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Manuel Farach

Bushnell v. Portfolio Recovery Associates, LLC, Case No. 2D17-429 (Fla. 2d DCA 2018).

An action for an account stated is sufficiently "with respect to a [credit card account] contract" such that the prevailing party is entitled to an award of attorney's fees under Florida Statute section 57.105(7).

Alvarez v. All Star Boxing, Inc., Case No. 3D17-925 (Fla. 3d DCA 2018).

Damages for unjust enrichment may be market value of the services or the value of the services to the party unjustly enriched, but nonetheless must be measurable and quantifiable even if rendered by a jury.

Gindel v. Centex Homes, Case No. 4D17-2149 (Fla. 4th DCA 2018).

The sending of the pre-suit notice of construction defects required under Florida Statute section 558.004(1)(a) qualifies as an "action" for purposes of satisfying the time requirements of Florida's Statute of Repose, Florida Statute section 95.11(3)(c).

Stankos v. Amateur Athletic Union of The United States, Inc., Case No. D17-3361 (Fla. 4th DCA 2018).

The filing of an amended complaint resurrects the right to compel arbitration only if the amended complaint materially differs from the initial complaint in substantive matters.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

KATRINA BUSHNELL,

Appellant,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Appellee.

Case No. 2D17-429

Opinion filed September 14, 2018.

Appeal from the County Court for Hillsborough County; Herbert M. Berkowitz, Judge.

Jennifer Erin Jones of McIntyre Thanasides Bringgold Elliott Grimaldi & Guito, P.A., Tampa, for Appellant.

Janet Varnell of Varnell & Warwick, P.A., Lady Lake; Lynn Drysdale of Jacksonville Area Legal Aid, Inc., Jacksonville; Craig E. Rothburd of Craig E. Rothburd, P.A., Tampa; and Arthur Rubin of We Protect Consumers, P.A., Tampa, for Amicus Curiae National Association of Consumer Advocates, in support of Appellant.

Robert E. Sickles and Jason S. Lambert of Broad and Cassell, Tampa; and David M. Greenbaum, Racquel A. White, Brian M. Bilodeau and Jessica L. Montes of

Portfolio Recovery Associates, LLC,
Norfolk, Virginia, for Appellee.

SILBERMAN, Judge.

Katrina Bushnell seeks review of a county court order denying her motion for prevailing party attorney's fees after Portfolio Recovery Associates, LLC, voluntarily dismissed its account stated cause of action against her. Portfolio, as the successor in interest to the original creditor under Bushnell's credit card account, had filed suit to recover $1021.22 based on Bushnell's alleged failure to object to a billing statement reflecting the amount due. Bushnell sought attorney's fees pursuant to a provision in the credit card account agreement that provides for fees to the creditor in any collection action and the reciprocity provision in section 57.105(7), Florida Statutes (2015). The trial court denied the request for fees and on rehearing certified that this case raises the following question of great public importance:

> IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION TO ENFORCE A CONTRACT, SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES UNDER § 57.105(7), FLORIDA STATUTES?

We rephrase the certified question as follows:

> IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION "WITH RESPECT TO THE CONTRACT" SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 57.105(7), FLORIDA STATUTES (2015)?

We answer this question in the affirmative, reverse the order denying Bushnell's motion for fees, and remand for further proceedings.

I. Background

This dispute arises from Bushnell's alleged failure to pay the balance owed on an Amazon.com store card. In its complaint and in an affidavit and exhibits attached to the complaint, Portfolio claimed that it is the assignee of and successor in interest to the original creditor and that it is the owner of Bushnell's credit card account and the proceeds of the account. It asserted that it has all of the account seller's "power and authority" regarding the account and that the seller has no further interest in the account or account proceeds. Notably, Portfolio brought the action as one for account stated, as opposed to breach of contract.

Bushnell answered the complaint, raised multiple affirmative defenses, and requested an award of attorney's fees based on the underlying credit card agreement. She filed an affidavit to which she attached the credit card agreement that she stated was for the account. Eventually, Portfolio voluntarily dismissed its complaint. Bushnell then filed a motion for award of attorney's fees and costs as the prevailing party, relying on the credit card agreement and section 57.105(7).

The credit card agreement contains a provision authorizing the creditor to recover its attorney’s fees as part of its collection costs if it "ask[s] an attorney who is not our salaried employee to collect your account." The agreement does not limit the recovery of fees to certain types of collection actions, whether for breach of contract or otherwise. And the creditor "may sell, assign or transfer any or all" of its rights or duties under the agreement including the rights to payments.

II. Arguments and Analysis

Section 57.105(7) provides, in pertinent part:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

The trial court found that Bushnell could not recover fees under section 57.105(7) because the underlying action is not an "action to enforce the contract" as required under that statute. Specifically, the court determined that an action for account stated is not an action for breach of the contract at issue, which is the credit card agreement. The court certified a question that requires proof of an "action to enforce the contract" as follows:

> IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN ACTION TO ENFORCE A CONTRACT, SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES UNDER § 57.105(7), FLORIDA STATUTES?

Bushnell argues that the trial court erred in interpreting section 57.105(7) to require an "action to enforce a contract." She asserts that the provision requires an action "with respect to the contract." She argues that the certified question should be rephrased to require proof of an action "with respect to the contract." And she claims that the account stated cause of action is an action with respect to the credit card agreement.

Consistent with the wording of the credit card agreement and the statute, and in light of the circumstances before us, we agree with Bushnell that the certified question should be rephrased. In our view, there are two requirements for application of the reciprocity provision in section 57.105(7): (1) the contract must include "a provision

allowing attorney's fees to a party when he or she is required to take any action to enforce the contract," and (2) the other party seeking fees must "prevail[] in any action, whether as plaintiff or defendant, with respect to the contract." See Portfolio Recovery Assocs., LLC v. Benjamin, 24 Fla. L. Weekly Supp. 96a (Fla. 9th Cir. Ct. Apr. 18, 2016); Pujol v. Capital One Bank (USA), N.A., 23 Fla. L. Weekly Supp. 517a (Fla. 15th Cir. Ct. Sept. 21, 2015); Portfolio Recovery Assocs., LLC v. Cordero, 23 Fla. L. Weekly Supp. 392b (Fla. 7th Cir. Ct. July 23, 2015).

The main thrust of the first requirement of section 57.105(7) is determining whether there is a contractual provision allowing for the recovery of fees by a party who is required to take any action to enforce the contract. There is no dispute that the credit card agreement at issue has such a provision. The second statutory requirement, if met, allows the other party to recover fees even though the agreement provides for the recovery of fees only in favor of one party. The main thrust of the second requirement is determining whether the movant is the prevailing party in an action with respect to the contract.

