Real Property and Business Litigation Report

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Impression Products, Inc. v. Lexmark International, Inc., Case No. 15–1189 (2017).
Sale of a patented product in the United States "exhausts" the patent rights in the product.

Taylor Engineering, Inc. v. Dickerson Florida, Inc., Case No. 1D15-4782 (Fla. 1st DCA 2017).
The First District adopts the "nominal exposure standard" for determining whether a proposal for settlement is made in good faith, i.e., a proposal is made in good faith when the "offeror had a reasonable basis to conclude that his/her exposure was nominal or minimal."

The City of Pensacola v. Seville Harbour, Inc., Case No. 1D16-2481 (Fla. 1st DCA 2017).
Pro tanto assignments of leases are recognized in Florida, and the retention of an easement when assigning a lease renders the lease transfer a *pro tanto* assignment and not a sublease since the assignor has retained an interest, i.e., the easement.

Department of Transportation v. Butler Carpet Company, Case No. 2D15-2030 (Fla. 2d DCA 2017).
A property owner is not entitled to severance damages for loss of access if the claimed loss of access is not caused by the use to which the property taken has been applied, but is entitled to severance damages if there is a direct connection between the activity on the taken property and the claimed loss of access.

Anderson v. Taylor Morrison of Florida, Inc., Case No. 2D16-314 (Fla. 2nd DCA 2017).
An arbitration provision which limits statutory claims is void as against public policy.

Collier HMA Physician Management, LLC v. Menichello, Case No. 2D16-1204 (Fla. 2nd DCA 2017).
A court must look to the corporate formalities and not the "substance" of a corporate transaction in determining whether an entity is a "successor employer" within the meaning of Florida Statute section 542.335(1)(f).

City of Key West v. Key West Golf Club Homeowners', Case No. 3D13-57 (Fla. 3rd DCA 2017).
A municipality may, as part of its legislative functions, require those who benefit from a storm water management system to participate in and pay for the system.

Deauville Hotel Management, LLC d/b/a Deauville Beach Resort v. Ward, Case No. 3D15-2114 (Fla. 3rd DCA 2017).
Intentional infliction of emotional distress may arise out of breach of contract, but the conduct must be outrageous and well beyond a mere breach of contract.

Miranda v. Pacheco Entertainment Production Enterprises, Inc., Case No. 3D16-1951 (Fla. 3rd DCA 2017).
While a court is required to dissolve a temporary injunction where there is clear legal error, *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 925-26 (Fla. 2017), it has no such requirement in regard to permanent injunctions.

Nikolits v. Haney, Case No. 4D15-4464 (Fla. 4th DCA 2017).
The property appraiser for a county may issue a Certificate of Correction under Florida Administrative Code Rule 12D-8.021(2)(a)(6), but an affected property owner may challenge the corrected value as being beyond market value.

Symcon Development Group Corporation v. Passero, Case No. 4D16-2641 (Fla. 4th DCA 2017).
The anticipated purchaser of real property which is the subject of litigation between the seller of the real property and a third party has a sufficient interest in the pending litigation to deviate from the normal rule so as to allow the non-party purchaser to intervene in the litigation.

Wells Fargo Bank, N.A. v. Eisenberg, Case No. 4D16-2646 (Fla. 4th DCA 2017).
A party need not have participated in the boarding process of a loan to permit a prior servicer's records to be admissible; a prior servicer's records are admissible where the current note holder presents testimony that it "had procedures in place to check the accuracy of the information it received from the previous note holder."

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

REGINALD ANDERSON and MICHELLE ANDERSON,

Appellants,

v.

TAYLOR MORRISON OF FLORIDA, INC.,

Appellee.

Case No. 2D16-314

Opinion filed May 31, 2017.

Appeal Pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Cheryl K. Thomas, Judge.

Matthew L. Wilson and Joshua E. Burnett of Burnett Wilson Reeder, Tampa, for Appellants.

J. Carlton Mitchel and Neal A. Sivyer of Sivyer Barlow & Watson, P.A., Tampa, for Appellee.

SILBERMAN, Judge.

Reginald and Michelle Anderson appeal a nonfinal order that stays proceedings in the trial court and compels arbitration in this action against their home builder, Taylor Morrison of Florida, Inc. (the Builder). Because the arbitration provision contained in the limited warranty (the Warranty) that the Builder provided to the

Andersons limits their statutory remedies, we conclude that the provision is void as against public policy. Therefore, we reverse the trial court's order and remand for further proceedings. Based on this disposition, we do not reach the remaining issue the Andersons raise of unconscionability.

In April 2009, the Andersons entered into a sales agreement with the Builder to purchase a home. The Andersons took possession of the home in November 2009. In June 2015, the Andersons provided notice to the Builder pursuant to section 558.004, Florida Statutes (2015), of construction defects based on building code violations. The notice referred to an attached engineering report and stated that the report found "construction defects associated with the application of the exterior stucco system to [the Andersons'] home." The report specified that the installation failed to meet the applicable building code provisions and that at multiple locations the cladding material had an inadequate thickness.

Unable to resolve the matter, the Andersons filed a three-count complaint in September 2015 alleging (1) violation of the Florida Building Code under section 553.84, Florida Statutes (2009); (2) breach of contract; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201-.213, Fla. Stat. (2009). The Andersons alleged that the Builder violated the building code "by inadequately and improperly installing the stucco system on" their home. They claimed that the code violations were latent and not readily observable or known to them "until damages began to manifest themselves in the form of cracking to the exterior stucco years after construction ended." They also alleged that the Builder knew or should have known that the building code was violated during the construction of the home and that the violations caused damages to them.

The Builder sought to compel arbitration on the basis of a provision in the Warranty provided with the purchase of the home. The Andersons argued that the arbitration provision was void as against public policy because it barred recovery of all statutory and contractual claims and that it was unconscionable. After a hearing, the trial court granted the motion to compel arbitration and found the arbitration provision valid. In doing so, the trial court appeared to implicitly reject the argument that the provision was void as against public policy. The Andersons now challenge the order compelling arbitration, focusing on the statutory remedy for the alleged building code violations.

The sales agreement between the parties states that the Builder will provide the Andersons with a warranty in place of all other warranties, including those arising under state law. After closing, the Builder's sole responsibility "is to cover items under warranty." The Builder provided a copy of the three-page Warranty with the sales agreement. The Andersons signed an acknowledgement that they had received the copy, reviewed it, and agreed to its terms and conditions. The Warranty includes a one-year warranty providing that materials and workmanship in the home will be in compliance with the review criteria that are contained in "the Customer Care Guidelines," a separate document. The Warranty also includes a ten-year warranty for "Major Structural Issues" as defined in the document.

Based on the definition of major structural defect in the Warranty, which includes items such as foundation systems, load-bearing beams, and bearing walls, the inadequate application of exterior stucco does not appear to fall within the coverage of the ten-year limited warranty. The one-year limited warranty addresses stucco finishes by reference to the review criteria, which provides that small cracks are common and that cracks that exceed one-eighth inch in width "are considered excessive" and are covered. The warranty does not otherwise address the proper application of stucco, including any required thickness. The complaint and notice allege violations of the building code based on improper application of stucco but do not specifically address whether the cracks in the home fall within the one-year warranty's definition of excessive. Rather, the Andersons asserted that the building code violations were not readily observable or known until the cracking appeared well after the one-year warranty expired.

With respect to arbitration, the Warranty contains an arbitration provision on the third page in a section titled Dispute Settlement. That section provides as follows:

> **Dispute Settlement**
> This Dispute Settlement provision sets forth the exclusive remedy for all disputes, claims or controversies arising out of, or in any manner related to, this Warranty or any alleged <u>issues</u> in your home or property. All disputes, claims or controversies which cannot be resolved between TM [the Builder] and you shall be submitted by you, not later than ninety (90) days after the expiration of the applicable warranty period, to the American Arbitration Association ("Arbitrator") for resolution in accordance with the rules and regulations of the Arbitrator. The final decision of the Arbitrator shall be binding on all parties and shall include final decisions relating to enforcement of the terms and provisions of this Warranty.

In addition, at the top of page one a statement in all capitals advises that the Warranty contains a binding arbitration provision, that the consumer should read the document in its entirety, and that the document contains exclusions.

The Warranty also contains a lengthy disclaimer of liability provision before the dispute settlement section. At the end of the disclaimer provision it states as follows:

> BUYER AGREES THAT THIS LIMITED WARRANTY SHALL BE THE EXCLUSIVE REMEDY FOR ANY <u>ISSUES</u> IN DESIGN, MATERIALS OR WORKMANSHIP. BUYER HERBY [sic] ASSUMES THE RISK OF ALL OTHER LOSS RESULTING FROM SUCH <u>ISSUES</u>, INCLUDING ANY CLAIMS FOR PROPERTY DAMAGE OR PERSONAL INJURY, AND WAIVE [sic] ALL OTHER CLAIMS, WHETHER IN CONTRACT, TORT OR OTHERWISE.

The Andersons contend that the arbitration provision, particularly when viewed in context with the limitation of remedies contained in the disclaimer provision, is void as against public policy because it prohibits any remedy, whether in tort, contract, or by statute, apart from items covered by the Warranty.

It is for the court, not the arbitrator, to determine whether a valid arbitration agreement exists. <u>Shotts v. OP Winter Haven, Inc.</u>, 86 So. 3d 456, 459 (Fla. 2011). Our review of the validity of an arbitration agreement on the challenge that it violates public policy is a question of law subject to de novo review. <u>Id.</u> at 471. If an arbitration agreement violates public policy, then no valid agreement exists. <u>Id.</u> at 465; <u>Global Travel Mktg., Inc. v. Shea</u>, 908 So. 2d 392, 398 (Fla. 2005) ("No valid agreement exists if the arbitration clause is unenforceable on public policy grounds.").

An arbitration agreement is unenforceable for public policy reasons when it defeats the remedial purpose of a statute or prohibits the plaintiff from obtaining meaningful relief under the statutory scheme. S.D.S. Autos, Inc. v. Chrzanowski, 976 So. 2d 600, 606 (Fla. 1st DCA 2007) (dealing with FDUTPA). "A remedial statute is one which confers or changes a remedy." Shotts, 86 So. 3d at 473 (quoting Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 298 (Fla. 4th DCA 2005)) (dealing with Nursing Home Residents' Rights Act). Section 553.84 is a remedial statute because it provides relief for a person whose home has been built in violation of the building code, "[n]othwithstanding any other remedies available."

The Builder contends that if the challenge is to the agreement as a whole but not specifically to the arbitration provision, the issue of the validity of the agreement is for the arbitrator to decide. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444, 449 (2006) (stating that the borrowers contended that the contract as a whole was invalid based on a usurious finance charge); Kaplan v. Divosta Homes, L.P., 983 So. 2d 1208, 1210 (Fla. 2d DCA 2008) (stating that the purchasers contended that the entire sales contract was void due to fraud); Hound Mounds, Inc. v. Finch, 153 So. 3d 368, 371 (Fla. 4th DCA 2014) (stating that the franchisee alleged the invalidity of the entire franchise agreement and did not specifically attack the arbitration provision). Here, though, the Andersons do not challenge the Warranty as a whole or the sales agreement pursuant to which it was issued. Rather, they challenge the arbitration provision because while it "sets forth the exclusive remedy for all disputes" arising from or related to the Warranty and all issues with the home or property, it precludes their ability to pursue their statutory claim.

The Builder also cites to Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, 118 So. 3d 957, 958 (Fla. 2d DCA 2013), in which this court recognized that statutory claims for violation of a building code can be subject to arbitration. But there the arbitration agreement applied to claims for breach of warranty and statutory claims. Id.

Here, the sales agreement specifies that the Builder's responsibility after closing is only as to items that are covered by the Warranty, and the disclaimer provision precludes any claims that are not covered by the Warranty, "whether in contract, tort or otherwise." The arbitration provision states that "[t]his Dispute Settlement provision sets forth the exclusive remedy for all disputes, claims or controversies arising out of" or related to the Warranty or issues with the home or property. The next sentence states that all unresolved "disputes, claims or controversies" must be submitted to arbitration. These provisions establish that the only remedy afforded to the Andersons through arbitration is for specified Warranty claims and that all other claims, including the Andersons' statutory claims, are precluded.

Yet the Builder insists that despite the language in the documents, a non-warranty claim could be brought and must be arbitrated. We cannot agree. As this court stated in a case involving similar stucco claims, arbitration cannot be compelled where "the parties did not agree to arbitrate claims such as those presented here." Nunez v. Westfield Homes of Fla., Inc., 925 So. 2d 1108, 1109 (Fla. 2d DCA 2006).

In Nunez, the homeowners brought a claim alleging that the builder violated the building code by misapplying the exterior stucco. The builder moved to compel arbitration in accordance with its limited home warranty that required arbitration of unresolved warranty issues. Id. The court observed that the limited warranty did not obligate the builder to conform the home to the applicable building codes. Id. at 1110.

Moreover, while the warranty required the builder to repair exterior cracks in stucco that exceeded one-eighth of an inch in width, the homeowners' claim was not based on that condition. Id. The warranty in Nunez extended only to specified circumstances, not including building code violations, and the builder "chose to limit the scope of disputes subject to arbitration." Id.

Here, the language of the arbitration provision is seemingly broader than the arbitration language discussed in Nunez. The arbitration provision in the Warranty indicates that all issues related to the Warranty, the home, or the property are to be arbitrated. But read in context with other provisions in the Warranty, particularly the disclaimer provision, it is evident that the alleged building code violations cannot be remedied through arbitration because the claims are not covered by the Warranty and all non-Warranty claims are waived. As the Florida Supreme Court stated in Shotts, "any arbitration agreement that substantially diminishes or circumvents these [statutory] remedies stands in violation of the public policy of the State of Florida and is unenforceable." 86 So. 3d at 474. Simply put, the arbitration provision here effectively limits the Andersons' remedies to Warranty claims, as defined in the documents, and does not just substantially diminish the Andersons' statutory remedy for a violation of the building code but totally eliminates it.

Moreover, contrary to the Builder's argument this is not a situation where the challenge is to the validity of the limited warranty contract as a whole. The Andersons do not allege that the contract is usurious or was entered into based on fraud. See Buckeye Check Cashing, 546 U.S. at 444; Kaplan, 983 So. 2d at 1210.

Instead, they specifically challenged the arbitration provision because it precludes enforcement of a statutory remedy that is available to them.

Because the arbitration provision limited the Andersons to warranty claims and prevents their assertion of a statutory claim, the arbitration provision violates public policy and is unenforceable. See Shotts, 86 So. 3d at 474-75. Accordingly, we reverse the order compelling arbitration and remand to the trial court for further proceedings on the Andersons' complaint.

Reversed and remanded.

KELLY and BLACK, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 31, 2017.

THIS OPINION IS NOT FINAL UNTIL DISPOSITION OF ANY FURTHER MOTION FOR REHEARING AND/OR MOTION FOR REHEARING EN BANC. ANY PREVIOUSLY-FILED MOTION FOR REHEARING EN BANC IS DEEMED MOOT.

No. 3D13-57
Lower Tribunal No. 09-822-K

City of Key West,
Appellant/ Cross-Appellee,

vs.

Key West Golf Club Homeowners', etc., et al.,
Appellees/Cross-Appellants.

An Appeal from the Circuit Court for Monroe County, David J. Audlin, Jr., Judge.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., and Michael T. Burke and Hudson C. Gill (Fort Lauderdale), for appellant/cross-appellee.

Smith Oropeza, P.L., and Barton W. Smith and Ashley N. Sybesma, for appellees/cross-appellants.

Before SALTER, EMAS, and LOGUE, JJ.

ON MOTION FOR REHEARING

LOGUE, J.

This case comes before us on rehearing. We grant rehearing, withdraw our previous opinion, and issue this opinion in its stead.[1]

Key West Golf Club Homeowners' Association, Inc. (Association), Key West Golf Club, LLC (Golf Course), and Key West HMA, LLC (Hospital) brought suit seeking a declaration that the City of Key West's stormwater utility fee was illegal as applied to their properties. After a bench trial, the court agreed and entered a judgment exempting the properties from future stormwater utility fees. We reverse.

The undisputed record at trial reveals that the Association, Golf Course, and Hospital contributed to the need for the stormwater utility by discharging stormwater. They also benefited from both the stormwater utility's flood control and pollution control measures. While the trial court apparently found that the amount of the fee had no reasonable relationship to the benefits received, it

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[1] The Appellant, City of Key West, filed a motion for rehearing en banc of the original panel opinion. When a motion for rehearing en banc is unaccompanied by a motion for rehearing, our Internal Operating Procedures require the motion for rehearing en banc to be treated as including a motion for rehearing which must be ruled upon by the panel. Wade v. State, 57 So. 3d 993, 994 (Fla. 3d DCA 2011). The Supreme Court has approved this policy. Romero v. State, 870 So. 2d 816, 818 (Fla. 2004) ("By treating motions for rehearing en banc as including motions for rehearing, the Third District adheres to the spirit of Florida Rule of Appellate Procedure 9.040(d).").

considered only the costs of the flood control measures and failed to consider the substantial, City-wide stormwater anti-pollution services which comprise a large part of the stormwater management system at issue. In City of Gainesville v. State, 863 So. 2d 138, 145 (Fla. 2003), the Florida Supreme Court upheld a method of establishing stormwater fees virtually identical to the method used here by the City. For these reasons, we hold that the City acted within its lawful authority by subjecting the properties to the stormwater utility fees.

FACTS

The State has authorized municipalities to create stormwater utilities in order to fund stormwater management. See §§ 403.0891, .0893, 163.3202(d), Fla. Stat. (2001). The purpose of these laws is to control flooding and to prevent pollution—the latter being deemed by the Legislature as "a menace to public health and welfare." See § 403.021(a). The need to mitigate the effects of stormwater discharge is particularly heightened in the municipality of Key West. It is part of the Florida Keys which the Legislature has designated "as an area of critical state concern" in order to, among other things, "[p]rotect and improve the nearshore water quality." § 380.0552 (2)(i) & (3), Fla. Stat.

In 2001, the City established a stormwater utility as authorized by Chapter 403 of Florida Statutes. See Key West, Fla. Code § 74.365. One purpose of the utility was to improve "the water quality in the stormwater and surface water system and its receiving waters." Key West, Fla. Code § 74.362. Tracking the ordinance upheld in City of Gainesville, the fee at issue is based on the amount of impervious surface area, such as buildings and parking lots, on a property. A larger impervious surface area results in a higher utility fee because the larger such areas, the less stormwater is absorbed into the ground and the more stormwater is discharged. The ordinance exempts certain property, including property that retains its stormwater runoff.[2] The ordinance establishes a sliding scale for the amount of the utility fee based upon the amount of water retained on site.[3] The fees do not go into the general fund, but are segregated in a separate account dedicated to plan, construct, operate, and maintain the City's stormwater management system on a city-wide, unitary basis for present and future needs.

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[2] "Exempt property means public rights-of-way, public streets, public alleys and public sidewalks, public parks, undisturbed property, conservation areas and easements; any property on which is retained 100 percent of the total volume of runoff within the property (measured on the basis of a 72-hour, 100-year storm event); and any property owned by the U.S Navy which by agreement with the City is deemed exempt." Key West, Fla. Code § 74.361.

[3] If a property is able to collect and retain 100% of the water on its property from a 100-year storm for a period of 72 hours, then that property will be exempt from paying the stormwater utility fee. Additionally, Section 74.365 of the Code provides for reductions in the stormwater utility fee: if a property owner is able to retain 100% of the water runoff of a 25-year storm event for a period of 72 hours, that property owner may receive a 15% reduction of their user fees. If the property owner is able to collect and retain 100% of the stormwater runoff of a 50-year storm for a period of 72 hours, then it is eligible to receive a 25% reduction of its user fees.

In 2003, the City began billing the Association, Golf Course, and Hospital for the stormwater utility fee. In 2009, the Association, Golf Course, and Hospital filed suit against the City, essentially claiming that they received little or no benefit from the stormwater utility.

The Association, Golf Course, and Hospital are located on Stock Island, which is immediately east of the island of Key West. Stock Island is bisected by US Highway 1 (US 1). The portion of Stock Island north of US 1 is within the municipal boundaries of the City of Key West. The main road providing access to the northern portion of Stock Island is College Road. College Road forms a horseshoe-shaped loop which generally runs along the water's edge on the perimeter of northern Stock Island. Each end of the loop intersects US 1.

Enclosed within the loop formed by College Road are all or part of the properties of the Association, Golf Course, and Hospital and also a tidal salt marsh. The submerged land under the salt marsh is largely owned by the City, although part is leased to the Golf Course and part is owned by the Hospital. The Association, Golf Course, and Hospital properties have injection wells, retention ponds, and catch basins. They stipulated, however, that the properties did not retain stormwater at levels that would qualify them for a fee exemption or reduction under the ordinance. Instead, they discharge stormwater into the salt marsh or

Gulf. The water discharged into the salt marsh drains out to the Gulf of Mexico by means of seven culverts cut through College Road.

At trial, the undisputed testimony of numerous witnesses was that without the seven culverts that allow the salt marsh to flow into the Gulf, the salt marsh would back up and the Association, Golf Course, and Hospital properties would flood. In addition, without the culverts and also the storm drains and outlets along College Road that divert stormwater coming onto the road into either the salt marsh or directly into the Gulf, College Road would flood and access to the landowners' properties would be blocked.

There was conflicting evidence as to whether the culverts, storm drains, and outlets that provided the drainage constituted part of the City's stormwater system. On this crucial point, however, the trial court found for the City and against the Association, Golf Course, and Hospital. As expressly found by the trial court, "[t]he City of Key West controls and maintains a stormwater system on North Stock Island." Key West Golf Club Homeowners' Assoc. v. City of Key West, Order Declaring Section 74.365 Illegal, Case no. 2009-CA-822-K at 20 (Fla. Cir. Ct. Nov. 9, 2012). This system, the trial court determined, "consist[s] of catch basins, culverts, and pipes carrying water from the basins to the salt marsh and then to the Gulf of Mexico, or to the Gulf directly." Id. at 7. The Association, Golf Course, and Hospital do not challenge this finding.

The undisputed testimony also indicated that the City's stormwater management system provides a host of citywide stormwater anti-pollution services. These citywide services include flood and pollution control education, storm drain stenciling, a stormwater hotline (to report polluters using storm drains), testing for illicit discharges into the storm drains, mandatory intergovernmental coordination regarding water quality for the watersheds and basins in which the City is located, water monitoring, and enacting and enforcing an ordinance requiring compliance with Florida Department of Environmental Protection and South Florida Water Management District rules and regulations. Stormwater runoff necessitates these services. These services are legally authorized to be part of the stormwater management program funded by the utility fees: "Stormwater management programs shall use a combination of <u>nonstructural</u> and structural <u>best management practices</u> . . . ." Fla. Admin. Code R. 62-40.431(3) (emphasis added).

As the undisputed testimony of one city official indicated, the stormwater management program also includes the City's work in obtaining and maintaining an MS4 National Pollutant Discharge Elimination System permit. The MS4 is a national permit issued by the State Department of Environmental Protection through authority delegated to it by the Federal Environmental Protection Agency. It is through this permit that the State and the federal government largely monitor and control stormwater discharge issues in the state and national waters surrounding the City. The City's MS4 permit is a legally authorized element of the City's stormwater management program: "local governments shall cooperatively implement on a watershed basis a comprehensive stormwater management program . . . implemented through . . . the National Pollutant Discharge Elimination System stormwater program." Fla. Admin. Code R. 62-40.431(3).

The evidence at trial indicated that the City's possession of the MS4 permit and the nonstructural citywide stormwater anti-pollution services benefit all ratepayers, like the Association, Golf Course, and Hospital, who discharge stormwater runoff. The undisputed testimony of a city official and of the property owners' own expert was that if the quality of the waters receiving the stormwater runoff drops below a certain level due to stormwater discharge, and the City's nonstructural citywide services are not accepted as sufficient efforts at remediation, the ability of the City and other permit holders like the Association, Golf Course, and Hospital to discharge stormwater into the state and national waters will be curtailed, which, in turn, will impact costs involved in discharging runoff and might ultimately impact the use of the lands.[4] Moreover, the

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[4] The testimony of the property owners' own expert, David Livingston, cannot be read to suggest he stated the Association, Golf Course, and Hospital's stormwater discharges would not be curtailed. The expert merely testified that the discharges from other properties might be curtailed first. This testimony can only be read to mean that, while the Association, Golf Course, and Hospital's runoff would not be curtailed <u>first</u>, it would certainly be curtailed <u>subsequently</u>. Thus, he never refuted the testimony of other witnesses that the Association, Golf Course, and Hospital benefited from the use of utility fees to fund the MS4 permit.

undisputed testimony indicated that the City's stormwater utility plans include both the installation of new headwalls and aprons at the outfalls to prevent mangrove growth and allow easier maintenance in the future and the retrofitting of the College Road street inlets with water quality inserts that will reduce and prevent pollution contained in the stormwater discharges.

