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Chmielewski v. The City of St. Pete Beach, Case No. 16-16402 (11th Cir. 2018).
A local government's encouragement of the public's use of a private parcel constitutes a compensable taking; a physical invasion is sufficient and exclusive dominion and control is not necessary to support a jury verdict of damages for the taking.

Koppel v. Ochoa, Case No. SC16-1474 (Fla. 2018).
The mere filing of a motion under Florida Rule of Civil Procedure 1.090 does not automatically enlarge the 30-day time frame to respond to a proposal for settlement; an order must be granted within the 30 days for the period to be extended.

Third Federal Savings & Loan Association of Cleveland v. Koulouvaris, Case No. 2D17-773 (Fla. 2d DCA 2018).
A Home Equity Line of Credit agreement is not a negotiable instrument, and thus must be authenticated before it can be admitted into evidence.

Perlberg v. Lubercy Asia Holdings, LLC, Case No. 3D17-2404 (Fla. 3d DCA 2018).
An order granting summary judgment on a fraudulent lien claim is not appealable as a final order because final judgment has not been entered and is not appealable as a non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii) because it does not determine an immediate right to possession of the property.

Florida Research Institute for Equine Nurturing, Development and Safety, Inc. v. Dillon, Case No. 4D17-605 (Fla. 4th DCA 2018).
A Florida not-for-profit corporation may terminate a person's membership without notice and without hearing as the current version of Florida Statute section 617.0607(1) does not require notice and hearing.

Madl v. Wells Fargo Bank, N.A., Case No. 5D16-53 (Fla. 5th DCA 2018).
Upon rehearing, the Fifth District clarifies that a lender that fails to prove standing through its promissory note may still have a contractual relationship through the mortgage that allows an award of attorney's fees to a prevailing borrower.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16402

D.C. Docket No. 8:13-cv-03170-JDW-MAP

PAUL CHMIELEWSKI, et al.,

Plaintiffs-Appellees,

versus

THE CITY OF ST. PETE BEACH,

Defendant-Appellant.

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

(May 16, 2018)

Before ED CARNES, Chief Judge, and NEWSOM and SILER,[*] Circuit Judges.

SILER, Circuit Judge:

In this appeal of an inverse condemnation action, Defendant-Appellant the City of St. Pete Beach ("the City") challenges a jury verdict in favor of Plaintiffs Katherine A. Chmielewski and Paul Chmielewski, as personal representative of the estate of Chester Chmielewski ("the Chmielewskis"). The underlying dispute involves a beachfront parcel, owned by the Chmielewskis, which experienced significant public usage. At trial, the jury found that the City encouraged and invited access by the general public, causing a seizure of the Chmielewskis' residential property and a taking of their beach parcel. After trial, the district court denied the City's motions for judgment as a matter of law and for a new trial. For the following reasons, we AFFIRM.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The beachfront property at issue in this case is located in the Don CeSar Place Subdivision in St. Pete Beach, Florida. The subdivision includes two blocks—Block M and Block N—that run parallel to the Gulf of Mexico. Between Block N to the north and Block M to the south stands the Don CeSar Hotel ("the Hotel") and the Hotel's privately-owned beach property. The Chmielewskis' home sits adjacent to Block M, three lots south of the Hotel. They purchased this lot in

[*] Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

1972, and as part of a 1975 insurance settlement, they acquired title to the beachfront portion of Block M contiguous to their residence, confirming that their property extended across Block M to the mean high water line ("MHWL") of the Gulf. This property—the "beach parcel"—is approximately 300 feet deep (east-west) and includes 50 feet of the Block M sidewalk, dunes, and sand. Under Florida law, the beach area between the water and the MHWL is available for public use, regardless of ownership in the Subdivision.

Chmielewskis' Ownership Rights

In 2006, the Chmielewskis initiated a quiet title action against the City, the Hotel, and the Don CeSar Place Property Association to confirm their ownership of the beach parcel. The Chmielewskis obtained partial summary judgment in 2008, establishing their fee simple ownership in the residential lot and in the contiguous strip of beach parcel, subject to a 1925 plat restriction. The restriction provides that all Don CeSar Subdivision owners retain their right to use Block M, including the Chmielewskis' beach parcel, for "beach and bathing purposes."[1] The plat also prohibits building any structure on Block M, including on the Chmielewskis' beach parcel. As part of a settlement in the quiet title action, the City agreed that

[1] A private sidewalk runs north-south, the length of Block M, and parallel to dunes, sand beach, and the Gulf of Mexico. There was no dispute that this sidewalk is part of Block M, and Don CeSar Subdivision owners, their family, friends, and guests have the right to use this sidewalk and traverse all of Block M.

its ownership of five lots in the Subdivision did not give the general public the right to use Block M, including the Chmielewskis' beach parcel.

The original subdivision developer's residence adjoined Block M, just north of the Chmielewskis' property. During World War II, the federal government acquired that land, known as the Don Vista property. In 1975, it deeded this property to the City with the requirement that the lot ("the mini-park") could not be used for public beach access.

City's Renovation of the Don Vista Property

From 2003 to 2005, the City used a federal grant to renovate the developer's residence—the Don Vista Building—and turn it into a community center. As part of those renovations, the City beautified the mini-park, installed benches, and cleared a direct public access path from the mini-park across Block M to the Gulf. For good measure, the City also cleared out the overgrowth on the Block M sidewalk behind the Chmielewskis' house. At both the north and south ends of Block M, the City posted large, circular signs with the City's emblem stating "Beach Access." These signs were visible to passing motorists on El Centro Street.

The City also cleared and improved the parking lot next to the Don Vista building, grassed and landscaped the area, and removed the fencing around the parking lot, as well as the chains and gate that blocked its entrance and had

previously prevented after-hours entry or use. The City made the area attractive with convenient public parking to facilitate beach access. In addition, the City installed metered public parking across the street (within half a block) for Block M beach access parking and publicly announced that it had provided parking to allow the public to use the Block M beach. On its website, the City published a map showing public access to the Block M beach at the Don Vista Center. At a public meeting, the City Manager proclaimed that the City had invested lots of money to have a beautiful center and needed to put it to full use by having the visiting public use the Block M beach.

City's Zoning Maps and Access to Beach Parcel

While the City was renovating the Don Vista Center, it also zoned and mapped Block M, including the Chmielewski beach parcel, as "recreation open space/public park." This designated the property as a public beach for public use, inconsistent with the Chmielewskis' private ownership rights. A former director of planning testified that the City's zoning designation for Block M meant that it was for public use, including the dunes area, and he considered that area to be public. This former city planner also testified that he frequented the Block M beach as a private citizen, parking his car at the Don Vista facility and using the beach access from there. He believed that the Block M beach was public and that he was allowed to go there and engage in normal beach activities. He traversed all over

Block M, observed other individuals coming and going through the property, and saw nothing to discourage these actions.

After the renovations, the City was motivated to encourage use of the Don Vista Building and its amenities. The City also entered into an agreement with the SunTan Art Center, a 501(c)(3) nonprofit organization, to operate the Don Vista Building as a community art center. The facility offered arts and crafts, yoga, art exhibits, and art sales. On Sundays, the Suntan Art Center hosted a flea market from 10:00 a.m. to 3:00 p.m.

Trespassers on the Chmielewskis' Beach Parcel

At trial, witnesses testified that before the City's renovations, the Chmielewskis' property and area around it "was quiet, serene, pleasant and peaceful, with only an occasional neighbor coming to the beach and not much foot traffic or heavy use." However, after the renovations, members of the public regularly trespassed onto the Chmielewskis' property, cutting through or walking along the side of their residence from the public parking areas. People also walked up the private sidewalk in front of their house and over dunes, or from the mini-park over the dunes and across to the Chmielewskis' beach parcel. On weekends and holidays, beachgoers flocked to Block M in large numbers and onto the Chmielewskis' beach parcel, often coming down either end of Block M where City signs stated "Beach Access."

The Chmielewskis believed the people coming onto their property were members of the general public, not subdivision residents who had a legal right to access the beach parcel. Having lived in the subdivision for forty-one years, the Chmielewskis knew their neighbors and did not recognize the people trespassing on their beach property. They testified that Don CeSar residents "generally walked to the beach for a short time; unlike the persons using Block M, they did not drive there, park in the Don Vista lot or at City parking meters, bring tents, coolers or lots of paraphernalia, stay all day or into the night, or come in large numbers." When the Chmielewskis spoke with people they encountered on their beach parcel, some said they were from out of town and others refused to answer questions.

When Mr. Chmielewski called the City about unauthorized persons on his beach parcel, the City declined to enforce its trespassing laws. Instead, when Mr. Chmielewski placed lawn furniture on the private sidewalk in an attempt to block the public from walking across his beach parcel, City police removed the furniture and threatened to arrest him.

The City also facilitated public use of Block M. The City Manager said people who used the Don Vista property could use Block M for a wedding. And the Chmielewskis often noticed nuptials on the beach parcel. The City held public events on Block M. It organized a large wiffle ball tournament in 2009 that occurred along Block M, including the beach parcel. Several hundred individuals

attended the event. A police officer told one Chmielewski family member that the event was private and made him leave his own property.