In this case, there is no dispute that Bushnell is the prevailing party. See Raza v. Deutsche Bank Nat'l Tr. Co., 100 So. 3d 121, 123 (Fla. 2d DCA 2012) (explaining that the courts in Florida have consistently determined that a defendant in a case that is voluntarily dismissed is the prevailing party for purposes of attorney's fees). However, there is a dispute over whether the action for account stated constitutes an action with respect to the credit card agreement. Thus, we rephrase the certified question as follows:

> IS AN ACCOUNT STATED CAUSE OF ACTION TO COLLECT ON AN UNPAID CREDIT CARD ACCOUNT AN

ACTION "WITH RESPECT TO THE CONTRACT" SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 57.105(7), FLORIDA STATUTES (2015)?

We answer this question in the affirmative. Our answer to the question is informed by the supreme court's interpretation of analogous contract language in Caufield v. Cantele, 837 So. 2d 371, 379 (Fla. 2002). In Caufield, the contract provided for "attorney's fees in connection with any litigation 'arising out of' the contract." Id. at 373. The supreme court concluded that the prevailing party in an action for fraudulent misrepresentation was entitled to fees under this provision. Id. at 379. In so doing, the court considered three other decisions in which courts declined to limit similar contractual provisions to contract enforcement claims. Id. (citing Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989) (rescission); Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998) (fraudulent misrepresentation); and Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001) (tortious interference)). The supreme court reasoned, "Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the tort complained of necessarily arose out of the underlying contract." Id.

Although Caufield interpreted a contractual provision, at least one court has applied its "inextricably intertwined" test to a statutory provision containing the "arising out of" language. See Randall v. Lady of Am. Franchise Corp., 532 F. Supp. 2d 1071, 1093 (D. Minn. 2007) ("The Court therefore finds that a non-contract claim 'aris[es] out of [a] contract' for purposes of § 95.03 when that non-contract claim could *only* arise if the parties have entered into a contract." (alteration in original)). We

conclude that the "arising out of" language is not materially different from the "with respect to" language in section 57.105(7). And we hold that the supreme court's "inextricably intertwined" test in Caufield is applicable to determine whether an action is "with respect to the contract" such that the reciprocity provision in section 57.105(7) applies.

We are not persuaded by Portfolio's argument that the application of the inextricably intertwined test to section 57.105(7) is inconsistent with Tylinski v. Klein Automotive, Inc., 90 So. 3d 870 (Fla. 3d DCA 2012). In Tylinski, the plaintiff car dealer filed suit against the defendants for breach of a Retail Order Contract (ROC) the defendants had signed in the course of purchasing a car. Id. at 871-72. The defendants prevailed in the breach of contract action, but the trial court denied their motion for attorney's fees under section 57.105(7). Id. at 872-73.

In affirming, the Third District discussed two documents that the parties had executed. Id. at 871-72. One was a Retail Order Contract (ROC), which did not contain an attorney's fee provision. Id. at 872. The other was a Retail Installment Sales Contract (RISC), which contained an attorney's fee provision. The court rejected the defendants' argument that fees should have been awarded to them in accordance with the terms of the RISC. The court stated that it understood the defendants' "argument that, but for the financial commitment reflected in the RISC, the dealership would not have allowed them to drive the car off the lot." Id. But the court explained that the dealer sued only for breach of the ROC. And in their answer to the complaint the defendants' asserted a claim for attorney's fees under the reciprocity provision of

section 57.105(7) and the ROC. The defendants did not plead a claim for fees under the RISC, which was the contract containing the fee provision. Id.

The Tylinski court's rejection of the defendants' "but for" argument to the application of section 57.105(7) is not inconsistent with the application of the inextricably intertwined test here. The Third District did not interpret the "with respect to the contract" language in section 57.105(7) to determine whether the defendants were entitled to fees. Instead, the court upheld the denial of attorney's fees because the defendants failed to plead a proper basis for the recovery of fees. Id. at 872-73.

In contrast to the circumstances of Tylinski, Portfolio brought an action to collect money owed as a result of Bushnell's use of the Amazon.com store credit card. Bushnell responded to the complaint and asserted her claim for fees under a provision in the credit card agreement and section 57.105(7). Thus, Tylinski simply does not apply here.

To apply the inextricably intertwined test from Caufield in this case, we must consider whether the account stated cause of action could have occurred absent the existence of the credit card contract. A claim for account stated requires proof "that there was 'an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment.' " Burt v. Hudson & Keyse, LLC, 138 So. 3d 1193, 1196 (Fla. 5th DCA 2014) (quoting Farley v. Chase Bank, U.S.A., N.A., 37 So. 3d 936, 937 (Fla. 4th DCA 2010)). There does not need to be an explicit agreement. Id. Instead, a claim for account stated can be based on a debtor's failure to object to an account statement. Id.

While a claim "for an account stated is based on 'the agreement of the parties to pay the amount due upon the accounting, and not any written instrument,' " Farley, 37 So. 3d at 937, the amount due here is based on the debtor's failure to pay under the credit card contract. Simply put, if there had been no credit card contract, the amount due would not have accrued in the first place. The credit card contract and the account stated cause of action are therefore inextricably intertwined such that the account stated cause of action is an action "with respect to the contract" under section 57.105(7). Accordingly, we answer the rephrased certified question in the affirmative.

In summary, we conclude that in an action for account stated brought to collect the amount due under a credit card agreement, the reciprocity provision in section 57.105(7) applies to a properly pleaded request for attorney's fees made pursuant to the terms of the agreement. As a result, we reverse the order that denied Bushnell's motion for attorney's fees and remand for the trial court to determine the reasonable amount of attorney's fees to be awarded to Bushnell.[1]

Reversed and remanded for further proceedings; certified question answered.

KELLY and MORRIS, JJ., Concur.

[1]The order on appeal awarded costs to Bushnell as the prevailing party pursuant to a stipulation. We do not disturb that portion of the order.

Third District Court of Appeal

State of Florida

Opinion filed September 12, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-925
Lower Tribunal No. 10-25018

Saul Alvarez,
Appellant,

vs.

All Star Boxing, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Migna Sanchez-Llorens, Judge.

Brodsky Fotiu-Wojtowicz, and Alaina Fotiu-Wojtowicz, Michael S. Olin, and Joel S. Perwin, for appellant.

Weiss Serota Helfman Cole & Bierman, P.L., and Edward G. Guedes and Adam Schwartzbaum, for appellee.

Before LAGOA, LOGUE, and SCALES, JJ.

LOGUE, J.

Saul Alvarez appeals a final judgment awarding All Star, Inc. $8.5 million for unjust enrichment following a 14-day jury trial. Alvarez argues that the amount of the damages was not based on competent substantial evidence. We agree, reverse, and remand with instructions.

