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Manuel Farach

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An allonge is part of a negotiable instrument, and as a result, the Best Evidence Rule requires the original allonge be introduced into evidence to enforce the note.

Newman v. Ernst & Young, LLP, Case No. 4D16-2162 (Fla. 4th DCA 2017).
A receiver is bound by a delegation clause requiring that arbitrability claims be decided by the arbitration panel.

Bank Of New York Mellon Trust Company, National Association v. Ginsberg, Case No. 4D16-316 (Fla. 4th DCA 2017).
"[T]he fact that the trust identified in the complaint is somewhat different from the trust identified in the special endorsement [attached to the foreclosure complaint] does not create a defect in standing."

Reunion West Development Partners, LLLP v. Guimaraes, Case No. 5D16-3665 (Fla. 5th DCA 2017).
"While arbitrability is generally an issue for trial courts to decide, courts must delegate the authority to the arbitrator if the parties' contract so provides."

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION f/k/a The Bank of New York Trust Company, N.A., as Successor to JPMorgan Chase Bank, N.A., as Trustee for Ramp 2003RS9,
Appellant,

v.

HARLAN S. GINSBERG, UNKNOWN HEIRS, BENEFICIARIES, DEVISEES AND ALL OTHER PARTIES CLAIMING AN INTEREST BY, THROUGH, UNDER OF THE ESTATE OF FRANCES L. GINSBERG a/k/a **FRANCES LILA GINSBERG** a/k/a **FRANCES LILLIAN GINSBERG,** deceased,
Appellees.

No. 4D16-3168

[July 5, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Judge; L.T. Case No. 10-26422 .

Kimberly S. Mello and Danielle M. Diaz of Greenberg Traurig, P.A., Tampa, for Bank of New York Mellon Trust Company, National Association.

David A. Strauss of The Strauss Law Firm, P.A., Fort Lauderdale, for appellee Harlan S. Ginsberg.

HANZMAN, MICHAEL A., Associate Judge.

Appellant, the Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A., as Successor to JPMorgan Chase Bank, N.A., as Trustee for Ramp 2003RS9 (the "Bank"), seeks reversal of summary judgment in favor of appellee, Harlan Ginsberg ("Ginsberg"). The Bank asserts that the disparity between the name of the trust in the complaint and the name of the trust in the special endorsement to the promissory note did not create a standing defect. We agree and reverse.

The Bank alleged in its complaint that it was trustee of the "Ramp

2003RS9" trust. The Bank subsequently filed a copy of the promissory note. The note had a special endorsement in favor of "The Bank of New York Mellon Trust Company, National Association F/K/A The Bank of New York Trust Company, N.A. as Successor to JPMorgan Chase Bank, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2003-RS9." Although the Bank moved to correct the scrivener's error in the complaint, the trial court denied the Bank's motion. Ginsberg then moved for summary judgment, arguing that the Bank "named the wrong trust" in its complaint. The only evidence Ginsberg offered to support the motion was the trial court's denial of the Bank's motion to correct the scrivener's error. The Bank did not offer evidence to oppose summary judgment. The trial court granted summary judgment and the Bank appealed.

We review the trial court's grant of summary judgment de novo. *See Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

A plaintiff has standing to foreclose if, at the time the complaint is filed, it possesses the promissory note and the note bears either a special endorsement in favor of the plaintiff or a blank endorsement. *McLean v. JP Morgan Chase Bank Nat'l. Assoc.*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). Here, the special endorsement on the note is in favor of the Bank, and Ginsberg offered no evidence to show the Bank lacked possession of the note at the time it filed the complaint. To prove standing, a plaintiff is not required to identify or prove the trust on whose behalf the plaintiff acts. *See id.* Thus, in this case, the fact that the trust identified in the complaint is somewhat different from the trust identified in the special endorsement does not create a defect in standing. *See also* Fla. R. Civ. P. 1.120(a) ("It is not necessary to aver the capacity of a party to sue or be sued . . . except to the extent required to show the jurisdiction of the court.").

Additionally, the Bank had no burden to come forward with evidence to oppose Ginsberg's motion for summary judgment. Ginsberg did not "tender[] competent evidence in support of his motion" for summary judgment. *Wells Fargo Bank, N.A. v. Bilecki*, 192 So. 3d 559, 561 (Fla. 4th DCA 2016) (quoting *Craven v. TRG-Boynton Beach, Ltd.*, 925 So. 2d 476, 479 (Fla. 4th DCA 2006)). Thus, the Bank was not obligated "to come forward with opposing evidence." *See id.*

We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

DAMOORGIAN and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-15042

D.C. Docket No. 2:09-cv-01640-SLB

RYAN D. BURCH,

Plaintiff - Appellant,

versus

P.J. CHEESE, INC.,

Defendant - Appellee.

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

(July 7, 2017)

Before TJOFLAT, JILL PRYOR, Circuit Judges, and MOODY,[*] District Judge.

TJOFLAT, Circuit Judge:

"This is another arbitration dispute in which the parties are litigating whether or not they should be litigating." *Anders v. Hometown Mortg. Servs.*, 346 F.3d 1024, 1026 (11th Cir. 2003). In this case, an employee sued his former employer for alleged discrimination in violation of several federal statutes. In response, the employer moved the District Court to submit the dispute to arbitration in accordance with an employment contract purportedly signed by the employee. The employee opposed the motion, denying that he signed the agreement. To resolve the factual dispute, the District Court held a bench trial and concluded that the signature was valid. Based on this finding, the Court granted the employer's motion to compel arbitration, and dismissed the employee's claims without prejudice.

The principal issue on appeal is whether the District Court erred in concluding that a general jury demand in the employee's complaint failed to preserve his statutory right to a jury trial under Section 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), on the disputed questions of fact related to the

[*] The Honorable James S. Moody, Jr., United States District Judge for the Middle District of Florida, sitting by designation.

authenticity of his signature on the purported arbitration agreement. Because we hold that that the specific procedures provided in Section 4 of the FAA for demanding a jury trial on arbitrability issues displace the general procedures for demanding a jury trial under the Federal Rules of Civil Procedure, we find no error and affirm the District Court's order.

I.

Ryan D. Burch ("Burch") began working for P.J. Cheese, Inc. ("P.J. Cheese")—a franchisee of Papa Johns located in Alabama—in 1999. In September, 2004, Burch was promoted to general manager of P.J. Cheese's Fairfield, Alabama location. He worked there until October 14, 2007, when he was asked to turn in his keys.

Roughly two years after the firing, on August 14, 2009, Burch brought this action against P.J. Cheese in the United States District Court for the Northern District of Alabama, seeking relief under an assortment of federal employment statutes. Specifically, Burch alleged that he was paid less than his female co-workers in violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) ("Equal Pay Act"), that he was discriminated against on account of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and 42 U.S.C. § 1981 ("Section 1981"), and that he was terminated in retaliation

for filing an Equal Employment Opportunity Commission ("EEOC") Charge and applying for Family and Medical Leave Act ("FMLA") leave in violation of the preceding statutes and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*. He demanded a jury trial on all claims so triable.

In response, on October 29, 2009, P.J. Cheese moved the District Court pursuant to 9 U.S.C. § 3[1] and 9 U.S.C. § 4[2] to stay the proceedings and compel

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[1] 9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

[2] 9 U.S.C. § 4 provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement

arbitration in accordance with the arbitration terms of an employment contract purportedly signed by Burch.[3] The Court ordered Burch to file any opposition to the motion by November 23, 2009. Burch complied, denying, in an affidavit filed with the court on November 23, that the signature on the alleged arbitration

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> or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

[3] The agreement, which P.J. Cheese authenticated by affidavit, provided:

> I recognize that differences may arise between the Company and me during or following my employment with the Company, and that those differences may or may not be related to employment. I understand and agree that any such differences will be resolved as provided in the Dispute Resolution Policy. . . . In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute.

agreement belonged to him. He did not, however, specifically demand that the authenticity of the signature on the agreement should be decided by a jury.

On December 11, 2009, the District Court denied P.J. Cheese's motion to compel arbitration, concluding that Burch's denial created a dispute of material fact over the authenticity of the arbitration agreement, and that he was therefore "entitled to a trial on the arbitrability question."[4] Rather than proceed immediately to trial on the signature issue, the Court moved forward with the pretrial proceedings on the merits of Burch's underlying claims. Specifically, the Court ordered P.J. Cheese to file an answer to Burch's complaint, and entered a Scheduling Order, setting, among other things, the deadline for the completion of discovery, and the dates for the final pretrial conference and trial of the case. P.J. Cheese complied with the Court's order, filing its answer on February 15, 2010, and proceeding with discovery.

Discovery lasted for approximately ten months. At its conclusion, P.J. Cheese moved for summary judgment on all claims brought in the complaint.[5]

[4] In addition to taking into consideration Burch's sworn affidavit, the District Court noted that "a cursory comparison of the signatures on [Burch's] Affidavit and his EEOC charges with the signature on the [Arbitration] Agreement shows that the signature on the Agreement is unlike the signatures on the Affidavit and the EEOC charges."

[5] Due to several unresolved discovery disputes and a referral to mediation which was subsequently vacated, briefing on the motion was not closed until the fall of 2012.

On March 27, 2013, the District Court ruled on P.J. Cheese's motion, granting summary judgment on Burch's Family Medical Leave Act and Title VII and Section 1981 claims, but denying it as to Burch's Equal Pay Act claim.[6]

Following the Court's ruling on the summary judgment motion, the parties prepared for litigation on Burch's remaining claim. At the final pretrial conference, held on July 11, 2013, the parties returned to the question that had been festering in the background for almost four years—should they be litigating the merits of the case at all? Distilled down to its essence, if Burch's signature on the arbitration agreement was valid, the answer was no; litigation should be halted, and the proceedings should be referred to arbitration. If the signature was *in*valid, the answer was yes; the proceedings should continue to a trial on the merits.

Back in 2009, the Court had already ruled that Burch was "entitled to a trial" on this signature question. All that remained to be decided in advance of such a

[6] On September 20, 2013, upon *sua sponte* reconsideration of the Court's summary judgment order, the District Court vacated its ruling on Burch's Title VII wage discrimination claim and denied P.J. Cheese's motion for summary judgment as to that claim.

trial was *who* would resolve the question: a jury or the court. The District Court asked the parties to brief the issue.[7]

Burch argued that the issue should be tried to a jury. Specifically, he contended that Section 4 of FAA grants the party alleged to be in default—in this case, Burch—with a statutory right to a jury trial on disputed issues of fact concerning the "making of [an] arbitration agreement," and that he invoked this right with the general jury demand in his complaint. His demand was ample, he argued, because Federal Rule of Civil Procedure 38 provides that a general demand preserves the party's right to a jury trial on any issues triable to a jury under the Seventh Amendment or a federal statute.

In response, P.J. Cheese argued that the signature issue should be tried to the bench. Although it agreed that Section 4 of the FAA provided Burch with a statutory right to a jury trial on any disputed facts related to the validity of his signature, it contended that Burch waived this right by failing to timely file a *specific* jury demand on the issue as Section 4 of the FAA requires. Further, Burch's general jury demand under the Federal Rules of Civil Procedure was inapplicable, P.J. Cheese contended, because Section 4 speaks to the specific

[7] Before asking the parties to brief the issue, the District Court expressed its tentative view that the plaintiff was *not* entitled to a jury trial on the issue.

procedures required to request jury trial on the "making of an arbitration agreement" and the Federal Rules of Civil Procedure become applicable only where the FAA is silent.[8]

The District Court agreed with P.J. Cheese, holding that Burch's failure to request a jury trial on the signature issue "on or before the return day of the notice of application" in accordance with Section 4 of the FAA operated as a waiver of his right to a jury trial on that issue. Following the District Court's decision, Burch filed an additional motion contending that P.J. Cheese had waived its right to compel arbitration by failing to demand arbitration prior to the commencement of Burch's suit against it and by failing to argue arbitrability in its motion for summary judgment.[9] The District Court rejected Burch's arguments, concluding that P.J. Cheese only participated in litigation on the merits of Burch's claims after

[8] Our precedent supports this position. *See Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 931 (11th Cir. 1990) ("It is only where the Arbitration Act is silent that the Federal Rules of Civil Procedure become applicable.").

[9] Burch also argued that P.J. Cheese waived its right to arbitration by withholding portions of the Dispute Resolution Program Booklet from Burch in discovery despite his repeated requests for the entire document, which Burch claimed contains "crucial arbitration information." The District Court rejected the argument, noting that the alleged failure to produce a supplementary document in discovery is immaterial to the issue of waiver.

being required to do so by court order, and that it had thus not acted "inconsistently with the arbitration right."[10]

On September 17, 2013, the District Court tried the signature issue before the bench. After receiving the relevant testimony from the parties, it concluded that Burch had signed the agreement. Based on this finding, it granted P.J. Cheese's motion to compel arbitration and dismissed the case without prejudice.

Burch now appeals the dismissal of his complaint,[11] contending that the District Court erred by (1) conducting a bench trial on the issue of arbitrability; (2) concluding that P.J. Cheese had not waived its right to arbitration; and (3) failing

[10] Burch accompanied his motion to dismiss P.J. Cheese's arbitrability claim with a motion to disqualify the trial judge, citing ex parte communications between the judge and Burch and his attorney, conversations which Burch contended evidenced that the judge would not be impartial in ruling on the arbitrability issue. The District Court denied the motion, concluding that the court had no personal bias or prejudice concerning the parties in the case, nor any personal knowledge of the disputed evidentiary facts in the proceeding.

[11] After filing a notice of appeal with the District Court, Burch sought to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 10(c) with two affidavits—one prepared by Burch and one by his attorney, describing communications he had with the District Court—and with several e-mails that he had exchanged with District Court concerning proposed pretrial orders and discovery issues. P.J. Cheese argued that the attachments included descriptions of events that were not "evidence or proceedings" under Rule 10(c) and moved the District Court to strike all documents with which Burch sought to supplement the record.

The Court, agreeing with P.J. Cheese that the documents were not covered by Rule 10(c), denied Burch's motion to approve Rule 10(c) statements, and granted P.J. Cheese's motion to strike the documents from the record.

to proceed to the trial on arbitrability in a timely manner. We affirm the District Court's dismissal, and address each of these arguments in turn.[12]

II.

In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S. Ct. 1204, 1207, 163 L. Ed. 2d 1038 (2006), and to declare a "'national policy

[12] In addition to the three chief arguments detailed above, Burch raises—in a circuitous and often unsubstantiated fashion—three additional arguments on appeal that do not merit significant discussion.

First, Burch argues that "in the interests of justice and judicial economy" we should review the District Court's partial grant of summary judgment to P.J. Cheese. To support this argument, Burch contends he will be unfairly prejudiced if the order is not reversed as the arbitrator is likely to adopt the District Court's reasoning in arbitration. Burch's contention that the arbitrator will be swayed by an extraneous ruling of the District Court is wholly speculative and without merit. The District Court's partial grant of summary judgment is vacated and we need not further address Burch's improbable proposition.