The Chmielewskis' Lawsuit

In 2009, the Chmielewskis initiated the underlying lawsuit pursuant to 42 U.S.C. § 1983 alleging an unreasonable seizure of their property in violation of their Fourth Amendment rights and an unlawful taking of their beach parcel without full compensation in violation of the Florida Constitution. The Chmielewskis alleged that the City had encouraged and invited the general public to use Block M and, as a result, they suffered a seizure of their residential property and a taking of their beach parcel.

Before trial, the district court denied the City's motion for summary judgment. The court found there was evidence that the City had invited or facilitated members of the public to access Block M and that those individuals traversed, and thus interfered with the Chmielewskis' possessory interest in their beach parcel. The district court further held that disputed issues of material fact existed as to whether the interference was meaningful, that is, sufficiently constant and physical to interfere with the Chmielewskis' possessory interests.

Jury Verdict for the Chmielewskis

A four-day jury trial ensued. At the close of the Chmielewskis' case, the district court denied the City's motion for a directed verdict. The jury returned a

verdict for the Chmielewskis on both the federal § 1983/Fourth Amendment claim ("Count I") and the state inverse condemnation claim ("Count II"). On Count I, the jury awarded emotional distress damages as well as property-related damages, which the district court subsequently found were duplicative of the damages awarded for Count II.[2] The jury awarded $1,489,700 on Count II—the exact amount that the Chmielewskis' appraiser testified represented "just compensation" for the value of the entire beach parcel plus the severance damages to the Chmielewskis' residential property.

After trial, the City moved for judgment as a matter of law and a new trial on both counts. The district court held that the evidence was sufficient to support the jury's finding that the City had meaningfully interfered with the Chmielewskis' use and enjoyment of their property, in violation of the Fourth Amendment, and that the Chmielewskis had presented substantial evidence from which a reasonable jury could find that the City's statements and actions had demonstrated "more than a passive attitude" about the public's use of the Chmielewski property. On the takings claim, the district court also held that the evidence supported a finding that the City:

[2] On April 19, 2017—after the completion of appellate briefing but before oral argument—the parties notified this court that Count I, the Fourth Amendment seizure claim, "has been settled and is no longer an issue in this appeal." Accordingly, we have limited our analysis to Count II, the Florida takings/inverse condemnation claim.

> created a right of public access across Block M behind the Don Vista Center, so that a fair-minded person could conclude that the City's actions gave members of the public a permanent and continuous right to pass to and fro on Block M, so that the Chmielewski Block M beach parcel may be continuously traversed.

The district court also denied the City's request, in the alternative, to compel transfer of fee simple title to the Chmielewskis' beach property.

STANDARD OF REVIEW

The City challenges two specific post-trial rulings of the district court: (1) the denial of its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, and (2) the denial of its motion for a new trial under Rule 59.

Under Rule 50, the "proper analysis is squarely and narrowly focused on the sufficiency of evidence," that is, whether the evidence is "legally sufficient to find for the party on that issue." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007). All reasonable inferences are drawn in favor of the nonmoving party, no credibility determinations may be made, the evidence may not be weighed, and evidence that the jury need not have believed is to be disregarded. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000). Such a motion is to be granted "only if the evidence is so overwhelmingly in favor of the moving party that a reasonable jury could not arrive at a contrary verdict." *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11th Cir. 2001).

A Rule 59 motion for a new trial based on evidentiary grounds is to be granted only if the verdict "is against the clear weight of the evidence or will result in a miscarriage of justice." *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984) (quotation marks omitted). "Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001).

DISCUSSION

As the Supreme Court has held, inverse condemnation cases inherently require a fact-intensive analysis. "No magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). The Supreme Court has drawn some bright lines, but "most takings claims turn on situation-specific factual inquiries." *Id.* at 32. In this appeal, the City argues that the inverse condemnation award must be reversed because there is no evidence of a taking under Florida law. Alternatively, the City contends that if the judgment is enforced, it should receive title to the beach parcel.

We are unpersuaded by the City's arguments. First, the evidence at trial supported the jury's finding that a physical taking occurred through the continuous

occupation of the Chmielewskis' property by members of the general public. Through its actions, the City encouraged public occupation by placing beach access signs, clearing vegetation, creating nearby parking spaces, hosting events at the property, and refusing to remove trespassers. Second, there was no basis to grant a new trial. Third, on the City's request for fee simple ownership of the beach parcel upon payment of the judgment—we hold that such relief is not warranted under Florida law and the district court did not abuse its discretion in denying the City's request to transfer title.

I. Permanent Physical Taking

Article X, § 6(a) of the Florida Constitution provides, "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ." This clause prohibits the government from taking private property for a public use without paying for it. *Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd.*, 493 So. 2d 417, 419-20 (Fla. 1986). Because Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis.[3]

A physical invasion constitutes a *per se* taking, in part because the "power to exclude has traditionally been considered one of the most treasured strands in an

[3] *See St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1226 (Fla. 2011) (holding that the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution are interpreted coextensively), *rev'd on other grounds*, 570 U.S. 595 (2013).

owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). A plaintiff need not demonstrate direct government appropriation of private property to prove a taking. A taking also occurs when the government gives third parties "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987).[4]

Moreover, even a temporary or intermittent invasion of private property can trigger physical takings liability. *Ark. Game & Fish Comm'n*, 568 U.S. at 32 (holding government-induced recurrent floodings, even if temporary in duration, are not categorically exempt from Takings Clause liability).

City's Actions Encouraged Use of Beach Parcel

In this case, the City encouraged public use of the beach parcel by:

- clearing the sidewalk abutting the Chmielewski residence and placing prominent "beach access" signs to encourage public use of the beach parcel;
- removing chairs the Chmielewskis had placed on the sidewalk in an attempt to block its use by the public;
- installing parking meters near the beach parcel and encouraging Don Vista Building patrons to access the beach after visiting the SunTan Arts Center;
- allowing weddings and other public events to be held on Blocks M and N;

[4] In *Nollan*, the Supreme Court held that the government could not take an easement for the public to cross a privately owned beach parcel without paying for it. 483 U.S. at 831. Even though "no particular person [wa]s permitted to station himself permanently upon the premises," the taking of "a permanent and continuous right to pass to and fro" across privately owned beach property constituted a "permanent physical occupation" and a *per se* taking. *Id.* at 831-32.

- using Block M for a July 4th celebration, even after the property owners in the subdivision voted to deny the City's request to use the property;

- publicly using Lot M for the mayor's charity wiffle ball tournament and having police threaten to arrest Mr. Chmielewski when he objected; and

- taking the public position, through its City Manager, that anyone authorized to use the Don Vista Center could use Block M, notwithstanding the City's concession in the 2008 quiet title settlement agreement that members of the general public would not be allowed to use Block M.

Each of these actions resulted in frequent public use of the beach parcel. In light of these facts, it cannot be said that the evidence was "so overwhelmingly in favor of the [City] that a reasonable jury could not arrive at a contrary verdict." *Middlebrooks*, 256 F.3d at 1246.

The City points to the district court's statement that "[t]he City has never asserted ownership or exclusive control over that strip owned by Mrs. Chmielewski [the beach parcel]." Yet ownership and exclusive control are not necessary elements for a takings claim. *See Loretto*, 458 U.S. at 427 n.5 (providing that a physical taking occurs when government "deliberately brings it about that . . . the public at large regularly use or permanently occupy space or a thing which theretofore was understood to be under private ownership"); *Rubano v. Dept. of Transp.*, 656 So. 2d 1264, 1267 (Fla. 1995) (recognizing a taking if the government "by its conduct . . . has effectively taken" private property).

At trial, the Chmielewskis presented sufficient testimony and evidence to show that the continuous public trespassing and occupation of their property was

the natural and intended effect of the City's actions. Moreover, the agreed-upon jury instruction stated that the City is responsible for a public occupation taking if "actions attributable to the government, result in a permanent physical occupation of the property by the government itself or by others."

Denying post-trial relief, the district court found the evidence could support a finding by a reasonable jury that the City "authorized or encouraged constant physical occupation of the Chmielewskis' property by the public." This finding alone is enough to hold the City liable for a physical taking. *Nollan*, 483 U.S. at 832. The City's actions, therefore, imposed a de facto public access easement on the Chmielewskis' property.

II. Motion for New Trial

The district court denied the City's Rule 59 motion for a new trial, holding that "the jury's verdict on liability on both Counts was supported by sufficient evidence, including reasonable inferences drawn from the evidence. The jury's verdict is not contrary to the great weight of the evidence." Nonetheless, the City asks us to reverse, arguing that the "the great weight of the evidence does not support the jury's verdict on either claim." We are unpersuaded by this argument. The standard of review on a motion for a new trial is abuse of discretion. *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524, 1528 (11th Cir. 1993). For the reasons articulated above, there is no basis to disturb the jury's verdict.