The evidence also reflected that no stormwater from the properties of the Association, Golf Course, or Hospital travels to the Island of Key West for wastewater treatment. And although no amount was quantified, the City spent relatively small amounts of money maintaining its anti-flood system of culverts, storm drains, and outlets which drain the waters on College Road and the salt marsh.

At the end of trial, the trial court found that the Association, Golf Course, and Hospital were non-users or minimal users of the stormwater utility. It refused to order a refund of previously paid stormwater fees, but it exempted the properties from future charges. The City appealed and the Association, Golf Course, and Hospital cross-appealed.

ANALYSIS

1. Can these properties be subject to any stormwater utility fee?

The first issue presented by this case is whether the City can lawfully charge the Association, Golf Course, and Hospital any stormwater utility fees at all. Here, the undisputed record at trial shows that Association, Golf Course, and Hospital contribute to the need for the stormwater utility by discharging stormwater, and they benefit from both the stormwater utility's flood control and pollution control measures.

A stormwater utility fee is a special type of user fee. User fees must be voluntary in the sense that a payer must be able to avoid the fee by declining the benefit. City of Gainesville, 863 So. 2d at 144. The law is well established, however, that a property owner elects to pay a stormwater utility fee when it elects to discharge stormwater rather than retain it. "Properties that are either undeveloped or implement ways to retain all stormwater on site are exempted. Therefore, property owners can avoid the fee either by not developing the property or by implementing a system to retain stormwater on site." Id. at 146. Here, the Association, Golf Course, and Hospital could elect to remove themselves from the ambit of the utility's services by refraining from discharging stormwater runoff. They cannot however, elect to discharge stormwater runoff and also refuse to pay for the programs which the legislature has determined are necessary to mitigate the "flooding, overdrainage, environmental degradation and water pollution" generated by the discharges. See generally §403.031(16).

Like similar statutes, the statute at issue authorizes stormwater utility fees to be paid based upon a ratepayer's contribution to the need for, and benefit from, the stormwater utility. <u>See, e.g.</u>, §403.031(17) (defining "stormwater utility" as "the funding of a stormwater management program by assessing the cost of the program to the <u>beneficiaries</u> based on their relative <u>contribution</u> to its <u>need</u>" (emphasis added)). Following this law, the Florida Supreme Court has held, "beneficiaries" of a municipal stormwater utility "can be charged." <u>City of Gainesville</u>, 863 So. 2d at 145. To decide if the Association, Golf Course, and Hospital can be charged a utility fee, we must decide if they contribute to the need for and benefit from the stormwater management system established by the stormwater utility.

"[T]he objective of a stormwater management system is to prevent or reduce flooding and pollution." <u>City of Gainesville</u>, 863 So. 2d at 140. <u>See</u> §403.031(16) (defining "[s]tormwater management system" as "a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system.").

The trial court did not make an express finding that the Association, Golf Course, and Hospital do not benefit from the stormwater anti-flooding system. Any such finding would not be supported by the record. The undisputed evidence at trial reflected that the stormwater discharge from their properties would cause the salt marsh to back up and flood their properties were it not for the drainage provided by the culverts, storm drains, and outlets which the trial court expressly found were part of the City's stormwater management infrastructure. The record thus reflects that the Association, Golf Course, and Hospital benefit as landowners from the anti-flooding stormwater management program: they gain access to and use of their land which would otherwise flood. This benefit is completely different from any ancillary benefit provided to the general public which could avoid the flooded road and properties.

Moreover, the trial court failed to credit the extensive and undisputed testimony that the Association, Golf Course, and Hospital benefited from the citywide stormwater anti-pollution services funded by the utility fees. Measures to mitigate the pollution and water degradation caused by stormwater discharges are central to the legislature's purpose in authorizing the creation of stormwater utilities. See §403.031(16).

In terms of the pollution control aspects of the program, the Association, Golf Course, and Hospital contribute to the need for the stormwater anti-pollution services by discharging runoff into the City's salt marsh, which then flows into the Gulf. While their runoff is not treated by the City, the larger program of the City includes many other federal and state required stormwater anti-pollution services that protect the quality of the water that touches and surrounds their properties. The

City's program also allows the landowners to avoid more onerous and expensive treatment for their runoff under applicable state and local laws. Thus, the stormwater anti-pollution services are components of the stormwater management system necessitated by their actions (discharging runoff) and are also something from which they specially benefit.

In their brief, the Association, Golf Course, and Hospital attempt to evade the legal consequences of these conclusions by asserting that these citywide stormwater anti-pollution services benefit the public generally and should be paid by taxes. They argue: "improved water quality is yet another general benefit shared by all of the public, not a specific benefit bestowed exclusively upon payers of the [City's] stormwater utility fee." This statement is wrong both as a matter of public policy and law.

Regarding public policy, the Florida Supreme Court has held that the use of a tax to fund remediation programs caused by stormwater runoff is unsound because it shifts the cost of paying for the programs necessitated by stormwater runoff from the landholders who generate stormwater runoff to others who did not generate the runoff. <u>Sarasota Cty. v. Sarasota Church of Christ, Inc.</u>, 667 So. 2d 180, 182 (Fla. 1995) ("To require that the stormwater utility services be funded through a general ad valorem tax, as requested by the religious organizations who filed this action, would shift part of the cost of managing the stormwater drainage problems, which are created by developed real property, to undeveloped property owners who neither significantly contributed to nor caused the stormwater drainage problems."). Although Sarasota County focused on drainage problems created by stormwater discharges, the same reasoning applies with equal force to pollution and water degradation caused by stormwater discharges.

More importantly, the legislature has enacted a law that authorizes municipalities to fund these stormwater anti-pollution management programs from utility fees charged to landholders whose properties generate stormwater runoff. See §§ 403.0891(3), .031(17); Fla. Admin. Code R. 62-40.431(3). Whether or not a court agrees with the legislature's public policy to fund these services through utility fees is of no moment. It is within the province of the legislature to authorize stormwater utility fees to pay for programs necessitated by stormwater runoff. The Association, Golf Course, and Hospital improperly ask us to usurp a legislative function when they contend we should replace the legislature's public policy choice that these stormwater services should be funded by utility fees with their own suspect public policy choice that these stormwater services should be funded by taxes. In City of Gainesville, the Florida Supreme Court repeatedly cited with approval to cases holding that stormwater utility fees and similar statutorily authorized municipal utility fees were not taxes. 863 So. 2d at 145-46.

Finally, the trial court attempted to distinguish City of Gainesville on the basis that the Florida Supreme Court held that the University of Florida was properly not charged a fee because the "campus drains into a lake for which the University provides all stormwater management services." Id. at 142. Here, however, the stormwater from the properties of the Association, Golf Course, and Hospital drain into the salt marsh for which the City provides all stormwater management services. And the undisputed testimony indicated that, without the drainage provided by the culverts, which the trial court expressly found was part of the City's stormwater infrastructure, the stormwater discharged from the Association, Golf Course, and Hospital properties would back up and flood the properties. Because there is no principled way to distinguish City of Gainsville, we hold it was within the lawful authority of the City to charge these properties a utility stormwater fee.

2. **Does the stormwater utility fee bear a reasonable relationship to the benefits conferred?**

The second issue presented is whether the fee charged bears a reasonable relationship to the benefits received. This discussion brings us to the crux of this case. This case is not really about whether the Association, Golf Course, and Hospital contribute to the need for or benefit from the City's stormwater management program. They do. This case is really about whether these ratepayers on North Stock Island should be charged a lower rate than the ratepayers on the main island of Key West. So this is a case about the level of the utility rate.

On this point, the Florida Supreme Court has held that "the establishment of utility rates is generally a legislative function." City of Gainesville, 863 So. 2d at 147. Indeed, "the creation of a statutorily-authorized utility strongly favors the validity of the fees imposed." Id. at 145.

In City of Gainesville, a ratepayer claimed a city's stormwater utility fee was "not based on the amount of stormwater a customer contributes to the system" – an argument identical to the one made in this case. Id. at 143. The method of calculating the stormwater fee—based on a property's impervious surface area with exemptions for undeveloped properties and properties that retained their stormwater—was identical to the method used in this case. The Florida Supreme Court upheld this method, noting that the legislature acts within its discretion when setting rates and that "[s]ection 403.0891(6), Florida Statutes, expressly authorizes this method of apportioning cost." Id. at 147. We believe this case falls squarely within the holding of City of Gainesville.

While the trial court apparently believed that the fee charged had no reasonable relationship to the benefits received, it considered only the costs of the flood control measures and failed to consider the substantial, City-wide stormwater anti-pollution measures that benefit these properties.

In emphasizing that none of the stormwater discharge from their properties travels through the stormwater infrastructure located on the island of Key West, the Association, Golf Course, and Hospital appear to argue that a ratepayer benefits from a statutorily authorized stormwater management system only to the extent that its stormwater travels through the utility's pipes and infrastructure. We reject this view for several reasons.

First, a stormwater utility funds more than infrastructure. In fulfilling their mission to mitigate the "environmental degradation and water pollution" generated by stormwater discharges, §403.031(16), "[s]tormwater management programs shall use a combination of <u>nonstructural</u> and structural <u>best management practices</u> . . . ." Fla. Admin. Code R. 62-40.431(3) (emphasis added). The undisputed testimony at trial indicated that these practices included many pollution control services listed previously in this opinion. Stormwater runoff necessitates these services and these services are legally authorized to be part of the stormwater management program funded by the utility fees. <u>See, e.g.</u>, Fla. Admin. Code R. 62-40.431(3) ("[L]ocal governments shall cooperatively implement on a watershed basis a comprehensive stormwater management program . . . implemented through . . . the National Pollutant Discharge Elimination System stormwater program."). The argument of the Association, Golf Course, and Hospital fails to take into account these essential components of the stormwater management program.

Moreover, the governing cases and statutes direct that the analysis of "use" in regards to a statutorily authorized stormwater or sewer utility focus on whether the ratepayer contributes to the need for and benefits from the utility, not whether the sewage or stormwater from a particular property travels through a particular pipe. See, e.g., §403.031(17) (defining "stormwater utility" as "the funding of a stormwater management program by assessing the cost of the program to the beneficiaries based on their relative contribution to its need" (emphasis added)); City of Gainesville, 863 So. 2d at 145 (holding "beneficiaries" of a municipal stormwater utility "can be charged"). In City of Gainesville, when upholding a stormwater utility fee virtually identical to the one at issue here, the Florida Supreme Court cited with approval a long line of cases holding that a utility fee was legally imposed when a landowner benefited from the existence of the utility whether or not its sewage or solid waste actually entered into the utility's infrastructure.[5]

[5] City of Gainesville, 863 So. 2d at 146 (citing State v. City of Miami Springs, 245 So. 2d 80 (Fla. 1971) (holding that a municipality may charge a mandatory fee for sewer service unrelated to whether sewage from particular property entered pipes); Town of Redington Shores v. Redington Towers, Inc., 354 So. 2d 942 (Fla. 2d DCA 1978) (holding that the subject sewer fee applied to unoccupied condominiums); Stone v. Town of Mexico Beach, 348 So. 2d 40 (Fla. 1st DCA 1977) (upholding a mandatory flat rate for garbage service, regardless of use); City of Riviera Beach v. Martinique 2 Owners Ass'n, 596 So. 2d 1164 (Fla. 4th DCA 1992) (holding that the subject solid waste removal ordinance applied to unoccupied condominiums without regard to actual use).

If adopted as the law of Florida, the argument of the Association, Golf Course, and Hospital in this regard would allow a utility ratepayer to chop a utility into component parts and obtain a judicial rate reduction based only on the parts of the system it "used." So, for example, a sewer utility ratepayer located near a water treatment plant could contend it used only the pipes and pumping stations between its property and the plant because its sewage makes its way only into those pipes. It could object to paying rates to support pipes and infrastructure farther from the plant than its own property because its sewage does not make its way into those pipes. Properly understood, the argument of the Association, Golf Course, and Hospital in this case is no more than a variation on this theme.

Ad hoc judicial utility rate adjustments based on the balkanization of utility infrastructure like that proposed by the Association, Golf Course, and Hospital invites abuse because they fail to account for the need to have such systems operate as part of a cohesive, unitary, regional whole. In the long run, judicial utility rate adjustments will generate more unfairness than the current legislative ratemaking process whose broad and realistic perspective allows consideration of the effect of a rate change on all ratepayers, not just the ratepayers who happen to be before the court.

No system for setting stormwater utility rates is perfect. The trial court's decision, however, simply shifts the entire future burden of the Association, Golf

Course, and Hospital's share of the costs of the City's stormwater management program to the remaining ratepayers. This is the mirror image of the unfairness of which the Association, Golf Course, and Hospital originally complained.

CONCLUSION

The City was well within its discretion to calculate stormwater utility fees as done here. It is extremely difficult, if not impossible, to establish a perfectly fair and accurate method of assessing these types of stormwater charges. For this reason, the legislature is given broad discretion in setting such fees. While the City may well have had the discretion to amend the ordinance and charge the Association, Golf Course, and Hospital a lower rate, it certainly would not have discretion under the existing ordinance to exempt these landholders altogether as the trial court did. This case is remanded with instructions to enter judgment for the City.

Reversed.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE CITY OF PENSACOLA,

Appellant,

v.

SEVILLE HARBOUR, INC., A FLORIDA CORPORATION, AND MERRILL LAND, LLC, A FLORIDA LIMITED LIABILITY COMPANY, GREAT SOUTHERN RESTAURANT GROUP OF PENSACOLA, INC., A FLORIDA CORPORATION,

Appellees.

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

CASE NO. 1D16-2481

Opinion filed June 1, 2017.

An appeal from the Circuit Court for Escambia County.
J. Scott Duncan, Judge.

Terrie L. Didier and J. Nixon Daniel of Beggs & Lane, RLLP, Pensacola, for Appellant.

Edward P. Fleming and R. Todd Harris of McDonald, Fleming, Moorhead, Ferguson, Green & de Kozan, LLP, Pensacola, for Appellee Seville Harbour, Inc.

Robert A. Emmanuel and Adam J. White of Emmanuel, Sheppard & Condon, Pensacola, for Appellee Merrill Land, LLC.

Charles F. Beall, Jr. of Moore, Hill & Westmoreland, P.A., Pensacola, for Appellee Great Southern Restaurant Group of Pensacola, Inc.

WETHERELL, J.

The City of Pensacola appeals the final summary judgment determining that the lease between the City and Appellee Seville Harbour, Inc., was properly renewed and that an agreement between Seville Harbour and Appellee Merrill Land, LLC, was a sublease, not a *pro tanto* (partial) assignment of the lease. We affirm the trial court's determination that the lease was properly renewed without further comment, and we affirm its determination as to the nature of the Seville Harbour-Merrill Land agreement for the reasons that follow.[1]

Factual and Procedural Background

In 1985, the City and Seville Harbour's predecessor-in-interest entered into a lease agreement—which we will refer to as the "Marina Lease"—for three parcels of undeveloped property along the waterfront in downtown Pensacola. The leased property was comprised of uplands and submerged lands, and as contemplated by the Marina Lease, the property has been developed into a marina and related facilities.

At the time the Marina Lease was executed, two of the parcels (Parcels I and

[1] We also affirm without further comment the "procedural issues" raised by the City.

III) were owned by the City, while the third parcel (Parcel IA) was owned by the State of Florida and leased to the City. In 1990, the State deeded Parcel IA to the City. None of the provisions of the Marina Lease related to Parcel IA were modified after this change of ownership.

The Marina Lease provided an initial lease term of 30 years for Parcels I and III, which could be "renewed and extended" for an additional 30 years upon written notice from the lessee (now Seville Harbour) to the City. The initial (sub)lease term for Parcel IA was also 30 years, but it could only be renewed in "successive five (5) year increments" upon payment of a "lease fee . . . equal to the appraised rental value . . . charged to [the City] by the State of Florida."

The annual rent due under the Marina Lease is the greater of a per-square-foot "ground rent" or a percentage of the lessee's (now Seville Harbour's) "gross sales" and "gross rentals" in the prior year. The Marina Lease defines "gross sales" as all monies received from business conducted on the leased property "by [Seville Harbour], its subsidiaries or <u>business combinations</u>" (emphasis supplied), and it defines "gross rentals" as all rents received "by [Seville Harbour] from all . . . sublessees or tenants" on the property.

In 2000, Seville Harbour and Merrill Land entered into the "Pitt Slip Marina Sublease Agreement" pursuant to which Seville Harbour "subleased" Parcels IA, III and part of Parcel I[2] to Merrill Land for "the remaining term of the Marina Lease plus any extensions or renewals thereof." This agreement, which we will refer to as the "Marina Sublease," reserved to Seville Harbour "a perpetual non-exclusive easement over and on the property . . . for ingress, egress, parking, signage, utility lines . . . as well as for maintenance, construction, and reconstruction of [the non-transferred part of Parcel I]." It also gave Seville Harbour (and the City) the right to access the property covered by the Marina Sublease "at all reasonable times deemed necessary for the purpose of the Marina Lease."

Thereafter, Merrill Land subleased Parcel IA to Appellee Great Southern Restaurant Group of Pensacola, Inc., which owns and operates two restaurants (The Fish House and Atlas Oyster House) on that parcel. Neither Seville Harbour nor Merrill Land pays additional rent to the City based on the "gross sales" from the restaurants operated by Great Southern.

In 2013, the City sent a "Notice of Default" to Seville Harbour and Merrill Land claiming that Merrill Land was a "partial assignee" of the Marina Lease and that additional rents were owed to the City based on the gross sales generated by the restaurants operated by Great Southern, which the City claimed was a "business

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[2] The legal description of the property covered by the Marina Sublease includes all of Parcel I (containing 8.529 acres) less a specifically described portion of the parcel containing "7 acres more or less." Thus, only approximately 1.5 acres of Parcel I is covered by the Marina Sublease.

combination" of Merrill Land. Appellees' counsel responded in a terse letter disputing the City's premise that the Seville Harbour-Merrill Land agreement was an assignment and not a sublease. The City thereafter withdrew the default notice.

Subsequently, in 2014, Seville Harbour and Merrill Land filed a declaratory judgment action seeking determinations that the agreement between Seville Harbour and Merrill Land was a sublease, not an assignment, and that the Marina Lease was properly renewed. The City filed an answer and third-party complaint joining Great Southern as a third-party defendant in which it argued among other things that (1) additional rent was due under the terms of the Marina Lease on Great Southern's gross sales because Merrill Land was an assignee under the lease by virtue of the Marina Sublease and Great Southern was a "business combination" of Merrill Land, and (2) the Marina Lease was not properly renewed as to Parcel IA because the "lease fee" applicable to that parcel had not been paid.

The parties each filed motions for summary judgment, and after a hearing, the trial court entered a final summary judgment in favor of Appellees. The trial court ruled that the City was not entitled to additional rent based on Great Southern's gross sales because the Marina Sublease between Seville Harbour and Merrill Land was a sublease, not a *pro tanto* assignment, and even if the Marina Sublease was an assignment, Great Southern was not a "business combination" of Merrill Land. The court also ruled that the Marina Lease was properly renewed because under the plain language of the lease, the "lease fee" for Parcel IA was equal to the appraised rental value charged by the State to the City and, since 1990, no amount was being charged to the City.[3]

This timely appeal followed.

Analysis

The crux of the parties' dispute in this case is whether the agreement between Seville Harbour and Merrill Land is a *pro tanto* assignment of the Marina Lease (as the City contends) or a sublease (as Appellees contend). This is an issue of law, which we review de novo. See BOLD MLP, LLC v. Smith, 201 So. 3d 1261, 1261 (Fla. 1st DCA 2016).

It is well-established that the nature of a real estate transaction is determined by its legal effect, not its form or title. C.N.H.F., Inc. v. Eagle Crest Dev. Co., 128 So. 844, 845 (Fla. 1930) ("[T]he form of an assignment of lease is immaterial; its character in law being determined by its legal effect."). Accordingly, the title of the Marina Sublease and its use of the term "sublease" throughout to describe the transaction between Seville Harbour and Merrill Land is not dispositive.

As a threshold matter, we agree with the parties and the trial court that *pro tanto* assignments are recognized in Florida. See id. ("An assignment by a lessee

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[3] The trial court also ruled that the renewal term for Parcel IA was 30 years, rather than 5 years. The City did not challenge that ruling on appeal.

transfers his entire interest in the demised premises or a part thereof for the unexpired term of the original lease.") (emphasis added). Accordingly, if the Marina Sublease is an assignment, it is a *pro tanto* assignment because the Marina Lease gave Seville Harbour a leasehold interest in three parcels, but Seville Harbour transferred to Merrill Land an interest in only two of those parcels and part of the third.

The test for determining whether a real estate transaction is an assignment (either *pro tanto* or full) or a sublease is whether the lessee "transfers [1] his entire interest in [all or part of the leased property] for [2] the unexpired term of the original lease." Id. (emphasis added); see also Estate of Basile v. Famest, Inc., 718 So. 2d 892, 892 (Fla. 4th DCA 1998) ("The test between an assignment and a sublease is whether the lessee transfers his entire interest in the property; if no reversionary interest is retained, the transaction is considered an assignment."); but cf. MDS (Canada) Inc. v. Rad Source Techs., Inc., 143 So. 3d 881 (Fla. 2014) (rejecting the use of this bright-line rule to distinguish between the assignment of a license agreement and a sublicense and holding that a multi-factor, case-by-case analysis is required in that context). Accordingly, it follows that if the lessee transfers less than his entire interest in the part of the leased property at issue—or his entire interest for less than the unexpired term of the lease—then the transaction is a sublease.

Here, it is undisputed that the term of the Marina Sublease was for the entire unexpired term of the Marina Lease. Accordingly, resolution of this case turns on whether Seville Harbour transferred to Merrill Land its "entire interest" in the property covered by the Marina Sublease.

The parties have not cited, nor has our research located, any Florida case addressing whether a lessee has transferred his "entire interest" in the leased property at issue when the lessee retains an easement in the property. However, this issue has been addressed by courts in other states and those courts have held that the transfer is a sublease rather than an assignment when the lessee retains an easement in the leased property. See, e.g., Damaro Rest. Group, LLC v. Gazette Realty Holdings, LLC, 21 Misc. 3d 1131(A), 873 N.Y.S.2d 510 (Sup. Ct. 2008) (finding an agreement to be a sublease where the grantor retained the right to enter the demised property: "While these rights to enter the property and make use of it may be small, the existence of these rights to enter, use and occupy the demised premises defeat the claim that [the grantor] transferred its entire estate."); First Trust Co. v. Downs, 230 S.W.2d 770, 774–75 (Mo. Ct. App. 1950) (finding agreement to be a sublease where grantor retained easements on the demised property during the entire term of the sublease); McNeil v. Kendall, 128 Mass. 245 (1880) (finding agreement to be a sublease where lessee transferred a portion of the leased property for the remainder of the lease term, but granted an easement on the retained premises: "It is plain, therefore, that . . . while he conveyed to the defendants his whole term for years, did not convey his whole interest in the premises, which the defendants had the right to occupy and enjoy under their lease; but retained in himself all the land . . . subject to the easements granted to the defendants. The interest which he conveyed to the defendants was a portion of the entire estate, and not his whole estate in a portion of the same.”).

These cases are consistent with the settled principle of Florida law that although an easement is not an “estate” in land, it is an “interest” in land. See Burdine v. Sewell, 109 So. 648, 653 (Fla. 1926) (“He, of course, must have known that a grant of an easement should be drawn and executed with the same formalities as a deed to real estate, an easement being an interest in land.”); Dianne v. Wingate, 84 So. 3d 427, 429 (Fla. 1st DCA 2012) (“Although an easement is a real property interest in land, it is a right distinct from ownership of the land itself and does not confer title to the land on which the easement is imposed.”); Keys Island Properties, LLC v. Crow, 97 So. 3d 329, 330 (Fla. 3d DCA 2012) (quoting Dean v. MOD Props., Ltd., 528 So. 2d 432, 433 (Fla. 5th DCA 1988)) (“[O]wnership of land, or an ownership interest in land, constitutes an ‘estate’ as distinguished from an easement, which is the right in one other than the owner of the land to use land for some particular purpose or purposes.”); Am. Quick Sign, Inc. v. Reinhardt, 899 So. 2d 461, 464–65 (Fla. 5th DCA 2005) (“Although an easement is not an estate in land and its creation does not convey title, it is an interest that gives to one other than the owner a right to use the land for some specific purpose.”).

Accordingly, when a lessee transfers his leasehold interest to a third party, but retains an easement in the leased property, it cannot be said that the lessee transferred his "entire interest" in the property.

