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Manuel Farach

Presley v. United States, No. 17-10182 (11th Cir. 2018).

A taxpayer has no expectation of privacy in bank records sought by the IRS, even if the records belong to a lawyer and may contain third party (including client) information.

Sachse Construction and Development Corporation v. Affirmed Drywall, Corp., Case No. 2D17-4276 (Fla. 2d DCA 2018).

The Federal Arbitration Act preempts Florida Statute section 47.025 (actions against contractors may only be brought where the action accrues or contractor resides) when the action is truly interstate, and arbitration need not be conducted where contractor resides in an interstate arbitration.

Morris v. MGZ Properties, LLC, Case No. 4D17-3587 (Fla. 4th DCA 2018).

The undefined word "sale" in a contract means any sale, including a foreclosure sale.

Goersch v. City of Satellite Beach, Case No. 5D17-386 (Fla. 5th DCA 2018).

A Florida Statute section 57.105 motion must be served in strict accordance with Rule of Judicial Administration 2.516, even if it is not served until after the "safe harbor" period expires. Conflict certified with *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014).

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10182

D.C. Docket No. 9:16-cv-81735-RLR

MICHAEL PRESLEY,
CYNTHIA PRESLEY,
BMP FAMILY LIMITED PARTNERSHIP,
PRESLEY LAW AND ASSOCIATES, P.A.,

Plaintiffs - Appellants,

versus

UNITED STATES,

Defendant - Appellee.

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

(July 18, 2018)

Before WILSON and ROSENBAUM, Circuit Judges, and TITUS,[*] District Judge.

[*] Honorable Roger W. Titus, United States District Judge for the District of Maryland, sitting by designation.

ROSENBAUM, Circuit Judge:

To say that the 1980 United States Men's Olympic Hockey Team had the odds stacked against it would be an understatement. With a roster of amateur players whose age averaged 22, the U.S. team had been routed 10-3 by the Soviet team less than two weeks before the Olympics began.[1] And that was not surprising since the Soviet team was filled with seasoned professionals, had won the past four Olympic gold medals, and had not even lost an Olympic game since 1968.[2] Beating the Soviet team seemed impossible. Yet on February 22, 1980, the U.S. team—led by Coach Herb Brooks—did exactly that, scoring a 4-3 "Miracle" win.[3]

[1] E.M. Swift, *A Reminder of What We Can Be*, Sports Illustrated, Dec. 22, 1980, https://www.si.com/vault/1980/12/22/106775781/a-reminder-of-what-we-can-be; *Miracle* (Walt Disney 2004).

[2] https://www.hockey-reference.com/olympics/teams/URS (last visited July 10, 2018).

[3] In many ways, Coach Brooks's story mirrored that of the 1980 team. Cut from the Olympic team in 1960, Brooks steadily rose through the coaching ranks, earning a reputation for fanatical preparation. Jamie Fitzpatrick, *The Miracle Unfolds*, https://www.thoughtco.com/miracle-on-ice-american-hockey-2778288 (last visited July 9, 2018). Coach Brooks knew the U.S. team faced overwhelming odds, but he used that fact to motivate the players. Indeed, the legendary pregame speech attributed to Coach Brooks relied in significant part on the long odds the team faced. The speech was so unforgettable that years later, for purposes of shooting the film *Miracle*, team member Jack O'Callahan (who faced the additional odds of coming back from a knee injury sustained in the 10-3 pre-Olympics loss to the Soviets) was able to recreate Coach Brooks's speech based on his own memories and those of his teammates. Bill Littlefield, *Hollywood Scores a 'Miracle' With Locker Room Speech*, WBUR, http://www.wbur.org/onlyagame/2015/06/06/us-miracle-olympics-herb-brooks (last visited July 10, 2018). In that speech, Coach Brooks is said to have told the team, among other things, "[I]f we played [the Soviets] ten times, they might win nine. But not this game, not tonight." *See Miracle* (Walt Disney 2004).

Our history contains many such stories of triumphs over long odds. This, however, is not one of those.

Plaintiffs-Appellants—a lawyer, his law firm, and associated parties—urge creative arguments to avoid their bank's compliance with Internal Revenue Service ("IRS") summonses for their account records. But forget about tough odds the U.S. hockey team faced, Plaintiffs face-off with something even more formidable: the Supreme Court's holdings long ago in *United States v. Miller*, 425 U.S. 435 (1976), and *United States v. Powell*, 379 U.S. 48 (1964). Those cases completely foreclose Plaintiffs' arguments. For this reason, neither Plaintiffs nor their law-firm clients whose interests Plaintiffs attempt to invoke have a viable Fourth Amendment objection to the IRS's collection of Plaintiffs' bank records from Plaintiffs' bank. We therefore affirm the district court's order denying the quashing of the IRS's summonses.

I.

In 2016, the IRS sent three summonses to Bank of America, N.A., (the "Bank") in the course of investigating the 2014 federal income-tax liabilities of each of Plaintiffs Michael Presley, Cynthia Presley, BMP Family Limited Partnership, and Presley Law and Associates, P.A. ("Presley Law"). The summonses sought records "pertaining to any and all accounts over which [each Plaintiff] has signature authority," including bank statements, loan proceeds,

deposit slips, records of purchase, sources for all deposited items, and copies of all checks drawn.

As we have suggested, Plaintiff Michael Presley is an attorney, while Presley Law is his law firm. Among the records the IRS sought were the law firm's escrow and trust bank-account records, which were held in the names of Presley Law and BMP.[4] Both accounts contained information about client finances. The IRS notified Plaintiffs of these summonses, but it did not inform Plaintiffs' clients because it was not investigating them.

Plaintiffs moved to quash. They objected only to the Bank's production of records related to their escrow and trust accounts, contending that these records revealed their clients' financial information. The government moved to dismiss, and the district court granted its motion. The district court reasoned that the summonses complied with the governing standard announced in *Powell*, 379 U.S. at 57-58, because the summonses were narrowly drawn and relevant to the IRS's investigation. In addition, the district court concluded that Plaintiffs lacked standing to challenge the summonses as violations of their clients' privacy because their clients lacked a reasonable expectation of privacy in records held by the Bank.

[4] Neither the Amended Petition nor any other part of the record sets forth Cynthia Presley's relationship to the escrow and trust accounts summonsed. But one of the summonses sought "all records without limitation, pertaining to any and all accounts over which MICHAEL PRESLEY . . . & CYNTHIA PRESLEY . . . have signature authority . . . ."

Plaintiffs now appeal.

II.

We will not reverse an order enforcing an IRS summons unless it is "clearly erroneous." *United States v. Morse*, 532 F.3d 1130, 1131 (11th Cir. 2008) (per curiam); *United States v. Medlin*, 986 F.2d 463, 466 (11th Cir. 1993).

Determining whether the district court's order was clearly erroneous requires us to first consider the general framework governing the enforceability of IRS summonses. To ensure compliance with the tax code, Congress designed a system that gives the IRS "broad statutory authority to summon a taxpayer to produce documents or give testimony relevant to determining tax liability." *United States v. Clarke*, 134 S. Ct. 2361, 2364 (2014).

Section 7602 of the Internal Revenue Code is the "centerpiece of that congressional design." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, (1984). Under § 7602, the IRS may inquire into the correctness of a return by "examin[ing] any books, papers, records, or other data . . . ." 26 U.S.C. § 7602(a)(1) & (2). This summons power is not limited to examining documents of the taxpayer under investigation but also extends to allow the IRS to obtain relevant information from a third party. 26 U.S.C. § 7602(a)(2). But where, as here, the IRS issues a summons to a third-party recordkeeper to gather information

about a taxpayer, the IRS must notify the taxpayer of the summons pursuant to 26 U.S.C. § 7609(a).