III. Transfer of Fee Title

In its post-trial motions, the City—for the first time—asked the district court, in the alternative, to transfer title to the Chmielewskis' beach parcel. Citing no authority and providing no explanation or analysis, the City raised the following one-sentence request for relief in the final paragraph of its twenty-five-page motion: "Finally if any amount is awarded for Count II (the takings claim), the CITY requests that title to the pathway and the beach parcel be transferred to the CITY." In a footnote, the district court summarily addressed and denied the City's "transfer of title" demand, ruling that "[i]n the final sentence of the motion, the City requests that title to the pathway and beach parcel be transferred to the City if damages are awarded for Count II, but provides no authority for this request. It is therefore denied."

Likewise, we are not swayed by the City's argument that title to the beach property should transfer so as to prevent a "windfall at the expense of the public." The City claims it would be inequitable for the Chmielewskis to retain fee title when the jury found the City had affected a physical taking of the entire beach parcel and had awarded damages for the full value of the property. Yet in returning a verdict for the Chmielewskis, the jury simply found that the City had taken for itself, or for the public, "a permanent and continuous right to pass to and fro" over the property. The district court agreed, denying the City's Rule 50

motion and holding that a reasonable jury could find, as this jury had, that "the City's actions gave members of the public a 'permanent and continuous right pass to and fro'" on the beach parcel. This is in the nature of an easement. *See Nollan*, 483 U.S. at 827-28, 831; *Loretto*, 458 U.S. at 433. It is not title ownership.

Under Florida law, the taking of an easement may, in some cases, amount to the taking of the full value of the fee with resultant severance damages, but "naked fee title" still remains in the property owner. *Smith v. City of Tallahassee*, 191 So. 2d 446, 448 (Fla. Dist. Ct. App. 1966). As the Chmielewskis observed in supplemental briefing, "[i]f the taking included legal title, the City arguably could erect rest shelters, widen the sidewalk across the Chmielewskis' property, alter the terrain on the dunes, or remove the Chmielewskis[']narrow pathway across the beach parcel toward the water."

Moreover, Florida law provides that the City "is not permitted to acquire a greater . . . interest [in condemned property] than is necessary to serve the public purpose for which the property is acquired." *Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So. 2d 503, 507 (Fla. 1986). The one and only public purpose the City ever asserted for what it did to the Chmielewskis' property was the need to provide public access to the beach. Because existing plat restrictions prevented the land in question from being developed, the City needed nothing more than a public easement across the land to accomplish its goal of beach access.

Finally, the jury's award of inverse condemnation damages was based on an appraisal by the Chmielewskis' expert who used a "before and after" approach to determine the loss of value to the Chmielewskis' property as a result of the easement-type taking. The appraiser's estimate was not introduced as a market valuation of the fee simple estate.

Therefore, we affirm the district court's ruling denying the City's request to transfer title of the beach parcel. However, in the interest of justice, we hold that the City has paid for, and is entitled to, a permanent easement across the Chmielewskis' beach property for the benefit of the public. We direct the district court to amend its judgment to reflect this permanent easement.

AFFIRMED.

Supreme Court of Florida

No. SC16-1474

DONNA KOPPEL,
Petitioner,

vs.

LAURA OCHOA, et al.,
Respondents.

[May 17, 2018]

QUINCE, J.

We have for review the decision of the Second District Court of Appeal in *Ochoa v. Koppel*, 197 So. 3d 77 (Fla. 2d DCA 2016), in which the district court certified conflict with *Goldy v. Corbett Cranes Services, Inc.*, 692 So. 2d 225 (Fla. 5th DCA 1997), regarding whether the filing of a motion under Florida Rule of Civil Procedure 1.090 to enlarge the time to accept a proposal for settlement automatically tolls the 30-day deadline for accepting the proposal until the motion is decided. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we conclude that a motion to enlarge does not toll the time to accept a

proposal for settlement. Accordingly, we approve the decision of the Second District and disapprove the decision of the Fifth District.

FACTS

The Second District set forth the following facts:

> On December 9, 2011, Ms. Ochoa was injured in a crash with a car driven by Ms. Koppel. In April 2013, she sued Ms. Koppel, alleging negligence and seeking damages to compensate her for her injuries.
>
> On September 3, 2013, Ms. Ochoa served Ms. Koppel with a proposal for settlement pursuant to section 768.79 and rule 1.442. The proposal offered to dismiss the action with prejudice in exchange for a lump-sum payment by Ms. Koppel of $100,000. Rule 1.442(f)(1) provides that a proposal for settlement is "deemed rejected" if not accepted within thirty days after service of the proposal, and Ms. Ochoa's proposal stated that it would be withdrawn if not accepted within that time. On the same day she served the proposal, Ms. Ochoa filed a notice that the case was ready for trial.
>
> On October 2, 2013—one day before the thirty-day period to accept the settlement proposal expired—Ms. Koppel filed a motion seeking to enlarge the time in which to respond to the proposal. The motion cited Florida Rule of Civil Procedure 1.090, which governs enlargements of time, and alleged that Ms. Koppel had not had sufficient time to evaluate the proposal because (1) she had recently received through discovery a new MRI report bearing on Ms. Ochoa's alleged injuries and (2) the case remained "in its infancy" and Ms. Ochoa's deposition had not been taken. Ms. Ochoa later filed a notice setting a hearing on the motion for December 2, 2013.
>
> Although we do not have a transcript of the hearing, the parties agree that the court did not render a decision on December 2 and that it instead requested that the parties submit additional authorities on or before December 5. The day after the hearing, on December 3, 2013, Ms. Koppel served a notice purporting to accept the proposal for settlement. Two days later, on December 5, 2013, she provided the court with the authorities it had requested. Later that day, the court

> entered an order denying Ms. Koppel's request to enlarge the time in which to accept the proposal for settlement.
>
> Ms. Ochoa next filed a motion to strike Ms. Koppel's notice accepting the proposal for settlement on grounds that it was untimely. Ms. Koppel opposed the motion and argued that under the Fifth District's decision in *Goldy* [*v. Corbett Cranes Services, Inc.*, 692 So. 2d 225 (Fla. 5th DCA 1997)], her filing of a motion to enlarge time under rule 1.090 tolled the thirty-day period in which she was authorized to accept the proposal. According to Ms. Koppel, the period remained tolled until the trial court denied her motion for enlargement of time on December 5, 2013. Ms. Koppel coupled her response to the motion to strike with a motion to enforce the settlement that she asserted was created by her acceptance of Ms. Ochoa's proposal for settlement.
>
> After a hearing, the trial court agreed that Ms. Koppel's filing of a motion to enlarge time tolled the time she had to accept the settlement proposal, denied the motion to strike the notice of acceptance, and granted the motion to enforce settlement. The trial court then entered a final judgment dismissing Ms. Ochoa's case with prejudice based upon the proposal and acceptance. Ms. Ochoa timely appealed.

Ochoa, 197 So. 3d at 78-79.

On appeal, the district court reversed the trial court, finding that the texts of rules 1.090 and 1.442 were "unambiguous in that neither contains language that could in any way be construed as providing that the time to accept a proposal for settlement is tolled when a motion to enlarge the time to do so is filed." *Id.* at 80. In rejecting Koppel's argument that *Goldy* was controlling, the court stated that the Fifth District's decision "seem[ed] . . . inconsistent with the concept of a strictly construed deadline" and certified conflict. *Id.* at 83.

ANALYSIS

The conflict issue presented is whether the filing of a motion under Florida Rule of Civil Procedure 1.090 to enlarge the time to accept a proposal for settlement automatically tolls the 30-day deadline for accepting the proposal until the motion is decided. The standard of review in determining whether an offer of settlement and purported acceptance comport with Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes (2013), is de novo. *Pratt v. Weiss*, 161 So. 3d 1268, 1271 (Fla. 2015). Similarly, the standard of review of a court's interpretation of the rules of civil procedure, in this case Florida Rule of Civil Procedure 1.090(b), is also de novo. *Strax Rejuvenation & Aesthetics Institute, Inc., v. Shield*, 49 So. 3d 741 (Fla. 2010).

Relevant Provisions

Section 768.79, Florida Statutes (2013), governs offers of judgment, and "provides a sanction against a party who unreasonably rejects a settlement offer." *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003). Section 786.79 provides, in relevant part:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs

> and attorney's fees against the award . . . .If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.

Rule 1.442 outlines the procedures that must be followed when implementing section 786.79. The rule provides, in relevant part:

> (f) Acceptance and Rejection.
>
> (1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of Florida Rule of Judicial Administration 2.514(b) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

Rule 1.090(b) governs the enlargement of time periods established by the civil rules. It provides, in relevant part:

> (b) Enlargement. When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion (1) with or without notice, may order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect, but it may not extend the time for making a motion for new trial, for rehearing, or to alter or amend a judgment; making a motion for relief from a judgment under rule 1.540(b); taking an appeal or filing a petition for certiorari; or making a motion for a directed verdict.