Here, the record establishes that Seville Harbour transferred less than its entire interest the property covered by the Marina Sublease to Merrill Land because Seville Harbour specifically retained "a perpetual non-exclusive easement over and on the property . . . for ingress, egress, parking, signage, utility lines . . . as well as for maintenance, construction, and reconstruction of [the non-transferred part of Parcel I]." Additionally, Seville Harbour specifically retained the right of access to the property covered by the Marina Sublease "at all reasonable times deemed necessary for purposes of the Marina Lease." Based upon these reservations, and the case law cited above, we find no error in the trial court's conclusion that the Marina Sublease is, in fact, a sublease, and not a *pro tanto* assignment.

Conclusion

In sum, because the trial court correctly concluded that the Marina Sublease was a sublease and not a *pro tanto* assignment (and because we find no merit in the other issues raised by the City[4]), we affirm the final summary judgment.

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[4] We did not need to consider the merits of the City's argument that Great Southern is a "business combination" of Merrill Land because, as the City conceded in its brief and confirmed at oral argument, that issue is moot if we determine—as we did in this opinion—that the Marina Sublease is not an assignment.

AFFIRMED.

WOLF, J., and LESTER, DON H., ASSOCIATE JUDGE, CONCUR.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

COLLIER HMA PHYSICIAN MANAGEMENT, LLC, d/b/a PHYSICIANS REGIONAL MEDICAL GROUP, a Florida limited liability company, Appellant, v. BRIAN MENICHELLO, M.D., an individual, Appellee.	)	Case No. 2D16-1204

Opinion filed May 31, 2017.

Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge.

Alan D. Lash, Martin B. Goldberg, Lorelei J. Van Wey, and Justin C. Fineberg, of Lash & Goldberg LLP, Miami, for Appellant.

Lawrence A. Farese and Michael R. Whitt, of Robins Kaplan LLP, Naples, for Appellee.

WALLACE, Judge.

In this case we are called upon to determine the enforceability of a restrictive covenant in an employment agreement between Collier HMA Physician

Management, LLC, d/b/a Physicians Regional Medical Group, a Florida limited liability company (Collier HMA), and Brian Menichello, M.D. (Dr. Menichello). Collier HMA appeals the circuit court's final summary judgment in favor of Dr. Menichello entered on the theory that the restrictive covenant was unenforceable because Collier HMA was a "successor" employer and the employment agreement did not expressly authorize enforcement of the covenant by an assignee or successor as required under section 542.335(1)(f), Florida Statutes (2012). Because the circuit court erred in basing its ruling on what it deemed to be the "substance" of a merger transaction involving Collier HMA's ultimate parent instead of on traditional principles of corporate law, we reverse.

I. THE FACTUAL AND PROCEDURAL BACKGROUND

Collier HMA is a Florida limited liability company with its principal place of business in Collier County.[1] The company owns and operates a health care business that employs approximately forty physicians and operates two hospitals. Collier HMA also has two full-service medical clinics, one in Naples and one in Bonita Springs.

Dr. Menichello is a medical doctor licensed to practice medicine in Florida. In September 2012, Collier HMA entered into an Employment Agreement (the Agreement) with Dr. Menichello. In accordance with the Agreement, Dr. Menichello was

[1]The circuit court conducted an evidentiary hearing on Collier HMA's motion for a temporary injunction. However, there has not been a final evidentiary hearing on the merits in the circuit court. The facts stated in this opinion are drawn from the pleadings, the transcript of the hearing on the motion for the temporary injunction, the depositions on file, the affidavits, and other documents in the record. We review these facts in the light most favorable to Collier HMA as the party against whom summary judgment was entered. See Markowitz v. Helen Homes of Kendall Corp., 826 So. 2d 256, 259 (Fla. 2002).

to practice medicine at Collier HMA and its two hospitals. The term of the Agreement was for three years, but it was terminable by either party on ninety days' notice.

The Agreement, as amended, included a restrictive covenant that provided in pertinent part, as follows:

> **6.7. <u>Restrictive Covenant.</u>** During the term of this Agreement, and for the 12-month period after this Agreement expires or is terminated, you won't have any financial relationship, including, without limitation, as an employee or independent contractor, with Naples Community Hospital, Inc., Lee Memorial Health System or Millennium Physician Group, nor any organization that directly or indirectly controls, is controlled by, or is under common control with, Naples Community Hospital, Inc., Lee Memorial Health System or Millennium Physician Group.

Notably, the Agreement does not provide that it is binding upon and enforceable by the successors and assigns of the parties. Instead, the Agreement expressly provides to the contrary:

> **6.11. <u>No Third-Party Beneficiaries.</u>** The terms and provisions of this Agreement are intended solely for the benefit of you and us. It is not the intention of the parties to confer third-party beneficiary rights upon any other person.

The absence of a provision for the enforcement of the Agreement by the successors and assigns of the parties is pertinent to their arguments regarding the enforceability of the restrictive covenant under section 542.335(1)(f).

In September 2012, when the parties entered into the Agreement and Dr. Menichello began the three-year term of his employment, Collier HMA was part of a large group of medical businesses that were ultimately controlled by Health Management Associates, Inc. (HMAI), a Delaware corporation with its headquarters and principal place of business in Naples. During the term of the Agreement, Community

Health Systems, Inc. (CHS), effected a merger transaction whereby it acquired control of all of the businesses in the chain that were previously subject to the ultimate control of HMAI. An explanation of the ownership of Collier HMA and its place in the family of several other companies related to it both before and after the merger is necessary to an understanding of the parties' arguments and the issue to be decided.

As is often the case with medical businesses, the structure of these companies was and remains characterized by multiple levels or tiers of ownership. At the first tier, Collier HMA owned and operated the business where Dr. Menichello was employed. At the second tier up the chain, Collier HMA was owned by a single member, Southwest Florida HMA Holdings, LLC. At the third tier, that entity was owned by Health Management Associates, LP. At the fourth tier, Health Management Associates, LP, was owned by Health Management General Partner, LLC. At the fifth tier, that entity was owned by Collier HMA's ultimate parent company, HMAI. The stock of HMAI was publicly traded. Thus, the equity interest in HMAI changed hands regularly. By contrast, the ownership of Collier HMA and the other companies in the multi-tiered ownership structure remained constant.

The merger by which CHS acquired HMAI, the ultimate parent of Collier HMA at the top tier of the ownership structure, occurred in January 2014. This transaction was structured as follows: CHS caused to be created a wholly-owned subsidiary named FWCT-2 Acquisition Corporation (FWCT-2). Upon approval of the merger by the necessary parties, FWCT-2 merged with and into HMAI, with the result that HMAI survived as a wholly-owned subsidiary of CHS.

After the merger, the stock of HMAI was no longer publicly traded. But HMAI survived the merger and continued to operate, as did all of the subsidiaries in the chain of ownership below HMAI. Obviously, there was a change in the ownership of HMAI, but there was no change in the ownership of its subsidiary companies, including Collier HMA. Indeed, Collier HMA continued to exist and to operate the medical practice, with Southeast Florida HMA Holdings, LLC, as its sole member, just as before the merger. Also, just as before, Dr. Menichello continued to be employed by and to receive his compensation from Collier HMA.

After the CHS merger, Dr. Menichello became dissatisfied with certain aspects of the continued operations of Collier HMA. Although we need not detail Dr. Menichello's complaints here, they related primarily to a claimed insufficiency in staffing and other services that he believed were necessary to the optimum operation of his practice. On September 24, 2014, Dr. Menichello gave Collier HMA ninety days' written notice of his intention to terminate the Agreement without cause effective December 24, 2014. Afterwards, Collier HMA learned that Dr. Menichello intended to begin working for Naples Community Hospital, Inc. (NCH), or one of its affiliates. On October 30, 2014, Collier HMA sent Dr. Menichello a letter reminding him of the provisions of the restrictive covenant in the Agreement. Collier HMA also informed Dr. Menichello of its intent to seek enforcement of the restrictive covenant in the event of a breach. At the end of the ninety-day notice period, Dr. Menichello became employed by NCHMD, Inc., an affiliate of NCH.

On December 29, 2014, Collier HMA filed a Verified Complaint for injunctive relief against Dr. Menichello and a Motion for Temporary Injunction. In particular, Collier HMA sought injunctive relief against Dr. Menichello prohibiting his employment in breach of the provisions of the restrictive covenant. Dr. Menichello filed an answer, affirmative defenses, and a counterclaim for declaratory relief in response to the complaint. Pertinent to the issues in this case, Dr. Menichello raised what the parties characterized as the "successor defense" in his fifth affirmative defense as follows:

> Community Health Systems, Inc. ("CHS") is the successor to Health Management Associates, Inc. ("HMA") in the ownership, operation, and control of Physicians Regional Healthcare System and affiliated companies, including in particular the Defendant's former employer, Collier HMA Physician Management, LLC. The Restrictive Covenant does not expressly authorize enforcement by a party's successors or assigns. Therefore, the Plaintiff, as a subsidiary and affiliate of the successor CHS, lacks standing to enforce the Restrictive Covenant, and this Court must refuse enforcement of the Restrictive Covenant, pursuant to Fla. Stat. § 542.335(1)(f).

Dr. Menichello also asserted the theory of the "successor defense" in his counterclaim seeking declaratory relief against Collier HMA.

The circuit court conducted a hearing over several days on Collier HMA's motion for a temporary injunction. At the conclusion of the hearing, the circuit court denied the motion. Collier HMA appealed the denial of its motion for temporary injunction, and this court affirmed the circuit court's order on January 15, 2016. Collier HMA Physician Mgmt., LLC v. Menichello, 185 So. 3d 1241 (Fla. 2d DCA 2016) (table decision).

II. THE CIRCUIT COURT'S RULING

Dr. Menichello moved for a partial summary judgment on his successor defense and on his related counterclaim seeking a declaratory judgment that the restrictive covenant was not enforceable. The circuit court granted the motion, ruling as follows:

> 1. The record evidence establishes beyond dispute that the Defendant's employer, Collier HMA Physician Management, LLC ("Collier HMA"), was acquired by a third party, Community Health Systems, Inc. ("CHS"), through its wholly owned subsidiaries, during the course of the Defendant's employment.
>
> 2. As a result of its acquisition by CHS during the course of Defendant's employment, the Plaintiff, Collier HMA, is a "successor" employer within the meaning of Fla. Stat. § 542.335(1)(f).
>
> 3. Pursuant to Fla. Stat. § 542.335(1)(f), a restrictive covenant is not enforceable by successors or assigns unless the restrictive covenant expressly authorizes such enforcement.
>
> 4. Neither the Employment Agreement at issue in this case, nor the restrictive covenant in particular, authorizes enforcement of the restrictive covenant by successors or assigns.
>
> 5. Therefore, the restrictive covenant is not enforceable by the Plaintiff as a matter of law.
>
> 6. There is no genuine issue as to any material fact relative to the successor defense and the Defendant is entitled to a judgment as a matter of law on the successor defense and related Counterclaim for Declaratory Judgment.

The circuit court's written findings do not explain the rationale underlying its conclusion that Collier HMA had become a successor employer. However, the circuit court noted that it based its ruling in part on the testimony and documentary evidence presented at the hearing on the motion for the temporary injunction. At the conclusion of that hearing, portions of the circuit court's oral ruling provide important clues to its thinking:

> And so I think you—you look at form over substance and—or the—you don't get—reverse that and say you don't

> get carried away by looking at the form—formal structure; <u>you look at the substance of it, who really owns it</u>. And—and, obviously, in this case the HMA—original HMA company is—I mean, is definitely owned by another corporate structure.

(Emphasis added.) The circuit court also noted that after the merger, there were certain indicia of a new employer-employee relationship in the mode of operation of Collier HMA. The circuit court noted as an example that Dr. Menichello had been required to submit to a drug screening after the merger as if he had been a new employee of the company. Thus, in applying section 542.335(1)(f) to the question of whether Collier HMA had become a successor entity after the merger, the circuit court viewed its task as to ferret out the substance of what had occurred rather than to examine the formal structure of the transaction and to determine whether there had been any change in the identity of Dr. Menichello's employer.

After the entry of the order granting Dr. Menichello's motion for summary judgment, the circuit court entered a final summary judgment in his favor. This appeal followed.

III. THE STANDARD OF REVIEW

The standard of review for an order granting a motion for summary judgment is de novo and requires a two-pronged analysis. <u>Volusia County v. Aberdeen at Ormond Beach, L.P.</u>, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper only if (1) no genuine issue of material fact exists, viewing every possible inference in favor of the party against whom summary judgment has been entered, and (2) the moving party is entitled to a judgment as a matter of law. <u>See</u> <u>id.</u>; <u>Huntington Nat'l Bank v. Merrill Lynch Credit Corp.</u>, 779 So. 2d 396, 398 (Fla. 2d DCA 2000). "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Holland v. Verheul, 583 So. 2d 788, 789 (Fla. 2d DCA 1991).

IV. COLLIER HMA'S APPELLATE ARGUMENTS

On appeal, Collier HMA makes three arguments. First, the circuit court misinterpreted and misapplied section 542.335(1)(f) in concluding that Collier HMA became a successor employer after the merger so as to preclude it from enforcing the restrictive covenant. Second, after the merger, Dr. Menichello executed an amendment to the Agreement in which he ratified and reaffirmed all terms and conditions of the Agreement and all prior amendments, including the restrictive covenant. Thus, Collier HMA may enforce the restrictive covenant against Dr. Menichello. Third, and in the alternative, there were genuine issues of material fact regarding the applicability of the successor defense that precluded the entry of a summary judgment in favor of Dr. Menichello on that issue. Based on our disposition of Collier HMA's first argument, we need not address its second and third arguments.

V. DISCUSSION

Section 542.335(1)(f), provides as follows:

> (1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:
>
> . . . .
>
> (f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is

> an assignee or successor to a party to such contract, provided:
>
> 1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.
>
> 2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

Under the statute, a court may not refuse to enforce a restrictive covenant because the party seeking enforcement is a third-party beneficiary of the contract, an assignee, or a successor of a party to the contract. See § 542.335(1)(f). In other words, in accordance with section 542.335(1)(f), as long as the contract expressly provides for enforcement of the restrictive covenant by a third-party beneficiary, assignee, or successor, a court may not refuse enforcement of the restrictive covenant on the ground that the entity seeking enforcement is not a party to the contract. See Cellco P'ship v. Kimbler, 68 So. 3d 914, 917 (Fla. 2d DCA 2011); Marx v. Clear Channel Broad., Inc., 887 So. 2d 405, 408 (Fla. 4th DCA 2004); Tusa v. Roffe, 791 So. 2d 512, 514 (Fla. 4th DCA 2001).

In his Fifth Affirmative Defense and in his counterclaim for declaratory relief, Dr. Menichello maintained that Collier HMA had become a "successor" within the meaning of section 542.335(1)(f) after the CHS merger. The circuit court agreed. Because the Agreement did not authorize enforcement of the restrictive covenant by successors, the circuit court ruled that Collier HMA—as a successor—did not have the right to enforce the restrictive covenant against Dr. Menichello. Thus, the question of Collier HMA's right to enforce the restrictive covenant against Dr. Menichello requires us to determine whether Collier HMA qualified as a successor after the merger within the meaning of the statute.

Section 542.335 does not provide a definition of the term "successor." The context in which the term is used requires us to seek the meaning of the term as it relates to corporations and other business entities. In this context, the term "successor" denotes "[a] corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." Black's Law Dictionary 1660 (10th ed. 2014); see also Corneal v. CF Hosting, Inc., 187 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001) ("The term successor 'is generally applicable to corporations wherein one corporation by a process of amalgamation, consolidation or duly authorized legal succession becomes vested in the rights and assumes the burdens of its predecessor corporation.' " (quoting Int'l Ass'n of Machinists & Local Lodge #954 v. Shawnee Indus., Inc., 224 F. Supp. 347, 352 (W.D. Okla. 1963))).

The status of Collier HMA after the CHS merger does not comport with the standard definition of a successor as it relates to corporations or other business entities. Placing our focus narrowly on Collier HMA, we see that it had not been consolidated with or amalgamated into another company after the merger. And Collier HMA had not acquired the rights of or assumed the burdens of any other entity. Indeed, the undisputed evidence showed that nothing about the corporate structure or ownership of Collier HMA was different after the merger. Collier HMA continued in existence as a single member limited liability company. It did not sell or otherwise transfer any of its assets. One could not identify a successor entity to Collier HMA as defined above because its ownership had not altered and it continued to operate with the same assets and personnel after the merger. Furthermore, Collier HMA had not assigned the Agreement to another entity because no such assignment was required. And if we step back to look at the larger picture, we see that Collier HMA continued to function after the merger as a part of the chain of health care businesses that had been part of the HMAI network.

If we take an even broader view, we must acknowledge that the ownership of HMAI—the ultimate parent of Collier HMA at the top of the multi-tiered chain of companies—did change after the merger. Obviously, CHS had acquired HMAI, the ultimate parent of Collier HMA. But the change in the ownership of HMAI did not cause any change in the ownership of Collier HMA. More to the point, the acquisition of HMAI by CHS did not make CHS the successor to Collier HMA. The argument to the contrary is inconsistent with the proposition that "[a] parent corporation and its wholly-owned subsidiary are separate and distinct legal entities." Am. Int'l Grp., Inc. v. Cornerstone Buss., Inc., 872 So. 2d 333, 336 (Fla. 2d DCA 2004) (citing Gladding Corp. v. Register, 293 So. 2d 729, 732 (Fla. 3d DCA 1974)). The idea that CHS became a successor to Collier HMA after the merger is also inconsistent with the principle that a parent corporation cannot exercise the rights of its subsidiary. See id. at 336. Notably, Dr. Menichello did not plead or prove that Collier HMA was operated as the mere instrumentality of CHS so as to warrant a disregard of the distinction between Collier HMA and its ultimate parent five or six tiers above it in the chain of ownership. See generally Unijax, Inc. v. Factory Ins. Ass'n, 328 So. 2d 448, 454 (Fla. 1st DCA 1976) (discussing the elements that must be proved to establish that a subsidiary entity is the mere instrumentality of the parent).

In response to these points, Dr. Menichello argues here—as he did successfully in the circuit court—that a proper application of section 542.335(1)(f) to the merger transaction under review in this case requires us to look at the substance of the transaction, not to the form by which it was structured. Dr. Menichello explains his position as follows:

> Here, CHS acquired HMA and all of its subsidiaries by merging HMA into a wholly owned CHS subsidiary. All ownership, control, and management of HMA and its subsidiaries, including Collier HMA, succeeded to CHS as of the date of the transaction. As a result of the merger, CHS, through its wholly owned subsidiary, became vested with the rights and duties of HMA. Thus, as the lower court correctly found, CHS is the "successor-by-merger" of HMA and all of its subsidiaries.

(Record references omitted.) Dr. Menichello concedes that Collier HMA survived the merger transaction. Nevertheless, he contends that Collier HMA survived only "as a wholly owned subsidiary and an employment arm of the successor, CHS, a total stranger to the Employment Agreement with Dr. Menichello." Dr. Menichello concludes that since Collier HMA is now nothing more than a subsidiary of CHS, it does not have the right to enforce the restrictive covenant because of the absence of the necessary authorization for enforcement by successors in the Agreement.

Based on the teaching of the Florida Supreme Court in Corporate Express Office Products, Inc. v. Phillips, 847 So. 2d 406 (Fla. 2003), we must reject Dr. Menichello's argument. In Corporate Express, the court affirmed that an analysis of the enforceability of restrictive covenants after a stock purchase, asset purchase, or corporate merger must be based on "the traditional principles of corporate law." Id. at 414. In other words, courts must rely on the "form of the commercial transaction" under review in determining the enforceability of a restrictive covenant after the completion of a stock purchase, asset purchase, or corporate merger. Id. The court rejected the Fifth District's reliance on a "culture and mode of operation" analysis in the case under review. Id. The court also expressly disapproved what it characterized as the Fifth District's substitution of "a novel test of changing corporate identity based on changes in corporate culture and mode of operation for well-established principles of commercial transactions." Id. (citing Phillips v. Corp. Express Office Prods., Inc., 800 So. 2d 618, 620 (Fla. 5th DCA 2001)). After expressing its disapproval of the Fifth District's substance-over-form analysis, the court explained the rationale for the correct approach to determining the enforceability of a restrictive covenant after the completion of a stock sale, asset sale, or corporate merger as follows:

> Reliance on changes in corporate culture and mode of operation as a measure of whether an employer has changed identity and therefore must obtain a consensual assignment of a noncompete agreement would inject unnecessary uncertainty into corporate transactions. Changes in corporate culture occur frequently, often in response to market forces and without a corresponding change in corporate structure. As long as the other prerequisites to the validity of a noncompete agreement are met, neither a 100 percent stock purchase nor a merger affects the enforceability of the agreement.

Id. Thus, the court rejected the approach adopted by the circuit court that would attempt to ascertain the "substance" of the transaction instead of a more practical focus on the transaction's structure following traditional principles of corporate and business law.[2]

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[2]We understand that in Corporate Express the court considered section 542.33, Florida Statutes (1985), the version of the statute applicable to restrictive covenants entered into before July 1, 1996. Section 542.335, Florida Statutes (Supp.

Accordingly, we must disapprove the effort to determine the question of whether CHS was a successor to Collier HMA by trying to discover what had "really happened" when the dust settled after CHS's acquisition of HMAI. Instead, we must focus on what occurred following traditional principles of corporate and business law. As we have seen, the merger transaction concluded with CHS in control of HMAI, Collier HMA's ultimate parent. Nevertheless, there was no change in the ownership structure or assets of Collier HMA. Granted, CHS became the ultimate parent of Collier HMA as a result of the merger, but CHS's status as the ultimate parent of Collier HMA did not give it the authority to enforce the restrictive covenant in the agreement. See Cellco P'ship, 68 So. 3d at 917-18. Viewing what occurred based on traditional principles of corporate law, no other entity emerged from the transaction as a successor to Collier HMA. Tellingly, Dr. Menichello continued to be employed by and to receive his compensation from Collier HMA. And, of course, Collier HMA could not be a successor to itself. As the only other signatory to the Agreement, Collier HMA had the right to seek enforcement of the restrictive covenant in its own contract. See Chen v. Cayman Arts, Inc., No. 10-80236-CIV, 2011 WL 782279, *8 (S.D. Fla. Feb. 24, 2001). It follows that Dr. Menichello's successor defense fails as a matter of law.

1996), replaced section 542.33 effective July 1, 1996. See ch. 96-257, §§ 1-2, Laws of Fla. Nevertheless, the court's analysis of the factors to be considered in determining the effect of a stock purchase, asset purchase, or a corporate merger in construing the statute remains generally applicable. See Johnson Controls, Inc. v. Rumore, No. 8:07-CV-1808-T-17TBM, 2008 WL 203575, *7 (M.D. Fla. Jan. 23, 2008) ("In Corporate Express, the Florida Supreme Court determined that a successor corporation's ability to enforce noncompete agreements entered into between employees and the predecessor corporation depends on the type of business transaction or transfer.").

VI. CONCLUSION

For the foregoing reasons, the circuit court erred in entering the order granting summary judgment and the final summary judgment in favor of Dr. Menichello. Accordingly, we reverse the order granting summary judgment and the final summary judgment and remand this case to the circuit court for further proceedings consistent with this opinion.

Reversed and remanded.

MORRIS and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 31, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-2114
Lower Tribunal No. 10-63383

Deauville Hotel Management, LLC d/b/a Deauville Beach Resort,
Appellant,

vs.

Kemesia Boota Ward and Patrick James Ward,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Norma S. Lindsey, Judge.

Billbrough & Marks, P.A. and Geoffrey B. Marks, for appellant.

Faudlin Pierre, for appellees.

Before LOGUE, SCALES, and LUCK, JJ.

LUCK, J.

"Chapel of Love," the tune made famous by the Dixie Cups, celebrates how a couple's wedding day should feel like "Spring is here, the sky is blue/Birds all sing as if they knew . . . Bells will ring, the sun will shine, I'll be his and he'll be mine." The Dixie Cups, Chapel of Love (Red Bird Records 1964). The birds, however, did not sing and the bells did not ring on Kemesia Boota Ward's wedding day. The hotel ballroom where she planned to have her wedding reception was closed by the city of Miami Beach, and the hotel moved the reception to its lobby. Ward's wedding day was "ruined," a "public spectacle," "cramped," and "very uncomfortable," and caused her to be "embarrassed," "cry[] uncontrollably," and have "nightmares." As a result, Ward and her husband, Patrick James Ward, sued the hotel that hosted and catered the wedding, Deauville Hotel Management, LLC, for breach of contract and intentional infliction of emotional distress.[1] The jury, after a five day trial, found for the couple on both claims and awarded Ward $23,000 and her husband $2,500 on their breach of contract claims, and the couple $5,000 for intentional infliction of emotional distress. The hotel contends on appeal that it did not breach the contract because it did not promise a specific location for the wedding within the hotel, the jury awarded more breach of contract damages than the facts supported, and its conduct was not outrageous enough for an intentional infliction of emotional distress claim. After reviewing the briefs, and with the benefit of oral argument, we affirm in part and reverse in part.

