# Real Property and Business Litigation Report

Volume X, Issue 48
December 4, 2017
Manuel Farach

**Capstone Bank v. Perry-Clifton Enterprises, LLC**, Case No. 1D16-1094 (Fla. 1st DCA 2017).
A charging order is the exclusive remedy by which a judgment creditor of a Florida limited liability company may execute upon a member's interest in the limited liability company or rights to distributions from the limited liability company.

**Lexon Insurance Company v. City of Cape Coral**, Case No. 2D16-1533 (Fla. 2d DCA 2017).
The statute of limitations for breach of a construction surety contract begins to run upon breach of the underlying construction contract, not upon demand upon the surety.

**Pinellas County v. The Richman Group of Florida, Inc.**, Case No. 2D16-3279 (Fla. 2d DCA 2017).
Citizen input may be a sufficient ground to support a governmental land use decision under the rational basis test, and it is not arbitrary and capricious for government to decide without a more formal investigation that citizen concerns are valid and that the proposed development should not be permitted as a result.

**McGrath v. Martin**, Case No. 3D15-1821 (Fla. 3d DCA 2017).
Florida Rule of Civil Procedure 1.530 applies to trial court decisions dismissing cases for lack of prosecution.

**Agritrade, LP v. Quercia**, Case Nos. 3D15-2392, 3D16-1181 (Fla. 3d DCA 2017).
The principle that a plaintiff cannot claim unjust enrichment when an express contract exists does not apply when there are multiple defendants facing the same damages and the there is no express contract against the party against whom unjust enrichment is sought.

**Magdalena v. Toyota Motor Corporation**, Case No. 3D16-2322 (Fla. 3d DCA 2017).
A dismissal based on *forum non conveniens* is not an adverse "judgment" under Florida Statute section 57.041 and thus the prevailing party is not entitled to an award of costs.

**HagertySmith, LLC v. Gerlander**, Case No. 5D16-3655 (Fla. 5th DCA 2017).
Upon rehearing, the Fifth District reaffirms that the littoral rights of owners of lakefront property include the right to an unobstructed view of the lake.

# Third District Court of Appeal

**State of Florida**

Opinion filed November 29, 2017.
Not final until disposition of timely filed motion for rehearing.

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Nos. 3D15-2392, 3D16-1181
Lower Tribunal No. 13-15713

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**Agritrade, LP, et al.,**
Appellants,

vs.

**Antonio Quercia, et al.,**
Appellees.

Appeals from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

White & Case, Raoul G. Cantero, James N. Robinson, David P. Draigh and Jesse L. Green; Perlman, Bajandas, Yevoli & Albright, Paul D. Turner, Jonathan Feldman, Joshua B. Spector and D. Porpoise Evans; Kula & Associates, Elliot B. Kula and W. Aaron Daniel, for appellants.

Ross & Girten and Lauri Waldman Ross; Kozyak Tropin & Throckmorton, Dyanne E. Feinberg, Gail A. McQuilkin, and Javier Lopez, for appellees.

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

EMAS, J.

In these consolidated appeals, Agritrade L.P. and Agritrade Lending, S.A. appeal partial final summary judgments entered against them in favor of Antonio Quercia and Agro Supply, S.A., and Juan Curbelo appeals final judgment entered against him, following a jury trial, in favor of Agro Supply, S.A. For the reasons that follow, we affirm in part and reverse in part.

## BACKGROUND AND PROCEDURAL HISTORY

Agritrade L.P. ("LP") and Agritrade Lending, S.A. ("Lending") are in the business of exporting agricultural products from the United States to Venezuela. Juan Curbelo ("Curbelo") is a member of LP and Lending, as well as several other related Agritrade companies.[1] Antonio Quercia, a citizen of Venezuela, is the sole shareholder of Agro Supply, S.A. ("Agro Supply").

On March 14, 2012, Agritrade manager/agent Ruben Sierra sent a letter on generic Agritrade letterhead, indicating an agreement for Quercia to "send funds" in the amount of $15 million "as an investment, which will accrue interest at an annual rate of 10%, to be renewed quarterly as Mr. Quercia may decide." The letter further provided that Quercia would give twenty days' notice when he wished to "withdraw the funds" and that the funds would be "received around the week of March 12, 2012." The letter was signed only by Sierra. (This letter will hereinafter be referred to as "the Letter of Intent.")

[1] There are several related Agritrade entities, including LP and Lending. When referred to in general, all of the companies, including LP and Lending, will be identified as "Agritrade."

On March 29, 2012, Sierra, on behalf of Lending, executed a "Revolving Promissory Note" evincing a loan from Quercia (identified as the "Payee") to Lending (identified as the "Maker"). Under the terms of the note, the principal was due on or before June 26, 2012, and as the Letter of Intent had indicated, fixed an interest rate of ten percent per annum. Quercia transferred the funds from his company Agro Supply's bank account to LP, who later allegedly transferred the funds to Lending.

On June 26, 2012, the day the note was to become due, another "Revolving Promissory Note" was executed by Sierra in favor of Quercia (again identified as the "Payee"), but this time Sierra signed under an LP signature block. Nonetheless, Lending was still identified in the note as the "Maker." The remaining terms of the note were the same, with the exception that the due date for repayment was extended to December 1, 2012. No additional funds were transferred.

As of May 1, 2013, it is undisputed that $9.5 million of the loaned funds remained unpaid. On that date, Agro Supply sued Lending and LP, as well as several other related entities and individuals. After the defendants moved to dismiss the complaint based on, inter alia, Agro Supply's failure to join Quercia as an indispensable party, an amended complaint was filed, adding Quercia as a plaintiff. The amended complaint alleged the following counts:

**Count I:** Breach of contract by Quercia and Agro against LP, Lending, Agritrade Investments, and Agri Commodity Trade, LLC[2] based on the Letter of Intent.

**Count II:** Breach of promissory note by Quercia against LP, Lending, Agritrade Investments, and Agri Commodity Trade, LLC based on the second promissory note. A copy of the second note was attached to the amended complaint.

**Count III:** Violation of Florida's Uniform Fraudulent Transfer Act (section 726.105(1), Florida Statutes), by Quercia and Agro against LP, Lending, Agritrade Investments, Agri Commodity Trade, LLC, Galo Group Limited ("Galo"), and Juan Curbelo,[3] alleging Curbelo improperly caused the Agritrade entities to transfer at least $9.5 million to his alter-ego corporations and that the transfers were made with the actual intent to hinder, delay, and/or defraud the Agritrade entities (or alternatively, without receiving a reasonably equivalent value in exchange) and with the knowledge that a debt was owed to Quercia and Agro.

**Count IV:** Violation of Florida's Uniform Fraudulent Transfer Act (section 726.106, Florida Statutes), by Quercia and Agro against LP, Lending, Agritrade Investments, Agri Commodity Trade, LLC, Galo Group Limited ("Galo"), and Curbelo, alleging at least $9.5 million was transferred to the alter-ego corporations without receiving a

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[2] Quercia and Agro alleged that these other entities, along with Lending and LP, "operate as a single joint venture business with overlapping ownership, employees, business objectives, business functions and funds."

[3] Quercia and Agro alleged that Curbelo "exercised complete control and dominion over" Galo and the Agritrade entities and that Galo, a BVI company, is merely Curbelo's alter ego. At some point during the litigation, Galo was dismissed for lack of personal jurisdiction.

reasonably equivalent value in exchange, resulting in the insolvency of the Agritrade entities.

**Count V:** Unjust enrichment by Quercia and Agro against LP, Lending, Agritrade Investments, Agri Commodity Trade, LLC, Galo Group Limited ("Galo"), and Curbelo.

**Count VI:** Fraud in the inducement by Quercia and Agro against Curbelo.

**Count VII:** Mere continuation liability by Quercia against Agricultural Services, LLC, alleging it was created in an attempt to shed the Agritrade entities of their debts in a conscious effort to fraudulently defraud, hinder and delay paying creditors.[4]

LP and Lending both answered the amended complaint, asserting several affirmative defenses, including: the Letter of Intent was subsumed and replaced by the subsequent promissory notes; Sierra made a mistake in identifying LP in the promissory note, and Lending was the actual borrower; and Quercia and Agro must elect between their incompatible theories of recovery (unjust enrichment or breach of contract).

Quercia and Agro moved for summary judgment against Lending on counts I and II (breach of contract and breach of promissory note) and against LP on count V (unjust enrichment). Quercia and Agro also moved for summary judgment on Count VIII, the lost instrument count. Agritrade filed its own motion for summary

[4] Quercia and Agro later amended the amended complaint to allege an additional lost instrument count (Count VIII) because they could not locate the second promissory note.

judgment, claiming that the original plaintiff, Agro, lacked standing at the time the complaint was filed, which was not later cured by adding Quercia as a plaintiff.

On July 31, 2015, the trial court held a hearing on all the pending motions for summary judgment. As to Quercia and Agro's motion for summary judgment on counts I and II (breach of contract and breach of promissory note) against Lending, the court denied the motion as to Agro, but granted it as to Quercia. As to Quercia and Agro's motion for summary judgment on count V (unjust enrichment) against LP, the trial court denied the motion as to Quercia but granted it as to Agro. The trial court also granted Quercia and Agro's motion on count VIII (reestablishment of lost note). Finally, the trial court denied Agritrade's motion for summary judgment on the standing issue.

Thereafter, Quercia and Agro voluntarily dismissed the remaining counts against LP and Lending and the court entered final judgment as follows: (1) in favor of Quercia against Lending in the amount of $9.5 million plus interest; and (2) in favor of Agro against LP in the amount of $9.5 million plus interest.

Lending and LP appealed (Case No. 3D15-2392). While the appeal was pending, the case proceeded to trial on counts III (fraudulent transfer) and V (unjust enrichment) against Curbelo only.[5] On both counts, the jury found in favor

[5] Trial also proceeded on count VII against Agricultural Services for mere continuation liability. After a jury verdict in favor of Agro Supply and Quercia, the court entered a final judgment in their favor against Agricultural Services for $9.5 million plus prejudgment interest. Agricultural Services has not appealed.

of Quercia and Agro and against Curbelo. The trial court denied Curbelo's motion to set aside the verdict, and entered final judgment against Curbelo, in favor of Agro Supply for $9.5 million plus interest on counts III (fraudulent transfer) and V (unjust enrichment); and against Curbelo in favor of Quercia for $9.5 million on counts III and V. The judgments all provide that "Plaintiffs Quercia and Agro Supply may collect up to the greater amount of any judgment against any one or more Defendants in this action but there shall be no double recovery."