Certified Conflict

In *Goldy*, the conflict case, the plaintiff submitted an offer of judgment to the defendant. 692 So. 2d at 226. In accordance with rule 1.442, the offer was set to expire in 30 days, on March 6. *Id.* The plaintiff then granted the defendant a gratuitous extension of time. *Id.* Under the extension, the offer would expire on March 29. *Id.* On March 14, the defendant filed a motion pursuant to rule 1.090 to enlarge the time to respond to the offer. *Id.* In response, the plaintiff directed a letter to the defendant stating that the offer would be withdrawn and no longer effective after March 29. *Id.* The motion to extend was never heard by the trial court in view of the plaintiff's absolute withdrawal. *Id.*

The jury verdict exceeded the plaintiff's settlement offer by 125%. *Id.* at 226. Following the verdict, the plaintiff filed a motion for sanctions against the defendant. *Id.* The trial court granted the defendant's motion to dismiss the request for sanctions, finding that the plaintiff's offer was withdrawn and rendered void in the March 25 letter. *Id.* On appeal, the Fifth District agreed with the trial court, which held that the defendant's motion to extend time "effectively tolled the responsive period until the motion could be heard." *Id.* at 228. Thus, the offer did not expire on March 29 and instead was withdrawn on March 29. *Id.* Consequently, the district court found that the plaintiff was not entitled to sanctions under a settlement offer that had not yet expired but instead had been withdrawn.

In support of its conclusion, the district court in *Goldy* quoted with approval the trial court's order, which relied on *Morales v. Sperry Rand Corp.*, 601 So. 2d 538 (Fla. 1992), and *Nationwide Mutual Fire Insurance Co. v. Holmes*, 352 So. 2d 1233 (Fla. 4th DCA 1977), two cases that also involved time periods that were to be strictly construed. *Id.* In *Morales*, we held that a motion seeking to extend the period within which to serve an adverse party with initial process only needed to be filed, not ruled on, within the 120-day period in order to avoid dismissal of the suit. 601 So. 2d at 540. In *Nationwide*, the Fourth District Court of Appeal held that a motion seeking to extend the period within which to substitute a party following the death of a party only needed to be filed within the 90-day period following suggestion of death, not ruled on, in order for the suit to avoid automatic dismissal. 351 So. 2d at 1234. Based on these cases, the district court agreed with the trial court's statement that it was "logical then to conclude that a motion to enlarge the period within which to respond to an Offer of Judgment would effectively toll the responsive period provided that the motion [was] filed before the period had otherwise expired." *Goldy*, 692 So. 2d at 228.

Judge Griffin concurred in part and dissented in part in *Goldy*. *Id.* at 228-29. She expressed concern with the court's holding that "the mere filing of a motion to extend the deadline for response to an offer of judgment tolls the time for its expiration." *Id.* at 228. Instead, she believed that "[t]he deadline must be extended

before the expiration occurs. . . . [O]therwise, any offer of judgment could be stymied in this way." *Id.* Despite this, she was not troubled by the outcome due to the plaintiff's use of the word "withdrawn." *Id.* at 229. Because the "rules and statutes should be strictly complied with," the judge believed that any misunderstanding regarding the effect of the word "withdrawn" on the offer should still disfavor an award. *Id.*

In this case, the plaintiff submitted an offer of judgment to the defendant. The offer was set to expire on October 3. 197 So. 3d at 78. On September 3, the plaintiff provided the defendant with an MRI report and a neurosurgical evaluation not previously disclosed. On October 2, the defendant filed a motion to enlarge the time to respond to the offer. *Id.* at 79. The defendant argued that she had not had the opportunity to review the offer of judgment in light of the new medical information disclosed and the fact that the plaintiff's deposition had not been taken. *Id.* The plaintiff later filed a notice setting a hearing on the motion for December 2. *Id.*

The trial court heard the motion on December 2 and ordered additional authorities from the parties. *Id.* On December 3, the defendant accepted the offer and on December 5, the defendant provided the court with the additional authorities it had requested and the trial court entered an order denying the motion to enlarge time. *Id.* The plaintiff then filed a motion to strike the defendant's

acceptance of the offer, arguing that the defendant's acceptance on December 3 was untimely. *Id.* The defendant opposed the motion and argued that under *Goldy* the motion to extend tolled the time to accept the offer. *Id.* The trial court agreed, and granted the motion to enforce the settlement. *Id.*

In reversing the trial court's order to enforce the settlement, the district court found that the texts of rules 1.090 and 1.442 were unambiguous and could not be construed in any way to provide for tolling once a motion to enlarge had been filed. *Id.* at 80. The court stated that holding otherwise "grants a party a de facto enlargement of time—without the judicial supervision, exercise of discretion, and substantive showings rule 1.090 requires—until the motion is decided." *Id.* at 81. Because the court could not "reconcile the Fifth District's holding with the requirement that civil rules be interpreted in accord with ordinary principles of statutory construction," the court certified conflict with *Goldy*. *Id.* at 82.

Interpretation

"It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." *Saia Motor Freight Line, Inc., v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So.

157, 159 (Fla. 1931)); *accord Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992). If, however, the language of the rule is ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity. *See, e.g., Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006).

Neither party argues that rules 1.090 and 1.442 are ambiguous. Despite this, Petitioner contends that this Court should look to rule 1.010 to construe the provisions. Rule 1.010 provides that the "rules shall be construed to secure the just, speedy, and inexpensive determination of every action." However, this is the direction only if a rule needs interpretation. Here, the language is clear and unambiguous. Accordingly, there is no need to resort to the rules of statutory interpretation, which would require us to consider the purpose of the rules as outlined in rule 1.010.

Instead, it is clear from the plain language that neither rule contains language that would provide for tolling once a motion to enlarge is filed. Rule 1.442 does not address the computation of time. In regards to accepting an offer for settlement, the rule states that (1) delivery of a written notice within 30 days is required, (2) Florida Rule of Judicial Administration 2.154(b) does not apply, and (3) oral communication cannot serve as an acceptance, rejection, or counteroffer.

Rule 1.090 allows for the time period set forth in rule 1.442 to be enlarged, but this enlargement is at the trial court's discretion if the motion was filed before expiration of the time period and cause has been shown. After the time period has expired, the trial court still has discretion to enlarge the time period if the moving party can demonstrate excusable neglect in addition to cause. Nowhere does the rule allow additional time to accept by simply filing the motion to enlarge. This seems consistent with the rule, which provides for additional time only after cause has been shown.

Petitioner argues that this Court should agree with the Fifth District's reasoning because it is consistent with the goals behind the Florida Rules of Civil Procedure and the public policy in favor of settlements. Petitioner contends that if rule 1.090 does not allow for automatic tolling upon filing, offerors will be able to surprise offerees with new discovery that offerees may not have time to consider before the 30-day window for acceptance closes. Additionally, if the motion must be heard before the offer expires, Petitioner worries that offerees in busier circuits will be disadvantaged if they are unable to secure a hearing on the motion to enlarge before the period to accept ends.

While these are valid concerns, it is apparent from the text of the rule that motions to enlarge are not granted without a showing of cause before the trial judge. As noted by Judge Griffin, and repeated by the Second District in *Ochoa,*

allowing the time to accept an offer of settlement to toll once a motion to enlarge has been filed would appear to provide an automatic period of enlargement and seems to undermine the rule as it is currently written. Without a showing of cause, an offeree could extend the offer indefinitely, all while the offering party continues to incur costs related to the case. In this case, the offeree did not extend the period indefinitely, but instead filed the motion to enlarge a day before it was set to expire. The court did not hear the motion until two months later, at which point the offeree accepted a day before the court denied the motion. Ultimately, the offeree accepted the offer 90 days after it was made without permission from the offeror or the trial court. The rules do not support this outcome.

Petitioner also argues that this Court should allow *Goldy* to stand because it has been the controlling law in Florida for the past 19 years. However, district courts have not agreed that rule 1.090 provides for tolling once a motion has been filed. The Second District first addressed this issue in *Donohoe v. Starmed Staffing, Inc.*, 743 So. 2d 623 (Fla. 2d DCA 1999), released two years after the Fifth District's decision in *Goldy*. In *Donohoe*, the defendants made an offer of settlement to the plaintiff and the plaintiff requested extra time to complete two depositions. 743 So. 2d at 624. The defendants refused to agree to an extension, and the plaintiff filed a motion to enlarge that was never set for hearing. *Id.* at 625. After trial, the defendants sought to recover their attorney's fees and costs, which

the trial court denied. *Id.* On review, the Second District reversed the trial court, finding the motion to enlarge did not toll the time to accept the offer and that *Goldy* was distinguishable because there the offer had been withdrawn. *Id.*

The Third District Court of Appeal came to a similar conclusion more recently in *Three Lions Construction, Inc. v. Namm Group, Inc.*, 183 So. 3d 1119 (Fla. 3d DCA 2015). There, the district court ruled that a corporation's motion for extension of time to accept a proposal for settlement was ineffective to toll the time for acceptance where the opposing party did not agree to the extension and the corporation did not obtain a hearing prior to the expiration of time. *Three Lions*, 183 So. 3d at 1119-20. Both *Donohoe* and *Three Lions* are more similar to the instant case, where Petitioner filed a motion to extend the time but did not set the motion for hearing before the period of time expired.

