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Manuel Farach

Hall v. Hall, Case No. 16–1150 (2018).
The losing party in cases consolidated under Federal Rule of Civil Procedure 42 has a right to an immediate appeal.

Chiu v. Wells Fargo Bank, N.A., Case No. 3D17-997 (Fla. 3d DCA 2018).
A trial court's *sua sponte* entering summary judgment, i.e., without a hearing, constitutes fundamental error subject to reversal on appeal.

Liukkonen v. Bayview Loan Servicing, LLC, Case No. 4D16-4193 (Fla. 4th DCA 2018).
A modification agreement is not a negotiable instrument like a promissory note, and thus the original need not be introduced into evidence to satisfy the Best Evidence Rule; *Rattigan v. Central Mortgage Co.*, 199 So. 3d 966 (Fla. 4th DCA 2016), is distinguished.

Trigeorgis v. Trigeorgis, Case No. 4D17-0262 (Fla. 4th DCA 2018).
The filing of a "Notice of Interest" (not a lis pendens associated with an action) is not a disparagement of title if the statement contained in the Notice is true or if plaintiff cannot prove that the alleged falsehood induced others to not deal with plaintiff.

HSBC Bank USA v. Magua, Case No. 4D17-1685 (Fla. 4th DCA 2018).
Confession of error on an appeal that has multiple issues without listing the precise error confessed leaves a later appellate court unable to determine the basis of error confessed.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST *v.* HALL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16–1150. Argued January 16, 2018—Decided March 27, 2018

Respondent Samuel Hall served as caretaker and legal advisor to his mother Ethlyn Hall, a property owner in the United States Virgin Islands. After falling out with Samuel, Ethlyn transferred her property into a trust and designated her daughter, petitioner Elsa Hall, as her successor trustee. Ethlyn sued Samuel and his law firm over the handling of her affairs (the "trust case"). When Ethlyn died, Elsa took Ethlyn's place as trustee and as plaintiff. Samuel later filed a separate complaint against Elsa in her individual capacity (the "individual case").

On Samuel's motion, the District Court consolidated the trust and individual cases under Federal Rule of Civil Procedure 42(a). The District Court held a single trial of the consolidated cases. In the individual case, the jury returned a verdict for Samuel, but the District Court granted Elsa a new trial. In the trust case, the jury returned a verdict against Elsa, and she filed a notice of appeal from the judgment in that case. Samuel moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment in the trust case was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed and dismissed the appeal.

Held: When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending. Pp. 4–18.

(a) Title 28 U. S. C. §1291 vests the courts of appeals with jurisdic-

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tion over "appeals from all final decisions of the district courts," except those directly appealable to this Court. Under §1291, "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal." *Arizona* v. *Manypenny*, 451 U. S. 232, 244. Here an appeal would normally lie from the judgment in the trust case. But Samuel argues that because the trust and individual cases were consolidated under Rule 42(a)(2), they merged and should be regarded as one case, such that the judgment in the trust case was merely interlocutory and not appealable before the consolidated cases in the aggregate are finally resolved. Pp. 4–5.

(b) Rule 42(a)(2) provides that if "actions before the court involve a common question of law or fact, the court may . . . consolidate the actions." The meaning of the term "consolidate" in this context is ambiguous. But the term has a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, §3, 3 Stat. 21 (later codified as Rev. Stat. §921 and 28 U. S. C. §734 (1934 ed.)). That history makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases. Pp. 5–6.

(c) Under the consolidation statute—which was in force for 125 years, until its replacement by Rule 42(a)—consolidation was understood not as completely merging the constituent cases into one, but as enabling more efficient case management while preserving the distinct identities of the cases and rights of the separate parties in them. See, *e.g.*, *Rich* v. *Lambert,* 12 How. 347; *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285; *Stone* v. *United States,* 167 U. S. 178. Just five years before Rule 42(a) became law, the Court reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson* v. *Manhattan R. Co.,* 289 U. S. 479, 496–497. This body of law supports the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. Pp. 6–12.

(d) Rule 42(a) was expressly modeled on the consolidation statute. Because the Rule contained no definition of "consolidate," the term presumably carried forward the same meaning ascribed to it under the statute and reaffirmed in *Johnson*.

Samuel nonetheless asserts that "consolidate" took on a different meaning under Rule 42(a). He describes the Rule as permitting two forms of consolidation: consolidation for limited purposes and consolidation for all purposes. He locates textual authority for the former in a new provision, subsection (a)(1), which permits courts to "join for hearing or trial any or all matters at issue in the actions." And he

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contends that subsection (a)(2), so as not to be superfluous, must permit the merger of cases that have been consolidated for all purposes into a single, undifferentiated case. But the narrow grant of authority in subsection (a)(1) cannot fairly be read as the exclusive source of a district court's power to consolidate cases for limited purposes, because there is much more to litigation than hearings or trials. Instead, that undisputed power must stem from subsection (a)(2). That defeats Samuel's argument that interpreting subsection (a)(2) to adopt the traditional understanding of consolidation would render it duplicative of subsection (a)(1), and that subsection (a)(2) therefore must permit courts to merge the actions into a single unit.

Moreover, a Federal Rules Advisory Committee would not take a term that had long meant that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do. Nothing in the pertinent Committee proceedings supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation; the Committee simply commented that Rule 42(a) "is based upon" its statutory predecessor, "but insofar as the statute differs from this rule, it is modified." Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., p. 887. The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms that the traditional understanding remains in place. See, *e.g.*, *Bank Markazi* v. *Peterson*, 578 U. S. ___, ___–___; *Butler* v. *Dexter*, 425 U. S. 262, 266–267.

This decision does not mean that district courts may not consolidate cases for all purposes in appropriate circumstances. But constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. Pp. 12–17.

679 Fed. Appx. 142, reversed and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 16–1150

ELSA HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHLYN LOUISE HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST, PETITIONER *v.* SAMUEL HALL, ET AL.

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

[March 27, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Three Terms ago, we held that one of multiple cases consolidated for multidistrict litigation under 28 U. S. C. §1407 is immediately appealable upon an order disposing of that case, regardless of whether any of the others remain pending. *Gelboim* v. *Bank of America Corp.*, 574 U. S. ___ (2015). We left open, however, the question whether the same is true with respect to cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure. *Id.*, at ___, n. 4 (slip op., at 7, n. 4). This case presents that question.

I

Petitioner Elsa Hall and respondent Samuel Hall are siblings enmeshed in a long-running family feud. Their mother, Ethlyn Hall, lived and owned property in the United States Virgin Islands. Samuel, a lawyer in the Virgin Islands, served as Ethlyn's caretaker and provided her with legal assistance. But trouble eventually came to

paradise, and Samuel and Ethlyn fell out over Samuel's management of Ethlyn's real estate holdings. During a visit from Elsa, Ethlyn established an *inter vivos* trust, transferred all of her property into the trust, and designated Elsa as her successor trustee. Ethlyn then moved to Miami—under circumstances disputed by the parties—to live with her daughter.

The family squabble made its way to court in May 2011. Ethlyn, acting in her individual capacity and as trustee of her *inter vivos* trust, sued Samuel and his law firm in Federal District Court (the "trust case"). Ethlyn's claims—for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment—concerned the handling of her affairs by Samuel and his law firm before she left for Florida.