Second, Burch argues that the District Court erred in refusing to recuse from the bench trial on the issue of arbitrability. Instead of putting forward an argument that the District Court abused its discretion in refusing to recuse itself, Burch simply asserts that statements made by the Court gave "[him] and his counsel the sense that the district court had all but already made up its mind on the issue of arbitrability before trial." Vague and unsupported suspicions regarding a district judge's perspective on an issue before the court do not rise to the level necessary for a judge to recuse, much less to the level required for this Court to reverse the Court's decision for abuse of discretion. Accordingly, we affirm the District Court's denial of Burch's motion to disqualify.

Third, Burch asserts that the District Court erred in granting P.J. Cheese's motion to strike the statements Burch had filed in an attempt to supplement to the record for appeal. We review the District Court's evidentiary rulings for abuse of discretion. *Morro v. City of Birmingham*, 117 F.3d 508, 513 (11th Cir. 1997). Because Burch cites no authority to support his apparent proposition that the District Court abused its discretion in striking these statements, we affirm the District Court's order granting P.J. Cheese's motion to strike.

favoring arbitration' of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 983, 169 L. Ed. 2d 917 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984). Three sections of the FAA play particularly important roles in achieving that purpose. 9 U.S.C. § 2—the "primary substantive provision" of the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 74 L. Ed. 2d 765 (1983)—provides that arbitration agreements in contracts "involving commerce" are "valid, irrevocable, and enforceable."[13] 9 U.S.C. § 3 directs courts to stay their proceedings in any case raising a dispute on an issue referable to arbitration. And 9 U.S.C. § 4 "authorizes a federal district court to issue an order compelling arbitration if there has been a 'failure, neglect, or refusal' to comply with [an] arbitration agreement." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987) (quoting 9 U.S.C. § 4).

[13] In its entirety, 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

As these provisions embody the "liberal federal policy favoring arbitration agreements," *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) (citation and quotation marks omitted), "doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration." *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329 (11th Cir. 2016) (emphasis added). This "presumption," however, "does not apply to disputes concerning whether an agreement to arbitrate has been made." *Id.* (citation omitted).

When, as in this case, a party moves a district court to compel arbitration under the FAA, the court must first determine whether "the making of the agreement for arbitration or the failure to comply therewith is . . . in issue." 9 U.S.C. § 4. If, under a "summary judgment-like standard," the district court concludes that there "is no genuine dispute as to any material fact concerning the formation of such an agreement," it "may conclude as a matter of law that [the] parties did or did not enter into an arbitration agreement." *Bazemore*, 827 F.3d at 1333 (citation and quotation marks omitted). If, on the other hand, the making of the agreement is in issue, "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

As in a traditional summary judgment motion, an examination of substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The "threshold question of whether an arbitration agreement exists at all is 'simply a matter of contract.'" *Bazemore*, 827 F.3d at 1329 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995)). Thus, just as "state law generally governs whether an enforceable contract" exists, state law generally governs whether an enforceable "agreement to arbitrate exists" as well. *Caley*, 428 F.3d at 1368. To prove the existence of a contract under Alabama law, the party seeking to enforce the contract must prove by a preponderance of the evidence: "an offer[,] an acceptance, consideration, and mutual assent to terms essential to the formation of a contract." *Shaffer v. Regions Fin. Corp.*, 29 So. 3d 872, 880 (Ala. 2009).

In this case, the District Court applied this standard and concluded that there was a disputed question of material fact over the existence of an authentic arbitration agreement. In light of this conclusion, it then properly determined that the Court was required—under 9 U.S.C. § 4—to proceed summarily to trial to resolve the disputed fact.

A.

The primary issue on appeal is whether the District Court erred in holding a *bench* trial on the signature issue in spite of Burch's general demand for a jury trial in his complaint. We conclude that that the District Court did not err.[14]

In a civil case, a right to trial by jury may arise either by the Seventh Amendment to the U.S. Constitution or via a federal statute. *Curtis v. Loether*, 415 U.S. 189, 191–92, 94 S. Ct. 1005, 1007, 39 L. Ed. 2d 260 (1974). The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." As evidenced by the Amendment's text, the Constitution does not a "create" a right to a jury trial in civil cases; instead it preserves the right in the federal courts as it existed at common law in 1791, when the Amendment was ratified. *Waldrop v. S.*

[14] Pursuant to the FAA, an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). The District Court's order granted P.J. Cheese's motion to compel arbitration and dismissed Burch's claims without prejudice, retaining jurisdiction only to enforce any judgment reached in arbitration or consider other appropriate action after the completion of arbitration. An order compelling arbitration and dismissing the plaintiff's underlying claims without prejudice is a "final decision" appealable pursuant to § 16(a)(3). *See Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005) (holding that an order dismissing an entire case without prejudice "'plainly disposed of the entire case' insofar as compelled arbitration was concerned, 'and left no part of it pending before the court'") (quoting *Green Tree Fin. Corp. v. Randoph*, 531 U.S. 79, 86, 121 S. Ct. 513, 520, 148 L. Ed. 2d 373 (2000)). Accordingly, we have jurisdiction to hear the appeal.

Co. Servs., 24 F.3d 152, 156 (11th Cir. 1994). Thus, to determine whether a party has constitutional right to a jury trial, a historical test is applied.[15] If the issue, in the context in which it arises today, would have been heard at common law in 1791, it is now triable of right to a jury. *Id.* If, on the other hand, the issue would have been tried to the courts of equity, the party has no constitutional right to a jury trial on that issue. *Id.*

A motion to stay court proceedings and compel arbitration is an "equitable defense."[16] *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 452, 55 S. Ct. 313, 314, 79 L. Ed. 583 (1935); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 873 (7th Cir. 1985). Thus, as a constitutional matter, a party

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[15] As our precedent makes clear, a two-pronged test is applied to see whether a claim is one for which a jury trial might have been demanded. First, a court must determine whether the statutory action is analogous to "18th century actions brought in the English courts prior to the merger of the courts of law and equity." *Waldrop*, 24 F.3d at 156 (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S. Ct. 1339, 1345, 108 L. Ed. 2d 519 (1990)). Second, the court must examine the remedy sought to see whether it is legal or equitable in nature. *Id.*

In the interest of clarity, we do not conduct a step-by-step application of the two-pronged test in this case because the parties both agree that the jury trial right at issue here is a statutory one, rather than a constitutional one. Our holding does nothing to displace the importance of applying the two-pronged test when it is argued that a party's constitutional right to a jury trial is at issue.

[16] The initial version of Section 4 of the FAA took notice of the equitable nature of an order compelling arbitration. *See* Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) ("The party alleged to be in default may . . . demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue . . . to a jury in the manner provided by law for referring to a jury issues in an *equity action*" (emphasis added)).

resisting a motion to compel arbitration, such as Burch in this case, has no right to a jury trial on questions of fact related to the making of an arbitration agreement.

In certain circumstances, the party does, however, have a statutory right to a jury trial on the issue. Specifically, 9 U.S.C. § 4 provides that "if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue . . . the party alleged to be in default may . . . demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury." *See also Matterhorn*, 763 F.2d at 873–74 ("9 U.S.C. § 4 creates an explicit right to trial by jury in the proceeding to determine whether an order to arbitrate should be issued."). In this case, because Burch's denial put the making of the arbitration agreement at issue, he had statutory right under 9 U.S.C. § 4 to try that disputed issue to a jury.

That Burch had a statutory *right* to a jury trial does not mean, however, that the District Court necessarily erred in denying him one. A party waives his right to a jury trial unless a timely and proper demand is made upon the courts. *LaMarca v. Turner*, 995 F.2d 1526, 1545 (11th Cir. 1993). The District Court, at P.J. Cheese's behest, concluded that Burch's demand was untimely and improper under 9 U.S.C. § 4, and that Burch therefore waived his right to a jury trial on the disputed issue of fact related to the making of the arbitration agreement.

The propriety of the District Court's ruling turns in large part on which statute sets the applicable procedural requirements for demanding a jury trial on issues related to the making of an arbitration agreement: Rule 38 of the Federal Rules of Civil Procedure or Section 4 of the Federal Arbitration Act. Burch contends that the procedures in Rule 38 control, and that the general jury demand in his complaint therefore preserved his statutory right to a jury trial on the disputed signature issue. P.J. Cheese contends that the procedures in Section 4 control, and that Burch waived his statutory right to a jury trial by failing to make a *specific* jury demand on the issue as Section 4 purportedly requires. We agree with P.J. Cheese.

In the vast majority of civil cases in federal court, Federal Rule of Civil Procedure 38 sets forth the applicable procedure for demanding a jury trial on disputed questions of fact. Under the rule, for a party to avoid waiving its right to a jury trial—as "[preserved] by the Seventh Amendment to the Constitution" or "provided by a federal statute"—it must serve the other parties with a written demand for a jury trial "no later than [fourteen] days after the last pleading directed to the issue is served." Fed. R. Civ. P. 38(b)(1). "In its demand, a party may specify the issues that it wishes to have tried by a jury." *Id.* at 38(c). If, however,

the party does not specify in its demand which issues it wants tried, "it is considered to have demanded a jury trial on all the issues so triable." *Id.*

Rule 38 does not apply in every situation, however. Specifically, Federal Rule of Civil Procedure 81 provides that the Federal Rules of Civil Procedure control proceedings operating under "9 U.S.C., relating to arbitration . . . *except as [9 U.S.C.] provide[s] other procedures*." Fed. R. Civ. P. 81(a)(6)(B) (emphasis added). In interpreting this provision we have explained, "[i]t is only where the Arbitration Act is silent that the Federal Rules of Civil Procedure become applicable." *Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 931 (11th Cir. 1990).

Because Burch attempted to invoke his statutory right to a jury trial under Section 4 of the FAA, we must determine whether the provisions of Section 4 provide "other procedures" for demanding a jury trial on the issue of arbitrability. If they do, then the mechanisms detailed in Rule 38 are cast aside and the procedures detailed by the FAA fill the resulting void.

Our inquiry, as always, begins with the statutory text. *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself." (citations omitted)). In relevant part, Section 4 of the FAA provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any

> United States district court. . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. Where such an issue is raised, *the party alleged to be in default may . . . on or before the return day of the notice of application, demand a jury trial of such issue*, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.

9 U.S.C. § 4 (emphasis added).

"When the words of a statute are unambiguous . . . judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992) (quotation marks and citation omitted). Section 4 of the FAA unmistakably provides a specific procedure—apart from those in Federal Rule of Civil Procedure 38—for demanding a jury trial on the issue of arbitrability. The statute first sets forth *who* is entitled to make a jury demand on an issue related to the "making of the arbitration agreement"—the "party alleged to be in default" in proceeding under the agreement. 9 U.S.C. § 4. It then sets forth *when* the specific party must make its demand—"on or before the return day of the

notice of application" to submit to arbitration.[17] *Id.* Then, finally, it sets forth *how* a party must make its demand—with a specific "demand [for] a jury trial of *such* issue."[18] *Id.* (emphasis added). In short, because Section 4 is far from "silent" on the mechanisms required to invoke the statutory right to a jury trial that it provides, its procedures displace the general jury demand procedures provided in Federal Rule of Civil Procedure 38.

Accordingly, we must evaluate whether the general jury demand in Burch's complaint complied with the Section 4's procedural requirements for demanding a jury trial on an issue related to the making of an arbitration agreement. For the reasons explained below, it did not.

To preserve his statutory right to a jury trial on the making of his arbitration agreement, "the party alleged to be in default"—Burch—was obligated to demand a jury trial of "*such issue*" "on or before the return day of the notice of application"

[17] Or, in more common parlance, before the deadline set by the district court for filing an opposition to the motion to compel arbitration.

[18] In fact, the existence of the separate procedure is so clear that Burch appears to acknowledge it at various points in his brief. *See, e.g.*, Appellant's Br. at 42 **(**"Burch had the choice according to 9 U.S.C.[] 4 of the FAA of demanding a jury trial on the issue of whether he signed it, as long as he made his decision prior to the day he had to respond to P.J. Cheese's motion to stay the proceedings and compel arbitration.").

to submit to arbitration—November 23, 2009.[19] 9 U.S.C. § 4 (emphasis added). In its use of the term "such issue," Section 4 clearly contemplates that a party must make a *specific* demand for a jury trial on a *specific* issue related to the "making of the arbitration agreement or the failure, neglect, or refusal to perform the same," to preserve its right to a jury trial on the issue. *Id.* Here, it is undisputed that Burch's only jury demand came in the form of a general demand in his complaint. Because Burch failed to demand a jury trial on a specific issue related to the making of the arbitration agreement, he waived his right to a jury trial on that issue. Accordingly, the District Court's decision to hold a bench trial on the issue of arbitrability is affirmed.[20]

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[19] Both parties agree that the District Court's order directing Burch to file any opposition to P.J. Cheese's Motion to Stay and Compel Arbitration by November 23, 2009 established that date as the dispositive "return day of the notice of application."

[20] In an unpublished case, the Fifth Circuit has similarly adopted this interpretation of 9 U.S.C. § 4. *See Chester v. DirecTV, L.L.C.*, 607 F. App'x 362, 365 n.5 (5th Cir. 2015) (explaining that that a party who had made a timely general demand for a jury trial in his complaint "may have been entitled to a jury trial on [an issue related to the making of an arbitration agreement] if he had requested one, but he did not."). As have the vast majority of district courts. *See, e.g.*, *Dalon v. Ruleville Nursing and Rehab. Ctr., LLC*, No. 4:15-CV-00086, 2016 WL 498432, at *2 n.3 (N.D. Miss. Feb. 8, 2016) ("There is no dispute that [the plaintiff] requested a jury trial for his underlying claims and has continued to assert this right in his briefing. However, a general jury demand in a complaint does not obviate the need to specifically request a jury trial under Section 4 of the FAA"); *Adams v. Citicorp Credit Servs., Inc.*, 93 F. Supp. 3d 441, 448 n.5 (M.D.N.C. 2015) (holding that because the plaintiff—who had made a general jury demand in his complaint—did not demand a jury trial in his response to the defendant's motion to compel arbitration, he "did not timely demand a jury trial on [the arbitration] issue"); *Tyus v. Va. Coll.*, No. 2:15-CV-211, 2015 WL 4645513, at *1 (M.D. Ala. Aug. 4, 2015) (same); *Castillo v. Lowe's HIW, Inc.*, No. C13-4590, 2013 WL 12143002, at *4

B.

The second issue on appeal is whether the District Court erred in concluding that P.J. Cheese did not waive its right to compel arbitration by participating in the litigation of the merits of the case after its motion to compel arbitration had been preliminarily denied. We find no error, and affirm.