BACKGROUND

By all accounts, the red-haired, twenty-eight-year-old Saul Alvarez, nicknamed "Canelo," is a rising international star in welterweight and middleweight boxing. As Alvarez himself testified, his 2013 fight against Floyd Mayweather was the second-highest grossing fight in boxing history at the time. Alvarez began his professional boxing career in Mexico at age 15. At an early and formative point in his career, Alvarez received boxing promotional services from All Star Boxing. All Star Boxing provided these services to Alvarez for a 15-month period that ran from September 2008 to December 2009 when Alvarez was approximately 18 years old.

The driving force behind All Star was Feliz Zabala Jr. Zabala has previously been named Latino Promoter of the Year by the World Boxing Organization. Zabala's father was a boxing promoter and Zabala was raised in the boxing industry. By eighteen, Zabala was a trainer and manager. In 2001, Zabala devoted himself full-time to being a promoter. He has promoted approximately 100 fighters—12 have become world champions.

Among other services during the 15 months, All Star obtained nine fights for Alvarez that prepared him for boxing stardom – seven fights in Mexico and two fights in the United States. Some of the fights were broadcast by Telefura Univision network. All Star also obtained a visa for Alvarez to travel to the United States for the fights. It garnered publicity in boxing publications and televised events. It paid for some of Alvarez's expenses including athletic shoes, equipment, air fare, and referee fees. Any money that it might have been entitled to for its work as promoter, it let Alvarez keep. Zabala personally attended some, but not all, fights. All Star viewed Alvarez as an investment. It assumed that if Alvarez reached the top, All Star would then obtain a fair return on investment by sharing the earnings generated by Alvarez's fights. By the end of 2009, All Star believed its effort had brought Alvarez to the verge of stardom.

All Star's expectations came to naught, however, when on January 21, 2010, Alvarez signed an exclusive promotional agreement with a different promoter, Golden Boy Productions, Inc. Golden Boy was an international, top-tier promoter with a track record of organizing fights on Pay-Per-View, HBO, Showtime, ESPN, and Fox, and at such venues as Madison Square Garden in New York and the Staples Center in Los Angeles. Golden Boy paid Alvarez a $1 million signing bonus.

The disappointed All Star sued Golden Boy for tortious interference and Alvarez for breach of contract and unjust enrichment. The jury rejected All Star's claims for tortious interference against Golden Boy and for breach of contract against Alvarez. But it found that Alvarez was unjustly enriched by All Star's services and awarded $8.5 million in damages. The amount of this unjust enrichment award is the only matter on appeal.

At trial, as reflected in the jury instruction, both parties agreed that the damages for unjust enrichment are "either the reasonable value of the labor [All Star] performed and the expenses [All Star] incurred if such labor or expenses conferred a benefit on Mr. Alvarez, or the value of the benefits that Mr. Alvarez received from All Star's labor or expenses."

All Star did not present evidence of a specific dollar figure to reflect the amount of its unjust enrichment damages. Instead, All Star's theory was apparently that the damages for unjust enrichment should be an unspecified percentage of Alvarez's subsequent earnings for all or part of his lifetime.

In this regard, All Star relied upon the testimony of its financial expert, Carl Fedde, a certified public accountant. Fedde's actual assignment was to calculate All Star's lost profits due to the breach of contract claim. He assumed All Star would have made the same as Golden Boy (Alvarez's new promoter), who in turn, would have made the same as Alvarez. Fedde first estimated that Alvarez earned

$27 million from boxing in the period from 2010 to 2015 (a number he reduced to $24 million when shown an error in his calculations on cross-examination).

His estimate of $24 million from boxing in the period from 2010 to 2015 was based on his research of the 16 bouts Alvarez fought during this time. Fedde was unable to obtain verified accounting information regarding the revenues and expenses from these fights. He relied on information from sports and boxing newspapers republished on the internet. From these sources, for each of the 16 fights, he separately estimated revenues from the gate, international TV, sponsors, closed circuit TV, other TV, and pay-per-view. He then estimated how the money was distributed to other promoters and pay-per-view providers. Fedde was unable to obtain actual information for line item expenses such as payments to undercard fighters at the fights, insurance, travel, lodging, legal fees, etc. Because of this, as All Star explained in its brief, he instead used a "conservative 50% catch-all category of expense (to cover unknown items)." He then also assumed Alvarez shared proceeds 50/50 with his own promoter, an assumption discussed in more detail below.

After estimating Alvarez's earnings from 2010 to 2015, Fedde next projected Alvarez would earn $135 million from 2016 to 2026. He did so by taking his estimates of the revenue from Alvarez's last five fights during the period of 2010 to 2015 and building similar income and expense projections for each of 21

different hypothetical future fights over the next 10 years. Among other things, he assumed Alvarez would not be injured or disqualified; Alvarez would fight two fights a year; Alvarez would be the star attraction of each fight; revenues would increase as Alvarez's reputation grew; and Fedde's own estimates and assumptions for the period 2010 to 2015 would similarly apply during the period 2016 to 2026, including the generic rate of 50% for expenses and the 50/50 split between boxer and promoter.

Fedde thereby projected that gross revenues from Alvarez's future fights from 2016 to 2026 would reach 1.9 billion dollars. From this amount Alvarez's net profits would be $219,969,428, which Fedde reduced to a present value of $135,042,147 using a five-percent discount rate.

A crucial part of Fedde's calculation concerned how Alvarez and his promoter shared their portion of the take. Some fighters receive zero percent while others receive eighty percent or more. Fedde settled on an estimate of a 50/50 split for both his estimates of past earnings (2010 to 2015) and projection of future earnings (2016 to 2026).

During cross-examination, Fedde struggled to explain how he reached the figure of 50 percent. Fedde initially offered explanations such as "I felt a 50/50 split would be the easiest way"; "[t]he reality was . . . that percentage could be between a hundred percent and zero percent and I took the average"; and "I picked

50 percent which is right in the middle." Fedde finally admitted that he selected 50 percent because he simply lacked the information "that would give me a reasonable basis to say whether or not 50 percent is reasonable or not":

> Q. Did you have such information?
>
> A. I do not have such information.
>
> Q. And, so the 50 percent, you can't say is reasonable or not, can you?
>
> A. No, Sir
>
> Q. Am I correct?
>
> A. You are correct, sir.

Fedde also conceded that no professional standard allowed him to arrive at the 50 percent figure on such a basis:

> Q. Is there anything that you can point to in the forensic accounting business that allows you to simply pick 50 percent when you don't have any information about whether it's zero or a hundred?
>
> A. No, sir.

In addition, Fedde testified that accountants may properly rely upon information from the internet "if, in fact, we can verify it." But he admitted that he was unable to verify significant numbers from the internet that he relied upon in his analysis. On redirect, when All Star's own lawyer attempted to rehabilitate him on this point by asking whether his computing of the lost profits reflected his

"independent investigation," Fedde answered "it's not really an independent investigation. It's information I got off the internet. I did not get verifiable information."