Curbelo timely appealed the final judgments against him (Case No. 3D16-1181) and the appeals of all the judgments in this case were consolidated by this court.

**THE SUMMARY JUDGMENTS**

LP and Lending assert that the trial court erred in entering summary judgment on the breach of contract, breach of note, unjust enrichment and lost note counts because, inter alia, there were genuine issues of material fact as to: (1) who was entitled to enforce the note—Quercia, Agro Supply, or both; (2) who was the second note's maker; (3) whether there was mutual assent to form a contract with the letter of intent; and (4) who conveyed and who retained the benefit of the money lent. Further, LP and Lending assert that summary judgment was improper as a matter of law.

**Summary Judgment – Counts I, II, and VIII – Quercia v. Lending**

The undisputed evidence was that the promissory note identified Quercia as the "Payee" and Lending as the "Maker." Lending acknowledges that it borrowed money from Quercia, and that $9.5 million remained unpaid at the time the lawsuit was filed. Thus, the trial court properly granted summary judgment on the breach of contract and breach of note claims in favor of Quercia against Lending. Further, the trial court properly granted summary judgment in favor of Quercia and against Lending on the lost note count (Count VIII).

**Summary Judgment – Count VIII – Agro Supply v. Lending**

However, we agree with Lending, and Agro Supply concedes, that the trial court erred in granting summary judgment to Agro Supply on the lost note count. The undisputed evidence established that only Quercia, and not Agro Supply, was a party to the promissory note. We therefore reverse and remand to the trial court for the limited purpose of amending the final judgment on Count VIII.

**Summary Judgment – Count V – Agro Supply v. LP**

As to the unjust enrichment claim, LP argues that the trial court erroneously granted summary judgment against LP and in favor of Agro Supply because there were disputed issues of fact as to who owned the money/conveyed the benefit (Agro Supply or Quercia) and as to whether LP retained the benefit or transferred it to Lending.

"The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2)

defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff." Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., 667 So. 2d 876, 879 (Fla. 3d DCA 1996). "At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other." Gonzalez v. Eagle Ins. Co., 948 So. 2d 1, 3 (Fla. 3d DCA 2006).

At the time summary judgment was entered, the undisputed facts established: Agro Supply wired the $15 million directly to the bank account of LP; LP received those funds; and LP used those funds. Further, LP is the entity that made partial repayments of $5.5 million on the loan, depositing those payments directly into Agro Supply's bank account. LP also made certain interest payments on the loan, directly to Agro Supply. Although Quercia was the sole shareholder, the funds themselves were those of Agro Supply and Agro Supply transferred those funds to LP. Agro Supply clearly conferred a benefit on LP.

As for the second prong—whether LP retained the benefit—LP contends that the affidavit of its treasurer and board member, Rita Wulff, created an issue of fact, because she averred that although she provided Quercia with the wiring instructions for Lending's bank account, the money was mistakenly deposited into LP's bank account, and to remedy that mistake, LP and Lending "adjusted their

respective books and records and made corresponding journal entries." However, Wulff did not state that LP actually transferred that money from its account to Lending's account. Rather, LP was the entity that actually paid back portions of the loan to Agro Supply on December 3, 2012 ($5 million) and on March 8, 2013 ($500,000). One month after the first installment was made (January 2, 2013), the alleged accounting adjustment was made. Further, Wulff acknowledged in her deposition that LP was the entity that used the loan proceeds.

As to the third element of an unjust enrichment claim, LP and Lending contend that Agro Supply did not suffer any harm because the undisputed evidence established the money loaned actually belonged to Quercia, not Agro Supply. However, it is undisputed that Agro Supply, a corporation, supplied the funds and therefore, the fact that the corporation might be a savings house for Quercia's money is irrelevant. LP and Lending failed to establish a lack of corporate formalities which would extinguish Agro Supply's interest in the loan proceeds it provided to LP.

LP and Lending also argue that Agro Supply cannot recover under the unjust enrichment count because it is barred by the existence of an express contract. We disagree. In Florida, it is well-settled that "the law will not imply a contract where an express contract exists concerning the same subject matter." Real Estate Value Co. v. Carnival Corp., 92 So. 3d 255, 263 n. 2 (Fla. 3d DCA 2012) (quoting Kovtan v. Fredericksen, 449 So. 2d 1, 1 (Fla. 2d DCA 1984)). See also Wiand v.

Wells Fargo Bank, N.A., 86 F.Supp.3d 1316, 1332 (M.D. Fla. 2015) (same). There is no doubt that an express contract exists which "concerns the same subject matter." The trial court so found by granting summary judgment in favor of Quercia on the promissory note. The money was loaned only once. The amount due is the same, and the final judgment entered in favor of Agro Supply was for the same $9.5 million that was awarded to Quercia on his breach of contract and breach of note claims.

However, in this unique situation, the parties to the contract which "concerns the same subject matter" are not the parties between whom the claim for unjust enrichment lies. Instead, the parties to the instant contract were Quercia and LP, while the "parties" in the unjust enrichment claim were Agro Supply and LP. We find this distinction significant. In Variety Children's Hospital, Inc. v. Vigliotti, 385 So. 2d 1052 (Fla. 3d DCA 1980), a hospital sued both parents of a child who had received medical care at the hospital for recovery of unpaid medical bills. The father had signed a written agreement to pay all charges not covered by insurance at the time the child was admitted. The mother did not sign the agreement. The trial court dismissed the hospital's complaint as to the mother, determining that the father's written agreement to pay precluded a claim for unjust enrichment against the mother. This court, on appeal, disagreed and reversed, holding that the hospital "may recover either from the father, by virtue of his express contract, or from the mother, pursuant to an implied in law contract." Id. at 1054. This court observed

that "the long standing rule that an express contract supersedes an implied contract was derived from cases in which the same parties agreed to more than one conflicting contract. Those cases are distinguishable from the case before this court, which involves different parties to different contracts." Id. See also 17 C.J.S. Contracts §7 (noting that "[t]he rule that the existence of an express contract excludes an implied contract has full effect only when the parties to the express contract are the same as the parties to the action.")

The court in Wilson v. EverBank, N.A., 77 F.Supp.3d 1202 (S.D. Fla. 2015), recognized Florida's law on this issue, distinguishing it from the New York law which holds otherwise. Wilson was among several plaintiffs who brought a class action against his mortgage company and several insurance companies regarding force-placed hazard insurance on mortgaged properties in Florida and other parts of the country. Wilson asserted, inter alia, claims for unjust enrichment against his lender, EverBank, and the insurance companies who charged him allegedly exorbitant premiums for that coverage. As to his claim for unjust enrichment against his lender, the court held that Wilson (and the other plaintiffs) could not maintain their unjust enrichment claims because their mortgage contracts precluded those claims. Id. at 1220 (citing to State Farm Mut. Auto. Ins. Co. v. Altamonte Springs Diagnostic Imaging, Inc., No. 6:11–cv–1373–Orl–31GJK at *5 (M.D. Fla. Dec. 21, 2011) for the proposition that "upon a showing that an express contract exists between the parties the unjust enrichment . . . count fails.")

However, as to the insurance company defendants (with whom Wilson and the other class members did not have an express contract), the court held that only the New York plaintiff's express contract with his lender barred his unjust enrichment claim against the insurance companies, because New York law differs from Florida in that "'claims for unjust enrichment may be precluded by the existence of a contract governing the subject matter of the dispute even if one of the parties to the lawsuit is not a party to the contract.'" Id. 1235 (quoting Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F.Supp.2d 162, 202 (S.D.N.Y. 2011)). The Florida and Illinois plaintiffs' claims for unjust enrichment survived because "under Florida and Illinois law, those agreements do not govern Plaintiffs' relationship with the Insurer Defendants." Id. at 1236. See also Kowalski v. Jackson Nat'l Life Ins. Co., 981 F.Supp.2d 1309 (S.D. Fla. 2013) (holding where insured not a party to the insurance policy, the existence of that policy does not preclude an unjust enrichment claim against a non-party to the contract.) Compare, Fulton v. Brancato, 189 So. 3d 967 (Fla. 4th DCA 2016) (holding trial court should not have allowed unjust enrichment claim against defendant and her agency where the jury found an express agreement between the defendant's agency and the buyers' agency.)[6] Accordingly, the existence of an express contract

[6] See also the discussion by the Fulton court regarding the fact that there was no evidence that the plaintiff suffered any additional damages by the defendant and her agency other than the damages that were incurred as a result of the breach of contract by the defendant's agency. Fulton, 189 So. 3d at 970. The court held that the trial court, following the jury verdict, should have granted the defendant and

between Quercia and LP did not bar Agro Supply's unjust enrichment claim against LP. We therefore affirm.[7]

**THE FINAL JUDGMENT FOLLOWING TRIAL**

The second appeal is from the two final judgments entered in favor of Quercia and Agro Supply, and against Curbelo, following a jury verdict which found Curbelo liable for unjust enrichment and fraudulent transfer. The amended complaint alleged that Curbelo was the alter ego of all the Agritrade companies, which all operated with a lack of attention to corporate formalities and under the sole control of Curbelo. The complaint also alleged that Curbelo fraudulently transferred funds to Galo Group, another company that was Curbelo's alter ego, "in furtherance of Curbelo's wrongful and fraudulent scheme to unjustly enrichment himself and to improperly recoup monies from the Agritrade Entities."

As to the unjust enrichment claim, Curbelo argues that it should be reversed because, inter alia, Quercia and Agro Supply did not confer a direct benefit on Curbelo; the claim was based on a veil-piercing theory that was never pled; and there was no evidence of an alter-ego relationship. Alternatively, Curbelo asserts that this court should reduce the amount of interest awarded because contractual

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her agency's motions for a judgment notwithstanding the verdict ("JNOV") to relieve the defendant and her agency from damages as a result of the unjust enrichment claim "once the jury determined a finite amount of damages attributable for the buyers' agency's breach of contract." Id.

[7] We also note our agreement with the trial court's determination, articulated in the final judgments dated May 3, 2016, that there shall be no double recovery in this action by Quercia and Agro Supply.

interest is not available on a claim for unjust enrichment. We find that the veil-piercing theory was properly pled, and further, that competent, substantial evidence supported the jury's determination that an alter-ego relationship did exist and that a direct benefit was conferred on Curbelo. We affirm without discussion the other issues raised by Curbelo on appeal.

**CONCLUSION**

We affirm the trial court's final judgments against LP, Lending and Curbelo, except for the judgment entered in favor Agro Supply against LP on the lost note count (Count VIII). We reverse that judgment and remand for the trial court to amend that portion of the final judgment which entered judgment in favor of Agro Supply against LP on Count VIII. In all other respects, the judgments are affirmed.