A district court's ruling on whether a party's conduct amounts to waiver of arbitration is subject to *de novo* review. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 n.18 (11th Cir. 2002). To establish waiver it must be shown that:

(N.D. Cal. Dec. 2, 2013) (same); *King v. Capital One Bank (USA), N.A.* No. 3:11-cv-00068, 2012 WL 4404862, at *1 (W.D. Va. Sept. 25, 2012) ("A general jury demand in a complaint does not obviate the need to specifically request a jury trial under Section 4 of the FAA."); *Alvarez v. T-Mobile USA, Inc.*, No. CIV. 2:10-2373, 2011 WL 6702424, at *9 (E.D. Cal. Dec. 21, 2011) ("Since [the plaintiff—who had made a general jury demand in his complaint—] did not demand a jury trial on or before the return day for [the movant]'s motion to compel arbitration, he no longer has the right to demand a jury trial on the issue of whether he entered into an agreement to arbitrate"); *Garcia v. Mason Contract Prods., LLC*, No. 08-23103-Civ., 2009 WL 1851131, at *4 (S.D. Fla. June 29, 2009) (same); *Geoffroy v. Wash. Mut. Bank*, 484 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007) (same); *Starr Elec. Co. v. Basic Constr. Co.*, 586 F. Supp. 964, 967 (M.D.N.C. 1982) (explaining that a general jury demand does not obviate the need for a specific demand under Section 4 because "9 U.S.C. § 4 has specific provisions for the demand and waiver of jury trial under Title 9. The demand and waiver provisions of Fed. R. Civ. P. 38 are inapplicable under Fed. R. Civ. P. 81"). *But see Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, No. CV 11-1219, 2017 WL 89556, at *1 (D.N.J. Jan. 9, 2017) (concluding that a general demand in a complaint is ample to trigger the plaintiff's right to a jury trial on the issue of arbitrability); *Walker v. Magic Burger, LLC* No. 6:14-cv-1751, 2015 WL 500909, at *2 n.5. (S.D. Fla. Feb. 5, 2015) ("Plaintiff's Complaint includes a demand for jury trial; accordingly, a jury trial is required on the issue of arbitrability."); *Graham v. Trugreen Landcare of Ala., LLC* 2:11-CV-2385, 2012 WL 2357677, at *4 n.7 (N.D. Ala. June 19, 2012) ("Whether the court or jury determines the arbitrability issue is up to the party objecting to the arbitration agreement and Plaintiff has requested a jury trial in his Complaint." (citation omitted)).

"(1) the party seeking arbitration substantially participate[d] in litigation to a point inconsistent with an intent to arbitrate; and (2) [that] this participation result[ed] in prejudice to the opposing party." *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) (quotation marks and citation omitted). "Prejudice exists when the party opposing arbitration undergo[es] the types of litigation expenses that arbitration was designed to alleviate." *Id.* (alteration in original) (quotation marks and citation omitted).

In considering waiver, we are mindful that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S. Ct. at 941. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver." *Id.* at 24–25. Consequently, "the party who argues waiver 'bears a heavy burden of proof.'" *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1200 n.17 (11th Cir. 2011) (citation omitted).

Here, Burch argues that P.J. Cheese's decision to continue litigating the merits of the case after the District Court initially denied its motion[21] to compel arbitration was inconsistent with an intent to arbitrate.[22]

We disagree. To preserve its right to arbitrate, a party is not required to gamble a default judgment against it. Recognizing this common-sense notion, we have explained that a party's "orderly participation in [a] lawsuit," after a district court decides to delay a final ruling on a determination on arbitrability is not

[21] In the District Court, Burch also argued that P.J. Cheese waived its arbitration right by waiting over two years after the company terminated Burch's employment to file its motion to compel arbitration. Burch abandons this argument on appeal, likely for good reason. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) (explaining that a party is under no obligation to make a "pre-suit demand for arbitration").

[22] As he did in the District Court, Burch also argues that P.J. Cheese waived its right to arbitration by withholding portions of the Dispute Resolution Program Booklet from Burch in discovery despite his repeated requests for the entire document, which Burch claimed contains "crucial arbitration information." Because the purported withholding of a booklet entirely supplemental to the principal arbitration agreement is immaterial to the issue of waiver, we reject Burch's argument.

Additionally, Burch argues that P.J. Cheese waived its right to arbitration by failing to press an interlocutory appeal of the District Court's initial denial of its motion to compel arbitration. Burch raises this argument for the first time on appeal. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) (internal quotation marks and citation omitted). Burch provides no argument that there is an exceptional circumstance to merit our plain error review. Accordingly, we decline to review this argument. We do note, however, that failure to press an interlocutory appeal is not dispositive of whether a party waives the right to compel arbitration. *Sibley v. Tandy Corp.*, 543 F.2d 540, 542 (5th Cir. 1976).

inconsistent with the party's right to arbitrate. *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924, 929 (5th Cir. 1970).[23]

This precedent is particularly applicable here. In this case, P.J. Cheese "promptly requested arbitration upon notification of this lawsuit," and only participated in litigation on the merits of the case after it was expressly ordered to do so by the District Court. Court proceedings should not be treated as "a sort of judicial tightrope which the party seeking arbitration walks at his peril." *Id.* To conclude that P.J. Cheese acted inconsistently with its right to arbitrate, we would have to conclude that P.J. Cheese should have disobeyed the District Court's order. We decline to adopt such a position.

Because we find that P.J. Cheese's participation in litigation on the merits of Burch's claims after the District Court's denial of its motion to compel arbitration was not inconsistent with its right to arbitration, consideration of the prejudice prong of the two-part waiver test is unnecessary. *See Ivax Corp.*, 286 F.3d at 1320 (finding it "unncesssary to discuss the prejudice prong of our two-part waiver test" after the Court's determination that the defendant had not acted inconsistently with

[23] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

its right to arbitration). The District Court's holding that P.J. Cheese did not waive its right to arbitration is affirmed.

C.

Burch additionally contends that the District Court erred in failing to proceed summarily to a trial on the issue of arbitrability immediately after it determined that there was dispute of material fact regarding the existence of an authentic arbitration agreement. This argument is not properly before us and we decline to review it for plain error.

"Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S. Ct. 719, 721, 85 L. Ed. 1037 (1941). However, this principle is not unyielding. "In an exceptional civil case, we might entertain the objection by noticing plain error." *S.E.C. v. Diversified Corp. Consulting Grp.*, 378 F.3d 1219, 1227 n.14 (11th Cir. 2004); *see also Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011) (recognizing that the plain error doctrine "rarely applies in civil cases"). Under the civil plain error standard, "we will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982).

In asserting for the first time on appeal that the District Court committed reversible error in compelling arbitration four years into litigation, Burch effectively argues that if a court fails to proceed to trial on a disputed question of fact within some specified time period, it forfeits its authority to order arbitration. To support this proposition, Burch cites solely to Section 4 of the FAA which states that when a trial court determines a genuine dispute of fact exists as to arbitrability, the court "shall proceed summarily to the trial thereof." 9 U.S.C. § 4. Although it is true that a goal of arbitration is to ensure the swift adjudication of claims, in the absence of countervailing law delimiting the court's capacity to order arbitration under Section 4, we decline to evaluate or adopt any such bright line rule when the record is devoid of any indication that affirming the District Court's order would result in a miscarriage of justice to Burch.

For a period of forty-five months, Burch never once petitioned the Court to hold a trial on arbitrability. He applied, on multiple occasions, for various extensions in the court proceedings. Finally, when discovery was completed, he seized the opportunity to brief the District Court on why he was still entitled to a jury trial on the question of arbitrability, but never claimed the Court no longer had the authority to order arbitration under the FAA. If arbitration truly would cause Burch the "great injustice" he now claims extemporaneously on appeal, Burch had

ample opportunity to implore the Court below to proceed to try the signature issue. Accordingly, we conclude that our refusal to entertain this argument will not result in a miscarriage of justice in the present situation.

III.

Based on the reasons stated above, we affirm the District Court's dismissal of Burch's claims and its order compelling the parties to submit their dispute to arbitration.

AFFIRMED.

Third District Court of Appeal

State of Florida

Opinion filed July 05, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2631
Lower Tribunal No. 16-21511

DDRA, LLC,
Appellant,

vs.

JARM, LLC, et al.,
Appellees.

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

Levine & Partners, P.A., and Allan S. Reiss, for appellant.

Gary Silberman, P.A., and Gary Silberman, for appellees.

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

ROTHENBERG, C.J.

DDRA, LLC ("DDRA") appeals from non-final orders (1) granting JARM, LLC ("JARM") and Dude IP, LLC's ("Dude IP") motion to stay the court

proceeding filed by DDRA, LLC ("DDRA") and to compel the arbitration proceeding they filed against South Beach Delivery Dudes, LLC ("South Beach Delivery") and DDRA; (2) denying DDRA's motion to stay arbitration and/or enjoin the arbitration proceeding filed by JARM and Dude IP; and (3) entering an agreed order correcting a scrivener's error in the order granting JARM and Dude IP's motion to stay the court proceeding and to compel the arbitration proceeding. Finding no error, we affirm.

JARM and Dude IP filed a demand for arbitration against South Beach Delivery and DDRA. The demand for arbitration arises out of a dispute between two members of South Beach Delivery, JARM and DDRA, relating to the alleged non-performance under South Beach Delivery's operating agreement, and a dispute between Dude IP and South Beach Delivery, relating to the alleged improper use of trademarks under the licensing agreement.

At the hearing on the parties' competing motions, JARM and Dude IP argued that the trial court was not authorized to determine the validity or the applicability of the arbitration provisions to the claims set forth in their demand for arbitration because the arbitration provisions in both the operating agreement and the licensing agreement contain the following language: "Any dispute regarding the validity of this arbitration provision, or the applicability of this provision to a particular claim, shall be decided by arbitration under this Section and not by a

court." After addressing JARM and Dude IP's argument, the trial court ruled that it was denying DDRA's motion to stay arbitration and/or enjoin arbitration, and it was granting JARM and Dude IP's motion to stay the court proceeding and to compel the arbitration **proceeding**. The trial court thereafter entered its written orders, and DDRA's non-final appeal of these orders followed.

The trial court's order granting JARM and Dude IP's motion to stay and to compel the arbitration "proceeding" does not specify whether the trial court had determined that, based on the operating and licensing agreements, it was required to submit the dispute as to the validity and applicability of the arbitration provisions for determination by an arbitrator, or whether the trial court was actually ordering the parties to arbitration. However, based upon our review of the hearing transcript and the inclusion of the word "proceeding" in the order that compelled the arbitration proceeding, we read the trial court's order as submitting the issue of the validity and applicability of the arbitration provisions at issue for resolution by the arbitrator. We also conclude that the trial court was correct in doing so.

The following language is contained within the arbitration provisions of both the licensing agreement and operating agreement: "Any dispute regarding the validity of this arbitration provision, or the applicability of this provision to a particular claim, shall be decided by arbitration under this Section and not by a

court." This language clearly and unmistakably requires the arbitrator, not a court, to determine both the validity of the arbitration provision and the applicability of the arbitration provision to the claims raised by JARM and Dude IP in their demand for arbitration. Thus, the trial court properly determined that it was prohibited from deciding these issues and that these issues are to be decided by the arbitrator. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (quoting AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643 649 (1986)) (emphasis and alteration added in Howsam); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.") (citations omitted); Mercedes Homes, Inc. v. Colon, 966 So. 2d 10, 14 (Fla. 5th DCA 2007) (holding that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration"). Accordingly, we affirm the orders under review.

Based on our resolution of the above issue, we do not need to address the remaining arguments.

Affirmed.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14716

D.C. Docket No. 1:13-cv-21653-KMW

HERBERT STETTIN,
Trustee,

Plaintiff,

ROBERT C. FURR,
Trustee,
MICHAEL I. GOLDBERG,
not individually, but as Chapter 11 Trustee of the estate of the debtor,
Rothstein Rosenfeldt Alder, P.A.,

Plaintiffs - Appellants,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
TWIN CITY FIRE INSURANCE COMPANY,

Defendants - Appellees,

AONRISK SERVICES INC. OF MASSACHUSETTS, et al.,

Defendants.

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

(July 5, 2017)

Before JORDAN and JULIE CARNES, Circuit Judges, and SCHLESINGER,* District Judge.

JORDAN, Circuit Judge:

This appeal is another remnant of the Ponzi scheme orchestrated by Scott Rothstein through his law firm, Rothstein Rosenfeldt Adler. *See, e.g.*, *S.E.C. v. Levin*, 849 F.3d 995 (11th Cir. 2017); *Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300 (11th Cir. 2014); *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205 (11th Cir. 2013). It arises out of litigation based on the alleged conduct of certain executives of Gibraltar Private Bank and Trust Company, at which RRA maintained accounts.

Gibraltar and some of its executives were named as defendants in numerous suits seeking to recover for losses caused by Mr. Rothstein's scheme. They requested that their insurance carriers, National Union Fire Insurance Company of Pittsburgh and Twin City Fire Insurance Company, extend coverage under

* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

Gibraltar's executive and organization liability insurance policies towards a joint settlement of the claims.

When National Union and Twin City denied coverage, Gibraltar and its executives began settlement discussions without the insurance companies. The parties eventually reached a settlement, which included Gibraltar and the executives assigning their policy rights to the bankruptcy trustees of RRA and of other entities that lost money in the Ponzi scheme.

After the assignment, the trustees again unsuccessfully demanded coverage. The trustees then filed suit, asserting breach of contract and bad faith claims. National Union and Twin City moved to dismiss the action, arguing that coverage was barred by a "professional services exclusion" found in each of the policies. The district court agreed, and granted the insurers' motions. The trustees now appeal.

The National Union policy is the primary policy, while the Twin City policy is an excess policy that follows the primary policy's relevant provisions. The terms of the policies are relatively straightforward. The policies provide for coverage for "the Loss of any Insured Person arising from a Claim made against such Insured Person for any Wrongful Act of such Insured Person, except when and to the extent the Organization has indemnified such an Insured Person." D.E.

18-1 at 7. The policies also exempt "professional services" from coverage. The professional services exclusion reads as follows:

> The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured alleging, arising out of, based upon, or attributable to the Organization's or any Insured's performance of or failure to perform professional services for others, or any act(s), error(s) or omission(s) relating thereto.

Id. at 37.

The district court reasoned that the plain language of the exclusion barred coverage because some of the insured executives at Gibraltar provided professional banking services directly to RRA. *See* D.E. 80 at 18 ("A plain reading of the Professional Services Exclusion demonstrates that it bars coverage for any Claim made against any Insured arising out of any Insured's performance or failure to perform professional services for others."). *See generally Kattoum v. New Hampshire Indem. Co.*, 968 So. 2d 602, 603 (Fla. 2d DCA 2007) ("If the policy provides joint coverage, the fraud or misconduct of one insured can be imputed to an 'innocent co-insured.'") (citation omitted).

The trustees ask that we reverse. They contend that the exclusion should be read severally, and therefore barring coverage only as to the claims against those insured executives who directly provided professional services to RRA. Under their reading, the district court erred because claims against executives who were

merely responsible for internal managerial banking functions, like complying with federal reporting regulations, are not exempt from coverage.

We affirm. Applying Florida law, and exercising plenary review, *see Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015), we reach the same conclusion as the district court.

The district court properly observed "that the phrase any insured unambiguously expresses a contractual intent to create joint obligations." D.E. 80 at 18 (quoting *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1385 (11th Cir. 1988)) (internal quotation marks omitted). The phrase "any insured," as we explained in *Sales*, generally makes the obligations under an insurance provision "jointly rather than severally held" and "unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured." 849 F.2d at 1385 (citing cases). *Sales* involved Georgia law, but Florida law is generally in accord. *See, e.g.*, *USAA Cas. Ins. Co. v. Gordon*, 707 So. 2d 1185, 1186 (Fla. 4th DCA 1998) ("We have no trouble concluding that exclusion (h), which excludes coverage for damage caused by 'any insured,' unambiguously results in joint property coverage in this case.") (citation omitted).

