385.

Furthermore, as our sister circuits have recognized, magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech subject to Lanham Act liability. See Farah v. Esquire Magazine, 736 F.3d 528, 541 (D.C. Cir. 2013) (holding that a satirical article about a book in a magazine's online blog was not commercial speech subject to Lanham Act liability even though "writers write and publishers publish . . . for commercial purposes"); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) ("A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not

fall outside of the protection of the First Amendment because it may help to sell copies."). We agree. Even if Dr. Novella receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue. See Va. State Bd. of Pharmacy, 425 U.S. at 761 ("Speech . . . is protected . . . even though it may involve a solicitation to purchase or otherwise pay or contribute money."); see also Burstyn v. Wilson, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). Thus, because the articles are not commercial speech, they cannot be subject to Lanham Act liability as commercial advertising or promotion. Accordingly, we need not reach the other elements of a prima facie Lanham Act false advertising action.

CONCLUSION

For all of the reasons stated above, the judgment of the district court is **AFFIRMED.**

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VITACOST.COM, INC.,
Appellant,

v.

JAMES MCCANTS,
Appellee.

No. 4D16-3384

[February 15, 2017]

Appeal of non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Cheryl Caracuzzo, Judge; L.T. Case No. 502016CA4982MB.

Edward R. Nicklaus and Kathleen Phillips of Nicklaus & Associates, P.A., Coral Gables, for appellant.

Sean C. Domnick of Dominick Cunningham & Whalen, Palm Beach Gardens, and Lawrence R. Lassiter and Charles Clayton Miller of Miller Weisbrod, LLP, Dallas, for appellee.

MAY, J.

The enforcement of an arbitration clause in an internet sale of dietary supplements is the issue in this appeal. A seller of dietary supplements appeals a non-final order denying its motion to compel arbitration in a products liability action. The issue is whether the terms and conditions located on the seller's website, which included an arbitration clause, were effectively incorporated into the sales agreement between the plaintiff purchaser and the seller. The trial court concluded that the arbitration clause was not incorporated and denied the seller's motion to compel arbitration. We agree with the trial court and affirm.

The plaintiff purchased dietary supplements, which allegedly caused serious damage to his liver. After the plaintiff filed his complaint, the seller moved to compel arbitration. The seller argued the "terms and conditions of sale," which were accessible via hyperlink during the online transaction, were incorporated into the sales agreement as part of a "browsewrap" agreement. Florida does not appear to have ruled on the enforceability of

an arbitration clause in a "browsewrap" agreement making this a case of first impression.

> "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.,* 356 F.3d 393, 403 (2d Cir.[ ]2004). One such principle is the requirement that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Specht v. Netscape Commc'ns Corp.,* 306 F.3d 17, 29 (2d Cir.[ ]2002) (applying California law).

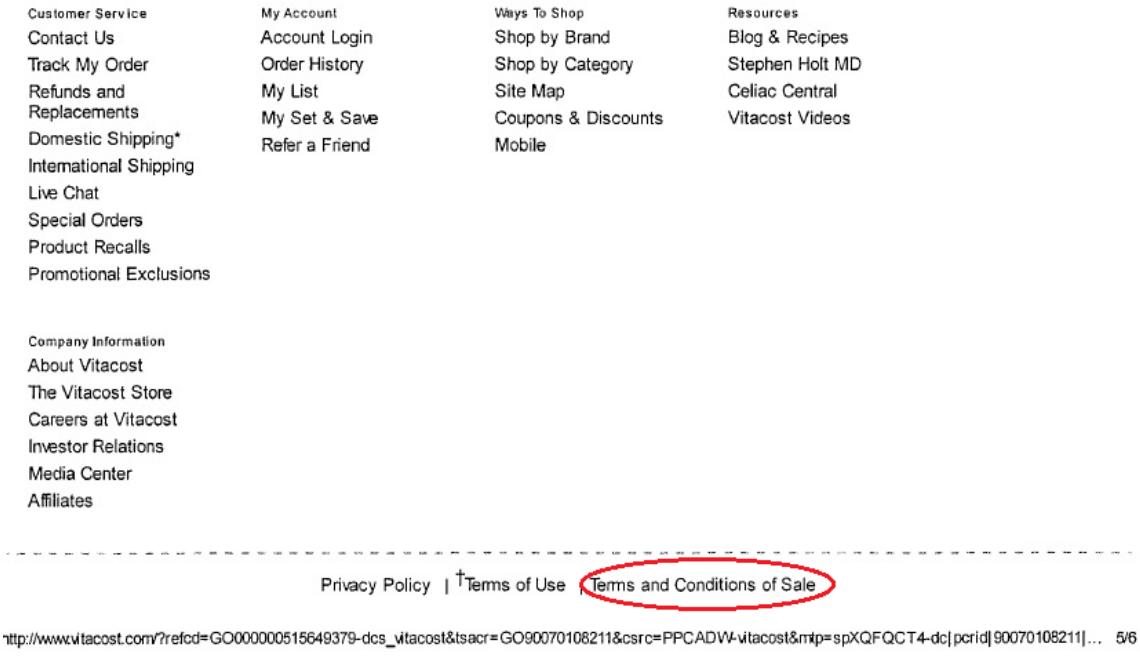
Nguyen v. Barnes & Noble, Inc., 763 F. 3d 1171, 1175-76 (9th Cir. 2014).