Finally, perhaps because the focus of the trial was alleged breach of contract, Fedde never testified as to how Alvarez's earnings could be used to calculate the amount that Alvarez was unjustly enriched by All Star's services. In other words, Fedde never testified how a particular percentage, range, or portion of Alvarez's earnings during all or any part of the 16-year period from 2010 to 2026 could be attributed to the promotional services performed by All Star during the 15-month period from September 2008 to December 2009.

Indeed, again perhaps for the same reason, All Star's entire closing argument regarding damages for unjust enrichment consisted entirely of the following three sentences in which All Star asked the jury to "look back" to Fedde's two income projections of $24 million and $135 million and to "compute" those two figures to determine the damages:

> And the last question [on the jury form] is: "What amount of damages is All Star Boxing entitled to as a result of Saul 'Canelo' Alvarez's unjust enrichment?"
>
> The request that we would make at this point is that you look back to Mr. Fedde's testimony. And you have the 24 million and the hundred and, 135 million, and that you compute those two.

The jury found against All Star on its claims for breach of contract and tortious interference. But the jury found for All Star on its claim that Alvarez was unjustly enriched and awarded $8.5 million in damages. In the course of the proceedings below, Alvarez filed motions in limine, moved and renewed a motion for directed verdict, and moved for remittitur based on its contention that Fedde's testimony was speculative. The trial court denied those motions. Alvarez timely appealed.

ANALYSIS

Alvarez argues that the award of $8.5 million was contrary to law because unjust enrichment cannot be based simply upon lost profits and, in any event, the projections of lost profits here were "absurdly speculative." We decline to reach the issue of whether lost profits can ever be used to calculate the damages for unjust enrichment. But we hold that lost profits cannot be used to calculate damages for unjust enrichment in the manner All Star did in this trial.

We review the jury's award of damages to see if it is supported by substantial competent evidence viewing the facts and all reasonable inferences in the light most favorable to the verdict. See, e.g., W. Boca Med. Ctr., Inc. v. Marzigliano, 965 So. 2d 240, 244–45 (Fla. 3d DCA 2007) (holding "an award by the jury will not be disturbed if supported . . . by substantial competent evidence. A purported award of lost future earning capacity that is not supported by such evidence, in contrast, will be reversed").

Damages for unjust enrichment may be valued based on either (1) the market value of the services; or (2) the value of the services to the party unjustly enriched. Restatement (Third) of Restitution and Unjust Enrichment §§ 49(3)(a) & (c)(2011). See Levine v. Fieni McFarlane, Inc., 690 So. 2d 712, 713 (Fla. 4th DCA 1997) (holding it was the benefit to the recipient, not the cost to the provider, which forms the basis for an award in an unjust enrichment case).

Because unjust enrichment damages are economic damages, the amount of damages must be measurable and quantifiable: "[i]t has long been accepted in Florida that a party claiming economic losses must produce evidence justifying a definite amount." United Auto. Ins. Co. v. Colon, 990 So. 2d 1246, 1248 (Fla. 4th DCA 2008). "Economic damages may not be founded on jury speculation or guesswork and must rest on some reasonable factual basis." Id. See Swindell v. Crowson, 712 So. 2d 1162, 1164 (Fla. 2d DCA 1998) ("Damages cannot be based on speculation, conjecture or guesswork.").

We conclude that the jury's verdict of $8.5 million in damages for unjust enrichment was speculative and is not supported by substantial competent evidence. Fedde's estimate of $24 million was itself speculative for at least two reasons. First, it was based on the assumption of the 50/50 split between Alvarez and his promoter. The percentages selected for this adjustment have an outsized impact on Fedde's final earnings estimate, potentially swinging the final number to

be over twice as large or twice as small.[1] Yet Fedde testified he had no basis for the allocation and, in fact, he could not testify that the allocation was reasonable.

On this point, we find the instant case is governed by Department of Transportation v. Samter, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981). In Samter, this court reversed a jury verdict in an eminent domain case where an appraiser could not explain his 50% adjustment to a comparable sale such that "[i]t is clear that the 50% figure . . . came only from the top of [the expert's] head." Id. at 1145. We held, "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually based chain of underlying reasoning." Here, like the testimony rejected in Samter, Fedde's assumption of a 50/50 split came from nowhere other than the top of his head. Like the valuation at issue in Samter, the valuation by Fedde can be given no evidentiary weight.

Secondly, Fedde's estimate of $24 million was speculative because it was formed using unverified numbers from the internet, when Fedde himself testified that accountants could use a number from the internet only "if, in fact, we can verify it." Fedde's use of unverified numbers from the internet in a manner that he

[1] To give one example, compare a split of 50% to the promoter and 50% to the boxer against a split of 20% to the promoter and 80% to the boxer (which Alvarez actually received for some fights). If the amount being split was $1,000 dollars, the first split gives the promoter $500 while the second split gives the promoter $200. The increase of 30 percentage points from 20% to 50% reflects a relative 250% increase in the dollar amount of the earnings estimate.

testified violated his own standards means his estimates and projections are not "the product of reliable principles and methods." § 90.702, Fla. Stat. (2017). They therefore cannot provide substantial competent evidence to support the jury verdict.

Fedde's projection of $135 million for future earnings from 2016 to 2026 shares these same flawed assumptions and is even more speculative than the estimate of $24 million. Indeed, on appeal, All Star did not even try to defend the projection of $135 million.

But even if Fedde's estimate of $24 million and projection of $135 million were not speculative, the verdict is still not supported by substantial competent evidence because All Star offered no competent way to convert these numbers to $8.5 million in damages for unjust enrichment.

All Star asked the jury to "look back to Mr. Fedde's testimony. And you have the 24 million and the hundred and, 135 million, and that you compute those two." But All Star made no attempt to explain to the jury how this computation might be made. In fact, on appeal, All Star abandoned any attempt to justify its request to the jury to use both $24 million and $135 million to compute unjust enrichment. It refers to Alvarez's argument that projected earnings from 2010 to 2026 were absurdly speculative as a "red herring." Instead of defending what it

asked the jury to do, All Star shifts ground and focuses only on Fedde's estimate of $24 million.

The sum and substance of its defense of the $8.5 million verdict is that Alvarez's income of $24 million for the 16 fights during the period from 2010 to 2015 could be allocated to various factors. These factors include Alvarez's own talent and charisma; his trainer and manager; the audience-drawing power of his 16 opponents; the services of his promoter (during these six years, the promoter was Golden Boy); publicity, media exposure, and excitement surrounding each fight; but also to All Star's prior services during 15 months from 2008 to 2009. All Star argues that the jury was free to allocate one third of Alvarez's 2010 to 2015 earnings to the All Star's promotional services during 2008 to 2009.

