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Manuel Farach

Hamer v. Neighborhood Housing Services of Chicago, Case No. 16–658 (2017).
If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time prescription fits within the Supreme Court's "claim-processing category" and is not jurisdictional.

Bayview Loan Servicing, LLC v. Newell, Case No. 1D16-5173 (Fla. 1st DCA 2017).
A metes and bounds legal description that has correct angles but is missing degree symbols is a property description that can be located by a surveyor and is thus a sufficient legal description, including for purposes of foreclosure.

RBS Citizens N.A. v. Reynolds, Case No. 2D16-735 (Fla. 2d DCA 2017).
Florida Statute Section 702.015(4) requires a foreclosure plaintiff in possession of the original promissory note to file a certification, under penalty of perjury, that it is in possession of the original promissory note but does not require that the certification be notarized.

Flatirons Bank v. The Alan W. Steinberg Limited Partnership, Case No. 3D15-1396 (Fla. 3d DCA 2017).
The *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980) (significant relationships test applies to determine which forum's law applies in a tort action brought in Florida) "significant relationships test" does not apply to a civil theft cause of action when the civil theft occurred entirely out of state.

Waverly 1 and 2, LLC v. Waverly At Las Olas Condominium Association, Inc., Case No. 4D16-2866 (Fla. 4th DCA 2017).
Language in a condominium declaration that "[a]nything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units" means that the landscaping requirements of section 9.1 of the condominium declaration does not apply to commercial unit owners.

Anfriany v. Deutsche Bank National Trust Company, Case No. 4D16-4182 (Fla. 4th DCA 2017).

Judicial estoppel under Florida law requires, in addition to other requirements, that one party be in possession of information not available to another party and that the party seeking judicial estoppel not "derive an unfair advantage or impose an unfair detriment" on the opposing party.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WALTOGUY ANFRIANY and **MIRELLE ANFRIANY,**
Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee, In Trust for the Registered Holders of Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2005-W4,
Appellee.

No. 4D16-4182

[December 6, 2017]

Petition for writ of certiorari being treated as a final appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Peter D. Blanc, Judge; L.T. Case No. 50-2008-CA-022070.

Brian K. Korte and Scott J. Wortman of Korte & Wortman, P.A., West Palm Beach, for appellants.

Julissa Rodriguez and Stephanie L. Varela of Greenberg Traurig, P.A., Miami, and C. Wade Bowden and Tyrone Adras of Greenberg Traurig, P.A., West Palm Beach, for appellee.

CONNER, J.

The appellants (collectively "Anfriany") petitioned for certiorari to review the trial court's order vacating their entitlement to attorney's fees and costs in the underlying foreclosure action initiated by the appellee, Deutsche Bank National Trust ("the Bank"). This Court ordered that the case be treated as a final appeal pursuant to Florida Rules of Appellate Procedure 9.110 and 9.030(b)(1)(A).

Anfriany raises substantive issues regarding the application of judicial estoppel to bar his entitlement to fees and costs, and a procedural issue. Because the trial court applied the wrong standard in dismissing the entitlement based on judicial estoppel, we reverse and remand for further proceedings. We do not address the procedural issue raised.

Background

The Bank filed the underlying foreclosure action against Anfriany and others in 2008. The trial court granted the Bank's voluntary dismissal without prejudice. In May 2011, Anfriany, through foreclosure counsel, moved to tax attorney's fees and costs. In May 2012, the trial court granted the motion and ordered that Anfriany was entitled to reasonable attorney's fees and costs ("the fee entitlement order"), and if the parties could not agree on the amount, Anfriany would set the matter for an evidentiary hearing.

In May 2013, Anfriany filed a Chapter 11 voluntary bankruptcy petition, represented by separate bankruptcy counsel. The petition included bankruptcy schedules and a statement of financial affairs, which required Anfriany to disclose and list the value of "all personal property of the debtor of whatever kind," including "contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." Anfriany did not list any assets in the contingent claims category. When Anfriany amended his personal property schedule later that year, he again did not list such assets. In 2014, the bankruptcy court confirmed Anfriany's reorganization plan based on his affidavits and disclosures. Subsequently, the bankruptcy court granted Anfriany's motion to temporarily and administratively close the case. Because it was a Chapter 11 bankruptcy, Anfriany's debts were not discharged under the approved reorganization plan.

In October 2015, Anfriany requested the trial court in the foreclosure action to hold an evidentiary hearing on his motion for attorney's fees and costs. The purpose of the hearing was "to determine the reasonable amount of attorney's fees and costs."