To guard against potential abuses of this "broad" power, the courts—and not the IRS—are authorized to enforce this summons power. *United States v. Bisceglia*, 420 U.S. 141, 146 (1975) ("Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts."). In *United States v. Powell*, 379 U.S. 48 (1964), the Supreme Court set forth the analytical framework that governs the courts' enforcement decisions.

First, for the government to establish a prima facie case for enforcement, it must demonstrate that (1) the investigation has a legitimate purpose, (2) the information summoned is relevant to that purpose, (3) the IRS does not already possess the documents sought, and (4) the IRS has followed the procedural steps required by the tax code. *Id.* at 57-58. If the government satisfies *Powell*, the "burden shifts to the taxpayer 'to disprove one of the four *Powell* criteria, or to demonstrate that judicial enforcement should be denied on the ground that it would be an 'abuse of the court's process.'" *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 680 (11th Cir. 1984) (quoting *United States v. Beacon Fed. Sav. & Loan*, 718 F.2d 49, 52 (2d Cir. 1983)). But significantly, a court's review is narrowly circumscribed. A court may inquire as to only whether the "IRS issued a summons in good faith, and must eschew any broader role of oversee[ing] the

[IRS's] determinations to investigate." *Clarke*, 134 S. Ct. at 2367 (alterations in original and internal quotation marks omitted) (quoting *Powell*, 379 U.S. at 56)).

III.

Plaintiffs do not contend that the IRS failed to comply with *Powell*. Instead, they assert that *Powell* does not apply at all because the Fourth Amendment and the Internal Revenue Code preclude its application in the circumstances of this case. We conduct our analysis of Plaintiffs' arguments in two parts. First, we address whether Plaintiffs have standing to raise their clients' Fourth Amendment claims.[5] Second, we consider the merits of Plaintiffs' claims.

A. Standing

Plaintiffs argue that they have standing to guard their clients' privacy rights under the Fourth Amendment. The government disagrees. We need not decide this issue.

Privacy is personal. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 132 (1978); *see also Crosby v. Paulk*, 187 F.3d 1339, 1345 n.10 (11th Cir. 1999) ("[T]he

[5] Plaintiffs have Article III standing to raise their clients' objections under the Internal Revenue Code because § 7609(b)(2) grants any person who has received notice of an IRS summons the right to file a petition challenging the summons on any ground. *See United States v. Gottlieb*, 712 F.2d 1363, 1369 (11th Cir. 1983) (ruling against the summoned party by holding that § 7609(f) was inapplicable to unnamed, unsummoned taxpayers and stating that "our holding does not leave unidentified third parties wholly without protection. [The summoned party] . . . can argue that the summons was issued for the purpose of obtaining the third party records and that the audit of the [summoned party] itself was a mere pretext or subterfuge").

Crosbys are precluded from asserting Fourth Amendment rights of third parties who were subject to searches . . . ."); *Lenz v. Winburn*, 51 F.3d 1540, 1549 (11th Cir. 1995) ("[C]ourts have held that a person does not have a reasonable expectation of privacy in another's belongings."). So under most circumstances, Plaintiffs must demonstrate that their own privacy rights are at stake.

Here, Plaintiffs contest only others' privacy rights. As a result, they would ordinarily lack Fourth Amendment standing.

But some debate exists over whether those in situations analogous to Plaintiffs' have standing to assert their clients' interests. That's because Plaintiffs include an attorney and his law firm, and as non-targets of the investigation, Plaintiffs' clients could face obstacles in raising their own privacy objections. *See United States v. Zadeh*, 820 F.3d 746, 755 (5th Cir. 2016) (permitting doctor-plaintiff to raise the privacy objections of his clients); *In re McVane*, 44 F.3d 1127, 1136 (2d Cir. 1995) (permitting summoned party to raise privacy objections of family members).

Recognizing the clients' hurdles in pursuing their own objections, some courts have authorized third-party standing in similar circumstances. In *Reiserer v. United States*, for example, the Ninth Circuit permitted an attorney to raise his clients' privacy objections to an IRS subpoena served on the attorney's bank. 479 F.3d 1160, 1165 (9th Cir. 2007) ("Reiserer does not object to the production of

records relating to his leasing companies, but contends that client identity and fee information should be protected from disclosure."). The attorney had sought to represent his clients' interests on the grounds that the subpoena captured his clients' fee information. *Id.*

But we need not resolve whether Plaintiffs here have standing to assert their clients' interests. Plaintiffs' clients' objections rely on the Fourth Amendment. And unlike Article III standing, standing under the Fourth Amendment is not jurisdictional; instead, we analyze it as a merits issue. *See Minnesota v. Carter*, 525 U.S. 83, 87 (1998) ("expressly reject[ing]" treating Fourth Amendment standing like Article III standing); *United States v. Noble*, 762 F.3d 509, 526 (6th Cir. 2014) ("Somewhat confusingly, the Supreme Court refers to this burden as Fourth Amendment standing. This type of standing, however, is not jurisdictional, nor rooted in Article III . . . .").

Because Fourth Amendment standing is not jurisdictional, we need not determine as a separate question whether Plaintiffs have standing under the Fourth Amendment to raise their clients' interests. *See United States v. Gonzalez*, 71 F.3d 819, 827 n.18 (11th Cir. 1996) (determining that the government waived the issue of standing because it "declined to press th[e] standing issue before the district court"); *Noble*, 762 F.3d at 527 (holding that the government may waive its Fourth Amendment standing argument because the "Supreme Court has made clear,

Fourth Amendment standing is akin to an element of a claim and does not sound in Article III"); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (rejecting the practice of "assuming" Article III standing for the purpose of deciding the merits, but distinguishing between statutory standing and Article III standing). Rather, we consider standing as part of the merits when we substantively address Plaintiffs' Fourth Amendment claims.

B. Merits

In the administrative-summons context, Plaintiffs' objections "must be derived from one of three sources: a constitutional provision;" the Internal Revenue Code; "or the general standards governing judicial enforcement of administrative subpoenas enunciated in *United States v. Powell* . . . ." *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741–42 (1984).

Here, Plaintiffs offer arguments under the first two sources. First, Plaintiffs contend that the Fourth Amendment obligates the government to demonstrate probable cause because their clients had a reasonable expectation of privacy in the records held by the Bank. Second, Plaintiffs argue that the IRS was obligated to proceed under 26 U.S.C. § 7609(f) by issuing John Doe summonses to their clients and petitioning the district court for an ex parte hearing before obtaining Plaintiffs' bank-account records.

We find no merit in these contentions. First, as we explain below, settled precedent requires us to conclude that Plaintiffs' clients lack a reasonable expectation of privacy in financial records held by the Bank, so the Fourth Amendment does not require a showing of probable cause. Second, the Internal Revenue Code does not require an ex parte hearing in the circumstances here. And since Plaintiffs do not dispute that the IRS satisfied the *Powell* factors, that is the end of the matter.

1. Plaintiffs' Clients Lack a Reasonable Expectation of Privacy in Financial Records Held By the Bank

Plaintiffs contend that the government must show probable cause to enforce the summonses. And that would be true if Plaintiffs' clients had a reasonable expectation of privacy in the financial records held by the Bank. *See Carpenter v. United States*, 138 S. Ct. 2206, 2221–22 (2018) ("[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy."). But they don't.

Rather, the third-party doctrine precludes that conclusion here. According to that doctrine, a party lacks a reasonable expectation of privacy under the Fourth Amendment in information "revealed to a third party and conveyed by [that third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443; *see also*

Centennial Builders, 747 F.2d at 683 ("An Internal Revenue summons directed to a third party bank or accountant does not violate the Fourth Amendment rights of a taxpayer under investigation since the records belong to the summoned party and not the taxpayer.").