Understanding that the phrase "any insured" must be read in context, *see Kattoum*, 968 So. 2d at 604–05, we believe that the district court correctly interpreted the exclusionary language. Here the professional services exclusion

twice uses the phrase "any insured," once in referring to the claim made and once in referring to the professional services rendered. And that, we think, evinces an intent to create joint obligations. *See Thoele v. Aetna Cas. & Sur.*, 39 F.3d 724, 725–27 (7th Cir. 1994) (holding, under Illinois law, that exclusion barring coverage for claims arising out of "business pursuits of any insured" included "injuries triggered by one insured in connection with the business pursuit of another"). This is not a case like *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 926 (11th Cir. 1998), in which we held, under Florida law, that the interchangeable use of the phrase "an insured" and "the insured" in a policy created an ambiguity and did not provide joint coverage or obligations "so as to exclude [an innocent insured] from recovering under the policy."

The trustees rely on *Premier Ins. Co. v. Adam*, 632 So. 2d 1054 (Fla. 5th DCA 1994), but that case does not call for a different result. In *Premier*, the Fifth District explained that an insurance policy's severability clause resulted in separate insurable interests for each insured, such that each insured must be treated as holding separate insurance coverage. *Id*. at 1055–57. As a result, notwithstanding an exclusion stating that the policy "did not apply" to "bodily injury or property damage which is expected or intended by *any insured*," coverage could only be denied against an insured who actually committed the excluded act. *Id*. at 1056–57 (emphasis added). Here, however, the insurance policies issued by National Union

and Twin City do not contain a severability clause. And that difference in policy language is fatal to the trustees' argument. *See Taylor v. Admiral Ins. Co.*, 187 So. 3d 258, 260–62 (Fla. 3d DCA 2016) (citing *Premier* and concluding that exclusion applying to conduct of "any insured" would bar claim but for policy's severability clause); *Gordon*, 707 So. 2d at 1186 (explaining that without a severability clause an exclusion applying to the conduct of "any insured" creates a joint obligation).

As to the trustees' other arguments, we affirm on the basis of the district court's well-reasoned order.

AFFIRMED.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GOLFROCK, LLC, a Florida limited liability company, Appellant, v. LEE COUNTY, FLORIDA, a political subdivision of the State of Florida, Appellee.	)	Case No. 2D15-2105

Opinion filed July 7, 2017.

Appeal from the Circuit Court for Lee County; Alane Laboda, Judge.

Gregory S. Rix and S. William Moore of Moore Bowman & Rix, P.A., Tampa, for Appellant.

Jay J. Bartlett and Jeffrey L. Hinds of Smolker, Bartlett, Loeb, Hinds & Sheppard, P.A., Tampa, and Richard Wm. Wesch, County Attorney, Fort Myers, for Appellee.

Mark Miller and Christina M. Martin, Palm Beach Gardens, for Amicus Curiae Pacific Legal Foundation.

KELLY, Judge.

Appellant, GolfRock, LLC, submitted an application to Appellee, Lee County, seeking to change the zoning of a parcel of land. Complete details of what transpired in the application process are not pertinent to our disposition of this appeal. It suffices to say that Lee County amended its comprehensive plan and asked GolfRock to withdraw its application. GolfRock did not withdraw the application; however, Lee County has deemed it withdrawn so no rezoning application is presently pending.

After being asked to withdraw its application for rezoning, GolfRock filed an action for declaratory judgment against Lee County. The complaint alleged that "[i]n order to assert its private property rights under Article X, Section 6(a) of the Florida Constitution . . . or under the statutory protection of Section 70.001, Florida Statutes . . . the 'Bert J. Harris, Jr., Private Property Rights Protection Act,' GolfRock is required to 'ripen' its claim. . . ." GolfRock asked the trial court to "enter a Declaratory Judgment finding that any continuation of the current zoning request is futile as a matter of law and that any claims for remedy for the injury to GolfRock's private property rights under the constitution or laws of Florida are ripe for adjudication."

Initially, Lee County moved to dismiss the complaint on several grounds. Among them, Lee County argued that the complaint failed to state a claim for declaratory relief. The trial court denied the motion and the case proceeded. Eventually, the parties filed cross-motions for summary judgment on the issue of ripeness. GolfRock's motion asked the trial court to find that "under the futility exception to the ripeness doctrine, any claim by GolfRock for a regulatory partial taking is now ripe for adjudication." Lee County argued that regardless of which type of takings claim GolfRock might eventually pursue, its claims were not ripe and the futility exception to

the ripeness doctrine did not apply. The trial court agreed that GolfRock had not established its claim was ripe nor had it established "the applicability of the futility exception[]." It entered summary judgment in favor of Lee County.

In this appeal GolfRock challenges that determination. We need not reach the merits of that issue, however, because we conclude GolfRock's complaint did not state a cause of action for declaratory relief. As a result, the trial court lacked jurisdiction and it should have dismissed the complaint.

To state a claim for declaratory relief, the party seeking the declaration must show that he is in doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that he is entitled to have such doubt removed. May v. Holley, 59 So. 2d 636, 638-39 (Fla. 1952); see § 86.011, Fla. Stat. (2013). GolfRock's complaint does not allege GolfRock is in doubt as to the existence or nonexistence of any immunity, power, privilege, status, or right. The only mention of rights anywhere in the complaint is GolfRock's assertion that it has private property rights, the existence of which is unquestioned.

GolfRock's complaint explains that to pursue a takings claim for any injury to its property rights occasioned by how Lee County handled its zoning application, it must have a final denial of the application. It alleges it would be "prohibitively expensive" to pursue the application further, however, and that its denial is a "fait accompli." It points to the fact Lee County's comprehensive plan, as amended while GolfRock's application was pending, no longer permits the planned use of its property. Accordingly, it asks the court to declare that "any continuation of the current zoning request is futile as a matter of law."

The concepts of ripeness and futility are pertinent to a takings claim challenging the application of land use regulations. See Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001); Lost Tree Vill. Corp. v. City of Vero Beach, 838 So. 2d 561, 569-71 (Fla. 4th DCA 2002). "[A] takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' " Palazzolo, 533 U.S. at 618 (quoting Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)). "[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Id. at 620; see also Lost Tree, 838 So. 2d at 573 ("In order to succeed in stating an as-applied takings claim, Lost Tree must show that it obtained a final decision on the permitted use of the land . . . ."). The Supreme Court has explained the necessity of having a final decision:

> A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question.

Palazzolo, 533 U.S. at 618 (citations omitted) (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986)). The "final decision requirement 'responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer.' " Id. at 620 (quoting Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997)).

The Supreme Court has carved out a limited exception for cases where further attempts to obtain approval of an application would be futile. Id. at 620; see Lost Tree, 838 So. 2d at 573. As explained in Palazzolo,

> [w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

533 U.S. at 620.

GolfRock's complaint asks the trial court to declare that any further pursuit of its application is futile. Viewed in the context of the case law on takings and ripeness, GolfRock is asking the trial court to determine the existence of an element of its potential as-applied regulatory takings claim. GolfRock has utterly failed to explain how this is an appropriate claim for declaratory relief. The complaint does not allege, even in a perfunctory fashion, that GolfRock is in doubt regarding the existence of a right, power, privilege, or immunity as required to invoke the trial court's jurisdiction to render a declaratory judgment. Nor has GolfRock argued its complaint can somehow be construed to satisfy that requirement. GolfRock does not claim it is in doubt regarding the existence of its property rights, nor does it say it is in doubt regarding the effect of the amended comprehensive plan on the land use it had proposed in its now withdrawn rezoning application. While the declaratory judgment act is intentionally broad, it does have limits—one of which is that courts will not render advisory opinions or give legal advice. See May, 59 So. 2d at 639. Because GolfRock has not met its burden to demonstrate how its complaint is sufficient to meet the jurisdictional requirements of the

declaratory judgment act, we reverse the final summary judgment and remand with directions to the trial court to dismiss the action.

Reversed and remanded.

LaROSE, C.J., and BADALAMENTI, JJ., Concur.

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

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

REUNION WEST DEVELOPMENT PARTNERS, LLLP,

Appellant,

v. Case No. 5D16-3665

AFRANIO SANFORD GUIMARAES, JR.
AND SANDRA FALCAO AURELIANO S. GUIMARAES,

Appellees.

_____/

Opinion filed July 7, 2017

Non-Final Appeal from the Circuit Court for Osceola County,
Kevin B. Weiss, Judge.

Jose G. Sepulveda and Veronica L. De Zayas, of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, for Appellant.

Scott R. Rost, of South Milhausen, P.A., Orlando, for Appellees.

PALMER, J.

Reunion West Development Partners (Reunion) appeals the order entered by the trial court denying its Motion to Compel Arbitration.[1] We reverse.

[1] Appellate jurisdiction is proper pursuant to rule 9.130 of the Florida Rules of Appellate Procedure.

The Guimaraes (the buyers) filed a breach of contract action against Reunion. The complaint alleged a claim of breach of a Home Purchase Agreement and a claim for declaratory relief regarding the arbitration provision contained in said agreement. The arbitration provision provides, in relevant part:

> ARBITRATION. BY ENTERING INTO THIS AGREEMENT, BUYER AND SELLER AGREE THAT ANY CONTROVERSY, CLAIM OR DISPUTE, ARISING OUT OF OR RELATED TO THIS AGREEMENT OR BUYER'S PURCHASE OF THE PROPERTY OR ANY RIGHTS AND OBLIGATIONS BETWEEN THE PARTIES WILL BE RESOLVED BY BINDING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT (TITLE 9 OF THE UNITED STATES CODE). THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA") AND THE TERMS OF THIS AGREEMENT.

Importantly, the Construction Industry Arbitration Rules of the American Arbitration Association authorizes the arbitrator to rule on the arbitrability of a dispute:

> **R-9. Jurisdiction**
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

The buyers filed a Motion to Determine Arbitrability, and Reunion responded by filing a Motion to Compel Arbitration and to Stay the Proceedings. The trial court conducted a hearing on the parties' motions. Counsel for the buyers argued that the arbitration clause was not enforceable because there was no meeting of the minds and because its terms were unconscionable, citing to Basulto v. Hialeah Automotive, 141 So. 3d 1145 (Fla. 2014). Counsel for Reunion asserted that the issue of arbitrability was expressly reserved for the arbitrator to decide, citing to Glasswall, LLC v. Monadnock

Construction, Inc., 187 So. 3d 248 (Fla. 3rd DCA 2016). The trial court entered an order denying Reunion's Motion to Compel Arbitration, citing to Basulto.

Reunion argues that the trial court reversibly erred in relying on Basulto and in rejecting its claim that the issue of arbitrability was for the arbitrator to decide. We agree.

Appellate courts "review de novo a trial court's ruling on a motion to compel arbitration, but . . . defer to the trial court's factual findings provided that they are supported by competent, substantial evidence." Timber Pines Plaza, LLC v. Zabrzyski, 211 So. 3d 1147, 1150 (Fla. 5th DCA 2017).

While arbitrability is generally an issue for trial courts to decide, courts must delegate the authority to the arbitrator if the parties' contract so provides. Morton v. Polivchak, 931 So. 2d 935, 938–39 (Fla. 2d DCA 2006); accord Glasswall, 187 So. 3d at 251; Grant v. Rotolante, 147 So. 3d 128, 130-31 (Fla. 5th DCA 2014); Rintin Corp., S.A. v. Domar, Ltd., 766 So. 2d 407, 409 (Fla. 3d DCA 2000). "[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." Contec Corp. v. Remote Solution, Co., Ltd., 398 F. 3d 205, 208 (2nd Cir. 2005); accord Glasswall. Where, like here, the language of the contract clearly states that AAA rules govern, then said rules are expressly incorporated into the contract. Younessi v. Recovery Racing, LLC, 88 So. 3d 364, 365 (Fla. 4th DCA 2012) (citing Terminix Int'l Co. v. Palmer Ranch Ltd., 432 F. 3d 1327, 1333 (11th Cir. 2005)).

Based on this case law, the trial court erred in denying Reunion's Motion to Compel Arbitration because the parties' contract expressly incorporates the Construction

Industry Arbitration Rules, and those rules provide that the arbitrator is authorized to rule on the arbitrability of the instant contract.

The trial court's reliance on Basulto was misplaced for several reasons. In that case, the buyers were challenging the existence of an enforceable contract, whereas here the buyers are only challenging the enforceability of the arbitration clause of their Home Purchase Agreement. Also, the arbitration clause at issue in Basulto did not incorporate the Construction Industry Arbitration Rules. Lastly, the terms of the contract in Basulto were substantively changed after signing, and contained inherently inconsistent provisions.

Accordingly, the trial court's order denying Reunion's Motion to Compel Arbitration is reversed and this matter remanded for further proceedings. Bank of America, N.A. v. Beverly, 183 So. 3d 1099 (Fla. 4th DCA 2015).[2]

REVERSED and REMANDED.

ORFINGER and EVANDER, JJ., concur.

[2] In light of the court's ruling on this issue, Reunion's other points on appeal are moot.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

U.S. BANK NATIONAL ASSOCIATION, As Trustee for **HOME EQUITY ASSET TRUST 2004-6 HOME EQUITY PASS-THROUGH CERTIFICATES, SERIES 2004-6,**
Appellant,

v.

JEAN KACHIK; Unknown Spouse of Jean Kachik; **BANK OF AMERICA, N.A.; BANK OF AMERICA** Successor By Merger To **BARNETT BANK OF BROWARD COUNTY, N.A.; UNITED STATES OF AMERICA;** Any and All Unknown Parties Claiming By, Through, Under and Against The Herein Named Individual Defendant(s) Who Are Not Known To Be Dead or Alive, Whether Said Unknown Parties May Claim An Interest As Spouses, Heirs, Devisees, Grantees, or Other Claimants; Unknown Tenant #1; Unknown Tenant #2; Unknown Tenant #3; and Unknown Tenant #4, The Names Being Fictitious To Account For Parties In Possession,
Appellee.

No. 4D16-1776

[July 5, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen Ireland, Senior Judge; L.T. Case No. 13-011979 CACE (11).

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

Jonathan H. Kline of Jonathan Kline, P.A., Weston, for appellee.

CIKLIN, J.

U.S. Bank National Association, as Trustee for Home Equity Asset Trust 2004-6 Home Equity Pass Through Certificates, Series 2004-6 ("the bank"), the plaintiff in the foreclosure proceedings below, appeals a final judgment in favor of Jean Kachik ("the homeowner"). Because the bank failed to file the original allonge to the subject note, we affirm.

A copy of the note on which the action was brought and a copy of a paper entitled "Endorsement and Assignment of Note" were attached to

the bank's single-count complaint for foreclosure. The endorsement and assignment stated in pertinent part, "I hereby transfer, endorse and assign to _____ the within Note and Deed of Trust securing the same, so far as the same pertains to said Note, without recourse." At trial, the bank moved into evidence the original note but only a copy of the endorsement and assignment. After entertaining memoranda on the effect of the endorsement and assignment, the trial court entered judgment in favor of the homeowner.