The Second District was correct in its conclusion that the filing of a motion to enlarge pursuant to rule 1.090 does not toll the time to accept an offer of settlement made under section 768.79. Accordingly, we approve the Second District's decision in *Ochoa* and disapprove the Fifth District's decision in *Goldy*.

Prospective Application

Petitioner argues that if we approve the Second District, this decision should be applied prospectively and not retroactively. In support of this position, Petitioner relies on *Florida Forest & Park Service v. Strickland*, 18 So. 2d 251

(Fla. 1944), *International Studio Apartment Assn., Inc. v. Lockwood*, 421 So. 2d 1119 (Fla. 4th DCA 1982), *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d DCA 2009), and *Aronson v. Congregation Temple De Hirsch*, 123 So. 2d 408 (Fla. 3d DCA 1960). However, none of these cases allows for a prospective application our holding in this case.

Judicial decisions in the area of civil litigation have retrospective as well as prospective application. *Lockwood*, 421 So. 2d at 1120. This includes decisions of a "court of last resort overruling a former decision . . . unless specifically declared by the opinion to have a prospective effect only." *Strickland*, 18 So. 2d at 253. The exception Petitioner claims is based on case law construing judicial construction of a statute. Such construction will ordinarily be deemed to:

> [R]elate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that where a *statute* has received a given construction by a *court of supreme jurisdiction* and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Id. (emphasis added). However, the Second District is not a "court of last resort" or the court of supreme jurisdiction referred to in *Strickland* or *Lockwood*. In *Lockwood*, the court also analyzed federal precedent because the decision declaring the statute at issue unconstitutional emanated from the United States Supreme

Court rather than this Court. *Lockwood*, 421 So. 2d at 1121-22. Such precedent has no application to this case.

In this case, the "court of last resort" is this Court, to which the Second District certified its conflict with *Goldy*. *See Nat'l Ins. Underwriters v. Cessna Aircraft Corp.*, 522 So. 2d 53 (Fla. 5th DCA 1988); *Cassidy v. Firestone Tire & Rubber Co.*, 495 So. 2d 801, 802 (Fla. 1st DCA 1986). Likewise, the Second District's decision did not qualify as an "overruling decision" as described in *Strickland* and *Lockwood*. The Second District did not overrule or overturn any "prior decision" that was controlling in the district. Instead, the Fifth District issued its *Goldy* decision, which the Second District had no authority to overrule. The Second District recognized this by certifying conflict to this Court, which does have that authority. *See* art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi).

Petitioner's reliance on *Green Tree* is misplaced. In that case, the Second District receded from an earlier decision and had to determine whether "application of the rule that we adopt today to the facts of this case would be fundamentally unfair to Green Tree." *Green Tree*, 15 So. 3d at 694. That did not occur in this case. Similarly, *Aronson* has no application to this case. There, the Third District receded from one of its earlier decisions construing the appellate rules and the deadline for filing a notice of appeal. *Aronson*, 123 So. 2d 411. Because the

court's recent decision which shortened the time period had not yet been published when Aronson filed his notice of appeal, the court held that fairness required the newer decision to apply prospectively from the date of publication. *Id.* That is not the issue in this case.

Rules 1.090 and 1.442 do not, and did not, provide for tolling of the time periods by the filing of a motion for extension and are applicable to this and all other cases.

CONCLUSION

The Second District correctly ruled that the filing of a motion to enlarge the time to accept a proposal for settlement does not automatically toll the 30-day period for accepting the proposal. Thus, it correctly held that the trial court erred in ruling that Respondent's proposal for settlement had been validly accepted by Petitioner. Accordingly, we approve the Second District, disapprove the Fifth District, and remand the case to the trial court for reinstatement of Respondent's negligence action.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and LAWSON, JJ., concur.

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

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

Second District - Case No. 2D14-1866

(Pinellas County)

Anthony J. Russo of Butler Weihmuller Katz Craig LLP, Tampa, Florida; and Paul U. Chistolini of Smoak, Chistolini & Barnett, PLLC, Tampa, Florida,

for Petitioner

George A. Vaka and Nancy A. Lauten of Vaka Law Group, Tampa, Florida,

for Respondent Laura Ochoa

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THIRD FEDERAL SAVINGS & LOAN ASSOCIATION OF CLEVELAND, Appellant, v. LEAH G. KOULOUVARIS a/k/a LEAH KOULOUVARIS and NICHOLAS KOULOUVARIS, Appellees.	)	Case No. 2D17-773

Opinion filed May 18, 2018.

Appeal from the Circuit Court for Pasco County; Kimberly Sharpe Byrd, Judge.

Morgan L. Weinstein of the Van Ness Law Firm, PLC, Deerfield Beach, for Appellant.

Mark Stopa of the Stopa Law Firm, Tampa, for Appellees.

LaROSE, Chief Judge.

Third Federal Savings & Loan Association of Cleveland appeals the trial court's order involuntarily dismissing its foreclosure case. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). Third Federal advances a variety of alleged trial court errors. We are not persuaded and, accordingly, affirm. We write for the limited purpose of explaining why the trial court properly dismissed count two of the complaint. In that

count, Third Federal sought to recover monies due on a home equity line of credit (HELOC), secured by a second mortgage.

Background

Leah and Nicholas Koulouvaris borrowed money to buy a home in Pasco County. The loan was evidenced by a note and secured by a mortgage. About a week later, they obtained a HELOC, secured by another note and a second mortgage. The HELOC note did not contain a promise by the Koulouvarises to repay a specified sum of money. Nor does our record reflect that Third Federal disbursed any money to them at the closing on the HELOC. Instead, the HELOC provided a credit limit of $40,000. Nothing on the face of the HELOC note indicates how much the Koulouvarises actually borrowed.

Third Federal sued the Koulouvarises after they defaulted on their loans. The foreclosure action proceeded to a nonjury trial. During its case-in-chief, Third Federal moved to admit the HELOC note into evidence. The Koulouvarises raised an authentication objection. They argued that the HELOC note was nonnegotiable and, thus, not a self-authenticating instrument. The trial court sustained the objection. Third Federal made no further effort to authenticate the HELOC note. The trial court also rejected Third Federal's effort to admit the HELOC mortgage into evidence, explaining that the second mortgage "has no legal significance without a note."

The Koulouvarises moved to involuntarily dismiss the case. As to count two, they argued that Third Federal failed to introduce a note, a mortgage, proof of a default, or any other competent evidence to support foreclosure. Essentially, they maintained that Third Federal failed to establish a prima facie case on its HELOC cause of action. The trial court agreed and dismissed the case.

Analysis

Florida law requires the authentication of a document prior to its admission into evidence. See § 90.901, Fla. Stat. (2012) ("Authentication or identification of evidence is required as a condition precedent to its admissibility."); Mills v. Baker, 664 So. 2d 1054, 1057 (Fla. 2d DCA 1995); see, e.g., DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439-40 (Fla. 2d DCA 2013) (holding that unauthenticated default letters from lender could not be considered in mortgage foreclosure summary judgment). Proffered evidence is authenticated when its proponent introduces sufficient evidence "to support a finding that the matter in question is what its proponent claims." § 90.901; Coday v. State, 946 So. 2d 988, 1000 (Fla. 2006) ("While section 90.901 requires the authentication or identification of a document prior to its admission into evidence, the requirements of this section are satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims.").

There are a number of recognized exceptions to the authentication requirement. One, as relevant here, relates to commercial paper under the Uniform Commercial Code, codified in chapters 678 to 680 of the Florida Statutes. "Commercial papers and signatures thereon and documents relating to them [are self-authenticating], to the extent provided in the Uniform Commercial Code." § 90.902(8); see, e.g., U.S. Bank Nat'l Ass'n for BAFC 2007-4 v. Roseman, 214 So. 3d 728, 733 (Fla 4th DCA 2017) (reversing the trial court's denial of the admission of the original note in part because the note was self-authenticating); Hidden Ridge Condo. Homeowners Ass'n v. Onewest Bank, N.A., 183 So. 3d 1266, 1269 n.3 (Fla. 5th DCA 2016) (stating that because the endorsed note was self-authenticating as a commercial paper, extrinsic evidence of authenticity was not required as a condition precedent to the note's

admissibility); Riggs v. Aurora Loan Servs., LLC, 36 So. 3d 932, 933 (Fla. 4th DCA 2010) (holding that there was no issue of authentication because the note was self-authenticating under section 90.902(8)).

Third Federal contends that the trial court should have admitted the HELOC note into evidence. According to Third Federal, the note was a self-authenticating negotiable instrument. We cannot bicker with the proposition that "for over a century . . . the Florida Supreme Court has held [promissory notes secured by a mortgage] are negotiable instruments. And every District Court of Appeal in Florida has affirmed this principle." HSBC Bank USA, Nat'l Ass'n v. Buset, 43 Fla. L. Weekly D305, 306 (Fla. 3d DCA Feb. 7, 2018) (citation omitted). That is as far as we can travel with Third Federal.