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

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

CAPSTONE BANK,

Appellant,

v.

PERRY-CLIFTON ENTERPRISES, LLC, CHRISTOPHER L. RICHARDS, JOHN ERIC RICHARDS AND CHRISTY RICHARDS,

Appellees.

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

CASE NO. 1D16-1094

Opinion filed November 30, 2017.

An appeal from the Circuit Court for Okaloosa County.
John T. Brown, Judge.

Louis E. Harper, III, T. A. Borowski, Jr., Darryl Steve Traylor, Jr., of Borowski & Traylor, P.A., Pensacola, for Appellant.

William L. Ketchersid, David L. Powell, of Ward & Ketchersid, P.A., Destin, for Appellee Christy Richards.

PER CURIAM.

Capstone Bank challenges the trial court's order finding that an Alabama divorce judgment obtained by former wife Christy Richards constitutes a charging order that has priority over the charging order issued to Capstone Bank in this

proceeding, each regarding the former husband's membership interest in Perry-Clifton Enterprises, LLC, a Florida limited liability company.

A charging order is "a remedy that a creditor of a member in an LLC (or of a partner in a limited partnership) can receive from a court that instructs the entity to give the creditor any distributions that would otherwise be paid to the partner or member from the entity." Alan S. Gassman, After Olmstead: Will a Multiple-member LLC Continue to Have Charging Order Protection?, 84 Fla. B.J. 10, (December 2010); see also Krauth v. First Cont'l Dev-Con, Inc., 351 So. 2d 1106, 1108 (Fla. 4th DCA 1977) ("The charging order is a flexible court-supervised substitute for the more disruptive process of execution by the sheriff."); Trawick, Fla. Prac. & Proc. § 27:11 (2016-2017 ed.) ("A charging order is the method used to collect a judgment when the judgment debtor has partnership or limited liability company assets.").

On April 14, 2015, the Circuit Court of Etowah County, Alabama issued a Final Judgment of Divorce (the "Alabama Judgment") which included reference to the membership interest of the former husband, Christopher Richards, in Perry-Clifton Enterprises, LLC. The Judgment provides that:

> In consideration for the property settlement awarded to Christy, Chris shall receive all right, title and interest in and to all business entities (Richard Motors, Inc.; Sunroc Properties, LLC; Economy Auto Mart, LLC; Perry-Clifton Enterprises; etc.), real property, automobiles, motorcycles, boats, aircraft and any future BP settlement proceeds, not otherwise awarded to the wife. However, the property settlement,

> unpaid alimony, or other financial obligations ordered payable by Chris for the benefit of Christy shall act as a lien against Chris' interest in all property awarded to him until paid in full.

The Alabama Judgment stated: "Each party shall execute any and all documents necessary to carry out the intent of this Order." Christy Richards recorded the Alabama Judgment in the Public Records of Okaloosa County, Florida and filed an affidavit stating that she remained unpaid. She did not seek issuance of a charging order.

On September 22, 2015, the trial court in Okaloosa County, Florida granted Capstone Bank's motion for a charging order against the membership interests of Christopher L. Richards and John Eric Richards in Perry-Clifton Enterprises, LLC. In response, on November 4, 2015, Christy Richards made a motion to intervene and a motion to stay the bank's charging order. The trial court determined that the Alabama Judgment itself constituted a charging order and was obtained prior to Capstone Bank's charging order, thereby giving Christy Richards priority in the membership interest of Christopher L. Richards in Perry-Clifton Enterprises, LLC.

The question is whether the Alabama Judgment is a de facto charging order under Florida law, such that its entry by the Alabama court before entry of the competing charging order of Capstone Bank grants it priority. We start by noting that under Florida law a charging order requires application to a court for its issuance. Section 605.0503(1), Florida Statutes (2014), provides: "*On application* to

a court of competent jurisdiction by a judgment creditor of a member or a transferee, the court may enter a charging order against the transferable interest of the member or transferee for payment of the unsatisfied amount of the judgment with interest." (Emphasis added). This language requires that a judgment creditor must file a motion for a charging order in order for one to be issued. See also Trawick, Fla. Prac. & Proc. § 27:11 (2016-2017 ed.) (citing Fla. R. Civ. P. Rule 1.100(b)) ("The judgment creditor must file a motion for a charging order and allege the judgment, that it has not been paid and the interest that the judgment creditor seeks to charge."); Regions Bank v. Alverne Assocs., LLC, 456 S.W.3d 52, 56 (E.D. Mo. 2014) (citing Mo. Rev. Stat. § 347.119 (1993)) ("To obtain a charging order, the judgment creditor must file an 'application to a court of competent jurisdiction.'"); Jay D. Adkisson, Charging Orders: The Peculiar Mechanism, 61 S.D. L. Rev. 440, 454 (2016) (internal citations omitted) (A charging order "requires that the creditor file a motion for charging order with the court, serve the debtor and often either the LLC, or all its members, and then have a hearing before the court where the merits of the charging order are considered.").

The need for issuance of a charging order is due to its exclusivity as a remedy in Florida, whose Legislature recently enacted a statute making it clear that "a charging order is the *sole and exclusive remedy* by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's

interest in a limited liability company or rights to distributions from the limited liability company" for multiple-member LLCs, the so-called Olmstead patch. § 605.0503(3), Fla. Stat. (2014) (emphasis added).[1] Accordingly, a judgment lien alone does not amount to a charging order. See Branch Banking and Trust Co. v. Crystal Ctr., LLC, No. 8:15-cv-1462-T-30AAS, 2016 WL 7650655, at *1 (M.D. Fla. December 12, 2016) (stating "the interest held by a member in a limited liability company is not subject to execution under Fla. Stat. § 55.061, and a judgment-creditor must, instead, seek a charging order against such interest") adopted in part and reversed in part, No. 8:15-cv-1462-T-30AAS, 2017 WL 57345 (M.D. Fla. January 5, 2017).

Here, the language of the Alabama Judgment creates a lien against the membership interest of Christopher Richards in Perry-Clifton Enterprises, LLC, for nonpayment of his obligations therein, but it does not itself rise to the level of a charging order for which Florida has established a procedure for issuance. As such, Christy Richards would need to apply for a charging order against the membership interest in Perry-Clifton Enterprises, LLC, which is the "sole and exclusive remedy"

[1] "In response to *Olmstead* [*v. F.T.C.*, 44 So. 3d 76 (Fla. 2010)] . . . the Legislature amended Sec. 608.433, *Fla. Stat.* [replaced by § 605.0503] to clarify the exclusive remedies available to a judgment creditor as to a judgment debtor's interest in an LLC: a charging order, or a charging order followed by a foreclosure sale." Regions Bank v. Hyman, No. 8:09-CV-1841-T-17MAP, 2015 WL 1912251, at *1, *7 (M.D. Fla. April 27, 2015). Section 608.433 was repealed in 2015 and became section 605.0503. See Historical and Statutory Notes, § 608.433, Fla. Stat.

available against a limited liability company of this type. § 605.0503(3), Fla. Stat. Because Christy Richards did not obtain a charging order, the trial court erred in concluding that the Alabama Judgment had priority over Capstone Bank's charging order.

REVERSED.

WOLF, RAY, and MAKAR, JJ., CONCUR.

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

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

HAGERTYSMITH, LLC,

Appellant,

v. Case No. 5D16-3655

TIMOTHY GERLANDER, CHRISTINE GERLANDER, KASHIF BATTLA, MARK PHANEUF AND ROSEANN PHANEUF,

Appellees.
_____/

Opinion filed December 1, 2017

Appeal from the Circuit Court
for Orange County,
Janet C. Thorpe, Judge.

Barry Rigby, of Law Offices of Barry Rigby, P.A., Orlando, for Appellant.

Erik E. Hawks, of Walsh Banks, PLLC, Orlando, for Appellees, Timothy Gerlander and Christine Gerlander.

No Appearance for Appellees, Kashif Battla, Mark Phaneuf and Roseann Phaneuf.

ON MOTION FOR REHEARING

LAMBERT, J.

Appellees, Timothy Gerlander and Christine Gerlander, filed a motion for rehearing of this court's prior opinion, dated October 20, 2017. We grant Appellees' motion, withdraw our previous opinion, and substitute this opinion in its place.

HagertySmith, LLC ("HagertySmith") appeals from a final summary judgment entered in favor of its former lakefront neighbors, Timothy Gerlander and Christine Gerlander ("the Gerlanders"), on its claim that it sustained damages as a result of the Gerlanders' construction of a dock and walkway that obstructed HagertySmith's view and enjoyment of the abutting lake. The trial court ruled that HagertySmith had no legally cognizable cause of action for damages because it failed to allege a statutory or contractual basis for its claimed right to an unobstructed view of the lake. We reverse.

HagertySmith and the Gerlanders owned adjacent lakefront real property located on Lake Tibet Butler in Orange County, Florida. The Gerlanders built a dock and walkway that extended into the lake in front of HagertySmith's property. HagertySmith eventually sold its property to a third party, but it asserts that the property's sale price was significantly reduced due to the Gerlanders' dock and walkway diminishing the fair market value of HagertySmith's property. HagertySmith sued the Gerlanders for money damages for the difference between the sale price of its property and the fair market value of the property without the obstructed view.

Contrary to the trial court's analysis, owners of real property abutting a lake have several special common law littoral rights,[1] including the right to an unobstructed view of the lake. *See, e.g.*, *Walton Cty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008). Evidence in this record arguably supports HagertySmith's claim that the

[1] HagertySmith's counsel referred to these rights as "riparian" rights, which is the more commonly used phrase. "Technically, '[t]he term riparian owner applies to waterfront owners along a river or stream, and the term littoral owner applies to waterfront owners abutting an ocean, sea, or lake.'" *5F, LLC v. Dresing,* 142 So. 3d 936, 939 n.3 (Fla. 2d DCA 2014) (quoting *Walton Cty. v. Stop the Beach Renourishment, Inc.,* 998 So. 2d 1102, 1105 n.3 (Fla. 2008)). Here, because HagertySmith and the Gerlanders are waterfront owners abutting a lake, the rights being affected are littoral.

Gerlanders' dock and walkway encroached on that portion of the lake abutting HagertySmith's property; that is, upon HagertySmith's littoral rights. Thus, the trial court erred in concluding that HagertySmith had no cognizable cause of action.

