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Weyerhaeuser Co. v. United States Fish and Wildlife Service, Case No. 17–71 (2018).
The designation by the U.S. Fish and Wildlife Service of an area as a "critical habitat" for an endangered species requires that the property be presently "habitable" for the species.

Ham v. Portfolio Recovery Associates, LLC, Case No. 1D17-3112 (Fla. 1st DCA 2018).
An action for account stated is not "an action to enforce a contract," so a prevailing party in such a suit is not entitled to the reciprocity benefits of Florida Statute section 57.105(7).

Adkins v. Memorial Motors, Inc., Case No. 2D18-1596 (Fla. 2d DCA 2018).
The refusal of an arbitration service to accept an arbitration demand due to an outstanding bill, which refusal is subsequently withdrawn by payment of the bill, does not waive a party's right to arbitration.

D & E Real Estate, LLC v. Vitto, Case No. 3D18-376 (Fla. 3d DCA 2018).
Failure to deliver marketable title under paragraph 15(b) of the FAR-Bar form contract can constitute a breach of the contract, entitling a buyer to seek specific performance:

> *SELLER DEFAULT: If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.*

Benavente v. Ocean Village Property Owners Association, Inc., Case No. 4D18-1819 (Fla. 4th DCA 2018).
An affidavit of diligent search is inadequate when, among other factors, plaintiff seeking to serve defendant has an email address for defendant such that plaintiff can request defendant's address of residence via email.

Charterhouse Associates, Ltd., Inc. v. Valencia Reserve Homeowners Association, Inc., Case No. 4D17-2640 (Fla. 4th DCA 2018).
A personal trainer invited by a homeowner to train him at the clubhouse owned and maintained by the homeowner's association is an invitee under Florida law, and is not a violation of the association's restrictive covenants when the covenants permit owner's invitees onto the property; use of the "economic benefit" test to determine the legal status of the invitee on the property is rejected.

Greenshields v. Greenshields, Case Nos. 5D18-400 & 5D18-1218 (Fla. 5th DCA 2018).
A court order requiring that certain disputed proceeds from a real estate closing be held in escrow and not disbursed to seller amounts to a temporary injunction, notwithstanding the disbursement of the funds was restricted by an agreement.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEYERHAEUSER CO. *v.* UNITED STATES FISH AND WILDLIFE SERVICE ET AL.

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

No. 17–71. Argued October 1, 2018—Decided November 27, 2018

The Fish and Wildlife Service administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior. In 2001, the Service listed the dusky gopher frog as an endangered species. See 16 U. S. C. §1533(a)(1). That required the Service to designate "critical habitat" for the frog. The Service proposed designating as part of that critical habitat a site in St. Tammany Parish, Louisiana, which the Service dubbed "Unit 1." The frog had once lived in Unit 1, but the land had long been used as a commercial timber plantation, and no frogs had been spotted there for decades. The Service concluded that Unit 1 met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and distance from existing frog populations made it essential for the species' conservation. §1532(5)(A)(ii). The Service then commissioned a report on the probable economic impact of its proposed critical-habitat designation. §1533(b)(2). With regard to Unit 1, the report found that designation might bar future development of the site, depriving the owners of up to $33.9 million. The Service nonetheless concluded that the potential costs were not disproportionate to the conservation benefits and proceeded to designate Unit 1 as critical habitat for the dusky gopher frog.

Unit 1 is owned by petitioner Weyerhaeuser and a group of family landowners. The owners of Unit 1 sued, contending that the closed-canopy timber plantation on Unit 1 could not be critical habitat for the dusky gopher frog, which lives in open-canopy forests. The District Court upheld the designation. The landowners also challenged the Service's decision not to exclude Unit 1 from the frog's critical habitat, arguing that the Service had failed to adequately weigh the

benefits of designating Unit 1 against the economic impact, had used an unreasonable methodology for estimating economic impact, and had failed to consider several categories of costs. The District Court approved the Service's methodology and declined to consider the challenge to the Service's decision not to exclude Unit 1. The Fifth Circuit affirmed, rejecting the suggestion that the "critical habitat" definition contains any habitability requirement and concluding that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable.

Held:

1. An area is eligible for designation as critical habitat under §1533(a)(3)(A)(i) only if it is habitat for the species. That provision, the sole source of authority for critical-habit designations, states that when the Secretary lists a species as endangered he must also "designate any habitat of such species which is then considered to be critical habitat." It does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species. The definition allows the Secretary to identify a subset of habitat that is critical, but leaves the larger category of habitat undefined. The Service does not now dispute that critical habitat must be habitat, but argues that habitat can include areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. Weyerhaeuser urges that habitat cannot include areas where the species could not currently survive. The Service, in turn, disputes the premise that the administrative record shows that the frog could not survive in Unit 1. The Court of Appeals, which had no occasion to interpret the term "habitat" in §1533(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1, should address these questions in the first instance. Pp. 8–10.

2. The Secretary's decision not to exclude an area from critical habitat under §1533(b)(2) is subject to judicial review. The Administrative Procedure Act creates a "basic presumption of judicial review" of agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140. The Service contends that the presumption is rebutted here because the action is "committed to agency discretion by law," 5 U. S. C. §701(a)(2), because §1533(b)(2) is one of those rare provisions "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln* v. *Vigil*, 508 U. S. 182, 191.

Section 1533(b)(2) describes a unified process for weighing the impact of designating an area as critical habitat. The provision's first sentence requires the Secretary to "tak[e] into consideration" economic and other impacts before designation, and the second sentence authorizes the Secretary to act on his consideration by providing that he

Syllabus

"may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of " designation. The word "may" certainly confers discretion on the Secretary, but it does not segregate his discretionary decision not to exclude from the mandated procedure to consider the economic and other impacts of designation when making his exclusion decisions. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191. Weyerhaeuser's claim—that the agency did not appropriately consider all the relevant statutory factors meant to guide the agency in the exercise of its discretion—is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion. The Court of Appeals should consider in the first instance the question whether the Service's assessment of the costs and benefits of designation and resulting decision not to exclude Unit 1 was arbitrary, capricious, or an abuse of discretion. Pp. 10–15.

827 F. 3d 452, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 17–71

WEYERHAEUSER COMPANY, PETITIONER *v.* UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

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

[November 27, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Endangered Species Act directs the Secretary of the Interior, upon listing a species as endangered, to also designate the "critical habitat" of the species. A group of landowners whose property was designated as critical habitat for an endangered frog challenged the designation. The landowners urge that their land cannot be *critical* habitat because it is not *habitat*, which they contend refers only to areas where the frog could currently survive. The court below ruled that the Act imposed no such limitation on the scope of critical habitat.

The Act also authorizes the Secretary to exclude an area that would otherwise be included as critical habitat, if the benefits of exclusion outweigh the benefits of designation. The landowners challenged the decision of the Secretary not to exclude their property, but the court below held that the Secretary's action was not subject to judicial review.

We granted certiorari to review both rulings.

I

A

The amphibian *Rana sevosa* is popularly known as the "dusky gopher frog"—"dusky" because of its dark coloring and "gopher" because it lives underground. The dusky gopher frog is about three inches long, with a large head, plump body, and short legs. Warts dot its back, and dark spots cover its entire body. Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62993 (2001) (Final Listing). It is noted for covering its eyes with its front legs when it feels threatened, peeking out periodically until danger passes. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 827 F. 3d 452, 458, n. 2 (CA5 2016). Less endearingly, it also secretes a bitter, milky substance to deter would-be diners. Brief for Intervenor-Respondents 6, n. 1.

The frog spends most of its time in burrows and stump holes located in upland longleaf pine forests. In such forests, frequent fires help maintain an open canopy, which in turn allows vegetation to grow on the forest floor. The vegetation supports the small insects that the frog eats and provides a place for the frog's eggs to attach when it breeds. The frog breeds in "ephemeral" ponds that are dry for part of the year. Such ponds are safe for tadpoles because predatory fish cannot live in them. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012) (Designation).

The dusky gopher frog once lived throughout coastal Alabama, Louisiana, and Mississippi, in the longleaf pine forests that used to cover the southeast. But more than 98% of those forests have been removed to make way for urban development, agriculture, and timber plantations. The timber plantations consist of fast-growing loblolly pines planted as close together as possible, resulting in a closed-canopy forest inhospitable to the frog. The near

eradication of the frog's habitat sent the species into severe decline. By 2001, the known wild population of the dusky gopher frog had dwindled to a group of 100 at a single pond in southern Mississippi. That year, the Fish and Wildlife Service, which administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior, listed the dusky gopher frog as an endangered species. Final Listing 62993–62995; see 87 Stat. 886, 16 U. S. C. §1533(a)(1).

B

When the Secretary lists a species as endangered, he must also designate the critical habitat of that species. §1533(a)(3)(A)(i). The ESA defines "critical habitat" as:

> "(i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> "(ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." §1532(5)(A).

Before the Secretary may designate an area as critical habitat, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. §1533(b)(2). The statute goes on to authorize him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species. *Ibid.*

A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through

activities of its own or by facilitating private development. Section 7 of the ESA requires all federal agencies to consult with the Secretary to "[e]nsure that any action authorized, funded, or carried out by such agency" is not likely to adversely affect a listed species' critical habitat. 16 U. S. C. §1536(a)(2). If the Secretary determines that an agency action, such as issuing a permit, would harm critical habitat, then the agency must terminate the action, implement an alternative proposed by the Secretary, or seek an exemption from the Cabinet-level Endangered Species Committee. See *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 652 (2007); 50 CFR 402.15 (2017).

Due to resource constraints, the Service did not designate the frog's critical habitat in 2001, when it listed the frog as endangered. Designation, at 35118–35119. In the following years, the Service discovered two additional naturally occurring populations and established another population through translocation. The first population nonetheless remains the only stable one and by far the largest. Dept. of Interior, U. S. Fish and Wildlife Serv., Dusky Gopher Frog (*Rana sevosa*) Recovery Plan iv, 6–7 (2015).

In 2010, in response to litigation by the Center for Biological Diversity, the Service published a proposed critical-habitat designation. Designation, at 35119. The Service proposed to designate as occupied critical habitat all four areas with existing dusky gopher frog populations. The Service found that each of those areas possessed the three features that the Service considered "essential to the conservation" of the frog and that required special protection: ephemeral ponds; upland open-canopy forest containing the holes and burrows in which the frog could live; and open-canopy forest connecting the two. But the Service also determined that designating only those four sites would not adequately ensure the frog's conservation.

Because the existing dusky gopher frog populations were all located in two adjacent counties on the Gulf Coast of Mississippi, local events such as extreme weather or an outbreak of an infectious disease could jeopardize the entire species. Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31394 (2010) (proposed 50 CFR Part 17).

To protect against that risk, the Service proposed to designate as *unoccupied* critical habitat a 1,544-acre site in St. Tammany Parish, Louisiana. The site, dubbed "Unit 1" by the Service, had been home to the last known population of dusky gopher frogs outside of Mississippi. The frog had not been seen in Unit 1 since 1965, and a closed-canopy timber plantation occupied much of the site. But the Service found that the site retained five ephemeral ponds "of remarkable quality," and determined that an open-canopy forest could be restored on the surrounding uplands "with reasonable effort." Although the uplands in Unit 1 lacked the open-canopy forests (and, of course, the frogs) necessary for designation as occupied critical habitat, the Service concluded that the site met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and its distance from existing frog populations made it essential for the conservation of the species. Designation, at 35118, 35124, 35133, 35135.

After issuing its proposal, the Service commissioned a report on the probable economic impact of designating each area, including Unit 1, as critical habitat for the dusky gopher frog. See 16 U. S. C. §1533(b)(2); App. 63. Petitioner Weyerhaeuser Company, a timber company, owns part of Unit 1 and leases the remainder from a group of family landowners. Brief for Petitioner 16. While the critical-habitat designation has no direct effect on the timber operations, St. Tammany Parish is a fast-growing part of the New Orleans metropolitan area, and the land-

owners have already invested in plans to more profitably develop the site. App. 80–83. The report recognized that anyone developing the area may need to obtain Clean Water Act permits from the Army Corps of Engineers before filling any wetlands on Unit 1. 33 U. S. C. §1344(a). Because Unit 1 is designated as critical habitat, Section 7 of the ESA would require the Corps to consult with the Service before issuing any permits.