There are at least two types of agreements found in internet sales, a "browsewrap" and a "clickwrap" agreement. *Id.* A "clickwrap" agreement occurs when a website directs a purchaser to the terms and conditions of the sale and requires the purchaser to click a box to acknowledge that they have read those terms and conditions. "Clickwrap" agreements are generally enforceable. *Id.*

A "browsewrap" agreement occurs when a website merely provides a link to the terms and conditions and does not require the purchaser to click an acknowledgement during the checkout process. *Id.* at 1176. The purchaser can complete the transaction without visiting the page containing the terms and conditions. "Browsewrap" agreements have only been enforced when the purchaser has actual knowledge of the terms and conditions, or when the hyperlink to the terms and conditions is conspicuous enough to put a reasonably prudent person on inquiry notice. *Id* at 1176-77.

The seller argues that the terms and conditions on its website were conspicuous enough to put the plaintiff on inquiry notice during the purchase. The seller filed a sworn affidavit from one of its officers in support of its motion to compel, attaching screenshots of the seller's website showing where the hyperlink to the "terms and conditions of the sale" is situated on each webpage.

Throughout most of the purchase process, the hyperlink appears at the very bottom of the seller's webpage and can be seen only if the purchaser scrolls to the bottom. Based on the webpage printouts, a purchaser would have to scroll through multiple pages of products before reaching the bottom where the link is located. The following screenshot of the bottom of the webpage shows the hyperlink circled:



When purchasers are ready to check out and click on their shopping cart, the hyperlink shifts over to the far right column, but it is still situated toward the bottom of the page. At this point, the hyperlink is labeled "terms and conditions," not "terms and conditions of *sale*." According to the affidavit, the "terms and conditions" hyperlink on the checkout page is in "bright blue" font. The following is a screenshot of the check-out page, which shows the hyperlink circled:


6/9/2016 Vitacost Single Page Checkout - Vitacost

VITACOST Checkout

Our Promise: Enjoy your shopping experience or we'll make things right.

Shipping information

SHIPPING ADDRESS

Change New

John Howie
4040 N. Central Expwy
Suite 850
Dallas, TX 75204
United States
214-622-6340
jhowie@howielawnet

How to send it? Shipping Details

Standard Shipping $4.99
Typically delivers 3 business days if placed before 1 P.M

FedEx Home Delivery $7.99
Typically delivers 3 business days if placed before 1 P.M

FedEx Two-Day Air $12.99
Delivers in 2 business days if placed before 1 P.M.

FedEx Overnight $17.99
Delivers in 1 business day if placed before 1 P.M.

Next step - Choose a payment method

Place order

SUMMARY

Subtotal: $14.99
Tax: $0.00
Shipping: $4.99
Order Total: $19.98

PROMOTION

Apply code

More than one code? That's OK! Please note that some codes can't be used with others, just be sure to enter one at a time.

SHOPPING CART 1

Vitacost Decaffeinated Green Tea Extract – 725 mg - 100 Vegetarian Capsules
SKU 844197016716
Vitacost price: $14.99
Item Total: $14.99
Qty: 1

Remove

CHECKOUT FAQs

Will I get a confirmation number?
What is your return policy?
What if I ordered the wrong product?

Terms and Conditions
Privacy Policy
Site Terms of Use

FRAUD PROTECTION BY CHASE PAYMENTECH

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In response to the seller's motion, the plaintiff filed an affidavit asserting that he did not have actual knowledge of the terms and conditions of the sale. He also filed an affidavit from one of his attorneys, attesting that he went through the purchase process on the seller's website and was never directed to review the "terms and conditions of sale." Screenshots from his transaction are attached to the affidavit as exhibits. With respect to hyperlink positioning, these screenshots match the screenshots attached to the seller's affidavit.