However, our review of the record shows that HagertySmith's present cause of action is insufficiently pled. Under these circumstances, where the summary judgment is based on the mistaken assumption that the party has no cognizable cause of action, but the cause of action as pled is presently legally insufficient, the appropriate remedy is to reverse with directions to enter a dismissal without prejudice with leave to amend. *See Brumer v. HCA Health Servs. of Fla., Inc.*, 662 So. 2d 1385, 1386 (Fla. 4th DCA 1995) ("Where a summary judgment is in essence a substitute for a motion to dismiss for failure to state a cause of action, leave to amend should be granted unless it is clear that no viable cause of action can be stated."). Because HagertySmith may be able to plead a viable cause of action for private nuisance, *see Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 193 (Fla. 1981) (recognizing a cause of action for private nuisance for an obstruction or interference with a riparian owner's rights), we reverse the final summary judgment in favor of the Gerlanders with directions for the trial court to dismiss HagertySmith's present cause of action against the Gerlanders without prejudice and provide HagertySmith leave to amend its complaint.[2]

REVERSED and REMANDED, with directions.

COHEN, C.J., and SAWAYA, J., concur.

[2] Whether HagertySmith is able to eventually prove its claim for damages or if the Gerlanders have any defenses to the claim is not before us, and we express no position on the same.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

| | | |
|---|---|---|
| LEXON INSURANCE COMPANY,<br><br>Appellant,<br><br>v.<br><br>CITY OF CAPE CORAL, FLORIDA; and COCO OF CAPE CORAL, LLC,<br><br>Appellees. | ) | Case No. 2D16-1533 |

Opinion filed November 29, 2017.

Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge.

John H. Pelzer of Greenspoon Marder, P.A., Fort Lauderdale; Victor Kline of Greenspoon Marder, Orlando; Robert E. Ferencik, Jr. and Laura A. Baker of Ferencik Libanoff Brandt Bustamante and Goldstein, P.A., Fort Lauderdale; and Bruce L. Maas of Harris Beach PLLC, Pittsford, New York, for Appellant.

Edmond E. Koester and Alex R. Figares of Coleman, Yovanovich & Koester, P.A., Naples, for Appellee Coco of Cape Coral, LLC.

E.A. "Seth" Mills, Jr. and S. Jordan Miller of Mills Paskert Divers P.A., Tampa, for Amicus Curiae The Surety and Fidelity Association of America.

Debbie Sines Crockett of Cheffy Passidomo, P.A., Tampa; and Lisha Bowen of Lisha Bowen, P.A., Tampa, for Amicus Curiae United Policyholders.

No appearance for remaining Appellee.

MORRIS, Judge.

Lexon Insurance Company appeals a final judgment entered in favor of Coco of Cape Coral, LLC (Coco), in Coco's action for breach of $7.7 million surety bond contracts in connection with the development of a subdivision in Cape Coral, Florida, by Priority Developers, Inc. (Priority). On appeal, Lexon argues, among other things, that Coco's claims are barred by the five-year statute of limitations, which Lexon argues began to run in 2007 when Priority abandoned the project and thus breached the surety bonds.[1] We agree, and because this issue is dispositive of the action, we decline to further comment on the other issues raised in this appeal. Accordingly, we reverse the decision of the trial court.

**I. Facts**

On January 31, 2005, the City of Cape Coral adopted Ordinance 14-05, a development order that governs the commercial and residential development of 446.09 acres. The project at issue in this appeal consists of the development of a single-family subdivision called the Village at Entrada. Priority hired contractors who began work on the subdivision improvements in 2005. The site plan permit authorizing the development of the subdivision was scheduled to expire on September 8, 2007.

[1]The Surety and Fidelity Association of America filed an amicus brief in support of Lexon, and United Policyholders filed an amicus brief in support of Coco.

Ordinance 14-05 required Priority, as the developer, to "provide a surety bond or certified check in an amount of the estimated cost to complete all required site improvements, as determined by the City." In June 2006, Lexon issued two subdivision bonds totaling $7.7 million. This amount represented the cost to complete the remaining work on the subdivision at the time the bonds were issued. The bonds provided as follows:

> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal [Priority] shall construct, or have constructed, the improvements herein described, and shall save the Obligee [the City] harmless from any loss, cost or damage by reason of its failure to complete said work, then this obligation shall be null and void, otherwise to remain in full force and effect, and the Surety, upon receipt of a resolution of the Obligee indicating that the improvements have not been installed or completed, will complete the improvements or pay to the Obligee such amount up to the Principal amount of this bond which will allow the Obligee to complete the improvements.

The City stopped completing inspections on the project in late 2006 and the contractor stopped work on the project in March 2007, both due to nonpayment by Priority. Photographs taken by the City's inspector on June 13, 2007, confirmed that the contractor was no longer working on the project, and the City's computer system indicated "that the site plan was closed" on that date. BankAtlantic, the lender on the project, obtained a foreclosure judgment against Priority in 2009.

On October 27, 2010, the City contacted Lexon, representing that the City "would like to place a claim to have the outstanding work on this project completed" and asking Lexon to notify the City "on the next step in this procedure." Lexon responded by letter on November 8, 2010, requesting information from the City in order for Lexon to review the request. The City did not provide the requested information to Lexon or

move forward on the claim because, by this time, the City was receiving interest from potential buyers of the project. In March 2012, Coco purchased the project for $6.2 million. On July 23, 2012, the City adopted Resolution No. 21-12 demanding that Lexon fulfill its obligations under the bonds.

On October 23, 2012, the City filed this action against Lexon for breach of contract and for declaratory relief. The City then assigned its claims to Coco, which was substituted as plaintiff in the action on January 23, 2014. After a bench trial in November 2015, the court memorialized its findings in a letter to the parties and entered judgment on the bonds for Coco and against Lexon on March 1, 2016. The trial court rejected Lexon's claim that the statute of limitations had expired before the City filed its complaint in October 2012. The court found that the lawsuit was timely filed and that

> surety bonds are a type of insurance contract[] and are breached once wrongful denial of a claim occurs. . . . The bonds contain no deadline by which claims must be made. Under Cape Coral Ordinance 14-05, the bond principal's obligations were not due for ten years from the adoption of the Ordinance, January 31, 2005.

The trial court also made additional rulings which we do not address because they are not relevant to the dispositive issue on which we reverse.

**II. Analysis**

On appeal, Lexon contends that the trial court erred in concluding that the statute of limitations did not bar Coco's claim because, Lexon argues, "the time to sue on a bond commences when the principal breaches its underlying obligation." Lexon argues that the five-year statute of limitations applicable to a claim for breach of contract began to run in March 2007 because that is the date Priority abandoned the project and the City's cause of action under the bonds accrued.

A legal action on a contract must be commenced within five years, and the cause of action accrues when the last element constituting the cause of action occurs. §§ 95.11(2)(b), 95.031(1), Fla. Stat. (2012). "Florida case law consistently holds that a cause of action for breach of contract accrues and the limitations period commences at the time of the breach." Tech. Packaging, Inc. v. Hanchett, 992 So. 2d 309, 313 (Fla. 2d DCA 2008). "Generally, 'the issue of whether [a] claim is barred by the statute of limitations is a question of law subject to de novo review.' " Access Ins. Planners, Inc. v. Gee, 175 So. 3d 921, 924 (Fla. 4th DCA 2015) (alteration in original) (quoting Beltran v. Vincent P. Miraglia, M.D., P.A., 125 So. 3d 855, 859 (Fla. 4th DCA 2013)). But "[t]he occurrence of a breach . . . is question of fact." Id. The question in this case centers on when the City's, now Coco's, cause of action accrued against Lexon on the surety bonds.

"[S]uretyship has been described as 'a contractual tripartite relationship in which one party (the surety) guarantees to another party (the obligee) that a third party (the principal) will perform a contract in accordance with its terms and conditions. The surety promises the obligee to answer the debt, default, or miscarriage of the principal.' " Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1226 (Fla. 2006) (quoting Edward Etcheverry, Rights and Liabilities of Sureties, in Florida Construction Law and Practice at 8-7 (5th ed. 2006)). Thus, the surety's liability to the obligee is based on the liability of the principal. Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992); see 72 C.J.S. Principal and Surety § 86 (2017) ("On a breach by the principal of the contract or condition secured, the surety is liable.").

In Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119, 1121-22 (Fla. 1998), the court held that the statute of limitations for an action on a surety bond began to run when the contractor defaulted, which under the facts of the case was when the work was accepted by the obligee, not when the obligee discovered latent defects in the work nine years later. The court noted that it was the principal's "default" that "constituted a breach," rejecting the obligee's argument that "the statute of limitations did not begin to run against [the surety] until" the surety was "called upon to cure the default." Id. at 1121 n.5.

"With respect to a claim arising from a bond, it is . . . well settled that the date of accrual occurs at the time of the breach of the bond." U.S. v. Cocoa Berkau, Inc., 990 F.2d 610, 613 (Fed. Cir. 1993). In Cocoa Berkau, the "critical issue on appeal [was] which event, the default . . . by the bond principal or the default of payment of . . . damages by the bond surety, constituted the breach of the bond which fixed liability for purposes of triggering the statute of limitations." Id. The government argued that the breach occurred when the surety refused payment under the bond after the government demanded payment, but the appellate court disagreed.

The court looked to the language of the bond "stipulating the relevant obligations of the bond principal and its surety." Id. Specifically, the bond provided that upon default of the principal, the principal or surety shall pay damages to the obligee "as may be demanded." Id. The court stated that the bond "placed an obligation on the bond principal to" perform a certain action and that the "bond was breached, and thus the government's right of action accrued, when the principal failed to" perform that action, "not when the surety failed to pay liquidated damages." Id. "[The surety's] duty

as bond surety to pay liquidated damages arose as a consequence of the default . . . by the principal, not on a demand for the damages by the government." Id.

The court went on to hold that a demand by the government for payment "was merely a procedural step for obtaining the damages and did not in itself create the liability." Id.; cf. U.S. v. Ins. Co. of N. Am., 83 F.3d 1507, 1510 (D.C. Cir. 1996) (holding that demand for payment was a prerequisite to commencement of statute of limitations where bond expressly stated that obligee "shall make a written demand" as a condition precedent to surety's liability). The court in Cocoa Berkau further noted that the

> government's interpretation that its right of action accrues only when demand for liquidated damages is made on the surety would subvert the purpose of the statute of limitations, which is intended to ensure that actions are brought in a timely fashion, before they become stale. . . . The accrual of a right of action should occur upon default by a liable party, not when a creditor takes steps to procure performance.