Then Ethlyn died, and Elsa stepped into her shoes as trustee and accordingly as plaintiff in the trust case. Samuel promptly filed counterclaims in that case against Elsa—in both her individual and representative capacities—for intentional infliction of emotional distress, fraud, breach of fiduciary duty, conversion, and tortious interference. Samuel contended that Elsa had turned their mother against him by taking advantage of Ethlyn's alleged mental frailty. But Samuel ran into an obstacle: Elsa was not a party to the trust case in her individual capacity (only Ethlyn had been). So Samuel filed a new complaint against Elsa in her individual capacity in the same District Court (the "individual case"), raising the same claims that he had asserted as counterclaims in the trust case.

The trust and individual cases initially proceeded along separate tracks. Eventually, on Samuel's motion, the District Court consolidated the cases under Rule 42(a) of the Federal Rules of Civil Procedure, ordering that "[a]ll submissions in the consolidated case shall be filed in" the docket assigned to the trust case. App. to Pet. for Cert. A–15.

Just before the trial commenced, the District Court dismissed from the trust case Samuel's counterclaims against Elsa. Those claims remained in the individual case. The parties then tried the consolidated cases together before a jury.

In the individual case, the jury returned a verdict for Samuel on his intentional infliction of emotional distress claim against Elsa, awarding him $500,000 in compensatory damages and $1.5 million in punitive damages. The clerk entered judgment in that case, but the District Court granted Elsa a new trial, which had the effect of reopening the judgment. The individual case remains pending before the District Court.

In the trust case, the jury returned a verdict against Elsa, in her representative capacity, on her claims against Samuel and his law firm. The clerk entered judgment in that case directing that Elsa "recover nothing" and that "the action be dismissed on the merits." *Id.*, at A–12.

Elsa filed a notice of appeal from the District Court's judgment in the trust case. Samuel and his law firm moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed. When two cases have been consolidated for all purposes, the court reasoned, a final decision on one set of claims is generally not appealable while the second set remains pending. The court explained that it considers "whether a less-than-complete judgment is appealable" on a "case-by-case basis." 679 Fed. Appx. 142, 145 (2017). Here, the fact that the claims in the trust and individual cases had been "scheduled together and tried before a single jury" "counsel[ed] in favor of keeping the claims together on appeal." *Ibid.* The court dismissed Elsa's appeal for lack of jurisdiction.

We granted certiorari, 582 U. S. ___ (2017), and now

reverse.

II

A

Had the District Court never consolidated the trust and individual cases, there would be no question that Elsa could immediately appeal from the judgment in the trust case. Title 28 U. S. C. §1291 vests the courts of appeals with jurisdiction over "appeals from all final decisions of the district courts," except those directly appealable to this Court. A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co.* v. *Central Pension Fund of Operating Engineers and Participating Employers*, 571 U. S. 177, 183 (2014). The archetypal final decision is "one[] that trigger[s] the entry of judgment." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 103 (2009). Appeal from such a final decision is a "matter of right." *Gelboim*, 574 U. S., at ___ (slip op., at 1). Under §1291, "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal," *Arizona* v. *Manypenny*, 451 U. S. 232, 244 (1981), which generally must be filed within 30 days, 28 U. S. C. §2107(a).

Here the jury's verdict against Elsa resolved all of the claims in the trust case, and the clerk accordingly entered judgment in that case providing that "the action be dismissed on the merits." App. to Pet. for Cert. A–12. With the entry of judgment, the District Court "completed its adjudication of [Elsa's] complaint and terminated [her] action." *Gelboim*, 574 U. S., at ___ (slip op., at 7). An appeal would normally lie from that judgment.

But, Samuel contends, there is more to the litigation than the suit Elsa pursued against him in her representative capacity. There is also his suit against her in her individual capacity, which has not yet been decided. Because the District Court consolidated the trust and

individual cases under Rule 42(a)(2), he argues, they merged and should be regarded as one case. Viewed that way, the judgment in the trust case was merely interlocutory, and more remains to be done in the individual case before the consolidated cases in the aggregate are finally resolved and subject to appeal.

B

Rule 42(a)—entitled "[c]onsolidation"—provides that if "actions before the court involve a common question of law or fact, the court may" take one of three measures. First, the court may "join for hearing or trial any or all matters at issue in the actions." Fed. Rule Civ. Proc. 42(a)(1). Second, the court may "consolidate the actions." Rule 42(a)(2). Third, the court may "issue any other orders to avoid unnecessary cost or delay." Rule 42(a)(3). Whether the judgment entered in the trust case is an immediately appealable final decision turns on the effect of consolidation under Rule 42(a).

Samuel, looking to dictionary definitions, asserts that the "plain meaning of the phrase 'consolidate the actions' is . . . to unite two or more actions into one whole—that is, to join them into a single case." Brief for Respondents 23 (citing Black's Law Dictionary (10th ed. 2014); some internal quotation marks and alterations omitted). But the meaning of "consolidate" in the present context is ambiguous. When Rule 42(a) was adopted, the term was generally defined, as it is now, as meaning to "unite, as various particulars, into one mass or body; to bring together in close union; to combine." Webster's New International Dictionary 570 (2d ed. 1942). Consolidation can thus sometimes signify the complete merger of discrete units: "The company consolidated two branches." But the term can also mean joining together discrete units without causing them to lose their independent character. The United States, for example, is composed of States

"unite[d], as various particulars, into one mass or body," "br[ought] together in close union," or "combine[d]." Yet all agree that entry into our Union "by no means implies the loss of distinct and individual existence . . . by the States." *Texas* v. *White*, 7 Wall. 700, 725 (1869). "She consolidated her books" hardly suggests that the "books" became "book." The very metaphor Samuel offers—that consolidation "make[s] two one, like marriage"—highlights this point. Tr. of Oral Arg. 56. However dear to each other, spouses would be surprised to hear that their union extends beyond the metaphysical. This is not a plain meaning case.

It is instead about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, §3, 3 Stat. 21 (later codified as Rev. Stat. §921 and 28 U. S. C. §734 (1934 ed.)). Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

C

Lord Mansfield pioneered the consolidation of related cases in England, and the practice quickly took root in American courts. See *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 292 (1892). In 1813, Congress authorized the

newly formed federal courts, when confronted with "causes of like nature, or relative to the same question," to "make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice" and to "consolidate[]" the causes when it "shall appear reasonable." §3, 3 Stat. 21. This consolidation statute applied at law, equity, and admiralty, see 1 W. Rose, A Code of Federal Procedure §823(a) (1907) (Rose), and remained in force for 125 years, until its replacement by Rule 42(a).

From the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them. In *Rich* v. *Lambert*, 12 How. 347 (1852), for example, we considered an appeal from several consolidated cases in admiralty. The appellees, the owners of cargo damaged during shipment, raised a challenge to our jurisdiction that turned on the nature of the consolidation. At the time, we could exercise appellate jurisdiction only over cases involving at least $2,000 in controversy. The damages awarded to the cargo owners in the consolidated cases surpassed $2,000 in the aggregate, but most of the constituent cases did not individually clear that jurisdictional hurdle. *Id.,* at 352–353.