According to the report, that consultation process could result in one of three outcomes. First, it could turn out that the wetlands in Unit 1 are not subject to the Clean Water Act permitting requirements, in which case the landowners could proceed with their plans unimpeded. Second, the Service could ask the Corps not to issue permits to the landowners to fill some of the wetlands on the site, in effect prohibiting development on 60% of Unit 1. The report estimated that this would deprive the owners of $20.4 million in development value. Third, by asking the Corps to deny even more of the permit requests, the Service could bar all development of Unit 1, costing the owners $33.9 million. The Service concluded that those potential costs were not "disproportionate" to the conservation benefits of designation. "Consequently," the Service announced, it would not "exercis[e] [its] discretion to exclude" Unit 1 from the dusky gopher frog's critical habitat. App. 188–190.

C

Weyerhaeuser and the family landowners sought to vacate the designation in Federal District Court. They contended that Unit 1 could not be critical habitat for the dusky gopher frog because the frog could not survive there: Survival would require replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest. The District Court nonetheless upheld the designation. *Markle Interests, LLC* v.

United States Fish and Wildlife Serv., 40 F. Supp. 3d 744 (ED La. 2014). The court determined that Unit 1 satisfied the statutory definition of unoccupied critical habitat, which requires only that the Service deem the land "essential for the conservation [of] the species." *Id.,* at 760.

Weyerhaeuser also challenged the Service's decision not to exclude Unit 1 from the dusky gopher frog's critical habitat, arguing that the Service had failed to adequately weigh the benefits of designating Unit 1 against the economic impact. In addition, Weyerhaeuser argued that the Service had used an unreasonable methodology for estimating economic impact and, regardless of methodology, had failed to consider several categories of costs. *Id.,* at 759. The court approved the Service's methodology and declined to consider Weyerhaeuser's challenge to the decision not to exclude. See *id.*, at 763–767, and n. 29.

The Fifth Circuit affirmed. 827 F. 3d 452. The Court of Appeals rejected the suggestion that the definition of critical habitat contains any "habitability requirement." *Id.,* at 468. The court also concluded that the Service's decision not to exclude Unit 1 was committed to agency discretion by law and was therefore unreviewable. *Id.,* at 473–475. Judge Owen dissented. She wrote that Unit 1 could not be "essential for the conservation of the species" because it lacked the open-canopy forest that the Service itself had determined was "essential to the conservation" of the frog. *Id.,* at 480–481.

The Fifth Circuit denied rehearing en banc. *Markle Interests, LLC* v. *United States Fish and Wildlife Serv.*, 848 F. 3d 635 (2017). Judge Jones dissented, joined by Judges Jolly, Smith, Clement, Owen, and Elrod. They reasoned that critical habitat must first be habitat, and Unit 1 in its present state could not be habitat for the dusky gopher frog. *Id.,* at 641. The dissenting judges also concluded that the Service's decision not to exclude Unit 1 was reviewable for abuse of discretion. *Id.,* at 654, and

n. 21.

We granted certiorari to consider two questions: (1) whether "critical habitat" under the ESA must also be habitat; and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. 583 U. S. ___ (2018).[1]

II

A

Our analysis starts with the phrase "critical habitat." According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the conservation of an endangered species.

Of course, "[s]tatutory language cannot be construed in a vacuum," *Sturgeon* v. *Frost*, 577 U. S. ___, ___ (2016) (slip op., at 12) (internal quotation marks omitted), and so we must also consider "critical habitat" in its statutory context. Section 4(a)(3)(A)(i), which the lower courts did not analyze, is the sole source of authority for critical-habitat designations. That provision states that when the Secretary lists a species as endangered he must also "designate any *habitat of such species* which is then considered to be critical habitat." 16 U. S. C. §1533(a)(3)(A)(i) (em-

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[1] Intervenor Center for Biological Diversity raises an additional question in its brief, arguing that Weyerhaeuser lacks standing to challenge the critical-habitat designation because it has not suffered an injury in fact. We agree with the lower courts that the decrease in the market value of Weyerhaeuser's land as a result of the designation is a sufficiently concrete injury for Article III purposes. See *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386 (1926) (holding that a zoning ordinance that "greatly . . . reduce[d] the value of appellee's lands and destroy[ed] their marketability for industrial, commercial and residential uses" constituted a "present invasion of appellee's property rights").

phasis added). Only the "habitat" of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.

The Center for Biological Diversity contends that the statutory definition of critical habitat is complete in itself and does not require any independent inquiry into the meaning of the term "habitat," which the statute leaves undefined. Brief for Intervenor-Respondents 43–49. But the statutory definition of "critical habitat" tells us what makes habitat "critical," not what makes it "habitat." Under the statutory definition, critical habitat comprises areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," as well as unoccupied areas that the Secretary determines to be "essential for the conservation of the species." 16 U. S. C. §1532(5)(A). That is no baseline definition of habitat—it identifies only certain areas that are indispensable to the conservation of the endangered species. The definition allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined.

The Service does not now dispute that critical habitat must be habitat, see Brief for Federal Respondents 23, although it made no such concession below. Instead, the Service argues that habitat includes areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. *Id.*, at 27. Weyerhaeuser, for its part, urges that habitat cannot include areas where the species could not currently sur-

vive. Brief for Petitioner 25. (Habitat can, of course, include areas where the species does not currently *live*, given that the statute defines critical habitat to include unoccupied areas.) The Service in turn disputes Weyerhaeuser's premise that the administrative record shows that the frog could not survive in Unit 1. Brief for Federal Respondents 22, n. 4.

The Court of Appeals concluded that "critical habitat" designations under the statute were not limited to areas that qualified as habitat. See 827 F. 3d, at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations."). The court therefore had no occasion to interpret the term "habitat" in Section 4(a)(3)(A)(i) or to assess the Service's administrative findings regarding Unit 1. Accordingly, we vacate the judgment below and remand to the Court of Appeals to consider these questions in the first instance.[2]

B

Weyerhaeuser also contends that, even if Unit 1 could be properly classified as critical habitat for the dusky gopher frog, the Service should have excluded it from designation under Section 4(b)(2) of the ESA. That provision requires the Secretary to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" and authorizes him to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U. S. C.

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[2] Because we hold that an area is eligible for designation as critical habitat under Section 4(a)(3)(A)(i) only if it is habitat for the species, it is not necessary to consider the landowners' argument that land cannot be "essential for the conservation of the species," and thus cannot satisfy the statutory definition of unoccupied critical habitat, if it is not habitat for the species. See Brief for Petitioner 27–28; Brief for Respondent Markle Interests, LLC, et al. in Support of Petitioner 28–31.

§1533(b)(2). To satisfy its obligation to consider economic impact, the Service commissioned a report estimating the costs of its proposed critical-habitat designation. The Service concluded that the costs of designating the proposed areas, including Unit 1, were not "disproportionate" to the conservation benefits and, "[c]onsequently," declined to make any exclusions.

Weyerhaeuser claims that the Service's conclusion rested on a faulty assessment of the costs and benefits of designation and that the resulting decision not to exclude should be set aside. Specifically, Weyerhaeuser contends that the Service improperly weighed the costs of designating Unit 1 against the benefits of designating *all* proposed critical habitat, rather than the benefits of designating Unit 1 in particular. Weyerhaeuser also argues that the Service did not fully account for the economic impact of designating Unit 1 because it ignored, among other things, the costs of replacing timber trees with longleaf pines, maintaining an open canopy through controlled burning, and the tax revenue that St. Tammany Parish would lose if Unit 1 were never developed. Brief for Petitioner 53–54. The Court of Appeals did not consider Weyerhaeuser's claim because it concluded that a decision not to exclude a certain area from critical habitat is unreviewable.

The Administrative Procedure Act creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. §702). As we explained recently, "legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 575 U. S. ___, ___–___ (2015) (slip op., at 7–8). The presumption may be rebutted only if the relevant statute precludes review, 5 U. S. C. §701(a)(1), or if the action is "committed to agency

discretion by law," §701(a)(2). The Service contends, and the lower courts agreed, that Section 4(b)(2) of the ESA commits to the Secretary's discretion decisions not to exclude an area from critical habitat.

This Court has noted the "tension" between the prohibition of judicial review for actions "committed to agency discretion" and the command in §706(2)(A) that courts set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Heckler* v. *Chaney*, 470 U. S. 821, 829 (1985). A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable. To give effect to §706(2)(A) and to honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly, restricting it to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993). The Service contends that Section 4(b)(2) of the ESA is one of those rare statutory provisions.

There is, at the outset, reason to be skeptical of the Service's position. The few cases in which we have applied the §701(a)(2) exception involved agency decisions that courts have traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U. S., at 191, or a decision not to reconsider a final action, *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987). By contrast, this case involves the sort of routine dispute that federal courts regularly review: An agency issues an order affecting the rights of a private party, and the private party objects that the agency did not properly justify its determination under a standard set forth in the statute.

Section 4(b)(2) states that the Secretary

> "shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area . . . unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U. S. C. §1533(b)(2).

Although the text meanders a bit, we recognized in *Bennett* v. *Spear*, 520 U. S. 154 (1997), that the provision describes a unified process for weighing the impact of designating an area as critical habitat. The first sentence of Section 4(b)(2) imposes a "categorical requirement" that the Secretary "tak[e] into consideration" economic and other impacts before such a designation. *Id.,* at 172 (emphasis deleted). The second sentence authorizes the Secretary to act on his consideration by providing that he may exclude an area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation. The Service followed that procedure here (albeit in a flawed manner, according to Weyerhaeuser). It commissioned a report to estimate the costs of designating the proposed critical habitat, concluded that those costs were not "disproportionate" to the benefits of designation, and "[c]onsequently" declined to "exercis[e] [its] discretion to exclude any areas from [the] designation of critical habitat." App. 190.

Bennett explained that the Secretary's "ultimate decision" to designate or exclude, which he "arriv[es] at" after considering economic and other impacts, is reviewable "for abuse of discretion." 520 U. S., at 172. The Service dismisses that language as a "passing reference . . . not necessarily inconsistent with the Service's understanding,"

which is that the Secretary's decision not to exclude an area is wholly discretionary and therefore unreviewable. Brief for Federal Respondents 50. The Service bases its understanding on the second sentence of Section 4(b)(2), which states that the Secretary "*may* exclude [an] area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]."

The use of the word "may" certainly confers discretion on the Secretary. That does not, however, segregate his discretionary decision not to exclude from the procedure mandated by Section 4(b)(2), which directs the Secretary to consider the economic and other impacts of designation when making his exclusion decisions. Weyerhaeuser's claim is the familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion. Specifically, Weyerhaeuser contends that the Service ignored some costs and conflated the benefits of designating Unit 1 with the benefits of designating all of the proposed critical habitat. This is the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under §706(2)(A). See *Judulang* v. *Holder*, 565 U. S. 42, 53 (2011) ("When reviewing an agency action, we must assess . . . whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (internal quotation marks omitted)).

Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding whether to exclude an area from critical habitat or to proceed with designation. The statute is, therefore, not "drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion" not to exclude. *Lincoln*, 508 U. S., at 191.

Because it determined that the Service's decisions not to

exclude were committed to agency discretion and therefore unreviewable, the Court of Appeals did not consider whether the Service's assessment of the costs and benefits of designation was flawed in a way that rendered the resulting decision not to exclude Unit 1 arbitrary, capricious, or an abuse of discretion. Accordingly, we remand to the Court of Appeals to consider that question, if necessary, in the first instance.

* * *

The judgment of the Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-3112

EUGENE HAM, III,

Appellant,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Appellee.

No. 1D17-3113

LAURA FOXHALL,

Appellant,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Appellee.

On appeal from the County Court for Escambia County.
Patricia A. Kinsey, Judge.

November 30, 2018

PER CURIAM.

In these consolidated cases, Eugene Ham and Laura Foxhall challenge final orders denying their claims for prevailing party attorney's fees in actions brought by Portfolio Recovery Associates, LLC, to recover unpaid credit card debt under an "account stated" theory of liability. We accepted jurisdiction of the orders certified by the county court to be of great public importance. For the reasons that follow, we affirm.

Background

Portfolio, as assignee of GE Capital Retail Bank ("Bank") and purchaser of certain consumer debts, filed separate actions against Mr. Ham and Ms. Foxhall in the small claims division of the Escambia County Court. In each case, Portfolio filed a one-count complaint for common law account stated to collect the balance allegedly owed on a credit card account originating with the Bank. Portfolio alleged that each debtor had a revolving credit card account with the Bank, the debtor used the account to make purchases and/or cash advances resulting in an unpaid balance, the Bank provided monthly credit card account statements to the debtor for the amounts due, and the debtor did not object to the account statement. The total amount in controversy for both cases was $4,754.43.[1] Portfolio did not attach to the complaint or mention any written credit card contracts between the Bank and the debtor ("credit contract"), nor did Portfolio plead an entitlement to attorney's fees if successful in the actions.

In their answers, the debtors denied the material allegations of the complaints and asserted several affirmative defenses. They also requested reciprocal attorney's fees pursuant to section 57.105(7), Florida Statutes.