The trial court denied the motion to compel, finding the hyperlinks were not conspicuous enough to put the plaintiff on inquiry notice of the "terms and conditions of sale." From this order, the seller now appeals.

We have de novo review of "[a]n order granting or denying a motion to compel arbitration. . . ." *Berkowitz, Dick, Pollack & Bryant v. Smith*, 49 So. 3d 309, 311 (Fla. 4th DCA 2010). However, any findings of fact will be upheld if they are supported by competent substantial evidence. *CFC of Delaware LLC v. Santalucia*, 91 So. 3d 899, 901 (Fla. 4th DCA 2012).

In Florida, to incorporate a collateral document into an agreement, the agreement must: (i) specifically provide that the collateral document is being incorporated; and (ii) sufficiently describe the collateral document being incorporated. *BGT Grp., Inc. v. Tradewinds Engine Servs., LLC*, 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011).

"Browsewrap" agreements have only been enforced when the hyperlink to the terms and conditions is conspicuous enough to place the user on inquiry notice. *Nguyen*, 763 F. 3d at 1176-77. Uniformly, courts have declined to enforce "browsewrap" agreements when the hyperlink to the terms and conditions is buried at the bottom of the page, and the website never directs the user to review them. *Id.* at 1177.

The seller relies heavily on *Hubbert v. Dell Corp.*, 835 N.E. 2d 113, 121 (Ill. App. Ct. 2005). There, the plaintiff sued a seller following a dispute regarding computers purchased on the seller's website. *Id.* at 117. To purchase the computers, the plaintiff had to complete three separate webpage forms, which expressly stated: "All sales subject to Dell's Terms and Conditions of Sale." *Id.* at 121-22. Each webpage contained a blue hyperlink labelled "Terms and Conditions of Sale." *Id.* at 121. The court found the terms and conditions of sale were incorporated into the online contract.

> The statement that the sales were subject to the defendant's "Terms and Conditions of Sale," combined with making the "Terms and Conditions of Sale" accessible online by blue hyperlinks, was sufficient notice to the plaintiffs that purchasing the computers online would make the "Terms and Conditions of Sale" binding on them.

Id. at 122.

Here, unlike *Hubbert*, none of the webpages made the plaintiff's purchase subject to the "terms and conditions of sale." The seller's website

allowed a purchaser to select a product and proceed to check-out without seeing the hyperlink to the "terms and conditions" because the hyperlink would not be visible unless the purchaser scrolled to the bottom of the page. Once on the check-out webpage, the hyperlink is only labeled "terms and conditions," and the page contains no statement that the sale is subject to those "terms and conditions."

In other cases cited by the seller, courts held that the "terms and conditions" were ***not*** incorporated into the agreement. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (holding that terms and conditions unenforceable where user would have to scroll to the bottom of the webpage to see the hyperlink); *In re Zappos.com*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012) (holding that terms and conditions were not incorporated where hyperlink was buried near the bottom of the webpage).

Finally, the seller claims that a message directing purchasers to review their orders, which appears at the bottom of the checkout webpage, is sufficient to put purchasers on inquiry notice of the terms and conditions. Specifically, the message reads: "Before submitting your order, please take a moment to make sure everything looks good." This is hardly an admonition for the purchaser to check and agree to the terms and conditions of the sale.

The seller does not claim that existing Florida case law supports its position. Indeed, Florida law does not support the seller. Florida law requires the agreement to specifically provide that the collateral document is being incorporated and to sufficiently describe the collateral document to be incorporated. *BGT Grp., Inc.*, 62 So. 3d at 1194. The seller's webpages failed to advise the plaintiff that his purchase was subject to the terms and conditions of the sale and did not put him on inquiry notice of the arbitration provision. *See, e.g.*, *Herman v. Seaworld Parks & Entertainment, Inc.,* 2016 WL 7447555 (Fla. M.D. Aug. 26, 2016).

We agree with the trial court that the terms and conditions of sale, including the arbitration agreement, were not sufficiently incorporated into the internet sales agreement between the plaintiff and the seller. The trial court correctly denied the seller's motion to compel arbitration.

Affirmed.

TAYLOR and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VITAL PHARMACEUTICALS, INC., d/b/a VPX/REDLINE,
a Florida corporation,
Appellant,

v.