We declined to view the consolidated cases as one for purposes of appeal, concluding that we had jurisdiction only over those constituent cases that individually involved damages exceeding $2,000. *Ibid.* As we explained, "although [a consolidated] proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action." *Id.,* at 353. Consolidation

was "allowed by the practice of the court for its convenience, and the saving of time and expense to the parties." *Ibid.*

The trial court's decree, we noted, had the effect of individually resolving each constituent case. *Ibid.* ("The same decree . . . is entered as in the case of separate suits."); see Black's Law Dictionary 532 (3d ed. 1933) ("decree" is a "judgment of a court of equity or admiralty, answering for most purposes to the judgment of a court of common law"). Accordingly, we did "not perceive . . . any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout." *Rich*, 12 How., at 353; see *Hanover Fire Ins. Co.* v. *Kinneard*, 129 U. S. 176, 177 (1889) (evaluating appellate jurisdiction over a writ of error in one of several consolidated cases without reference to the others).

We elaborated on the principles underlying consolidation in *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285. *Hillmon*, a staple of law school courses on evidence, involved three separate actions instituted against different life insurance companies by one Sallie Hillmon, the beneficiary on policies purchased by her husband John. Sallie claimed she was entitled to the sizable proceeds of the policies because John had died while journeying through southern Kansas with two companions in search of a site for a cattle ranch. The three companies countered that John was in fact still alive, having conspired with one of the companions to murder the other and pass his corpse off as John's, all as part of an insurance fraud scheme. The trial court consolidated the cases and tried them together. *Id.,* at 285–287.

The court, for purposes of determining the number of peremptory juror challenges to which each defendant was entitled, treated the three cases as though they had merged into one. *Ibid.* On appeal we disagreed, holding

that each defendant should receive the full complement of peremptory challenges. *Id.,* at 293. That was because, "although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defence . . . to which it would have been entitled if the cases had been tried separately." *Ibid.* On remand, one case settled, and a consolidated trial of the others "result[ed] in separate judgments" for Sallie. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 209 (1903).

In *Stone* v. *United States*, 167 U. S. 178, 189 (1897), we held that a party appealing from the judgment in one of two cases consolidated for trial could not also raise claims with respect to the other case. John Stone was the sole defendant in one case and one of three defendants in the other. *Id.,* at 179–181. After a consolidated trial, the jury returned a verdict in the case against Stone alone; its verdict in the multidefendant case was set aside. *Id.,* at 181. Stone appealed from the judgment in his case, arguing that the failure to grant a peremptory challenge in the multidefendant case affected the jury's verdict in his. *Id.,* at 189. We rejected that claim, punctiliously respecting the distinction between the constituent cases. There was "no merit in the objection," we said, because in the case before us Stone had "had the benefit of the three peremptory challenges" to which he was entitled in that case. *Ibid.*; see *Stone* v. *United States*, 64 F. 667, 672 (CA9 1894) ("The two cases, although consolidated, were separate and distinct. Defendant had exercised all the rights and privileges he was entitled to in this case.").

And just five years before Rule 42(a) became law, we reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson* v. *Manhattan R. Co.,* 289 U. S. 479, 496–497

(1933). A major case of its day, *Johnson* arose from the "financial embarrassment" during the Great Depression of two companies involved in operating the New York subway system. *Johnson* v. *Manhattan R. Co.*, 61 F. 2d 934, 936 (CA2 1932). In the resulting litigation, the District Court consolidated two suits, apparently with the intent to "effect an intervention of the parties to the [first suit] in the [second] suit"—in other words, to make the two suits one. *Id.*, at 940. Judge Learned Hand, writing for the Second Circuit on appeal, would have none of it: "consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before." *Ibid.* We affirmed, relying on *Hillmon* and several lower court cases reflecting the same understanding of consolidation. *Johnson*, 289 U. S., at 497, n. 8. We explained once more that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.,* at 496–497.

Decisions by the Courts of Appeals, with isolated departures,* reflected the same understanding in cases involving all manners of consolidation. See, *e.g., Baltimore S. S. Co., Inc.* v. *Koppel Indus. Car & Equip. Co.*, 299 F. 158, 160 (CA4 1924) ("the consolidation for convenience of trial did not merge the two causes of action" or "deprive either

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*See, *e.g., Edward P. Allis Co.* v. *Columbia Mill Co.*, 65 F. 52, 54 (CA8 1894) (involving two suits "consolidated, and tried as one action," with the "complaint in the first suit . . . treated as a counterclaim interposed in the second suit"). State practice was varied. Compare, *e.g., East Bay Municipal Util. Dist.* v. *Kieffer*, 99 Cal. App. 240, 263 (1929) (denial of rehearing) ("By such consolidation the three proceedings became one proceeding and should have been determined by a single verdict, 'a single set of findings and a single judgment.'"), with *Missouri Pac. R. Co.* v. *Helmert*, 196 Ark. 1073, 121 S. W. 2d 103 (1938) (consolidated cases resulted in separate judgments).

party of any right or relieve it of any burden incident to the libel or cross-libel as a separate proceeding"); *Taylor* v. *Logan Trust Co.*, 289 F. 51, 53 (CA8 1923) (parties to one constituent case could not appeal orders in the other because "consolidation did not make the parties to one suit parties to the other"; cited in *Johnson*); *Toledo, St. L. & K. C. R. Co.* v. *Continental Trust Co.*, 95 F. 497, 506 (CA6 1899) (consolidation "operates as a mere carrying on together of two separate suits supposed to involve identical issues" and "does not avoid the necessity of separate decrees in each case"; cited in *Johnson*).

One frequently cited case illustrates the point. In *Adler* v. *Seaman*, 266 F. 828, 831 (CA8 1920), the District Court "sought to employ consolidation as a medium of getting the two independent suits united," but the Court of Appeals made clear that the consolidation statute did not authorize such action. The court explained that constituent cases sometimes "assume certain natural attitudes toward each other, such as 'in the nature of' a cross-bill or intervention." *Id.,* at 838. Be that as it may, the court continued, "this is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit." *Ibid.* The court described "the result of consolidation" as instead "merely to try cases together, necessitating separate verdicts and judgments or separate decrees," and to "leave" the constituent cases "separate, independent action[s]." *Id.,* at 838, 840.

Treatises summarizing federal precedent applying the consolidation statute also concluded that consolidated cases "remain distinct." 1 Rose §823(c), at 758. They recognized that consolidated cases should "remain separate as to parties, pleadings, and judgment," W. Simkins, Federal Practice 63 (rev. ed. 1923), and that "[t]here must be separate verdicts, judgments or decrees, even although the consolidating party wished for one verdict," 1 Rose §823(c), at 758; see also G. Virden, Consolidation Under

Rule 42 of the Federal Rules of Civil Procedure, in 141 F. R. D. 169, 173–174 (1992) (Virden) ("as of 1933 and the *Johnson* case of that year, it was well settled that consolidation in the federal courts did not merge the separate cases into a single action").