The HELOC note is not a self-authenticating negotiable instrument. By its own terms, the note established a "credit limit" of up to $40,000 from which the Koulouvarises could "request an advance . . . at any time." Further, the note provided that "[a]ll advances and other obligations . . . will reduce your available credit." The HELOC note was not an unconditional promise to pay a fixed amount of money. Rather, it established "[t]he maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed." See Line of Credit, Black's Law Dictionary, 949 (8th ed. 1999).

This distinction is not esoteric legalese. Florida law is clear that a "negotiable instrument" is "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." § 673.1041(1), Fla. Stat. (2012) (emphasis added). The HELOC note reflects no such

undertaking. It only obligates the Koulouvarises to repay whatever they borrow, up to $40,000.

Recently, the Fifth District reached the same result. In Chuchian v. Situs Invs., LLC, 219 So. 3d 992, 993 (Fla. 5th DCA 2017), the borrowers executed a series of credit agreements, the first for a credit line of up to $30,000, the second modified the credit line to up to $90,500. The Fifth District held that the "credit agreement . . . was a nonnegotiable instrument because it was not for a fixed sum." Id.

The HELOC note failed to require the payment of a fixed amount of money, making it a nonnegotiable instrument. As such, it was not self-authenticating. Thus, absent other proof of authentication, it was inadmissible into evidence. See, e.g., BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 939 (Fla. 2d DCA 2010) (noting that an unauthenticated document attached as an exhibit to a motion was inadmissible); Wright v. JPMorgan Chase Bank, N.A., 169 So. 3d 251, 252 (Fla. 4th DCA 2015) ("This [notice of servicing rights] is not competent evidence, however, because it was never authenticated and admitted into evidence at trial."); Ciolli v. City of Palm Bay, 59 So. 3d 295, 297 (Fla. 5th DCA 2011) (noting that an unauthenticated document attached to a memorandum of law does not constitute competent evidence); Tunnell v. Hicks, 574 So. 2d 264, 266 (Fla. 1st DCA 1991) (noting that an unauthenticated letter attached as an exhibit to a motion was not admissible and not properly before the court).

Conclusion

We cannot conclude that the trial court erred in sustaining the objection to the admission of the HELOC note. See State v. Wells, 538 So. 2d 1292, 1295 (Fla. 2d DCA 1989) ("We recognize that the trial court's ruling in this area of authenticating

evidence should be sustained, unless the ruling is clearly erroneous." (citing Justus v. State, 438 So. 2d 358, 365 (Fla. 1983))). Ultimately, the trial court's decision to involuntarily dismiss the case was proper.

Affirmed.

SILBERMAN and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 16, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2404
Lower Tribunal No. 15-22164

Robert Perlberg,
Appellant,

vs.

Lubercy Asia Holdings, LLC, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Samantha Ruiz Cohen, Judge.

Donald N. Jacobson, P.A., and Donald N. Jacobson (Palm Beach), for appellant.

Holland & Knight LLP, and Monte S. Starr and J. Keith Ramsey (Orlando), for appellee.

Before ROTHENBERG, C.J., and LAGOA and LOGUE, JJ.

ROTHENBERG, C.J.

This case involves a dispute between the owner of a condominium, Lubercy Asia Holdings, LLC ("Lubercy"), and an interior design firm, Perlberg Associates, Inc. ("PAI"), whose lien against the condominium was declared fraudulent by the trial court and discharged. Specifically, the trial court's order granted Lubercy's motion for summary judgment on two counts. First, the order granted summary judgment against PAI on its claim to foreclose its lien on the condominium. Second, the order granted summary judgment in favor of Lubercy on its counterclaim that PAI and Robert Perlberg ("Perlberg"), the president of PAI, filed a fraudulent lien. The trial court's order declared PAI's lien on the condominium unenforceable, discharged the lien, and determined that Lubercy is entitled to prevailing party fees and punitive damages pursuant to section 713.31(2)(c), Florida Statutes. Perlberg appeals the trial court's order granting summary judgment. For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

The trial court's order granting summary judgment is neither a final nor a partial final judgment because there are still several counts pending before the trial court in the complaint and counter-complaint that involve the same parties and arise out of the same underlying facts. See Almacenes El Globo De Quito, S.A. v. Dalbeta L.C., 181 So. 3d 559, 561-62 (Fla. 3d DCA 2015) (stating that "an order of the circuit court is 'final' if it ends all judicial labor in the case" and that an

appellate court can hear a partial final judgment "only when the claims adjudicated by that order are separate and independent from the portion of the case still to be adjudicated. . . . If all claims arise from the same set of facts, an order resolving fewer than all of the counts is not appealable") (citations and footnote omitted).

On appeal, Perlberg also contests the trial court's determination that Lubercy is entitled to prevailing party fees pursuant to section 713.31(2)(c), but that determination is not appealable because the amount of fees has not yet been fixed. Threadgill v. Nishimura, 222 So. 3d 633, 635 (Fla. 2d DCA 2017) ("An order that merely finds entitlement to attorney's fees but does not set an amount is a nonfinal, nonappealable order."); Mem'l Sloan-Kettering Cancer Ctr. v. Levy, 681 So. 2d 842, 842 (Fla. 3d DCA 1996) (holding that "because the trial court's order finding that the appellees were entitled to an award of attorney's fees against the appellant did not fix the amount, we dismiss that portion of the appeal for lack of jurisdiction").

Perlberg contends that this Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii), which grants district courts of appeal jurisdiction over appeals of non-final orders that determine "the right to immediate possession of property." However, even an order granting summary judgment and determining that a party has "no legal right to possess the property" is not appealable under rule 9.130(a)(3)(C)(ii) because it does not "determine the

'immediate right to possession' even though it may resolve the underlying legal issues." Tarik, Inc. v. NNN Acquisitions, Inc., 17 So. 3d 912, 913 (Fla. 4th DCA 2009). Similarly, here, although the summary judgment order on appeal adjudicated some of the underlying legal issues, it did not determine the **immediate** right to possession of property. Accordingly, rule 9.130(a)(3)(C)(ii) does not provide this Court with jurisdiction.

For these reasons, we dismiss this appeal as taken from a non-final, nonappealable order.

Dismissed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA RESEARCH INSTITUTE FOR EQUINE NURTURING, DEVELOPMENT AND SAFETY, INC., a Florida not for profit corporation,
Appellant,

v.

DANA DILLON and **ROBERT DILLON,** individually,
Appellees.

No. 4D17-605

[May 16, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos A. Rodriguez, Judge; L.T. Case No. CACE13-024657.

Thomas H. Loffredo and Rebecca A. Rodriguez of Gray|Robinson, P.A., Fort Lauderdale, and Kristie L. Hatcher-Bolin of Gray|Robinson, Lakeland, for appellant.

Bruce H. Little of Bruce H. Little, P.A., Fort Lauderdale, for appellees.

GERBER, C.J.

A corporation, organized to provide horse rescue services, appeals from the circuit court's final judgment, after a non-jury trial, in favor of a wife and husband arising from their alleged membership rights in the corporation. The corporation primarily argues that the trial court erred in two respects: (1) by concluding that the corporation illegally terminated the wife's membership in the corporation without affording her notice and a hearing; and (2) by finding that the husband was a member of the corporation at the time he demanded to inspect the corporation's corporate records. On the first argument, we agree with the corporation and reverse as to the wife's action. On the second argument, we disagree with the corporation and affirm without discussion as to the husband's action.

We present the circuit court's findings of fact in the final judgment as to the wife's action to the extent such findings are supported by competent, substantial evidence. *See Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) ("When a decision in a non-jury trial is

based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence."). Other record facts are included below where necessary to provide a complete picture of the material facts.

Procedural History

The corporation was formed as a not for profit charitable organization under chapter 617, Florida Statutes (governing not for profit corporations). Persons can become member sponsors of the corporation essentially by completing a membership application, paying a membership fee, being approved for membership, and paying recurring contributions towards the care of a horse or horses which the member is sponsoring.

The corporation was governed by a board of directors, sometimes referred to as the board of trustees. The corporation was operated according to a set of bylaws and a set of rules. The corporation's original bylaws provided that the board could remove a member by providing written notice to the member of a hearing, at which the board could remove the member for cause. The corporation later amended its bylaws to delete the requirements of notice and a hearing before the board could remove a member for cause. The amended bylaws provide, in pertinent part:

> The Board of Trustees may suspend or expel a member . . . for "just cause" after a vote is held at any regular, special or emergency meeting if deemed in the best interest of the organization, the horses or the general membership. Management may enforce the termination of membership if the member has received a prior verbal and written warning as stated in the Rules and Regulations. Should there be a vote of the Board of Trustees to terminate a member, and that vote is unanimous, when they terminate this member, then that member becomes ineligible for reinstatement.