In *Miller*, 425 U.S. at 444, the Supreme Court considered whether a taxpayer enjoys a reasonable expectation of privacy in his bank records. There, while investigating Miller for tax evasion, the IRS subpoenaed his banks, seeking financial documents, including monthly statements. *Miller*, 425 U.S. at 440. Miller objected to the subpoenas, invoking the Fourth Amendment.

The Supreme Court rejected Miller's challenge for two reasons. First, Miller had "neither ownership nor possession" of the documents because they were "business records of the banks." *Id.* Second, the nature of the records the IRS was seeking—checks—further limited Miller's expectations of privacy since the checks were "not confidential communications but negotiable instruments to be used in commercial transactions." *Id.* at 442. The Supreme Court recently reaffirmed the vitality of *Miller*'s holding. *See Carpenter v. United States*, 138 S. Ct. at 2220 (2018) ("We do not disturb the application of . . . *Miller* . . . .").

Both of the Supreme Court's considerations in *Miller* also apply here. As in *Miller*, a third-party bank holds the financial records the IRS seeks, and these records are "not confidential communications" because they are simply registries

of financial transactions. Nor does it matter that Plaintiffs' clients gave their records to Plaintiffs rather than directly to the bank. Plaintiffs conveyed their records, such as checks for deposit in Presley Law's escrow or trust accounts, knowing that the firm would, in turn, deposit these items with the Bank. So if Plaintiffs cannot escape *Miller* directly, Plaintiffs' clients cannot avoid its application indirectly. In short, *Miller* precludes us from holding that Plaintiffs' clients have a reasonable expectation of privacy in the summoned records.

Despite *Miller*'s teachings, Plaintiffs assert their clients have a reasonable expectation of privacy because the Florida Constitution recognizes a privacy right in the circumstances of this case. But that cannot help Plaintiffs.

State law does not apply here because under the Supremacy Clause, state laws that conflict with federal laws by impeding the "full purposes" of Congress must give way as preempted. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000); *see also United States v. Fleet*, 498 F.3d 1225, 1227 (11th Cir. 2007); *Matter of Int'l Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982) ("It is clear . . . that this is a federal law proceeding and that the Bankruptcy Court is not required to apply the Georgia accountant-client privilege."); *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992) (per curiam) (holding that state-law doctor-patient privilege must yield when it conflicts with IRS's authority under federal summons statute).

And there is no question that the Florida constitutional provision granting a privacy interest in bank records would substantially impede the IRS's ability to summon bank records pursuant to the Internal Revenue Code. *See United States v. First Bank*, 737 F.2d 269, 274 (2d Cir. 1984) (holding state-law privacy statute that conflicted with the Internal Revenue Code was preempted); *see also St. Luke's Reg'l Med. Ctr., Inc. v. United States*, 717 F. Supp. 665, 666 (N.D. Iowa 1989) ("[S]tate law may not establish prerequisites to compliance with [an] administrative subpoena issued by a federal agency in accordance with and pursuant to federal statutory law, as such is prohibited [by] article VI, clause 2 of the United States Constitution." (internal quotation marks omitted)). So the privacy right in Florida's Constitution must yield.[6]

Faced with these problems, Plaintiffs respond with a proposed solution to *Miller*. Relying upon *Neece v. IRS*, 922 F.2d 573 (10th Cir. 1990), Plaintiffs argue that if their Fourth Amendment challenge does not succeed, "then [the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422] would apply." But Plaintiffs asserted this argument for the very first time only after we held oral argument in this case, when they filed a Rule 28(j), Fed. R. App. P., supplemental authority

[6] The way Plaintiffs attempt to use the Florida Constitution here would plainly interfere with the IRS's abilities to execute its summons authority and conduct its investigation. For that reason, the Court need not conduct a full-on preemption analysis. For a more thorough discussion of conflict preemption and its several forms, *see Arizona v. United States*, 567 U.S. 387, 398-400 (2012).

contending that the RFPA applies. That is simply too late. *See, e.g.*, *United States v. Njau*, 386 F.3d 1039, 1042 (11th Cir. 2004) (per curiam) (refusing to consider argument raised for the first time in a 28(j) letter).

And even if it weren't, the RFPA does not help Plaintiffs. In response to the broad sweep of *Miller*, Congress enacted the RFPA. The RFPA prohibits financial institutions from supplying the government with information about their customers' financial records, unless the customer authorizes the disclosure of such information or the government obtains a valid subpoena. *See* 12 U.S.C. § 3402.

But significantly, the RFPA does not affect the holding in *Miller* as it pertains to an IRS summons. On the contrary, the statute explicitly provides that "[n]othing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26." 12 U.S.C. § 3413(c); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1083 (9th Cir. 2001) ("[C]ourts have consistently interpreted RFPA as exempting IRS summonses provided that the IRS followed appropriate Title 26 procedures.").

Nor does *Neece* assist Plaintiffs. Plaintiffs assert that *Neece* renders the RFPA's exemption of IRS summonses inapplicable in situations like the one here. There, the Tenth Circuit recognized the RFPA's exemption of IRS summonses. *See Neece*, 922 F.2d at 575-76 ("The legislative history of [the RFPA] confirms that such records are exempt from the RFPA . . . [a]dministrative summonses

issued by the Internal Revenue Service are already subject to privacy safeguards under section 1205 of the Tax Reform Act of 1976." (citation and quotation marks omitted)). And though the court found it inapplicable, it did so only because of the circumstances in that case—circumstances that do not exist here.

In *Neece*, the IRS avoided the usual notice requirements under Title 26 by coaxing the bank into voluntarily disclosing the taxpayer's records. *See id.* at 576 ("Defendants' reading of section 7602(a)(1) would largely negate the taxpayers' protections found in the RFPA by giving a financial institution the unilateral power to abrogate those rights if the financial institution decides to cooperate voluntarily with an IRS investigation of one of its customers."). That, of course, is not the case here.

Plaintiffs have not suggested—and the record does not support the notion—that the IRS neglected to discharge its notice obligations under 26 U.S.C. § 7609(a). Rather, unlike in *Neece*, the IRS here notified Plaintiffs after summoning the Bank for records of Plaintiffs' accounts. And as we explain later in the next section, that is all the law requires. For these reasons, to enforce the summonses at issue here, the IRS was not required to demonstrate probable cause.

2. Compliance with *Powell* renders the IRS's summonses reasonable, and the IRS was not required to issue John-Doe subpoenas.

Nevertheless, the mere fact that probable cause does not apply does not mean the IRS's authority to issue subpoenas is unbridled. *See United States v. Bailey*, 228 F.3d 341, 349 (4th Cir. 2000) ("The value of constraining governmental power, which Bailey has urged through his misplaced probable cause argument, is nevertheless recognized in the judicial supervision of subpoenas."). In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Court held that "the basic distinction" between administrative summonses of business records and actual searches of things in which citizens hold a reasonable expectation of privacy means a separate Fourth Amendment standard applies to each circumstance. *Id.* at 204.

For IRS summonses of bank records, the "gist" of the Fourth Amendment protection is that the disclosure sought "shall not be unreasonable." *Id.* at 208. This baseline requirement emanates from the interest of all citizens "to be free from officious intermeddling." *Id.* at 213. But an IRS summons is not unreasonable, provided the IRS "has complied with the *Powell* requirements." *United States v. Reis*, 765 F.2d 1094, 1096 (11th Cir. 1985) (per curiam). In other words, when it comes to the IRS's issuance of a summons, compliance with the *Powell* factors satisfies the Fourth Amendment's reasonableness requirement. *See*

United States v. McAnlis, 721 F.2d 334, 337 (11th Cir. 1983); *Bailey*, 228 F.3d at 347.