Several aspects of this body of law support the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. We made clear, for example, that each constituent case must be analyzed individually on appeal to ascertain jurisdiction and to decide its disposition—a compartmentalized analysis that would be gratuitous if the cases had merged into a single case subject to a single appeal. We emphasized that constituent cases should end in separate decrees or judgments—the traditional trigger for the right to appeal, for which there would be no need if an appeal could arise only from the resolution of the consolidated cases as a whole. We explained that the parties to one case did not become parties to the other by virtue of consolidation—indicating that the right of each to pursue his individual case on appeal should not be compromised by the litigation conduct of the other. And, finally, we held that consolidation could not prejudice rights to which the parties would have been due had consolidation never occurred. Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a "matter of right," *Gelboim*, 574 U. S., at ___ (slip op., at 1), to which he was "entitled," *Manypenny*, 451 U. S., at 244.

D

Against this background, two years after *Johnson*, the Rules Advisory Committee began discussion of what was to become Rule 42(a). The Rule, which became effective in 1938, was expressly modeled on its statutory predecessor,

the Act of July 22, 1813. See Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., p. 887. The Rule contained no definition of "consolidate," so the term presumably carried forward the same meaning we had ascribed to it under the consolidation statute for 125 years, and had just recently reaffirmed in *Johnson*. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it"); cf. *Class* v. *United States*, 583 U. S. ___, ___ (2018) (slip op., at 10) (Federal Rule of Criminal Procedure 11(a)(2) did not silently alter existing doctrine established by this Court's past decisions).

Samuel nonetheless asserts that there is a significant distinction between the original consolidation statute and Rule 42(a). The statute authorized district courts to "consolidate" related "causes when it appears reasonable to do so" or to "make such orders and rules . . . as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice." 28 U. S. C. §734 (1934 ed.). Rule 42(a) permits district courts not only to "consolidate the actions" (subsection (a)(2)) and "issue any other orders to avoid unnecessary cost or delay" (subsection (a)(3)), but also to "join for hearing or trial any or all matters at issue in the actions" (subsection (a)(1)).

Whatever "consolidate" meant under the statute, Samuel posits, it took on a different meaning under Rule 42(a) with the addition of subsection (a)(1). Samuel describes the Rule as "permit[ting] two forms of consolidation": consolidation that "extend[s] only to certain proceedings," such as discovery, and consolidation "for all purposes." Brief for Respondents 4–5. He locates textual authority for the former in subsection (a)(1), which he says empowers courts to "join[] multiple actions for procedural purposes." *Id.,* at 23. In light of this broad grant of authority,

he contends, subsection (a)(2) must provide for something more if it is not to be superfluous. And Samuel sees that something more as the ability to merge cases that have been consolidated for "all purposes" into a single, undifferentiated case—one appealable only when all issues in each formerly distinct case have been decided. See *id.,* at 22–24 (to "consolidate" separate actions is "to join them into a single case" or "meld [them] into a single unit" (alterations omitted)).

We disagree. It is only by substantially overreading subsection (a)(1) that Samuel can argue that its addition compels a radical reinterpretation of the familiar term "consolidate" in subsection (a)(2). The text of subsection (a)(1) permits the joining of cases only for "hearing or trial." That narrow grant of authority cannot fairly be read as the exclusive source of a district court's power to "join[] multiple actions for procedural purposes." Brief for Respondents 23. There is, after all, much more to litigation than hearings or trials—such as motions practice or discovery. A district court's undisputed ability to consolidate cases for such limited purposes must therefore stem from subsection (a)(2). That defeats Samuel's argument that interpreting subsection (a)(2) to adopt the traditional understanding of consolidation would render it "wholly duplicative of [subsection] (a)(1)," and that subsection (a)(2) "therefore must permit courts . . . to 'consolidate' the actions *themselves* into a single unit." *Id.,* at 23–24. Samuel's reinterpretation of "consolidate" is, in other words, a solution in search of a problem.

We think, moreover, that if Rule 42(a) were meant to transform consolidation into something sharply contrary to what it had been, we would have heard about it. Congress, we have held, "does not alter the fundamental details" of an existing scheme with "vague terms" and "subtle device[s]." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); cf. *Class*, 583 U. S., at ___

(slip op., at 10). That is true in spades when it comes to the work of the Federal Rules Advisory Committees. Their laborious drafting process requires years of effort and many layers of careful review before a proposed Rule is presented to this Court for possible submission to Congress. See Report of Advisory Committee on Rules for Civil Procedure (Apr. 1937) (describing the exhaustive process undertaken to draft the first Federal Rules of Civil Procedure). No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do.

Similarly, nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation. See *United States* v. *Vonn*, 535 U. S. 55, 64, n. 6 (2002) (Advisory Committee Notes are "a reliable source of insight into the meaning of a rule"). In this instance, the Committee simply commented that Rule 42(a) "is based upon" its statutory predecessor, "but insofar as the statute differs from this rule, it is modified." Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., at 887. The Committee did not identify any specific instance in which Rule 42(a) changed the statute, let alone the dramatic transformation Samuel would have us recognize. See Virden 174–181 (evaluating the history of the development of Rule 42(a) and finding no evidence that the Committee intended a shift in meaning along the lines proposed by Samuel). This is significant because when the Committee intended a new rule to change existing federal practice, it typically explained the departure. See, *e.g.,* Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 747 (a predecessor statute "is substantially continued insofar as it applies to a sum-

mons, but its requirements as to teste of process are superseded"); Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 18, 28 U. S. C. App., p. 802 ("In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner . . . to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10.").

As a leading treatise explained at the time, through consolidation under Rule 42(a) "one or many or all of the phases of the several actions may be merged. But merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately." 3 J. Moore & J. Friedman, Moore's Federal Practice §42.01, pp. 3050–3051 (1938). Thus, "separate verdicts and judgments are normally necessary." *Id.*, at 3051, n. 12.

The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms the traditional understanding. Just recently in *Bank Markazi* v. *Peterson*, 578 U. S. ___, ___–___ (2016) (slip op., at 19–20), for example, the Court determined that cases "consolidated for administrative purposes at the execution stage . . . were not independent of the original actions for damages and each claim retained its separate character." The Court quoted as authority a treatise explaining that "actions do not lose their separate identity because of consolidation." *Id.,* at ___ (slip op., at 20) (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure §2382, p. 10 (3d ed. 2008) (Wright & Miller)).

In *Butler* v. *Dexter*, 425 U. S. 262, 266–267 (1976) (*per curiam*), we dismissed an appeal because the constitutional question that supplied our jurisdiction had been raised not in the case before us, but instead only in other cases with which it had been consolidated. We explained that "[e]ach case . . . must be considered separately to determine whether or not this Court has jurisdiction to consider

its merits". *Id.*, at 267, n. 12; see *Rich*, 12 How., at 352–353. And in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 735, and n. 22 (1976) (Marshall, J., dissenting), four dissenting Justices—reaching an issue not addressed by the majority—cited *Johnson* for the proposition that actions are "not merged" and do "not lose their separate identities because of . . . consolidation" under Rule 42(a).

In the face of all the foregoing, we cannot accept Samuel's contention that "consolidate" in Rule 42(a) carried a very different meaning—with very different consequences—than it had in *Johnson*, just five years before the Rule was adopted.