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[1] Ward also sued for negligent and fraudulent misrepresentation but those claims are not at issue in this appeal.

Factual Background and Procedural History

On February 17, 2010, Ward signed the contract with Deauville to hold her wedding reception in the hotel's Richelieu ballroom on July 9, 2010. The contract did not specify in which room or area of the hotel the wedding would be held and, instead, referred to the "function space." The contract further stated that:

> Function space is assigned, and reassigned if needed, to accommodate both the GROUP and all other parties who are using the HOTEL facilities during the GROUP'S event dates. THE GROUP agrees to promptly notify the HOTEL of any changes in function space requirements and/or attendance.

The contract also contained the following provision regarding the hotel's cancellation policy:

> HOTEL'S CANCELLATION: If Hotel cancels this Agreement or is unable to provide the requested space, the Hotel will work with Group to arrange alternative space at the prices set forth herein. Hotel will arrange for comparable space in the same vicinity of the Hotel and shall provide, without charge, necessary transportation between the alternative site and the Hotel. Hotel's liability is limited to these remedies, and Hotel shall not be liable for any consequential, punitive or special damages.

Nine days before the Wards' wedding, on June 30, 2010, the city of Miami Beach red-tagged (i.e., shut down) the hotel's three ballrooms, including the Richelieu, as unsafe and in violation of certain building codes.[2] Deauville did not

[2] The red-tag the city put on the door of the Richelieu ballroom stated:

> UNSAFE BUILDING. This building or structure is, in the opinion of the building official, unsafe, as defined in 8-5, unsafe structures of the Miami-Dade County Municipal Code. This building shall be vacated,

inform the Wards of the shut down and, instead, staff was instructed to continue the preparations for the reception as planned. Meanwhile, Deauville attempted to have the red-tag removed. The next day after the city closed the ballrooms, the hotel sent a facsimile to the city's building department requesting a ninety-day extension of time for compliance. The extension was denied. On July 8, the day before the wedding, the hotel filed an emergency motion for temporary injunction against the city to allow access to the ballrooms. The hotel was again unsuccessful in its attempts to have the ballrooms reopened. Finally, an emergency inspection was conducted on the day of the wedding, but because no repairs had been made, the ballroom remained closed.

The Wards learned of the shutdown hours before their wedding on July 9. While the Wards were married in a ceremony off-site, the Deauville moved the reception to the "Napoleon Pre-function area," which is what the hotel called its lobby. The lobby, unlike the Richelieu ballroom, was too small for the 190 guests; the tables were "crammed" in the space; there was no privacy for the event; the disc jockey playing music was told numerous times to lower the volume; and hotel guests were walking through the wedding reception (some in their bathing suits) and participating in the reception (clapping during the introduction of the wedding party).

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not be occupied.

For ruining their wedding, the Wards sued the hotel for breach of contract (as to Ward), breach of a third-party beneficiary contract (as to her husband), and intentional infliction of emotional distress. The jury found in favor of Ward on her breach of contract claim, and awarded her $23,000 in compensatory damages. The jury also found that Ward's husband was a third-party beneficiary to the contract and suffered damages in the amount of $2,500. With respect to the intentional infliction of emotional distress claim, the jury found that the hotel engaged in extreme and outrageous conduct and awarded damages in the amount of $5,000. The trial court denied Deauville's post-trial motion for judgment in accordance with its directed verdict motion. This appeal followed.

Standard of Review

We review a denial of a motion for directed verdict de novo, viewing "all of the evidence presented and all available inferences from that evidence in the light most favorable" to the non-moving party. R.J. Reynolds Tobacco Co. v. Ballard, 163 So. 3d 541, 545 (Fla. 3d DCA 2015) (quotation omitted). "[A]n appellate court," in other words, "must affirm the denial of a motion for directed verdict if any reasonable view of the evidence could sustain a verdict in favor of the non-moving party." Meruelo v. Mark Andrew of Palm Beaches, Ltd., 12 So. 3d 247, 250 (Fla. 4th DCA 2009).

Analysis

Deauville appeals the trial court's denial of its post-trial motion for direct verdict on three grounds. The directed verdict motion should have been granted as to the breach of contract claims, Deauville contends, because: there was no breach as the contract between the hotel and Ward did not specify that the wedding would be held in the Richelieu ballroom; and the jury's damage award exceeded what the law allowed and the evidence supported. The hotel argues, as to the intentional infliction of emotional distress claim, that directed verdict should have been granted because its conduct was not, as matter of law, extreme and outrageous.

1. Breach of contract.

To prevail in a breach of contract action, a plaintiff must prove: (1) a valid contract existed; (2) a material breach of the contract; and (3) damages. See Murciano v. Garcia, 958 So. 2d 423 (Fla. 3d DCA 2007). Deauville contends that because the contract allowed it to reassign a space as needed and because "function space" was not defined as the Richelieu ballroom, the hotel did not breach the contract when it unilaterally moved the Wards' reception to the lobby of the hotel. Deauville's reading of the contract is an incomplete one.

The contract was unambiguous that it provided for an assigned, committed, and reserved function space. The contract provided that a "[f]unction space is assigned, and reassigned if needed, to accommodate both the GROUP [the Wards] and the other parties who are using the HOTEL facilities during the GROUP's event dates." It further provided that "[i]f the HOTEL resells the Function Space committed to the GROUP, revenue received by the HOTEL from the resale will reduce the amount owed by the GROUP." The contract continued that "[i]f Hotel . . . is unable to provide the requested space, the Hotel will work with Group to arrange alternative space." The contract, in other words, provided for a function space that was "assigned," "committed," and "reserved" for the Wards. The only questions for the jury were whether the Richelieu ballroom was the assigned, committed, and requested function space, and whether the lobby was a "comparable" alternative space when the hotel was unable to provide the Richelieu ballroom.

The jury answered in favor of the Wards, and the evidence at trial supported the jury's verdict. The hotel's computer system had the Richelieu ballroom as the reserved function space for the reception. A banquet event order form generated by the hotel identified the Richelieu ballroom as the space rented for the wedding. And the electronic mail and text messages sent between Ward and Deauville's catering manager confirmed the assigned function space was the Richelieu ballroom.

The alternative space that the hotel provided, moreover, was not "comparable." The jury saw a schematic drawing and pictures of the hotel comparing the Richelieu ballroom and the lobby. Witnesses testified that the tables were "crammed" into the lobby; there was no ocean view; there was no room for a head table with bridesmaids and groomsmen; the music was drowned out; and there was no separation between wedding and hotel guests. This evidence, viewed in the light most favorable to the Wards, supported the jury's verdict that the hotel did not provide the reserved and committed space, and when it was unable to do so, the hotel did not provide a "comparable" alternative as required by the contract.

2. Compensatory Damages.

Deauville, next, contends that the jury awarded more compensatory damages than was supported by the evidence. The Wards, the hotel argues, paid $12,985.65 for food and beverages, which money also included use of the room. The jury's award of $25,500 ($23,000 to Ward and $2,500 to her husband as a third-party beneficiary), Deauville continues, was far too high. The $25,500 was justified, the Wards respond, for two reasons: the incidental expenses for flowers, linens, photography, videography, entertainment, transportation, and cake cost the couple $9,500; and the rental value of the Richelieu ballroom was $15,000.

As to the incidental expenses claimed by the Wards, the evidence at trial was that they had flowers, linens, photography, videography, entertainment, transportation, and cake at the wedding. While these things were not in the Richelieu ballroom, they were at the wedding and used by the Wards and their guests. "Compensatory damages are designed to make the injured party whole to the extent that it is possible to measure such injury in monetary terms." MCI Worldcom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008). A plaintiff "is not entitled to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of the defendant." Id. The purpose of compensatory damages is not to punish defendants or to "bestow a windfall on plaintiffs." Id. at 224 (quotation omitted). The Wards were already whole with regard to these incidental expenses. They cannot get the benefit of these expenses twice. See Kingswharf, Ltd. v. Kranz, 545 So. 2d 276, 278 (Fla. 3d DCA 1989) ("Both counts were based on the same elements of damages, and there is clearly a duplication in the damages awarded. Double recovery on the same element of damages is prohibited.").

As to the Wards' position that the damage award compensated them for the value of the ballroom, the evidence at trial showed that the cost of the Richelieu ballroom was free when a party, like them, entered into a food and beverage contract with the hotel. Only where a party rented the room by itself – without a food and beverage contract – would they pay $15,000 for the rental. Here, the Wards entered into a food and beverage contract and, therefore, did not pay for renting the ballroom. Awarding them the value of renting the Richelieu ballroom when the couple was not charged and did not pay for renting it by virtue of the food and beverage contract would constitute a "windfall," paying the Wards twice for the same thing. MCI, 995 So. 2d at 224.

There was evidence at trial supporting the jury's compensatory damages verdict for the $12,985.65 paid for the food and beverage contract to secure the requested function space. Beyond that, the directed verdict motion should have been granted.

3. Intentional Infliction of Emotional Distress

Deauville, finally, contends that its conduct was legally insufficient to support a claim for outrageous conduct required for an intentional infliction of emotional distress claim. To prove intentional infliction of emotional distress, the plaintiff must show:

> (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
> (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
> (3) the conduct caused emotion distress; and
> (4) the emotional distress was severe.

LeGrande v. Emmanuel, 889 So. 2d 991, 994 (Fla. 3d DCA 2004). What constitutes outrageous conduct is a question that must be decided as a matter of law. De La Campa v. Grifols Am., Inc., 819 So. 2d 940, 943 (Fla. 3d DCA 2002) ("What constitutes outrageous conduct is a question for the trial court to determine as a matter of law.") The plaintiff's "subjective response" to the conduct "does not control the question of whether the tort of intentional infliction of emotional distress occurred." Liberty Mut. Ins. Co. v. Steadman, 968 So. 2d 592, 595 (Fla. 2d DCA 2007).

As to the second element, for one's actions to rise to the level of intentional infliction of emotional distress, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Clemente v. Horne, 707 So. 2d 865, 867 (Fla. 3d DCA 1998) (quotation omitted). It is not "enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Gallogly v. Rodriguez, 970 So. 2d 470, 471-72 (Fla. 2d DCA 2007) (quotation omitted). In other words, even purposeful conduct that one knows is going to hurt another is not outrageous enough to support a claim.

For example, calling a minister a thief in front of his parishioners is not legally outrageous. See LeGrande, 889 So. 2d at 994; see also Food Lion, Inc. v. Clifford, 629 So.2d 201, 202-03 (Fla. 5th DCA 1993) (stating that a false accusation of theft was insufficient to support a cause of action for intentional infliction of emotional distress). Neither is a supervisor calling an African-

American employee the n-word and monkey, and threatening to fire the employee without cause. See Williams v. Worldwide Flight SVCS., Inc., 877 So. 2d 869, 870 (Fla. 3d DCA 2004).

Deauville, here, pulled a bait-and-switch. The Wards expected and paid for birds and bells at their wedding reception, and instead got bikini-clad hotel guests and background noise. We do not minimize or condone what Deauville did. It was wrong, and tortious (as reflected by the jury's negligent misrepresentation verdict), and caused the Wards physical and emotional distress. It was not worse, however, than purposefully and falsely ruining a pastor's reputation in his church and community, or ruining one's career by hurling racial slurs and making him think he's going to be fired for no reason. The Wards' day was ruined; the LeGrande and Williams plaintiffs had ruined reputations and careers. Because the courts did not find what the LeGrande and Williams defendants did to be sufficiently outrageous, we cannot find the Deauville's conduct to be legally outrageous either.

The two cases cited by the Wards in support of their intentional infliction claim, Steadman and Thomas v. Hosp. Bd. of Dirs. of Lee Cnty., 41 So. 3d 246 (Fla. 2d DCA 2010), are telling. In Steadman, the insurance company intentionally denied and delayed payment for the plaintiff's treatment in an effort to speed up her demise, to induce stress that it knew would be detrimental to her health, and to inflict emotional distress. Steadman, 968 So. 2d at 595. In Thomas, "[a] hospital and its employees negligently rendered medical care, resulting in the death of the decedent" and, "[s]ubsequent to the death, the hospital and its employees then engaged in a purported cover-up and notified the family that the decedent died from natural causes despite knowing that such information was false." Thomas, 41 So. 3d at 254. The Steadman and Thomas cases, in essence, dealt with matters of life-and-death. The defendants in those cases caused the death of another, and intentionally inflicted harm.

A wedding day is an important one in the lives of a young couple. Wedding memories – good or bad – do not easily fade. Causing these bad memories (as the hotel did here), however, is many degrees removed from causing or covering up the negligent death of another on the outrageousness scale. Purposefully causing death by withhold insurance benefits or covering up the negligent death of a family member is atrocious, utterly intolerable, and outside the bounds of decency in a way that causing nightmares, disappointment, and embarrassment because of a ruined wedding is not.

Conclusion

For these reasons, we affirm the trial court's decision denying Deauville's post-trial directed verdict motion as to jury's finding the hotel breached the food and beverage contract. We reverse the trial court's decision denying the directed verdict motion as to: (1) the jury's award of breach of contract damages for any amount greater than $12,985.65; and (2) the jury's finding that the hotel engaged in extreme and outrageous conduct. We remand for the trial court to enter judgment on Kemesia Ward's breach of contract claim for $12,985.65; on Patrick Ward's third-party beneficiary claim for $1.00 as nominal damages[3]; and for Deauville on the intentional infliction of emotional distress claim.

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

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[3] Destiny Const. Co. v. Martin K. Eby Const., 662 So. 2d 388, 390 (Fla. 5th DCA 1995) ("[E]ven if Destiny is not able to prove that it sustained actual damages as a result of the breach, Destiny would be entitled to recover nominal damages upon a showing of breach of contract."); Young v. Johnston, 475 So. 2d 1309, 1313 (Fla. 1st DCA 1985) ("An aggrieved party who has suffered no damages is entitled to a judgment for nominal damages only." (citation omitted)); AMC/Jeep of Vero Beach, Inc. v. Funston, 403 So. 2d 602, 605 (Fla. 4th DCA 1981) ("While there is a legal remedy for every legal wrong and, thus, a cause of action exists for every breach of contract, an aggrieved party who has suffered no damage is only entitled to a judgment for nominal damages."), quoted in In re Standard Jury Instructions – Contract & Bus. Cases, 116 So. 3d 284, 341 (Fla. 2013).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

BUTLER CARPET COMPANY, a Florida Corporation, d/b/a BOB'S CARPET MART,

Appellee.

Case No. 2D15-2030

DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

CHK, LLC, a California Limited Liability Company,

Appellee.

Case No. 2D15-3075

CONSOLIDATED

Opinion filed May 31, 2017.

Appeals from the Circuit Court for Pinellas County; Pamela A.M. Campbell and Walter L. Schafer, Jr., Judges.

Clinton L. Doud, Special Counsel and Marc Peoples, Assistant General Counsel, Department of Transportation, Tallahassee, for Appellant.

Raymond T. Elligett, Jr., and Shirley T.
Faircloth of Buell & Elligett, P.A., Tampa;
James A. Helinger, Jr., of Law Offices of
James A. Helinger, Jr.; and D. Tobyn
DeYoung of D. Tobyn DeYoung, P.A.,
St. Petersburg, for Appellees.

SLEET, Judge.

The Department of Transportation appeals the stipulated final judgments awarding damages to Butler Carpet Company and CHK, LLC, in individual inverse condemnation actions brought by Butler and CHK concerning properties along U.S. 19 in Pinellas County.[1] We affirm the trial courts' awards to Butler and CHK of damages for the actual physical takings of portions of their properties. However, because the trial courts in these individual cases both erred in finding that the Department's partial physical takings of the properties directly caused severance damages for loss of access and visibility and that access to each property was substantially diminished as a result of the U.S. 19 construction project, we reverse those portions of the final judgments that award severance damages and damages for substantially diminished access and loss of visibility.

The facts in these cases are undisputed. Both properties are similarly situated on either side of U.S. 19 in Pinellas County—Butler on the eastern side and CHK on the western side. Butler owns and operates a business called Bob's Carpet Mart on its property, and CHK owns property upon which there is a furniture store. Prior to the Department's U.S. 19 reconstruction project, Butler's property directly abutted the road's northbound lanes and CHK's property directly abutted the southbound lanes. At

[1]We have consolidated these appeals for the purposes of opinion only.

that time, motorists could directly access these commercial properties via driveways that connected to U.S. 19, as well as by other local roads running along the sides and backs of the properties. Old U.S. 19 was rebuilt as an elevated highway with twenty-five-foot-high walls. On either side of U.S. 19, the Department constructed frontage roads that directly abut Butler's and CHK's properties. As such, there is no longer direct access from U.S. 19 to Butler's and CHK's properties, and instead access is via the frontage roads and the existing side and rear local roads. The frontage roads can be accessed from U.S. 19 at major intersections via exit ramps and U-turns beneath overpasses. The exits include signage displaying businesses' names and addresses to alert motorists of which exit to use to access properties along the frontage roads.

New U.S. 19 and the frontage roads were constructed on the Department's own right of way. But the Department encroached upon small portions of Butler's and CHK's properties to construct driveways and sidewalks connecting the properties to the frontage roads, and an additional portion of Butler's parking lot was used to build a drainage area. The Department did so without permission from the property owners and without instituting eminent domain proceedings. As a result, both Butler and CHK filed actions for inverse condemnation against the Department.

The Department stipulated pretrial that it did not have the legal right to physically invade Butler's and CHK's properties and that the reconstruction of U.S. 19 damaged both properties. As such, the only issue at each trial was whether the damage caused by the Department was compensable.

After conducting nonjury trials on the issue of liability, both trial courts entered orders finding compensable takings for the physical encroachment and construction upon the properties and ruling that both Butler and CHK were also entitled to severance damages for loss of access and visibility and damages for substantially diminished access. The parties then entered into mediated settlement agreements setting forth the amounts of damages, as well as attorney fees and costs.

On appeal, the Department does not challenge either trial court's finding that physical takings occurred in these cases. Rather the Department argues that the trial courts erred in finding compensable severance damages for loss of access and visibility due to the Department's partial physical takings. The Department maintains that the loss of access and visibility did not result directly from the physical takings but rather from the overall impact of the construction of new U.S. 19 and the frontage roads on the Department's own property. The Department also argues that the trial courts further erred in determining that Butler and CHK were entitled to compensable damages because the project substantially diminished access to their properties. We agree with both of the Department's arguments.

The general policy of takings law "is that owners of property taken by a governmental entity must receive full and fair compensation." Fla. Dep't of Transp. v. Armadillo Partners, Inc., 849 So. 2d 279, 282 (Fla. 2003) (quoting Broward County v. Patel, 641 So. 2d 40, 42 (Fla. 1994)). "When less than the entire property is being appropriated, 'full compensation for the taking of private property . . . includes both the value of the portion being appropriated and any damage to the remainder caused by the taking.' " Id. at 282-83 (quoting Div. of Admin. v. Fenchman, Inc., 476 So. 2d 224, 226 (Fla. 4th DCA 1985)). "The damage to the remainder caused by the taking is also referred to as severance damages, damage caused by severing a part from the whole." Id.

I. SEVERANCE DAMAGES

In an inverse condemnation proceeding grounded upon an alleged loss of access, the trial court makes both findings of fact and conclusions of law. Palm Beach County v. Tessler, 538 So. 2d 846, 850 (Fla. 1989). The trial court, as finder of fact, resolves all conflicts in the evidence and "[b]ased upon the facts as so determined . . . then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity." Id. On appeal, "the trial court's factual findings are afforded deference, but its application of the facts to the law . . . is reviewed de novo." Dep't of Transp. v. Fisher, 958 So. 2d 586, 590 (Fla. 2d DCA 2007).

The general rule in takings law is that "[w]hen less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking." Div. of Admin., State Dep't of Transp. v. Capital Plaza, 397 So. 2d 682, 683 (Fla. 1981) (emphasis added) (determining that the landowner was not entitled to severance damages for loss of access caused by a new median that was constructed on the Department's own right of way and not by the widening of a road that was performed on a portion of property taken from the landowner); see also City of Jacksonville v. Twin Rests., Inc., 953 So. 2d 720, 723-24 (Fla. 1st DCA 2007) (reversing award of severance damages for changes in traffic flow caused by construction of new median on the city's own right of way because award was inconsistent with supreme court's holding in Capital Plaza "that landowners have no compensable interest in traffic flow and that, in order to receive severance damages, any complained-of impairment must result directly from a taking" (quoting Capital Plaza, 397 So. 2d at 683)).

Nevertheless, Butler and CHK maintain that they are entitled to severance damages here pursuant to this court's opinion in Fisher, 958 So. 2d 586. In Fisher, where there was no physical taking by the Department, a landowner whose property abutted U.S. 19 before the roadway's reconstruction brought an inverse condemnation action for loss of access because he was left with only direct access to a frontage road. This court ultimately reversed the summary judgment based on our conclusion that the landowner's access had not been substantially diminished. But in doing so, this court stated that "when the government physically appropriates some portion of a property owner's land, any diminished access to the property may be considered as part of the severance damages owed for the reduced value of the remainder of the land." Id. at 589 (citing Tessler, 538 So. 2d at 849). Both trial courts in the instant cases relied upon this statement to conclude that the Department's physical takings here automatically entitled Butler and CHK to severance damages for loss of access. Such, however, is a misreading of Fisher.

This statement in Fisher does not create an automatic entitlement to severance damages for loss of access whenever there has been a partial taking. This court merely stated that diminished access "may be considered" when determining severance damages. 958 So. 2d at 589. There was no reason for this court to elaborate on this legal concept in Fisher because there was no partial taking in that case and severance damages therefore were not at issue. But this court did recognize in Fisher that in order to establish compensable damages for lack of access, a landowner must show a connection between the government action and the loss of access. Id. at 592 ("[T]he Fishers have not shown that the Department's actions destroyed or diminished access to their property. Rather, they have shown only that drivers must now travel a less convenient route from the newly constructed U.S. 19 to their property. Thus . . . the Fishers have failed to show that they have suffered a compensable loss of access.").

Accordingly, where there has been a partial taking of property and the landowner brings a claim for loss of access, the trial court must first determine whether the claimed loss of access is a direct result of the use or activity on the land taken or whether it is solely the result of activity that occurred on property other than that taken from the property owner. If the claimed loss of access is not caused by the use to which the property taken has been applied, the property owner is not entitled to severance damages for loss of access. Capital Plaza, 397 So. 2d at 683. But if the evidence demonstrates a direct connection between the activity on the taken property and the claimed loss of access, the property owner is entitled to severance damages for the loss of access he or she can prove. Fisher, 958 So. 2d at 589.

Applying this standard to the instant cases, we conclude that Butler and CHK are not entitled to severance damages for loss of access. The Department's takings of these properties were for the specific purpose of reconstructing Butler's and CHK's driveways to connect the properties to the public frontage road and, in Butler's case, to construct a drainage area. But Butler's and CHK's claims for loss of access did not relate to this construction and instead were grounded upon the reconfiguration of U.S. 19 and construction of a frontage road system, which—like the median in Capital Plaza—occurred on the Department's own existing right of way, not on the land taken from the property owners.

We do recognize that in Lee County v. Exchange National Bank of Tampa, 417 So. 2d 268 (Fla. 2d DCA 1982), this court carved out a very narrow exception to

Capital Plaza's general rule. The Lee County exception "authorizes an award for damages to the remainder where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put." Id. at 270. However, a taking does not fall within this exception, and severance damages are not proper, if it is "practicable to separate the use of the land taken from that of the adjoining land." Id. at 271 (quoting Pub. Serv. Elec. & Gas Co. v. Oldwick Farms, Inc., 308 A.2d 362, 365 (N.J. Super. Ct. App. Div. 1973)). Such is the case here. There is a clear distinction between the project constructed on the Department's right of way and the work executed on Butler's and CHK's properties. The U.S. 19 project involved major construction of a new elevated highway and the frontage road system for the purpose of improving the flow of traffic on U.S. 19. In contrast, construction upon the taken portions of Butler's and CHK's properties was designed to enhance and improve driver access between the properties and the frontage roads. Butler's and CHK's claims of loss of access stem from the Department's use of its own right of way independent of the small portions of land taken from the property owners. This is not the factual scenario envisioned by the Lee County court. See id. at 269-70 (noting that a good example of the general rule's exception would be highway construction cases "grounded on the premise that it is impossible to separate the damages caused by the small portion of the highway built upon the taken land from the damages caused by the highway as a whole" (emphasis added)).