The summonses here satisfy that standard. In fact, as we have mentioned, Plaintiffs do not contest that the summonses satisfy each *Powell* factor. For example, Plaintiffs do not suggest that the files containing their clients' records are not relevant to the IRS's investigation and that the summonses are not narrowly tailored. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 321 (1985) ("[B]y definition, the IRS is not engaged in a 'fishing expedition' when it seeks information relevant to a legitimate investigation of a particular taxpayer. In such cases, the incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws.").

Nor do Plaintiffs contend that the summonses were really just a subterfuge so the IRS could investigate their clients or invade the attorney-client privilege.[7] *Cf. id.* at 322 ("[I]f the district court finds in the enforcement proceeding that the IRS does not in fact intend to investigate the summoned party, or that some of the records requested are not relevant to a legitimate investigation of the summoned

[7] This latter point bears repeating. Notably, Plaintiffs do not raise their clients' Sixth Amendment rights. For that reason, we have no occasion to consider how Plaintiffs' clients' Sixth Amendment rights might affect the analysis, if at all. The record likewise contains no evidence concerning this issue, and "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege." *In re Grand Jury Proceedings (David R. Damore)*, 689 F.2d 1351, 1352 (11th Cir. 1982). So today we decide only that neither the Fourth Amendment nor § 7609's notice requirements preclude enforcement of the IRS summonses at issue here.

party, the IRS could not obtain all the information it sought unless it complied with § 7609(f).”). We are likewise unable to discern any other reason why the summonses should not be enforced. Because the *Powell* factors define the reasonableness of the summonses under the Fourth Amendment and Plaintiffs do not contest that the summonses satisfy them, our inquiry should be complete.

But Plaintiffs raise yet one more argument—this time under a different section of the Code. Specifically, Plaintiffs contend that the district court erred by not holding an ex parte hearing pursuant to § 7609(f). They base their contention on the premise that in *Tiffany*, 469 U.S. 310, the Supreme Court allegedly suggested that the IRS may obtain documents pertaining to unnamed taxpayers in only two ways: “the summoned party and the unnamed taxpayer must both be under active investigations, or the United States needs to first conduct a full hearing pursuant to section 7609(f).” Appellants’ Reply Br. at 8. We find three problems with this argument.

First, Plaintiffs make this argument for the first time in their reply brief. That is too late to raise a new issue. *See Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008) (“We decline to address an argument advanced by an appellant for the first time in a reply brief.”); *United States v. Evans*, 473 F.3d 1115, 1120 (11th Cir. 2006) (“[A]rguments raised for the first time in a reply brief are not properly before a reviewing court.”).

Second, even if it were not, the text of § 7609(f) does not support Plaintiffs' argument. Section 7609(f) requires the Secretary to make certain showings concerning so-called John Doe summonses—summonses that "do[] not identify the person with respect to whose liability the summons is issued," 26 U.S.C. § 7609(f)—that is, unnamed persons who are the subject of the IRS investigation in furtherance of which the summons is issued. But the summonses here identify the subjects of the IRS's investigation as Plaintiffs. Specifically, they state that they seek records "relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws *concerning the person identified above*" (emphasis added), and the "person[s] identified above" are specified as Michael Presley, Cynthia Presley, Presley Law, and BMP. Plus, Plaintiffs expressly concede that their clients are not the subject of an IRS investigation. So the clients are not "person[s] with respect to whose liability the summons is issued," 26 U.S.C. § 7609(f), and § 7609(f) does not apply.

Third and finally, *Tiffany* hurts, not helps, Plaintiffs' case. In fact, *Tiffany*'s holding requires the conclusion that notice to Plaintiffs affords their clients protection without notifying the unnamed clients specifically.

In *Tiffany*, the IRS issued summonses to a company for its financial statements as well as for a list of the names, addresses, and Social Security

numbers of persons who had acquired licenses to distribute Tiffany's products. 469 U.S. at 312. The summonses served dual purposes: to investigate the tax liabilities of Tiffany and to investigate the tax liabilities of its licensees. *Id.* at 313. But because the IRS did not know the identities of the licensees, it provided notice to only Tiffany. *Id.* Tiffany contended that since the IRS sought information about the licensees, the IRS needed to comply with § 7609(f)'s strictures by obtaining court approval through an ex parte hearing. *Id.*

The Supreme Court rejected Tiffany's arguments. The Court held that so long as the IRS followed the proper notice procedures as to one party it was investigating (Tiffany), the IRS was not required to comply with § 7609(f) for the unidentified licensees who were also under investigation but had not received a summons. *Id.* at 324. Under those circumstances, the Supreme Court concluded, "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." *Id.* at 321. In further explaining this holding, the Court reasoned that notice to one of the parties under investigation would ensure that the "IRS w[ould] not strike out arbitrarily or seek irrelevant materials" because the summoned party "w[ould] have a direct incentive to oppose enforcement . . . ." *Id.*

Plaintiffs seek to draw a distinction between this case and *Tiffany*. They argue that *Tiffany* suggests that if the summoned party—in this case, the Bank—is

not under investigation, the IRS must use the § 7609(f) process if the summons happens to sweep in information about somebody other than the taxpayer being investigated. But Plaintiffs miss *Tiffany*'s point. Under *Tiffany*, it matters only that Plaintiffs received notice under § 7609(a) that they were being investigated and were afforded the opportunity to contest the summonses. *See id.* at 317 n.5 ("[A]ll that matters is that the IRS was pursuing a legitimate investigation of Tiffany."). That happened here. And as the Court foresaw in *Tiffany*, Plaintiffs have "argued vigorously—albeit unsuccessfully—against enforcement of the summonses," to no avail. *Id.* at 321. So *Tiffany* cannot help Plaintiffs, either.

V.

For these reasons, the judgment of the district court is affirmed.

AFFIRMED.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SACHSE CONSTRUCTION AND DEVELOPMENT CORPORATION, a Florida corporation,

Appellant,

v.

AFFIRMED DRYWALL, CORP., a Florida corporation, and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurance company,

Appellees.

Case No. 2D17-4276

Opinion filed July 18, 2018.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Collier County; Lauren L. Brodie, Judge.

Richard B. Akin, II, and J. Matthew Belcastro of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for Appellant.

Steven M. Siegfried and Nicholas D. Siegfried of Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel, P.A., Coral Gables, for Appellee Affirmed Drywall Corp.

No appearance for remaining Appellee.

SILBERMAN, Judge.

Based on a subcontract to perform drywall work (the Subcontract), Affirmed Drywall Corp. filed a two-count complaint for (1) breach of contract against Sachse Construction and Development Corporation and (2) an action against bond naming Sachse and Travelers Casualty and Surety Company. Sachse appeals a nonfinal order determining that the arbitration clause in the Subcontract is void and unenforceable because it requires arbitration in Michigan of a contract dispute relating to the improvement of real property in Florida, in violation of section 47.025, Florida Statutes (2016). We reverse that order because if the Federal Arbitration Act (FAA) applies, it preempts section 47.025. However, because the trial court did not first determine whether the contract involves interstate commerce so as to make the FAA applicable, on remand the trial court must address the question of interstate commerce.

In October 2016, Sachse, as contractor, and Affirmed Drywall, as subcontractor, entered into the Subcontract. The Subcontract reflects that Sachse is a Michigan Limited Liability Company (LLC) with an address in Detroit and reflects an address in Coral Gables, Florida, for Affirmed Drywall. Affirmed Drywall was to provide all labor, materials, and equipment associated with drywall work for the improvement of real property in Naples, Florida. Paragraph 23 of the Subcontract states that any dispute between Sachse and Affirmed Drywall "in any way relating to the Work or this Subcontract may be submitted to mediation and/or arbitration pursuant to the Construction Industry Rules of the American Arbitration Association then in effect." Paragraph 23 also provides that arbitration "shall take place at the American Arbitration Association's Southfield, Michigan, office or within 20 miles thereof." Paragraph 21

provides that the "Subcontract shall be governed by and construed in accordance with the laws of the State of Michigan."