In September 2016, the Bank moved to vacate the fee entitlement order. In the motion, the Bank asserted that Anfriany's claim for attorney's fees was barred by judicial estoppel because Anfriany failed to disclose in his bankruptcy case his award of entitlement to attorney's fees and costs, which was a contingent and unliquidated asset. The Bank argued that Anfriany therefore misled "the bankruptcy court and creditors to believe that he had fewer assets from which he could pay his creditors." Thus, because Anfriany was taking inconsistent positions before the bankruptcy and foreclosure courts, the Bank asserted that judicial estoppel should bar his recovery.

In his written response to the motion, Anfriany argued that judicial estoppel did not bar his claim for fees and costs. Anfriany asserted that, because a Chapter 11 bankruptcy petition does not discharge his debts, he did not deprive any creditors of their rights to collect amounts owed;

thus, no parties were prejudiced by his omission. Additionally, Anfriany argued that he himself was unaware that attorney's fees are legally classified as an "asset" and his bankruptcy counsel was unaware of the attorney's fees claim; thus, the omission was not an attempt to conceal assets.

A hearing was held on the Bank's motion to vacate, and the trial court made the following conclusion:

> Okay. Relying upon the case of *Coastal Plains*, which is 179 F.3d 197, which says, "Considering judicial estoppel for bankruptcy cases," it doesn't say Chapter 7. It says for bankruptcy cases. "The debtor's failure to satisfy statutory disclosure is 'inadvertent' only when in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment."
>
> That seems to very clearly apply to the facts of this case, so I believe the Court has no discretion. But under a common sense interpretation of that language, even if the Court had discretion, it seems like its discretion is limited.
>
> Because the record states in this case that -- well, the record does not indicate that the debtor lacked knowledge of the undisclosed claims. Clearly, the debtor had no motive for concealment, whether it's inadvertent or not, it doesn't carry any weight, and the Court is obligated to find that judicial estoppel applies and bars the further pursuit of the attorney's fees claims.

As such, the trial court granted the Bank's motion.

Anfriany gave notice of appeal.

Appellate Analysis

We employ a mixed standard of review of a judicial estoppel claim. *See Bueno v. Workman*, 20 So. 3d 993, 997 (Fla. 4th DCA 2009). "To the extent the trial court's order is based on factual findings, [the appellate court] will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review." *Id.* (quoting *Foreclosure FreeSearch, Inc. v. Sullivan*, 12 So. 3d 771, 774 (Fla. 4th DCA 2009)).

Anfriany raises two substantive issues regarding the application of judicial estoppel to bar his claim for fees and costs. First, he argues that

the fee award was not his asset, but an asset of his attorney. Second, he argues the trial court improperly failed to consider the nature of the bankruptcy filing (reorganization of debt versus discharge of debt) and whether his failure to disclose was inadvertent. We affirm without discussion the first argument; we address the second argument.

"Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (quoting *Smith v. Avatar Props., Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). This Court has explained that judicial estoppel "protects the integrity of the judicial process and prevents parties from making a mockery of justice by inconsistent pleadings and playing fast and loose with the courts." *Grau v. Provident Life & Accident Ins. Co.*, 899 So. 2d 396, 400 (Fla. 4th DCA 2005) (internal quotations and citations omitted). Judicial estoppel is imposed because "*intentional self-contradiction* is being used as a means of obtaining an unfair advantage in a forum provided for suitors seeking justice." *Scarano v. Cent. R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953) (emphasis added).

Our supreme court in *Blumberg* described the doctrine of judicial estoppel under Florida law as follows:

> In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it to act in reliance upon it unjust to him to allow that first party to subsequently change his position. *There can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel*; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law.

Blumberg, 790 So. 2d at 1066 (emphasis added) (quoting *Chase & Co. v. Little*, 156 So. 609, 610 (1934)).

In *Grau*, we noted that *Blumberg* "reshaped" and "broadened" the Florida doctrine of judicial estoppel announced in 1934 by the court in

Chase & Co. in three ways. *Grau*, 899 So. 2d at 399. The court: (1) recognized an exception to the general rule that there be mutuality of parties between an earlier proceeding and the later one in which judicial estoppel is applied; the court held that mutuality of the parties is not required where "special fairness and policy considerations" compel application of the doctrine; (2) "appears to have dispensed with the *Chase & Co.* requirement that the 'party claiming the estoppel must have been misled and have changed his position' by the other party's conduct in the earlier suit";[1] and (3) held that a jury verdict met the requirement of successfully maintaining a position in a prior suit, even though no final judgment was entered. *Id.* at 399-400.

Grau described the post-*Blumberg* rule of judicial estoppel as follows:

> A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the "special fairness and policy considerations" exception to the mutuality of parties requirement.