At trial, Butler and CHK each presented the expert witness testimony of an engineer,[2] who stated that the use to which their land was put was an "integral and

[2]CHK and Butler both engaged the same engineer to testify as an expert witness at their respective trials.

inseparable part of the entire project" because the reconstruction of U.S. 19 made it necessary for the Department to connect the properties to frontage roads, improve the sidewalks, and in Butler's case, provide a drainage area. He also testified that the sidewalks had to be improved to comply with the federal Americans with Disabilities Act in order for the Department to receive federal funds to complete the entire project. But there was no testimony or evidence that the work on the land taken by the Department directly caused a loss of access. See Twin Rests., 953 So. 2d at 722 ("Twin put on no evidence that the actual taking of its property, as opposed to effects it anticipated from median-induced changes in traffic flow, would cause any severance damages."). In fact, both he and the Department's engineer agreed that the work performed on the property taken improved access from both properties to the frontage road. As such, the Lee County exception is inapplicable to the instant cases. See Lee County, 417 So. 2d at 271 ("[W]here it is possible to separate the element of damage to remaining lands due to use of the land taken from the owner, from the damage thereto flowing from the use of lands taken from others for the same project, the measure of damage is limited to that caused by use of the land taken from the owner." (quoting Oldwick Farms, 308 A.2d at 364)).

As such, Butler and CHK are not entitled to severance damages for their claims of loss of access.

II. SUBSTANTIAL DIMINUTION OF ACCESS

Independent of their claims for severance damages due to loss of access, Butler and CHK could be entitled to compensation if the Department's actions amounted to a taking by substantially diminishing access to their properties. See Tessler, 538 So. 2d at 849 (holding that "[t]here is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property" independent of whether there was a physical taking). "The owner of property abutting a public wa[y] has a right of ingress to and egress from his property." Weir v. Palm Beach County, 85 So. 2d 865, 868-69 (Fla. 1956); see also § 334.03(20), Fla. Stat. (2009) (defining "right of access" as "the right of ingress to a highway from abutting land and egress from a highway to abutting land"). "[W]hen an established land service road is converted into a limited access facility the abutting property owners are entitled to compensation for the destruction of their previously existing right of access." Anhoco Corp. v Dade County, 144 So. 2d 793, 797 (Fla. 1962).[3] However, this right is "subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as . . . to have the way improved to meet the demands of public convenience and necessity." Weir, 85 So. 2d at 869; see also Bowden v. City of Jacksonville, 42 So. 394 (Fla. 1906). And " 'access' as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic." State Dep't of Transp. v. Stubbs, 285 So. 2d 1, 4 (Fla. 1973).

In Tessler, 538 So. 2d at 849, the Florida Supreme Court explained:

> It is not necessary that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished.

[3]"A limited access facility may be described generally as a broad super-highway with traffic lanes separated by a central median strip, and with ingress and egress to and from the highway only at designated interchanges or crossovers, oftentimes substantial distances apart." Anhoco, 144 So. 2d at 797.

The trial courts here relied on Tessler to determine that there had been compensable takings of access in the instant cases. Based on our de novo review, we conclude that this was error. See Fisher, 958 So. 2d at 590.

In Tessler, the court concluded that evidence that the proposed government action in that case, when completed, "would block all access" to the public roadway that the landowner's business fronted and would leave "access thereto only through a circuitous alternative route through residential streets" supported "the conclusion that there was a substantial loss of access." 538 So. 2d at 847, 850. Here, however, the government action did not "block all access" to the public roadway; instead, the Department's reconstruction project included public frontage roads that provided access to U.S. 19 from Butler's and CHK's properties. As such, Tessler is factually distinguishable from the instant case.

So too are Stubbs, 285 So. 2d 1, and Department of Transportation v. Krieder, 658 So. 2d 548 (Fla. 4th DCA 1995), both of which Butler and CHK cite on appeal. In Stubbs, the Department's project included a plan to permanently close the part of the public road abutting the landowner's property without constructing a service road or any other road to replace access to the public road, "seriously disturb[ing], if not destroy[ing]" the property's ingress and egress. 285 So. 2d at 3. The landowner's property would go from being "accessible to automobile traffic moving both north and south" on the public road to being placed in a cul-de-sac. Id. at 2. In Kreider, the abutting landowner's access to the main travel lanes of a state road was replaced with access to a one-way service road that was characterized as a "road to nowhere." 658 So. 2d at 550. Neither factual scenario is similar to the facts of the instant cases.

Furthermore, placement on a frontage road alone does not per se amount to a substantial diminution of access or, therefore, a compensable taking. See Tessler, 538 So. 2d at 849 ("The loss of the most convenient access is not compensable where other suitable access continues to exist."); see also Rubano v. Dep't of Transp., 656 So. 2d 1264, 1269 (Fla. 1995) ("[W]e noted in Anhoco[, 144 So. 2d 793,] that the completion of the service road, which provided Anhoco with access to the highway, had effectively remedied Anhoco's access problem."); Fisher, 958 So. 2d at 589-90 (concluding that access was not substantially diminished despite the fact that Fisher's property could only be reached via the frontage road); cf. Anhoco, 144 So. 2d at 798 ("It will be recalled that by the time the instant condemnation suit was instituted the State Road Department had constructed a frontage road paralleling the limited access facility and running the length of Anhoco's property. This road appears to have provided reasonable access to the new highway from both theaters. If this had been done at the outset much of the instant problem would never have arisen."). Instead, placement on the frontage road is a factor to be considered in the accessibility analysis.

In the instant cases, the provision of frontage roads preserved Butler's and CHK's individual access to a public road. And as the supreme court in Tessler recognized, a property owner's right of ingress and egress is to a public road, not to a particular public road. 538 So. 2d at 849 (stating that "the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless" the landowner's overall access is substantially diminished (emphasis added)). Additionally, access to Butler's and CHK's properties via side and rear roads was unaffected by the U.S. 19 project.

Butler and CHK presented evidence below similar to that presented by the landowner in Fisher of the longer routes northbound and southbound drivers would have to take to access the affected properties via exit ramps, U-turns, and frontage roads. 958 So. 2d at 590. Like we did in Fisher, we conclude that Butler and CHK have merely established that they have lost "their most convenient means of access" to their properties but that such "is not compensable under the clear holding of Tessler." Id. at 590-91. "[M]ere circuity of access is not compensable unless the remaining access to the property is 'substantially diminished.' "[4] Id. at 589.

Additionally, Butler and CHK have not demonstrated that they have suffered special damages not common to the general public. See Rubano, 656 So. 2d at 1270 ("[I]f injury or inconvenience is the same in kind as that suffered by others similarly situated, but different only in degree, compensation is not recoverable." (quoting Anhoco, 144 So. 2d at 798)). Butler and CHK are in no different position than any other landowner abutting a U.S. 19 frontage road. They have not established that they are entitled to compensable damages due to the substantial diminution of access to their properties.

III. LOSS OF VISIBILITY

With regard to Butler's and CHK's claims of loss of visibility, we start with the general rule that any decrease in visibility suffered as a result of the overall U.S. 19 construction project is not compensable. See Dep't of Transp. v. Weggies Banana

[4]The engineer for Butler and CHK based his distance calculations on a starting point that would require every driver traveling to these businesses to opt to use an exit other than the one nearest to each business. We can only assume that the reason for this method of calculation was to enhance the evidence of routes that are circuitous and time consuming, but the length of the new routes supported by this testimony does not change our analysis under Tessler and Fisher.

Boat, 576 So. 2d 722, 724 (Fla. 2d DCA 1990). In Weggies, this court stated that "any decrease in visibility or increased circuity of access Weggies suffered as a result of the overall design of the project is not compensable." Id. For that proposition, this court relied on Division of Administration, State Department of Transportation v. Ness Trailer Park, Inc., 489 So. 2d 1172, 1180 (Fla. 4th DCA 1986), which involved a loss of access claim—not a loss of visibility claim—and which relied on the Capital Plaza general rule to reverse an award of severance damages "when the directly taken property was not used for the purpose of limiting access." As such, this court in Weggies recognized that the general rule of Capital Plaza is not limited to loss of access claims. See Capital Plaza, 397 So. 2d at 683 ("When less than the entire property is taken, compensation for damage to the remainder can be awarded only if such damage is caused by the taking." (emphasis added)). Here, Butler and CHK allege loss of visibility caused by the construction of elevated U.S. 19. Because they have not alleged a damage that is the result of the partial taking, Capital Plaza precludes recovery for their loss of visibility claims.

Furthermore, "the agency controlling the street may in fact interfere with easements of light, air, and view without [it] constituting a taking so long as the interference is reasonable." State, Dep't of Transp. v. Suit City of Aventura, 774 So. 2d 9, 14 (Fla. 3d DCA 2000) (first citing Tessler, 538 So. 2d at 848; and then citing Benerofe v. State Rd. Dep't, 217 So. 2d 838, 839 (Fla. 1969)). In Suit City, the Third District concluded that the "interference" there, "i.e., the elevation of the lanes[, was] not a taking of light, air, or view (or visibility). Reducing the traffic distress at this intersection by elevated lanes is certainly within the discretion of the [Department] and is well within the bounds of reason." Id. Here, the reconstruction of U.S. 19 on the

Department's own right of way for the purpose of increasing traffic flow and reducing traffic distress is also well within the bounds of reason. As such, Butler and CHK are not entitled to severance damages based on their claims of loss of visibility.

IV. CONCLUSION

We affirm the awards to Butler and CHK of damages for the actual physical takings of portions of their properties. However, we reverse the trial courts' awards of severance damages and damages for substantially diminished access and loss of visibility. Furthermore, even though the parties agreed to specific amounts of attorney fees and costs in their mediated settlement agreements, those agreements also noted that the Department reserved the right to appeal "this matter in its entirety." As such, on remand, the trial courts shall reconsider the issue of attorney fees and costs. Finally, because our disposition will reduce the amounts of the overall awards to Butler and CHK, on remand the trial courts shall also recalculate prejudgment interest.

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

CASANUEVA and ROTHSTEIN-YOUAKIM, JJ., Concur.

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

IMPRESSION PRODUCTS, INC. *v.* LEXMARK INTERNATIONAL, INC.

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

No. 15–1189. Argued March 21, 2017—Decided May 30, 2017

A United States patent entitles the patent holder to "exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States." 35 U. S. C. §154(a). Whoever engages in one of these acts "without authority" from the patentee may face liability for patent infringement. §271(a). When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to "exhaust."

Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and abroad. It owns a number of patents that cover components of those cartridges and the manner in which they are used. When Lexmark sells toner cartridges, it gives consumers two options: One option is to buy a toner cartridge at full price, with no restrictions. The other option is to buy a cartridge at a discount through Lexmark's "Return Program." In exchange for the lower price, customers who buy through the Return Program must sign a contract agreeing to use the cartridge only once and to refrain from transferring the cartridge to anyone but Lexmark.

Companies known as remanufacturers acquire empty Lexmark toner cartridges—including Return Program cartridges—from purchasers in the United States, refill them with toner, and then resell them. They do the same with Lexmark cartridges that they acquire from purchasers overseas and import into the United States. Lexmark sued a number of these remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. The first group consists of Return

Program cartridges that Lexmark had sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, Impression Products infringed the Lexmark patents when it refurbished and resold them. The second group consists of all toner cartridges that Lexmark had sold abroad and that Impression Products imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so Impression Products infringed its patent rights by doing just that.

Impression Products moved to dismiss on the grounds that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired overseas. The District Court granted the motion to dismiss as to the domestic Return Program cartridges, but denied the motion as to the cartridges sold abroad. The Federal Circuit then ruled for Lexmark with respect to both groups of cartridges. Beginning with the Return Program cartridges that Lexmark sold domestically, the Federal Circuit held that a patentee may sell an item and retain the right to enforce, through patent infringement lawsuits, clearly communicated, lawful restrictions on post-sale use or resale. Because Impression Products knew about Lexmark's restrictions and those restrictions did not violate any laws, Lexmark's sales did not exhaust its patent rights, and it could sue Impression Products for infringement. As for the cartridges that Lexmark sold abroad, the Federal Circuit held that, when a patentee sells a product overseas, it does not exhaust its patent rights over that item. Lexmark was therefore free to sue for infringement when Impression Products imported cartridges that Lexmark had sold abroad. Judge Dyk, joined by Judge Hughes, dissented.

Held:

1. Lexmark exhausted its patent rights in the Return Program cartridges that it sold in the United States. A patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose. As a result, even if the restrictions in Lexmark's contracts with its customers were clear and enforceable under contract law, they do not entitle Lexmark to retain patent rights in an item that it has elected to sell. Pp. 5–13.

(a) The Patent Act grants patentees the "right to exclude others from making, using, offering for sale, or selling [their] invention[s]." 35 U. S. C. §154(a). For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude: When a patentee sells an item, that product "is no longer within the limits of the [patent] monopoly" and instead becomes the "private, individual property" of the purchaser. *Bloomer* v. *McQuewan*, 14 How. 539, 549–550. If the patentee negotiates a contract restricting the purchaser's right to use or resell the item, it may be able to enforce that restriction as a matter of contract law, but may not do so through a patent infringement lawsuit.

The exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act promotes innovation by allowing inventors to secure the financial rewards for their inventions. Once a patentee sells an item, it has secured that reward, and the patent laws provide no basis for restraining the use and enjoyment of the product. Allowing further restrictions would run afoul of the "common law's refusal to permit restraints on the alienation of chattels." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 538. As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction "is voide, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man." 1 E. Coke, Institutes of the Laws of England §360, p. 223 (1628). Congress enacted and has repeatedly revised the Patent Act against the backdrop of this hostility toward restraints on alienation, which is reflected in the exhaustion doctrine.

This Court accordingly has long held that, even when a patentee sells an item under an express, otherwise lawful restriction, the patentee does not retain patent rights in that product. See, *e.g., Quanta Computer, Inc.* v. *LG Electronics, Inc.*, 553 U. S. 617. And that well-settled line of precedent allows for only one answer in this case: Lexmark cannot bring a patent infringement suit against Impression Products with respect to the Return Program cartridges sold in the United States because, once Lexmark sold those cartridges, it exhausted its right to control them through the patent laws. Pp. 5–9.

(b) The Federal Circuit reached a different result because it started from the premise that the exhaustion doctrine is an interpretation of the patent infringement statute, which prohibits anyone from using or selling a patented article "without authority" from the patentee. According to the Federal Circuit, exhaustion reflects a default rule that selling an item "*presumptively* grant[s] 'authority' for the purchaser to use it and resell it." 816 F. 3d 721, 742. But if a patentee withholds some authority by expressly limiting the purchaser's rights, the patentee may enforce that restriction through patent infringement lawsuits. See *id.*, at 741.

The problem with the Federal Circuit's logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is a limit on the scope of the patentee's rights. The Patent Act gives patentees a limited exclusionary power, and exhaustion extinguishes that power. A purchaser has the right to use, sell, or import an item because those are the rights that come along with ownership, not because it purchased authority to engage in those practices from the patentee. Pp. 9–13.

2. Lexmark also sold toner cartridges abroad, which Impression Products acquired from purchasers and imported into the United States. Lexmark cannot sue Impression Products for infringement with respect to these cartridges. An authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.

The question about international exhaustion of intellectual property rights has arisen in the context of copyright law. Under the first sale doctrine, when a copyright owner sells a lawfully made copy of its work, it loses the power to restrict the purchaser's right "to sell or otherwise dispose of . . . that copy." 17 U. S. C. §109(a). In *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, this Court held that the first sale doctrine applies to copies of works made and sold abroad. Central to that decision was the fact that the first sale doctrine has its roots in the common law principle against restraints on alienation. Because that principle makes no geographical distinctions and the text of the Copyright Act did not provide such a distinction, a straightforward application of the first sale doctrine required concluding that it applies overseas.

Applying patent exhaustion to foreign sales is just as straightforward. Patent exhaustion, too, has its roots in the antipathy toward restraints on alienation, and nothing in the Patent Act shows that Congress intended to confine that principle to domestic sales. Differentiating between the patent exhaustion and copyright first sale doctrines would also make little theoretical or practical sense: The two share a "strong similarity . . . and identity of purpose," *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 13, and many everyday products are subject to both patent and copyright protections.

Lexmark contends that a foreign sale does not exhaust patent rights because the Patent Act limits a patentee's power to exclude others from making, using, selling, or importing its products to acts that occur in the United States. Because those exclusionary powers do not apply abroad, the patentee may not be able to sell its products overseas for the same price as it could in the United States, and therefore is not sure to receive the reward guaranteed by American patent laws. Without that reward, says Lexmark, there should be no exhaustion.

The territorial limit on patent rights is no basis for distinguishing copyright protections; those do not have extraterritorial effect either. Nor does the territorial limit support Lexmark's argument. Exhaustion is a distinct limit on the patent grant, which is triggered by the patentee's decision to give a patented item up for whatever fee it decides is appropriate. The patentee may not be able to command the same amount for its products abroad as it does in the United States. But the Patent Act does not guarantee a particular price. Instead, the Patent Act just ensures that the patentee receives one reward—of whatever it deems to be satisfactory compensation—for every item that passes outside the scope of its patent monopoly.

This Court's decision in *Boesch* v. *Gräff*, 133 U. S. 697, is not to the contrary. That decision did not, as Lexmark contends, exempt all foreign sales from patent exhaustion. Instead, it held that a sale abroad does not exhaust a patentee's rights when the patentee had nothing to do with the transaction. That just reaffirms the basic premise that only the patentee can decide whether to make a sale that exhausts its patent rights in an item.

Finally, the United States advocates what it views as a middle-ground position: that a foreign sale exhausts patent rights unless the patentee expressly reserves those rights. This express-reservation rule is based on the idea that overseas buyers expect to be able to use and resell items freely, so exhaustion should be the presumption. But, at the same time, lower courts have long allowed patentees to expressly reserve their rights, so that option should remain open to patentees. The sparse and inconsistent decisions the Government cites, however, provide no basis for any expectation, let alone a settled one, that patentees can reserve rights when they sell abroad. The theory behind the express-reservation rule also wrongly focuses on the expectations of the patentee and purchaser during a sale. More is at stake when it comes to patent exhaustion than the dealings between the parties, which can be addressed through contracts. Instead, exhaustion occurs because allowing patent rights to stick to an already-sold item as it travels through the market would violate the principle against restraints on alienation. As a result, restrictions and location are irrelevant for patent exhaustion; what matters is the patentee's decision to make a sale. Pp. 13–18.

816 F. 3d 721, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part. GORSUCH, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 15–1189

IMPRESSION PRODUCTS, INC., PETITIONER *v.* LEXMARK INTERNATIONAL, INC.

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

[May 30, 2017]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A United States patent entitles the patent holder (the "patentee"), for a period of 20 years, to "exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States." 35 U. S. C. §154(a). Whoever engages in one of these acts "without authority" from the patentee may face liability for patent infringement. §271(a).

When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to "exhaust." The purchaser and all subsequent owners are free to use or resell the product just like any other item of personal property, without fear of an infringement lawsuit.

This case presents two questions about the scope of the patent exhaustion doctrine: First, whether a patentee that sells an item under an express restriction on the purchaser's right to reuse or resell the product may enforce that restriction through an infringement lawsuit. And second, whether a patentee exhausts its patent rights by selling its product outside the United States, where American patent laws do not apply. We conclude that a patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose or the location of the sale.

I

The underlying dispute in this case is about laser printers—or, more specifically, the cartridges that contain the powdery substance, known as toner, that laser printers use to make an image appear on paper. Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and around the globe. It owns a number of patents that cover components of those cartridges and the manner in which they are used.

When toner cartridges run out of toner they can be refilled and used again. This creates an opportunity for other companies—known as remanufacturers—to acquire empty Lexmark cartridges from purchasers in the United States and abroad, refill them with toner, and then resell them at a lower price than the new ones Lexmark puts on the shelves.

Not blind to this business problem, Lexmark structures its sales in a way that encourages customers to return spent cartridges. It gives purchasers two options: One is to buy a toner cartridge at full price, with no strings attached. The other is to buy a cartridge at roughly 20-percent off through Lexmark's "Return Program." A customer who buys through the Return Program still owns the cartridge but, in exchange for the lower price, signs a contract agreeing to use it only once and to refrain from transferring the empty cartridge to anyone but Lexmark. To enforce this single-use/no-resale restriction, Lexmark installs a microchip on each Return Program cartridge that prevents reuse once the toner in the cartridge runs out.

Lexmark's strategy just spurred remanufacturers to get more creative. Many kept acquiring empty Return Program cartridges and developed methods to counteract the effect of the microchips. With that technological obstacle out of the way, there was little to prevent the remanufacturers from using the Return Program cartridges in their resale business. After all, Lexmark's contractual single-use/no-resale agreements were with the initial customers, not with downstream purchasers like the remanufacturers.

Lexmark, however, was not so ready to concede that its plan had been foiled. In 2010, it sued a number of remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. One group consists of Return Program cartridges that Lexmark sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, the remanufacturers infringed the Lexmark patents when they refurbished and resold them. The other group consists of all toner cartridges that Lexmark sold abroad and that remanufacturers imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so the remanufacturers ran afoul of its patent rights by doing just that.

Eventually, the lawsuit was whittled down to one defendant, Impression Products, and one defense: that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired abroad. Impression Products filed separate motions to dismiss with respect to both groups of cartridges. The District Court granted the motion as to the domestic Return Program cartridges, but denied the motion as to the cartridges Lexmark sold abroad. Both parties appealed.

The Federal Circuit considered the appeals en banc and ruled for Lexmark with respect to both groups of cartridges. The court began with the Return Program cartridges that Lexmark sold in the United States. Relying on its decision in *Mallinckrodt, Inc.* v. *Medipart, Inc.*, 976 F. 2d 700 (1992), the Federal Circuit held that a patentee may sell an item and retain the right to enforce, through patent infringement lawsuits, "clearly communicated, . . . lawful restriction[s] as to post-sale use or resale." 816 F. 3d 721, 735 (2016). The exhaustion doctrine, the court reasoned, derives from the prohibition on making, using, selling, or importing items "without authority." *Id.*, at 734 (quoting 35 U. S. C. §271(a)). When you purchase an item you presumptively also acquire the authority to use or resell the item freely, but that is just a presumption; the same authority does not run with the item when the seller restricts post-sale use or resale. 816 F. 3d, at 742. Because the parties agreed that Impression Products knew about Lexmark's restrictions and that those restrictions did not violate any laws, the Federal Circuit concluded that Lexmark's sales had not exhausted all of its patent rights, and that the company could sue for infringement when Impression Products refurbished and resold Return Program cartridges.

As for the cartridges that Lexmark sold abroad, the Federal Circuit once again looked to its precedent. In *Jazz Photo Corp.* v. *International Trade Commission*, 264 F. 3d 1094 (2001), the court had held that a patentee's decision to sell a product abroad did not terminate its ability to bring an infringement suit against a buyer that "import[ed] the article and [sold] . . . it in the United States." 816 F. 3d, at 726–727. That rule, the court concluded, makes good sense: Exhaustion is justified when a patentee receives "the reward available from [selling in] American markets," which does not occur when the patentee sells overseas, where the American patent offers no protection and therefore cannot bolster the price of the patentee's goods. *Id.*, at 760–761. As a result, Lexmark was free to exercise its patent rights to sue Impression Products for bringing the foreign-sold cartridges to market in the United States.

Judge Dyk, joined by Judge Hughes, dissented. In their view, selling the Return Program cartridges in the United States exhausted Lexmark's patent rights in those items because any "authorized sale of a patented article . . . free[s] the article from any restrictions on use or sale based on the patent laws." *Id.*, at 775–776. As for the foreign cartridges, the dissenters would have held that a sale abroad also results in exhaustion, unless the seller "explicitly reserve[s] [its] United States patent rights" at the time of sale. *Id.*, at 774, 788. Because Lexmark failed to make such an express reservation, its foreign sales exhausted its patent rights.

We granted certiorari to consider the Federal Circuit's decisions with respect to both domestic and international exhaustion, 580 U. S. ___ (2016), and now reverse.

II

A

First up are the Return Program cartridges that Lexmark sold in the United States. We conclude that Lexmark exhausted its patent rights in these cartridges the moment it sold them. The single-use/no-resale restrictions in Lexmark's contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.

The Patent Act grants patentees the "right to exclude others from making, using, offering for sale, or selling [their] invention[s]." 35 U. S. C. §154(a). For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude. See *Bloomer* v. *McQuewan*, 14 How. 539 (1853). The limit functions automatically: When a patentee chooses to sell an item, that product "is no longer within the limits of the monopoly" and instead becomes the "private, individual property" of the purchaser, with the rights and benefits that come along with ownership. *Id.*, at 549–550. A patentee is free to set the price and negotiate contracts with purchasers, but may not, "*by virtue of his patent*, control the use or disposition" of the product after ownership passes to the purchaser. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250 (1942) (emphasis added). The sale "terminates all patent rights to that item." *Quanta Computer, Inc.* v. *LG Electronics, Inc.*, 553 U. S. 617, 625 (2008).

This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act "promote[s] the progress of science and the useful arts by granting to [inventors] a limited monopoly" that allows them to "secure the financial rewards" for their inventions. *Univis*, 316 U. S., at 250. But once a patentee sells an item, it has "enjoyed all the rights secured" by that limited monopoly. *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, 661 (1895). Because "the purpose of the patent law is fulfilled . . . when the patentee has received his reward for the use of his invention," that law furnishes "no basis for restraining the use and enjoyment of the thing sold." *Univis*, 316 U. S., at 251.