The problem we have with this argument is the lack of evidence for the quantification: no expert testified to one-third; no other evidence supported one-third; and on appeal, no explanation is proven for one-third. The total absence of any evidence or explanation on how the $8.5 million was derived from the $24 million is fatal. Even assuming earnings could be used to establish unjust enrichment, they could only be used if the plaintiff provided evidence establishing a fact-based chain of reasoning to allocate or quantify to some degree the plaintiff's contribution to those earnings. Perhaps this need not be done with

mathematical certainty, but it cannot be based upon an unknown, subjective, unexplainable, and therefore unreviewable method as All Star proposes.

In Walters v. State Road Department of Florida, 239 So. 2d 878, 882 (Fla. 3d DCA 1970), this court reversed a jury verdict in an eminent domain case when the amount awarded was based on an appraisal method that the appraiser could not explain at trial. This situation made the position of the opposing party "almost untenable, for there was no way to rebut a secret, purely subjective, formula that existed, if at all, only in the mind of a partisan appraiser." Id. Here, the absence of any explanation regarding how the $8.5 million was derived left Alvarez in a similar impossible predicament—requiring him to rebut "a secret, purely subjective formula." See id.

Also instructive on this point is American Safety Insurance Service, Inc. v. Griggs, 959 So. 2d 322, 332 (Fla. 5th DCA 2007). In Griggs, borrowers sued their lenders for unjust enrichment after a foreclosure and received an award of damages. The Fifth District, however, set the award aside because the borrowers offered evidence only of their anticipated profits and "presented no evidence of the value of the benefit conferred upon" the lender. Id. Accordingly, the court reversed because the borrowers "did not establish the value of the benefit allegedly conferred." Id. This is essentially what All Star did here.

Thus, the total absence of any evidence (by expert opinion or otherwise) or logical explanation describing how the jury could have reached the allocation that one-third of the 2010-2015 earnings were generated by services provided in 2008-2009 means the allocation is not supported by substantial competent evidence.

All Star cites to Kane v. Stewart Tilghman Fox & Bianchi, P.A., 85 So. 3d 1112, 1114 (Fla. 4th DCA 2012) in support of the jury's verdict, but Kane is in accord with our decision. Kane involved a claim of unjust enrichment by one set of lawyers against another. The plaintiffs claimed the defendants were unjustly enriched when, after the defendants had asked for and received the plaintiffs' legal advice and services, the defendants obtained a lucrative settlement of an extensive and complex series of lawsuits against an insurance carrier. The court upheld an award to the plaintiffs based on unjust enrichment because (1) substantial competent evidence established the settlement proceeds were produced by the work of both sets of attorneys and (2) substantial competent evidence (in the form of testimony of a lawyer expert in the exact type of lawsuits and settlements at issue) established that 50% of the settlement was attributable to work of the plaintiffs. Here, in contrast, there is no substantial competent evidence either for the $24 million estimate or for the method to allocate a portion of that estimate to All Star's services. For this reason, the judgment must be reversed.

ON REMAND

While the record fails to support the judgment of $8.5 million, the fact still remains that the jury found that Alvarez was unjustly enriched by All Star's services during 2008-2009. The record appears to contain evidence of the amount of All Star's out of pocket expenses and the value of All Star's services, for example, by way of the testimony of Rafael Mendoza, who at least suggested a number, although we do not decide whether such evidence is competent. Also, Alvarez's request for relief in this court commendably acknowledged the case should be remanded for entry of a judgment for All Star's out-of-pocket expenses. We therefore reverse and remand with instructions for the trial judge to vacate the current final judgment; to reconsider the motion for remittitur; to enter a judgment of remitter if there is evidence of the value of All Star's expenditures and services in the existing record or, if not, a judgment for the defense; and for further proceedings consistent with this opinion.

Reversed and remanded.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ROBERT GINDEL, KEVIN HUMPHREY, XIOADAN SONG, WEIJING LI, PATRICIA JACOBS, CRAIG HANDWRECKER, JOHN WOODS, MICHELLE CHARBONNEAU, ANNIE BROUSSEAU, CLAUDE RACINE, ROLAND SKERGET, ANNE SMART, ANTHONY D'ACUNTO, GREGG LUTZ, ERIC NEMETH, JUDITH GRASSO, LORI BRYAN, BRIAN STREICHER, AND GRACE MACKEY,
Appellants,

v.

CENTEX HOMES, CENTEX REAL ESTATE CORPORATION, 2728 HOLDING CORPORATION, PULTE HOME CORPORATION, AND PULTE CORPORATION,
Appellees.

No. 4D17-2149

[September 12, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit; Palm Beach County, Edward L. Artau, Judge; L.T. Case No. 50-2014-CA-005369.

Scott C. Harris of Whitfield Bryson & Mason, LLP, Raleigh, NC, for appellants.

Luis E. Ordonez and Gabriel A. Alfonso of Quintairos, Prieto, Wood & Boyer, P.A., Miami, John H. Dannecker, Derrick M. Valkenburg, and Jennifer P. Sommerville of Shutts & Bowen, LLP, Orlando, and Jason B. Gonzalez of Shutts & Bowen, LLP, Tallahassee, for appellees.

FERNANDEZ, ASSOCIATE JUDGE.

Robert Gindel, et al., (collectively, "Homeowners") appeal the Final Judgment entered by the trial court granting summary judgment in favor of Centex Homes and its subcontractor, Reliable Roofing and Gutters, Inc., (collectively, "Centex"). Upon consideration of the statute of repose for actions founded upon the improvement of real property, we find that Homeowners commenced an action before the expiration of the statute of repose when they provided the requisite pre-suit notice of defect to Centex,

pursuant to section 558.004, Florida Statutes (2014). Accordingly, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The underlying case is a construction defect case for damages arising from allegedly improperly constructed townhomes. On March 31, 2004, Homeowners closed on and took possession of their townhomes constructed by Centex. From this date, the statute of repose, section 95.11(3)(c), Florida Statutes (2014), began to run as to any construction defect, the expiration of which was ten years later. The Homeowners discovered the alleged construction defect and, on February 6, 2014, provided the requisite pre-suit notice of defect to Centex, pursuant to Chapter 558. At the completion of the mandatory pre-suit procedure, Centex notified Homeowners that it would not cure the alleged defect. On May 2, 2014, Homeowners filed suit.

The trial court found that Homeowners commenced an action upon filing suit and, therefore, concluded that the action originated after the expiration of the ten-year period of the statute of repose. In response, Homeowners argued that the action commenced upon filing the requisite pre-suit notice of Chapter 558, which was in fact filed before the 10 year period lapsed. The trial court rejected Homeowners' argument and granted summary judgment in favor of Centex. Homeowners appealed.