[1] Portfolio sought recovery of $819.74 from Mr. Ham and $3,934.69 from Ms. Foxhall.

Both sides moved for summary disposition with competing affidavits. Portfolio submitted affidavits from its records custodian with attached credit card statements and other documents. The debtors submitted affidavits in which they disputed the balances claimed by Portfolio and denied agreeing with Portfolio to any account balances.

The county court proceeded to trial in both cases. Finding that Portfolio failed to offer any admissible evidence to support the complaints, the court entered final judgments in favor of the debtors and reserved jurisdiction to address attorney's fees and costs.

After entry of the final judgments, the debtors filed motions for reciprocal attorney's fees pursuant to section 57.105(7). The motions referenced the provisions of the respective credit contracts providing for the payment of attorney's fees and costs for collection of the account in the event of default. Portfolio opposed the requests for attorney's fees on several grounds, including that the credit contracts did not apply since its complaints were based on the theory of "account stated," not breach of contract.

The trial court initially agreed with the debtors regarding their entitlement to attorney's fees, concluding that because there would be no consumer debt but for the credit contracts, the extension of credit and ultimate collection of the debts are inextricably intertwined and cannot be separated. After an evidentiary hearing, the court ordered Portfolio to pay attorney's fees and costs of $51,046.50 in Mr. Ham's case and $53,570.00 in Ms. Foxhall's case.

Portfolio moved for a new trial with respect to the debtors' entitlement to attorney's fees based on an intervening appellate decision from the Escambia County Circuit Court, *Portfolio Recovery Associates, LLC v. Gruenwald*, No. 2016 AP 000024 (Fla. 1st Cir. Ct. Apr. 21, 2017).[2] In *Gruenwald*, the First Circuit held

[2] The circuit court's appellate decision in *Gruenwald* is currently pending in this Court on certiorari review in Case No. 1D17-1914. Based on our review of the docket in that case, it appears that the party's name is correctly spelled "Grunewald."

that section 57.105(7) does not apply in a case in which a creditor proceeds under an account stated cause of action independent of any written credit card agreement the creditor has with a debtor. *Id.* at *3-4. Citing *Gruenwald* as binding precedent,[3] the county court granted the motions for new trial and reversed its judgments for attorney's fees and costs. Recognizing the conflicting judicial decisions on the issue[4] and the significance of its ruling, the court

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[3] Circuit court appellate decisions are binding on all county courts within that circuit. *Fieselman v. State*, 566 So. 2d 768, 770 (Fla. 1990).

[4] Though this case is one of first impression in this Court, several courts have previously ruled on this issue. The Second District, in agreement with several circuit courts sitting in their appellate capacity, recently held that section 57.105(7) provides for attorney's fees in an account stated action when the contract includes a unilateral provision for attorney's fees. *See Bushnell v. Portfolio Recovery Assocs., LLC*, 43 Fla. L. Weekly D2144a (Fla. 2d DCA Sept. 14, 2018) ("The credit card contract and the account stated cause of action are . . . inextricably intertwined such that the account stated cause of action is an action 'with respect to the contract' under section 57.105(7)."); *Portfolio Recovery Assocs., LLC, v. York*, 25 Fla. L. Weekly Supp. 4a (Fla. 10th Cir. Ct. Mar. 16, 2017) ("[B]ut for the credit agreement there would not be credit given in order to have a debt (Account Stated) in the first place."); *Portfolio Recovery Assocs., LLC, v. Benjamin*, 24 Fla. L. Weekly Supp. 96a (Fla. 9th Cir. Ct. Apr. 18, 2016) ("[T]he lawsuit encompassed the situation that the attorney's fee provision contemplated."). However, several circuit courts, when confronted by the same question, have held the opposite. *See Portfolio Recovery Assocs., LLC v. Gruenwald*, 2016 AP 000024 (Fla. 1st Cir. Ct. Apr. 21, 2017) (holding that an account stated cause of action is "independent of the original credit contract" and not an action "with respect to the contract" subject to section 57.105(7)); *Balog v. CACH, LLC*, 24 Fla. L. Weekly Supp. 474a (Fla. 6th Cir. Ct. Sept. 20, 2016) ("[I]f CACH had prevailed at the trial level, it would not have been entitled to attorney's fees; therefore, awarding attorney's fees under the reciprocity provision of section 57.105(7) . . . would be contrary to legislative intent."); *Pujol v. Capital One Bank (USA)*, 23 Fla. L. Weekly Supp. 517a (Fla. 15th Cir. Ct. Sept.

certified the following question of great public importance to this Court:

> IS AN "ACCOUNT STATED" CAUSE OF ACTION BROUGHT BY AN ASSIGNEE SEEKING TO COLLECT A CREDIT CARD DEBT ARISING FROM A WRITTEN CREDIT CARD AGREEMENT BETWEEN THE DEFENDANT DEBTOR AND THE ASSIGNOR, WHICH INCLUDES A UNILATERAL ATTORNEY'S FEE PROVISION, AN ACTION TO ENFORCE A CONTRACT, SUCH THAT THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER §57.105(7), FLORIDA STATUTES, WHERE A PORTION OF THE DEBT INCLUDES LATE FEES AND FINANCE CHARGES ARISING OUT OF THAT WRITTEN AGREEMENT?

We have jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(4)(A) and 9.160.

Analysis

It is well settled that the prevailing party in litigation is not entitled to recover attorney's fees unless there is a statutory or contractual basis for the award. *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004); s*ee also State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) ("This Court has followed the 'American Rule' that attorney's fees may be awarded by a court only when authorized by statute or by agreement of the parties."). In these cases, the debtors sought attorney's fees under the unilateral fee provisions in their credit contracts, which they contend were made reciprocal to them under section 57.105(7). Since resolution of this

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21, 2015) (defining an account stated cause of action as "a separately enforceable legal agreement"); *Portfolio Recovery Assocs., LLC v. Cordero*, 23 Fla. L. Weekly Supp. 392b (Fla. 7th Cir. Ct. July 23, 2015) ("[A]ttorneys' fees were not recoverable under Section 57.105(7) because Portfolio's initial Complaint was not based on a contract, even though there was an underlying credit card agreement between the parties that did provide for the recovery of fees.").

case rests on the interpretation of a statute, our review is de novo. *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018).

Section 57.105(7) provides as follows:

> 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 purpose behind section 57.105(7) is to provide mutuality of attorney's fees as a remedy in contract cases. The statute is designed to even the playing field, not expand it beyond the terms of the agreement." *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) (citations and internal quotation marks omitted). Thus, we must examine the nature of Portfolio's action against the debtors to determine whether the attorney's fees provision in the credit contracts was triggered.

Portfolio elected to file a one-count complaint against each of the debtors, seeking a balance owed from account statements rendered to them as a result of unpaid credit card debt. Florida courts have long recognized a cause of action for account stated, which requires (1) an agreement between the parties as to the amount owed, (2) an agreement that the amount owed was due, and (3) an express or implicit promise to pay that amount. *Everett v. Webb Furniture Co.*, 124 So. 278, 279 (Fla. 1929). An action for "account stated is based on 'the agreement of the parties to pay the amount due upon the accounting, and not any written instrument.'" *Farley v. Chase Bank, U.S.A.,* 37 So. 3d 936, 937 (4th DCA 2010) (quoting *Whittington v. Stanton*, 58 So. 489, 491 (Fla. 1912)). Therefore, "it is not necessary, in order to support a count upon account stated, to show the nature of the original debt, or to prove the specific items constituting the account." *Id.* (quoting *Daytona Bridge Co. v. Bond*, 36 So. 445, 447 (Fla. 1904)). Simply put, an action for account stated is based on a new promise to pay that is separately enforceable without regard to any written contract from which the debt may have originated.

Here, the essential allegations of Portfolio's complaints against the debtors are that (1) the debtors had business relations with the Bank, (2) they obtained and used their respective credit cards to make purchases resulting in unpaid balances, and (3) the Bank rendered billing statements to them that were not objected to within a reasonable time. Portfolio did not reference or attach the credit contracts to the complaints, but instead attached monthly billing statements.

Because the action framed by Portfolio in these cases did not rely on the credit contracts containing the unilateral fee provision, we conclude that the debtors are not entitled to reciprocal fees under section 57.105(7) by virtue of those contracts. To rule otherwise would undermine Portfolio's ability to choose its cause of action. *See Feinberg v. Naile*, 561 So. 2d 1307, 1308 (Fla. 3d DCA 1990) ("A plaintiff is not guaranteed success in the choice of remedies, only an opportunity to proceed under a theory which has been pled."). While Portfolio could have brought a claim for enforcement of the credit contracts, it elected not to do so and instead chose to pursue an account stated theory. As a result, had Portfolio prevailed at the trial level, it would not have been entitled to fees under the credit contracts either.

In so holding, we have not overlooked the debtors' argument that the credit contracts are inextricably intertwined with the account stated claims because the account stated claims would not exist but for the credit contracts. Portfolio's claim, they reason, is therefore an action "with respect to the contract" under section 57.105(7). They rely primarily on the Florida Supreme Court's decision in *Caufield v. Cantele*, 837 So. 2d 371, 378 (Fla. 2002), for support. *Caufield* involved a suit for fraudulent misrepresentation related to a contract for the sale of a mobile home park. The supreme court held that because the tort would not have occurred but for the contract, "the existence of the contract and the subsequent misrepresentation . . . [were] inextricably intertwined." *Id.* at 379. The court explained that the tort claim arose from a party's failure "to carry out its contractual duty to reveal defects in the property," and no claim would have existed but for the contract. *Id.* Section 57.105(7) was not at issue because the contract provided a mutual provision for attorney's fees.

We distinguish this case from *Caufield* because the actions for accounts stated were distinct from, and not inextricably intertwined with, the credit contracts. Portfolio pled a cause of action for account stated that was based not on the credit contracts, but rather on a separately enforceable legal agreement that arose from the debtors' implied promises to pay on an accounting rendered by the Bank. The tort claim in *Caufield* required proving the existence and the breach of the contract. *Id.* An account stated claim, on the other hand, exists independent of the underlying contract, requires no evidence of breach of the contract, and can exist in the absence of any contract at all.

The facts of this case are more analogous to the facts in *Tylinski v. Klein Automotive, Inc.*, 90 So. 3d 870 (Fla. 3d DCA 2012). In that case, the Tylinskis entered into two contracts with a car dealership for the purchase of a vehicle. One contract was for the sale of the vehicle ("ROC") and the other was for its financing ("RISC"). *Id.* at 871. Only the RISC contained an attorney's fees provision. *Id.* at 872. The dealership sued for breach of the ROC, and the Tylinskis prevailed. *Id.* The Tylinskis then moved for attorney's fees based on section 57.105(7), arguing that both contracts were relevant because the sale would not have existed but for the financing. *Id.* The Third District affirmed the denial of fees, emphasizing the dealership's decision to proceed only under the ROC:

> We understand the Tylinskis' 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. Nevertheless, the dealership sought recovery under the ROC, not the RISC; there is no contractual avenue for recovering attorney's fees based on the ROC, and the Tylinskis did not plead any statutory basis for recovering attorney's fees other than § 57.105(7).

Id. at 872 (footnote omitted).

The same reasoning applies here. Although the debtors would not have credit card debt but for their contracts with the Bank, Portfolio did not sue under the credit contracts. It instead proceeded under an account stated cause of action that was not

dependent on a contract. Accordingly, "there is no contractual avenue for recovering attorney's fees." *See id.*

Finally, the certified question suggests the argument that because Portfolio sued for amounts that included previously accrued late fees and interest, the credit contracts are inextricably intertwined with Portfolio's claims, even if framed as account stated. This argument misstates the nature of a cause of action for account stated. The elements of a claim for account stated required Portfolio to show it had a business relationship with the debtor, it sent a bill to the debtor, and the debtor expressed or implied agreement to the amount owed. Whether all or part of the debt arises from terms of a written agreement is irrelevant to the cause of action. The claim stems from an agreement to pay an amount due upon an accounting, not the individual items constituting the account balance. *See Farley*, 37 So. 3d at 937 ("An itemized statement of underlying charges is not required to establish a claim for an account stated.").

For these reasons, we affirm the trial court's order denying attorney's fees, answer the certified question in the negative, and certify conflict with the Second District's decision in *Bushnell v. Portfolio Recovery Associates, LLC*, 43 Fla. L. Weekly D2144a (Fla. 2d DCA Sept. 14, 2018).

WETHERELL, RAY, and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Louis K. Rosenbloum of Louis K. Rosenbloum, P.A., Pensacola, and Robert N. Heath, Jr., of Robert N. Heath, Jr., P.A., Pensacola, for Appellants.