PROFESSIONAL SUPPLEMENTS, LLC, a Wisconsin Limited Liability Company, a/k/a OFFICIAL PROFESSIONAL SUPPLEMENTS, d/b/a WISCONSIN PROFESSIONAL SUPPLEMENTS, LLC; **PRO SUPPS USA, LLC,** a Texas Limited Liability Company, a/k/a PRO SUPPS d/b/a PROFESSIONAL SUPPLEMENTS; **THOMAS HUMPHREYS,** a/k/a T.J. HUMPHREYS; **JASON ARNTZ; RONALD GALLAGHER; MICHAEL GUADAGNO,** a/k/a MIKE GUADAGNO; **BRIAN IKALINA;** and **VICTOR LANZA,** a/k/a J.P. LANZA,
Appellees.

No. 4D15-1123

[February 15, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates, Judge; L.T. Case No. 12-007083 07.

Beverly A. Pohl, P.A., and Christina Lehm of Broad and Cassel, Fort Lauderdale, for appellant.

Elliot B. Kula and William D. Mueller of Kula & Associates, P.A., Miami, and Timothy W. Schulz of Timothy W. Schulz, P.A., West Palm Beach, for appellees.

ON MOTION FOR REHEARING

KLINGENSMITH, J.

We grant appellees' motion for rehearing, deny rehearing en banc and certification, and withdraw our previous opinion. We hereby substitute the following.

In a previous appeal, we affirmed the trial court's order dissolving a temporary injunction entered in favor of Vital Pharmaceuticals, Inc. ("VPX") and against the appellees who are two former employees of the

company. *Vital Pharms., Inc. v. Prof'l Supplements, LLC*, 114 So. 3d 952, 952 (Fla. 4th DCA 2013). In this appeal, appellant VPX now challenges the court's order granting those appellees' entitlement to attorneys' fees as damages stemming from the issuance of that wrongful injunction. Because the injunction was deficient as a matter of law and the statute relied on by appellees makes damages unrecoverable, we reverse.

VPX initially filed its underlying complaint against appellees, who include the former employees and their new employer, for various claims of tortious interference as well as alleged breaches of the employees' non-compete agreements with VPX. At the same time, VPX also sought an emergency injunction to stop the former employees from continuing to work for the competing business. The trial court granted the temporary injunction, albeit without requiring VPX to post a bond as required by Florida Rule of Civil Procedure 1.610(b) and section 542.335(1)(j), Florida Statutes (2012). After another hearing, the trial court issued an order dissolving the temporary injunction without providing any specific reason for doing so. Thereafter, appellees moved to recover damages resulting from the injunction under section 60.07, Florida Statutes (2012). Based on evidence presented at multiple hearings, the trial court awarded the former employees $34,202.44. This appeal of that award followed.

VPX's arguments in this appeal are essentially the same as those made at the entitlement hearing. In opposing appellees' entitlement to damages resulting from the wrongful injunction, VPX asserts that appellees were not entitled to any award since the absence of a bond made the injunction unenforceable, as any award was limited by law to an amount not exceeding the amount of the injunction bond. VPX submits, therefore, that because there was no bond, appellees could not recover on their claim for damages. Based on the language of rule 1.610(b), we agree.

"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).

Rule 1.610(b) provides:

> (b) Bond. No temporary injunction shall be entered **unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined**. When any injunction is issued on the pleading of a municipality or the state or

> any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.

Fla. R. Civ. P. 1.610(b) (emphasis added).

Additionally, section 60.07 provides that "[i]n injunction actions, on dissolution, the court may hear evidence and assess damages to which a defendant may be entitled **under any injunction bond**, eliminating the necessity for an action on the injunction bond if no party has requested a jury trial on damages." (Emphasis added).