None of this means that district courts may not consolidate cases for "all purposes" in appropriate circumstances. District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases. See 9A Wright & Miller §2383 (collecting cases). What our decision does mean is that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. That is, after all, the point at which, by definition, a "district court disassociates itself from a case." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995). We thus express no view on any issue arising prior to that time.

* * *

The normal rule is that a "final decision" confers upon the losing party the immediate right to appeal. That rule provides clear guidance to litigants. Creating exceptions to such a critical step in litigation should not be undertaken lightly. Congress has granted us the authority to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under" §1291, 28 U. S. C. §2072(c), and we have explained that changes with respect to the meaning of final decision "are to come from rule-

making, . . . not judicial decisions in particular controversies," *Microsoft Corp.* v. *Baker*, 582 U. S. ___, ___ (2017) (slip op., at 15). If, as Samuel fears, our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.

Rule 42(a) did not purport to alter the settled understanding of the consequences of consolidation. That understanding makes clear that when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals.

We reverse the judgment of the Court of Appeals for the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Third District Court of Appeal

State of Florida

Opinion filed March 28, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-997
Lower Tribunal No. 15-13427

Gordon B. Chiu,
Appellant,

vs.

Wells Fargo Bank, N.A., successor-by-merger to Wachovia Bank, N.A., a national banking association,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Steven F. Samilow, P.A., and Steven F. Samilow (Boca Raton), for appellant.

Carlton Fields Jorden Burt, P.A., and Joseph H. Lang, Jr., Donald R. Kirk, and Niall T. McLachlan (Tampa), for appellee.

Before SUAREZ, LAGOA, and LINDSEY, JJ.

LAGOA, J.

Appellant, Gordon Chiu ("Chiu"), appeals from a final summary judgment entered in favor of Wells Fargo Bank, N.A. ("Wells Fargo"). We reverse.

I. FACTUAL AND PROCEDURAL HISTORY

In September 2005, Appellant, Gordon Chiu ("Chiu"), and his friend, Colin Green ("Green"), purchased an investment property in Port St. Lucie, Florida. To finance the purchase, Chiu and Green signed a promissory note in the amount of $504,985.97 in favor of Wachovia Bank, N.A. Chiu and Green were jointly and severally obligated under the terms of the note. The loan fell into arrears, and on June 15, 2015, Wells Fargo, successor-by-merger to Wachovia Bank, N.A., filed a complaint against Chiu for breach of the promissory note. On September 1, 2016, Chiu filed his consolidated answer and second amended affirmative defenses. Chiu asserted numerous affirmative defenses, including estoppel, unclean hands, statute of limitations, laches, unconscionability, fraud in the inducement, negligent misrepresentation, that the extension of the due dates under the note was void or voidable, failure to mitigate damages by failing to pursue the foreclosure action, misconduct in connection with the presentation of Green's creditworthiness and finances, failure to state a cause of action, and breach of fiduciary duty.

On December 7, 2016, Wells Fargo filed its motion for summary judgment, arguing that it was entitled to judgment in its favor as a matter of law and that none of Chiu's affirmative defenses raised a genuine issue of material fact. Wells Fargo

filed an affidavit of amounts due and owing on March 1, 2017. Chiu filed a memorandum and amended memorandum in opposition to the motion for summary judgment on March 27, 2017. Chiu also filed affidavits in support of his memorandum on March 25, 2017 and March 27, 2017.

The parties agree that a hearing on Wells Fargo's motion for summary judgment was set for April 3, 2017. On March 31, 2017, however, the trial court, on its own initiative, entered an order cancelling the hearing set for April 3 and granting Wells Fargo's motion for final summary judgment. In its order, the trial court stated that it had reviewed Wells Fargo's motion and supporting materials as well as Chiu's memorandum in opposition to the motion and materials in opposition. The trial court entered final judgment in favor of Wells Fargo on April 5, 2017. Chiu's appeal ensued.

II. STANDARD OF REVIEW

A trial court's order entering final summary judgment is reviewed de novo. Tropical Glass & Const. Co. v. Gitlin, 13 So. 3d 156, 158 (Fla. 3d DCA 2009).

III. ANALYSIS

Chiu argues that the trial court erred in entering summary judgment without conducting a hearing on Wells Fargo's motion for summary judgment as required by Florida Rule of Civil Procedure 1.510(c).[1] This Court has held that "Florida

[1] Rule 1.510(c) states, in pertinent part:

Rule of Civil Procedure 1.510(c) contemplates a hearing on a summary judgment motion." State Farm Fire & Cas. Co. v. Lezcano, 22 So. 3d 632, 634 (Fla. 3d DCA 2009). Indeed, a trial court does not have discretion to decide whether to conduct a hearing on a motion for summary judgment. Kozich v. Hartford Ins. Co. of Midwest, 609 So. 2d 147, 148 (Fla. 4th DCA 1992) ("[Rule 1.510(c)] does not provide the trial court with discretion to decide whether 'a hearing is required.'"). Thus, where a trial court grants final summary judgment without conducting a hearing pursuant to rule 1.510(c), reversal is required. See, e.g., Greene v. Seigle,

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> (c) Motion and Proceedings Thereon. The motion must state with particularity the grounds on which it is based and the substantial matters of law to be argued and must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant must serve the motion at least 20 days before the time fixed for the **hearing**, and must also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party must identify, by notice served pursuant to rule 1.080 at least 5 days prior to the day of the **hearing**, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent that summary judgment evidence has not already been filed with the court, the adverse party must serve a copy on the movant pursuant to rule 1.080 at least 5 days prior to the day of the **hearing**, or by delivery to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of **hearing**.

(emphasis added).

745 So. 2d 411, 411 (Fla. 4th DCA 1999); Travelers Ins. Co. v. Fla. Med. Ctr., Inc., 621 So. 2d 581, 581 (Fla. 4th DCA 1993); Kozich, 609 So. 2d at 148.

Wells Fargo asserts that Chiu failed to preserve his objection to the trial court's procedure because he did not file a motion for reconsideration or rehearing below or otherwise bring the issue of a lack of hearing to the trial court's attention. Generally, in order to raise an issue on appeal, it must be presented to the trial court, and the "specific legal argument or ground to be argued on appeal must be part of that presentation." Holland v. Cheney Bros., Inc., 22 So. 3d 648, 649-50 (Fla. 1st DCA 2009); see also Pensacola Beach Pier, Inc. v. King, 66 So. 3d 321, 324 (Fla. 1st DCA 2011) (finding that appellants failed to preserve argument for appeal where the "trial court's error appeared for the first time on the face of the final summary judgment" and appellants did not attempt to correct error in the trial court). There is an exception to this general rule, however, where the trial court's action constitutes fundamental error. See Hall v. Marion Cty. Bd. of Cty. Comm'rs, 43 Fla. L. Weekly D197, D199 (Fla. 5th DCA Jan. 19, 2018) (stating that a party may raise an issue for the first time on appeal if it constitutes fundamental error); see also Hooters of Am., Inc. v. Carolina Wings, Inc., 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995).