Robert E. Sickles and John P. Gaset of Broad and Cassel, LLP, Tampa, for Appellee.

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 National Association of Consumer Advocates.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

PETER ADKINS,

Appellant,

v.

MEMORIAL MOTORS, INC.,
d/b/a LAKELAND TOYOTA,

Appellee.

Case No. 2D18-1596

Opinion filed November 28, 2018.

Appeal pursuant to Fla. R. App. P. 9.130
from the Circuit Court for Polk County;
Catherine L. Combee, Judge.

Philip A. Rhodes, Patrick J. Cremeens, and
Jeanne M. Cremeens of The Law Office of
Patrick Cremeens, P.L., Tampa, for
Appellant.

Walter C. Thomas, Jr., Lakeland, for
Appellee.

VILLANTI, Judge.

Peter Adkins appeals an order granting Memorial Motors, Inc., d/b/a Lakeland Toyota's motion to stay litigation and compel arbitration.[1] Because the record

[1]We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(C)(iv).

does not support Adkins' argument that Lakeland Toyota waived its right to arbitrate, we affirm.

Adkins purchased a used Audi from Lakeland Toyota, and as part of this purchase he signed a retail installment sale contract which contained a provision requiring the parties to arbitrate any dispute "which arises out of or relates to . . . [the] condition of this vehicle" if either party so requested. After Adkins experienced several problems with the Audi, he requested arbitration of the dispute by filing documents with the American Arbitration Association (AAA). However, because Lakeland Toyota had failed to pay certain arbitration fees several years earlier in a different arbitration proceeding before the AAA, the AAA initially refused to arbitrate the dispute.

As soon as Lakeland Toyota learned of the AAA's refusal, it took the necessary steps to pay the past due fees to the AAA and then notified Adkins that arbitration could move forward. By then, however, Adkins had changed his mind and no longer wanted to arbitrate. Instead, he filed suit against Lakeland Toyota, which responded by filing a motion to stay the litigation and compel arbitration. At a hearing on Lakeland Toyota's motion, the trial court determined that a legally binding agreement to arbitrate existed, that the parties' dispute fell within the scope of that arbitration agreement, and that Lakeland Toyota had not waived its right to arbitrate. Therefore, the court granted the motion. Adkins then filed this appeal, arguing as he did below that Lakeland Toyota's failure to pay the earlier AAA fees, which resulted in the AAA refusing to arbitrate the dispute, constituted a form of waiver of the right to arbitrate.

Both parties in this case agree that the elements a court must consider when determining whether to order arbitration are whether a valid written agreement to

arbitrate exists, whether an arbitrable issue exists, and whether the right to arbitrate has been waived. See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). They also agree that only the third element—waiver—is at issue in this appeal. Adkins contends that Lakeland Toyota's act of failing to pay the AAA fees in a different case several years earlier constituted a waiver of its right to arbitrate in this case because its conduct amounted to a voluntary relinquishment of a known right to arbitrate. See Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005) (defining "waiver" as "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right" (citing Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n.12 (Fla. 2001))). In contrast, Lakeland Toyota contends that its failure to pay the earlier fees is irrelevant because that act, in a different case with a different purchaser under a different contract, cannot constitute an intentional relinquishment of its contractual right to arbitrate the current dispute with Adkins.

While Lakeland Toyota's actions in the prior proceeding may have constituted a waiver of its right to arbitrate in that proceeding, none of the actions it took in this proceeding are inconsistent with its right to arbitrate in this proceeding. When Lakeland Toyota received Adkins' request to arbitrate, it promptly took the necessary steps to resolve its earlier dispute with the AAA so that it could arbitrate the current dispute with Adkins. Neither that action nor any of its other actions were inconsistent with its right to arbitrate in this case. Therefore, the trial court's rationale in rejecting Adkins' argument is fully supported by the record.

Moreover, Adkins' reliance on the AAA Consumer Arbitration Rules is unavailing in this case for two reasons. First, the contractual right of a party to arbitration is not governed by rules unilaterally adopted by a private entity such as the AAA unless those rules are explicitly incorporated into the contract. Cf. Younessi v. Recovery Racing, LLC, 88 So. 3d 364, 365 (Fla. 4th DCA 2012) (holding that if the language of the contract clearly indicates that the AAA rules govern, then those rules are expressly incorporated into the contract and will govern resolution of the parties' dispute). Here, the contract between Adkins and Lakeland Toyota does not expressly incorporate the AAA Consumer Arbitration Rules. Therefore, they cannot be applied to negate Lakeland Toyota's contractual right to arbitrate.

Second, the unavailability of the AAA to conduct the arbitration does not negate the parties' agreement to arbitrate. See New Port Richey Med. Inv'rs, LLC v. Stern ex rel. Petscher, 14 So. 3d 1084, 1087 (Fla. 2d DCA 2009). Here, the parties' arbitration agreement provides that Adkins may choose the AAA "or any other organization to conduct the arbitration subject to" Lakeland Toyota's approval. Therefore, even if the AAA rules bar the AAA from arbitrating this dispute, those rules do not prevent Lakeland Toyota from enforcing its contractual right to have the dispute arbitrated by "any other organization" authorized to conduct arbitrations. Instead, in compliance with the contract, Adkins may select a different organization to arbitrate this dispute.

Accordingly, because the trial court was eminently correct in granting Lakeland Toyota's motion to stay litigation and compel arbitration, we affirm.

Affirmed.

SILBERMAN and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed November 29, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-376
Lower Tribunal No. 15-7166

D & E Real Estate, LLC,
Appellant,

vs.

Jose Vitto,
Appellee.

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

Kaplan, Young & Moll Parrón PLLC, and Justin B. Kaplan and Matthew S. Sarelson, for appellant.

Berger Singerman LLP, and David L. Gay, for appellee.

Before ROTHENBERG, C.J., and SALTER and LINDSEY, JJ.

ROTHENBERG, C.J.

The defendant below, D & E Real Estate, LLC ("D & E"), appeals from the final judgment entered by the trial court granting the plaintiff, Jose Vitto's ("Dr. Vitto"), claim for specific performance. We affirm.

SUMMARY OF THE EVIDENCE

In 2002, David Cooper, Mel Cooper, Eric Ramos, and a fourth member of a limited liability company purchased twelve preconstruction units at the Fontainebleau condominium building in Miami Beach through the members' limited liability company. After a few years, the fourth member split from the limited liability company, and the remaining members, along with David Cooper's wife, Clara, formed Imperial Capital LLC ("Imperial") and took ownership of eight of the twelve condominium units. Sometime thereafter, Imperial fell behind on the mortgage payments and the banks commenced foreclosure proceedings.

In 2011, David Cooper and Ramos had a falling out with Mel Cooper, and ultimately Imperial transferred four of the units, including units 2601 and 2603, which are the subject of this lawsuit, to D & E. However, the foreclosure actions continued against Imperial.

The underlying action for specific performance stems from a January 28, 2014 contract between D & E and Dr. Vitto for the sale and purchase of units 2601 and 2603, which are two of the condominium units that were transferred from Imperial to D & E. The agreed upon sale price for these two units was $1,700,000.

After executing the contract, it is undisputed that Dr. Vitto timely paid the agreed-upon deposits in the amount of $170,000.

When D & E and Dr. Vitto entered into the subject contract, which had a projected closing date of March 31, 2014, units 2601 and 2603 were in foreclosure and a foreclosure sale date had been set for the sale of unit 2601. However, D & E moved to reschedule the foreclosure sale date based on D & E's contract to sell unit 2601 (and 2603) to Dr. Vitto, D & E's receipt of Dr. Vitto's $170,000 deposit, and D & E's representation that, based on the contract, it would be able to satisfy its debt to the foreclosing bank. The foreclosure court granted D & E's motion and rescheduled the foreclosure sale to April 9, 2014, which was after the projected closing date.

However, prior to the closing date, Mel Cooper, on behalf of himself and Imperial, filed for bankruptcy in the Southern District of New York, thus creating a cloud on title. In the bankruptcy case, Imperial claimed that it had an interest in the subject units despite the fact that Imperial had transferred the units to D & E in 2011. On March 4, 2014, David Cooper, Ramos, and Clara Cooper (David Cooper's wife) filed a motion to dismiss the bankruptcy action, claiming that Mel Cooper had no authority to file for bankruptcy on behalf of Imperial.

A few days later, on March 6, 2014, Anthony DeYurre, counsel for D & E, contacted Neal Litman, Dr. Vitto's real estate attorney, to notify him of the title

defect and to inform Dr. Vitto that D & E was attempting to cure the title defect. On April 1, 2014, Litman emailed DeYurre to inquire whether D & E wished to extend the closing date under the contract. DeYurre forwarded the email to David Cooper and Ramos and asked if they wanted to "extend the closing date" or wait and "see if the buyer [would] walk away?" Ramos immediately responded that they should extend the closing date, and David Cooper agreed. Notwithstanding David Cooper's and Ramos' express intent to extend the closing date, the record does not reflect that DeYurre ever responded to Litman's email.

On April 4, 2014, due to the ongoing bankruptcy proceedings, the bank moved to cancel the foreclosure sale of units 2601 and 2603, which had been rescheduled to April 9, 2014 based on D & E's contract with Dr. Vitto. On May 5, 2014, DeYurre, D & E's counsel, filed a notice of bankruptcy with the trial court to stay the foreclosure sale of the two units. Meanwhile, the motion to dismiss the bankruptcy proceedings in the Southern District of New York was heard on May 28, 2014. Although the motion was denied, the bankruptcy court advised counsel that if the parties identified any assets which they believed they had a right to take possession of, the parties could move for a stay and the bankruptcy court would grant stay relief as to those properties. Despite the bankruptcy court's assurances that it would essentially remove the subject units from the bankruptcy proceedings upon a motion identifying the property which D & E believed it had a right to take

possession of, D & E never filed any motion identifying units 2601 and 2603 as its property, nor did D & E attempt to demonstrate Imperial's transfer of these units to D & E in 2011.

A few days later, on June 3, 2014, Litman emailed DeYurre asking for an update. In this communication, Litman told DeYurre that although it was clear that D & E had not been making a diligent effort to clear the title defect, "in an abundance of caution," Dr. Vitto was giving D & E notice that he was electing to extend the cure period to 120 days as provided by the contract. There is no record evidence that DeYurre responded to this email.

Litman again emailed DeYurre on June 13, 2014, attaching an updated title commitment and again inquiring as to whether there had been any progress on the title issues. On this same day, Litman contacted Michael Venditto, D & E's bankruptcy counsel, regarding the updated title commitment and inquiring as to what needed to be done to obtain relief. On June 18, 2014, Venditto told Litman that Imperial and Mel Cooper "definitely would consider allowing the sales to proceed" but they needed certain documents, including the contract, in order to do so. Litman forwarded Venditto's email to DeYurre.

On July 9, 2014, Litman sent Venditto a copy of the contract. On September 29, 2014, Litman wrote to Venditto asking for an update. The record reflects that Venditto forwarded this correspondence to David Cooper, Ramos, and

DeYurre, and in this communication Venditto expressed uncertainty as to whether the contract was still enforceable. DeYurre responded by informing Venditto that he intended to send a notice to Dr. Vitto cancelling the contract. However, DeYurre did not send cancellation notices to Litman or Dr. Vitto, and on January 4, 2015, Litman again emailed DeYurre questioning DeYurre regarding his unreturned phone calls and requesting that DeYurre call him. DeYurre did not respond. Thereafter, Dr. Vitto demanded that D & E fulfill its obligations under the contract. D & E responded that the contract had terminated.

The three-count complaint sought specific performance against D & E (Count I), injunctive relief to prohibit D & E from transferring the properties prior to the resolution of the action (Count II), and money damages from David Cooper and Ramos for fraudulent misrepresentation (Count III). Following a five-day trial, the trial court entered its findings of fact and conclusions of law, finding among other things, that Dr. Vitto was entitled to specific performance of the contract. This appeal followed.

THE TRIAL COURT'S ORDER

In the final judgment, the trial court made the following findings. The properties are unique. Dr. Vitto was ready, willing, and able to close absent the title defect. Dr. Vitto did not obtain an extension of the March 31, 2014 closing date due to D & E's claim that they could not close. A party cannot insist on

performance of a condition precedent that it has, itself, frustrated or prevented, and a buyer is not required to tender the purchase price if title is not marketable.