We have explained in the context of copyright law that exhaustion has "an impeccable historic pedigree," tracing its lineage back to the "common law's refusal to permit restraints on the alienation of chattels." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 538 (2013). As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction "is voide, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man." 1 E. Coke, Institutes of the Laws of England §360, p. 223 (1628); see J. Gray, Restraints on the Alienation of Property §27, p. 18 (2d ed. 1895) ("A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land").

This venerable principle is not, as the Federal Circuit dismissively viewed it, merely "one common-law jurisdiction's general judicial policy at one time toward anti-alienation restrictions." 816 F. 3d, at 750. Congress enacted and has repeatedly revised the Patent Act against the backdrop of the hostility toward restraints on alienation. That enmity is reflected in the exhaustion doctrine. The patent laws do not include the right to "restrain[ ] . . . further alienation" after an initial sale; such conditions have been "hateful to the law from Lord Coke's day to ours" and are "obnoxious to the public interest." *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 501 (1917). "The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration." *Keeler*, 157 U. S., at 667.

But an illustration never hurts. Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem. See Brief for Costco Wholesale Corp. et al. as *Amici Curiae* 7–9; Brief for Intel Corp. et al. as *Amici Curiae* 17, n. 5 ("A generic smartphone assembled from various high-tech components could practice an estimated 250,000 patents").

This Court accordingly has long held that, even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that product. In *Boston Store of Chicago* v. *American Graphophone Co.*, for example, a manufacturer sold graphophones—one of the earliest devices for recording and reproducing sounds—to retailers under contracts requiring those stores to resell at a specific price. 246 U. S. 8, 17–18 (1918). When the manufacturer brought a patent infringement suit against a retailer who sold for less, we concluded that there was "no room for controversy" about the result: By selling the item, the manufacturer placed it "beyond the confines of the patent law, [and] could not, by qualifying restrictions as to use, keep [it] under the patent monopoly." *Id.*, at 20, 25.

Two decades later, we confronted a similar arrangement in *United States* v. *Univis Lens Co.* There, a company that made eyeglass lenses authorized an agent to sell its products to wholesalers and retailers only if they promised to market the lenses at fixed prices. The Government filed an antitrust lawsuit, and the company defended its arrangement on the ground that it was exercising authority under the Patent Act. We held that the initial sales "relinquish[ed] . . . the patent monopoly with respect to the article[s] sold," so the "stipulation . . . fixing resale prices derive[d] no support from the patent and must stand on the same footing" as restrictions on unpatented goods. 316 U. S., at 249–251.

It is true that *Boston Store* and *Univis* involved resale price restrictions that, at the time of those decisions, violated the antitrust laws. But in both cases it was the sale of the items, rather than the illegality of the restrictions, that prevented the patentees from enforcing those resale price agreements through patent infringement suits. And if there were any lingering doubt that patent exhaustion applies even when a sale is subject to an express, otherwise lawful restriction, our recent decision in *Quanta Computer, Inc.* v. *LG Electronics, Inc.* settled the matter. In that case, a technology company—with authorization from the patentee—sold microprocessors under contracts requiring purchasers to use those processors with other parts that the company manufactured. One buyer disregarded the restriction, and the patentee sued for infringement. Without so much as mentioning the lawfulness of the contract, we held that the patentee could not bring an infringement suit because the "authorized sale . . . took its products outside the scope of the patent monopoly." 553 U. S., at 638.

Turning to the case at hand, we conclude that this well-settled line of precedent allows for only one answer: Lexmark cannot bring a patent infringement suit against Impression Products to enforce the single-use/no-resale provision accompanying its Return Program cartridges. Once sold, the Return Program cartridges passed outside of the patent monopoly, and whatever rights Lexmark retained are a matter of the contracts with its purchasers, not the patent law.

B

The Federal Circuit reached a different result largely because it got off on the wrong foot. The "exhaustion doctrine," the court believed, "must be understood as an interpretation of" the infringement statute, which prohibits anyone from using or selling a patented article "without authority" from the patentee. 816 F. 3d, at 734 (quoting 35 U. S. C. §271(a)). Exhaustion reflects a default rule that a patentee's decision to sell an item "*presumptively* grant[s] 'authority' to the purchaser to use it and resell it." 816 F. 3d, at 742. But, the Federal Circuit explained, the patentee does not have to hand over the full "bundle of rights" every time. *Id.*, at 741 (internal quotation marks omitted). If the patentee expressly withholds a stick from the bundle—perhaps by restricting the purchaser's resale rights—the buyer never acquires that withheld authority, and the patentee may continue to enforce its right to exclude that practice under the patent laws.

The misstep in this logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is instead a limit on "the scope of the *patentee's rights*." *United States* v. *General Elec. Co.*, 272 U. S. 476, 489 (1926) (emphasis added). The right to use, sell, or import an item exists independently of the Patent Act. What a patent adds—and grants exclusively to the patentee—is a limited right to prevent others from engaging in those practices. See *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24, 35 (1923). Exhaustion extinguishes that exclusionary power. See *Bloomer*, 14 How., at 549 (the purchaser "exercises no rights created by the act of Congress, nor does he derive title to [the item] by virtue of the . . . exclusive privilege granted to the patentee"). As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.

The Federal Circuit also expressed concern that preventing patentees from reserving patent rights when they sell goods would create an artificial distinction between such sales and sales by licensees. Patentees, the court explained, often license others to make and sell their products, and may place restrictions on those licenses. A computer developer could, for instance, license a manufacturer to make its patented devices and sell them only for non-commercial use by individuals. If a licensee breaches the license by selling a computer for commercial use, the patentee can sue the licensee for infringement. And, in the Federal Circuit's view, our decision in *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175, aff'd on reh'g, 305 U. S. 124 (1938), established that—when a patentee grants a license "under clearly stated restrictions on post-sale activities" of those who purchase products from the licensee—the patentee can *also* sue for infringement those purchasers who knowingly violate the restrictions. 816 F. 3d, at 743–744. If patentees can employ licenses to impose post-sale restrictions on purchasers that are enforceable through infringement suits, the court concluded, it would make little sense to prevent patentees from doing so when they sell directly to consumers.

The Federal Circuit's concern is misplaced. A patentee can impose restrictions on licensees because a license does not implicate the same concerns about restraints on alienation as a sale. Patent exhaustion reflects the principle that, when an item passes into commerce, it should not be shaded by a legal cloud on title as it moves through the marketplace. But a license is not about passing title to a product, it is about changing the contours of the patentee's monopoly: The patentee agrees not to exclude a licensee from making or selling the patented invention, expanding the club of authorized producers and sellers. See *General Elec. Co.*, 272 U. S., at 489–490. Because the patentee is exchanging rights, not goods, it is free to relinquish only a portion of its bundle of patent protections.

A patentee's authority to limit *licensees* does not, as the Federal Circuit thought, mean that patentees can use licenses to impose post-sale restrictions on *purchasers* that are enforceable through the patent laws. So long as a licensee complies with the license when selling an item, the patentee has, in effect, authorized the sale. That licensee's sale is treated, for purposes of patent exhaustion, as if the patentee made the sale itself. The result: The sale exhausts the patentee's rights in that item. See *Hobbie* v. *Jennison*, 149 U. S. 355, 362–363 (1893). A license may require the licensee to impose a restriction on purchasers, like the license limiting the computer manufacturer to selling for non-commercial use by individuals. But if the licensee does so—by, perhaps, having each customer sign a contract promising not to use the computers in business—the sale nonetheless exhausts all patent rights in the item sold. See *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 506–507, 516 (1917). The purchasers might not comply with the restriction, but the only recourse for the licensee is through contract law, just as if the patentee itself sold the item with a restriction.

General Talking Pictures involved a fundamentally different situation: There, a licensee "knowingly ma[de] . . . sales . . . *outside* the scope of its license." 304 U. S., at 181–182 (emphasis added). We treated the sale "as if no license whatsoever had been granted" by the patentee, which meant that the patentee could sue both the licensee and the purchaser—who knew about the breach—for infringement. *General Talking Pictures Corp.* v. *Western Elec. Co.*, 305 U. S. 124, 127 (1938). This does not mean that patentees can use licenses to impose post-sale restraints on purchasers. Quite the contrary: The licensee infringed the patentee's rights because it did *not* comply with the terms of its license, and the patentee could bring a patent suit against the purchaser only because the purchaser participated in the licensee's infringement. *General Talking Pictures*, then, stands for the modest principle that, if a patentee has not given authority for a licensee to make a sale, that sale cannot exhaust the patentee's rights.

In sum, patent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.

III

Our conclusion that Lexmark exhausted its patent rights when it sold the domestic Return Program cartridges goes only halfway to resolving this case. Lexmark also sold toner cartridges abroad and sued Impression Products for patent infringement for "importing [Lexmark's] invention into the United States." 35 U. S. C. §154(a). Lexmark contends that it may sue for infringement with respect to all of the imported cartridges—not just those in the Return Program—because a foreign sale does not trigger patent exhaustion unless the patentee "expressly or implicitly transfer[s] or license[s]" its rights. Brief for Respondent 36–37. The Federal Circuit agreed, but we do not. An authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.

This question about international exhaustion of intellectual property rights has also arisen in the context of copyright law. Under the "first sale doctrine," which is codified at 17 U. S. C. §109(a), when a copyright owner sells a lawfully made copy of its work, it loses the power to restrict the purchaser's freedom "to sell or otherwise dispose of . . . that copy." In *Kirtsaeng* v. *John Wiley & Sons, Inc.*, we held that this "'first sale' [rule] applies to copies of a copyrighted work lawfully made [and sold] abroad." 568 U. S., at 525. We began with the text of §109(a), but it was not decisive: The language neither "restrict[s] the scope of [the] 'first sale' doctrine geographically," nor clearly embraces international exhaustion. *Id.,* at 528–

533. What helped tip the scales for global exhaustion was the fact that the first sale doctrine originated in "the common law's refusal to permit restraints on the alienation of chattels." *Id.*, at 538. That "common-law doctrine makes no geographical distinctions." *Id.,* at 539. The lack of any textual basis for distinguishing between domestic and international sales meant that "a straightforward application" of the first sale doctrine required the conclusion that it applies overseas. *Id.,* at 540 (internal quotation marks omitted).

Applying patent exhaustion to foreign sales is just as straightforward. Patent exhaustion, too, has its roots in the antipathy toward restraints on alienation, see *supra*, at 6–8, and nothing in the text or history of the Patent Act shows that Congress intended to confine that borderless common law principle to domestic sales. In fact, Congress has not altered patent exhaustion at all; it remains an unwritten limit on the scope of the patentee's monopoly. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident" (internal quotation marks omitted)). And differentiating the patent exhaustion and copyright first sale doctrines would make little theoretical or practical sense: The two share a "strong similarity . . . and identity of purpose," *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 13 (1913), and many everyday products—"automobiles, microwaves, calculators, mobile phones, tablets, and personal computers"—are subject to both patent and copyright protections, see *Kirtsaeng*, 568 U. S., at 545; Brief for Costco Wholesale Corp. et al. as *Amici Curiae* 14–15. There is a "historic kinship between patent law and copyright law," *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 439 (1984), and the bond between the two leaves no room for a rift on the question of international exhaustion.

Lexmark sees the matter differently. The Patent Act, it points out, limits the patentee's "right to exclude others" from making, using, selling, or importing its products to acts that occur in the United States. 35 U. S. C. §154(a). A domestic sale, it argues, triggers exhaustion because the sale compensates the patentee for "surrendering [those] *U. S.* rights." Brief for Respondent 38. A foreign sale is different: The Patent Act does not give patentees exclusionary powers abroad. Without those powers, a patentee selling in a foreign market may not be able to sell its product for the same price that it could in the United States, and therefore is not sure to receive "the reward guaranteed by U. S. patent law." *Id.*, at 39 (internal quotation marks omitted). Absent that reward, says Lexmark, there should be no exhaustion. In short, there is no patent exhaustion from sales abroad because there are no patent rights abroad to exhaust.

The territorial limit on patent rights is, however, no basis for distinguishing copyright protections; those protections "do not have any extraterritorial operation" either. 5 M. Nimmer & D. Nimmer, Copyright §17.02, p. 17–26 (2017). Nor does the territorial limit support the premise of Lexmark's argument. Exhaustion is a separate limit on the patent grant, and does not depend on the patentee receiving some undefined premium for selling the right to access the American market. A purchaser buys an item, not patent rights. And exhaustion is triggered by the patentee's decision to give that item up and receive whatever fee it decides is appropriate "for the article and the invention which it embodies." *Univis*, 316 U. S., at 251. The patentee may not be able to command the same amount for its products abroad as it does in the United States. But the Patent Act does not guarantee a particular price, much less the price from selling to American consumers. Instead, the right to exclude just ensures that the patentee receives one reward—of whatever amount the patentee deems to be "satisfactory compensation," *Keeler*, 157 U. S., at 661—for every item that passes outside the scope of the patent monopoly.

This Court has addressed international patent exhaustion in only one case, *Boesch* v. *Gräff*, decided over 125 years ago. All that case illustrates is that a sale abroad does not exhaust a patentee's rights when the patentee had nothing to do with the transaction. *Boesch*—from the days before the widespread adoption of electrical lighting—involved a retailer who purchased lamp burners from a manufacturer in Germany, with plans to sell them in the United States. The manufacturer had authority to make the burners under German law, but there was a hitch: Two individuals with no ties to the German manufacturer held the American patent to that invention. These patentees sued the retailer for infringement when the retailer imported the lamp burners into the United States, and we rejected the argument that the German manufacturer's sale had exhausted the American patentees' rights. The German manufacturer had no permission to sell in the United States from the American patentees, and the American patentees had not exhausted their patent rights in the products because they had not sold them to anyone, so "purchasers from [the German manufacturer] could not be thereby authorized to sell the articles in the United States." 133 U. S. 697, 703 (1890).

Our decision did not, as Lexmark contends, exempt all foreign sales from patent exhaustion. See Brief for Respondent 44–45. Rather, it reaffirmed the basic premise that only the patentee can decide whether to make a sale that exhausts its patent rights in an item. The American patentees did not do so with respect to the German products, so the German sales did not exhaust their rights.

Finally, the United States, as an *amicus*, advocates what it views as a middle-ground position: that "a foreign sale authorized by the U. S. patentee exhausts U. S. patent rights unless those rights are expressly reserved." Brief for United States 7–8. Its position is largely based on policy rather than principle. The Government thinks that an overseas "buyer's legitimate expectation" is that a "sale conveys all of the seller's interest in the patented article," so the presumption should be that a foreign sale triggers exhaustion. *Id.*, at 32–33. But, at the same time, "lower courts long ago coalesced around" the rule that "a patentee's express reservation of U. S. patent rights at the time of a foreign sale will be given effect," so that option should remain open to the patentee. *Id.*, at 22 (emphasis deleted).

The Government has little more than "long ago" on its side. In the 1890s, two circuit courts—in cases involving the same company—did hold that patentees may use express restrictions to reserve their patent rights in connection with foreign sales. See *Dickerson* v. *Tinling*, 84 F. 192, 194–195 (CA8 1897); *Dickerson* v. *Matheson*, 57 F. 524, 527 (CA2 1893). But no "coalesc[ing]" ever took place: Over the following hundred-plus years, only a smattering of lower court decisions mentioned this express-reservation rule for foreign sales. See, *e.g.*, *Sanofi, S. A.* v. *Med-Tech Veterinarian Prods., Inc.*, 565 F. Supp. 931, 938 (NJ 1983). And in 2001, the Federal Circuit adopted its blanket rule that foreign sales do not trigger exhaustion, even if the patentee fails to expressly reserve its rights. *Jazz Photo*, 264 F. 3d, at 1105. These sparse and inconsistent decisions provide no basis for any expectation, let alone a settled one, that patentees can reserve patent rights when they sell abroad.

The theory behind the Government's express-reservation rule also wrongly focuses on the likely expectations of the patentee and purchaser during a sale. Exhaustion does not arise because of the parties' expectations about how sales transfer patent rights. More is at stake when it comes to patents than simply the dealings between the parties, which can be addressed through contract law. Instead, exhaustion occurs because, in a sale, the patentee elects to give up title to an item in exchange for payment. Allowing patent rights to stick remora-like to that item as it flows through the market would violate the principle against restraints on alienation. Exhaustion does not depend on whether the patentee receives a premium for selling in the United States, or the type of rights that buyers expect to receive. As a result, restrictions and location are irrelevant; what matters is the patentee's decision to make a sale.

* * *

The judgment of the United States Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 15–1189

IMPRESSION PRODUCTS, INC., PETITIONER *v.* LEXMARK INTERNATIONAL, INC.

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

[May 30, 2017]

JUSTICE GINSBURG, concurring in part and dissenting in part.

I concur in the Court's holding regarding domestic exhaustion—a patentee who sells a product with an express restriction on reuse or resale may not enforce that restriction through an infringement lawsuit, because the U. S. sale exhausts the U. S. patent rights in the product sold. See *ante*, at 5–13. I dissent, however, from the Court's holding on international exhaustion. A foreign sale, I would hold, does not exhaust a U. S. inventor's U. S. patent rights.

Patent law is territorial. When an inventor receives a U. S. patent, that patent provides no protection abroad. See *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 531 (1972) ("Our patent system makes no claim to extraterritorial effect."). See also 35 U. S. C. §271(a) (establishing liability for acts of patent infringement "within the United States" and for "import[ation] into the United States [of] any patented invention"). A U. S. patentee must apply to each country in which she seeks the exclusive right to sell her invention. *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 456 (2007) ("[F]oreign law alone, not United States law, currently governs the manufacture and sale of components of patented inventions in foreign countries."). See also Convention at Brussels, An

Additional Act Modifying the Paris Convention for the Protection of Industrial Property of Mar. 20, 1883, Dec. 14, 1900, Art. I, 32 Stat. 1940 ("Patents applied for in the different contracting States . . . shall be independent of the patents obtained for the same invention in the other States."). And patent laws vary by country; each country's laws "may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions." *Microsoft*, 550 U. S., at 455 (internal quotation marks omitted).

Because a sale abroad operates independently of the U. S. patent system, it makes little sense to say that such a sale exhausts an inventor's U. S. patent rights. U. S. patent protection accompanies none of a U. S. patentee's sales abroad—a competitor could sell the same patented product abroad with no U. S.-patent-law consequence. Accordingly, the foreign sale should not diminish the protections of U. S. law in the United States.

The majority disagrees, in part because this Court decided, in *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 525 (2013), that a foreign sale exhausts U. S. *copyright* protections. Copyright and patent exhaustion, the majority states, "share a strong similarity." *Ante*, at 14 (internal quotation marks omitted). I dissented from our decision in *Kirtsaeng* and adhere to the view that a foreign sale should not exhaust U. S. copyright protections. See 568 U. S., at 557.

But even if I subscribed to *Kirtsaeng*'s reasoning with respect to copyright, that decision should bear little weight in the patent context. Although there may be a "historical kinship" between patent law and copyright law, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 439 (1984), the two "are not identical twins," *id*, at 439, n. 19. The Patent Act contains no analogue to 17 U. S. C. §109(a), the Copyright Act first-sale provision analyzed in *Kirtsaeng*. See *ante*, at 13–14. More importantly, copyright protections, unlike patent protections, are harmonized across countries. Under the Berne Convention, which 174 countries have joined,* members "agree to treat authors from other member countries as well as they treat their own." *Golan* v. *Holder*, 565 U. S. 302, 308 (2012) (citing Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, Arts. 1, 5(1), 828 U. N. T. S. 225, 231–233). The copyright protections one receives abroad are thus likely to be similar to those received at home, even if provided under each country's separate copyright regime.

For these reasons, I would affirm the Federal Circuit's judgment with respect to foreign exhaustion.

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*See WIPO-Administered Treaties: Contracting Parties: Berne Convention, www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=5 (as last visited May 25, 2017).

Third District Court of Appeal
State of Florida

Opinion filed May 31, 2017.
Not final until disposition of timely filed motion for rehearing.

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No. 3D16-1951
Lower Tribunal No. 11-41471

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Michael Fernando Sierra Miranda,
Appellant,

vs.

Pacheco Entertainment Production Enterprises, Inc., etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Eric William Hendon, Judge.

The Hachar Law Firm, P.A., and Cody Pellicer and Pierre Hachar, Jr.; Acosta & Diaz, LLC, and Madeline M. Acosta and Christina K. Diaz, for appellant.

Richard J. Diaz, P.A., and Richard J. Diaz, for appellee.

Before LOGUE, SCALES and LUCK, JJ.

SCALES, J.

The defendant below, Michael Fernando Sierra Miranda, appeals the trial court's post-judgment order denying Miranda's motion to dissolve a permanent injunction. We affirm because, under the unique procedural facts of this case, the trial court did not abuse its discretion by refusing to dissolve the injunction.

Facts

The facts are not in dispute. In October 2011, Miranda, a Cuban national performing artist, entered into an agreement with appellee, plaintiff below, Pacheco Entertainment Production Enterprises, Inc. ("Pacheco"). Pursuant to the agreement, Miranda agreed to engage in no "performance activity" without the prior written consent of Pacheco. In return, Pacheco was obligated to pay Miranda for Miranda's "performance activity," to arrange his "performance activity" and to distribute Miranda's recordings. The agreement defined "performance activity" as follows:

> For purposes of this Agreement, the phrase "Performance Activity" shall include, without limitation, any use of Artist's talents and activities throughout the entertainment industry, including but not limited to live performance(s), the production of phonograph records, performances contained on phonograph records and mechanical or electrical transcriptions, record sales, musical composition and publishing, television, motion pictures, internet, radio, stage, concerts, tours, nightclubs, hotels and personal appearances of all kinds, merchandising and commercial endorsements, product tie-ins of all types, and from the sale, lease, license or other disposition of visual, literary, audio-visual, dramatic and/or musical material or productions for use in any medium of communication or entertainment, whether now known or hereafter invented, and from any and all allied, kindred or other fields of entertainment or endeavor (including, but not limited

> to, cable television, pay-per-view television, internet, downloads, audio-visual devices, etc.) in which Artist may be or become professionally engaged.

In early December 2011, Pacheco learned that Miranda was going to be performing live at a Miami club at a Christmas Eve event not coordinated by Pacheco. Unable to resolve the matter with Miranda's representative, Pacheco filed a verified complaint against Miranda in the Miami-Dade circuit court seeking both temporary and permanent injunctive relief (in Count I) and damages for breach of contract (in Count II).[1] Pacheco also filed an emergency motion to enjoin Miranda from performing at the local club.

At a December 19th hearing, the trial court entered a temporary injunction against Miranda. The trial court's injunction enjoined Miranda from performing at any entertainment event—including the Christmas Eve event—without either the express written consent of Pacheco or further order of the court. Miranda did not seek rehearing or appeal the trial court's December 19th temporary injunction order.

In January 2012, Miranda filed a motion seeking to dismiss Pacheco's verified complaint. Miranda's dismissal motion asserted that the action should be

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[1] Pacheco's verified complaint also contained a claim alleging that those hiring Miranda intentionally interfered with Pacheco's business relationship with Miranda. It appears that Pacheco never effected service of process on those defendants. In any event, those claims and those defendants are not involved in this appeal.

dismissed for lack of personal jurisdiction; the motion also argued that Pacheco had failed to join an indispensable party. The trial court denied the motion.

Very little took place in the case until almost three years later when, in March 2015, Pacheco filed a motion in the trial court seeking to compel Miranda to answer its complaint. The trial court entered an order in April 2015, directing Miranda to answer the complaint within twenty days. The trial court's order warned that if Miranda failed to timely answer the complaint Pacheco would be entitled to an automatic default final judgment without the need of further court hearing.

Miranda did not file an answer, and, in May 2015, the trial court entered an order which it characterized as a default final judgment as to Pacheco's injunction count ("May 2015 Injunction"). Specifically, the May 2015 Injunction enjoined Miranda from, among other things, "public appearances and performances of any type . . . without [Pacheco's] prior written consent, all of which is in accordance with the written contract . . . ."[2,3]

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[2] Paragraph 2 of the May 2015 Injunction reads, in its entirety, as follows:

> [P]ursuant to Count I of the complaint, the Defendant Michael Fernando Sierra [Miranda] is enjoined from public appearances and performances of any type, shall not appear on or in or participate in any way in connection with studio recordings, radio, internet or wireless services, website application or platform, print media, live performance or personal appearance, commercials or other endorsements, merchandising, or any other media platform or application or services now knowns [sic] or hereafter devised, or

Miranda did not seek rehearing or appeal the May 2015 Injunction. Rather, five months after its entry, Miranda filed a motion pursuant to Florida Rule of Civil Procedure 1.540, requesting the court to vacate the May 2015 Injunction. Miranda's Rule 1.540 motion asserted that the May 2015 Injunction was void because: (i) it was entered without notice; and (ii) the parties' underlying agreement purportedly violated federal law, which generally prohibits contracts with foreign nationals for the transfer of property. See 31 C.F.R. § 515.201(b).