In Lezcano, this Court held that "[a] trial court's failure to conduct a hearing prior to ruling on the motion for summary judgment constitutes a denial of the due

process guarantee of notice and an opportunity to be heard." 22 So. 3d at 634; accord Greene, 745 So. 2d at 411; Kozich, 609 So. 2d at 148 ("An order granting summary judgment on liability determines a party's right to the relief requested and to deny either party a hearing must be construed as a denial of due process."); cf. WG Evergreen Woods SH, LLC v. Fares, 207 So. 3d 993, 996 (Fla. 5th DCA 2016) (in determining whether Rule 1.190(f) required a hearing, appellate court looked to Rule 1.510(c) for guidance and cited to Lezcano, Kozich, and Greene, noting that "[s]everal cases have concluded that it is a denial of due process 'to deny either party a hearing' when ruling on a motion for summary judgment" (citations omitted)). A denial of due process constitutes fundamental error that may be raised for the first time on appeal. Blechman v. Dely, 138 So. 3d 1110, 1114 (Fla. 4th DCA 2014); Weiser v. Weiser, 132 So. 3d 309, 311 (Fla. 4th DCA 2014); Verizon Bus. Network Servs., Inc. v. Dep't of Corrections, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008).

The parties agree that a hearing was scheduled on Wells Fargo's motion for summary judgment and that the trial court unilaterally cancelled the scheduled hearing. It is, therefore, appropriate for this Court to consider Chiu's due process arguments despite the fact that Chiu did not present this argument to the trial court as "[a] trial court's failure to conduct a hearing prior to ruling on the motion for

summary judgment constitutes a denial of the due process guarantee of notice and an opportunity to be heard." Lezcano, 22 So. 3d at 634.

Because we find that the trial court committed fundamental error in entering final summary judgment in favor of Wells Fargo without conducting a hearing as provided by rule 1.510(c), the final summary judgment entered in favor of Wells Fargo is reversed, and the cause remanded for further proceedings.[2] See Lezcano, 22 So. 3d at 634; Greene, 745 So. 2d at 411; Kozich, 609 So. 2d at 148.

Reversed and remanded.

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[2] Because we are reversing on the basis of a procedural due process error, we do not address Chiu's substantive arguments directed toward the final summary judgment. See Casa Inv. Co. v. Nestor, 8 So. 3d 1219, 1221 (Fla. 3d DCA 2009) ("Because we find merit with the procedural argument raised by [petitioner], we do not address the substantive issues raised on appeal."); Kozich, 609 So. 2d at 148 (reversing order granting final summary judgment where trial court failed to conduct a hearing and expressing no opinion on the merits of the motion for summary judgment because "[a]ppellate review of the merits would be premature given the trial court's failure to provide appellant an opportunity to be heard").

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOANNE LIUKKONEN,
Appellant,

v.

BAYVIEW LOAN SERVICING, LLC,
Appellee.

No. 4D16-4193

[March 28, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barry Stone, Senior Judge; L.T. Case No. CACE 13-004110(11).

Jonathan Kline of Jonathan Kline, P.A., Weston, for appellant.

Cynthia L. Comras, David Rosenberg and Jarrett Cooper of Robertson, Anschultz & Schneid, P.L., Boca Raton, for appellee.

FORST, J.

Appellant Joanne Liukkonen appeals a final judgment of foreclosure entered against her and her husband. She contends Appellee Bayview Loan Servicing, LLC, violated the best evidence rule when it introduced mere copies of the loan modifications without explanation. We disagree and affirm. We write to clarify our jurisprudence on this issue and affirm without comment all other issues raised by Appellant.

Background

At trial, Bayview introduced an original note, but only introduced copies of the loan modifications (which affected the interest rates) and offered no explanation as to why it did not produce the originals. Appellant offered no objection at the time, but objected during closing and in her motions to strike and for rehearing. The objections were overruled.

Analysis

We review evidentiary rulings for abuse of discretion. *Holt v. Calchas,*

LLC, 155 So. 3d 499, 503 (Fla. 4th DCA 2015). As a preliminary matter, Appellant has waived her best evidence rule objection because she failed to make it contemporaneously with the introduction of the copies. *See Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010).

We nevertheless address the merits on this issue to clarify our decision in *Rattigan v. Central Mortgage Co.*, 199 So. 3d 966 (Fla. 4th DCA 2016). There, a bank introduced an original note, but violated the best evidence rule by foreclosing under the terms of a modification without introducing the original *or a copy* into evidence. We held that "[w]ithout the agreement itself in evidence, testimony regarding the contents of the agreement is not permitted." *Id.* at 967 (citing *J.H. v. State*, 480 So. 2d 680, 682 (Fla. 1st DCA 1985)). Therefore, there was no proper evidence to support foreclosure under the terms of the modified note.

We noted in dicta:

> The Bank violated the best evidence rule by virtue of its failure to introduce the modification at trial (either the original or a duplicate with an explanation as to why the original note was unavailable, *see Deutsche Bank Nat'l Tr. Co. v. Clarke*, 87 So. 3d 58, 62 (Fla. 4th DCA 2012)).

Rattigan, 199 So. 3d at 967 (citing *J.H.*, 480 So. 2d at 682). In *J.H.*, the court simply held the Health and Rehabilitative Services' failure to introduce an agreement it entered into with a mother—the nonfulfillment of which was the basis for its dependency petitions—violated the best evidence rule. 480 So. 2d at 682 (citing § 90.952, Fla. Stat. (1983)).

The foreclosing bank in *Clarke* introduced a copy of a promissory note into evidence. *Clarke*, 87 So. 3d at 59. We noted that "[a] duplicate is . . . admissible to the same extent as an original," unless "[t]he document or writing is a negotiable instrument as defined in s. 673.1041." *Id.* at 60 (first and third alterations in original) (quoting § 90.953(1), Fla. Stat. (2010)). "A promissory note is a negotiable instrument," thus requiring production of the original. *Id.* at 60-61. We explained the reasons for the exception: (1) the document itself is the source of the obligation, not just the terms; and (2) "surrender removes a note from the stream of commerce, preventing someone else from trying to enforce it against the defendant a second time." *Id.* at 60-62. Therefore, a foreclosing party must produce and surrender the note or reestablish it to take it out of the stream of commerce or give another "satisfactory explanation" for its failure to produce the original. *Id.* at 61-62 (quoting *State St. Bank & Tr. Co. v. Lord*, 851 So. 2d 790, 791 (Fla. 4th DCA 2003)).

Earlier surrender of the note to the court file was "one such 'satisfactory explanation' for failing to produce the original at trial." *Id.* at 62.

A modification to a note, while "as much a part of the parties' agreement [i.e., its terms] as the original note," *Rattigan*, 199 So. 3d at 967, is not, itself, a negotiable instrument. *See* § 673.1041, Fla. Stat. (2016); *see also* § 673.1171, Fla. Stat. (2016). Like a mortgage, it "may thus be proved by using a properly authenticated duplicate." *Clarke*, 87 So. 3d at 61 (quoting *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004)). No explanation as to why the original was unavailable is required.

Therefore, the trial court correctly admitted copies of the modifications and accompanying testimony. Appellant did not timely challenge their authenticity or the fairness of using copies, § 90.953(2)-(3), Fla. Stat. (2016), thus waiving any such challenge.

Conclusion

Appellant failed to preserve her best evidence rule objection, and she misconstrues the holding of *Rattigan*. A copy of a modification is admissible to the same degree as an original, as it is not a negotiable instrument as defined in section 673.1041. § 90.953, Fla. Stat. (2016).