The trial court further found that any question as to the timeliness of the updated loan commitment was waived because D & E failed to raise this issue. The trial court also emphasized that it is usually the buyer that discovers a defect and notifies the seller. Here, it was D &E that notified Dr. Vitto of the bankruptcy case and its intention to cure the defect. Thus, Dr. Vitto had no obligation to notify D & E within five days of receiving the title commitment regarding the defect to title, as required under the contract. Lastly, the trial court found that it was DeYurre's March 6, 2014 notice to Litman of the bankruptcy proceeding that commenced the thirty-day cure period; D & E's actions were wholly inconsistent with its position that the contract was terminated; and Dr. Vitto relied on D & E's actions to his detriment.

D & E's actions included: (1) DeYurre's email to defendants David Cooper and Ramos in April 2014 asking whether they wanted to extend the closing date (neither Dr. Vitto, nor his counsel, were copied on this email); (2) the email from Litman to Venditto and Venditto's response, which indicated that the bankruptcy trustees would consider allowing the sale to proceed; (3) D & E's continued efforts to resolve the title defect in the bankruptcy proceeding; and (4) D & E's failure to return Dr. Vitto's deposit.

For these reasons, the trial court concluded that D & E, David Cooper, and Ramos failed to exercise reasonable diligent efforts in good faith to provide Dr. Vitto with marketable title, and therefore, entered judgment in Dr. Vitto's favor for his specific performance claim.

STANDARDS OF REVIEW

A trial court's findings of fact shall not be disturbed unless they are clearly erroneous. See Emaminejad v. Ocwen Loan Servicing, LLC, 156 So. 3d 534, 535 (Fla. 3d DCA 2015). A trial court's legal conclusions, however, are subject to *de novo* review. Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889, 891 (Fla. 3d DCA 2010). The interpretation of a contract is a question of law which is also subject to *de novo* review. Kissman v. Panizzi, 891 So. 2d 1147, 1149 (Fla. 4th DCA 2005). For present purposes, we must consider whether D & E exercised reasonable diligence to clear title, and "[w]hat constitutes reasonable diligence is nearly always a mixed question of law and fact." Blackmon v. Hill, 427 So. 2d 228, 230 (Fla. 3d DCA 1983).

ANALYSIS

I. Did the Contract Expire by its Own Terms?

D & E contends that the trial court erred by determining that D & E was estopped from relying on the contract's language to argue that the contract expired by its own terms. For the reasons that follow, we disagree.

A. Marketable Title

D & E argues that the contract expired by its own terms because D & E could not provide marketable title and Dr. Vitto did not timely avail himself of the provision in the contract that allowed him to extend the closing date. D & E further contends that under the contract, the failure to deliver marketable title does not constitute a breach if D & E undertook a "reasonable diligent effort" to provide marketable title prior to the date of the closing. In support of its position, D & E cites to paragraph 15(b) of the contract, which states, in relevant part as follows:

> **SELLER DEFAULT:** If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.

Nothing in this paragraph suggests that failure to deliver marketable title is excepted from constituting a breach. Instead, the contract merely provides that if the seller defaults, and the default is for a reason other than failing to deliver marketable title after the seller has made a reasonable diligent effort to cure the title defect, the buyer *may* elect a refund of his/her deposit without waiving a claim for specific performance or damages. Thus, failure to deliver marketable title may still constitute a breach of the contract, and if the seller fails to make a reasonable diligent effort to cure the defect, the buyer may seek specific performance.

B. Cure Period

The trial court correctly found, and the record supports, that the 30-day cure period commenced on March 6, 2014 and ended on April 7, 2014. The bankruptcy case rendered the title unmarketable, and DeYurre's March 6, 2014 notice to Litman commenced the 30-day cure period, thus, relieving Dr. Vitto from the March 30, 2014 closing date unless the title defect was cleared by March 30, 2014. Because D & E failed to clear the title defect, Dr. Vitto clearly had no obligation to close on March 30, 2014. See, e.g., Jay Vee Realty Corp. v. Jaymar Acres, Inc., 436 So. 2d 1053, 1055 (Fla. 4th DCA 1983) (finding that a defendant must have complied with, or offered to comply with, all of the terms of the contract in order to properly raise delay as a defense to specific performance).

Paragraph 18(A)(ii) of the contract provides, in part, as follows:

> If Seller is unable to cure defects within Cure Period, then Buyer may, within 5 days after expiration of Cure Period, deliver written notice to Seller: (a) extending Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (b) electing to accept title with existing defects and close this Contract on Closing Date . . . ; or (c) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If after reasonable diligent effort, Seller is unable to timely cure defects, and Buyer does not waive the defects, this Contract shall terminate, and Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

The record reflects that the parties were working together to clear the title defect well after the closing date had passed. However, on June 3, 2014, when D & E failed to clear the title defect and Dr. Vitto concluded that D & E was not making a reasonable diligent effort to do so, Dr. Vitto sent a notice, through counsel, extending the cure date for 120 days. DeYurre never objected or responded to this notice.

The trial court concluded that the contract did not automatically terminate on April 7, 2014, when Litman failed to extend the cure period because D & E: (1) did not, either by providing notice to Dr. Vitto or by its actions, terminate the contract; (2) had not used reasonable diligent efforts to cure the defect; and (3) D & E could not use its own failure to cure the title defect as grounds for relieving it of its obligations under the contract. Further, it is clear that Dr. Vitto believed that the cure period had been extended and was relying on D & E's representations that it was trying to cure the title defect. In sum, the extension of the cure period was for the benefit of D & E to provide D & E with more time to cure the defect. Because D & E failed to cure the title defect despite being given ample time to do so, the trial court properly granted Dr. Vitto's claim for specific performance.

C. Estoppel

D & E also argues that reversal is warranted because Dr. Vitto failed to prove that he justifiably relied on D & E's silence or omissions, and that this

reliance was intended or reasonably anticipated by D & E. We disagree.

The primary purpose of the doctrine of equitable estoppel is to prevent a party from profiting from his or her own wrongdoing. Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001). A party's own wrongful act cannot serve as the basis for a claim of equitable estoppel against another party. Barnett & Klein Corp. v. President of Palm Beach–A Condo., Inc., 426 So. 2d 1074, 1075 (Fla. 4th DCA 1983). Here, D & E ignores the fact that the express terms of the contract required that the running of the cure period and the extended cure period be predicated on the seller's efforts to clear title. The trial court found, and the record supports, that D & E failed to make a reasonable diligent effort to cure the title defect, and thus, the trial court correctly concluded that D & E was precluded from claiming that its own failure to clear title was grounds for relieving it from its obligations under the contract.

In its findings of fact and conclusions of law, the trial court relied on Kubicek v. Way, 102 So. 2d 173 (Fla. 2d DCA 1958). In Kubicek, a vendor contracted to sell 600 acres of land that he did not yet own. With the knowledge that he did not yet own the land, and unsure of whether he would be able to acquire all of the land within the requisite time period, the vendor included an "out" clause that rendered the contract void if the vendor could not convey the full 600 acres. Id. at 174. The vendor was ultimately unable to acquire the total acreage, so he

sought to cancel the contract. The vendee sued for specific performance as to the acreage that the vendor did actually own. Id. at 173. The Second District Court of Appeal concluded that because the clause in the contract regarding title defects was put in place for the benefit of the buyer, the seller could not rely on the avoidance clause to claim that the contract was terminated due to his own inability to render the title marketable. Id. at 173-75. We agree with the trial court's application of the holding in Kubicek and its finding that D & E was precluded from using its own failure to cure the defect to establish that Dr. Vitto was not entitled to specific performance.

We also note that D & E has taken materially inconsistent positions as to when the contract allegedly terminated. At trial, D & E argued that the contract terminated on March 31, 2014. However, D & E's actions during 2014-2015 are inconsistent with its position that the contract had terminated in March 2014.

For instance, when Litman emailed D & E's attorney, DeYurre, on April 1, 2014, inquiring as to whether D & E wished to extend the closing date, DeYurre did not respond that the contract had terminated and thus, no extension was necessary. Instead, DeYurre contacted D & E and asked D & E whether D & E wished to extend the closing date or whether it wanted to wait and see if Dr. Vitto would walk away. As noted by the trial court, if D & E was under the impression that the contract had already terminated on March 31, then there would not have

been a contract from which Dr. Vitto could walk away. Similarly, with respect to the June 3, 2014 email from Litman to D & E wherein Litman invoked the cure period on behalf of Dr. Vitto, DeYurre did not respond that the contract had already terminated. Further, after speaking to Venditto, the bankruptcy attorney, Litman sent the updated title commitments to both Venditto and DeYurre. Nothing in the record suggests that either one responded by questioning why Litman was forwarding these documents as the contract had terminated. In fact, on June 18, Venditto responded by informing Litman that the trustees in the bankruptcy proceedings were considering whether to allow the sales of the units to proceed. Lastly, when Litman wrote to Venditto on September 29, 2014 requesting an update on the status, Venditto forwarded the email to DeYurre to respond. In response, DeYurre did not take the position that the contract had already terminated or that the contract was unenforceable. Instead, he sent an email to D & E stating that he would prepare cancellation notices. Logically, as noted by the trial court, there would be no need to cancel the contract if the contract had already terminated.

Lastly, we note that D & E and Dr. Vitto, through their respective counsels, engaged in multiple discussions as to the efforts being made in order to clear title. During these discussions, D & E conducted itself as though the contract was in full force and effect, and as if it fully intended to close on the sale of the properties.

Thus, the record supports the trial court's finding that Dr. Vitto relied on D & E's actions to his detriment by, among other things, not moving forward with the purchase of another property, as well as incurring both the time and expense of pursuing his rights under the contract for several years.

I. Reasonable Diligent Efforts

D & E contends that the trial court erred by finding that D & E failed to use reasonable diligent efforts to clear title. Specifically, D & E claims that it was not required to undertake "extraordinary efforts or expenditures" in order to clear title. These arguments likewise fail to persuade.

The trial court's findings were based, in part, on D & E's actions vis-à-vis the bankruptcy proceedings. The record supports the trial court's conclusion that D & E "did not in any way exercise good faith, or reasonably diligent efforts to provide Dr. Vitto with marketable title" and that "[D & E] did not use diligence in pursuing reasonable efforts to clear title attendant to the [bankruptcy case]." We agree with the trial court that merely filing a motion to dismiss does not constitute reasonable diligent efforts to clear title, especially in light of the bankruptcy court's suggestion that it would have entered a stay if asked to do so.

The trial court's findings are also supported by the holding in Galt View Apartments, Inc. v. Fazio, 490 So. 2d 1005 (Fla. 4th DCA 1986). At issue in Galt View was the purchase of a co-op apartment building. There, the buyer brought an

action for specific performance, and the trial court found that the seller failed to make a diligent good faith effort to satisfy a condition precedent contained in the contract. Id. at 1006. The contract required the seller to obtain, among other things, an approval from the Department of Housing and Urban Development ("HUD"). The seller submitted an application to HUD, however, it was rejected. Id. The seller claimed that the filing of the application was sufficient to comply with its obligations. However, evidence produced at trial demonstrated that the seller had declined several options for obtaining the approval. Id. at 1008.

Similarly, in the instant case, although D & E filed a motion to dismiss the bankruptcy case, D & E did not even mention the properties, nor did it request expedited consideration of its motion to dismiss. D & E also completely ignored the bankruptcy judge's invitation to identify any assets it believed it had a right to possess and to move for a stay, which the bankruptcy judge advised D & E it would grant. A stay could have resulted in a removal of the properties from the bankruptcy proceeding and would have permitted the sale of units 2601 and 2603 to Dr. Vitto to proceed. As noted by the trial court: "A party seeking to utilize reasonable and diligent efforts to cure the title defect would have done what the bankruptcy court suggested and sought stay relief, or [other] types of relief. . . . It was unreasonable in this case for the Defendants to have failed to do so."

Here, D & E's actions call its intentions into question. The record reflects that D & E admitted that it entered into the contract with Dr. Vitto in order to avoid the pending foreclosure sale of unit 2601, and that D & E used the contract to delay the foreclosure sale for months. Once the bankruptcy proceedings were initiated, the foreclosure cases were stayed, and thus, D & E and the defendants no longer needed their contract with Dr. Vitto, the pending sales of the units, and Dr. Vitto's $170,000 deposit to prevent the foreclosure sale from occurring. In the interim, the defendants were offered more money for the subject properties than the sale price to Dr. Vitto. In fact, they admitted that the value of the units had gone up since the execution of the contract. This may explain DeYurre's non-responsiveness and suggestion that they "wait and see" if Dr. Vitto would simply walk away from the contract, and fully supports the trial court's conclusion that D & E failed to exercise reasonable diligent efforts to provide Dr. Vitto with marketable title.