990 F.2d at 614 (citations omitted).

We find the reasoning of Cocoa Berkau persuasive. The surety bond in this case placed an obligation on the principal, Priority, to construct improvements on the project. When Priority failed in its obligation to construct those improvements, the City's right of action on the bond accrued. See id.; see also N.J. Div. of Taxation v. Selective Ins. Co. of Am., 944 A.2d 667, 674 (N.J. Super. Ct. App. Div. 2008) ("[A] claim against a surety arises upon the principal's default." (quoting Ark. State Highway Comm'n v. Union Indem. Ins. Co., 748 S.W.2d 338, 339 (Ark. 1988))); 72 C.J.S. Principal and Surety § 85 ("[T]he liability of a surety accrues on the breach of the contract."). Lexon's duty to pay under the bond arose as a consequence of Priority's failure to construct the improvements, not as a result of the City's demand for damages.

The language in the bond referring to Lexon's "receipt of a resolution" by the City sets forth the procedure by which the City is to seek payment under the bond, but it is not the fact that created Lexon's liability. Under the facts of this case, Lexon became liable when Priority failed to construct the improvements.[2] To hold that the statute of limitations commenced when the City passed a resolution demanding payment in 2012 would be contrary to the purpose of the statute of limitations and would allow the City to wait to bring a claim against Priority as late as 2017, ten years after Priority failed in its obligation under the bonds. See Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001) ("[A] main purpose of the statute of limitations is to protect defendants from unfair surprise and stale claims.").

We disagree with the trial court's conclusion that because "surety bonds are a type of insurance contract," they "are breached once wrongful denial of a claim occurs." While a surety contract is a type of insurance contract, "the surety relationship possesses characteristics that are unique and distinct from the traditional liability insurance relationship." Dadeland Depot, Inc., 945 So. 2d at 1226. Because the unique nature of the surety contract bases the surety's liability to the obligee on the liability of the principal, the default of Priority, the principal, was the act that breached the bonds and started the running of the statute of limitations for purposes of Lexon's liability to the City or Coco.

By noting that that the "principal's obligations were not due for ten years from the adoption of the Ordinance, January 31, 2005," the trial court suggested that

[2]The date that a contractor abandons a project commences the statute of limitations for a breach of contract claim against the contractor. See Alexander v. Suncoast Builders, Inc., 837 So. 2d 1056, 1058-59 (Fla. 3d DCA 2002).

Priority would not be in breach of the bond until January 2015. The trial court relied on language in the ordinance that provides in pertinent part that "[t]he physical development authorized under this Development Order shall terminate in ten years . . . , unless an extension is approved by" the city council. However, it is clear that Priority stopped its work in March 2007 and there is no indication that Priority ever resumed its obligations. Further, the trial court's interpretation that Priority had until 2015 to complete its obligation would allow the City to bring a claim against Lexon as late as 2020, when the evidence is clear that Priority breached the bond in 2007. This language does nothing more than address when the City's authorization of the project expires; it has no bearing on when Priority breached the bonds.

In sum, the City's or Coco's cause of action accrued at the earliest in March 2007, when Priority stopped development of the project, or at the latest in September 2007. The City's action filed in October 2012 was filed beyond the five-year statute of limitations and was therefore time-barred. Accordingly, we reverse and remand for the trial court to enter judgment in favor of Lexon.

Reversed and remanded.

LUCAS, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.

# Third District Court of Appeal

**State of Florida**

Opinion filed November 29, 2017.
Not final until disposition of timely filed motion for rehearing.

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No. 3D16-2322
Lower Tribunal No. 12-1321

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**Isabel Magdalena, et al.,**
Appellants,

vs.

**Toyota Motor Corporation, et al.,**
Appellees.

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

Fowler Rodriguez LLP, and Luis E. Llamas, for appellants.

Bowman and Brooke LLP, and Stephanie M. Simm, John C. Seipp, Jr., and Donald A. Blackwell, for appellees Toyota Motor North America, Inc., Toyota Tsusho America, Inc., and Toyota Motor Sales USA, Inc.

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

ROTHENBERG, C.J.

Isabel Magdalena, individually and as plenary guardian of Eugenio Magdalena, and Eugenio Magdalena, individually (collectively, "the plaintiffs")

appeal the trial court's order granting Toyota Motor North America, Inc., Toyota Tsusho America, Inc., and Toyota Motor Sales USA, Inc.'s (collectively, "Toyota") motion to tax costs and the final judgment subsequently rendered setting the amount of the costs award. The orders under review are based on the trial court's earlier ruling granting Toyota's motion to dismiss on the basis of forum non conveniens and its later finding that, pursuant to section 57.041, Florida Statutes (2016), and Florida Rule of Civil Procedure 1.525, Toyota was entitled to its costs as the "prevailing party." Because we conclude that a dismissal on the ground of forum non conveniens is not a judgment or ruling on the merits of the claims against Toyota, but rather a ruling which merely provides that another forum is more convenient and would best serve the ends of justice, we conclude that the trial court erred by awarding Toyota its costs.

## STANDARD OF REVIEW

As the issue before this Court involves the interpretation of a statute, which is a pure question of law, the standard of review is de novo. B.Y. v. Dep't of Children & Families, 887 So. 2d 1253, 1255 (Fla. 2004); Winn-Dixie Stores, Inc. v. Reddick, 954 So. 2d 723, 730 (Fla. 1st DCA 2007) ("An appellate court reviews whether a trial court's award of costs is excessive for an abuse of discretion; however, whether a cost requested may be awarded, at all, is a question of law to be reviewed de novo.") (citation omitted).

## ANALYSIS

The trial court awarded Toyota its costs as the prevailing party under section 57.041. We conclude that this was error for several reasons. First, there is existing authority that calls into question whether the "prevailing party" standard is even applicable when assessing whether a party is entitled to an award of costs under section 57.041. See Wolfe v. Culpepper Constructors, Inc., 104 So. 3d 1132, 1137 (Fla. 2d DCA 2012) (en banc) (receding from its earlier decision in Spring Lake Improvement Dist. v. Tyrrell, 868 So. 2d 656 (Fla. 2d DCA 2004), and holding that the "prevailing party" standard is inapplicable to a determination of whether a party is entitled to an award of costs under section 57.041); Bessey v. Difilippo, 951 So. 2d 992, 995 (Fla. 1st DCA 2007) (holding that '"prevailing party' is not the statutory standard for costs awards") (footnote omitted); but see Granoff v. Seidle, 915 So. 2d 674 (Fla. 5th DCA 2005) (applying the "prevailing party" standard to a determination under section 57.041).

Second, regardless of whether or not the "prevailing party" standard may be applied under section 57.041, it was error to award Toyota its costs under section 57.041 because no judgment has been entered, and Toyota is not a "prevailing party" merely because the litigation will take place in a different forum.

### A. **Section 57.041**

Section 57.041 provides in relevant part as follows:

**Costs; recovery from losing party.—**

> (1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators in actions when they are not liable for costs.

Here, the plaintiffs have not obtained a "judgment" within the meaning of section 57.041; the case has simply been transferred to another forum. There was no determination of liability or holding on the merits, and the dismissal was conditioned on Toyota not contesting jurisdiction or raising certain defenses, such as the statute of limitations, should the case be refiled in Panama or Japan within one year of the date the dismissal order becomes final. In fact, the case has already been refiled in Panama against all of the Toyota defendants.

Although we have not found a case specifically addressing whether an order dismissing a case on forum non conveniens grounds constitutes a "judgment," the following cases are persuasive. In Do v. GEICO General Insurance Co., 137 So. 3d 1039, 1044-45 (Fla. 3d DCA 2014), this Court held that the order of dismissal for lack of prosecution was not a judgment or its functional equivalent, when determining whether a party was entitled to an award of attorney's fees under section 627.428, Florida Statutes, which requires the "rendition of a judgment" for entitlement to attorney's fees. Additionally, in Sal's Abatement Corp. v. Sid Harvey Industries, Inc., 718 So. 2d 885 (Fla. 3d DCA 1998), and O.A.G. Corp. v. Britamco Underwriters, Inc., 707 So. 2d 785, 786 n.1 (Fla. 3d DCA 1998),

*abrogated on other grounds by* Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002), this Court held that a voluntary dismissal is not an adjudication on the merits and therefore, does not constitute a judgment or its functional equivalent. See also Guarantee Ins. Co. v. Worker's Temp. Staffing, Inc., 61 So. 3d 1233 (Fla. 5th DCA 2011) (same).

In conclusion, section 57.041 is clear and unambiguous. Only a "party recovering judgment shall recover his or her legal costs." No judgment or the functional equivalent has been obtained by Toyota. Thus, Toyota is not entitled to recover its costs at this stage of the proceedings.

B. **Prevailing Party**

Toyota is also not entitled to recover its costs at this stage of the proceedings as a "prevailing party." The parties agree that the prevailing party (the party that prevailed on the significant issues below) is entitled to recover its costs.

Although there is no Florida case directly on point, there are federal cases that have addressed this very issue. In Dattner v. Congra Foods, Inc., 458 F.3d 98, 100 (2d Cir. 2006), the United States Circuit Court noted that "[a] dismissal on the ground of *forum non conveniens* does not, after all, immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims; it merely provides that another forum would be the most convenient and best serve the ends of justice." (italics in original) (internal quotation omitted). The Second Circuit therefore

found that "because Dattner [was] free to pursue his claims against the defendants in France, and because it remains to be seen which party will, in fact, prevail on the merits, defendants have not yet achieved a judicially sanctioned change in the legal relationship of the parties so as to be considered 'prevailing' under Rule 54(d)." Id. at 103; see also United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1057 (10th Cir. 2004) (holding that Praxair was the prevailing party in the context of attorney's fees because "Grynberg is now prohibited from bringing further claims on these facts"); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1076-77 (7th Cir. 1987) (holding that the defendant was not a "prevailing party" where the complaint was dismissed without prejudice because "dismissal without prejudice . . . does not decide the case on the merits. . . . The defendant remains at risk.").

We find these cases persuasive as the reasoning is sound. An order granting dismissal on forum non conveniens grounds resolves a procedural issue, not a substantive issue in the case. Liability has yet to be determined. Although the forum issue was hotly debated and extensively litigated, and may, at the end of the litigation, be determined to have been a "significant issue" upon which Toyota prevailed, resolution of whether Toyota may recover its costs litigating that issue is premature. Determination of whether a party was the prevailing party on the significant issues of a case requires consideration of the final judgment rendered as

to the parties at the end of the case. See Moritz v. Hoyt Enters., Inc., 604 So. 2d 807, 810 (Fla. 1992) (holding that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party"); Lake Region Paradise Island, Inc. v. Graviss, 323 So. 2d 610, 612 (Fla. 2d DCA 1975) (concluding that costs were not taxable against the party that caused the mistrial and that the determination of entitlement to costs must await final judgment); Sharpe v. Ceco Corp., 242 So. 2d 464, 465 (Fla. 3d DCA 1970) ("The prevailing party is regarded as that party who has affirmative judgment rendered in his favor at the conclusion of the entire case.").