Affirmed.

LEVINE and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LENOS TRIGEORGIS,
Appellant,

v.

GEORGE TRIGEORGIS,
Appellee.

No. 4D17-0262

[March 28, 2018]

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. CACE 12-019414.

Michael B. Buckley of Buckley Law Group, P.A., St. Petersburg, for appellant.

Peter A. Tappert of Weissman & Dervishi, P.A., Miami, for appellee.

DAMOORGIAN, J.

Lenos Trigeorgis ("Father") appeals the final judgment entered in George Trigeorgis' ("Son") slander of title action. Son cross-appeals the final judgment entered on Father's money lent counterclaim. Because Son failed to establish all of the elements for a slander of title claim, we reverse the slander of title judgment. We also reverse and remand the money lent judgment for recalculation of the prejudgment interest.

At its core, this case involves a bitter dispute between Father and Son regarding repayment of money lent. In late 2009, Father and Son decided to purchase a condo as an investment property. The original plan was for the condo to be purchased in both of their names and for each party to contribute towards the purchase price. Ultimately, however, it was decided that Father would fund the entire purchase price and that the condo would be purchased in Son's name only. This arrangement was contingent on Son agreeing to repay the loan within three years at an 8% annual interest rate. To that end, Father drafted a loan agreement memorializing the above described terms and transferred a total of $231,000 to Son. On April 23, 2010, Son purchased the subject condo for

$185,000. At the time of closing, Son had not yet signed the loan agreement.

After the closing, Father asked Son to sign the written loan agreement and Son assured him that he would. On July 13, 2011, nearly fifteen months after the closing, Son took it upon himself to revise and sign the loan agreement drafted by Father. That agreement, titled "Loan Agreement for Purchase of Symphony Condo Unit 1704-S" ("the Agreement"), provided as follows:

> [Son] hereby agrees to borrow $187,908 from [Father] for the purchase of Unit 1704-S at the Symphony Condominium, 600 West Las Olas Boulevard #1704-S, Fort Lauderdale, FL 33312, using the property as collateral.
>
> The loan is due and payable in 3 years with an accrued 8% annual interest. If the amount due is not paid in 3 years, [Father] will receive ownership of the property. That is, [Father] can obtain the property in lieu of the amount due (principal plus interest) in 3 years.

Shortly after signing the Agreement, Son had a falling out with Father and decided to sell the condo. Upon learning that the condo had been listed for sale, Father filed a notice of interest in real property in the public records claiming to have an interest in the subject condo. Attached to the notice was a copy of the Agreement drafted and signed by Son.

In July of 2012, Son sued Father for slander of title and to quiet title. In his complaint, Son alleged that had Father not filed the notice of interest, he would have been able to sell the condo. Father answered the complaint and raised as an affirmative defense that the Agreement attached to the notice of interest was a true and valid agreement. Father also counterclaimed for money lent, arguing that Son owed him $187,908 plus interest for the money lent to purchase the condo.

The matter proceeded to a bench trial. With regard to Son's slander of title action, Son testified, generally, that as a result of the notice of interest, he was unable to sell the condo. No specific evidence was presented showing how or if the notice of interest induced others not to deal with Son. With regard to Father's money lent counterclaim, Father testified that in total, he lent Son $231,000 for the purchase of the condo. Father later admitted that $70,000 had already been paid back, thus reducing the amount owed to $161,000. Son readily admitted that he owed Father money, however testified that he had already paid back $97,000 and

therefore only owed a remaining $134,000. Son also acknowledged that at the time of closing, the plan was for there to be a formal loan agreement in place similar to the one that he signed in 2011.

At the conclusion of the trial, the court found in favor of Son on his slander of title action and awarded him a total of $64,720.33 in attorney's fees and costs as damages. The court, however, offered no analysis to accompany its finding. The court also found in favor of Father on his money lent claim and awarded him the principal amount of $134,000. The court did not award Father the 8% accrued interest provided for in the Agreement as additional direct damages. The court did, however, award Father the following prejudgment interest:

> [P]re-judgment interest at the statutory rate from April 23, 2010, through October 30, 2011, in the amount of $12,093.54 ($11,587.78 at 6% and $505.76 at 4.75%), and at the rate of 8% from October 31, 2011, through the date of this Final Judgment in the amount of $55,127.49, being in the total amount of interest of $67,221.03.

This appeal follows.

Slander of Title

In a slander of title action, also known as a disparagement of title or property action, the plaintiff must prove the following five elements:

> (1) A falsehood (2) has been published, or communicated to a third person (3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood.

McAllister v. Breakers Seville Ass'n, 981 So. 2d 566, 573 (Fla. 4th DCA 2008) (quoting *Bothmann v. Harrington*, 458 So. 2d 1163, 1168 (Fla. 3d DCA 1984)). In this case, the evidence did not establish that there was a falsehood or that such falsehood played a material and substantial part in inducing others not to deal with Son.

First, enforceable or not, the Agreement attached to the notice of interest did not constitute a falsehood because the record reflects that

Father recorded the notice of interest under the belief that the parties had an enforceable agreement. *See Brown v. Kelly*, 545 So. 2d 518, 520 (Fla. 5th DCA 1989) (holding that a statement in an estoppel letter did not constitute a falsehood for slander of title purposes because the statement "was clearly predicated on the seller's belief, albeit mistaken, that he had a valid and enforceable agreement with the buyer"). Likewise, the fact that Father was owed substantially less money at the time of the trial does not change the fact that the figure listed in the Agreement accurately reflected the amounts lent to Son for the purchase of the condo in 2010. It is worthwhile noting that Father did not file a claim of *lien* in this case but rather a claim of *interest*. *Cf. IberiaBank v. Coconut 41, LLC*, 984 F. Supp. 2d 1283, 1304 (M.D. Fla. 2013) (finding that the claim of *lien* was substantively false because the amount of the lien was substantially lower than the total claim of lien asserted on the property).

Second, even if the notice of interest was a falsehood, Son did not prove that "in fact, the falsehood [played] a material and substantial part in inducing others not to deal with the plaintiff." *McAllister*, 981 So. 2d at 573 (quoting *Bothmann*, 458 So. 2d at 1168). To satisfy this element, the plaintiff must present specific evidence showing exactly how the falsehood induced others not to deal with the plaintiff. *See, e.g.*, *id.* at 574 (holding that the plaintiff satisfied the material and substantial part element by testifying that several of his prospective tenants were unable to rent his units due to the recording of a lien and by presenting testimony from a tenant who explained that because of the lien, he "did not want to get involved"); *Atkinson v. Fundaro*, 400 So. 2d 1324, 1326 (Fla. 4th DCA 1981) (plaintiffs presented evidence showing that they encountered difficulties in obtaining favorable institutional financing due to the filing of a lis pendens). For example, in *IberiaBank*, the plaintiff sued for slander of title after a claim of lien was filed against its property. 984 F. Supp. 2d at 1303. The plaintiff argued that the claim of lien disparaged its title "because a lien is an encumbrance making the property unmarketable and reducing its value." *Id.* Notwithstanding the unmarketability argument, the court determined that under Florida law the plaintiff failed to establish the material and substantial part element because "there was no evidence presented that there were others who did not deal with [the plaintiff]" or that the plaintiff "had a contract to sell the property or parts of the property [or] attempted to transfer the property." *Id.* at 1305.