The court denied Miranda's Rule 1.540 motion. While Miranda appealed the trial court's denial of his Rule 1.540 motion, he voluntarily dismissed that appeal within a week of filing the notice of appeal.

In March 2016, Pacheco filed a motion requesting the trial court to find Miranda in contempt of the May 2015 Injunction. Miranda filed a response in May 2016, and also moved to dissolve the May 2015 Injunction. In his May 2016 response, Miranda, *for the first time*, asserted that the May 2015 Injunction was unauthorized because it purported to enforce, via injunction, a personal services

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> perform any performance activity without Plaintiff's prior written consent, all of which is in accordance with the written contract between Plaintiff and Defendant and which is attached as an Exhibit to the Verified Complaint.

[3] Notwithstanding the trial court characterizing the May 2015 Injunction as a "default final judgment," it is probably more accurately characterized as a partial final judgment because it reserved jurisdiction to adjudicate Pacheco's related breach of contract claim against Miranda.

contract in contravention of Montaner v. Big Show Productions, S.A., 620 So. 2d 246 (Fla. 3d DCA 1993).

In July 2016, the trial court held a hearing on the parties' motions. Prior to the hearing, on June 6, 2016, Pacheco voluntarily dismissed its breach of contract claim (count II of its Verified Complaint) against Miranda, pursuant to Florida Rule of Civil Procedure 1.420(a)(1).[4] In August 2016, the trial court entered an order granting Pacheco's motion for contempt finding that Miranda had willfully violated the May 2015 Injunction, and that Miranda owed Pacheco damages in an amount equal to what Pacheco would have been paid had Miranda honored the terms of his written contract. At the July 2016 hearing, the trial court made no comments regarding whether the May 2015 Injunction violated the dictates of Montaner, and, via separate order, the trial court summarily denied Miranda's motion to dissolve the May 2015 Injunction. Miranda appeals only the trial court's denial of his motion to dissolve the May 2015 Injunction.

Analysis

[4] Arguably, Pacheco's June 2016 voluntary dismissal of its breach of contract claim—its only unadjudicated claim still pending against Miranda—"converted" the trial court's May 2015 Injunction into a final judgment. Indeed, following Pacheco's voluntary dismissal of the breach of contract claim, the trial court's only remaining judicial labor in this case as to Miranda related solely to matters involving enforcement of the injunction. Thus, as discussed more fully below, Pacheco's June 2016 voluntary dismissal probably provided Miranda with yet another opportunity to appeal the May 2015 Injunction—this time as a final judgment.

We review the trial court's denial of Miranda's motion to dissolve the May 2015 Injunction for abuse of discretion. See Simonik v. Patterson, 752 So. 2d 692, 692-93 (Fla. 3d DCA 2000) ("The trial court has broad discretion in granting, denying, dissolving, or modifying injunctions, and, unless a clear abuse of discretion is demonstrated, appellate courts will not disturb the trial court's decision."). The unique issue before this Court is whether a trial court abuses its discretion in failing to dissolve a permanent injunction manifested in a final judgment upon a showing that the entry of the injunction was the result of clear legal error, notwithstanding that no change in circumstances occurred since the entry of the permanent injunction.[5]

We begin our analysis by noting that the trial court's May 2015 Injunction—prohibiting Miranda from engaging in any performance activities absent the prior written consent of Pacheco—may very well be the result of legal error. See Montaner, 620 So. 2d at 248. The May 2015 Injunction specifically states that it is entered in accordance with the parties' written personal services contract. Injunctive relief is not available to enjoin a breach of a personal services contract; a party aggrieved by a breach of such a contract is limited to recovery of damages.

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[5] At oral argument, Miranda's counsel suggested that Miranda's retaining a lawyer familiar with this Court's Montaner opinion constituted a sufficient change in circumstances to warrant review of the trial court's final injunction order. Without further elaboration, we disagree.

Id. Yet, Miranda did not raise this issue until a year after the May 2015 Injunction was entered.

In this case, we are not reviewing any legal error associated with the *entry* of the trial court's May 2015 Injunction. Nor are we reviewing an interlocutory trial court order relating to a temporary injunction entered simply to maintain the status quo. Rather, we are reviewing the trial court's consideration and denial of Miranda's post-judgment motion seeking to dissolve a permanent injunction manifested in a final judgment. Thus, the unique procedural posture of this case requires us to weigh two compelling, yet competing, judicial axioms: finality in litigation versus correction of legal error.

We are mindful that the Florida Supreme Court has recently made clear that, irrespective of changed circumstances, a trial court abuses its discretion by not dissolving a *temporary* injunction where a party can demonstrate that the *temporary* injunction was entered as a result of "clear legal error or misapprehension of facts on the part of the trial court." Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 925-26 (Fla. 2017). Nothing in the MMB Properties opinion, however, can be read to extend its rationale to permanent injunctions, such as the instant one, manifested in a final judgment.

Similarly, while it is well settled that a trial court necessarily retains jurisdiction to modify a permanent injunction when changed circumstances make it equitable to do so, see Hale v. Miracle Enters., 517 So. 2d 102, 103 (Fla 3d DCA 1987), it is equally well settled that the trial court exercises such jurisdiction only if the party seeking to dissolve the injunction establishes a change in circumstances. Elias v. Steele, 940 So. 2d 495, 497 (Fla. 3d DCA 2006) ("An individual seeking to modify or dissolve an injunction must establish that the circumstances justifying the injunction have changed so that the terms of the injunction are no longer equitable."); see also Reyes v. Reyes, 104 So. 3d 1206, 1207 (Fla. 5th DCA 2012) (holding that a party seeking to dissolve a domestic violence injunction must allege a change in circumstances, not merely challenge the original issuance of the injunction); Simonik, 752 So. 2d at 693 (concluding the trial court did not abuse its discretion in refusing to vacate a permanent injunction absent a change in circumstances).

Miranda has provided us no authority for the proposition that a trial court continues to exercise jurisdiction to modify or vacate a permanent injunction, simply because of legal error, without any change in circumstances.

We note that Miranda could have challenged the merits of the December 2014 temporary injunction either by requesting a rehearing within fifteen days of its entry,[6] or by appealing that temporary injunction as a non-final order within thirty days of its rendition.[7] Similarly, Miranda could have challenged the May 2015 Injunction by seeking rehearing, by appealing it as a non-final order, or by appealing it within thirty day days of Pacheco's voluntary dismissal of its breach of contract claim, i.e., when the May 2015 Injunction became a final judgment.[8]

At the July 2016 hearing, the trial court lacked jurisdiction to entertain Miranda's contention that the May 2015 Injunction is "simply wrong as a matter of law on the merits"; that challenge should have been raised under a timely Rule 1.530 motion or on plenary appeal. Balmoral Condo. Ass'n v. Grimaldi, 107 So. 3d 1150, 1152 (Fla. 3d DCA 2013); see also Curbelo v. Ullman, 571 So. 2d 443, 444 (Fla. 1990).

The rules prescribing the procedural mechanisms for challenging judicial orders, judgments and decrees promote finality in litigation. See Balmoral, 107 So. 3d at 1151 ("The importance of finality in any justice system . . . cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end." (quoting Witt v. State, 387 So. 2d 922, 925 (Fla. 1980))). Notwithstanding the merits of Miranda's most recent challenge to the May 2015 Injunction, we cannot cast aside Florida's requirements of judicial finality, nor expand the limited nature of the trial court's post-judgment

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[6] See Fla. R. Civ. P. 1.530(b)
[7] See Fla. R. App. P. 9.130(a)(3)(B)
[8] See Fla. R. App. P. 9.130(h) and footnote four, supra.

jurisdiction. See Bank One, Nat'l Ass'n v. Batronie, 884 So. 2d 346, 348 (Fla. 2d DCA 2004) ("After rendition of a final judgment, the trial court loses jurisdiction over the case except to enforce the judgment and except as provided by rule 1.540."); Francisco v. Victoria Marine Shipping, Inc., 486 So. 2d 1386, 1388-89 (Fla. 3d DCA 1986) ("The trial court's authority to modify, amend, or vacate an order or final judgment after rendition of the final judgment is limited to the time and manner provided by rule or statute.") (footnote omitted).

Conclusion

Therefore, under the unique facts of this case, we are compelled to affirm the trial court's denial of Miranda's motion seeking to dissolve the May 2015 Injunction.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

GARY R. NIKOLITS, as Property Appraiser for Palm Beach County,
Appellant,

v.

FRANKLIN L. HANEY, EMELINE W. HANEY and **ANNE M. GANNON,** as Tax Collector for Palm Beach County, Florida,
Appellees.

No. 4D15-4464

[May 31, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward L. Artau, Judge; L.T. Case No. 2014CA005416XXXXMB.

Neil B. Jagolinzer and Jeffrey M. Clyman, West Palm Beach, for appellant.

Jane Kreusler-Walsh and Stephanie L. Serafin of Law Office of Kreusler-Walsh, Compiani & Vargas, P.A., West Palm Beach, and Christopher M. Larmoyeux of Larmoyeux & Bone, P.L., West Palm Beach, for appellees Franklin L. Haney and Emeline W. Haney.

Pamela Jo Bondi, Attorney General, and Jeffrey M. Dikman, Assistant Attorney General, Tallahassee, for Amicus Curiae State of Florida Department of Revenue.

WARNER, J.

The property appraiser appeals a final judgment in favor of homeowners declaring null and void corrections in property value made by the appraiser for tax years 2011-13 on the appellees' homestead property, due to the appraiser's successful appeal of the Value Adjustment Board's lowering of the value for the 2010 assessments. The appraiser argues that the corrections made to the 2011-13 tax year assessed values as a result of the circuit court's upward adjustment of the value of the homestead for 2010 were ministerial and allowable. We agree that the statutes and rules allow for corrections to subsequent years' values, which constitute mathematical corrections. However, the homeowners had the right to challenge the corrected valuations as being greater than market value, of which right they were deprived. We thus reverse and remand to allow for the correction of the valuations and also for new notifications to allow the homeowners their right to petition the Value Adjustment Board to contest the new valuations.

In 2008, the appellee homeowners purchased property in Palm Beach County for $23,500,000 and expended another $2,800,000 for improvements. They were given a homestead tax exemption for 2009. In 2010, the property appraiser's office assessed the property at a market value of $19,780,167, which prompted the homeowners to petition the Value Adjustment Board ("VAB") to reduce the assessment. Even though they had invested more than $24,000,000 in the property, they claimed that their homestead was worth only $12,000,000 due to a downturn in the real estate market. The VAB reduced the market value to $12,000,000. As required by section 193.122(3), Florida Statutes (2010), the property appraiser re-certified the tax roll after the VAB revision to $12,000,000. Exercising the right to challenge the VAB decision, the property appraiser filed an original action in the circuit court pursuant to sections 193.122(4) and 194.036(1)(a), Florida Statutes (2010).

Because the property was a homestead, the Save Our Homes provision of section 193.155(1), Florida Statutes (2010), applied to any increases in the property's value. The Save Our Homes cap allows an annual increase of only 3% in the assessed value of property, or the yearly increase in the Consumer Price Index, whichever is less. Under section 193.155(2), Florida Statutes, if the capped value exceeds the market value in a given year, the capped value will be reduced to the market value. Thus, the 2010 capped value of the homeowners' homestead was lowered from $19,780,167 to $12,000,000.

While the property appraiser's suit challenging the VAB reduction in value was pending, the property appraiser's office applied the Save Our Homes cap to the VAB value of $12,000,000 for subsequent years so that the property's value for tax purposes was capped at $12,180,000 in 2011, $12,545,400 in 2012, and $12,758,672 in 2013. Despite this reduction in valuation due to the VAB change, the property appraiser's office still provided Truth in Millage ("TRIM") notices to the homeowners showing the market (just) value of the property to be $17,865,887 in 2011, $17,762,500 in 2012, and $19,614,912 in 2013. The TRIM notices thus provided three different values for the property: the market value estimated by the Property Appraiser, the capped or assessed value, and the taxable value.

The pending suit by the property appraiser led to a final judgment in 2014 rejecting the VAB's $12,000,000 assessment, as well as the property appraiser's assessment of $19,780,167. The court found that the proper market value was $17,500,000. Neither side appealed the court's judgment.

Thereafter, the property appraiser concluded that the capped values for 2011 through 2013 required recalculation since they had initially been calculated based on the now-discarded $12,000,000 assessment. The property appraiser filed three Certificates of Correction to revise the 2011, 2012 and 2013 tax rolls. This changed the 2010 market value and assessed values to $17,150,000, and the capped valuations for the ensuing years were raised accordingly. As a result of the Certificates of Correction, the homeowners' taxes increased over $90,000 for each of the three tax years.

The homeowners then filed a declaratory judgment action against the property appraiser and tax collector to dispute the right to the additional taxes. The property appraiser responded by pointing out that the final judgment had increased the market value assessment in 2010 from $12,000,000 to $17,150,000. Revision of the subsequent years' valuations constituted a mathematical correction authorized by Florida Administrative Code Rule 12D-8.021(2)(a)6, through the issuance of a Certificate of Correction.

In its ruling on the declaratory judgment, the court rejected the property appraiser's argument that he was seeking to correct a clerical, administrative, mathematical, or factual error other than an error in judgment. The court found it was not an "error of omission or commission" under Florida Administrative Code Rule 12D-8.021(2)(a)(12), concluding that the rule seeks to prevent issuance of Certificates of Correction for errors of judgment. The court reasoned that the VAB, as well as the final judgment, were simply correcting an error in judgment as to the original valuation by the property appraiser, and the subsequent corrections were "seeking to make corrections based on a change in value due to an error in judgment." The court also concluded that the property appraiser violated due process because he failed to provide the homeowners with notice and opportunity to challenge the corrections for 2011-13. The court found that under Florida Administrative Code Rule 12D-8.021(7) and (9), the homeowners were entitled to notice and an opportunity to seek review with the VAB for the 2011-13 years. From these rulings, the property appraiser appeals.

The question of whether the property appraiser's reassessment of the homeowners' property and the Certificates of Correction complied with Florida law is a question of law, thus subject to de novo review. *Holland v. Gross,* 89 So. 2d 255, 258 (Fla. 1956). Statutory construction and interpretation of administrative rules are also legal issues subject to de novo review. *W. Fla. Reg'l Med. Ctr. v. See*, 79 So. 3d 1, 8 (Fla. 2012).

Property taxes are collected on all non-exempt properties in Florida as a means of funding counties, school boards, and local governments. All non-exempt properties are subject to taxation, and the Florida Constitution provides that statutes and regulations must "secure a just valuation of all property[.]" Art. VII, § 4, Fla. Const. To that end, section 197.122(1), Florida Statutes (2013), provides for revision of property taxes where mistakes may be made in the assessment or collection of taxes:

> An act of omission or commission on the part of a property appraiser, tax collector . . . does not defeat the payment of taxes, interest, fees, and costs due and may be corrected at any time by the party responsible in the same manner as provided by law for performing acts in the first place. Amounts so corrected shall be deemed to be valid ab initio and do not affect the collection of the tax.

Further, Florida Administrative Code Rule 12D-13.006(2) provides:

> The payment of taxes shall not be excused because of any act or omission or commission on the part of any property appraiser, tax collector, value adjustment board . . . .

Additionally, Florida Administrative Code Rule 12D-8.021(2)(a) lists the types of errors which shall be subject to correction by the property appraiser. Among the twenty-six types of errors which can be corrected are "4. Error[s] in extending the amount of taxes due" and "6. Mathematical errors." Fla. Admin. Code R. 12D-8.021(2)(a). As it is used in number 4, "extending" means the arithmetic computation of converting millage to the taxable value of property to determine the tax. *See* § 192.001(6), Fla. Stat. (2013). In addition, the rule provides that "[t]he correction of errors shall not be limited to the preceding [twenty-six] examples, but shall apply to any errors of omission or commission that may be subsequently found." Fla. Admin. Code R. 12D-8.021(2)(b).

On the other hand, the property appraiser cannot correct certain errors which amount to changes in the property appraiser's judgment. Fla. Admin. Code R. 12D-8.021(2)(d). These include "[a]ny error of judgment in land or improvement valuation." Fla. Admin. Code R. 12D-8.021(2)(d)(5). In this context, the term "judgment" means, in part, "the opinion of value, arrived at by the property appraiser based on the presumed consideration of the factors in Section 193.011, F.S." Fla. Admin. Code R. 12D-8.021(2)(d).

As applied to this case, the changes in value in the 2011-13 years constitute changes necessitated by the final judgment which established the initial homestead valuation in 2010 as $17,150,000. For the years thereafter, the property appraiser had to adjust the assessed value as required by the Save Our Homes cap. This constituted a strictly mathematical calculation. It did not amount to an opinion on value based upon the factors of section 193.011, Florida Statutes. It amounted to either a mathematical error, an error "extending the amount of taxes due," or it falls within the catch-all category of errors "of omission or commission that may be subsequently found" and made necessary so as not to "defeat the payment of taxes" required of all property owners. Fla. Admin. Code R. 12D-8.021(2)(a).

In *Smith v. Krosschell*, 937 So. 2d 658 (Fla. 2006), the supreme court considered the effect of a data entry error which significantly undervalued homestead property by eliminating improvements on the property. The court held that the property appraiser could correct such an error at any time pursuant to section 197.122(1), Florida Statutes. *Smith*, 937 So. 2d at 661. The court explained that the data entry error which eliminated improvements on the property was not a "just value" and did not reflect the "fair market value" of the property. *Id.* at 662. The court noted:

> [T]he Save Our Homes cap does not forever "lock in" the erroneous data and resulting assessment, thereby allowing property owners to forever pay artificially reduced taxes as long as they own the property. Instead, we conclude that section 197.122(1) applies to correct this error, thereby allowing the appraiser to correct the erroneous data previously entered and erroneously changed to establish forever a "true just value" upon which the cap can be applied to tax increases in future years.

Id. Similarly, in the present case, the 2010 erroneous valuation does not forever "lock in" a reduced valuation for subsequent years. Once the valuation is corrected pursuant to the final judgment, it allows the appraiser to correct the mathematical calculation of the Save Our Homes valuation in subsequent years. Therefore, the court erred in concluding that the correction constituted an error of judgment. The error was correctable under the statute and applicable rule.

The property appraiser had the authority to issue Certificates of Correction for the years 2011-13. Notice of the certificates was furnished to the homeowners, who then sought review before the VAB. Unfortunately, the VAB rejected the petitions. In the declaratory judgment, the homeowners sought a declaration of their rights in that they have been denied the ability to challenge the corrected assessments. They contended that the property value continued to fall during the years in question. Thus, they would seek to prove that the market or just value of the property was less than the Save Our Homes capped value for each year. We agree with the trial court that they should be allowed to make that challenge and were denied due process.

The Taxpayer Bill of Rights, section 192.0105, Florida Statutes (2016), gives to the taxpayer the right of due process in the assessment and tax collection process. It allows the taxpayer the right to be sent notices of proposed property taxes and assessments, as well as the right to both an informal conference with the property appraiser regarding valuation as well as the right to petition the VAB regarding objections to assessments. *Id.* To effectuate these rights in connection with the property appraiser's ability to correct errors in assessed valuations, rule 12D-8.021 contains notice and remedy provisions:

> (9) The property appraiser shall notify the property owner of the increase in the assessed valuation. The notice to the property owner by the property appraiser shall state that the property owner shall have the right to present a petition to the value adjustment board relative to the correction, except when the property appraiser has served a notice of intent to record a lien when property has improperly received homestead exemption.
>
> (10) If the value adjustment board has adjourned, the property owner shall be afforded the following options when an error has been made which, when corrected, will have the effect of increasing the assessed valuation and subsequently the taxes. The options are:
>
> . . . .
>
> (b) The property owner may refuse to waive the right to petition the value adjustment board at which time the property

> appraiser shall notify the proper owner and tax collector that the correction shall be placed on the current year's tax roll and also at such time as the subsequent year's tax roll is prepared, the property owner shall have the right to file a petition contesting the corrected assessment.
>
> (c) If the value adjustment board has adjourned for the year or the time for filing petitions has elapsed, a back assessment shall be considered made within the calendar year if, prior to the end of the calendar year, a signed Form DR-409, Certificate of Correction (incorporated by reference in Rule 12D-16.002, F.A.C.) or a supplemental assessment roll is tendered to the tax collector and a notice of proposed property taxes with notice of the right to petition the next scheduled value adjustment board is mailed or delivered to the property owner.

Fla. Admin. Code R. 12D-8.021.

On this record, the VAB had adjourned for the years in question and option "c" was the only available option for the petitioners. The property appraiser had furnished the Certificate of Correction. As required by the rule, the notice of proposed property taxes "with notice of the right to petition the next scheduled value adjustment board" should have been mailed to the property owner. Fla. Admin. Code R. 12D-8.021(10)(c). Then the homeowners would have been entitled to contest the corrected assessments at the "next schedule value adjustment board." *Id.* The homeowners are entitled to this relief. On remand, the property appraiser shall furnish the notice, and the next scheduled VAB shall consider any petition to the prior years' corrected assessments as they may file.

Reversed and remanded for proceedings consistent with this opinion.

GERBER and KUNTZ, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SYMCON DEVELOPMENT GROUP CORPORATION,
Appellant,

v.

BINDU PASSERO and **ANAND AMARNATH,**
Appellees.

No. 4D16-2641

[May 31, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mily Rodriguez-Powell, Judge; L.T. Case No. CACE16-001994.

Susan E. Trench of Arnstein & Lehr LLP, Miami, for appellant.

Robert S. Miller of Robert S. Miller, P.A., Fort Lauderdale, for appellee Anand Amarnath.

FORST, J.

Appellant Symcon Development Group Corp. appeals the trial court's denial of its motion to intervene, arguing the court should not have denied its motion because Appellant had a direct and immediate interest in the subject matter of the underlying lawsuit between Appellees Bindu Passero and Anand Amarnath. As set forth below, we agree with Appellant, and reverse and remand for the trial court to grant Appellant's motion.

Background

Bindu Passero ("Plaintiff") filed an amended verified complaint against her brother, Anand Amarnath ("Defendant"), alleging Defendant committed tortious acts leading to the improper transfer of certain real property from their father to Defendant. Allegedly, after their father suffered a stroke, Defendant "unduly influenced the Decedent [father] into executing a Quit-Claim Deed dated November 16, 2011, which had the effect of removing Plaintiff as a remainder beneficiary of the subject real property upon the death of the Decedent." Plaintiff attached the quit-claim deed to the verified complaint, and contended she "would have been a joint owner of the subject real property but for the improper conduct of the Defendant."

After learning of the suit, Appellant filed an Emergency Motion to Intervene. Appellant sought intervention because "Intervenor has a pending Residential Contract for Sale and Purchase with Defendant, ANAND AMARNATH, to purchase the Property . . . ." Appellant attached the land sale contract to its motion, and stated that it was "affected in a direct and immediate manner such that Intervenor will either gain or lose by the direct legal operation and effect of the Court's final judgment in this matter."

The trial court denied the motion to intervene. The court's decision found Appellant's interest in the case was "merely indirect, inconsequential, or contingent," and noted that Defendant could adequately defend Appellant's interest in the underlying lawsuit. It also found that Appellant could sufficiently guard its interest in the property by bringing separate suit. Appellant filed a motion for reconsideration, but the trial court denied it, explaining that because Defendant "no longer desires to go forward with the sale" with Appellant, the matter was moot and intervention unnecessary.[1] The court also noted it was denying the motion for reconsideration because Appellant had since initiated a separate lawsuit to enforce the contract.

Analysis

"We review an order denying a motion to intervene for abuse of discretion." *De Sousa v. JP Morgan Chase, N.A.*, 170 So. 3d 928, 929 (Fla. 4th DCA 2015).

Pursuant to Florida Rule of Civil Procedure 1.230, "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." Shedding light on the rule, the Florida Supreme Court has established the definitive test for determining whether a third party can intervene:

> "It has generally been held that the interest which will entitle a person to intervene under this provision must be in the

[1] This doesn't moot Appellant's interest in intervention because it is seeking to enforce the contract even if Defendant is trying to back out.

> matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation."

Miracle House Corp. v. Haige, 96 So. 2d 417, 418 (Fla. 1957) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918)). The court recognized that "the aim of the rules [is] to allow liberal joinder of parties and claims and the policy of equity to grant complete relief and avoid a multiplicity of suits." *Id.*; *see also Nat'l Wildlife Fed'n Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988) ("Intervention should be liberally allowed.").