The claims filed by the plaintiffs against Toyota in Miami-Dade circuit court are still pending, albeit in Panama, due to the forum non conveniens dismissal and based on the refiling of the plaintiffs' claims against these same Toyota defendants in Panama. While **one** significant issue in the litigation **may** have been resolved in Toyota's favor,[1] whether these Toyota defendants may be entitled to recover costs will ultimately depend on whether it is determined that Toyota or a specific Toyota company is the prevailing party at the conclusion of its litigation with the plaintiffs in the case. We, therefore, conclude that the trial court's consideration of Toyota's

[1] This Court takes no position on whether a dismissal on forum non conveniens grounds, which is a procedural ruling, as opposed to a substantive ruling on the merits of the claims alleged in the complaint, can be considered a "significant issue" upon which a motion for costs may be directed for purposes of determining prevailing party costs.

motion for costs as the prevailing party and subsequent award of costs was legal error. Accordingly, we reverse the orders on appeal.

Reversed.

# Third District Court of Appeal

**State of Florida**

Opinion filed November 29, 2017.
Not final until disposition of timely filed motion for rehearing.

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No. 3D15-1821
Lower Tribunal No. 10-674-K

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**John McGrath,**
Appellant,

vs.

**Robert Martin, Jr., et al.,**
Appellees.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

The Corona Law Firm, P.A., and Ricardo M. Corona, for appellant.

Johnson Law Group, and Jeffrey W. Johnson and Michael E. Wargo (Boca Raton), for appellees.

Before SUAREZ, LOGUE, and LUCK, JJ.

LOGUE, J.

John McGrath appeals an order dismissing his case for lack of prosecution under Florida Rules of Civil Procedure 1.420(e). McGrath sued Martin for personal injuries stemming from an accident. On March 5, 2015, Martin filed a notice of lack of prosecution asserting that no record activity had occurred in the prior ten months. The record, however, reflected activity had in fact occurred within the prior ten months, namely, plaintiff's co-counsel's motion to withdraw filed on October 17, 2014, and the trial court's order granting the motion to withdraw on November 17, 2014.

Nevertheless, the trial court dismissed the case on June 8, 2015. McGrath filed a timely motion for rehearing under Florida Rule of Civil Procedure 1.530 pointing out the legal error. Martin responded by arguing that Rule 1.530 did not apply to dismissals for lack of prosecution. The trial court agreed stating that "the 1.530 analysis doesn't apply because this was not a non-jury trial, nor was it a summary judgment." It denied the motion for rehearing.

On appeal, Martin continues to argue that Rule 1.530 does not apply to dismissals for lack of prosecution. We reject this argument. See, e.g., Renovaship, Inc. v. Quatremain, 208 So. 3d 280, 284 (Fla. 3d DCA 2016) ("In the instant case, the order dismissing the action for lack of prosecution contained no reservation of jurisdiction, and the order became final when no motion for rehearing was served within the fifteen-day period following the order of dismissal. See Fla. R. Civ. P.

1.530(b).”); Beverly Enters.-Fla., Inc. v. Lane, 855 So. 2d 1172 (Fla. 5th DCA 2003) (recognizing the trial court could rehear an order which was “dismissed without prejudice for failure to prosecute”); Cape Royal Realty, Inc. v. Kroll, 804 So. 2d 605, 606 (Fla. 5th DCA 2002) (recognizing the trial court could use Rule 1.530 to rehear a “final order dismissing [plaintiff's] case for failure to prosecute”). See generally, De La Osa v. Wells Fargo Bank, N.A., 208 So. 3d 259, 261 (Fla. 3d DCA 2016). We note neither party cited these cases to the trial court.

Reversed and remanded for further proceedings consistent with this opinion.

SUAREZ, J., concurs.

LUCK, J., concurs in result only.

LUCK, J., concurring in the result.

I agree with the conclusion reached by the majority opinion but I would get there in a different way. I would reverse the trial court's Rule 1.420(e) order of dismissal for lack of prosecution because there was record activity within the ten months preceding the notice of inactivity. See Bay Park Towers Condo. Ass'n, Inc. v. Triple M. Roofing Corp., 55 So. 3d 591, 592 (Fla. 3d DCA 2010) (reversing Rule 1.420(e) lack of prosecution dismissal because "in the ten-month period that preceded the service date of the lack of prosecution notice, there were five docket entries which provided five reasons why the notice of no activity was a nullity"); see also HSBC Bank USA, N.A. v. Cochrane, 180 So. 3d 1163, 1164 (Fla. 4th DCA 2015) (reversing Rule 1.420(e) dismissal because "appellant filed a motion to mediate, which constituted record activity, within the ten-month period immediately prior to the trial court's notice of lack of prosecution"). Because the trial court incorrectly found no record activity within ten months of the notice, and reversal of the dismissal order is appropriate for this reason, I wouldn't reach the issue of whether rehearing of the same order should have been granted under Rule 1.530.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PINELLAS COUNTY, FLORIDA, an Independent and Chartered Florida County,

Appellant,

v.

THE RICHMAN GROUP OF FLORIDA, INC., a Florida corporation,

Appellee.

Case No. 2D16-3279

Opinion filed November 29, 2017.

Appeal from the Circuit Court for Pinellas County; Walter L. Schafer, Jr., Judge.

Sylvia H. Walbolt, Chris W. Altenbernd, and Nicholas A. Brown of Carlton Fields Jorden Burt, P.A., Tampa; and James Bennett, Pinellas County Attorney's Office, Clearwater, for Appellant.

Landis V. Curry, III, Scott A. McLaren, E.D. Armstrong, III, and Fred C. Marshall, II of Hill, Ward & Henderson, P.A., Tampa, for Appellee.

CRENSHAW, Judge.

Pinellas County appeals the final judgment awarding the Richman Group of Florida, Inc., over $16.5 million in damages under 42 U.S.C. § 1983 (2012), based on

the trial court's conclusion that the County violated Richman's substantive due process and equal protection rights under the Fourteenth Amendment to the United States Constitution by denying Richman's proposed amendment to the County's land use plan. Because the trial court erred in concluding that the County had no rational basis to deny the proposed amendment, we reverse the final judgment. In light of this disposition, we do not reach the County's remaining arguments.

## I. BACKGROUND

In 2012, Richman executed a contract to purchase 34.55 acres of land in the City of Safety Harbor subject to Richman obtaining certain government approvals to develop the land. At issue in this appeal is Richman's attempt to obtain approval of an amendment to the Countywide Future Land Use Plan that would have changed the land use designation of roughly sixteen acres of land from Industrial Limited (IL) to Residential Medium (RM) so that Richman could develop the property in a way that is not permitted on land with the IL designation.

### A. The Legislative Framework

Under the Special Act governing the County's land use plan, only a local government with jurisdiction over the subject property may submit a proposal to amend the plan to the Pinellas Planning Council. Ch. 90-396, § 10(4)(a), at 40, Laws of Fla. The Council reviews the proposal and makes a recommendation to approve, deny, continue, or alter it. Id. § 10(4)(a), (b), at 40. If the Council recommends approval, it forwards the proposal along with its recommendation to the Board of County Commissioners for a public hearing and vote in the Board's capacity as the County Planning Authority (CPA). Id. § 10(4)(d), at 40. If the CPA votes to deny the proposal,

any substantially affected person may seek a hearing before an Administrative Law Judge (ALJ) pursuant to Chapter 120, Florida Statutes; this hearing "is limited to a review of the facts pertaining to the subject property, the countywide future land use plan, and those rules, standards, policies, and procedures applicable thereto." Id. § 10(4)(d), (f), at 40-41. The hearing "is not the appropriate forum for a constitutional challenge." Id. § 10(4)(f), at 41. After the hearing, the ALJ's "recommended order shall be forwarded to and considered by the [CPA] in a final hearing. The basis for the [CPA's] final decision approving or denying the proposed amendment is limited to the findings of fact of the [ALJ]." Id. § 10(4)(d), at 40-41. The CPA's decisions under the act "are legislative in nature" and are subject to judicial review. Id. § 10(4)(g), at 41. Importantly, nothing in the Special Act mandates that proposed amendments that are consistent with the amendment review criteria must be granted by the CPA.

In line with this legislative framework, Richman applied to the City of Safety Harbor to initiate the process of amending the County's land use plan. After the Safety Harbor Commission approved Richman's proposal by a vote of 3-2, despite significant neighborhood opposition to it, the city submitted the proposal to the Council, which recommended approval by a vote of 8-5. The Council forwarded the proposal to the CPA along with its recommendation to approve the amendment.

In May 2013, the CPA considered Richman's proposal at a public hearing where hundreds of residents from the area surrounding the subject property expressed opposition to the amendment. The residents articulated specific, rational concerns that amending the land use designation to allow Richman's planned development of the property would cause traffic, transportation, safety, and economic problems. Members

of the CPA, as well as some of the residents, highlighted the scarcity of IL-designated land in the area and explained that removing the IL designation would harm the local economy because it would result in even less land available to support "target employers" that bring high-paying jobs to the County's residents. Citing Resolution 06-3, which set forth "the need to reserve industrial parcels for target employers" in Pinellas County, the CPA unanimously voted to deny the amendment.

**B. The Administrative Proceedings**

As a person substantially affected by the CPA's denial, Richman obtained a hearing before an ALJ. The parties stipulated that the issue to be decided at that hearing was "[t]he manner in, and extent to, which the amendment is consistent" with the criteria in the rules governing amendments to the County's land use plan. The rules, promulgated pursuant to the Special Act, provide that "[i]n the consideration of a regular Countywide Plan Map amendment, it is the objective of these Countywide Rules to evaluate the amendment so as to make a balanced legislative determination based on" certain relevant considerations. The crux of the parties' dispute at this hearing was whether Resolution 06-3 was part of these relevant considerations. Agreeing with Richman, the ALJ resolved this dispute by finding that "Resolution 06-3 . . . is not a source of criteria applicable to the [a]mendment" because that resolution had not been "repeated, paraphrased, or adopted by reference in the Countywide Rules." Thus, to the extent that the CPA denied the amendment because it was inconsistent with the relevant considerations in the rules—namely, Resolution 06-3—the ALJ concluded that the amendment was indeed consistent with the relevant criteria. However, the ALJ did

not find, or otherwise conclude, that the CPA had to approve the amendment because it was consistent.