In the present case, aside from generally testifying that he was unable to sell the condo, Son presented no specific evidence showing how the notice of interest played a material and substantial part in inducing others not to deal with him. In fact, the trial court acknowledged in one of its post-trial orders that "there was no evidence that [Son] was unable to

complete a sale because of the cloud on his title." In other words, the court clearly found that Son failed to establish that the claim of interest played any part, let alone a material and substantial part, in inducing others not to deal with him. Despite the lack of evidence, and for no apparent reason, the court ruled in favor of Son.

Accordingly, we reverse the court's judgment holding Father liable for slander of title.

Prejudgment Interest

We next consider the court's prejudgment interest award on Father's money lent claim. In Florida, an award of prejudgment interest "is merely another element of pecuniary damages." *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985). Accordingly, "when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest . . . from the date of that loss." *Id.* at 215. For actions sounding in contract, prejudgment interest is allowed "from the date the debt is due." *Lumbermens Mut. Cas. Co. v. Percefull*, 653 So. 2d 389, 390 (Fla. 1995).

With respect to the interest rate, section 687.01, Florida Statutes (2016) provides that "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03." However, in order for a contract rate to apply in lieu of the statutory rate, the contract must actually provide for a specific post-maturity/default interest rate. *See Olson v. Hirschberg*, 145 So. 2d 303, 305 (Fla. 1st DCA 1962) (holding that the applicable statutory rate applied because "the note contain[ed] no express provision as to the rate of interest after the maturity date"); *see also Celotex Corp. v. Buildex, Inc.*, 476 So. 2d 294, 296 (Fla. 3d DCA 1985).

In the present case, the evidence at trial established that Father lent Son money to purchase the condo on April 23, 2010. The evidence further established that the parties agreed that the loan would be repaid in three years from the date of closing. Accordingly, the date of loss was the date the money was due and not the closing date as found by the court. Therefore, the court should have only awarded prejudgment interest from April 24, 2013 (date of loss) through December 21, 2016 (date the final judgment was entered).

Turning to the applicable interest rate, the court utilized the 8% interest rate provided for in the Agreement rather than the applicable statutory rate. This was error. While the Agreement did provide that "[t]he loan was

due and payable in 3 years with an accrued 8% annual interest," the document is entirely silent as to what interest rate applies after maturity or in the event of default. Accordingly, the 8% interest rate is not applicable to the court's prejudgment interest award. Rather, the statutory interest rate in effect as of the date of loss (April 23, 2013) governs. *See Genser v. Reef Condo. Ass'n*, 100 So. 3d 760, 762 (Fla. 4th DCA 2012). It appears that in applying the 8% interest rate provided for in the Agreement, the trial court was attempting to award Father additional damages for Son's failure to make the interest payments during the life of the loan. While the court could have awarded the accrued interest as additional direct damages, awarding such damages under the guise of prejudgment interest was incorrect.

Based upon the foregoing, we reverse the prejudgment interest award entered in Father's money lent claim and remand for recalculation of the prejudgment interest consistent with this opinion.

Reversed and remanded.

TAYLOR and MAY, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

HSBC BANK USA, As Trustee For PHH 2007-2,
Appellant,

v.

DAVID MAGUA; SYLVIA J. MAGUA; WESTON LAKES MAINTENANCE ASSOCIATION INC.; and **THE TOWN FOUNDATION, INC.**,
Appellees.

No. 4D17-1685

[March 28, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Senior Judge; L.T. Case No. 07-33789 CACE.

Nicholas S. Agnello, Matt Mitchell and Sabrina Niewialkouski of Burr & Forman LLP, Fort Lauderdale, for appellant.

Nicole R. Moskowitz of Neustein Law Group, P.A., Aventura, for appellees David and Sylvia J. Magua.

CIKLIN, J.

This appeal arises out of a foreclosure complaint filed by the bank. After a bench trial, the trial court entered a foreclosure judgment in favor of the bank and the homeowners appealed. With respect to that first appeal, the homeowners argued that (1) the bank lacked standing and (2) it failed to prove damages and satisfaction of a condition precedent, as the exhibits used to prove these elements constituted hearsay. In lieu of an answer brief in the first appeal, the bank filed a confession of error which stated that it "confesses to error and does not oppose reversal of the Final Judgment."

Then, as to the first appeal, this court issued an opinion which provided the following: "Appellee confesses error, and does not oppose reversal of the final judgment. After reviewing the record, we agree that the trial court erred, and reverse the final judgment of foreclosure entered by the trial court and remand for further proceedings." *Magua v. HSBC Bank USA*, 197 So. 3d 1274, 1274 (Fla. 4th DCA 2016). On

remand, the homeowners moved for and were awarded attorney's fees and costs.

Now on this second appeal, the bank challenges the award of fees and costs awarded following the agreed upon reversal asserting that fees and costs cannot be awarded because the reversal came about upon the bank's confession of error regarding standing. The bank cites a recent opinion of this court, *Nationstar Mortgage LLC v. Glass*, 219 So. 3d 896 (Fla. 4th DCA 2017). There, this court recognized the following:

> [T]o be entitled to fees pursuant to the reciprocity provision of section 57.105(7), the movant must establish that the parties to the suit are also entitled to enforce the contract containing the fee provision. A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract.

Id. at 899.

The bank argues that because this court reversed the final judgment in the first appeal based on the homeowners' argument that the bank lacked standing, the trial court could not award fees based on a provision of the mortgage contract which the bank had no right to enforce. This, the bank argues, has become the "law of the case."

We find the bank's argument fails though because as to the first appeal, the bank confessed error without specification as to which of the two appellate issues it was confessing error. Likewise, this court (without objection or a motion to reconsider or clarify) reversed based on a finding of an unspecified error. Thus, it is not apparent that this court considered the standing issue, a requirement under the law of the case doctrine. *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) ("The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.").

The bank argues that this court implicitly or necessarily decided the standing issue when it reversed. *See id.* at 106. ("[T]he law of the case doctrine may foreclose subsequent consideration of issues implicitly addressed or necessarily considered by the appellate court's decision."). However, it cannot be said that this court's reversal equates to an implicit or necessary finding on the standing issue. Clearly, reversal could have been based solely on the second (condition precedent) ground

raised by the homeowners. *See, e.g., Edmonds v. U.S. Bank Nat'l Ass'n*, 215 So. 3d 628, 629 (Fla. 2d DCA 2017) (declining to reach remaining issues raised on appeal where reversal was based on dispositive issue of whether bank complied with condition precedent to filing suit). For similar reasons, the bank's judicial estoppel argument is unpersuasive.[1]

Based on the foregoing, we affirm.

Affirmed.

LEVINE and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[1] The bank also contends that this court's denial of the homeowners' motion for appellate fees in the first appeal must have been based on the bank's lack of standing, and points to the arguments made by the bank in its response to the motion. This court denied the motion before the *Glass* opinion issued and the order contains no elaboration. We decline to attempt to divine a previous panel's reasons for denying the motion.