III. Release of D & E's Obligations Under the Contract

Lastly, D & E contends that the trial court erred by concluding that D & E had not been released from its obligations under the contract because the deposit was never returned to Dr. Vitto. Section 18(A)(ii) of the contract provides, in part, as follows: "If after a reasonable diligent effort, Seller is unable to timely cure defects, and Buyer does not waive the defects, this Contract shall terminate, and

Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract."

Because the trial court found that D & E failed to make a reasonable diligent effort, the contract did not terminate, D & E was not released from its obligations under the contract, and Dr. Vitto was free to seek specific performance, rather than a return of his deposit. Section 18(A)(ii) predicates any release on a refund of the deposit to Dr. Vitto, and the record reflects that Dr. Vitto never sought nor received a return of his deposit. Thus, the trial court properly concluded that D & E continued to be bound by the contract.

CONCLUSION

We conclude that: (1) the contract did not expire by its own terms and that D & E was properly estopped from making such a claim; (2) D & E failed to use reasonable diligent efforts to deliver marketable title before the extended closing date or prior to the expiration of the contract; and (3) D & E failed to comply with the contract's requirements for a release of its obligations. Accordingly, we affirm the trial court's order granting Dr. Vitto's claim for specific performance.

Affirmed.

ANY POST-OPINION MOTION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE POST-OPINION MOTION MAY BE FILED WITHIN FIVE DAYS THEREAFTER.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

RAFAEL BENAVENTE and **CLARA E. BENAVENTE,**
Appellants,

v.

OCEAN VILLAGE PROPERTY OWNERS ASSOCIATION, INC., and **GUIVAZ ENTERPRISES, LLC,**
Appellees.

No. 4D18-1819

[November 28, 2018]

Appeal of nonfinal order from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Robert E. Belanger, Judge; L.T. Case No. 562018CA000085AXXXHC.

David J. Miller of Law Offices of Damian G. Waldman, P.A., Largo, for appellants.

J. Henry Cartwright of Fox McCluskey Bush Robinson, PLLC, Stuart, for appellee Ocean Village Property Owners Association, Inc.

Patrick Dervishi of Shir Law Group, P.A., Boca Raton, for appellee Guivaz Enterprises, LLC.

PER CURIAM.

Rafael and Clara Benavente ("the Homeowners") appeal a nonfinal order denying their Motion to Vacate Certificate of Title, Certificate of Sale, Final Default Judgment of Foreclosure, and Clerical Defaults and Motion to Quash Constructive Service of Process ("Motion to Vacate and Quash"). Given that Ocean Village Homeowner's Association ("the Association") did not properly exercise due diligence in its efforts to personally serve the Homeowners at their primary address and presented a facially deficient Affidavit for Service by Publication, we reverse and remand the trial court's finding that constructive service of process by publication was proper.

The Association filed a complaint against the Homeowners, seeking to foreclose on a lien for unpaid assessments. Counsel for the Association sent pre-suit demand letters to three addresses: a Fort Pierce property

being foreclosed on, and two Key Biscayne properties—one on Harbor Drive and one on Crandon Boulevard.

The Homeowners signed a certified mail receipt at the Harbor Drive property, acknowledging receipt of the pre-suit demand letter. However, the Association only attempted to serve the Homeowners at the Fort Pierce property.

After failing to locate and serve the Homeowners, the Association filed an Affidavit of Non-Service that reflected seven attempts of service at the Fort Pierce property—and each attempted service noted that there was no answer at the door, there was no vehicle in the driveway, and/or the property seemed vacant.[1]

Thereafter, the Association filed an Affidavit for Service by Publication that alleged that the Homeowners could not be found within Florida. Relevantly, the affiant certified the following as true:

> 4. That Affiant has made a diligent search, an honest and conscientious effort and inquiry and good faith efforts on information available to located [the Homeowners] by use of:
>
> a. Process servers/investigators,
> b. Computerized legal research and people trackers,
> c. Skip traces, and
> d. DBPR license searches.
>
> 5. That the residences of [the Homeowners] is unknown and attempts to track down [the Homeowners] at other known addresses reasonably available to Plaintiff have been unsuccessful.

As a result of the Affidavit for Service by Publication, service was published twice in the St. Lucie News Tribune. Due to a lack of response within thirty days, the Association moved for, and the clerk entered, a default. Then, the Association moved for, and the trial court entered, a final default judgment. Consequently, the Fort Pierce property was sold at a foreclosure auction to a third party to whom title was transferred.

The Homeowners subsequently filed the aforementioned Motion to Vacate and Quash, along with affidavits in support of the motion. According to these filings, a diligent search was not conducted because the applicable public records would indicate that the Homeowners'

[1] Two entries noted the placement and removal of a card or note.

primary residence was the Harbor Drive property where they had resided since 2010. Further, they claimed that the Association knew their primary address, there had been prior litigation between the parties, the Association knew the Fort Pierce property was a rental property, and the Association possessed the Homeowners' email address.

At the hearing on the Motion to Vacate and Quash, the parties essentially recounted the facts as described above with a few additions. The Homeowners contended that, since there was no car in the driveway of the Fort Pierce property and it "appeared vacant," it was reasonable to presume that no one lived there; yet, for some unexplained reason, the Association did not attempt to serve the Homeowners at either the Harbor Drive or Crandon Boulevard addresses.

The Association acknowledged that the demand letters were sent to "two different Miami addresses," and conceded that the Homeowners signed the certified mail receipt at the Harbor Drive property. However, counsel for the Association claimed that "mail had been shut off at the Harbor Drive [property]," which caused the Association to believe that the Homeowners did not live there either. Counsel further maintained that the Association attempted service three weeks after a hurricane, but "access to the Keys had been cut off and people had been evacuated."

The court ultimately determined there was "insufficient evidence to grant the motion," and denied the Homeowners' Motion to Vacate and Quash. An order was later entered to that effect. The trial court denied a subsequent motion for rehearing filed by the Homeowners, and this appeal followed.

"An order denying a motion to vacate a default judgment is reviewed under an abuse of discretion standard." *Fla. Eurocars, Inc. v. Pecorak*, 110 So. 3d 513, 515 (Fla. 4th DCA 2013); *see also Lloyd's Underwriter's At London v. Ruby, Inc.*, 801 So. 2d 138, 139 (Fla. 4th DCA 2001) ("It is an order *granting* a motion to vacate which is reviewed under a *gross* abuse of discretion standard." (Emphasis in original)).

We recently stated:

> "Substitute service statutes are an exception to the rule requiring personal service, and . . . must be strictly construed . . . to protect a defendant's due process rights." *Clauro Enters., Inc. v. Aragon Galiano Holdings, LLC*, 16 So. 3d 1009, 1011 (Fla. 3d DCA 2009). The fundamental purpose of service is to give proper notice to a defendant in a case so that the

> party is answerable to the claim of the plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy. *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 953 (Fla. 2001). Where constructive service is attempted, the trial court must determine both whether the affidavit of diligent search filed by the plaintiff is legally sufficient, and whether the plaintiff conducted an adequate search to locate the defendant. *Giron v. Ugly Mortg., Inc.*, 935 So. 2d 580, 582 (Fla. 3d DCA 2006) (citing *Se. & Assocs., Inc. v. Fox Run Homeowners Assoc., Inc.*, 704 So. 2d 694, 696 (Fla. 4th DCA 1998)). Substitute service is unauthorized if personal service could be obtained through reasonable diligence; the test is "whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant." *Coastal Capital Venture, LLC v. Integrity Staffing Sols., Inc.*, 153 So. 3d 283, 285 (Fla. 2d DCA 2014) (citations omitted). This is because "there is a strong public policy interest in seeing that a defendant receives notice of any action against him so that he may have his day in court in accordance with due process requirements." *Id.*

Green Emerald Homes, LLC v. Bank of New York Mellon, 204 So. 3d 512, 515 (Fla. 4th DCA 2016); *accord* § 49.011, Fla. Stat. (2017); § 49.021, Fla. Stat. (2017); § 49.041, Fla. Stat. (2017); *Martins v. Oaks Master Prop. Owners Ass'n, Inc.*, 159 So. 3d 142, 145-46 (Fla. 5th DCA 2014); *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009).

"If the trial judge were to find the affidavit to be defective on its face, service would be void as to the bona fide purchaser." *Lewis v. Fifth Third Mortg. Co.*, 38 So. 3d 157, 160 (Fla. 3d DCA 2010). "If the trial judge finds the affidavit sufficient on its face, but were to determine that a diligent search was not performed, the foreclosure would be voidable, not void, as to the bona fide purchaser." *Id.*

In *Martins*, the Fifth District considered facts strikingly similar to this case. There, a homeowner's association filed a foreclosure complaint against Martins. *Martins*, 159 So. 3d at 144. The association addressed a letter containing a claim of lien to Martins at the subject property; thereafter, a service processor attempted to serve him at the same address, but found the house unfurnished and without power. "A neighbor reported that the owner [was] there now and then." *Id.* Subsequently, the

association filed an affidavit for service by publication describing several methods used to attempt to contact Martins. *Id.* at 144-45. The association published a notice in a local newspaper, the clerk granted default, and the trial court entered summary final judgment in favor of the association. *Id.* at 145. Consequently, the property was sold at public auction to a third party.

Martins then filed a motion to vacate final judgment, void sale of real property, vacate default, and quash service of process. He insisted that the association's search was insufficient because it failed to consult: public records outside of Osceola County, the voter registration records, the Osceola County Tax Collector's records, the Florida Department of Motor Vehicle records, Martins' neighbors, or utility companies servicing the subject property. He claimed that had the association consulted these resources, it would have discovered that he lived in Cutler Bay, Florida, not Osceola County. In addition, Martins stressed that the association had previously mailed correspondence to his Cutler Bay address, but never attempted service at that location.

The Fifth District ruled, "[A]lthough the HOA made some effort to obtain Martins' address, its search was less than diligent because his address was easily accessible . . . ." *Id.* at 147. "[N]ot only was the HOA's search insufficient, but the HOA's affidavit [wa]s patently inaccurate in that it fail[ed] to disclose that the HOA was aware of Martins' Cutler Bay address." *Id.* The Fifth District reversed and remanded the trial court's order denying Martins' motion to vacate and quash because the summary final judgment was void—all while considering the appeal under the heightened and incorrect standard of review of *gross* abuse of discretion.[2]

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[2] The court cited to several relevant cases in support of its decision:

> *See Godsell*, 923 So. 2d at 1215 (finding that final judgment of foreclosure was void where the constructive service on defendant was ineffective due to the plaintiff's failure to do a diligent search and failure to include, inter alia, any reference to the defendant's possible Canadian address); *Miller*, 31 So.3d at 228 (finding that constructive service by publication was defective based on the fact that plaintiffs knew the defendant's physical address, the defendant had previously been served twice at his known address, and the plaintiffs' attorney had mailed correspondence to the defendant's known address; and reversing final default judgment of partition); *Gans v. Heathgate–Sunflower Homeowners Ass'n, Inc.*, 593 So. 2d 549, 551 (Fla. 4th DCA 1992) (finding that two unsuccessful service attempts were not sufficient to allow for service by publication where the plaintiff failed to ascertain the defendant's whereabouts

This case is an example whereby a foreclosure is void as a matter of law for two reasons: (1) the Affidavit for Service by Publication was facially defective, and (2) the Association did not conduct a diligent search. *See Lewis*, 38 So. 3d at 160. First, the Affidavit was "patently inaccurate" because it failed to note that the Association was aware of the Homeowners' Harbor Drive address. *See Martins*, 159 So. 3d at 147. Second, while the Association made some effort to search for and serve the Homeowners, it failed to uncover an easily accessible address. *See id.* The Association possessed a certified mail receipt indicating that the Homeowners received mail at the Harbor Drive address and an email address to contact the Homeowners and inquire as to their primary residential address. This information was sufficient to provide a basis for service at the Harbor Drive address, or at least the reasonable likelihood of the address's discovery.

We reverse and remand because the trial court erred by denying the Homeowners' Motion to Vacate and Quash since the affidavit was facially deficient and a diligent search was not conducted. *See id.*

Reversed and remanded.

TAYLOR, LEVINE and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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by talking to her neighbors, or trying to contact her by phone or by mail); *Redfield*, 990 So. 2d at 1138–39 (finding that plaintiff's search fell below the statutory and constitutional requirements necessary to satisfy Florida's service of process by publication law where plaintiff made some efforts to locate the defendant, but the sworn statement did not indicate that the plaintiff contacted the source that most likely could have provided information regarding the defendant); *Floyd*, 704 So. 2d at 1112 (finding that the affidavit omitted the most meaningful search, namely "getting out of the office, finding the property, inquiring of persons in possession of the property, or talking with neighbors, relatives or friends").