II. RELEVANT STATUTES

The outcome of this appeal hinges on whether the pre-suit notice required by Chapter 558 qualifies as "an action," as the term is defined in the statute of repose, sections 95.011 and 95.11(3)(c).

Chapter 95 - Statute of Repose

The applicable language limiting actions founded upon the improvement of real property is provided as follows:

> **95.011** *A civil action or proceeding*, called *"action"* in this chapter, [. . .] shall be barred unless begun within the time prescribed in this chapter [. . .].
>
> **95.11(3)(c)** *An action* founded on the design, planning, or construction of an improvement to real property [. . .] *must be commenced within 10 years* after the date of actual possession

> by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

§§ 95.011, 95.11(3)(c), Fla. Stat. (2014) (emphasis added).

Chapter 558 - Pre-suit Notice Requirement

Chapter 558 required Homeowners to provide pre-suit notice of defect to Centex to allow the contractor an opportunity to cure, as an alternative to litigation. The relevant portion of the statute reads:

> **558.002(1)** *"Action" means any civil action or arbitration proceeding* for damages or indemnity asserting a claim for damage to or loss of real or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect.
>
> **558.003** A claimant *may not file an action* subject to this chapter *without first complying with the requirements of this chapter*. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, *on timely motion by a party to the action the court shall stay the action*, without prejudice, and the action may not proceed until the claimant has complied with such requirements.
>
> **558.004(1)(a)** In actions brought alleging a construction defect, the claimant shall, at least *60 days before filing any action*, or at least 120 days before filing an action involving an association representing more than 20 parcels, *serve written notice of claim on the contractor*, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter.

§§ 558.002(1), 558.003, 558.004(1)(a), Fla. Stat. (2014) (emphasis added).

III. ANALYSIS

Throughout the order on appeal, the trial court conflated the separate and distinct definitions of the term "action" provided in Chapter 95 and Chapter 558. In Chapter 558, given the definition and the context in which the term is used, it is evident that the term "action" indeed does not include the mandatory pre-suit procedure set forth in the chapter. This is especially apparent when, in section 558.004, the chapter instructs that a written notice of claim shall be served on the contractor *before* an action is brought. However, in Chapter 95, "action" is defined more broadly and without much context to limit the meaning of the term. Chapter 95 is a statute of repose specific to construction claims but does not appear to rely on Chapter 558 or reference it in any way. Therefore, this Court concludes that the interpretation of the term "action" in Chapter 95 is distinct from and without reliance on the term as it is defined and used in Chapter 558.

Focusing on the Chapter 95 term, Homeowners argue that the definition of "action" is broad in scope as it is simply defined as, "A civil action or proceeding." Homeowners focus on the "proceeding" portion of the definition and contend that the mandatory pre-suit notice and procedure set forth in Chapter 558 is a "proceeding" and is thus an "action." Homeowners' reasoning is logical and practical. The trial court interpreted "action" exclusively as a "civil action," that is commenced solely by filing a complaint. The trial court's interpretation ignores the full definition of Chapter 95, rendering the rest of the definition, "or proceeding," as meaningless surplusage.

Homeowners cite to *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013), for the proposition that the Florida Supreme Court has already recognized that civil actions and proceedings are distinct concepts and therefore must be interpreted separately. The trial court had found, and the Second District agreed, that the definition "civil action or proceeding," pursuant to section 95.011, only applies to judicial actions and does not include arbitration proceedings. *Raymond James Fin. Servs., Inc. v. Phillips*, 110 So. 3d 908, 912 (Fla. 2d DCA 2011), *decision quashed*, 126 So. 3d 186 (Fla. 2013). Upon certification to the Florida Supreme Court, the Supreme Court found that if the legislature wanted to limit proceedings to judicial proceedings, it would have added "judicial" before "proceeding" in the definition. *Raymond*, 126 So. 3d at 191. For the plain meaning of the term, the Supreme Court cited to dictionary definitions, including Merriam-Webster's Dictionary of Law defining "proceeding" as "a particular step or series of steps in the

enforcement, adjudication, or administration of rights, remedies, laws, or regulations."[1] *Id.* at 191 n. 4. Homeowners claim in their brief,

> If Chapter 558 did not have mandatory procedures that must be followed in order to recover damages for construction defects, then the Homeowners would have filed the class action complaint on February 6, 2014. [. . .] By impacting the entire process of a construction defect claim, Chapter 558 imposes mandatory steps that are on a continuum of a larger proceeding.

We agree with Homeowners that Chapter 558 lays out a series of mandatory steps that must be complied with before judicial action is to be taken, and therefore, the pre-suit notice constitutes an "action" for purposes of the statute of repose.

Up until this decision, Florida courts had not directly addressed the issue of whether the mandatory pre-suit notice of Chapter 558 qualifies as an "action," pursuant to Chapter 95. However, in *Musculoskeletal Institute Chartered v. Parham,* 745 So. 2d 946 (Fla. 1999), the Florida Supreme Court held that, in the context of medical malpractice, compliance with the statutory pre-suit notice and investigation requirements of sections 766.104(1) and 766.106(4), Florida Statutes (1989), constituted commencement of an "action" for purposes of the statute of repose. The

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[1] The Supreme Court also referred to Black's Law Dictionary for guidance:

> Black's Law Dictionary defines "civil action" as "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Black's Law Dictionary* 34 (9th ed. 2009). It defines "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency." *Id.* at 1324. . . . As Black's Law Dictionary notes, a tribunal is '[a] court or *other adjudicatory* body." *Black's Law Dictionary* 1646 (emphasis added).

Raymond, 126 So. 3d at 190-91. Though Black's Law states that the purpose of a proceeding is to seek redress from "a tribunal or agency," ultimately. Homeowners are striving to seek redress from the judicial courts, if necessary, and in order to reach the courts, Homeowners must first pass through the "procedural means" of compliance with the mandatory pre-suite notification procedure of Chapter 558.

Supreme Court found that "commencing an action in the circuit court is inextricably linked to [...] [the] provisions of chapter 766." Id. at 951. And, "[I]t would be an unconstitutional impediment to access to the courts if compliance with the statutory requirements in chapter 766 resulted in a potential claimant's suit being forever barred by the associated statute of repose." *Id.* at 952. We find the same to be true in the construction context.