Considering these two provisions together, section 60.07 presupposes the existence of a bond because an injunction order requires a bond under rule 1.610(b) and is subject to dissolution until a bond is posted. Florida case law also supports this position. In *Hathcock v. Hathcock*, 533 So. 2d 802, 804 (Fla. 1st DCA 1988), one of the reasons why the First District found a temporary injunction order in a dissolution proceeding to be deficient was that "the trial court failed to impose the bond requirements of Rule 1.610(b)." Consequently, the appellate court denied the appellant's claim for damages (including attorney's fees) resulting from the erroneous injunction, reasoning that such damages were not awardable under section 60.07 because there was no injunction bond filed. *Id.* As the *Hathcock* court explained:

> Finally, appellant claims that he is entitled, on reversal and remand to the trial court, to compensatory and punitive damages and attorney's fees as determined by the trial court based upon the erroneous issuance of the temporary order. As authority, appellant cites to *Carpenters District Council of Jacksonville v. Waybright*, 282 So. 2d 193 (Fla. 1st DCA 1973), and *Braun v. Intercontinental Bank*, 452 So. 2d 998 (Fla. 3d DCA 1984). Both cases rely upon Section 60.07, Florida Statutes, in holding that a defendant is entitled to recover damages (including attorney's fees) which resulted from the issuance of the temporary injunction. **However, fatal to appellant's reliance upon the above authorities is the fact that Section 60.07 allowing the court in the main suit to determine and award damages upon dissolution of an injunction applies only where an injunction bond has been filed.** *See Hoffman v. Barlly*, 97

> So. 2d 355 (Fla. 3d DCA 1957). Thus, any remedy appellant might have for damages for the erroneous issuance of the subject order must lie elsewhere than in the instant suit.

Id. (emphasis added) (footnote omitted).

Likewise, in *Ross v. Champion Computer Corp.*, 582 So. 2d 152, 153 (Fla. 4th DCA 1991), this court opined on a party's ability to recover damages in the absence of a bond in light of our supreme court's precedent in *Parker Tampa Two v. Somerset Development Corp.*, 544 So. 2d 1018 (Fla. 1989):

> *Parker* stands for the proposition that if any damages incur to the party against whom an injunction is issued, where such injunction is later determined to have been wrongfully issued, the damages recoverable are limited to the amount of the bond, if any, required upon the issuance of the injunction. **In the instant case, if it is later determined, upon a full hearing and the presentation of further evidence, that Champion's injunction was wrongfully obtained, appellant would not be able to collect any damages, as there was no bond required.**

Ross, 582 So. 2d at 153 (emphasis added); *see also Highway 46 Holdings, LLC v. Myers*, 114 So. 3d 215, 223 (Fla. 5th DCA 2012) ("[I]n the event no bond is posted, the wrongfully enjoined party, if any, is without recourse as to damages stemming from the wrongful injunction.").

Here, appellees specifically sought damages under section 60.07. Section 60.07 allows "the court in the main suit to determine and award damages upon dissolution of an injunction," but only where an injunction bond has been filed. *Hathcock*, 533 So. 2d at 804. As a result, we reiterate the First District's observation in *Hathcock* that any remedy appellees might have must "lie elsewhere than in the instant suit." *Id.*

Reversed.

GERBER and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE PRIMESTAR-H FUND I TRUST,

Appellant,

v. Case No. 5D15-3830

ROSENA LOUISSAINT,

Appellee.

_____/

Opinion filed February 17, 2017

Appeal from the Circuit Court
for Brevard County,
Lisa Davidson, Judge.

Ezra Scrivanich, of Scrivanich/Hayes,
Plantation, for Appellant.

Andres H. Lopez, of The Andres Lopez
Law Firm, P.A., Coral Springs, for
Appellee.

WALLIS, J.,

Appellant, Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as trustee for the Primestar-H Fund I Trust ("Bank"), appeals the trial court's final judgment dismissing its foreclosure action against appellee, Rosena Louissaint. Because

the trial court erred by finding that Bank lacked standing to foreclose, we reverse and remand for entry of final judgment of foreclosure.

In April 2007, Louissaint executed and delivered a mortgage and note in favor of SunTrust Mortgage, Inc. ("SunTrust"), with MERS acting as nominee. The following series of assignments subsequently occurred: from MERS to SunTrust; from SunTrust to Nationstar Mortgage, LLC; from Nationstar Mortgage, LLC, back to SunTrust; and from SunTrust to Bank. This final assignment from SunTrust to Bank, dated February 8, 2013, assigned only the mortgage, not the accompanying note.

In January 2014, Bank filed a complaint against Louissaint, asserting foreclosure and reestablishment of a lost note. Bank attached a lost-note affidavit, prepared by a representative of its servicer, which included a copy of the unindorsed note and a copy bearing an undated blank indorsement from SunTrust. In her answer, Louissaint argued, *inter alia*, that Bank lacked standing to enforce the note and mortgage because it "never had possession of the Note and did not have possession when it filed this action," "[Bank] does not own the Note," and "[t]he Assignments of Mortgage do not confer any rights to [Bank]." In September 2015, upon locating the original note, Bank dropped its lost-note count.[1] The original note, like the copy attached to the complaint, bore a blank indorsement from SunTrust.