On March 20, 2017, Affirmed Drywall filed its two-count complaint for breach of contract and an action against bond. Sachse filed a motion to dismiss or to compel arbitration in which it argued that the Subcontract is governed by and enforceable in accordance with the FAA. It contended that the FAA supersedes any inconsistent state law, that Florida courts must enforce valid arbitration agreements within the scope of the FAA, and that the trial court should compel the parties to proceed to arbitration in Michigan pursuant to the Subcontract's terms.

Affirmed Drywall opposed the motion and contended that Sachse failed to adequately allege facts that evidence interstate commerce. Affirmed Drywall also argued that under Florida law the venue provision requiring arbitration in Michigan was void as against public policy and cited, among other things, section 47.025.

At the hearing on the motion, Sachse argued that the Subcontract provides that the laws of Michigan control the contract, so section 47.025 does not even apply. But counsel stated that "far more importantly," as argued in Sachse's motion to compel arbitration, the contract involves interstate commerce because the contract shows that Sachse's principal place of business is in Detroit, Michigan, and Affirmed Drywall's principal place of business is Coral Gables, Florida; thus, Sachse's counsel argued that the FAA applies. In its motion to compel and on appeal, Sachse cites federal and Florida law, and neither party mentions what Michigan law provides. Sachse argued to the trial court that the FAA preempts section 47.025.

Affirmed Drywall argued that an evidentiary hearing would be necessary to determine if the contract involved interstate commerce. Affirmed Drywall further argued that section 47.025 prohibited the enforcement of a provision that requires venue outside the State of Florida in a contract concerning improvements to real property. Thus, Affirmed Drywall argued that the arbitration agreement violated public policy, a generally applicable contract defense that could be used to invalidate the agreement, relying upon Shotts v. OP Winter Haven, Inc., 86 So. 3d 456 (Fla. 2011).

The trial court stated that if it decided the agreement violated public policy, then arbitration would not be compelled. If it did not, then the trial court recognized that the issue of whether interstate commerce was involved would need to be determined. The trial court took the matter under advisement.

Later, the trial court denied the motion to compel arbitration. In its order, the trial court determined that "the arbitration clause that required arbitration of disputes arising out of the improvement to real property within the state of Florida to take place in the state of Michigan" was void and unenforceable, citing to Shotts and section 47.025. The trial court implicitly rejected Sachse's preemption argument because the order did not mention the FAA or preemption. Apparently, the court did not consider whether arbitration could be ordered in Florida rather than in Michigan. The order further directed Sachse to file its answer within twenty days.

On appeal, Sachse contends that the Subcontract involves interstate commerce. We discuss later in this opinion the threshold question of interstate commerce that the trial court did not answer and which must be addressed on remand.

Sachse also contends that the FAA preempts section 47.025, leaving the arbitration provision enforceable under the FAA. We now turn to that issue.

The FAA and Preemption

Section 47.025, entitled "Actions against contractors," provides as follows:

> Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman, as defined in part I of chapter 713, to be brought outside this state is void as a matter of public policy. To the extent that the venue provision in the contract is void under this section, any legal action arising out of that contract shall be brought only in this state in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located, unless, after the dispute arises, the parties stipulate to another venue.

(Footnote omitted.)

Our review of whether the FAA preempts Florida law is de novo as a question of law. See McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1180 (Fla. 2013). The FAA "establishes a liberal federal policy favoring arbitration agreements." Id. at 1180-81. The FAA applies in both federal and state courts. Id. at 1185; Global Travel Mkt., Inc. v. Shea, 908 So. 2d 392, 396 (Fla. 2005). Section 2 of the FAA provides that an arbitration provision in a contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). "Commerce" includes "commerce among the several States or with foreign nations." 9 U.S.C. § 1.

Enacted pursuant to the Commerce Clause of the United States Constitution, the FAA preempts conflicting or inconsistent state law. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 343-44 (2011); Southland Corp. v. Keating, 465 U.S.

1, 10-11 (1984); Gilman + Ciocia, Inc. v. Wetherald, 885 So. 2d 900, 903 (Fla. 4th DCA 2004); Jensen v. Rice, 809 So. 2d 895, 899 (Fla. 3d DCA 2002). Thus, a Florida court must enforce an arbitration agreement that is valid and enforceable under the FAA even when the agreement would be unenforceable under Florida law. Jensen, 809 So. 2d at 899.

The saving clause of § 2 of the FAA allows "arbitration agreements to be declared unenforceable based on 'generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " McKenzie Check Advance, 112 So. 3d at 1181 (quoting Concepcion, 563 U.S. at 339). "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.' " Concepcion, 563 U.S. at 344 (alteration in original) (quoting Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Concepcion, 563 U.S. at 343.

In Shotts, which Affirmed Drywall and the trial court relied upon, the Florida Supreme Court held that in determining whether a valid agreement to arbitrate exists, the court, not the arbitrator, decides whether an arbitration agreement violates public policy and is unenforceable. 86 So. 3d at 471. The supreme court recognized that "[i]n Florida, an arbitration clause in a contract involving interstate commerce is subject to the Florida Arbitration Code (FAC), to the extent the FAC is not in conflict with

the FAA."[1] Id. at 463-64. The Shotts court stated that public policy is one of the " 'generally applicable contract defenses' for purposes of section 2" of the FAA because "if an arbitration agreement violates public policy, no valid agreement exists." Id. at 464-65. There, the court determined that "the limitations of remedies provisions in [an agreement regarding a nursing home] violate public policy, for they directly undermine specific statutory remedies" provided by the Florida Legislature. Id. at 474. The court concluded that the challenged provisions were unenforceable. Id. at 474-75.

The Shotts court recognized that courts are prohibited from "invalidat[ing] arbitration agreements under state laws applicable *only* to arbitration provisions." Id. at 463 (quoting Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996)). In Casarotto, the Supreme Court determined that the FAA preempted a Montana statute that required all arbitration agreements to comply "with a special notice requirement not applicable to contracts generally." 517 U.S. at 687. The Court stated that the FAA's goals "are antithetical to threshold limitations placed specifically and solely on arbitration provisions." Id. at 688. The Court pointed out that the Montana statute "place[d] arbitration agreements in a class apart from 'any contract,' and singularly limit[ed] their validity." Id.

Since Shotts, our supreme court in McKenzie addressed an arbitration agreement that contained a class action waiver that the Fourth District had determined was a violation of Florida public policy. 112 So. 3d at 1177. The arbitration agreement in McKenzie contained a severability clause, unlike the arbitration provision at issue

[1]The Revised Florida Arbitration Code, effective July 1, 2013, would be applicable to the present case. See § 682.01, Fla. Stat. (2016); Ch. 2013-232, § 40 at 2767, Laws of Fla. The parties do not address this.

here, but the parties in McKenzie stipulated "that if the class action waivers were held to be unenforceable, the arbitration provisions would be stricken." Id. at 1179. Relying upon Concepcion, the McKenzie court determined "that the FAA preempts invalidating the class action waiver in this case on the basis of it being void as against public policy." Id. at 1178.

The McKenzie court discussed the saving clause of § 2 and stated that it reflected the " 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' " Id. at 1181 (quoting Concepcion, 563 U.S. at 339). Arbitration agreements cannot be declared unenforceable by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Id. (quoting Concepcion, 563 U.S. at 339). The court recognized that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Id. at 1185-86 (quoting Concepcion, 563 U.S. at 351).