Id. at 400 (footnotes omitted). Additionally, we observed in *Grau* that "[t]he 'prejudice' component of judicial estoppel occurs when 'the party seeking to assert an inconsistent position *would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.*'" *Id.* at 400 n.3 (emphasis added) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001)); *see also S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo*

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[1] We note that the case law from this and other districts after *Grau* contends that judicial estoppel has an element of misleading the other party on a factual matter upon which the other party relied. *See Bueno*, 20 So. 3d at 997 ("The elements of judicial estoppel are the same as equitable estoppel, with the added elements of successfully maintaining a position in one proceeding, while taking an inconsistent position in a later proceeding, in which the same parties and questions are involved.") *Fintak v. Fintak*, 120 So. 3d 177, 186 (Fla. 2d DCA 2013) (holding that for judicial estoppel to apply, "the party claiming estoppel must have relied on or been misled by the former position" and "the party seeking estoppel must have changed his or her position to his or her detriment based on the representation").

Ass'n, 89 So. 3d 264, 269 (Fla. 3d DCA 2012) (stating that the positions must be "inherently inconsistent").

In this case, the trial court erred by failing to properly apply the Florida doctrine of judicial estoppel. Instead, the trial court relied on *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), a Fifth Circuit case, to conclude that judicial estoppel applied. Below, both parties cited to Florida and federal cases discussing judicial estoppel, but failed to alert the trial court that "the elements of judicial estoppel under federal law in such cases 'may not be identical to the elements usually required under state law in Florida.'" *Montes v. Mastec N. Am., Inc.*, 132 So. 3d 1195, 1198 n.2 (Fla. 3d DCA 2014) (quoting *Losacano v. Deaf & Hearing Connection*, 988 So. 2d 66, 70 n.2 (Fla. 2d DCA 2008)).

Thus, because the trial court did not apply the Florida judicial estoppel doctrine as iterated in *Blumberg* and *Grau*, we are compelled to reverse. We conclude that judicial estoppel does not bar the claim for attorney's fees for two reasons.

First, as stated in *Blumberg*, "[t]here can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel." 790 So. 2d at 1066 (quoting *Chase & Co.*, 156 So. at 610). Here, the Bank was a creditor in the bankruptcy proceeding and was as aware of the fee entitlement order as Anfriany.

Second, Anfriany's asserted inconsistent position of not disclosing the fee entitlement order in the bankruptcy proceeding did not "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Grau*, 899 So. 2d at 400 n.3 (quoting *New Hampshire*, 532 U.S. at 751). In other words, the record fails to show any prejudice to the Bank. Anfriany's entitlement to fees had already been fully litigated, and no assertions by Anfriany in the bankruptcy proceeding were inconsistent with the facts justifying the fee entitlement order. The trial court made a specific finding that Anfriany had no motive to conceal the fee entitlement order in the bankruptcy proceeding.[2] If there was no motive to conceal, the facts do not support either a finding or conclusion that "*intentional*

[2] In his reply brief, Anfriany raises issues regarding the lack of "evidence" to support the trial court's decision and the burden of proof for judicial estoppel. However, because these two issues were never raised below or in the initial brief, we state no opinion on these issues. *See United Auto. Ins. Co. v. Hollywood Injury Rehab Ctr.*, 27 So. 3d 743, 744 n.1 (Fla. 4th DCA 2010) ("That issue was not raised in this case until the filing of the reply brief. Matters argued for the first time therein will not be considered by the reviewing court.").

self-contradiction is being used as a means of obtaining an unfair advantage in a forum provided for suitors seeking justice." *Id.* at 401 (emphasis added) (quoting *Scarano*, 203 F. 2d at 513).

Instead, the record before us leads us to the same conclusion this Court reached in *Grau*: To apply judicial estoppel to Anfriany's entitlement to fees and costs would bestow a windfall in favor of the Bank. Therefore, we quash the trial court order vacating and dismissing Anfriany's entitlement to attorney's fees and costs based on judicial estoppel and remand the case to the trial court for further proceedings.

Reversed and remanded.

DAMOORGIAN and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

BAYVIEW LOAN SERVICING, LLC,

Appellant,

v.

DEBRA A. NEWELL, et al.,

Appellee.

_____/

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

CASE NO. 1D16-5173

Opinion filed December 6, 2017.

An appeal from the Circuit Court for Alachua County.
Robert E. Roundtree, Jr., Judge.

David Rosenberg, Jarrett Cooper, and Cynthia L. Comras of Robertson, Anschutz & Schneid, P.L., Boca Raton, for Appellant.