The ALJ did find that other sections of the rules were relevant to the dispute. Among those other sections, the ALJ highlighted section 2.3.3.6.1, which provides the following purpose behind the IL designation:

> It is the purpose of this category to depict those areas of the county that are now developed, or appropriate to be developed, in a limited industrial manner; and so as to encourage the reservation and use of consolidated areas for industrial and industrial/mixed use in a manner and location consistent with surrounding use, transportation facilities, and natural resource characteristics.

Regarding the consistency between the current use of the land and the purpose laid out in section 2.3.3.6.1, the ALJ found that the property currently has "numerous industrial buildings and structures associated with a citrus processing facility that is no longer in operation." The property is otherwise undeveloped. Commercial areas run along the southern and western borders of the property, whereas a residential area runs along its eastern border. To the north is a large, undeveloped area that separates the property from another residential area. According to the ALJ, "[t]he area is not part of a larger consolidated industrial area, but the Richman parcel, together with the IL parcel across 10th Street South, could function as a small industrial park." The ALJ found that the property "can accommodate certain 'target employers,' " but it noted that the IL designation also broadly authorizes "other uses that would be incompatible with surrounding uses." In other words, only a limited array of target employers could utilize the subject property in a manner consistent with the surrounding properties.

Although the ALJ ultimately recommended that the amendment be approved, noting that it "creates more points of consistency and fewer points of

inconsistency than the existing" designation, the ALJ expressly recognized that the final decision was left to the CPA, which had to make a "balanced legislative determination" whether to amend the plan or maintain the status quo. In making that legislative determination, the ALJ explained, "the CPA [was] not bound by the balance struck by the [ALJ], based on his perception of the differential importance of various findings." Nowhere in the ALJ's order did it find that the CPA had no rational basis to deny the amendment or that the preservation of IL land for target employers did not constitute a rational basis. Nor did the ALJ find that the existing designation was improper or that the current use of the property was inconsistent with its IL designation.

Pursuant to the Special Act, the proposed amendment, along with the ALJ's order, came before the CPA for a final public hearing in January 2014. Again, numerous residents voiced their opposition, highlighting the problems that would be caused if the amendment was approved. The CPA expressed its disappointment with the ALJ's finding that Resolution 06-3 was not an official criterion applicable to the proposal, explaining that it had always intended for the resolution to be a part of the criteria and it relied on "staff and others telling [the CPA], yes, everything is in sync." Recognizing that it was bound only by the ALJ's findings of fact and that it still had to make the ultimate legislative decision, the CPA voted unanimously to deny the proposed amendment.

**C. The § 1983 Proceedings**

Instead of seeking judicial review of the CPA's denial as expressly authorized under the Special Act, Richman chose to sue the County for monetary damages under § 1983, alleging violations of its equal protection and substantive due

process rights as secured by the Fourteenth Amendment to the United States Constitution. In its equal protection claim, Richman asserted that the CPA treated it differently from similarly-situated applicants by denying its application "without any conceivable basis to support its actions, or any rational relationship between its denial and any legitimate government interests." On the substantive due process claim, Richman asserted that the denial "was an irrational, arbitrary, and capricious decision without any rational basis in fact or law." In support of both theories, Richman alleged that "the CPA was legally required to approve" the amendment at the final hearing once the ALJ found that the amendment was consistent with all relevant criteria and that, instead of applying the existing criteria, the CPA denied the amendment based on "significant political pressure." (Emphasis added).

After a bench trial, the trial court entered a final judgment in favor of Richman on both counts. The court explained that the equal protection claim required a ruling "as to whether the County had a rational basis for denying" Richman's amendment and that the same " 'rational basis' question [was] the principal issue involved in the arbitrary and capricious due process claim." See, e.g., Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467-68 (7th Cir. 1988) (noting that the same rational basis test applies to equal protection and substantive due process challenges).

On the question of whether the County had a rational basis to deny the application, the trial court found that the ALJ "ruled that 'industrial land preservation' was not a legitimate reason/rational basis for denying the [a]mendment." The court also determined that the ALJ found the existing IL designation on the property was "not consistent" with the relevant criteria in the rules. The trial court characterized both of

these as findings of fact that were binding on the CPA under the Special Act and that were simply "ignor[ed]" by the CPA in denying the amendment. Expanding this perceived violation of the Special Act to the Constitutional dimension, the trial court concluded that "[b]ecause the CPA applied a non-existent criterion to deny Richman's Amendment, the County acted arbitrarily and capriciously in violation of Richman's Constitutional right to due process protections." But the trial court seemingly contradicted that conclusion by also finding that "[t]he evidence establishes that the CPA's final decision was based on a desire to appease the Safety Harbor residents, whose forceful opposition was brought to bear throughout the Countywide amendment process." Thus, the trial court apparently determined that both the constituents' rational objections and the economic impact of losing even more scarce industrial land suitable for target employers were not rational bases because those factors were not explicitly contained in the relevant criteria in the rules.

Based on its ruling that the County had no rational basis to deny the amendment, the trial court concluded that Richman was also entitled to relief on its equal protection claim because, "given that the relevant characteristics of the Richman Amendment and its comparators were the same, there is no rational basis for distinguishing between these amendments." The court noted that the "only meaningful difference" between Richman's amendment and its comparators was the "overwhelming neighborhood opposition," but it determined that such opposition was not a rational basis to deny the amendment.

The trial court rejected the County's argument that the CPA had the discretion to make a legislative decision to maintain the status quo based on the court's

determination that the CPA's discretion was not "unbridled" in light of the limitations placed on it by the Special Act and the CPA's own review criteria. Quoting only a portion of this court's holding in Island, Inc. v. City of Bradenton Beach, 884 So. 2d 107, 108 (Fla. 2d DCA 2004), the trial court acknowledged that the CPA's legislative decision was subject to the deferential "fairly debatable" standard of review, but it concluded that the CPA's decision to deny the amendment was not fairly debatable because the ALJ found both that the amendment satisfied the review criteria and that the current IL designation was not consistent with that same criteria.

The County now argues that the trial court erred in concluding that the ALJ's order established that the CPA could not rationally deny the amendment because, first, the ALJ made no such finding and, second, even under the limitations placed on it by the Special Act, the CPA still had the discretion to make the legislative, policy decision to maintain the status quo and its decision to do so was fairly debatable. Even if the trial court was correct that the Special Act mandated approval of the amendment, the trial court erred in equating this ostensible violation of state law to a violation of the Constitution because, under the exacting Constitutional standard, the CPA's decision was still rationally grounded in the public interest. The County maintains that the trial court similarly erred in granting relief on the equal protection claim because the court based its equal protection ruling on the same defective rational basis analysis it conducted on the substantive due process claim.

Richman responds that, in light of the limitations placed on it by the Special Act, the County had no discretion to deny the amendment once the ALJ issued its order. In fact, at oral argument, Richman's counsel emphasized that its position is

that the CPA had absolutely no discretion to do anything other than approve the amendment at that point. Richman contends that the County's decision to intentionally violate the Special Act in order to appease the residents, without more, amounts to arbitrary and capricious action in violation of the Constitution.

## II. ANALYSIS

Turning first to the due process claim, to support its claim for damages under § 1983 based on a violation of its substantive due process rights, Richman had to show that it had been deprived of a constitutionally recognizable interest and that the deprivation was the result of arbitrary and capricious action on the part of the County. See Gardens Country Club, Inc. v. Palm Beach County, 712 So. 2d 398, 403 (Fla. 4th DCA 1998) (citing Exec. 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991)). The County raises no challenge to the trial court's finding that Richman had a constitutionally recognizable interest in the proposed amendment. As such, our review is limited to the question of whether the County's denial of the amendment was arbitrary and capricious.

"Substantive due process challenges are analyzed under the rational basis test; that is, a legislative act of the government will not be considered arbitrary and capricious if it has 'a rational relationship with a legitimate general welfare concern.' " Id. at 404 (quoting Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995)). "In other words, the Plaintiff must show the government's infringement was 'arbitrary, conscience shocking, or oppressive in the constitutional sense, not merely incorrect or ill-advised.' " 545 Halsey Lane Props., LLC v. Town of Southampton, 45 F. Supp. 3d 257, 266 (E.D.N.Y. 2014) (quoting Ferran v. Town of Nassau, 471 F.3d 363,

369-70 (2d Cir. 2006)). "In the zoning context, the issue is whether the [government's] action bore any substantial relation to the public welfare." Exec. 100, 922 F.2d at 1541. If the government's legislative decision is "at least debatable" there is no denial of substantive due process. Shelton v. City of College Station, 780 F.2d 475, 483 (5th Cir. 1986) (en banc). "Arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of governmental authority that will offend the substantive component of the Due Process Clause." Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999).

> [T]he conventional planning dispute—at least when not tainted with fundamental procedural irregularity, racial animus, or the like—which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.

Creative Env'ts Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982) (emphasis added).

**A. The Fairly Debatable Standard**

In resolving Richman's substantive due process claim, the trial court was required to apply the fairly debatable standard of review to the CPA's final decision. See Martin County v. Section 28 P'ship, Ltd., 772 So. 2d 616, 619 (Fla. 4th DCA 2000) (explaining that there is a "close relationship between the fairly debatable standard and the review of substantive due process claims" (citing Martin County v. Section 28 P'ship, Ltd., 676 So. 2d 532, 537 (Fla. 4th DCA 1996))). "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Martin County v. Yusem, 690 So.

2d 1288, 1295 (Fla. 1997). "This court reviews the trial court's application of the fairly debatable standard de novo." Island, 884 So. 2d at 108.

Because reasonable persons could differ as to the propriety of the CPA's decision, we conclude that the trial court erred in ruling that the CPA's decision to maintain the status quo was not fairly debatable. First, despite Richman's insistence below and before this court, nothing in the Special Act mandated the CPA's approval of the amendment once the ALJ found that the amendment was consistent with the review criteria in the rules. On the contrary, as explained by the ALJ, even amendments that are consistent with the relevant considerations in the rules are still subject to the CPA's final legislative decision under the Special Act.