The corporation's rules provide, in pertinent part:

> Membership termination is at the discretion of management and the Board of Directors.
>
> . . .
>
> Any member/sponsor, who we determine has intentionally tried to undermine the organization, the Board of Directors or Management will terminate their membership immediately and without warning.

The bylaws amendment and rules existed before the wife became a member of the corporation.

After the wife became a member of the corporation, she received multiple verbal and written warnings for various rules violations. Despite these warnings, the wife ultimately sent an e-mail to someone outside of the corporation, accusing the corporation of a variety of misdeeds, and alleging, among other things, "[The corporation] is as corrupt as you can imagine."

After the corporation's board became aware of the wife's accusatory e-mail, the board set an emergency meeting without providing notice to the wife. At the meeting, the board unanimously voted to terminate the wife's membership for cause. The corporation sent the wife a letter notifying her of the termination.

The wife brought a declaratory judgment action against the corporation. The wife alleged, among other things, that the board did not legally terminate her membership because the board did not provide her with notice and a hearing before terminating her membership.

In its answer, the corporation alleged that it terminated the wife's membership "pursuant to a fair and reasonable procedure carried out in good faith." The corporation alleged that the wife had violated the corporation's rules and ignored the corporation's directions to comply with the rules before the corporation terminated her after multiple violations.

After a non-jury trial, the trial court entered a final judgment in the wife's favor. The trial court reasoned, in pertinent part:

> The termination of any member of [the corporation] is governed by Florida Statute § 617.0607, which dictates that a member may not be expelled or suspended and that a membership of a corporation may not be terminated or suspended except pursuant to a procedure that is fair and reasonable and carried out in good faith. The statute was obviously designed to comply with constitutional due process of law and notice requirements.
>
> . . .
>
> The changes in the By-Laws affected the requirement of a hearing, but both the [original] and [amended] By-Laws

required "just cause" for removal of any member. Procedurally, the determination of whether there is just cause must be "fair and reasonable" by statute which legislates that some measure of due process must occur. The [amended] By-Laws do not establish a procedure for removal that is "fair and reasonable."

No emergency existed for the termination of [the wife's] membership without notice, a hearing and the opportunity to be heard as required by a reasonable interpretation of the By-Laws, and strict interpretation of Florida law and due process.

. . .

Pursuant to Florida law, and [the corporation's] By-Laws, and constitutional due process of law, [the corporation] was required to provide a fair and reasonable procedure for the termination of [the wife's] membership after they decided to terminate or initiated the process.

[The wife's] membership was never effectively terminated; and therefore, the Court determines her to still be a member of [the corporation].

. . .

In reaching a decision in this case . . . , the Court considered and applied . . . sec. 617.0607[,] Florida Statute[s]. A similar case considered and applied by the Court was *La Gorce Country Club v. Cerami*, 74 So. 2d 95 (Fla. 1954). In *Cerami*, a member of a private club was terminated under a similar By-Law provision without a hearing and at the sole discretion of the Board. The Supreme Court affirmed the trial court in compelling his reinstatement based on the due process requirement that he be afforded a hearing.

. . .

The Court finds in favor of [the wife] as to her declaratory action and determines that her membership was not reasonably, fairly or legally terminated and therefore, she continues to be a member of [the corporation].

> The [corporation], . . . the Board or individual members are hereby ordered to provide all the benefits and obligations of membership in [the corporation] to [the wife] and to refrain from involuntarily terminating the membership of [the wife] without first according her notice and a hearing which comports with Fla. Stat. § 617.0607 and the minimum standards of due process of law . . . .

Our Review

This appeal followed. The corporation argues that the trial court misapplied the applicable law and relied upon an inapplicable legal standard in ruling that the wife's membership was unreasonably and unlawfully terminated. More specifically, the corporation argues the trial court erred by ruling that the corporation's membership termination procedures were invalid based upon a purported due process violation.

To the extent the trial court's final judgment was based upon its legal conclusion that the corporation's application of the bylaws violate due process, our review is de novo. *See Acoustic Innovations*, 976 So. 2d at 1143 ("[W]here a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo*."); *Natiello v. Winn-Dixie Stores, Inc.*, 203 So. 3d 209, 210 (Fla. 4th DCA 2016) ("[T]he issue of whether a party has been denied procedural due process is reviewed de novo."); *Retreat at Port of Islands, LLC v. Port of Islands Resort Hotel Condo. Ass'n, Inc.*, 181 So. 3d 531, 532 (Fla. 2d DCA 2015) ("[O]rganizational bylaws are treated as contracts, and we review construction of those bylaws de novo.").

We agree with the corporation's arguments regarding its termination of the wife's membership for three reasons:

1. the plain language of section 617.0607(1), Florida Statutes (2013), does not require notice and a hearing before a not for profit corporation terminates a member;

2. the corporation's bylaws and rules set forth an expulsion and termination procedure "that is fair and reasonable and [was] carried out in good faith" under section 617.0607(1); and

3. the case upon which the trial court primarily relied, *La Gorce Country Club v. Cerami*, 74 So. 2d 95 (Fla. 1954), is inapplicable.

We address each reason in turn.

1. Plain Language

First, the plain language of section 617.0607(1), Florida Statutes (2013), does not require notice and a hearing before a not for profit corporation terminates a member. Section 617.0607(1) states: "A member of a [not for profit] corporation may not be expelled or suspended, and a membership in the corporation may not be terminated or suspended, *except pursuant to a procedure that is fair and reasonable and is carried out in good faith*." (emphasis added). If the legislature had intended that a member of a not for profit corporation may not be expelled or suspended, or that a membership in a corporation may not be terminated or suspended, except pursuant to "notice and a hearing," then the legislature could have said so. Because the legislature has not said so, both we and the trial court are without power to modify the statute to include the requirement of notice and a hearing before a not for profit corporation terminates a member. *See Hill v. Davis*, 70 So. 3d 572, 575-76 (Fla. 2011) ("Courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. Thus, if the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute.") (internal citations and quotation marks omitted).

2. Fair, Reasonable, and Good Faith

Second, the corporation's bylaws and rules set forth an expulsion and termination procedure "that is fair and reasonable and [was] carried out in good faith" under section 617.0607(1). The bylaws provided, in pertinent part:

> The Board of Trustees may suspend or expel a member . . . for "just cause" after a vote is held at any regular, special or emergency meeting if deemed in the best interest of the organization, the horses or the general membership. Management may enforce the termination of membership if the member has received a prior verbal and written warning as stated in the Rules and Regulations. Should there be a vote of the Board of Trustees to terminate a member, and that vote is unanimous, when they terminate this member, then that member becomes ineligible for reinstatement.

Further, the corporation's rules provided, in pertinent part:

> Membership termination is at the discretion of management and the Board of Directors.
>
> . . .
>
> Any member/sponsor, who we determine has intentionally tried to undermine the organization, the Board of Directors or Management will terminate their membership immediately and without warning.

The record evidence indicates that the corporation complied with this fair and reasonable procedure and did so in good faith. The wife received multiple verbal and written warnings for various rules violations. Despite these warnings, the wife ultimately sent an e-mail to someone outside of the corporation, accusing the corporation of a variety of misdeeds, and alleging, among other things, "[The corporation] is as corrupt as you can imagine." This ultimate action, along with the wife's prior conduct, provided the board with "just cause" to find that the wife was intentionally trying to undermine the organization, and justified the board's unanimous vote to terminate the wife's membership.

3. ***La Gorce*'s Inapplicability**

Third, the case upon which the trial court primarily relied, *La Gorce Country Club v. Cerami*, 74 So. 2d 95 (Fla. 1954), is inapplicable. In *La Gorce*, our supreme court indeed concluded that a social club member was entitled to notice and a hearing before being expelled from the club. However, our supreme court reached that conclusion after finding that "the present case is controlled by statute under which the club was incorporated, namely F.S. § 617.10." *Id.* at 97. Section 617.10 was repealed in 1990 (effective in 1991), and was very different than the current section 617.0607. Section 617.10 provided, in pertinent part:

> Social clubs or societies not for profit may be incorporated under this chapter; provided, however, that any such club or society may, in its by-laws:
>
> . . .
>
> (2) Prescribe that an incorporator or member shall not have any vested right, interest or privilege of, in or to the assets, functions, affairs, or franchises of the corporation, or any right, interest or privilege which may be transferable or inheritable, or which shall continue after his membership

> ceases, or while he is not in good standing; provided, that *before his membership shall cease against his consent he shall be given an opportunity to be heard* . . . .

(emphasis added).

The current section 617.0607, which the trial court cited in its final judgment, contains no such requirement that before a person's membership shall cease against that person's consent, the person shall be given notice and an opportunity to be heard. Instead, the current section 617.0607(1) states: "A member of a [not for profit] corporation may not be expelled or suspended, and a membership in the corporation may not be terminated or suspended, *except pursuant to a procedure that is fair and reasonable and is carried out in good faith*." (emphasis added). The trial court's conclusion, that this procedure requires notice and an opportunity to be heard, finds no support in section 617.0607's plain language or case law.