Martins, 159 So. 3d at 147.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CHARTERHOUSE ASSOCIATES, LTD., INC., As Trustee of the Kenneth and Gail Browne Trust U/D/T DTD June 7, 2010, **KENNETH BROWNE**, and **GAIL BROWNE**,
Appellants,

v.

VALENCIA RESERVE HOMEOWNERS ASSOCIATION, INC.,
Appellee.

No. 4D17-2640

[November 28, 2018]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Thomas H. Barkdull III, Judge; L.T. Case No. 502014CA015292.

Scott Edwards of Scott J. Edwards, P.A., Boca Raton, and Christopher A. Sadjera of Sajdera Kim, PLLC, Boca Raton, for appellants.

Ashley Landrum of Vernis & Bowling of Palm Beach, P.A., North Palm Beach, and Allen E. Rossin of Rossin & Burr, PLLC, West Palm Beach, for appellee.

KLINGENSMITH, J.

Is a personal trainer in a fitness center like a "call girl" sitting at a clubhouse bar? This was the comparison drawn by the trial court when granting partial summary judgment in favor of a homeowner's association against one of its property owners regarding the issue of whether the personal trainer was an invitee or licensee. For the reasons set forth below, neither the analogy nor the analysis used by the trial court was properly applied to the facts presented here. Therefore, we reverse.

Charterhouse Associates, Ltd., Inc.,[1] owns property within the Valencia Reserve community. It authorized Kenneth and Gail Browne to reside at

[1] Charterhouse filed the initial notice of appeal as trustee of the Kenneth and Gail Browne Trust U/D/T DTD June 07, 2010. Collectively, Charterhouse and the Brownes will be referred to as "appellants."

the property and assume the ownership rights of Charterhouse, which included membership within the Valencia Reserve Homeowner's Association ("the Association"). The Valencia Reserve community includes amenities such as a fitness center, which is the Association's property. According to the Association's Declaration, the center is available for the use of owners, family members, guests, invitees, and tenants.

On several occasions, the Brownes paid and authorized their friend, a personal trainer, to accompany them to the fitness center. He was only present when invited by the Brownes. Sometime thereafter, the Association entered into a contract with a third-party vendor, Total Health Systems ("THS"), to be the exclusive provider of fitness services in the Association's fitness center.

The relevant provisions of the Association's Declaration are as follows:

> PRIVATE USE: For the term of this Declaration, the Association Property (except otherwise specifically provided in this Declaration, e.g., the Rural Parkway) is not for the use and enjoyment of the public, *but is expressly reserved for the private use and enjoyment of the Declarant, the Association, and the Owners, and their family members, guests, invitees and tenants, but only in accordance with this Declaration.*

. . . .

> OWNERS' EASEMENTS OF ENJOYMENT: *Every Owner and family member, guest, tenant, agent, or invitee of an Owner shall, except as may otherwise be provided in this Declaration, have a permanent and perpetual, nonexclusive easement for ingress and egress over, enjoyment in, and use of Association Property within the Property* (except as otherwise may be provided elsewhere in this Declaration), in common with all other Owners, their family members, guests, tenants, agents, and invitees, which easement shall be appurtenant to, and shall pass with deed and/or title to, each Owner's Lot. This right shall be subject to the following conditions and limitations:

. . . .

> C. The right of the association to establish, amend and/or abolish from time to time, uniform rules and regulations pertaining to the use of the Association Property.

(Emphases added). Because of the contract with THS, the Association enacted a new rule prohibiting private trainers, instructors, physical therapists, and massage therapists from working in the fitness center.[2]

Appellants filed an action seeking declaratory relief, injunctive relief, and damages for breach of their rights under the Association's Declaration. They alleged that the Association exceeded its powers granted by the Declaration by excluding the Brownes' personal trainer from working with them at the fitness center via its newly enacted rule.[3] The Association moved for partial summary judgment, and argued that the trainer was a licensee who could be excluded from the Association's property based on the new rule. Appellants opposed the motion, and asserted that their trainer was an invitee permitted to enter the fitness center according to the plain wording of the Declaration.

At the summary judgment hearing, the trial court found in favor of the Association:

> If [the personal trainer] is getting a dime for training [the Brownes], at any time, which you have basically said he is, then he is carrying on a business, and you're going to the Fourth DCA if you have a problem with my ruling.

. . . .

> As soon as [the personal trainer] starts getting paid for his services is the difference between the girlfriend sitting at the clubhouse bar and the call girl. One is getting paid, they're a licensee; the other one is an invitee. Invitees are welcome, businesses are not.

Consequently, the trial court entered final partial summary judgment for the Association, and this appeal followed.

The standard of review regarding a trial court's ruling on a motion for summary judgment is *de novo*. *See Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009). "When reviewing a ruling on summary judgment,

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[2] Notably, this rule did not prohibit private swimming instructors from providing private instruction in the Association's swimming pool.

[3] The trial court action includes other disputes between the parties; however, only the claims related to the fitness center were at issue in the Association's Motion for Partial Summary Judgment.

an appellate court must examine the record and any supporting affidavits in the light most favorable to the non-moving party." *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 997 (Fla. 4th DCA 2004) (quoting *City of Lauderhill v. Rhames*, 864 So. 2d 432, 434 n.1 (Fla. 4th DCA 2003)). "Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Frost*, 15 So. 3d at 906. "[T]he burden is upon the party moving for summary judgment to show conclusively the complete absence of any genuine issue of material fact." *Albelo v. S. Bell*, 682 So. 2d 1126, 1129 (Fla. 4th DCA 1996). "When a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove his cause of action. Rather, the court's function is solely to determine whether the record conclusively shows that the claim cannot be proved as a matter of law." *Jennaro v. Bonita-Fort Myers Corp.*, 752 So. 2d 82, 83 (Fla. 2d DCA 2000).

Personal Trainer's Status as an Invitee

Under the common law, a visitor who enters the private property of another falls within one of three classifications: a licensee, an invitee, or a trespasser. *See Post v. Lunney*, 261 So. 2d 146, 147 (Fla. 1972); *see also Nolan v. Roberts*, 383 So. 2d 945, 946 (Fla. 4th DCA 1980) ("In the leading Florida case of *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973), the Supreme Court divided plaintiffs in cases of this nature into three categories: invitees, uninvited licensees and trespassers.").

To determine whether one has the status of an invitee, Florida courts originally applied the "economic benefit test":

> [T]he general test is whether the injured person, at the time of the injury, had present business relations with the owner of the premises which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner of the premises. *In the absence of some relation which inures to the mutual benefit of the two, or to that of the owner, no invitation can be implied, and the injured person must be regarded as a mere licensee.*

McNulty v. Hurley, 97 So. 2d 185, 188 (Fla. 1957) (emphasis in original) (quoting *Cowart v. Meeks*, 111 S.W.2d 1105, 1107 (Tex. Comm'n App. 1938)).

Over time, courts began to use the "invitation test" to achieve more uniform results. *See Post*, 261 So. 2d at 148-49. In *Post*, the Florida Supreme Court receded from *McNulty*, and stated, "We agree with the Fourth District Court of Appeal that the Second Restatement of Torts invitation test, which includes the public invitee as well as the business invitee is preferable to the exclusive use of the mutual benefit test . . . ." *Post*, 261 So. 2d at 148; *see also Wood*, 284 So. 2d at 693 (noting that the terms "mutual benefit test" and "economic benefit test" are interchangeable); *Lunney v. Post*, 248 So. 2d 504, 506 (Fla. 4th DCA 1971) ("Florida, too, has recognized the value of the invitation test.").

According to the Restatement's invitation test, "[a]n invitee is either a public invitee or a business visitor." Restatement (Second) of Torts § 332 (1965). "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id.* "A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.*

In words recently echoed by our court:

> [T]he invitation test bases "invitation" on the fact that the occupier by his arrangement of the premises or other conduct has led the entrant to believe that the premises were intended to be used by visitors for the purpose which this entrant was pursuing, and that such use was not only acquiesced in by the owner or possessor, but that it was in accordance with the intention and design with which the way or place was adopted or prepared.

Arp v. Waterway E. Ass'n, Inc., 217 So. 3d 117, 120 (Fla. 4th DCA 2017) (quoting *Smith v. Montgomery Ward & Co.*, 232 So. 2d 195, 198 (Fla. 4th DCA 1970)). Invitees also include anyone present on a premises via express or reasonably implied invitation of the property owners. *Wood*, 284 So. 2d at 695.

Nevertheless, the Florida Supreme Court has maintained its limited definition of licensees in the wake of *Wood*, *Post*, and *Smith*:

> We thereby eliminate the distinction between commercial (business or public) visitors and social guests upon the premises . . . . In doing so, we continue the category of licensees who are [u]ninvited, that is, persons who choose to

> come upon the premises *solely for their own convenience without invitation* either expressed or reasonably implied under the circumstances.

Wood, 284 So. 2d at 695 (alteration and emphasis added). "An uninvited licensee is neither an invitee nor a trespasser, but rather, a legal status in between whose presence is neither sought nor forbidden, but merely permitted or tolerated by the landowner." *Arp*, 217 So. 3d at 121 (quoting *Bishop v. First Nat'l Bank of Fla.*, 609 So. 2d 722, 725 (Fla. 5th DCA 1992)); *see, e.g., Arp*, 217 So. 3d at 119 (holding that an individual crossing a shopping center's property late at night as a shortcut when the center's businesses were closed was nothing more than an uninvited licensee); *Porto v. Carlyle Plaza*, 971 So. 2d 940, 941 (Fla. 3d DCA 2007) (finding that an individual walking a dog across private property and allowing it to relieve itself classifies such individual as an uninvited licensee); *Iber v. R.P.A. Int'l Corp.*, 585 So. 2d 367, 368 (Fla. 3d DCA 1991) (concluding that an individual entering an office building to use building's private telephone to call a taxi was an uninvited licensee); *Barrio v. City of Miami Beach*, 698 So. 2d 1241, 1242 (Fla. 3d DCA 1991) (holding that an individual walking on a public beach after midnight when the beach was closed to the public was an uninvited licensee).

The Association's Declaration gives its property owners[4] an easement for ingress and egress, enjoyment in, and use of the fitness center, and specifically authorizes their guests and invitees to use the premises.[5] When a homeowner exercises in the Association's fitness center and invites a third party along, whether for companionship or personalized guidance, they are using the property for a recreational purpose. This remains true regardless of whether the guest is a friend or a business invitee, because the activity they are engaging in is virtually the same. The evidence established that the Brownes expressly invited the trainer to accompany them into the fitness center, he was only on the premises with the Brownes, and did not attempt to gain business from other residents. The trainer never entered or remained in the fitness center solely for his own convenience at any time without an express or implied invitation from the Brownes. *See Arp*, 217 So. 3d at 120; *Wood*, 284 So. 2d at 695; *Post*, 261 So. 2d at 148-49; *Smith*, 232 So. 2d at 198.

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[4] In this case, Charterhouse, itself, or the Brownes via authorization from Charterhouse, as noted above.

[5] This court cannot ignore the fact that while the trainer's presence certainly benefitted the homeowner, it also indirectly benefitted the Association by facilitating the use of the exercise room by the resident, while also enabling the safe and proper use of the equipment.

The trial court erred by using the "economic benefit" test when it concluded that the Brownes' personal trainer was a licensee. The trial court incorrectly focused on the fact that the Brownes' trainer was paid for his services. Instead, the status of the personal trainer in this scenario is more akin to the invitee "girlfriend" at a clubhouse (using the trial court's analogy), rather than the uninvited licensee "call girl" soliciting her services to provide a "girlfriend experience" for paying customers.

As this court stated in *Beachwood Villas Condo. v. Poor*, 448 So. 2d 1143, 1144 (Fla. 4th DCA 1984):

> *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. 4th DCA 1981), suggested that condominium rules falling under the generic heading of use restrictions emanate from one of two sources: the declaration of condominium or the board of directors. Those contained in the declaration "are clothed with a very strong presumption of validity . . . . ," *id.* at 639, because the law requires their full disclosure prior to the time of purchase and, thus, the purchaser has adequate notice. *See* Section 718.503(2)(a), Florida Statutes (1983). Board rules, on the other hand, are treated differently. *When a court is called upon to assess the validity of a rule enacted by a board of directors, it first determines whether the board acted within its scope of authority* and, second, whether the rule reflects reasoned or arbitrary and capricious decision making.

(Emphasis added).