Sachse relies upon R.A. Bright Construction, Inc. v. Weis Builders, Inc., 930 N.E.2d 565 (Ill. App. Ct. 2010), and OPE International LP v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001), to support its argument that the FAA preempts section 47.025. OPE dealt with a similar Louisiana statute providing that with respect to construction contracts for work to be done within Louisiana any provision which "[r]equires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state" is "void and unenforceable as against public policy." 258 F.3d at 446 (quoting La. Stat. Ann. § 9:2779 (1998)). The court recognized that the FAA prohibited "States from singling out arbitration provisions for suspect status" and required that the courts place arbitration provisions "upon the same footing as other

contracts." Id. at 447 (quoting Casarotto, 517 U.S. at 687). The court determined that "[t]he statute directly conflicts with § 2 of the FAA because the Louisiana statute conditions the enforceability of arbitration agreements on selection of a Louisiana forum" and that requirement was "not applicable to contracts generally." Id.

R.A. Bright relied upon OPE in determining that the FAA preempted a similar Illinois statute. 930 N.E.2d at 571-72. The statute provided that in building and construction contracts to be performed in the state a provision requiring litigation or arbitration to take place in another state was void as against public policy. Id. at 571. In determining that the FAA preempted the statute, the court stated that the statute was "not applicable to all contracts generally, but only to contracts involving building and construction." Id. at 572; see also LaSalle Grp., Inc. v. Electromation of Del. Cty., Inc., 880 N.E.2d 330, 333 (Ind. Ct. App. 2008) (stating that the Indiana statute applied "only to dispute resolution forum selection clauses in" contracts for the improvement of real property and not to "any" contract).

Also, in United States ex rel. TGK Enterprises, Inc. v. Clayco, Inc., 978 F. Supp. 2d 540, 548 (E.D.N.C. 2013), the federal court determined that the FAA preempted a general North Carolina statute and one applying specifically to construction contracts because the statutes prohibited the out-of-state prosecution of an action or arbitration of a dispute. The court explained that where a statute's enforcement was sought to invalidate the arbitration agreement calling for arbitration in Missouri, this "would 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " Id. (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

Even if section 47.025 "is desirable for unrelated reasons," Florida "cannot require a procedure that is inconsistent with the FAA." McKenzie, 112 So. 3d at 1184 (quoting Concepcion, 563 U.S. at 351.) Section 2 specifically provides that arbitration provisions in contracts involving commerce "shall be valid, irrevocable, and enforceable" and that the exception to enforcement of an arbitration provision is "grounds as exist at law or in equity for the revocation of any contract." (Emphasis added.) Thus, the language of § 2, along with OPE, R.A. Bright, and LaSalle, support our determination that the FAA preempts section 47.025.

And not only did the trial court determine that section 47.025 prohibited arbitration in Michigan, but also the trial court denied the motion to compel arbitration and ordered Sachse to file its answer in twenty days.[2] Thus, it appears that the trial court prohibited arbitration in both Michigan and Florida. In Clayco, the court determined that the state statute conflicted with the FAA when the result was to invalidate the arbitration agreement and require resolution by a judicial forum. 978 F. Supp. 2d at 548. That was the consequence in this case as well. Because the trial court's order requires the parties to litigate the matter, the result is to "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Id. (quoting Southland Corp., 465 U.S. at 10). Because the FAA preempts section 47.025 if the FAA is applicable, we reverse the trial court's order that finds the arbitration provision unenforceable and requires the defendants to answer the complaint.

[2]We note that the Subcontract does not contain a severability clause, and the parties have not argued this issue to us.

Interstate Commerce

As indicated earlier, the trial court never addressed the threshold question of whether the Subcontract involves interstate commerce. Because we have determined that the FAA preempts section 47.025 if the FAA is applicable, the trial court must determine on remand whether the Subcontract involves interstate commerce. That question should have been resolved first to determine if the FAA even applies to the Subcontract, perhaps making unnecessary the preemption analysis.

We do not agree with Sachse that the face of the Subcontract clearly shows that interstate commerce is involved by virtue of the fact that Sachse is a Michigan LLC. In Hound Mounds, Inc. v. Finch, 153 So. 3d 368, 370 (Fla. 4th DCA 2014), which Sachse relies upon, the court determined that a franchise agreement between a Texas corporation and Florida resident involved interstate commerce. Sachse also relies upon Pilot Catastrophe Services, Inc. v. Fouche, 145 So. 3d 151, 153 (Fla. 5th DCA 2014), in which a Florida employee filed a lawsuit against her employer, an Alabama corporation, for disability and gender discrimination. The Fifth District did state that "[a] contract between a Florida resident and a foreign corporation is an agreement evidencing a transaction involving interstate commerce." Id. at 154. The court cited Gilman + Ciocia, Inc. v. Wetherald, 885 So. 2d 900, 904-05 (Fla. 4th DCA 2004), for this proposition. 145 So. 3d at 154. But in Gilman, in addition to the parties to the contract being a Florida resident and a New York corporation, the contract was an employment contract in which the Florida employee provided accounting, insurance, and broker services. 885 So. 2d at 902. The court listed seven provisions in the parties' agreement it considered in determining that interstate commerce was involved, such as the employee providing services of buying and selling securities and

the parties' sharing of data, exchanging correspondence, and transferring funds between New York and Florida. Id. at 904-05.

The present case does not involve a franchise agreement or employment agreement. Rather, it involves a contract to improve real property in Florida. Further, while Sachse maintains that it is a Michigan LLC, Affirmed Drywall alleged in its complaint that "Contractor [Sachse] is a Florida Corporation, authorized to, and doing business in Collier County, Florida." The parties did not address this allegation in light of the interstate commerce analysis. Because the trial court never ruled on the issue of whether the Subcontract involves interstate commerce and the record is not conclusive on this issue, we direct the trial court to address this issue on remand.

Reversed and remanded with directions.

CRENSHAW and SLEET, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JEFFREY MORRIS,
Appellant,

v.

MGZ PROPERTIES, LLC, YORAM GALEL, HENRY GALEL,
and **DAVIS ZIMET**,
Appellees.

No. 4D17-3587

[July 18, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey Dana Gillen, Judge; L.T. Case No. 50-2014-CA-03775XXXXMB (AE).

Carol A. Gart of Carol A. Gart P.A., Boca Raton, for appellant.

Ronald M. Gaché and Scott A. Simon of Shapiro, Fishman & Gaché, LLP, Boca Raton, for appellees.

KUNTZ, J.

Does the word "sale" mean any sale? The appellees insist it does not, at least not when the parties did not contemplate a specific form of a sale when they signed the contract. However, because this contract is clear and unambiguous, and not susceptible to multiple meanings, we conclude it must be applied as written and reverse the circuit court's judgment.

The contract at issue stated that payment would be due if any of three triggering events occurred, the first event being the "sale of the property" located at a specific street address. The appellant argued that this payment obligation was triggered when the property was sold at a foreclosure sale. The circuit court disagreed and concluded that the word "sale" as used in the contract contained a latent ambiguity, requiring the court to consider parol evidence to determine whether the parties intended that an involuntary sale, such as a foreclosure sale, would trigger the payment obligation.

The appellees argue that "[t]his is a classic case of latent ambiguity in a contract." In support, they rely extensively on cases such as *Taylor v. Taylor*, 183 So. 3d 1121, 1122 (Fla. 5th DCA 2015), *Florida Power & Light Co. v. Hayes*, 122 So. 3d 408, 411 (Fla. 4th DCA 2013), and *Riera v. Riera*, 86 So. 3d 1163, 1166 (Fla. 3d DCA 2012). Indeed, these cases do state that a latent ambiguity can arise from clear and intelligible language when "some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two or more possible meanings." *Riera*, 86 So. 3d at 1166. But that is not what we have here.