Although the trial court recognized that the CPA was required to make the final legislative decision, the court concluded that the CPA's discretion in making that decision was limited by the Special Act and that the CPA violated those limitations by ignoring the ALJ's findings. But, in arriving at this conclusion, the trial court mischaracterized the ALJ's findings. For instance, in reviewing the ALJ's order, the trial court concluded that "the specific issue presented to [the ALJ] was whether the County had any rational basis for denying the Amendment" under the rules. However, the parties stipulated that the issue presented to the ALJ was the manner in, and extent to, which the amendment was consistent with the rules, not whether the County had any rational basis for denying the amendment. Even if the ALJ did conclude that the CPA had no rational basis to deny the amendment, that conclusion would not be binding on the CPA because the CPA was limited only by the ALJ's findings of fact, whereas the question of whether a decision has a rational basis for the purposes of a § 1983 claim is

a question of law. See Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1578 (11th Cir. 1989). Moreover, the hearing before the ALJ was "limited to a review of the facts pertaining to the subject property, the countywide future land use plan, and those rules, standards, policies, and procedures applicable thereto." Ch. 90-396, § 10(4)(f), at 41. Thus, under the plain language of the Special Act, the ALJ could not have ruled on the question of whether the CPA had a rational basis on which to deny the amendment, and the trial court erred in so concluding.

The trial court also erred in ruling that the ALJ's findings established that the existing classification was inconsistent with the criteria in the rules and relying on that inconsistency to conclude that, because no reasonable person could agree that an inconsistent designation should remain, the CPA's decision was not fairly debatable. To be sure, the ALJ did find that "[t]he IL category, with all potential uses allowed, is 'in the broadest sense' inconsistent with single-family uses to the north and east" and that "[t]he IL designation within the [Scenic Non-Commercial Corridor designation] is inconsistent with the goal of the corridor and is a factor (not a requirement) in favor of changing [the] current IL designation." (Emphasis added). When it conducted its own balancing of the relevant considerations, the ALJ recommended approving the amendment because "the amendment creates more points of consistency and fewer points of inconsistency than the existing IL land use classification."

However, the ALJ never found that the IL designation was not suitable for the property, and at least some of the ALJ's findings support the CPA's decision to allow the IL designation to remain on the land. The ALJ found, for example, that the property is currently developed in an industrial manner and that it was still feasible for the

property to be part of a small consolidated industrial park. These findings comport with the purpose behind the IL designation as stated in section 2.3.3.6.1 of the rules. And, while the ALJ did find that there were many uses allowed under the IL designation that would be inconsistent with surrounding uses, it did not find that all of the potential uses under the IL designation—including use for target employers—would be inconsistent. Indeed, it found that the subject property could nevertheless support certain target employers despite the surrounding limitations. Furthermore, pursuant to the Special Act, the ALJ's finding that the property could currently support target employers under the existing designation was a finding of fact that the CPA had to consider in making its final decision. Ch. 90-396, § 10(4)(d), at 40. In other words, although the ALJ found that Resolution 06-3 was not a criterion on which the CPA could conclude that the amendment was inconsistent with the rules, the ALJ did not find that the CPA was prohibited from otherwise considering the land's current suitability for target employers when making its final legislative determination. Accordingly, in the proper context of the ALJ's findings, the CPA's decision to deny the amendment and keep the land available for target employers was fairly debatable.

**i. The Trial Court's Application of Island**

Applying its determination that the ALJ's order established that the existing designation was inconsistent with the criteria in the rules to this court's opinion in Island, 884 So. 2d 107, the trial court concluded that the CPA's decision was not fairly debatable. This, too, was error.

In Island, this court reviewed the trial court's finding that the City of Bradenton Beach's denial of two small-scale development amendments to the City's

future land use plan was fairly debatable. 884 So. 2d at 107-08. The developers in Island sought amendments that would have changed the designation of their property "from preservation, a classification which permits no development, to medium/high residential/tourist in order to construct a duplex on each of their two lots." Id. at 108. The evidence presented at trial showed that "the designation of the [developers'] property as preservation was erroneous because the property did not meet the definition of preservation [under the City's plan]." Id. The developers also presented evidence showing that the property had been taxed as residential property and that "the mayor's son had been issued a license to operate a sailboat rental business on the property, which activity is not allowed on preservation property." Id. According to the majority, no evidence rebutted the developers' evidence "that the property did not meet the definition of preservation." Id.

Holding that the trial court erred in finding that the City's denial was fairly debatable, this court explained that "[r]easonable persons could not differ in concluding that the [developers] were entitled to a small-scale amendment to the comprehensive plan because their property was improperly designated preservation." Id. (emphasis added). "[R]ecognizing the stringent requirements of the fairly debatable rule," Judge Villanti specified that he concurred with the majority because "[a]bsolutely all of the expert opinion and supporting data was unrefuted; i.e., that the preservation classification was imposed in error." Id. at 109 (Villanti, J., concurring). Thus, this court's application of the fairly debatable standard in Island is limited to situations in which unrefuted evidence establishes that an existing land use designation is improper under the terms of the land use plan itself.

Here, although the ALJ found that the amendment would make the property more consistent with the relevant criteria for approving an amendment to the plan, the ALJ did not conclude that the current designation was imposed in error or that the property was being used in a way inconsistent with its current designation. As explained above, the ALJ's findings show otherwise. Unlike Island, the amendment at issue here sought to change the property's valid, existing designation so that Richman could develop it in a way it had never been used before. Because there was no unrefuted evidence showing that the subject property did not meet the definition of IL land under the County's land use plan or that the property was being used in a way that was not permitted under its existing designation, the trial court erred in concluding that Island established that the CPA's denial was not fairly debatable.

**B. The Rational Basis Question**

Rejecting the County's argument that the CPA's decision was fairly debatable, the trial court determined that the CPA violated Richman's substantive due process rights both by denying the amendment based on the preference to preserve IL land, which the ALJ determined was not part of the relevant criteria for approving an amendment under the rules, and by making its decision simply to appease local residents. We address each alternative basis in turn.

To the extent that the trial court based its substantive due process ruling on its finding that the CPA was motivated by significant political pressure, the CPA's consideration of its constituents' concerns did not amount to a violation of the Constitution in this case. Without citing to any legal authority, the trial court determined that "neighborhood opposition is not a legitimate basis for denying a land use

application," even though it agreed that such opposition was a "meaningful difference" between Richman's amendment and its purported comparators. However, resident opposition, provided it is motivated by legitimate concerns, can provide a rational basis for a government's land use decision. See, e.g., Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1208 (11th Cir. 2007) ("In sum, the suggestion that the defendants violated the Equal Protection Clause by responding to the concerns of local citizens is, under these circumstances, without merit."); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1387 (11th Cir. 1993) ("Merely because citizen input may not be a sufficient basis for a rational government land use decision in every instance does not mean it can never be a sufficient basis for such a decision. In most cases it will be. Where, as here, citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted." (citation omitted)); Greenbriar, 881 F.2d at 1579 ("[A] planning commission or a City Council is not a judicial forum; it is a legislative body held democratically accountable through precisely the forms of political suasion to which Greenbriar objects. . . . Here, there is no indication that Council members' attention to citizens' concerns in assessing Greenbriar's zoning plan deprived their decision of a rational basis." (citations omitted)); Estabrook, 680 F.2d at 832 ("Here it is merely indicated that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws."). In fact, the Special Act mandates notice to all affected residents and a public hearing before the

adoption of any amendment to the land use plan. Ch. 90-396, § 10(5), at 41. As such, even the Special Act itself contemplates the CPA's consideration of concerns from local residents.

Richman argues that the CPA could not consider the residents' objections because that consideration was not part of the relevant criteria in the rules, criteria which limited the CPA's discretion under the Special Act. While Richman's argument may support a determination that the CPA violated state law, Richman fails to appreciate that it chose to bring this dispute into the Constitutional arena where "[i]t has long been established that zoning regulations will not be declared unconstitutional as violative of substantive due process unless they 'are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " Greenbriar, 881 F.2d at 1577 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926)). This rigorous Constitutional standard requires more than a violation of state law. See, e.g., Coniston Corp., 844 F.2d at 467 ("Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law."); Estabrook, 680 F.2d at 833 ("It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."). That "something more" was simply not present in this case. Here, hundreds of local residents articulated specific, rational concerns regarding the proposed amendment's effect on the general welfare. Accordingly, even if the CPA violated the Special Act, it

did not violate the Constitution of the United States in considering legitimate input from affected residents.

In alternatively concluding that the CPA's application of the IL preference was arbitrary and capricious, the trial court relied on Everett v. City of Tallahassee, 840 F. Supp. 1528 (N.D. Fla. 1992), explaining that "[t]he same logic applies in this case, where Richman was subject to the application of an uncodified policy that never had been adopted as part of the applicable criteria." We cannot agree.

Everett involved a § 1983 action brought by the owner of a 3.52-acre undeveloped property against the City of Tallahassee alleging, among other things, a violation of the owner's substantive due process rights. 840 F. Supp. at 1530. The litigation arose after the City denied the owner's request to change the zoning of the property from residential to nonresidential use, citing an uncodified, standardless policy as the only reason for the denial. Id. at 1537. The owner also presented evidence showing that the City itself violated this same uncodified policy, as well as other zoning restrictions, in order to build City facilities on property adjacent to the owner's land. Id. at 1541. In analyzing the owner's claim, the court applied the principle that "[a] violation of state law, without more, is not a denial of due process of law." Id. at 1543 (citing Coniston Corp., 844 F.2d 461). Nevertheless, the court ruled that the uncodified policy was "unconstitutionally vague" and held that "[b]ecause no standards [were] set forth in the [policy], the City's arbitrary and capricious use of the policy violate[d] [the owner's] substantive due process rights." Id. at 1546.

The same logic does not apply to this case. Here, Richman made no argument, and the trial court made no ruling, that the policy to preserve IL land was

unconstitutionally vague. There is also no indication that the uncodified policy in Everett was related to a legitimate welfare concern, whereas here, the policy to preserve IL land for target employers who bring high-paying jobs to the County is related to a legitimate fiscal concern. Moreover, the City violated its own uncodified policy to suit its own purposes in Everett; Richman alleged no such conduct on the part of the County in this case. Thus, unlike this case, Everett clearly concerned something more than a simple violation of state law.

Finally, we reject Richman's assertion that in reversing the final judgment at issue here we would need to overrule our decision in City National Bank of Florida v. City of Tampa, 67 So. 3d 293 (Fla. 2d DCA 2011). The relevant portion of that decision simply discusses the cognizability of claims under § 1983 and contains no rational basis analysis. City Nat'l Bank of Fla., 67 So. 3d at 297.

## III. RESOLUTION

As the trial court noted, the dispositions of both of Richman's Constitutional claims hinge on the question of whether the CPA had a rational basis to deny the amendment. Having concluded that the trial court erred in ruling that the CPA's decision lacked a rational basis, we reverse the final judgment in its entirety.

Reversed.

LaROSE, C.J., and MORRIS, J., Concur.