On appeal, the bank argues that the endorsement and assignment was merely an assignment for which the original document was not required. The homeowner argues the subject document was an allonge and, as such, the bank was required to file the original. We agree with the homeowner.

"A promissory note is a negotiable instrument." *Deutsche Bank Nat'l Trust Co. v. Clarke*, 87 So. 3d 58, 60-61 (Fla. 4th DCA 2012). Where a document is a negotiable instrument, the best evidence rule, as codified, requires the production of the original. § 90.953(1), Fla. Stat. (2016) ("A duplicate is admissible to the same extent as an original, unless . . . [t]he document or writing is a negotiable instrument . . . ."). "Therefore, a party who seeks to foreclose on a mortgage must produce the original note." *Clarke*, 87 So. 3d at 61.

This court has explained the concept of an allonge as an addition to a negotiable instrument:

> "An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof." *See Booker v. Sarasota, Inc.*, 707 So. 2d 886, 887 n.1 (Fla. 1st DCA 1998). Although Florida's Uniform Commercial Code does not specifically mention an allonge, the Code provides that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." § 673.2041(1), Fla. Stat.

Isaac v. Deutsche Bank Nat'l Trust Co., 74 So. 3d 495, 496 n.1 (Fla. 4th DCA 2011) (alteration in original). *Isaac* also describes the effect of an allonge that does not identify a specific payee:

> A promise or order is "payable to bearer" if it: "(a) [s]tates

> that it is payable to bearer . . . ; (b) [d]oes not state a payee; or (c) [s]tates that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person." § 673.1091(1), Fla. Stat. "If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." § 673.2011(2), Fla. Stat.

Id. at 496 (alterations in original).

Since *Isaac* dictates that an allonge is part of the note, and an original note is required, it follows that an original allonge is required. Partially relying on *Isaac*, the Second District reached this conclusion in a similar case:

> These documents are insufficient to show that U.S. Bank had standing to foreclose. Though the copy of the note and the allonge attached to the complaint indicate that the note was transferred to U.S. Bank, U.S. Bank never filed the original allonge. "In order to prevail in a suit on a note and mortgage, the original note and mortgage must be introduced into evidence or a satisfactory reason must be given for failure to do so." *Fair v. Kaufman*, 647 So. 2d 167, 168 (Fla. 2d DCA 1994). Because an allonge is essentially part of the note, *see Isaac v. Deutsche Bank Nat'l Trust Co.*, 74 So. 3d 495, 496 n.1 (Fla. 4th DCA 2011), it was necessary for U.S. Bank to file the original allonge along with the original note.

Caballero v. U.S. Bank Nat'l Ass'n ex rel. RASC 2006-EMX7, 189 So. 3d 1044, 1045-46 (Fla. 2d DCA 2016).

Turning to the document at hand, the endorsement and assignment states "I hereby transfer, endorse and assign to _____ the within Note and Deed of Trust securing the same, so far as the same pertains to said Note, without recourse." The paper's reference to "the within Note" contemplates physical attachment to the note, indicating that the paper is effectively an allonge. Further, because the paper does not specify a payee, it is payable to bearer, and was thus negotiable by transfer alone, rendering it a negotiable instrument for which the original document was required.

Because the bank failed to produce the original allonge and did not plead a lost instrument count, we affirm the trial court's judgment in favor of the homeowner.

Affirmed.

TAYLOR and MAY, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Supreme Court of Florida

No. SC15-2289

VENICE HMA, LLC D/B/A VENICE REGIONAL MEDICAL CENTER,
Appellant,

vs.

SARASOTA COUNTY, et al.,
Appellee.

No. SC15-2292

SARASOTA DOCTORS HOSPITAL, INC., et al.,
Appellant,

vs.

SARASOTA COUNTY, et al.,
Appellee.

[July 6, 2017]

POLSTON, J.

These consolidated cases are before the Court on appeal from the decision of the Second District Court of Appeal in Venice HMA, LLC v. Sarasota County, 198 So. 3d 23 (Fla. 2d DCA 2015), which held that the indigent care provision of the

special law applicable only to Sarasota County constitutes an unconstitutional privilege because it provides for reimbursement to the public and private hospitals only in Sarasota County rather than in the entire State of Florida.[1] However, because a special law by definition operates only in a defined subdivision of the State, we reverse the Second District's decision. The indigent care provision does not grant a privilege to a private corporation in violation of article III, section 11(a)(12) of the Florida Constitution because it applies equally to all hospitals in Sarasota County, whether public or private.

BACKGROUND

The Second District described the background of the statutory provision at issue and the factual history of these cases as follows:

> [B]y special law in 1949, the legislature established the Sarasota County Public Hospital District, one of thirty-four special hospital districts. The special law granted the hospital district its own taxing authority separate from Sarasota County. See ch. 26468, Laws of Fla. (1949). Sarasota County voters approved the special act in a 1950 referendum.
>
> Almost a decade later, in 1959, the legislature amended the special law. The legislature added an indigent care provision requiring Sarasota County to reimburse the hospital district for medical services provided to indigent patients at hospital district facilities. See ch. 59–1839, § 8(i), at 3884–85, Laws of Fla. Significantly, the indigent care provision also required reimbursement to any other hospital in Sarasota County providing indigent care. See id.

1. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

> The indigent care provision was not submitted for voter approval. Our record does not contain documentation of public notice; presumably, such notice was published pursuant to article III, section 20 of the 1885 Constitution as an alternative to a referendum. The parties do not claim otherwise.
>
> . . . .
>
> [I]n 2003, the legislature repealed the 1959 special law. See ch. 03–359, § 2, at 316, Laws of Fla. It enacted a 2003 special law for "the codification of all special acts relating to [the] Sarasota County Public Hospital District" to provide "a single, comprehensive special act charter for the District including all current legislative authority granted to the District by its several legislative enactments." See id. § 1. The 1959 indigent care provision, with only minor nonsubstantive changes, remained a part of this 2003 comprehensive legislation. Compare 1959 Laws of Fla. § 8(i), 3884–85 with ch. 03–359, § 8(9), at 321, Laws of Fla. Notice of the 2003 special law was published in compliance with article III, section 10 of the 1968 Constitution. See Fla. H.R. Comm. on Local Gov't & Veterans Affairs HB 1113 (2003) Staff Analysis 5 (Mar. 7, 2003).
>
> . . . .
>
> Beginning in November 2008, and monthly thereafter, the Private Hospitals[2] submitted to the County a list of costs associated with providing hospital care to the indigent in Sarasota County. The Private Hospitals requested reimbursement for these costs pursuant to section 8(9) of the 2003 special law[.] The County refused to pay.

Venice HMA, 198 So. 3d at 25-28 (footnotes omitted).

In 2011, the Private Hospitals "sought a declaration establishing their right to reimbursement from the County for providing indigent care under the indigent care provision of the 2003 special law." Id. at 28. However, "[t]he County

2. Sarasota Doctors Hospital, Inc., Englewood Community Hospital, Inc., and Venice HMA, LLC d/b/a Venice Regional Medical Center are collectively referred to as "the Private Hospitals." See Venice HMA, 198 So. 3d at 24.

maintained that such reimbursement would provide an unconstitutional privilege to private corporations" in violation of article III, section 11(a)(12). Id. The trial court entered summary judgment agreeing with the County. Id. at 29.

On appeal, the Second District affirmed, stating that "[t]he correct analysis is whether the 2003 special act gives the Private Hospitals in Sarasota County a privilege that private hospitals elsewhere in the state do not share." Id. at 30 (quoting and agreeing with the County). The Second District explained that "[b]efore addition of the indigent care provision in the 1959 special law, no non-District hospital was entitled to reimbursement for providing medical care to the indigent" and that "[t]he Private Hospitals, if they prevail, certainly would have an advantageous position relative to other private hospitals in Florida, indeed, even as to those that may exist in adjacent counties." Id. at 29-30.[3]

ANALYSIS

"The constitutionality of a statute is a pure question of law subject to de novo review." City of Fort Lauderdale v. Dhar, 185 So. 3d 1232, 1234 (Fla. 2016).

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3. The brief filed in this Court by Sarasota Doctor's Hospital, Inc. and Englewood Community Hospital, Inc. states that there are 33 special hospital districts created by special law in Florida, and "[f]ully one-third of [those] authorize reimbursement for the delivery of medical care to indigent patients by nonpublic providers." Initial Brief at 12-13 (citing special laws involving the Health Care District of Palm Beach County, the West Volusia Hospital Authority, the Lakeshore Hospital Authority in Columbia County, the North Broward Hospital District, and the Citrus County Hospital District, among others).

"[A] determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." Pub. Defender, Eleventh Jud. Cir. v. State, 115 So. 3d 261, 280 (Fla. 2013).

Article X, section 12(g) of the Florida Constitution explains that " '[s]pecial law' means a special or local law." And this Court has described special and local laws as follows:

> [A] special law is one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal; a local law is one relating to, or designed to operate only in, a specifically indicated part of the state, or one that purports to operate within classified territory when classification is not permissible or the classification adopted is illegal.

Florida Dep't of Bus. & Prof'l Reg. v. Gulfstream Park Racing Ass'n, 967 So. 2d 802, 807 (Fla. 2007) (quoting State ex rel. Landis v. Harris, 163 So. 237, 240 (Fla. 1934)) (emphasis added). In contrast, "[a] general law operates universally throughout the state, or uniformly upon subjects as they may exist throughout the state, or uniformly within permissible classifications by population of counties or otherwise, or is a law relating to a state function or instrumentality." Id. No one disputes that the law at issue here is a local law (which is included in the constitutional definition of special law) in that it operates only in Sarasota County.

Article III, section 10 of the Florida Constitution provides that "[n]o special law shall be passed unless notice of intention to seek enactment thereof has been

published in the manner provided by general law;" however, such notice is unnecessary if the special law is "conditioned to become effective only upon approval by vote of the electors of the area affected." As the Second District explained, no one is claiming that the provision at issue in this case was not properly noticed as a special law. See Venice HMA, 198 So. 3d at 26.

Furthermore, article III, section 11 provides a list of subjects that may not be addressed by special law. Specifically, according to article III, section 11(a) (emphasis added), "[t]here shall be no special law or general law of local application pertaining to:"

> (1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies;
> (2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability;
> (3) rules of evidence in any court;
> (4) punishment for crime;
> (5) petit juries, including compensation of jurors, except establishment of jury commissions;
> (6) change of civil or criminal venue;
> (7) conditions precedent to bringing any civil or criminal proceedings, or limitations of time therefor;
> (8) refund of money legally paid or remission of fines, penalties or forfeitures;
> (9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts;
> (10) disposal of public property, including any interest therein, for private purposes;
> (11) vacation of roads;
> (12) private incorporation or grant of privilege to a private corporation;

(13) effectuation of invalid deeds, wills or other instruments, or change in the law of descent;
(14) change of name of any person;
(15) divorce;
(16) legitimation or adoption of persons;
(17) relief of minors from legal disabilities;
(18) transfer of any property interest of persons under legal disabilities or of estates of decedents;
(19) hunting or fresh water fishing;
(20) regulation of occupations which are regulated by a state agency; or
(21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

The Private Hospitals argue that the indigent care provision of the special law at issue here does not grant a privilege to a private corporation in violation of article III, section 11(a)(12) because it applies equally to all hospitals in Sarasota County, whether public or private. We agree.

In Lawnwood Medical Center, Inc. v. Seeger, 990 So. 2d 503, 517-18 (Fla. 2008), this Court held that a special law affecting two private hospitals in St. Lucie County, which were both owned by the same private corporation, provided an unconstitutional privilege because it granted the corporation "almost absolute power in running the affairs of the hospital, essentially without meaningful regard for the recommendations or actions of the medical staff." In its analysis, this Court considered whether the "privilege" prohibited by section 11(a)(12) is "economic favoritism over other entities similarly situated" or whether " 'privilege' encompasses more than a financial benefit." Id. at 510. This Court "conclude[d]

that a broad reading of the term 'privilege' as used in article III, section 11(a)(12),—one not limiting the term to any particular type of benefit or advantage—is required." Id. at 512.

In determining the plain meaning of the constitutional text "grant of privilege to a private corporation," this Court in Lawnwood considered dictionary definitions of "privilege" from the time when the text was adopted, noting that "[t]he definitions have not substantially changed from those that existed at the time of the 1968 constitutional revision." Id. at 511 n.10; see Myers v. Hawkins, 362 So. 2d 926, 930 (Fla. 1978) ("[W]e initially consult widely circulated dictionaries, to see if there exists some plain, obvious, and ordinary meaning for the words or phrases approved for placement in the Constitution."). Specifically, we referenced Black's Law Dictionary, which defined "privilege" as "a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens." Lawnwood, 990 So. 2d at 511 (quoting Black's Law Dictionary 1359 (4th ed. 1968)). We also considered Webster's Seventh New Collegiate Dictionary, which defined "privilege" as "a right or immunity granted as a peculiar benefit, advantage, or favor." Id. at 511 (quoting Webster's Seventh New Collegiate Dictionary 677 (7th ed. 1967)). Further, this Court in Lawnwood explained that "definitions from other state supreme courts construing similar provisions in their constitutions parallel the dictionary definitions as well as the

common sense understanding of a 'privilege' as connoting a special benefit, advantage, or right enjoyed by a person or corporation." Id. at 512. In other words, in common parlance, a privilege is having something that others do not have.

Here, the indigent care provision provides for reimbursement to all hospitals in Sarasota County for expenses related to care for indigent patients:

> To certify to the Board of County Commissioners of Sarasota County, on or before the 15th day of each month commencing with the month of November 1959, a list of all the medically indigent persons who have been hospitalized in any of the hospitals which are operated by the Hospital Board during the preceding month, together with the itemized charges for the hospital services and care for each of said medically indigent persons which have been rendered in such preceding month by the said hospital. The Board of County Commissioners of Sarasota County shall, within 45 days after the receipt of such certified list of medically indigent patients with the hospital charges, make remittance to the treasurer of the Hospital Board of the sum total of the amount shown on the certified list to be the amount owing to the Hospital Board for the hospital services and care rendered to the medically indigent persons during the month embraced in said certification.
>
> . . . .
>
> The said Board of County Commissioners shall in like manner reimburse any other hospital in Sarasota County, approved by the State Board of Health, for hospital services rendered to medically indigent persons as herein defined, upon like certification by such hospital and at such rates as shall not exceed those prescribed for such patients by hospitals owned and operated by said Hospital Board.

Ch. 2003-359, § 3, at 321, Laws of Fla. (emphasis added). Therefore, because the provision provides for reimbursement to all hospitals in Sarasota County (private and public), it is not providing a "particular and peculiar benefit or advantage" to a

private corporation that is "beyond the common advantage of other citizens." Lawnwood, 990 So. 2d at 511 (quoting Black's Law Dictionary 1359 (4th ed. 1968)). Accordingly, the indigent care provision does not violate the plain meaning of article III, section 11(a)(12) of the Florida Constitution.

Importantly, we reach this holding based upon the plain meaning of the text in the Florida Constitution, including the plain meaning of the term "privilege." And we reject the dissent's accusation that our decision adds words to the text of our state's foundational document. We believe that the language "grant of privilege to a private corporation" contained in section 11(a)(12) reasonably means providing a benefit to a private corporation that others do not receive. This special law neither singles out private corporations as a class or any particular private corporations for any privilege.