In *Riera*, the contract stated that "the parties shall equally pay for the costs of the minor child's tuition, books, supplies and any and all other related expenses," and the parties disputed whether room and board fit within the phrase "related expenses." *Id.* at 1166-67. The Third District concluded that the language was intelligible on its face but room and board are material expenses one would expect to be included if the parties intended to split those costs equally. *Id.* Thus, the court held, it "becomes paramount to determine whether 'any and all other related expenses' refers to expenses related to tuition, books, and supplies, or whether it refers to all related expenses associated with attending college." *Id.* The court then concluded that a latent ambiguity exists when "a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations." *Id.*

Similarly, in *Taylor* the parties prepared a contract providing that a Qualified Domestic Relations Order ("QDRO") would serve as the method for enforcing distribution of the husband's pension plan. 183 So. 3d at 1122. The City of Orlando Police Department rejected the QDRO and the Fifth District concluded that rejection qualified "as an extrinsic fact or extraneous circumstance which altered the parties' understanding of the means of payment and their respective duties." *Id.* at 1123.

Finally, in *Hayes*, this Court held that the contractual language "lying within the lake" could be applied in two equally plausible ways. 122 So. 3d at 411. We concluded that the "contract language here is 'susceptible to two different interpretations, each one of which is reasonably inferred from the terms of the contract . . .'" and reversed the court's summary judgment order. *Id.* (quoting *Miller v. Kase*, 789 So. 2d 1095, 1097–98 (Fla. 4th DCA 2001)).

The facts in the cases upon which the appellees rely are not comparable to those here. Here, there is no extrinsic fact or extraneous circumstance that changed the parties' understanding of the contract. Nor is the contractual language susceptible to two interpretations. Thus, we "look to

the dictionary for the plain and ordinary meaning" of the word "sale." *See Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999).

Black's Law Dictionary defines "sale" as "[t]he transfer of property or title for a price." *Sale*, *Black's Law Dictionary* (10th ed. 2014). For "foreclosure sale," Black's Law Dictionary states "see sale," and then defines the term within the definition of "sale" as "[t]he sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy a debt." *Foreclosure Sale*, *Black's Law Dictionary* (10th ed. 2014). Similarly, we have held that "[i]t would therefore seem that both the common and legal meanings of the word, 'sale,' indicate a transfer of title. . ." *Martyn v. First Fed. Sav. & Loan Ass'n of W. Palm Beach*, 257 So. 2d 576, 579 (Fla. 4th DCA 1971). This includes any transfer of title; foreclosure sales included.

To accept the appellees' position would require us to rewrite the contract to state "sale of the property, unless it is a foreclosure sale" or "voluntary sale of the property." If that is what the appellees intended, they should have written the contract accordingly before signing it.

When the terms of a contract are clear and unambiguous, we are required to apply the plain and ordinary meaning of the words and apply them as they are written. The "sale of the property" provision was triggered when the property was sold. On remand, judgment must be entered in favor of the appellant.

Reversed and remanded.

DAMOORGIAN and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

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

KLAUS GOERSCH AND
BRIGITTE GOERSCH,

Appellants,

v. Case No. 5D17-386

CITY OF SATELLITE BEACH,

Appellee.

_____/

Opinion filed July 20, 2018

Appeal from the Circuit Court
for Brevard County,
John M. Harris, Judge.

Clifford R. Repperger, Jr., of Rossway Swan Tierney Barry Lacey & Oliver, P.L., Melbourne, for Appellants.

Clifford B. Shepard and Patrick Brackins, of Shepard, Smith, Kohlmyer & Hand, P.A., Maitland, for Appellee.

TORPY, J.

We address an issue of first impression for this Court regarding whether a motion for sanctions served pursuant to section 57.105(4), Florida Statutes (2015), must be served in accordance with Florida Rule of Judicial Administration 2.516, even though the motion may not be filed, if at all, until after the expiration of a safe harbor period. Several

of our sister courts have reached conflicting dispositions on this and an analogous issue regarding proposals for settlement, which, similar to section 57.105 motions, are served but not contemporaneously filed. We affirm and hold that a section 57.105 motion must be served in strict compliance with rule 2.516.

Section 57.105 provides a statutory mechanism for recovery of attorney's fees when asserted claims or defenses fall below the statutory threshold. Procedurally, it involves a two-step process. § 57.105(4), Fla. Stat. First, the movant must serve the motion on the opposing party, but may not immediately file the motion. *Id.* Second, only if the opposing party fails to withdraw or otherwise correct the challenged claim or defense within twenty-one days may the movant file the motion with the court and pursue sanctions by hearing. *Id.* The statute is silent on particular procedures for serving or filing the motion. Accordingly, it is necessary to look to the Florida Rules of Civil Procedure for direction.

Florida Rule of Civil Procedure 1.080 is the starting point for service of pleadings, orders and "every other document filed in the action." Fla. R. Civ. P. 1.080(a). It requires service in conformity with rule 2.516. Similar to rule 1.080, rule 2.516 addresses service of pleadings and "every other document filed in any court proceeding." Fla. R. Jud. Admin. 2.516(a). It mandates service by e-mail and compliance with certain technical requirements, including service to all designated e-mail addresses, attachment of the documents being served in "PDF" format, inclusion of specific identifying data in the subject line and body of the e-mail, and a limitation on the size of the e-mail and documents attached thereto. Fla. R. Jud. Admin. 2.516(b)(1)(E). In addition, **but not in**

lieu of, redundant service may be accomplished by traditional means such as mail, facsimile, or personal delivery. Fla. R. Jud. Admin. 2.516(b)(2).

In this case, Appellants' initial e-mail service of the motion admittedly did not comply with the requirements of rule 2.516 in several respects. After the twenty-one-day safe harbor period expired, Appellants filed the motion and served it a second time, at which point they complied with the rule 2.516 service requirements. When sanctions were sought, Appellee challenged the sufficiency of the first service. Relying on *Matte v. Caplan*, 140 So. 3d 686 (Fla. 4th DCA 2014), and although expressing reservation, the trial court denied fees because the initial e-mail service did not comply with rule 2.516. In *Matte*, the Fourth District Court of Appeal held that "strict compliance with Florida Rule of Judicial Administration 2.516 regarding e-mail service . . . is required before a court may assess attorney's fees pursuant to section 57.105, Florida Statutes." 140 So. 3d at 690.

The Second District subsequently expressed conflict with *Matte*, but not with the notion that strict compliance with rule 2.516 is necessary. Instead, it concluded that rule 2.516 is not applicable at all because a section 57.105 motion is not a document "filed in any court proceeding." *Isla Blue Dev., LLC v. Moore*, 223 So. 3d 1097, 1099 (Fla. 2d DCA 2017). In reaching this conclusion, the Second District followed an earlier decision from that court, which applied the same reasoning to conclude that rule 2.516 does not apply to a proposal for settlement. *Boatright v. Philip Morris USA, Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017). Indeed, it appears that the Second District correctly concluded that the holding in *Boatright* governed its disposition in *Isla Blue Development, LLC*, given that section 57.105 motions and proposals for settlement share a similar characteristic: neither

are filed contemporaneously with the initial service.[1] Nonetheless, because we disagree with the Second District's conclusion that "filed in any court proceeding" under rule 2.516(a) means contemporaneously filed, we reject Appellants' claim that rule 2.516 is inapplicable.