At a non-jury trial, the parties stipulated to admission of the original note and mortgage, and certified copies of the assignments. A senior litigation associate for the

[1] After a previous, since-dismissed foreclosure action against Louissaint by SunTrust, the trial court retained the original note, which it later released in March 2013 to SunTrust. SunTrust's counsel subsequently delivered the original note and mortgage to Statebridge on September 14, 2015.

loan servicer testified that a December 21, 2012 purchase agreement showed that SunTrust purchased the loan from NNPL, Trust Series 2012-1. Further, the March 27, 2013 assignment assumption and recognition agreement showed that NNPL, Trust Series 2012-1, then assigned the pool of loans for this sale to Bank. Bank then rested, after which Louissaint moved for dismissal, maintaining that Bank lacked standing because it did not possess the note at the time of filing. After argument from both parties, the trial court reserved ruling on the motion.

The trial court ultimately entered final judgment in Louissaint's favor, denying foreclosure and dismissing the case. The judgment contained only two findings: "[Bank] did not have possession of the Note when the case was filed," and "[t]he Assignment of Mortgage does not confer the Plaintiff with standing to foreclose because it does not assign the Note. As a result, the plaintiff did not have standing to prosecute this case at its inception."

"The trial court's granting of a motion for involuntary dismissal is reviewed de novo." Bank of N.Y. v. Calloway, 157 So. 3d 1064, 1069 (Fla. 4th DCA), review denied, 177 So. 3d 1263 (Fla. 2015). When reviewing the grant of an involuntary dismissal, we "view the evidence and all inferences of fact in a light most favorable to the nonmoving party," and affirm "only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." Deutsche Bank Nat'l Tr. Co. v. Clarke, 87 So. 3d 58, 60 (Fla. 4th DCA 2012).

A party seeking foreclosure must prove, by competent, substantial evidence, that it has standing to foreclose at the time of filing the lawsuit. Schmidt v. Deutsche Bank, 170 So. 3d 938, 940-41 (Fla. 5th DCA 2015). "[A] person entitled to enforce the note and

foreclose on a mortgage is the holder of the note, a non-holder in possession of the note who has the rights of a holder, or a person not in possession of the note who is entitled to enforce under section 673.3091, Florida Statutes." Gorel v. Bank of N.Y. Mellon, 165 So. 3d 44, 46 (Fla. 5th DCA 2015) (citing § 673.3011, Fla. Stat. (2013)). "If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." § 673.2051(2), Fla. Stat. (2015). "[U]nder the Uniform Commercial Code, a plaintiff is not required to be both the owner and holder of the note in order to have standing to foreclose." Tilus v. AS Michai, LLC, 161 So. 3d 1284, 1285-86 (Fla. 4th DCA 2015) (citing Wells Fargo Bank, N.A. v. Morcom, 125 So. 3d 320, 322 (Fla. 5th DCA 2013)).

Here, the trial court improperly relied on Bank's lack of actual possession of the note at the time of filing, disregarding Bank's statutorily-permitted lost-note count as an exception to actual possession. See Snyder v. JP Morgan Chase Bank, Nat'l Ass'n, 169 So. 3d 1270, 1273 (Fla. 4th DCA 2015) ("[N]othing in the statute allows an 'owner' to enforce the note without possession, except where the instrument is lost or destroyed." (citing § 673.3091, Fla. Stat. (2009)). The Fourth District Court previously addressed the prevalence of lost-note actions:

> In the present case, as is common in recent foreclosure cases, Chase did not attach a copy of the original note to its complaint, but instead brought a count to re-establish a lost note. Later, however, Chase filed with the circuit court the original promissory note, which bore a special endorsement in favor of Chase. Because Chase presented to the trial court the original promissory note, which contained a special endorsement in its favor, it obtained standing to foreclose, at least at some point.

McLean, 79 So. 3d at 174. In the case at issue, Bank followed its action to reestablish the lost note by filing the original note, once found. Thus, Bank established its standing "at some point." See id. Bank further buttressed its standing by introducing evidence of assignments,[2] as well as the mortgage loan purchase agreement and the assignment assumption and recognition agreement, both of which specifically referred to Louissaint's loan—showing its path to Bank—and predated the filing of the complaint. Thus, Bank sufficiently established that it had standing to enforce the lost note at the time of filing of the complaint. Cf. id.; Schmidt, 170 So. 3d at 942 (reversing a foreclosure judgment where there existed no evidence of intent to transfer any interest in the note to the bank as trustee and "there was insufficient testimony and evidence that the note and mortgage in this case were actually included as part of the Mortgage Loan Purchase Agreement").