Here, we find that Appellant had a "direct and immediate" interest in the underlying lawsuit by virtue of its pending Contract for Sale and Purchase with Defendant. The underlying lawsuit between Plaintiff and Defendant could certainly have affected the validity of that sale. After all, Plaintiff's amended complaint sought to void the quit-claim deed by which their father made Defendant the sole remainder beneficiary of the subject real property. If Plaintiff prevails below, then the contract between Appellant and Defendant will be no more because Defendant would not have the whole interest the contract purports to transfer. The end result would be that Plaintiff, not Appellant, will be owner of the property. As Appellant explained in its motion, "Intervenor will either gain or lose by the direct legal operation and effect of the Court's final judgment in this matter."

The instant case is analogous to *Miracle House Corp.* There, the Florida Supreme Court reversed the denial of the appellant's motion to intervene because the appellant had asserted a direct and immediate interest in the real property at issue in the underlying lawsuit. *Miracle House Corp.*, 96 So. 2d at 418. That appellant, like the one in the instant case, had executed a land sale contract with one of the appellees, and subsequently learned that the seller and another party were contesting ownership of the property. *Id.* The court held that the appellant had a right to intervene because he "had a very real interest in a parcel of the property in litigation by virtue of a contract of purchase and sale thereof executed in its favor by one of the appellees. The determination of the rights of appellees would have a direct effect on the rights of the appellant under its contract." *Id. See also Bymel v. Bank of Am., N.A.*, 159 So. 3d 345, 347 (Fla. 3d DCA 2015) (holding appellant purchaser had a right to intervene in the underlying mortgage foreclosure action because, given the particular facts, the purchaser had a reasonable basis for obtaining title to the subject real property). Here too, the resolution of property ownership in the underlying suit will have a direct effect on Appellant's rights.

As a final matter, the trial court's supplementary reasons for denying Appellant's motion to intervene are flawed. First, the court denied the motion because it believed Defendant could adequately represent Appellant's interest in the underlying lawsuit. But later, in an order denying Appellant's motion for reconsideration, the court recognized that "Defendant testified that he does not wish to extend the subject matter contract with [Appellant] and no longer desires to go forward with the sale." The trial court's conclusion is thus at odds with Defendant's testimony, with the latter certainly calling into question Defendant's continued support for the sale of the property to Appellant. Moreover, the court denied the motion to intervene because Appellant could commence a separate lawsuit (and, in fact, it has done so). But again, as the Florida Supreme Court explained, one of the main reasons allowing for intervention of third parties is to avoid a multiplicity of lawsuits. *See Miracle House Corp.*, 96 So. 2d at 418.

Conclusion

We reverse and remand the trial court's denial of Appellant's motion to intervene because Appellant had a direct and immediate interest in the real property that was the subject of the underlying lawsuit. In conformity with the language of Rule 1.230, as well as the case law discussed above ("[i]ntervention should be liberally allowed"), we remand with instructions to the trial court to grant Appellant's motion to intervene.

Reversed and remanded.

DAMOORGIAN and GERBER, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

TAYLOR ENGINEERING, INC. & ROBERT J. WAGNER, P.E.,

Appellants,

v.

DICKERSON FLORIDA, INC., a Florida corporation,

Appellee.

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

CASE NO. 1D15-4782

Opinion filed May 31, 2017.

An appeal from the Circuit Court for Duval County.
Karen K. Cole, Judge.

George R. Truitt and Kathryn L. Ender of Cole, Scott & Kissane, P.A., Miami, for Appellants.

Peter A. Robertson, Erin Rohan Smith, William Douglas Stanford, Thomas J. Tollefsen, and William Collins Cooper of the Robertson Firm, St. Augustine; James C. Hauser of Attorney's Fees in Florida PL, Maitland, for Appellee.

WINOKUR, J.

Appellants (collectively "Taylor") filed a post-trial motion for attorneys' fees and costs pursuant to section 768.79(1), Florida Statutes, and Florida Rule of Civil

Procedure 1.442. The trial court denied the motion on the authority of *Borden Dairy Co. of Alabama, LLC v. Kuhajda*, 171 So. 3d 242 (Fla. 1st DCA 2015) (holding that a proposal for settlement must strictly comply with the content requirements of rule 1.442(c)(2) in order to entitle the movant to attorneys' fees and costs). Taylor appealed. However, while this appeal was pending, the Florida Supreme Court quashed our decision in *Borden Dairy*. *Kuhajda v. Borden Dairy Co. of Alabama, LLC*, 202 So. 3d 391 (Fla. 2016). Based on the supreme court's decision, Appellee ("Dickerson") concedes that the trial court erred in holding that Taylor's proposal for settlement was invalid for failing to strictly comply with the content requirements of rule 1.442. Accordingly, we reverse and remand for the trial court to reconsider Taylor's motion in light of the supreme court's decision in *Kuhajda*.

The *Kuhajda* decision does not, however, fully resolve this appeal. Dickerson also argued that Taylor's proposal for settlement was a nominal offer that was not made in good faith, and for this reason the trial court should disallow an award of costs and attorneys' fees. § 768.79(7)(a), Fla. Stat. The parties contend that this Court has made inconsistent rulings concerning the standard in determining whether a nominal offer is made in good faith. While we find that the case law is not inconsistent, we reiterate that, for purposes of the offer of judgment statute, a nominal offer is made in good faith where the offeror has a reasonable basis to believe that its exposure to liability is minimal.

The apparent inconsistency in the good-faith standard involves *Arrowood Indemnity Co. v. Acosta, Inc.*, 58 So. 3d 286 (Fla. 1st DCA 2011), and *General Mechanical Corp. v. Williams*, 103 So. 3d 974 (Fla. 1st DCA 2012). The *Arrowood* court noted "[i]n the context of a nominal offer of judgment, this court has held that where the offeror has a reasonable basis to believe that exposure to liability is *minimal*, a nominal offer is appropriate." *Arrowood*, 58 So. 3d at 289 (emphasis supplied). However, in the same context, we held in *General Mechanical* that "a reasonable basis [for a nominal offer] exists only where the undisputed record strongly indicates that the defendant had *no* exposure." *Gen. Mech.*, 103 So. 3d at 976 (emphasis supplied). At first glance, it appears that the *General Mechanical* court would disqualify a nominal offer from the offer of judgment statute unless the defendant had "no exposure" at all to liability, whereas the *Arrowood* court would permit a nominal offer under the statute as long as the defendant's exposure to liability could be characterized as "minimal." However, a review of the relevant case law reveals no such inconsistency.

The offer of judgment statute provides in pertinent part as follows:

> (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 . . . from the date of filing of the offer if the judgment is one of no liability[.]
>
> . . . .

> (7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

§ 768.79(1) & (7)(a), Fla. Stat.[1]

In determining whether a nominal offer was made in good faith, we have previously applied the standard articulated in *Arrowood*. *See Zachem v. Paradigm Prop. Mgmt. Team, Inc.*, 867 So. 2d 1263 (Fla. 1st DCA 2004) ("A nominal offer is appropriate where the offeror has a reasonable basis to believe that exposure to liability is minimal."). *See also Connell v. Floyd*, 866 So. 2d 90, 94 (Fla. 1st DCA 2004) (Benton, J., dissenting) (stating that the rule is that "a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal").[2] The apparently different standard used by this Court in *General Mechanical* cites for that rule to *Event Services America, Inc., v. Ragusa*, 917 So. 2d 882 (Fla. 3d DCA 2005). In fact, *Event Services* does not necessarily set a different standard.

The *Event Services* court held as follows:

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[1] Similarly, Florida Rule of Civil Procedure 1.442(h)(1) provides that the court may "determine that a proposal [for settlement] was not made in good faith" and "disallow an award of costs and attorneys' fees."

[2] While this observation was made in a dissenting opinion, the majority based its ruling on the lack of particularity of the settlement offer, not the lack of exposure to liability.

> A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had *no exposure*" in the case. Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its *exposure was nominal*.

Id. at 884 (citations omitted; emphasis supplied) (citing *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So. 2d 292, 300 (Fla. 3d DCA 1997)). In other words, *Event Services* appears to utilize *both* the no-exposure and the minimal-exposure standard. However, we find that *Event Services* can be reasonably read as using the phrase "no exposure" as synonymous with "nominal exposure." This conclusion is bolstered by the fact that, aside from *Event Services* and *Peoples Gas*, the Third District has consistently held that the standard is whether there is a reasonable basis to indicate that a defendant's exposure was nominal. *See, e.g., Key West Seaside, LLC v. Certified Lower Keys Plumbing, Inc.*, 208 So. 3d 718 (Fla. 3d DCA 2015) (holding that good faith exists as a matter of law where at the time an offer was made the offeror had a reasonable basis to conclude that its exposure was nominal); *Isaias v. H.T. Hackney Co.*, 159 So. 3d 1002, 1004-05 (Fla. 3d DCA 2015) (footnote omitted) ("The determination of whether a 'nominal' offer is in good faith requires the trial court to consider whether the offeror had a reasonable basis to conclude, at the time of making the offer, that its exposure was nominal."); *Downs v. Coastal Sys. Int'l, Inc.*, 972 So. 2d 258 (Fla. 3d DCA 2008) (applying standard requiring a reasonable belief of nominal exposure); *Dep't of Highway Safety & Motor Vehicles, Fla.*

Highway Patrol v. Weinstein, 747 So. 2d 1019, 1020 (Fla. 3d DCA 1999) (applying standard requiring reasonable belief of nominal exposure). Moreover, the fact that the Third District has not seen fit to address the seeming discrepancy supports the proposition that it does not consider *Event Services* or *Peoples Gas* to be inconsistent with its other cases.

Even if *Event Services* did set a "no exposure" standard, we continue to follow the "minimal exposure" standard. The Fourth District has suggested that *Event Services* did specifically establish a no-exposure standard for a good-faith offer, but has rejected that standard. In *Citizens Property Insurance Corp. v. Perez*, the Fourth District distinguished *Event Services* and clarified that it had consistently held that "[t]he rule is that a minimal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a *reasonable basis* to conclude that its *exposure was nominal*." 164 So. 3d 1, 3 (Fla. 4th DCA 2014) (quoting *State Farm. Mut. Auto. Ins. Co. v. Sharkley*, 928 So. 2d 1263, 1264 (Fla. 4th DCA 2006) (emphasis original)). The Fourth District opined that the no-exposure standard is "too onerous." *Id.* at 3; *see also Sharaby v. KLV Gems Co.*, 45 So. 3d 560, 564 (Fla. 4th DCA 2010) (Warner, J., concurring) (disagreeing with the *Event Services* standard and also stating she did not "think that *Peoples Gas* intended to set a rule that requires an undisputed record, showing no liability, in order to prove that a minimal offer was made in good faith").

The Second and Fifth District Courts of Appeal also apply the standard articulated in *Arrowood*. *See, e.g.*, *Gawtrey v. Hayward*, 50 So. 3d 739, 743 (Fla. 2d DCA 2010) ("In assessing whether Ms. Gawtrey's nominal offer was made in good faith, the trial court was required to look at whether Ms. Gawtrey had a reasonable basis when the offer was made to conclude that her exposure in the case was nominal."); *Gurney v. State Farm Mut. Auto. Ins. Co.*, 889 So. 2d 97, 99 (Fla. 5th DCA 2004) (explaining that a nominal offer can be made in good faith if the evidence demonstrates that, at the time it was made, the offeror had a reasonable basis to conclude that its exposure was nominal).

In summary, it appears that the no-exposure standard articulated in *General Mechanical* originated from language in *Peoples Gas*, which was then adopted in *Event Services*—but neither opinion clearly adopts this standard. In turn, this Court cited *Event Services* in explaining the appropriate standard to determine whether a nominal offer is made in good faith. Because this Court and other district courts have generally applied the *Arrowood* minimal-exposure standard, and because *Event Services*—the case on which *General Mechanical* relies—appears to be a deviation from the standard generally used in the Third District, the appropriate standard is whether the offeror had a reasonable basis to conclude that his/her exposure was nominal or minimal.[3] This is the standard the trial court should apply on remand to

[3] We also note the well-established rule that "a three-judge panel of a district

determine whether Taylor's offer of judgment was made in good faith, pursuant to section 768.79(7)(a).

REVERSED AND REMANDED.

OSTERHAUS and BILBREY, JJ., CONCUR.

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court should not overrule or recede from a prior panel's ruling on an identical point of the law." *In re Rule 9.331*, 416 So. 2d 1127, 1128 (Fla. 1982). The *General Mechanical* panel would not have been authorized to overrule *Arrowood* without an en banc proceeding. *See Adams v. State*, 188 So. 3d 849 (Fla. 1st DCA 2012).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WELLS FARGO BANK, N.A.,
Appellant,

v.

MARA ELIZABETH EISENBERG a/k/a
MARA E. EISENBERG, et al.,
Appellees.

No. 4D16-2646

[May 31, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lisa S. Small, Judge; L.T. Case No. 502013CA018761.

Dean A. Morande and Michael K. Winston of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellant.

Anthony E. Saurini of The Ticktin Law Group, PLLC, Deerfield Beach, for appellee Mara Elizabeth Eisenberg.

KLINGENSMITH, J.

Appellant Wells Fargo Bank, N.A. ("Bank") appeals the involuntary dismissal of its foreclosure case against appellee Mara Elizabeth Eisenberg ("Borrower"). The trial court based the dismissal on Bank's failure to adequately prove damages. Bank alleges two grounds for reversal: 1) that the trial court erred by preventing Bank from admitting into evidence the portion of the loan payment history initially generated by the first servicer, which Bank incorporated into its own business records; and 2) that the court's involuntary dismissal was improper since Bank prima facie established the amounts due and owing, even though the portion of the payment history showing the date on which Borrower was alleged to have initially defaulted was not admitted into evidence. We agree on both issues, and reverse and remand for further proceedings.

Bank filed a mortgage foreclosure complaint against Borrower, alleging that "the payment due for December 1, 2008 and all subsequent payments have not been made." The complaint claimed that the "principal sum of $101,098.78" along with other expenses were due and owing.

Borrower's loan was initially serviced by First Union Mortgage Corporation, which later merged into Wachovia; subsequently, Wachovia merged into Bank. At trial, Bank called a loan verification analyst to testify that Bank was the servicer of Borrower's loan, and that she had become familiar with Bank's "policies and procedures related to the preparation and maintenance of business records" during her career with Bank. Although she had not worked for Wachovia, she was familiar with its recordkeeping procedures; however, she was not familiar with First Union's procedures.

When Bank attempted to admit Borrower's complete payment history into evidence, Borrower's counsel objected due to the witness's insufficient knowledge of the policies and procedures of First Union and Wachovia. The court sustained the objection, but allowed further questioning to elucidate the witness's knowledge of Bank's boarding process. After the witness did so, Borrower stood by her prior objection, contending that the payment history should be excluded because the witness could not attest to the policies and procedures of the initial servicer. The court agreed and sustained Borrower's objection for failing to lay a proper foundation in terms of the witness's knowledge of how First Union created its records while it was the servicer of the loan.

Once Bank's merger document with Wachovia was admitted as evidence, Bank entered into evidence without objection the payment history starting from Wachovia's servicing of the loan (beginning in March 2010) onward. Bank also entered into evidence without objection a payoff screenshot from its records showing all the amounts due and owing, including the principal balance that Bank alleged Borrower owed in the foreclosure complaint ($101,098.78), the escrow advance, accrued interest, and per diem interest. The screenshot also specified that this principal amount was originally due on December 1, 2008.

Borrower moved for involuntary dismissal, arguing that Bank failed to prove standing and did not present competent evidence of the amount owed on the note. Borrower argued that the accuracy of the payment history could not be ensured because the first default date alleged in the complaint was for December 2008, but the admitted payment history began in March 2010. Bank countered that that there was sufficient evidence of the amounts due and owing, but alternatively suggested that, to the extent the court believed it was necessary to have the payment history reach the initial default date, it was willing to reduce the amount it was seeking to only those sums reflected in the payment history in evidence (i.e., from March 2010).

The trial court denied involuntary dismissal on the standing issue, but granted it for failure to prove the amounts due and owing. It ruled that Bank "failed to demonstrate by substantial competent evidence the amount due and owing" because of an "an incomplete payment history." The court further stated that there was "no definitive date that was testified to in terms of when the actual default occurred." After Bank's motion for rehearing was denied, this appeal followed.

<u>The Prior Loan History</u>

"The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence." *Ocwen Loan Servicing, LLC v. Gundersen*, 204 So. 3d 530, 533 (Fla. 4th DCA 2016) (quoting *Tengbergen v. State*, 9 So. 3d 729, 736 (Fla. 4th DCA 2009)). "[T]he question of whether evidence falls within the statutory definition of hearsay is a matter of law, subject to de novo review." *Id.* (quoting *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006)).

Bank asserts that it laid the proper foundation for admission of Borrower's complete payment history by way of the analyst's testimony about Bank's boarding procedures and verification process. In sustaining Borrower's objection, the trial court reasoned that it was interpreting this court's holding in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015), to mean "that it's not just the boarding process and that whole reliability, accuracy, auditing, verification process but we're still dealing with the part of the evidence rule concerning laying a foundation in terms of how these records are created." On that point, it appears that the court took an exceedingly narrow view of our holding in *Calloway*, and should have admitted the precluded portion of the payment history.

In *Calloway*, the bank attempted to introduce the payment history and transaction dates from the current servicer's computer system, but since the payment history derived from documents transferred from a prior servicer and the testifying employee of the current servicer lacked familiarity with the prior servicer's practices and procedures, the trial court excluded those documents. *Id.* at 1067–69. We reversed, holding that the witness's testimony regarding how the current servicer reviewed the payment histories for accuracy before integrating them into its own records established sufficient trustworthiness of the prior servicer's documents. *Id.* at 1072; *see also Deutsche Bank Tr. Co. Ams. v. Frias*, 178 So. 3d 505, 508 (Fla. 4th DCA 2015) (reversing trial court's preclusion of records originating from prior servicers because although current servicer's testifying employee had not worked for any prior servicers, employee adequately established that the prior servicers' records met the business records exception and were checked for accuracy by current servicer).

As we clarified in *Gundersen*:

> "Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.' " *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1071 (Fla. 4th DCA 2015). "[T]he authenticating witness need not be 'the person who actually prepared the business records.' " *Cayea v. CitiMortgage, Inc.*, 138 So. 3d 1214, 1217 (Fla. 4th DCA 2014) (quoting *Cooper v. State*, 45 So. 3d 490, 492 (Fla. 4th DCA 2010)). As such, it is not necessary to present a witness who was employed by the prior servicer or who participated in the boarding process. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213–14 (Fla. 5th DCA 2015); *Le v. U.S. Bank*, 165 So. 3d 776, 778 (Fla. 5th DCA 2015). Rather, the records of a prior servicer are admissible where the current note holder presents testimony that it "had procedures in place to check the accuracy of the information it received from the previous note holder." *Holt v. Calchas, LLC*, 155 So. 3d 499, 506 (Fla. 4th DCA 2015). The testifying witness "just need[s][to] be well enough acquainted with the activity to provide testimony." *Cayea*, 138 So.3d at 1217. "Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records." *Love v. Garcia*, 634 So.2d 158, 160 (Fla.1994).

204 So. 3d at 533–34 (alterations in original).

Here, the trial court abused its discretion by excluding the payment records Bank sought to introduce into evidence. The analyst testified in considerable detail how Bank utilized a two-step process to board a loan. The first step, after a purchase, acquisition, or merger, was for Bank to take the electronic information from the transferring entity and match it up with other corresponding information received from them. Upon confirmation that the information matched, Bank uploaded the information into its servicing system. Within that system there were "additional checks and balances" to ensure the information would "service correctly," including accuracy checks of the property address, the name, the origination dates, and the principal balance at the time of the acquisition. This additional "testing" was performed before the loan became active within Bank's system.

The second step of the process was to send a "welcome letter" to the borrower explaining that Bank was the new servicer, with directions to call Bank if there were any issues with the payments or if the borrower thought any information was incorrect.

The analyst explained that Bank determined the trustworthiness of the records it obtained from prior servicers once the acquisitions departments ensured their accuracy, and that these records were inputted into Bank's records once they were verified. She explained that while Bank could not verify a prior servicer's processing and procedures in their entirety, Bank's review was based on verifying that the number of payments, loan balance, interest rate, and due dates as originally provided by the prior servicer matched those contained in the actual loans acquired. If the numbers did not match, Bank would have the prior servicer review the information for correctness.

This testimony demonstrated the analyst's familiarity with the boarding process and how the records were created, as well as the trustworthiness of the documents and information accepted from the prior servicer. Thus, the testimony demonstrated sufficient knowledge of the accuracy of the records and satisfied the requirements for admitting the complete payment history under the business records exception to hearsay.

<u>Involuntary Dismissal</u>

The standard of review for an order granting a motion for involuntary dismissal is de novo. *Deutsche Bank Nat'l Tr. Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014). "An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a *prima facie* case on the non-moving party's claim." *McCabe v. Hanley*, 886 So. 2d 1053, 1055 (Fla. 4th DCA 2004) (quoting *Hack v. Estate of Helling*, 811 So. 2d 822, 825 (Fla. 5th DCA 2002)). We can affirm an involuntary dismissal "only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Green Tree Servicing LLC v.*

Sanker, 204 So. 3d 496, 497 (Fla. 4th DCA 2016) (quoting *Huber*, 137 So. 3d at 563–64).

In seeking reversal, Bank relies on *Deutsche Bank National Trust Co. v. Baker*, 199 So. 3d 967, 968 (Fla. 4th DCA 2016). There, Deutsche Bank, through the current servicer's loan payment history, established the principal balance of the loan that was originally taken from the prior servicer's records. *Id.* at 969. As the prior servicer's records were not admitted, the trial court admitted the current servicer's loan payment history into evidence over the defense objection "without prejudice" against defense counsel to argue the issue regarding the starting principal balance. *Id.* Thereafter, the trial court dismissed the foreclosure action based on Deutsche Bank's supposed "fail[ure] to present reliable evidence of damages." *Id.* This court reversed, concluding that "Deutsche Bank did present a prima facie case, albeit one based upon erroneously admitted evidence of damages." *Id.* As we explained:

> Where a foreclosure plaintiff presents evidence of the amount of damages under the loan, there is sufficient prima facie evidence of damages to preclude an involuntary dismissal, even if the evidence of damages was based on inadmissible hearsay that was erroneously admitted at trial. *See Beauchamp v. Bank of New York*, 150 So. 3d 827, 829 n.2 (Fla. 4th DCA 2014) (reversing and remanding for further proceedings to determine the amount due under the note, rather than reversing for a dismissal, where "the Bank established the amount of indebtedness through witness testimony, even though that testimony concededly was inadmissible hearsay"); *Peuguero v. Bank of Am., N.A.*, 169 So. 3d 1198, 1203–04 (Fla. 4th DCA 2015) (reversing for a determination of the correct amount owed, rather than reversing for a dismissal, where the Bank's loan payment history reflected the amount of principal, but the only evidence of the amount of interest came from a witness who merely testified that the amount written on an unadmitted proposed final judgment was correct); but compare *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 281–82 (Fla. 2d DCA 2014) (reversing for dismissal where the plaintiff failed to produce any evidence, admissible or not, supporting the amount of indebtedness).

Id. at 968–69.

Along similar lines, this court reversed a trial court's involuntary dismissal in *Bayview Loan Servicing, LLC v. Del Lupo*, 208 So. 3d 97, 97–98 (Fla. 4th DCA 2017), where a payment history showing the principal amount due was admitted into evidence, even though the witness failed to confirm or interpret the payment history. We held that "[w]hen considered in the light most favorable to Bayview, this evidence was sufficient to establish a *prima facie* case on damages. Having admitted Bayview's proof of damages, albeit in a form not easily comprehensible, the trial court should not have granted appellees' motion for involuntary dismissal." *Id.*; *see also Wachovia Mortg., F.S.B. v. Goodwill*, 199 So. 3d 346, 348 (Fla. 4th DCA 2016) (remanding for further proceedings because "[t]he payment history and testimony of [the bank]'s witness were sufficient to present a prima facie case on damages and withstand involuntary dismissal"); *Lasala v. Nationstar Mortg., LLC*, 197 So. 3d 1228, 1230 (Fla. 4th DCA 2016) (stating that an admitted loan payment history provides "some evidence the trial court can use to support a judgment on the principal amount owed").

Here, the payoff screenshot in evidence showed all the amounts due and owing, including the principal balance of $101,098.78, the escrow advance, accrued interest, and per diem interest, and that the principal amount was originally due on December 1, 2008. The analyst's testimony confirmed that the information in the screenshot was created by Bank's servicing platform based on many different records within the platform, including the payment history. The analyst based her testimony about the principal balance on the screenshot in evidence, which would have also been verified by the payment history records had they been admitted.

When considered in the light most favorable to Bank, the evidence regarding the incomplete payment history was sufficient to establish a prima facie case on damages. Having admitted that evidence, the trial court erred by granting Borrower's motion for involuntary dismissal. Accordingly, we reverse the entry of the involuntary dismissal and remand this case for further proceedings consistent with this opinion.

Reversed and Remanded with instructions.

DAMOORGIAN and GERBER, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.