In the order on appeal, the trial court extensively cited to a singular footnote in *Busch v. Lennar Homes, LLC*, 219 So. 3d 93 (Fla. 5th DCA 2017), for support as to why Florida courts cannot apply *Parham* to a construction case. In this singular footnote, the *Busch* court stated that in the construction context, there is no infringement upon a construction defect claimant's right to access the courts as is present in the medical malpractice context. *Id.* at 96 n. 2. This assertion is based on the stay provision provided in Chapter 558 that allows a party, who has already filed suit before complying with the pre-suit requirement, to stay the suit until compliance with the statute, while the pre-suit notice requirement of the medical malpractice chapter does not include a stay provision. *Id.*

Aside from this footnote being dicta, as *Busch* was decided on the insufficiency of the complaint and not on the issue at hand, the trial court is using the stay provision as a sword against the Homeowners. In the order on appeal, the trial court argues that Homeowners should have availed themselves of the stay provision that would have allowed the Homeowners to file suit for the purpose of commencing an action before the expiration of the statute of repose. Chapter 558 makes clear that the pre-suit notice requirement is a mandatory procedure that must be complied with before filing suit. Homeowners should not be penalized for rightly complying with the mandates of the statute.

Though Homeowners could have taken advantage of the Chapter 558 stay provision, this provision has no bearing on whether an action was commenced before the statute of repose period lapsed. The statute of repose clearly defines an action as a civil suit *or a proceeding*. Thus, on the basis of Florida Supreme Court precedent set forth in *Raymond* and *Parham*, this Court concludes that compliance with the pre-suit notice requirement of Chapter 558 constitutes an "action" for purposes of the statute of repose in the context of the improvement of real property. Chapter 558 was not intended as a stalling device in order to bar claims.

IV. CONCLUSION

Therefore, because the Homeowners commenced an action by providing the requisite pre-suit notice to Centex within the ten-year statute of repose period, we reverse the Final Judgment entered by the trial court granting summary judgment in favor of Centex and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SUAREZ and SCALES, Associate Judges, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WILLIAN STANKOS and **JOANNE STANKOS,** Individually and as Parents and Natural Guardians of **SAM JADEN STANKOS**, a Minor Child,
Appellants,

v.

AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC.,
Appellee.

No. 4D17-3361

[September 12, 2018]

Appeal of non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sandra Perlman, Judge; L.T. Case No. 062016CA006103AXXXXCE.

David J. Sales and Daniel R. Hoffman of David J. Sales, P.A., Jupiter, and Jack Scarola and David P. Vitale, Jr. of Searcy Denney Scarola Barnhart & Shipley, P.A., West Palm Beach, for appellants.

Elizabeth K. Russo of Russo Appellate Firm, P.A., Miami, and Rafferty E. Taylor and Martin D. Stern of Hinshaw & Culbertson, Fort Lauderdale, for appellee.

PER CURIAM.

William and Joanne Stankos (the "Stankoses") timely appeal a non-final order compelling arbitration in the underlying personal injury action. It is undisputed that the defendant below, the Amateur Athletic Union of the United States, Inc. ("AAU"), waived arbitration by answering the Stankoses' initial complaint. However, after the Stankoses filed an amended complaint, AAU filed a motion to compel arbitration, arguing that its right to seek arbitration was revived by the amended complaint. The trial court granted AAU's motion and entered the order compelling arbitration. Having determined that the Stankoses' amended complaint did not revive AAU's right to compel arbitration, we reverse.

Background

The underlying action arises from a head injury, which the Stankoses' minor son suffered during a taekwondo competition organized by AAU. The Stankoses' initial complaint alleged several causes of action against AAU, including claims for negligence, "misrepresentation and concealment," loss of filial consortium, and injunctive relief. AAU filed an answer and an amended answer to the initial complaint. AAU also engaged in extensive discovery pertaining to the merits of the case.

More than a year after the initial complaint was filed, the Stankoses filed an amended complaint.[1] In the amended complaint, the Stankoses added two additional causes of action, namely, a claim alleging that AAU violated section 943.0438, Florida Statutes (2013), and a claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

The count alleging violations of section 943.0438 appears to be directed at augmenting the Stankoses' negligence count based on a theory of negligence per se for AAU's alleged failure to comply with the provisions in that statute requiring youth sports organizations to adopt certain safety measures. *See* § 943.0438(2)(f) & (g), Fla. Stat.

Additionally, the FDUTPA count alleged in relevant part that "[p]ermitting children, such as Jaden, to compete in 'light head contact' competitions *without first* complying with Florida state law to enforce rules and bylaws intended to protect youth athletes from potentially life-long injuries related to concussions and head injuries, is obviously deceptive, grossly unfair, and beyond conscionable."

After the amended complaint was filed, AAU moved to compel arbitration based on an arbitration clause contained within the AAU handbook. The Stankoses agreed to be bound by this clause when they applied for an AAU membership. In the motion, AAU argued that, although it may have waived arbitration by answering the initial complaint, its right to seek arbitration was revived when the Stankoses filed their amended complaint, which AAU maintains expanded the scope of the litigation. The trial court granted the motion and entered an order

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[1] The Stankoses' original complaint against AAU was styled below as an "Amended Complaint." Accordingly, any references in this opinion to the "original complaint" or the "initial complaint" will refer to the complaint styled below as the "Amended Complaint," and any references in this opinion to the "amended complaint" will refer to the complaint styled below as the "Second Amended Complaint."

compelling arbitration.

Discussion

As a preliminary matter, there is no doubt that AAU waived its right to compel arbitration by answering the Stankoses' initial complaint and engaging in discovery directed to the merits of the case. *Doctors Assocs., Inc. v. Thomas*, 898 So. 2d 159, 162 (Fla. 4th DCA 2005); *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 427 (Fla. 4th DCA 2003).

With respect to the effects of the amended complaint, no Florida case holds that the right to compel arbitration is revived by the filing of an amended complaint. To the contrary, at least one district court of appeal has concluded that "[t]he fact that the plaintiffs filed an amended complaint does nothing to revive [the defendant's] right to arbitration." *Morrell v. Wayne Frier Mfrd. Home Ctr.*, 834 So. 2d 395, 398 (Fla. 5th DCA 2003).

AAU argues, based on *Eden Owners Ass'n, Inc. v. Eden III, Inc.*, 840 So. 2d 419 (Fla. 1st DCA 2003), that an amended complaint can revive a defendant's previously waived right to compel arbitration. AAU's reliance on *Eden* is misplaced. In *Eden*, the plaintiff did not raise an arbitrable issue until it filed its second amended complaint. *Id.* at 420. As the plaintiff's earlier complaints did not raise any arbitrable issues, the defendant did not waive arbitration by answering those complaints. *Id.* In this case, unlike *Eden*, the Stankoses' initial complaint raised arbitrable issues.

AAU also argues, based on federal case law, that an amended complaint can revive a defendant's previously waived right to compel arbitration if the amended complaint unexpectedly alters the nature and scope of the litigation. *See*, *e.g.*, *Krinsk v. SunTrust Banks, Inc.*, 654 F. 3d 1194 (11th Cir. 2011). In *Krinsk*, the court held that an amended complaint, which expanded the putative class by thousands (possibly tens of thousands), revived the defendant's right to compel arbitration. *Id.* at 1203–04. The court determined, as a matter of fairness, that the defendant's right to seek arbitration was revived because the defendant "could not have foreseen that [the plaintiff] would expand the putative class in such a broad way nine months into the litigation." *Id.* at 1204.