In *Beachwood*, this court was tasked with determining the validity of two rules enacted by a condominium board of directors. 448 So. 2d at 1143. As in this case, there was no suggestion that the rule under consideration violated the Condominium Act, Section 718, Florida Statutes (1983), or was otherwise unreasonable, only the scope of the board's authority was in question:

> A declaration of condominium is "the condominium's 'constitution'." *Schmidt v. Sherrill*, 442 So. 2d 963, 965 (Fla. 4th DCA 1984). Often, it contains broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the condominium's operation through the rulemaking process. It would be impossible to list all

> restrictive uses in a declaration of condominium. Parking regulations, limitations on the use of the swimming pool, tennis court and card room—the list is endless and subject to constant modification. Therefore, we have formulated the appropriate test in this fashion: *provided that a board-enacted rule does not contravene either an express provision of the declaration or a right reasonably inferable therefrom, it will be found valid, within the scope of the board's authority.* This test, in our view, is fair and functional; it safeguards the rights of unit owners and preserves unfettered the concept of delegated board management.

Beachwood, 448 So. 2d at 1145 (emphasis added).

The Association claims they enacted the personal trainer exclusion rule pursuant to the Declaration's provision authorizing the Association to "provide owners with service [and] amenities . . . which will enhance the quality of life at Valencia Reserve." Regardless of the rule's intent, it ultimately fails by directly conflicting with the Declaration's provision granting a property owner's invitees access to the fitness center. *See Beachwood*, 448 So. 2d at 1145. The rule contravenes an express provision of the Declaration, therefore, the Association exceeded the scope of its authority by enacting the subject rule. Accordingly, we need not discuss the reasonableness of the rule. *See id.* at 1144.

In sum, the trial court's errors arose from its failure to apply the proper test when designating the personal trainer as a licensee. That error was compounded when the trial court erroneously upheld the validity of the rule as applied, and failed to consider whether the Association had the authority to enact the rule at all. Therefore, we reverse the partial summary judgment entered in favor of the Association, and remand for further proceedings consistent with this opinion.

Reversed and remanded.

TAYLOR and KUNTZ, 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

CLARE J. GREENSHIELDS,

Appellant,

v. Case Nos. 5D18-400 & 5D18-1218

MARK GREENSHIELDS,

Appellee.

_____/

Opinion filed November 30, 2018

Non-Final Appeal from the Circuit Court for Brevard County,
Charles J. Roberts, Judge.

Thomas H. Yardley, Cocoa, for Appellant.

Francis Hannon, of Dewitt Law Firm P.A., Tampa, for Appellee.

COHEN, C.J.

Clare Greenshields ("Former Wife") appeals two orders: the first discharged a lis pendens on property she owned but imposed a restriction on the proceeds of its sale, and the second denied her request to dissolve an injunction, or alternatively, to require Mark Greenshields ("Former Husband") to post a bond. We reverse the requirement of both orders enjoining Former Wife's use of proceeds from the sale of property.

The parties, who had three children together, divorced in 2011 while living in Merritt Island. After the divorce, Former Wife bought a house in Merritt Island, and Former

Husband relocated to Orlando. In an attempt to bring the children closer to Former Husband, Former Wife agreed to relocate, and Former Husband agreed to loan Former Wife the money to purchase a house in Orlando. It is undisputed that in 2013, Former Husband loaned Former Wife $152,837.33 in principal for the purchase of the Orlando house. However, Former Wife retained ownership of her Merritt Island house. As part of the loan agreement, Former Wife gave Former Husband a power of attorney that provided:

> My Attorney-in-Fact shall have full power and authority to act on my behalf. This power and authority shall authorize my agent to manage and conduct all of my affairs and to exercise all of my legal rights and powers. My agent's powers shall include, but not be limited to, the following:
>
> . . . .
>
> To deal with any interest I may have in the real property at 912 Harbor Pines Drive, Merritt Island, Florida 32952 . . . . These powers include, but are not limited to, the ability . . . :
>
> . . . .
>
> iii. to direct or cause to direct on a first priority basis the proceeds of the sale of the property at 912 Harbor Pines in full repayment of all and any advances including interest, insurance, utilities or other charges incurred either with the . . . loan for the purchase of 1333 Falling Star Orlando or the existing property at 912 Harbor Pines to ensure that Mark Greenshields is made completely whole and to act to direct any remaining funds after full repayment to Mark Greenshields to the bank account of my choice.
>
> . . . .
>
> My Attorney-in-Fact will receive no compensation except for the reimbursement of all out-of-pocket expenses associated with the carrying out of my wishes in addition to 100% of the costs of loaning me the money to purchase my new property at 1333 Falling Star, Orlando, Florida, including interest paid by him on this loan and any other costs directly associated

> with it as well as any expenses incurred in the sale or maintenance of 912 Harbor Pines, Merritt Island, Fl 32952. Any money remaining from the sale of 912 Harbor Pines Drive, Merritt Island, Florida 32952 after reimbursing my Attorney-in-Fact and the payments made by him on my behalf will . . . immediately be paid to me in cleared funds to the bank account of my choosing.

The relocation resulted in disharmony within Former Wife's home and consequently, she sold the Orlando house and moved back to Merritt Island. During this time period, Former Husband accrued arrearages for his court-ordered alimony payments. Upon selling the Orlando house in 2014, Former Wife repaid Former Husband $132,826.93 while an additional $20,000 of the proceeds was placed into Former Wife's lawyer's trust account to bring Former Husband's alimony arrearages current. The parties agreed to this course of action and subsequently entered into a mediated settlement agreement, which provided: "The funds remaining in the trust account of . . . counsel for the Former Wife, shall be released to the Former Wife, and the Former Husband waives and relinquishes any and all claims he may have to these funds." The record does not reflect that Former Husband claimed Former Wife owed him any additional monies at that time or that he attempted to set off any additional monies allegedly owed from the $20,000. Thus, the mediated settlement agreement appeared to have resolved repayment of the loan for the Orlando house and Former Husband's alimony arrearages.

In 2017, Former Wife listed her Merritt Island house for sale. Days before the scheduled closing, Former Husband filed a verified complaint against Former Wife for breach of contract, declaratory judgment, and unjust enrichment, alleging that Former Wife did not intend to compensate him from the proceeds of the sale as detailed in the power of attorney. Former Husband contemporaneously filed a notice of lis pendens.

Notably, Former Husband recorded the power of attorney immediately prior to filing his complaint.

In response, Former Wife filed an emergency motion to discharge the lis pendens, and the trial court held an evidentiary hearing. While his complaint did not break down the amount sought, at the hearing, Former Husband acknowledged that he loaned Former Wife $152,837.33 in principal for the purchase of the Orlando house and received $132,826.92 from the sale of the Orlando house but claimed that he incurred other costs associated with the loan that amounted to a total outlay of $162,157.30. He sought $20,000 from what he claimed was the original principal of the loan, as well as $9,319.97 in interest and other costs.[1] Former Husband argued that the mediated settlement agreement that brought his $20,000 alimony arrearages current never waived repayment of the $20,000 in principal or the additional costs and interest upon the sale of the Merritt Island house. In total, Former Husband claimed that Former Wife owed him "about $30,000" plus interest on that amount.[2] Former Wife argued that the mediated settlement agreement satisfied her obligation to repay the loan considering Former Husband's alimony arrearages. Thus, she contended that Former Husband sought repayment of the alimony arrearages paid out of the sale proceeds of the Orlando house, which he waived pursuant to the mediated settlement agreement.

Following the hearing, the trial court discharged the lis pendens and found that Former Husband was not entitled to injunctive relief but required Former Wife to keep

[1] The $9,319.97 sought in interest included interest on the $20,000.

[2] At other times, Former Husband claimed that Former Wife owed him up to $60,000.

$36,500 from the sale of the Merritt Island house in escrow until the resolution of Former Husband's claims. In response to the trial court's order, Former Wife moved to dissolve what she alleged was a temporary injunction or alternatively, to require that Former Husband post a bond to support escrowing the sale proceeds. The trial court denied Former Wife's requests, maintaining the restriction on the sale proceeds of her house.

Initially, we decline to rule upon the issue Former Wife spends the majority of her brief arguing—whether Former Husband could place a lien or file a lis pendens on her homestead property. The trial court properly discharged the lis pendens, rendering that issue moot for purposes of our review.

However, we agree with Former Wife that while the trial court found that Former Husband was not entitled to an injunction, the relief fashioned effectively enjoined Former Wife's use and benefit from the sale proceeds of her house while the parties disputed the status of the loan. We find that the trial court erred both in requiring Former Wife to place monies into escrow and in failing to require Former Husband to post a bond. Cf. Rosasco v. Rosasco, 641 So. 2d 493, 494–95 (Fla. 1st DCA 1994) (finding error where trial court required former husband to deposit portion of sale proceeds into escrow pending resolution of former wife's claims for payment where former wife could not illustrate entitlement to injunctive relief).

Former Husband's characterization of the $20,000 sought as principal does not make it so. It is undisputed that three years after agreeing to repay his court-ordered alimony arrearages from the sale proceeds of the Orlando house, Former Husband was attempting to not only obtain repayment of the alimony but also interest on that payment. Thus, the majority of the monies the trial court required to be escrowed pertained to that

$20,000 alimony payment which was entirely unrelated to the power of attorney.[3] These are not the circumstances contemplated by Van Vorgue v. Rankin, 41 So. 3d 849 (Fla. 2010), on which the dissent relies. In Van Vorgue, the parties agreed to escrow funds pending resolution of a suit alleging that a quitclaim deed was not properly witnessed and that a stock assignment was fraudulently induced. Id. at 849–50.

The record is not unclear on this issue. If simple math does not make this obvious, at numerous times, as well as in pleadings, Former Husband's attorney did. For example, at the emergency hearing to dissolve the lis pendens, counsel for Former Husband set out his contention:

> THE COURT: Mr. Hannon, does she still owe your client some money?
>
> MR. HANNON: Yes, she does, Your Honor.
>
> THE COURT: How much?
>
> MR. HANNON: At this point, with a baseline of $162,000 that's claimed in the affidavit, the plaintiff is seeking somewhere in the neighborhood of $40,000 to $50,000.
>
> THE COURT: Why is that, if she paid him $152,837.33?
>
> MR. HANNON: She paid us $132,000, Your Honor, respectfully.
>
> THE COURT: Wait a minute. Wait a minute. She paid you the other $20,000, on top of that, for his alimony obligation, right?

[3] Under Former Husband's theory, the mediated settlement agreement to repay his alimony arrearages was meaningless because Former Wife, effectively, was required to repay those arrearages to Former Husband upon sale of the Merritt Island property. Under this theory, Former Wife would be required to institute contempt proceedings to once again recover monies to which she was admittedly owed. Perhaps Former Husband's defense to that action would be that he had already paid those monies.

> MR. HANNON: The other $20,000 was withheld in escrow and never released to my client. Essentially, Your Honor, there's two separate issues here. The one covering the amounts given to the defendant pursuant to the subject Power of Attorney, the other in the context of the divorce case has to do with the alimony payments.
>
> . . . .
>
> THE COURT: All right. And you acknowledge that you owed her—or your client owed her $20,000. Is that right?
>
> MR. HANNON: We do acknowledge that, and moreover, that that is pursuant to the settlement agreement of 2015, by which that amount was agreed to be released.

The parties presented the trial court these issues in the form of an emergency motion to dissolve a lis pendens and subsequent rehearing. The court did a commendable job under the circumstances, and its decision to dissolve the lis pendens was correct. However, the requirement that Former Wife hold monies in escrow pending the outcome of the litigation effectively enjoined her use of the monies and was improper.

REVERSED AND REMANDED.

TORPY, J., concurs.
EISNAUGLE, J., dissents with opinion.

EISNAUGLE, J., dissenting.

I respectfully dissent because I find no meaningful distinction between the facts of this case and Van Vorgue v. Rankin, 41 So. 3d 849 (Fla. 2010). In Van Vorgue, our supreme court made it clear that a trial court's order directing proceeds from the sale of real property in escrow is not an injunction where the funds were already "restricted" by agreement of the parties. Id. at 853.

As in Van Vorgue, the parties here entered into a loan agreement wherein Former Wife granted Former Husband the right "to direct or cause to direct on a first priority basis the proceeds of the sale of the [Merritt Island home]." Therefore, the trial court's order relates to "restricted" funds and, as Van Vorgue instructs, is not in the nature of an injunction.

Importantly, the trial court itself has not yet reached the merits of Former Husband's claims. Perhaps Former Husband is attempting to obtain relief to which he is not entitled, but I cannot conclusively determine as much based on the limited and undeveloped record before us. At a minimum, a bona fide dispute remains on the face of our record as to Former Husband's claim for a yet-to-be-determined amount of costs and interest.

Accordingly, Van Vorgue forecloses Former Wife's argument that the trial court was without authority to direct the funds to escrow, and she has not raised an alternative argument that the trial court erred in the *amount* directed. Therefore, on this record, I would apply Van Vorgue and allow the trial court to resolve the parties' claims after hearing all of the evidence.