The County argues, and the Second District agreed, that "[t]he correct analysis is whether the 2003 special act gives the Private Hospitals in Sarasota County a privilege that private hospitals elsewhere in the state do not share." Venice HMA, 198 So. 3d at 30 (quoting and agreeing with the County). However, this argument conflates the definition of "privilege" with the very nature of special laws, which by definition only operate in a defined subdivision of the State. See article X, § 12(g), Fla. Const. (providing that " '[s]pecial law' means a special or local law"); Gulfstream Park Racing Ass'n, 967 So. 2d at 807 (explaining that "a

local law is one relating to, or designed to operate only in, a specifically indicated part of the state" (quoting State ex rel. Landis, 163 So. at 240)); see also State v. Leavins, 599 So. 2d 1326, 1331 n.10 (Fla. 1st DCA 1992). Because the special law only applies to Sarasota County, we must limit our comparisons to Sarasota County.

The dissent observes that the special law in Lawnwood—the St. Lucie County Hospital Governance Law—"was a local law that applied only to hospitals in St. Lucie County." Dissenting op. at 15. Because this Court in Lawnwood invalidated such a local law (by ruling that it "impermissibly provide[d] a privilege to a private corporation"), the dissent contends that "Lawnwood made clear that the appropriate analysis is between the hospitals affected by the local law and other similarly situated hospitals in the State of Florida." Id. Based on this understanding of Lawnwood, the dissent asserts that our "resolution of this case is . . . directly and irreconcilably in conflict with Lawnwood on the facts." Id. at 18.

But our opinion in Lawnwood repeatedly makes the point that the special law affected only privately owned hospitals in St. Lucie County. And that fact was central to our reasoning in support of the conclusion that the special law at issue in Lawnwood impermissibly granted a corporate privilege. In reciting the facts in Lawnwood, we observed that "[i]t is uncontroverted that the special law affected only the two private hospitals in St. Lucie County, which are both owned by the

same private parent corporation." 990 So. 2d at 508. In our analysis, we stated that an express provision of the special law "makes clear that the hospitals affected by the law are only those whose licenses are held by corporations," and we observed that "[i]t is apparent from the express language in the [special law] that the law was intended to affect only those privately operated hospitals located in St. Lucie County." Id. at 510. From this we concluded that the special law "is unquestionably a special law affecting a private corporation." Id. We reiterated that the special act "was passed as a special law and specifically enacted to affect only private, corporately owned hospitals in St. Lucie County." Id.

Contrary to the dissent's apparent interpretation, all of this in the Lawnwood opinion cannot reasonably be understood as designed to make the obvious point that hospitals outside St. Lucie County were not affected by the St. Lucie County Hospital Governance Act. Rather, the point the Lawnwood opinion turned on was that only hospitals owned by private corporations were affected—that is, granted a privilege—by the special law. And that is what distinguishes Lawnwood from the present case. In other words, the special law was invalidated in Lawnwood because it affected only private hospitals, whereas the special law is permissible here because it affects both public and private hospitals.

Additionally, although not addressed in the Second District's decision, the County and the District contend that the indigent care provision violates the

County's home-rule powers because it was not approved by the voters in Sarasota County. The County and District cite article VIII, section 1(g) of the Florida Constitution in support of their argument. But, while article VIII, section 1(g) of the 1968 Florida Constitution discusses charter counties' powers of self-government and mentions "special law approved by vote of the electors," this provision was not in effect when the indigent care provision was enacted in 1959. See art. XII, § 6(a), Fla. Const. ("All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed."). Moreover, when a statute is "repealed and substantially re-enacted," as this one was in 2003, it is "deemed to have been in operation continuously from the original enactment." McKibben v. Mallory, 293 So. 2d 48, 53 (Fla. 1974). Therefore, we disagree with the County's and District's argument that the indigent care provision unconstitutionally violates the County's home-rule powers.[4]

CONCLUSION

Accordingly, because the indigent care provision of the special law applies to all hospitals (public and private) in Sarasota County, it does not grant a privilege to a private corporation in violation of the plain meaning of article III, section

4. We also reject without further comment the County's and District's argument that the special law is void for vagueness.

11(a)(12). We reverse the Second District's decision affirming the invalidation and severance of the indigent care provision.

It is so ordered.

LABARGA, C.J., and LEWIS, QUINCE, and CANADY, JJ., concur.
LAWSON, J., dissents with an opinion, in which PARIENTE, J., concurs.

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

LAWSON, J., dissenting.

In my view, our decision in Lawnwood Medical Center, Inc. v. Seeger, 990 So. 2d 503 (Fla. 2008), applies the unambiguous language of article III, section 11(a)(12), and article X, section 12(g), of the Florida Constitution and is controlling here. Staying the constitutional course charted by our precedent, I would approve the decision of the Second District Court of Appeal. Therefore, I respectfully dissent.

In Lawnwood, we defined "privilege" in the context of article III, section 11(a)(12)'s prohibition against a "special law"—which pursuant to article X, section 12(g), includes a "local law" of the type at issue here—as "a right, a special benefit [including "a financial benefit"], or an advantage."[5] Lawnwood, 990 So.

5. Article X, section 12(g), of the Florida Constitution defines "[s]pecial law" as "a special or local law." (Emphasis added.) The law at issue here is a local law, meaning that it is a special law. Id. Article III, section 11(a)(12), prohibits any "special law" that "pertain[s] to . . . private incorporation or grant of privilege to a private corporation."

2d at 511. The law at issue in Lawnwood was a local law that applied only to hospitals in St. Lucie County. Id. at 506 ("The parties do not dispute that the HGL is a special law applicable to private corporations only in St. Lucie County . . . ."). Our Court held the act to be invalid because it "impermissibly provide[d] a privilege to . . . a private corporation" in St. Lucie County not granted to other hospitals in the state. Id. After recognizing that the Florida Constitution defines "a special law as 'a special or local law,' " our Court clearly stated: "It is apparent from the express language in the HGL that the law was intended to affect only those privately operated hospitals located in St. Lucie County. Therefore, the HGL is unquestionably a special law affecting a private corporation." Id. at 510 (emphasis added). Thus, Lawnwood made clear that the appropriate analysis is between the hospitals affected by the local law and other similarly situated hospitals in the State of Florida.

I would apply Lawnwood the same way here and thereby stay the constitutional course. Specifically, the payment of local government funds to private hospital corporations mandated by the special law at issue here is a financial benefit and therefore a privilege as defined by Lawnwood. Because this financial benefit was conferred by special law, it violates article III, section 11(a)(12). Mandating these payments to private corporations from local tax dollars may constitute sound public policy that should be implemented on a statewide

basis by general law. But, article III, section 11(a)(12), unambiguously bars the grant of this type of benefit to private corporations by special law.

Instead of applying the straightforward language of the Constitution in this straightforward manner, the majority focuses on the fact that the word "privilege" connotes a benefit not enjoyed by others. In my view, it makes no sense to ask whether the benefit conferred is "enjoyed by others" when that concept is a structural part of the constitutional provision. In other words, granting a benefit by special law means that the benefit is not extended to other similarly situated private corporations in the state. This is especially apparent when considering a non-local special law.

For example, if the special law at issue here had granted this very same financial benefit to one or more private hospital corporations by name, petitioners readily and properly concede that the financial benefit would constitute an unauthorized privilege because other private hospital corporations operating in Florida would be excluded from the same financial benefit. This same straightforward application should apply to local laws because the Constitution uses the exact same language for all special laws. Instead of applying the Constitution as written—to prohibit this local law "pertaining to . . . private incorporation or grant of privilege to a private corporation," article III, section

11(a)(12), Florida Constitution—the majority has effectively rewritten the Constitution to differentiate between local laws and other special laws as follows:

> The legislature shall not enact either: (1) special laws that pertain to private incorporation or grant of privilege to a private corporation or (2) local laws that pertain to private incorporation or grant of privilege to a private corporation where the privilege is not also granted to other similar private and public corporations within the same locality.

My first observation regarding this judicially reworked constitutional language is that it appears to always permit the grant of a privilege by local law because, by definition, "a local law is one relating to, or designed to operate only in, a specially indicated part of the state . . . ." Lawnwood, 990 So. 2d at 509 (quoting Florida Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, 967 So. 2d 802, 807 (Fla. 2007). Therefore, a local law directed at hospitals, like the law at issue here and in Lawnwood, by definition necessarily applies to all hospitals in the locality (because that is the very nature of a local law). If the law were drawn more narrowly, to apply to only specified hospitals in the area, it would be a non-local special law.

My second observation is that this rewrite of the Constitution directly contradicts the acknowledgment in Lawnwood that "we are not at liberty to add words to article III, section 11(a)(12), which were not placed there by the drafters of the Florida Constitution." Id. at 512. Ironically, not only is this addition of language to article III, section 11(a)(12), expressly prohibited by Lawnwood, but

the majority's resolution of this case is also directly and irreconcilably in conflict with Lawnwood on the facts.

My third observation about the majority's judicial rewrite of this constitutional provision is that it makes no logical sense to treat local laws differently than non-local special laws because it allows the Legislature to grant the exact same corporate privilege by local law that would clearly be barred by non-local special law. For example, take a county with one public hospital (say, the "Local Hospital") and one private hospital (the "ABC Hospital Corp."). Clearly, the Legislature could not pass a special law requiring millions of local tax dollars to be paid to the Local Hospital and the ABC Hospital Corp. by name, and no other hospital in the state. There is no rational argument that this non-local special law would not violate article III, section 11(a)(12). But, under the majority's interpretation of article III, section 11(a)(12), the Legislature could provide the exact same corporate privilege to the same private hospital by local law. That makes no sense where the language prohibits the grant of this type of privilege by any type of special law. Of course, I could come up with any number of hypotheticals involving counties with no private hospitals or multiple public and private hospitals where a non-local special law granting the privilege would be barred under the majority's interpretation but a local law granting the same corporate privilege would be upheld as constitutional. This odd anomaly of the

majority's interpretation is really just another way of pointing out that the majority's reading of the language barring special law corporate privileges actually allows the Legislature to grant a corporate privilege by local law.

Finally, it seems worth reflecting upon the obvious policy concerns underlying this particular provision of the Florida Constitution, as written. Some relate to all special laws. For example, it seems that granting special benefits to private corporations by any type of special law would be subject to criticism as an improper use of taxpayer money or as unfair in a free market system or as rife with the potential for graft. Again, if it is good public policy to give taxpayer money to a class of private corporations (such as hospital corporations) in the state, then it should be good public policy throughout the state. Otherwise, the special treatment begins to look like legislative largess to particularly connected corporations in that class instead of just good public policy. But, at least the enactment of a non-local special law privilege (to a private corporation) would be consistent with the underlying structure of our representative form of government. That is, if a non-local special law privilege were permitted by the Constitution and the Florida Legislature voted to directly grant a significant financial benefit to a select group of named for-profit private hospitals in the state from general revenue, the citizens of this state would have recourse at the ballot box if they disagreed with the action.

But, with a local law like the one at issue here, legislators from other parts of the state could force the citizens of a single county to bear a significant financial burden flowing to a few private corporations in their county even if their local representatives voted against the measure and even if the electorate never had an opportunity to ratify the action by a local vote, as happened here. That, to me, seems like the most troublesome type of special law privilege because it could be enacted entirely by legislators not accountable to the local citizens on whom they placed the burden of financing the corporate privilege.[6] Unfortunately, the majority has now written the protection against granting a corporate privilege by local law out of our Constitution. Therefore, I dissent.

PARIENTE, J., concurs.

An Appeal from the District Court of Appeal – Statutory or Constitutional Invalidity

Second District - Case Nos. 2D13-5752 & 2D13-5753

(Sarasota County)

Geoffrey D. Smith, Timothy B. Elliott, Kara L. Gross, and Susan C. Smith of Smith & Associates, Tallahassee, Florida,

for Appellant Venice HMA, LLC, d/b/a Venice Regional Medical Center

6. In this case, it is estimated that the citizens of Sarasota County will owe $300 million to the private hospital corporations in their county.

Raoul G. Cantero, David P. Draigh, and Ryan A. Ulloa of White & Case LLP, Miami, Florida; and Stephen A. Ecenia and J. Stephen Menton of Rutledge Ecenia, P.A., Tallahassee, Florida,

for Appellants Sarasota Doctor's Hospital, Inc., and Englewood Community Hospital, Inc.

Raymond T. Elligett, Jr., and Amy S. Farrior of Buell & Elligett, P.A., Tampa, Florida; Robert L. Nabors of Nabors, Giblin & Nickerson, P.A., Tallahassee, Florida; and Stephen E. DeMarsh, County Attorney, and Frederick J. Elbrecht, Deputy County Attorney, Sarasota, Florida,

for Appellee Sarasota County

David A. Wallace of Bentley & Bruning, P.A., Sarasota, Florida,

for Appellee Sarasota County Public Hospital District

Third District Court of Appeal

State of Florida

Opinion filed July 05, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-100
Lower Tribunal No. 13-34873

Catherine Wadley and Bliss Consulting Services, Inc.,
Appellants,

vs.

Thomas P. Nazelli,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Bronwyn C. Miller, Judge.

The Law Offices of Mario G. Menocal, P.A., and Mario G. Menocal; Gutierrez Bergman Boulris, PLLC, and Jennifer A. Kerr, for appellants.

Krinzman Huss & Lubetsky, and Michael I. Feldman, for appellee.

Before ROTHENBERG, C.J., and SCALES and LUCK, JJ.

ROTHENBERG, C.J.

The plaintiffs below, Bliss Consulting Services, Inc. ("Bliss Consulting")

and its sole shareholder, Catherine Wadley ("Wadley") (collectively, "the plaintiffs"), appeal from an order dismissing with prejudice their first amended complaint ("amended complaint") solely as to defendant Thomas P. Nazelli ("Nazelli"), a nonresident defendant and the president and sole shareholder of defendant Orchestra Management Solutions, Inc. ("OMS") (collectively, "the defendants"), for lack of personal jurisdiction.[1] Because the plaintiffs failed to establish that Nazelli was subject to jurisdiction under Florida's long-arm statute, section 48.193(1)(a)2., Florida Statutes (2015), we affirm the order under review.

I. Facts and Procedural History

The plaintiffs filed an amended complaint stemming from the alleged breach of an alleged joint venture agreement between the plaintiffs and the defendants for the purpose of marketing and selling a software product developed by OMS.[2] The plaintiffs alleged in their amended complaint that jurisdiction was proper under section 48.193(1)(a) of Florida's long-arm statute based on Nazelli's commission of a tortious act in Florida, and that Nazelli had sufficient minimum contacts with

[1] The defendants, Nazelli and OMS, filed a joint motion to dismiss. The trial court, however, entered separate orders as to Nazelli and OMS. In its order as to OMS, the trial court found that it had personal jurisdiction over OMS. The trial court's order as to OMS was not appealed by any of the parties and, therefore, is not a subject of this appeal.

[2] The amended complaint alleges a breach of a joint venture agreement. The exhibit attached to the amended complaint to support this allegation reflects that the proposed joint venture agreement was between OMS and Bliss Consulting, and that the proposed joint venture agreement was never executed.