In this case, unlike *Krinsk*, the amended complaint does not alter the scope or theory of the underlying litigation in an unforeseeable way. The amended complaint does not involve issues significantly separate and distinct from those raised in the original complaint. The new claims are

still directed toward the minor child's injury and AAU's safety practices. The Stankoses' claim under section 943.0438 merely provides a possible basis for a finding of negligence per se based on the same core set of facts raised in the initial pleading. Similarly, the FDUTPA claim, assuming it is even viable,[2] does not unexpectedly alter the scope or theory of the litigation. The original complaint already asserted a similar claim for misrepresentation, and already sought injunctive relief that would be applied to other taekwondo participants at AAU events. Finally, the inclusion of a request for attorney's fees in the FDUTPA claim cannot be deemed to have materially altered the scope or theory of the litigation.

Accordingly, we reverse the trial court's order compelling arbitration and remand for further proceedings consistent with this opinion.

Reversed and Remanded.

TAYLOR and FORST, JJ., concur.
LEVINE J., concurs specially with opinion.

LEVINE, J., concurring specially.

I concur in the result to reverse the trial court's rulings. I also write to expound upon why the *Krinsk* standard is the correct standard to apply when determining whether an amended complaint would allow the defendant to rescind an earlier waiver and revive an arbitration agreement after waiving it following the initial complaint.

In granting the motion to compel arbitration, the trial court found that the right to arbitration was not waived and, even if it was waived, there was no showing of prejudice. Initially, the trial court erred in applying a prejudice test because under Florida law proof of prejudice is not required "in order for there to be an effective waiver of the right to arbitrate." *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005).

Additionally, the trial court erred in finding that AAU did not initially waive arbitration. Although Florida law favors resolution by arbitration, a valid contractual right to arbitrate a dispute may be waived. *Id.* "A party who actively participates in the litigation waives its right to compel arbitration." *Sitarik v. JFK Med. Ctr. Ltd.*, 11 So. 3d 973, 974 (Fla. 4th

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[2] The amended complaint does not specify what the Stankoses' alleged "actual damages" are under the FDUTPA count. However, FDUTPA expressly excludes claims for personal injury or death. § 501.212(3), Fla. Stat. (2013).

DCA 2009). In this case, AAU actively participated in litigation by filing an answer and affirmative defenses as well as an amended answer and affirmative defenses and engaging in discovery after the initial complaint. *See id.*

In *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011), the Eleventh Circuit recognized that there are circumstances in which an amended complaint can revive the right to compel arbitration:

> [A] defendant's waiver of the right to compel arbitration is not automatically nullified by the plaintiff's filing of an amended complaint. Rather, courts will permit the defendant to rescind his earlier waiver, and revive his right to compel arbitration, only if it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims.

Id. (citations omitted). The right to compel arbitration is not revived, however, where the amended complaint makes only minor changes to the factual allegations or legal claims previously asserted. *Id.* Thus, in *Krinsk*, the court found that the right to compel arbitration could be revived by the filing of an amended complaint that broadened the potential scope of litigation by opening the door to thousands of new class plaintiffs not contemplated in the original class. *See also Plaintiffs' S'holders Corp. v. S. Farm Bureau Life Ins. Co.*, 486 Fed. Appx. 786 (11th Cir. 2012).

The *Krinsk* standard is consistent with Florida cases involving counterclaims, which suggest that an amended complaint could revive the right to arbitration if it involves issues separate and distinct from those raised in the original complaint, or if the amended complaint significantly alters the scope and nature of the litigation. For instance, in *Owens & Minor Medical, Inc. v. Innovative Marketing & Distribution Services, Inc.*, 711 So. 2d 176 (Fla. 4th DCA 1998), appellant filed suit against appellee for breach of contract, among other claims. Appellee filed a counterclaim, alleging that the contract was fraudulently induced and, if enforceable, breached by appellant. Appellant moved to compel arbitration. This court found that appellant waived its right to arbitrate by actively participating in the litigation. We rejected appellant's argument that it did not participate in the litigation in relation to the counterclaim, stating:

> [T]he counterclaim does not involve issues separate and distinct from those raised in appellant's amended complaint . . . . The matters raised in the counterclaim are intertwined with issues raised in the amended complaint, since to decide

> each claim a fact finder would necessarily have to resolve fact issues common to both.
>
> This close relationship between the claims of the parties distinguishes this case from those cited by appellant, where claims subject to arbitration were "separate and distinct" from claims for which arbitration had arguably been waived. *See Design Benefit Plans, Inc. v. Enright*, 940 F.Supp. 200 (N.D. Ill. 1996); *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328 (7th Cir.1995). Similarly, the counterclaim did not significantly alter the scope and nature of the litigation, such that it revived a previously waived right to demand arbitration. *Cf. Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108 (2d Cir. 1987); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995). . . .

Id. at 177. *See also Chaikin v. Parker Waichman LLP*, 42 Fla. L. Weekly D2165 (Fla. 2d DCA Oct. 11, 2017); *Fine Decorators, Inc. v. Argent Glob. (Bermuda), Ltd.*, 919 So. 2d 604, 606 (Fla. 3d DCA 2006); *Hawkins v. James D. Eckert, P.A.*, 738 So. 2d 1002, 1002-03 (Fla. 2d DCA 1999).

The *Krinsk* standard is also consistent with Florida law pertaining to waiver. Waiver is defined as "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Roger E. Freilich, D.M.D., P.A. v. Shochet*, 96 So. 3d 1135, 1138 (Fla. 4th DCA 2012) (citation omitted). In analyzing whether waiver has occurred, "[t]he essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." *Id.* (citation omitted). Thus, where an amendment unexpectedly changes the scope or theory of the claims, it cannot be said that the opposing party knowingly waived arbitration.

Changed circumstances, like in *Krinsk*, should result in the court re-evaluating whether the waiver covers the amended complaint. Waiver may not be irreversible and all-encompassing. Facts and circumstances do matter when evaluating the scope of the waiver. Factually, AAU waived the right to compel arbitration as to the first complaint, contrary to the trial court's finding. Only as to the second amended complaint do we make a separate inquiry as to whether there is a continuing waiver. Applying the *Krinsk* standard to this case, although the amended complaint added two new counts, it did not "unexpectedly change[] the scope or theory of [appellants'] claims." *Krinsk*, 654 F.3d at 1202. Rather, the issues in the

amended complaint were substantially the same as the issues in the original complaint for which AAU had already waived arbitration.

For all of these reasons, I would reverse.

* * *

Not final until disposition of timely filed motion for rehearing.