The mere combination of the copy of the note with the complaint and the later-filed original sufficed to establish Bank's standing to foreclose. Wells Fargo Bank, N.A. v. Ousley, 41 Fla. L. Weekly D1409, D1410 (Fla. 1st DCA June 15, 2016) ("A copy of a note with a blank endorsement attached to the complaint, with the original filed at trial, is enough to establish standing for the party that filed the complaint."). Thus, the trial court erroneously dismissed Bank's case for lack of standing. See id. (citing Ortiz v. PNC Bank, Nat'l Ass'n, 188 So. 3d 923 (Fla. 4th DCA 2016); Clay Cty. Land Tr. v. JPMorgan Chase Bank, N.A., 152 So. 3d 83 (Fla. 1st DCA 2014)). We reverse the order dismissing the

[2] In its order, the trial court correctly asserted that "an assignment of the mortgage without an assignment of the debt creates no right in the assignee." Bristol v. Wells Fargo Bank, Nat'l Ass'n, 137 So. 3d 1130, 1133 (Fla. 4th DCA 2014) (quoting Vance v. Fields, 172 So. 2d 613, 614 (Fla. 1st DCA 1965)). However, unlike the bank in Bristol, Bank relies on more than just the assignment of the mortgage to establish its standing. Cf. id.

action and remand with instructions to foreclose the mortgage in question. See Mortg. Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 34 (Fla. 3d DCA 2007).

REVERSED and REMANDED with Instructions.

TORPY, J., and JACOBUS, B.W., Senior Judge, concur.

Third District Court of Appeal

State of Florida

Opinion filed February 15, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-490
Lower Tribunal No. 15-190-P

Sandra Kent Wheaton,
Appellant,

vs.

Mardella Wheaton,
Appellee.

An Appeal from a non-final order from the Circuit Court for Monroe County, Luis M. Garcia, Judge.

Hershoff, Lupino & Yagel and Robert C. Stober (Tavernier), for appellant.

Vernis & Bowling of the Florida Keys and Matthew S. Francis (Islamorada), for appellee.

Before SUAREZ, C.J., and EMAS and FERNANDEZ, JJ.

EMAS, J.

Appellant Sandra Wheaton seeks review of the trial court's order denying her motion for attorney's fees pursuant to a proposal for settlement. The trial court denied the motion because the proposal for settlement, which was served upon Appellee by e-mail, failed to comply with Florida Rule of Judicial Administration 2.516, which sets forth certain requirements for service by e-mail. Appellant contends that rule 2.516, and its e-mail requirements, are inapplicable because a proposal for settlement is not filed contemporaneously with the court. A trial court's interpretation of court rules is reviewed de novo, and "[o]ur courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006) (quoting Brown v. State, 715 So. 2d 241, 243 (Fla. 1998)). We affirm the trial court's ruling, and hold that proposals for settlement served by e-mail must comply with the e-mail service provisions of rule 2.516.

The relevant portions of rule 2.516 provide:

> **(a) Service; When Required.** Unless the court otherwise orders, or a statute or supreme court administrative order specifies a different means of service, **every pleading subsequent to the initial pleading and every other document filed in any court proceeding**, except applications for witness subpoenas and documents served by formal notice or required to be served in the manner provided for service of formal notice, must be served in accordance with this rule on each party. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.

> **(b) Service; How Made.** When service is required or permitted to be made upon a party represented by an attorney, service must be made upon the attorney unless service upon the party is ordered by the court.
> (1) *Service by Electronic Mail ("e-mail").* **All documents required or permitted to be served** on another party **must be served by e-mail,** unless the parties otherwise stipulate or this rule otherwise provides. A filer of an electronic document has complied with this subdivision if the Florida Courts e-filing Portal ("Portal") or other authorized electronic filing system with a supreme court approved electronic service system ("e-Service system") served the document by e-mail or provided a link by e-mail to the document on a website maintained by a clerk ("e-Service"). The filer of an electronic document must verify that the Portal or other e-Service system uses the names and e-mail addresses provided by the parties pursuant to subdivision (b)(1)(A).

(Emphasis added.)