Florida to satisfy federal due process requirements.[3]

The defendants filed a verified motion to dismiss asserting, in part, lack of personal jurisdiction over Nazelli. Following an evidentiary hearing, the trial court entered an order granting Nazelli's verified motion to dismiss for lack of personal jurisdiction, finding that the plaintiffs failed to establish that Nazelli's contacts with the state of Florida were sufficient to confer jurisdiction pursuant to Florida's long-arm statute and to satisfy federal due process requirements. The plaintiffs' appeal follows. We review the order granting Nazelli's motion to dismiss for lack of personal jurisdiction de novo. See Wendt v. Horowitz, 822 So. 2d 1252, 1256 (Fla. 2002) (holding that a trial court's ruling on a motion to dismiss for lack of personal jurisdiction is reviewed de novo on appeal).

II. Analysis

The plaintiffs contend that the trial court erred by dismissing their amended complaint with prejudice as to defendant Nazelli for lack of personal jurisdiction. We disagree.

In Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989), the Florida Supreme Court set forth a two-step inquiry to determine whether the courts in Florida have long-arm jurisdiction over a nonresident defendant. First, a court

[3] The amended complaint also alleged personal jurisdiction over Nazelli pursuant to the general jurisdiction provision set forth in section 48.193(2) of Florida's long-arm statute. The plaintiffs have since abandoned this argument.

must determine if the operative complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long-arm statute, section 48.193, Florida Statutes. If this step is satisfied, the court must then determine if the nonresident defendant has sufficient "minimum contacts" with the forum state to satisfy the Fourteenth Amendment's due process requirements. To satisfy the "minimum contacts" requirement, a court must determine that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980).

Florida's long-arm statute provides for either "specific" jurisdiction under section 48.193(1)(a) if the nonresident defendant committed any of the acts enumerated under section 48.193(1)(a) in Florida, or "general" jurisdiction under section 48.193(2) if the nonresident defendant "engaged in substantial and not isolated activity within this state." See Caiazzo v. Am. Royal Arts Corp., 73 So. 3d 245, 250 (Fla. 4th DCA 2011). As this Court explained in Gerber Trade Finance, Inc. v. Bayou Dock Seafood Co., 917 So. 2d 964, 967 (Fla. 3d DCA 2005):

> While it is true that under the general jurisdiction standard the defendant must be involved in substantial, not isolated, and continuous contacts within the State, see § 48.193(2), Fla. Stat. (2004), for specific jurisdiction, the plaintiff need only show that the defendant's contact within the State resulted in, among several options, a tortious act. § 48.193(1)(b), Fla. Stat. (2004).[4]

In the instant case, the plaintiffs argue that they have alleged sufficient jurisdictional facts in their amended complaint to bring the action within the "specific" jurisdiction provision of Florida's long-arm statute, section 48.193(1)(a), which provides, in part, as follows:

> **48.193 Acts subjecting person to jurisdiction of courts of state.—**
> (1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:
> . . . .
> 2. Committing a tortious act within this state.

The plaintiffs argue on appeal that Nazelli personally committed the tort of fraudulent inducement within the state of Florida based on his alleged actions in Florida and hundreds of communications into Florida with Wadley, a Florida resident. In Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002), the Florida Supreme Court held that "'committing a tortious act' in Florida under section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications **into** Florida. However, the cause of action must arise from the communications." (emphasis added). See also Swanky Apps, LLC v. Roony Invest & Finance, S.A., 126 So. 3d 336, 339 (Fla. 3d DCA 2013)

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[4] Section 48.193(1)(b), Florida Statutes (2002), pertaining to "[c]ommitting a tortious act" within Florida, was renumbered in 2013 as section 48.193(1)(a)2.

("[C]omitting a tortious act within Florida under section 48.193(1)(b) can occur by making telephonic, electronic, or written communications into this State, provided that the tort alleged arises from such communications, and under certain circumstances, such communications can also satisfy due process requirements.") (internal quotations and citations omitted); OSI Indus., Inc. v. Carter, 834 So. 2d 362, 365 (Fla. 5th DCA 2003) (holding that a telephone call from an out-of-state defendant to a plaintiff in Florida during which the defendant allegedly made misrepresentations to the plaintiff to induce the plaintiff to continue his employment with a corporation, in which the defendant was a principal, was sufficient to constitute committing a tort in Florida and adequate minimum contacts to satisfy federal due process where the out-of-state defendant knew that the misrepresentations would impact the plaintiff in Florida).

Thus, as the above cases demonstrate, a nonresident defendant's communications into Florida can form the basis for committing a tortious act within Florida. However, in the instant case, although there were some general allegations within the amended complaint that could support a cause of action for fraudulent inducement, the amended complaint did not specifically plead a cause of action for fraudulent inducement. Further, during the evidentiary hearing on the motion to dismiss, the plaintiffs did not argue that Nazelli committed the tort of fraudulent inducement while in Florida or move to further amend their complaint

to add a cause of action for fraudulent inducement. In fact, the plaintiffs did not address the tort of fraudulent inducement at the hearing. Finally, the plaintiffs did not file a motion for rehearing requesting that the trial court consider the general allegations set forth in the amended complaint that may support a cause of action for fraudulent inducement.

The plaintiffs now argue on appeal that the dismissal should have been without prejudice to allow them to further amend their complaint to state a cause of action for fraudulent inducement. However, by failing to seek an amendment to their complaint before the trial court, the plaintiffs have failed to preserve this issue for appellate review.

In Vorbeck v. Betancourt, 107 So. 3d 1142, 1147-48 (Fla. 3d DCA 2012), this Court explained:

> The rule of preservation, which is a keystone in our appellate process, dictates that "[i]n the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal." Keech v. Yousef, 815 So. 2d 718, 719 (Fla. 5th DCA 2002); see also Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal."). As Florida courts have long recognized, "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation . . . ." Sunset Harbour, 914 So. 2d at 928 (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)).

This Court also noted that the rule of preservation applies to the dismissal of a

complaint with prejudice, id. at 1148, and cited to the following cases:

> Stander v. Dispoz–O–Products. Inc., 973 So. 2d 603, 605 (Fla. 4th DCA 2008) (noting that "a party who does not seek to amend in the trial court cannot raise the issue of amendment for the first time on appeal," and holding that the plaintiff waived the right to challenge the dismissal with prejudice because when the trial court orally "announced that it was dismissing with prejudice," the plaintiff merely responded "Thank you, your Honor," and "did not request leave to amend the complaint, nor did plaintiff move for rehearing to amend after the order of dismissal was entered"); Jelenc v. Draper, 678 So. 2d 917, 918 n.1 (Fla. 5th DCA 1996) ("The Jelencs alternatively argue that even if dismissal was proper, it should have been without prejudice to allow them the opportunity to amend their complaint. While our disposition of the case moots this claim, we note that we would not have been able to address the claim because the record does not disclose that the Jelencs ever requested the opportunity to amend, and thus, the issue was not preserved for appellate review."); Century 21 Admiral's Port, Inc. v. Walker, 471 So.2d 544, 545 (Fla. 3d DCA 1985) (holding that the "appellants' failure to seek leave to amend prior to the dismissal with prejudice or to move for rehearing requesting leave to amend, precludes consideration of the issue for the first time on appeal"); see also Thomas v. Hosp. Bd. of Dirs. of Lee Cnty., 41 So. 3d 246, 255 (Fla. 2d DCA 2010). Thus, the failure to raise an issue regarding an improper dismissal with prejudice at the trial level constitutes a waiver of this issue on appeal. See Keech, 815 So. 2d at 720 ("The failure to preserve an issue for appellate review constitutes a waiver of the right to seek reversal based on that error.").

Because the plaintiffs failed to preserve their objection to the dismissal of their complaint with prejudice; request leave to amend their complaint to state a cause of action for fraudulent inducement; or otherwise attempt to argue that the tortious act they were relying on to establish specific jurisdiction over Nazelli was fraudulent inducement, we find no error with the trial court's determination that the

plaintiffs failed to allege sufficient jurisdictional facts to bring the plaintiffs' actions within the ambit of Florida's long-arm statute, section 48.193(1)(a)2. As we have determined that the plaintiffs did not satisfy the first inquiry set forth in Venetian Salami, we need not determine whether there were sufficient minimum contacts between Florida and Nazelli to satisfy federal due process requirements. Accordingly, we affirm the order under review.

The remaining arguments raised by the plaintiffs do not merit discussion.

III. Conclusion

We affirm the trial court's order finding that it lacked personal jurisdiction over Nazelli under Florida's long-arm statute, section 48.193(1)(a)2.

Affirmed.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREGORY J. WINCHEL, Appellant, v. PENNYMAC CORP.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICA'S WHOLESALE LENDER; UNKNOWN TENANT #1 N/K/A MATT BOTTORFF; and UNKNOWN TENANT #2 N/K/A JENNIFER EARLY, Appellees.	)	Case No. 2D15-5601

Opinion filed July 7, 2017.

Appeal from the Circuit Court for Charlotte County; Michael T. McHugh, Chief Judge.

Kenneth Eric Trent of Trent Law Office, Fort Lauderdale, for Appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee; William P. Heller of Akerman LLP, Fort Lauderdale; and Eric M. Levine of Akerman LLP, West Palm Beach, for Appellee Pennymac Corp.

No appearance for remaining Appellees.

SALARIO, Judge.

Gregory Winchel appeals from a final judgment of foreclosure in favor of PennyMac Corp. The judgment was rendered after the trial judge approved the report and recommendations of a foreclosure magistrate following a nonjury trial at which Mr. Winchel was not represented because his counsel failed to appear. Because Pennymac failed to prove its standing at the inception of the case—a matter as to which it bore the burden of proof—we are required to reverse.

This case began when JPMorgan Chase Bank filed a complaint to reestablish a lost note under which Mr. Winchel was the borrower and to foreclose a mortgage that secured his obligations under the note. It alleged that JPMorgan had the right to enforce the note, which it either had at the time the note was lost or acquired from someone else who did. It also attached copies of a note and mortgage naming America's Wholesale Lender as the lender and an assignment of the note and mortgage from Mortgage Electronic Registration Systems as nominee for America's Wholesale Lender to Countrywide Home Loans, Inc. Because those attachments did not say anything about JPMorgan, however, they did not, standing alone, bear out its allegations concerning its right to enforce the note.

Over a year later, a purported original of the note was filed. That note was identical to the copy attached to the complaint, except that it contained a blank, undated indorsement signed by Countrywide. Not long thereafter, JPMorgan filed a motion to substitute PennyMac as the plaintiff. It alleged that the note and mortgage had been transferred and assigned to PennyMac and included an attached assignment of the mortgage, but not the note, from JPMorgan to PennyMac. The motion was granted. Although the complaint was never amended to delete the claim to reestablish a lost note, it is clear that from the time PennyMac was substituted, the case proceeded on

the theory that PennyMac was entitled to enforce the note not because it was entitled to do so under the lost note statute, but rather because it was either the holder of the note or a nonholder in possession of the note with the rights of a holder.[1] See § 673.3011, Fla. Stat. (2012) (defining persons entitled to enforce a negotiable instrument as a holder, a nonholder in possession with the rights of a holder, or a person not in possession entitled to enforce under the lost note or mistake statutes).

Mr. Winchel then filed an answer in which he alleged as an affirmative defense a lack of standing at the time the complaint was filed—what is commonly called a defense of "no standing at inception."[2] Thereafter, the trial judge entered an order referring the case to a foreclosure magistrate to conduct a nonjury trial, see Fla. R. Civ. P. 1.491, and scheduling that trial for a date and time certain.

Mr. Winchel's attorney did not appear at the trial. The court minutes reflect that the case was called at the scheduled time and again fifteen minutes later, with plans to proceed without the attorney once it was called a third time. Meanwhile, Mr. Winchel's attorney's office filed an emergency motion to continue—alleging that a member of his staff incorrectly informed the attorney of his schedule for the day of trial, that the attorney was at that moment driving across the state to the courthouse, and that the attorney was having difficulty with a low tire during the trip. It is not clear when or if the attorney made it to the courthouse that day, but when the case was called for the

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[1]At the trial, PennyMac's counsel agreed to dismiss the lost note count. Best practices, however, would have included the timely filing of an amended complaint that deleted the lost note count and that stated the basis of PennyMac's authority to enforce the note once the original was located and transferred to it.

[2]The answer was not filed earlier because Mr. Winchel had filed a motion to dismiss the complaint which postponed the filing of the answer until the motion was decided. See Fla. R. Civ. P. 1.140(a)(3).

third time, the attorney was absent, and the magistrate denied the emergency motion to continue and conducted a nonjury trial with only PennyMac's counsel participating.

PennyMac's trial evidence consisted of the testimony of a single witness through whom three documents were admitted: (1) a limited power of attorney from JPMorgan to PennyMac giving PennyMac authority to foreclose certain mortgage loans identified in a separate loan purchase and servicing agreement, (2) an acceleration notice informing Mr. Winchel that he was in default, and (3) Mr. Winchel's loan payment history. There was, however, no evidence presented to show that JPMorgan was entitled to enforce Mr. Winchel's note at the time the complaint was filed. The original note—which was not admitted into evidence but that the magistrate recognized was in the court file—bore an undated indorsement in blank. PennyMac did not produce testimony or documents showing when JPMorgan came into possession of the note or, if it was a nonholder in possession, when it acquired the rights of a holder to enforce the note.

After the trial, the magistrate issued a report finding that PennyMac proved its case and recommending entry of a proposed final judgment of foreclosure tendered by PennyMac at trial. Mr. Winchel filed exceptions to the report and recommendations, see Fla. R. Civ. P. 1.490(i), (j); 1.491(f), arguing that the magistrate lacked authority to deny his emergency motion to continue. After a hearing, the trial judge rendered orders overruling Mr. Winchel's objections and approving the report and recommendations. A final judgment of foreclosure was separately entered.

In this timely appeal, Mr. Winchel asserts that the judgment should be reversed both because PennyMac failed to prove standing at the inception of the case and because the magistrate lacked authority to deny his emergency motion to continue.

We agree that PennyMac failed to prove standing at inception and, because we reverse on that basis, do not address Mr. Winchel's argument concerning the requested continuance. On the standing issue, our review is de novo. See St. Clair v. U.S. Bank Nat'l Ass'n, 173 So. 3d 1045, 1046 (Fla. 2d DCA 2015).

As defenses go, standing has become something of a legal oddity. We treat it as an affirmative defense in that the defendant must put it in play by raising it in an appropriate pleading—ordinarily, the answer.[3] See Dage v. Deutsche Bank Nat'l Tr. Co., 95 So. 3d 1021, 1024 (Fla. 2d DCA 2012) ("[L]ack of standing is an affirmative defense that must be raised by the defendant and the failure to raise it generally results in waiver." (alteration in original) (quoting Phadael v. Deutsche Bank Tr. Co. Ams., 83 So. 3d 893, 895 (Fla. 4th DCA 2012))); see also Fla. R. Civ. P. 1.110(d) (requiring that affirmative defenses be pleaded in the answer). Yet once injected into a case by a defendant's pleading, we say that it must be proved at trial by the plaintiff. See Dickson v. Roseville Props., LLC, 198 So. 3d 48, 50 (Fla. 2d DCA 2015); May v. PHH Mortg. Corp., 150 So. 3d 247, 248 (Fla. 2d DCA 2014). Once put at issue by a defendant, then, standing becomes a part of the prima facie case that a foreclosure plaintiff must prove in order to secure a judgment. See Dhanik v. HSBC Bank USA, Nat'l Ass'n, 210 So. 3d 113, 115 (Fla. 2d DCA 2016).