The plain language of rule 2.516 leads us to the inescapable conclusion that the timing of the "filing" is of no consequence to the requirement of service under the rule. The rule says "filed," not immediately filed or contemporaneously filed. The motion at issue here was ultimately "filed," albeit much later than when it was initially served. Had it not been filed at some point the document would have been inconsequential and this entire dispute avoided. Our conclusion on this point is buttressed by rule 2.516(d), which governs the **timing** of the filing of the **document**. It requires that all documents "must be filed with the court either before service or immediately thereafter, **unless otherwise provided for by general law** or other rules." Fla. R. Jud. Admin. 2.516(d) (emphasis supplied). Accordingly, rule 2.516 contemplates two temporal categories of **filed** documents**—**those that are filed immediately and those that are filed at some other time. No distinction is made in the rule regarding **service** of these two distinct categories of documents. In the case of a section 57.105 motion, the general law controls the **timing**

[1] Without mentioning *Matte*, but instead following the logic of the Second District in *Boatright*, the Fourth District concluded in *McCoy v. R.J. Reynolds Tobacco Co.*, 229 So. 3d 827 (Fla. 4th DCA 2017), that rule 2.516 does not apply to proposals for settlement. Presumably, it concluded that *Matte* was not in tension with its decision because *Matte* did not expressly address the applicability of rule 2.516. The *McCoy* court did, however, express conflict with *Wheaton v. Wheaton*, 217 So. 3d 125 (Fla. 3d DCA 2017), *review granted*, No. SC17-716, 2017 WL 4785810 (Fla. Oct. 24, 2017), which had, in part, relied upon *Matte* to conclude that proposals for settlement must be served in accordance with rule 2.516.

of the filing. The earliest it can be filed is twenty-two days after service. § 57.105(4), Fla. Stat.

Prior to the adoption of rule 2.516 in 2012, rule 1.080 provided the methods of service for "paper[s] filed in the action." Fla. R. Civ. P. 1.080(a) (2011). Motions of this nature—like all other motions—were routinely served in accordance with this rule, bearing a certificate of service as prescribed by the rule, even though they were not "filed" immediately. *See* Fla. R. Civ. P. 1.080(b), (c), (f) (2011). When ultimately filed, the practice was to serve a notice of filing, not to serve a second copy of the same motion with a supplemental certificate of service. The rule has never required the **motion** to be served twice. Service and filing are distinct acts. Now, with e-mail service and e-filing, when applicable, the motion is served by e-mail. Then, after the passage of the safe harbor period, it is filed through the e-portal and sent to the other party via e-mail directly through the e-portal system. *See* Fla. R. Jud. Admin. 2.525(e) (governing e-service of filed documents). Although the motion is now served twice simply because of the design of the e-portal system, there is no indication that the change to e-mail service and e-filing was intended to alter the category of "documents" or "papers" that are to be governed by rule 1.080, which now directs service in conformity with rule 2.516. The "filed in the action" modifier is substantially the same in both generations of rule 1.080. Even though the motion is now served twice, the redundant service at the time of filing cannot cure the defect in the original service without undermining the letter of the statute and the purpose of the safe harbor period.

Apart from our literal interpretation of the rule, we think it is also significant that there is no other rule or statute that governs the procedure for service of documents of

the nature we address here. If the Second District is correct, there is a gaping hole in the rules of procedure for "documents" that are served first and filed later. We cannot discern anything in the history of this rule change manifesting an intent by the drafters to alter by exclusion the procedure for service of this hybrid form of document. Nor do we think our high court intended the change to create a void in the rules of procedure for service of this category of document. In our view, like its predecessor, the revised rule 1.080 (which now incorporates rule 2.516's service requirements) is the rule that was intended to govern the **service** of **any** document to be filed in any action, regardless of the timing of the filing.

Accordingly, we certify conflict with our sister court in *Isla Blue Development, LLC* and align ourselves with *Wheaton v. Wheaton,* 217 So. 3d 125 (Fla. 3d DCA) (holding that service requirements of rule 2.516 apply to proposals for settlement even though proposals are not filed contemporaneously with service), *review granted*, No. SC17-716, 2017 WL 4785810 (Fla. Oct. 24, 2017), for the reasons therein expressed and the additional reasons we express herein.

Although Appellants do not direct our attention to any decision that conflicts with *Matte*'s holding that strict compliance with rule 2.516 is mandated by the language of that rule, they urge that *Matte* is incorrect and, to the extent rule 2.516 applies, present the alternative argument that substantial compliance is sufficient. We disagree. As our sister court in *Matte* reasoned, this rule uses mandatory language. The technical dictates for e-mail service in the rule further evince an intent to mandate strict compliance with all of the identified stringent standards for e-mail service to lessen the potential for an inconspicuous e-mail to get buried in the voluminous inbox of a busy practitioner in the

modern, fast-paced practice of law. Besides the practical dilemma for trial courts in applying a somewhat nebulous substantial compliance test, with the inherent result of inconsistency and the potential for proliferation of evidentiary hearings, a relaxed rule of service might undermine e-mail service altogether.[2] Accordingly, for the reasons expressed in *Matte* and the additional reasons expressed herein, we hold that strict compliance is required. Because Appellants concede that they did not strictly comply with rule 2.516 when they initially served the section 57.105(4) motion, we affirm the trial court's denial of fees on this alternative argument.

In rejecting Appellants' substantial compliance argument, we have not overlooked our decision in *Henderson-Bullard v. Lockard,* 204 So. 3d 568 (Fla. 5th DCA 2016). That case did not hold that strict compliance with rule 2.516 is unnecessary, as Appellants contend. The holding in *Lockard* was that a lack of strict compliance with the rule does not render a judgment void, an entirely different issue. Our decision there turned on the application of Florida Rule of Civil Procedure 1.540, not the interpretation of rule 2.516.

Nor do we believe that relaxed compliance with rule 2.516 is authorized by *Kuhajda v. Borden Dairy Co. of Alabama*, 202 So. 3d 391 (Fla. 2016). In that case, the rule of procedure required that a proposal for settlement include an element that was not required by the statute addressing the substance of proposals for settlement. *Id.* at 395. The Florida Supreme Court concluded that the procedural rule should not "trump" the statute or otherwise "be strictly construed to defeat a statute it is designed to implement."

[2] The test for "substantial compliance" is heavily grounded in whether an omission causes prejudice. *See, e.g.*, *Bank of N.Y. Mellon v. Johnson*, 185 So. 3d 594 (Fla. 5th DCA 2016). In a case like *Isla Blue Development, LLC*, where actual service was accomplished in the traditional manner, prejudice might not be apparent, yet there was not even an attempt to comply with the e-mail service requirement in that case.

Id. at 395-96. Here, by contrast, there is no conflict between the rule and the statute. Section 57.105 does not specify a method of service. If it did, then the statute would control, because rule 2.516(a) expressly defers to statutorily prescribed methods of service.

AFFIRMED; CONFLICT CERTIFIED.

JOLLEY, M.G., Associate Judge, concur.
BERGER, J., dissents with opinion

I disagree with the majority based on the reasoning set forth in Isla Blue Development, LLC v. Moore, 223 So. 3d 1097 (Fla. 2d DCA 2017) (concluding email service requirements of rule 2.516(b)(1) do not apply to section 57.105(4) motions, which provide that the required twenty-one-day safe harbor notice "must be served but may not be filed with or presented to the court") and Boatright v. Philip Morris USA, Inc., 218 So. 3d 962 (Fla. 2d DCA 2017) (concluding email service requirements of rule 2.516(b)(1) do not apply to proposals for settlement unless the proposals are attached to motions for acceptance or enforcement under section 768.79(3), Florida Statutes (2013), or Florida Rule of Civil Procedure 1.442(d) and are filed in court). As such, I would reverse the order of the trial court and certify conflict with Matte v. Caplan, 140 So. 3d 686 (Fla. 4th DCA 2014), the case on which the majority relies.[3]

Accordingly, I dissent.

[3] There is no notable difference between the language in section 57.105(4), which states, "[a] motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected" and section 768.79(3), which provides, "[t]he offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." Without any explanation or reference to the other, the Fourth District Court of Appeal reached opposite conclusions in Matte, 140 So. 3d at 690 (concluding strict compliance with rule 2.516 applies to section 57.105 motions that are served with required 21 day safe harbor notice but not filed with court), and McCoy v. R.J. Reynolds Tobacco Co., 229 So. 3d 827, 829 (Fla. 4th DCA 2017) (concluding initial offer of judgment is outside email service requirements of Rule 2.516(a)).