The rule thereafter delineates a variety of formatting and content requirements for any document that is served by e-mail. See rule 2.516(b)(1)(E)(i)-(iv).[1] It is undisputed that the instant proposal for settlement, served by e-mail, did not meet the service by e-mail requirements of rule 2.516.

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[1] Rule 2.516(b)(1)(E) provides:

> Format of E-mail for Service. Service of a document by e-mail is made by an e-mail sent to all addresses designated by the attorney or party with either (a) a copy of the document in PDF format attached or (b) a link to the document on a website maintained by a clerk.
>
> (i) All documents served by e-mail must be sent by an e-mail message containing a subject line beginning with the words "SERVICE OF COURT DOCUMENT" in all capital letters, followed by the case number of the proceeding in which the documents are being served.
>
> (ii) The body of the e-mail must identify the court in which the

However, in asserting that proposals for settlement do not fall within the scope of rule 2.516, Appellant relies upon the language in rule 2.516(a) which provides that "every pleading subsequent to the initial pleading and every other document filed in any court proceeding . . . must be served in accordance with this rule on each party." Appellant contends that because the proposal for settlement is neither a pleading nor a "document filed in any court proceeding," it is not subject to the requirements of rule 2.516.

It is true, of course, that both the proposal for settlement statute (section 768.79, Florida Statutes) and the proposal for settlement rule (Florida Rule of Civil Procedure 1.442) prohibit counsel from filing a proposal for settlement contemporaneously with service of the proposal. In fact, a proposal for settlement may only be filed with the court if the proposal is accepted or if filing is necessary

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> proceeding is pending, the case number, the name of the initial party on each side, the title of each document served with that e-mail, and the name and telephone number of the person required to serve the document.
>
> (iii) Any document served by e-mail may be signed by any of the "/s/," "/s," or "s/" formats.
>
> (iv) Any e-mail which, together with its attached documents, exceeds the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court, must be divided and sent as separate e-mails, no one of which may exceed the appropriate size limitations specified in the Florida Supreme Court Standards for Electronic Access to the Court and each of which must be sequentially numbered in the subject line.

for enforcement purposes.[2] Appellant asserts that compliance with rule 2.516 would be required only upon the subsequent filing of a motion for enforcement of the proposal for settlement (since such a motion would be served and filed contemporaneously).

While Appellant's premise is correct (a party is not permitted to file her proposal for settlement contemporaneously with service of the proposal), we disagree with her conclusion, as it focuses on the incorrect portion of the rule. The relevant language is contained in subdivision (b) of rule 2.516, which provides in pertinent part: "All documents required **or permitted to be served** on another party **must be served by e-mail**, unless the parties otherwise stipulate or this rule otherwise provides." In this case, the document in question (the proposal for settlement) is "permitted to be served on another party." And because the parties did not "otherwise stipulate," and because the rule does not "otherwise provide,"[3]

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[2] Rule 1.442(d) provides: **"**A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule." Section 768.79(3), Fla. Stat. (2015) provides similarly: "The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section."

[3] To the contrary, subdivision (d) of rule 2.516 provides in pertinent part: "All documents must be filed with the court either before service or immediately thereafter, unless otherwise provided for by general law or other rules." This provision implicitly acknowledges that even if a document (such as a proposal for settlement) is not to be filed contemporaneously, it nevertheless falls within the purview of this rule. Had the Florida Supreme Court intended to exempt such served-but-not-contemporaneously-filed documents from the requirements of rule 2.516, it surely would have said so in subdivision (d).

this proposal for settlement "must be served by e-mail" and therefore must be served in compliance with the e-mail requirements of rule 2.516, regardless of whether the document is contemporaneously filed with the court. We find this language plain and unambiguous, and hold that a proposal for settlement falls clearly within the scope of rule 2.516(b) and is subject to that rule's requirements.

In so holding, we agree with the decision and analysis of our sister court in Floyd v. Smith, 160 So. 3d 567 (Fla. 1st DCA 2015) (holding that a proposal for settlement served by e-mail must comply with the e-mail service requirements of rule 2.516). See also Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014) (affirming trial court's denial of a motion for attorney's fees sought as a sanction pursuant to section 57.105(4), Florida Statutes (2013), because the motion was not served in strict compliance with rule 2.516, and implicitly recognizing that a motion for attorney's fees under section 57.105(4) must comply with rule 2.516 even though the motion cannot be filed contemporaneously with service on opposing counsel).

Affirmed.