[3]But see McLagan v. Fed. Home Loan Mortg. Corp., 145 So. 3d 943, 945 (Fla. 2d DCA 2014) (holding that standing was sufficiently raised when defendant denied standing allegations in complaint, raised standing in a motion for summary judgment, and argued standing in response to plaintiff's motion for summary judgment, which resulted in the summary judgment on appeal (citing Maynard v. Fla. Bd. of Educ. ex rel. Univ. of S. Fla., 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009))).

Because the count to reestablish a lost note fell out of the case, PennyMac's standing hinged on whether it and its predecessor in interest were the holders of Mr. Winchel's note or nonholders in possession with the rights of a holder. See § 673.3011(1), (2); Creadon v. U.S. Bank N.A., 166 So. 3d 952, 954 (Fla. 2d DCA 2015). PennyMac was required by law to prove standing under either theory both at the time of trial and also at the inception of the case. See Powers v. HSBC Bank USA, N.A., 202 So. 3d 121, 122-23 (Fla. 2d DCA 2016). Because PennyMac was substituted as plaintiff for JPMorgan after the complaint was filed, proof of standing at inception required proof that JPMorgan had standing when it filed the complaint. See Russell v. Aurora Loan Servs., LLC, 163 So. 3d 639, 642 (Fla. 2d DCA 2015).

There was a complete absence of any such evidence here. Because no one has argued otherwise, we assume that the magistrate properly considered the purported original note in the court file. But see Heller v. Bank of Am., N.A., 209 So. 3d 641, 644 (Fla. 2d DCA 2017). That note, however, was filed after the complaint was filed, did not show that JPMorgan was the original lender, and bore an undated, blank indorsement. There was no testimony or other evidence to explain when the indorsement was placed on the note. As such, PennyMac failed entirely to show that the note had been indorsed at the time the complaint was filed or that JPMorgan was in possession of the note at that time. It thus failed entirely to prove that JPMorgan was either a holder or a nonholder in possession at the inception of the case. See Phan v. Deutsche Bank Nat'l Tr. Co., 198 So. 3d 744, 747 (Fla. 2d DCA 2016) ("Under the law, without the requisite proof of possession at the time a foreclosure action is commenced, the plaintiff's status as the holder of the note—and, hence, its authority to enforce the note in foreclosure—remains unproven, and its complaint untenable." (citing Focht v.

Wells Fargo Bank, N.A., 124 So. 3d 308, 310 (Fla. 2d DCA 2013))); Corrigan v. Bank of Am., N.A., 189 So. 3d 187, 190 (Fla. 2d DCA 2016) (en banc) ("Though Bank of America later filed the original note and mortgage along with an assignment, these documents did not establish standing at the time the original complaint was filed because the endorsement was undated and the assignment was dated after the original complaint was filed.").

There was nothing else in PennyMac's trial evidence to show that JPMorgan had standing at inception under any theory. Having been set with the burden to prove standing at inception once Mr. Winchel pleaded it as an affirmative defense, PennyMac failed to carry it, and the final judgment must be reversed. See, e.g., Jallali v. Christiana Tr., 200 So. 3d 149, 151-53 (Fla. 4th DCA 2016) (reversing foreclosure judgment based on plaintiff's failure to prove standing at inception where, as here, the defendant failed to appear at trial).

PennyMac argues that all of this is academic because Mr. Winchel did not object to its proof of standing at inception at the trial (he was not there) or in his exceptions to the magistrate's report and recommendations. As such, it says that Mr. Winchel failed to preserve this issue for appeal. See Franklin v. Patterson-Franklin, 98 So. 3d 732, 738 (Fla. 2d DCA 2012) (discussing requirement that appellate grounds be preserved by timely objection in the trial court). Under Florida Rule of Civil Procedure 1.530(e), however, Mr. Winchel was not required to object in order to raise the sufficiency of PennyMac's proof of standing on appeal. Rule 1.530(e) provides as follows:

> When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the

> party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment.

Under the plain language of the rule, when there has been a nonjury trial and the appellate issue is the sufficiency of the evidence to support the judgment, the failure to object based on the insufficiency of the evidence will not bar raising that issue on appeal. See, e.g., Correa v. U.S. Bank Nat'l Ass'n, 118 So. 3d 952, 954-55 (Fla. 2d DCA 2013) (holding that foreclosure defendant's failure to object to sufficiency of the evidence to support reestablishment of lost note in the trial court did not bar raising the issue on appeal). There is, of course, no question that this was a nonjury trial. Furthermore, as explained above, when Mr. Winchel raised standing in his answer, PennyMac became obligated to prove the standing it asserted in order to win a judgment in the trial court. As such, the appellate issue Mr. Winchel raises goes to the sufficiency of the evidence to support a judgment. See, e.g., Delia v. GMAC Mortg. Corp., 161 So. 3d 554, 555 n.1 (Fla. 5th DCA 2014) (applying rule 1.530(e) to hold that foreclosure defendant's failure to object at nonjury trial to plaintiff's standing did not preclude the appeal because it was an issue of sufficiency of the evidence); Lacombe v. Deutsche Bank Nat'l Tr. Co., 149 So. 3d 152, 153 (Fla. 1st DCA 2014) (same). For that reason, his failure to object in the trial court—whether during the nonjury trial or by way of exceptions to the magistrate's report and recommendations—does not prohibit him from raising the issue on appeal.[4]

[4]PennyMac cites Rosen v. Wilson, 922 So. 2d 401 (Fla. 4th DCA 2006), for the proposition that when a specific objection is not included in a party's exceptions to a magistrate's report and recommendations, the issue not specifically objected to is unpreserved for appeal. However, that case did not involve a challenge to the

PennyMac argues, however, that a nonjury trial before a foreclosure magistrate is not a trial before "the court without a jury" within the meaning of rule 1.530(e) (emphasis added). The premise of this argument is that a proceeding before a magistrate without a jury is not a nonjury trial before "the court," even though the results of the proceeding are reviewed by and a final judgment is entered by a trial judge. We disagree. A foreclosure magistrate is appointed by the chief judge of a circuit as necessary to "expeditiously preside over all actions and suits for the foreclosure of a mortgage on residential real property." Fla. R. Civ. P. 1.491(a). The magistrate may conduct those duties only with the consent of the parties, pursuant to an order referring a matter to the magistrate, and under the supervision of the court. Fla. R. Civ. P. 1.490(d); 1.491(b), (c). That is what happened here; the trial judge made an order referring the case to the foreclosure magistrate for the purpose of conducting a nonjury trial, and the parties (including PennyMac) consented to the magistrate's doing so. Under the rules and order referring the case to her, the magistrate conducted the nonjury trial on the court's behalf and as its officer. Cf. Burns v. Burns, 13 So. 2d 599,

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sufficiency of the evidence in a nonjury trial; it involved a putative legal error in a magistrate's determination that a party was not entitled to attorney's fees. Id. at 402. As such, rule 1.530(e)'s exception to the general rules of preservation, which applies in this case, could not have applied in Rosen. Because here rule 1.530(e) excuses Mr. Winchel's failure to object in the trial court, we need not consider the potential tension between Rosen and other cases that have held that a failure to file any exceptions to a magistrate's report and recommendations does not prohibit raising appellate issues embedded in it. See, e.g., P.P. v. Dep't of Children & Family Servs., 86 So. 3d 556, 560 (Fla. 2d DCA 2012) (holding that the failure to file exceptions to a report and recommendations in the juvenile context did not bar raising an issue on appeal); U.S. Bank Nat'l Ass'n v. Grant, 180 So. 3d 1092, 1093 (Fla. 4th DCA 2015) ("We have considered and reject the Association's argument that the Bank's failure to file exceptions to the special master's report precludes appellate review."); Apsoft, Inc. v. WebClay, 983 So. 2d 761, 764 n.1 (Fla. 5th DCA 2008) (holding that failure file exceptions at all does not bar raising appellate issues).

602 (Fla. 1943) (describing a special master, the precursor to the magistrate, as "a highly important and responsible officer of the court, acting for and under the appointment of the court, and vested with considerable authority of a judicial nature"). She was acting for the court for purposes of conducting the nonjury trial, and that trial was thus a trial before "the court" within the meaning of rule 1.530(e). Furthermore, the trial court entered the final judgment of foreclosure without jury findings by adopting the findings and recommendations it had tasked the magistrate to make. That is by definition a type of judgment entered by a trial court upon a nonjury trial, as are all judgments in judicial foreclosures in Florida.

Finally, PennyMac asserts that our decision in Sanabria v. PennyMac Mortgage Investment Trust Holdings I, LLC, 197 So. 3d 94 (Fla. 2d DCA 2016), holds that notwithstanding rule 1.530(e), a foreclosure defendant must raise the sufficiency of the plaintiff's evidence on standing at inception at trial in order to preserve it for appeal. PennyMac stretches that case too far. Anything Sanabria said about preservation and standing was dicta. The foreclosure defendant there secured a reversal on grounds that the trial court refused to consider whether a signature on a note was authentic based on an erroneous ruling that the issue had been insufficiently pleaded. Id. at 98. Our statements that he failed to preserve a different ground for reversal related to standing, id. at 95 & n.1, did not control the outcome. See, e.g., Shipley v. Belleair Grp., Inc., 759 So. 2d 28, 29 (Fla. 2d DCA 2000) (characterizing statement in earlier decision as dictum where the case was resolved on a different basis). Moreover, the limited discussion of standing in Sanabria does not say what the nature of the standing issue raised on appeal was—sufficiency of the evidence, which would have been subject to rule 1.530(e), or something else, which might have otherwise required preservation—

and does not say whether the defendant-appellant argued rule 1.530 on appeal as a basis for not objecting in the trial court. For these reasons, we decline PennyMac's invitation to read Sanabria as holding that rule 1.530(e) contains an exception, completely missing from its text, for sufficiency challenges when the underlying issue is standing in a foreclosure case.

PennyMac failed to meet its burden of proving at trial that JPMorgan had standing when it filed the complaint. That requires us to reverse. We do not ordinarily give a party who has failed to prove its case at trial a do-over by remanding for retrial. Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 283 (Fla. 2d DCA 2014) (citing Correa, 118 So. 3d at 956). Seeing no principled basis to depart from that rule here, we remand for entry of judgment in Mr. Winchel's favor.[5] See, e.g., Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc., 955 So. 2d 1124, 1131 (Fla. 4th DCA 2007) (reversing and remanding for entry of judgment where plaintiff failed to meet its burden of proof on issue where it bore that burden).

Reversed; remanded with instructions.

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[5]In foreclosure cases where standing at inception has not been proven, we ordinarily have remanded for entry of an order of involuntary dismissal. Many of those opinions make clear that the defendant moved for an involuntary dismissal during trial, which would, of course, make remand for entry of such an order appropriate. See, e.g., May, 150 So. 3d at 248-49. Others do not disclose whether such a motion was made. See, e.g., Dhanik v. HSBC Bank USA, Nat'l Ass'n, 210 So. 3d 113, 115 (Fla. 2d DCA 2016). Here, it is clear that no motion for involuntary dismissal was made—Mr. Winchel's attorney was absent from the trial—and remand for an order of involuntary dismissal is thus inappropriate. See Fla. R. Civ. P. 1.420(b) (providing that a "party may move" for an involuntary dismissal); Colson v. State Farm Bank, F.S.B., 183 So. 3d 1038, 1041 (Fla. 2d DCA 2015) (stating that remand for an order of involuntary dismissal is inappropriate where no such motion was made). Mr. Winchel argues that we should remand for entry of a judgment in his favor, and because PennyMac failed to prove at trial that which it was required to prove in order to win a judgment after trial, we agree.

SILBERMAN and BADALAMENTI, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed July 05, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-969
Lower Tribunal No. 12-2537

Yellow Cab Company,
Appellant,

vs.

Calvina Ewing, a minor, by and through her mother and next friend, Tonya Jones,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Michael S. Kaufman, for appellant.

Rosenthal Law Group, and Alex P. Rosenthal and Rhiannon Sforza-Flick (Weston), for appellee.

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

ROTHENBERG, C.J.

The defendant below, Yellow Cab Company, appeals from an amended sanctions judgment entered in favor of the plaintiff, Calvina Ewing. Because Yellow Cab Company's notice of appeal was not timely filed, we dismiss the appeal for lack of jurisdiction.

Whether Yellow Cab Company's appeal was timely filed depends on whether the amendment of the sanctions judgment was material. If the amendment was material, the time to file an appeal began to run on the date the amended sanctions judgment was rendered, not on the date the initial sanctions judgment was rendered, and therefore, the appeal would be timely filed. However, if the amendment was not material, the time to file the appeal began to run on the rendition of the initial sanctions judgment, and therefore, the appeal would be untimely filed. See St. Moritz Hotel v. Daughtry, 249 So. 2d 27, 28 (Fla. 1971) ("An amendment or modification of an order or judgment in an immaterial way does not toll the time within which review must be sought. But where the modification or amendment materially changes the original order or judgment, the limitation period is said to run from the time of such modification or amendment."); Rice v. Freeman, 939 So. 2d 1144, 1146 (Fla. 3d DCA 2006) ("Florida follows the majority rule that, where a judgment is amended in a material respect, the appeal time runs from the date of the amendment, provided the amendment is material, not minor or formal.") (quoting DeGale v. Krongold, Bass

& Todd, 773 So. 2d 630, 631-32 (Fla. 3d DCA 2000)).

The record reflects that the final judgment and the sanctions judgment in the instant case incorrectly referred to the defendant as Yellow Cab, Inc., rather than Yellow Cab Company as set forth in the complaint and the motion to dismiss the complaint. The trial court therefore amended the sanctions judgment and the final judgment to reflect the correct name of the defendant, Yellow Cab Company, as reflected in the plaintiff's complaint and confirmed by Yellow Cab Company in its motion to dismiss the complaint.

In DeGale, this Court addressed a similar situation and concluded that, because the amended final judgment was entered to reflect the correct spelling of a party's name, "[t]he effect of the amendment was to correct mere clerical errors, which had no impact on the rights of the parties or the finality of the trial court's original final summary judgment." Thus, this Court found that the amendment was not material, and therefore, the time for filing the appeal began to run when the initial final judgment was rendered, not when the amended final judgment was rendered. Accordingly, the appeal was dismissed as untimely filed.

As reflected above, the situation in this case is similar to the situation in DeGale—a judgment was amended to reflect the correct name of a party as properly stated in both the complaint and in the motion to dismiss. Thus, the amendment to the sanctions judgment is not material because it merely corrects

clerical errors, and because the time for filing the appeal began to run in June 2014, when the initial sanctions judgment was rendered, the appeal in the instant case was untimely filed.

Appeal dismissed.