Conclusion

Based on the foregoing, we reverse the trial court's final judgment to the extent the trial court concluded that the corporation illegally terminated the wife's membership in the corporation without affording her notice and a hearing. We remand for the trial court to enter a new final judgment finding in the corporation's favor on the wife's declaratory action, determining that the wife's membership was reasonably, fairly, and legally terminated, and that the wife ceased being a member of the corporation when the corporation terminated her membership. The new final judgment shall not disturb the trial court's findings of fact and conclusions of law as to the husband's action, which, in sum, were that although the husband was a member of the corporation whose membership was never terminated, the husband's request to inspect the corporation's records was impermissibly vague and overbroad and, therefore, the corporation did not improperly fail to respond to the request.

Affirmed in part, reversed in part, and remanded for entry of new final judgment consistent with this opinion.

DAMOORGIAN and KLINGENSMITH, 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

INTERIM NON-DISPOSITIVE OPINION. NO MANDATE WILL BE ISSUED AT THIS TIME.

JOE MADL AND MELISSA MADL,

Appellants,

v.

Case No. 5D16-53

WELLS FARGO BANK, N.A., AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT RELATING TO IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2, ET AL.,

Appellees.

_____/

Opinion filed May 18, 2018

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

Beau Bowin, of Bowin Law Group, Satellite Beach, for Appellants.

Adam Shamir, David S. Ehrlich, and Nicole R. Topper, of Blank Rome LLP, Fort Lauderdale, and Monika E. Siwiec, and Manuel S. Hiraldo, of Blank Rome LLP, Boca Raton, for Appellee, Wells Fargo Bank, N.A., As Trustee Under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp, Mortgage Pass Through Certificates, Series 2005-2.

Jacob A. Brainard, Scott C. Davis and Michael H. Casanover, of Business Law Group, P.A., Tampa, for Appellee, Suntree Master Homeowners Association, Inc.

No appearance for other Appellee.

EDWARDS, J.

ON MOTIONS FOR REHEARING, CERTIFICATION OF CONFLICT, AND RECONSIDERATION

Appellee, Wells Fargo, filed motions for rehearing, certification of conflict, and reconsideration, in which it argues, in part, that we erred in granting Appellants' motion for attorney's fees pursuant to the mortgage and section 57.105(7), Florida Statutes (2015). Because there was a contractual relationship between the parties and Appellants are the prevailing parties, they are entitled to attorney's fees in accordance with the mortgage and section 57.105(7). As discussed in more detail below, we deny Appellee's motions concerning the award of attorney's fees to Appellants.[1] Appellee has also filed a motion for rehearing en banc, which is denied by a separate order.

Under current Florida law, the plaintiff in a mortgage foreclosure suit must prove that it has standing both at the time suit is filed and at the time of trial; failure to have standing at either time requires dismissal of the suit. *See McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). Appellee claimed to be the holder of the note, and thus entitled to sue. However, Appellee's proof was lacking

[1] We deny the balance of Appellee's motions for rehearing, certification of conflict, and reconsideration. In its motions, Appellee has improperly re-argued its case and has taken literary license with the facts established by the record, conduct that may result in the imposition of sanctions in the future if counsel chooses to repeat this behavior. *See Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So. 3d 1063 (Fla. 5th DCA 2017).

because: (1) the copy of the note attached to the complaint was not indorsed either in blank or to Appellee; (2) Appellee and its counsel had been searching for the note for a period of years that extended beyond the initiation of this suit; and (3) the note was ultimately delivered by Deutsche Bank, who had sued Appellants and claimed to be the holder of the same note, to Appellee five years after this suit was filed, but while it was still pending. Deutsche Bank dismissed its foreclosure suit against Appellants after Appellee had filed the underlying suit. Based upon this remarkable combination of facts, we found that Appellee lacked standing when it filed suit. However, it did appear to have standing by the time of trial as a result of Deutsche Bank's unexplained delivery of the allegedly original note. Unlike the copy attached to the complaint, the "original" note bore an indorsement in blank, the timing of which was not explained.

We also determined that Appellee failed to prove that it or anyone acting on its behalf provided Appellants with notice of default and intent to accelerate, a condition precedent to foreclose. Accordingly, because of a lack of standing and a lack of proving compliance with a condition precedent, we reversed the judgment in favor of Appellee and instructed the trial court to involuntarily dismiss the case. Thus, Appellants are prevailing parties.

Appellants' mortgage had been assigned to Appellee. Like many others, the subject mortgage provides that only the lender is entitled to recover its litigation and appellate attorney's fees incurred in successful collection or foreclosure actions. *See Fla. Cmty. Bank v. Red Rd. Residential, LLC*, 197 So. 3d 1112, 1114 (Fla. 3d DCA 2016). "[B]y operation of law, section 57.105(7) bestows on the other party to the contract[—the borrower—]the same entitlement to prevailing party fees." *Id.* at 1115. Section 57.105(7)

transforms a unilateral right into a reciprocal right so that all parties to the contract are entitled to recover attorney's fees upon prevailing. *HFC Collection Ctr., Inc. v. Alexander*, 190 So. 3d 1114, 1116 (Fla. 5th DCA 2016).

In order to obtain prevailing party fees pursuant to section 57.105(7), the moving party must prove three requirements: 1) the contract provides for prevailing party fees, 2) both the movant and opponent are parties to that contract, and 3) the movant prevailed. *See Nationstar Mortg. LLC v. Glass*, 219 So. 3d 896, 898 (Fla. 4th DCA 2017) (en banc); *Fla. Cmty. Bank*, 197 So. 3d at 1115. First, as noted above, the Appellants' mortgage contains the prevailing party fee provisions. Second, by virtue of the assignment and the indorsement, Appellee joined Appellants, the original mortgagors, as parties to the contract. Third, Appellants prevailed on appeal, resulting in dismissal of the underlying lawsuit. Having satisfied all three requirements, Appellants are entitled to recover their attorney's fees and expenses from Appellee.

Conversely, section 57.105(7) cannot support an award of fees in favor of parties who are strangers to the contract or where a contract never existed. *See Fla. Cmty. Bank*, 197 So. 3d at 1115 (defendant whose signature was forged on mortgage cannot recover fees; not party to the contract); *Bank of N.Y. Mellon v. Mestre*, 159 So. 3d 953, 956–57 (Fla. 5th DCA 2015) (defendants not entitled to fees where their signatures were forged on mortgage being foreclosed because not parties to contract). Nor can section 57.105(7) be employed to impose fees on a non-party to the contract. *See Bank of N.Y. Mellon Tr. Co. v. Fitzgerald*, 215 So. 3d 116, 121 (Fla. 3d DCA 2017) (defendant borrowers not entitled to fees under section 57.105(7) after proving mortgage never assigned and note never delivered to plaintiff); *HFC Collection Ctr., Inc.*, 190 So. 3d at 1117 (defendant not

entitled to fees under section 57.105(7) after proving that her credit card agreement and debt were never assigned to plaintiff.) Reciprocity under section 57.105(7) is available only when, as here, both sides are parties to the contract. Given the lack of contractual mutuality in the just-discussed cases, they do not support Appellee's position.

Appellee relies upon cases from the Fourth District Court of Appeal, which on their face stand for the proposition that a foreclosure plaintiff's lack of standing automatically forecloses application of section 57.105(7). In *Glass*, the fourth district broadly stated that "[a] party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the [mortgage] contract cannot recover fees based upon a [fee] provision in that same contract." 219 So. 3d at 899. The *Glass* opinion does not disclose whether there was or was not any contractual relationship between those parties or whether the plaintiff had standing at the time of trial; thus, we have no basis to agree or disagree with the outcome. Appellee's reference to the fourth district's decision in *GMAC Mortgage, LLC v. Wallach*, 231 So. 3d 3 (Fla. 4th DCA 2017), sheds no light on the subject as the two-sentence opinion does not discuss the existence *vel non* of any contractual relationship between the parties.

Appellee also relies upon the fourth district's opinion *Christiana Trust v. Rushlow*, 231 So. 3d 558 (Fla. 4th DCA 2017), in which it reversed, citing to *Glass*, the trial court's award of attorney's fees to defendant pursuant to section 57.105(7) after finding that plaintiff lacked standing "both at the initiation of suit and at trial." *Id.* at 559. *Rushlow* appears to be consistent with those cases in which, unlike here, there "is no contract between the parties, which would entitle one to recover attorney's fees in the first place, [thus] 'there is no basis to invoke the compelled mutuality provisions' of § 57.105(7)."

HFC Collection Ctr., Inc., 190 So. 3d at 1117 (quoting *Fla. Med. Ctr., Inc. v. McCoy*, 657 So. 2d 1248, 1252 (Fla. 4th DCA 1995)). Thus, we find no conflict between our decision and *Rushlow*.

Accordingly, Appellee's motions for rehearing, certification, and reconsideration are denied.

ORFINGER and WALLIS, JJ., concur.