Glorimil (Gloria) R. Walker and Judy Renee Collins, Three Rivers Legal Services, Inc., Gainesville, for Appellee.

BILBREY, J.

Bayview Loan Servicing, LLC, appeals a final order denying its claim for foreclosure and the trial court's *sua sponte* entry of a money judgment under the promissory note.[1] Because Bayview proved its foreclosure claim at the final

[1] The final order also dismissed Bayview's claim for deed reformation (Count II of

hearing and no affirmative defenses to foreclosure were proven by Debra Newell, the borrower, we reverse the final order and remand for entry of a final judgment of foreclosure.

The initial complaint for foreclosure was filed by Bayview on November 7, 2014. The copies of the note and mortgage attached to the complaint both listed the street address of the property on South U.S. Highway 441, Micanopy, Florida 32667, as the property intended to secure the loan. The mortgage, in addition to the street address of the property, listed the Alachua County Property Appraiser's parcel identification number. Finally, the mortgage referenced a metes and bounds description of the parcel, attached to the mortgage as exhibit A. The exhibit A metes and bounds point of beginning was "the Northwest corner of Lot 57 of the LEITNER TRACT" in Alachua County. However, the corner angles following the point of beginning were improperly notated. While the digits for the angles were correct, the degree symbols were missing, so that, for example, what should have been "N. 85°26'03" W." appeared in exhibit A as "N. 8526'03" W."

Shortly after the commencement of the foreclosure action, a previous owner of the property who had been included in the original list of defendants sought to be dismissed from the action. To clarify that defendant's position that he no longer

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second amended complaint) and did not dispose of Bayview's claim for mortgage reformation (Count III of second amended complaint). However, Bayview does not challenge these aspects of the final order.

held any interest in the securing real property and thus had no interest in the foreclosure case, he and the title company sought to correct the typographical errors in the deed to Ms. Newell which had been filed in the Official Records of Alachua County. As a result, a corrective warranty deed which included the degree symbols in the notations of the angles in the metes and bounds description, was prepared, recorded in the Official Records, and filed in the foreclosure case on March 17, 2015. Ms. Newell's grantor and the grantor's former spouse were then dropped as parties to the action.

The case proceeded to final hearing upon Bayview's second amended complaint, filed August 24, 2015.[2] In her answer to the second amended complaint, Ms. Newell admitted the allegations of paragraph 3 — that she had executed and delivered the note and mortgage at issue, that the mortgage had been recorded, and that the mortgage encumbered the property described in the mortgage and owned and possessed by Ms. Newell. The only affirmative defenses asserted as to the second amended complaint were that the claim for reformation of the mortgage was time-barred by the statute of limitations and that Bayview had failed to mitigate its damages. No affirmative defense to foreclosure of the mortgage was asserted in the answer to the second amended complaint.

[2] Despite the filing of the corrected deed, Bayview's second amended complaint retained a count for reformation of the deed. This count was properly deemed moot by the general magistrate, dismissed by the trial court, and such dismissal is not challenged on appeal.

The case progressed to a final hearing before a general magistrate. *See* Fla. R. Civ. P. 1.491. Bayview presented documentary evidence authenticated by its witness, and the documents were admitted. Ms. Newell did not call any witnesses or present any evidence. During closing arguments, counsel for Ms. Newell argued that the mortgage was "clearly erroneous," apparently referring to the lack of degree symbols in the metes and bounds description. Counsel for Ms. Newell suggested that Bayview could recover a money judgment on the note rather than foreclosing on the mortgage, but counsel for Bayview did not agree and insisted that the error was "nothing but a scrivener's error" and that Bayview sought foreclosure rather than a money judgment on the note alone.

The magistrate found that Bayview had established its standing to enforce the note via the foreclosure action and had presented competent substantial evidence to prove that the loan was in default and to prove the amounts due and owing. However, the magistrate did not recommend any disposition on Bayview's foreclosure claim, recommended that Bayview's claim for mortgage reformation be dismissed as untimely, and found that Bayview was "entitled to damages under the Promissory Note." Bayview's exceptions to the magistrate's report and recommendations, including its exception to the entry of a money judgment on the note rather than a judgment of foreclosure, were denied by the trial court. Bayview then moved for rehearing, reiterating its position that it sought foreclosure and not

a money judgment and arguing that the mortgage did not need reformation of the metes and bounds description in order to support foreclosure. Bayview's motion for rehearing was likewise denied. The final order on appeal denied foreclosure without explanation and entered a final money judgment on the note.

Bayview never requested a money judgment on the note in any pleading or motion, and objected consistently when this remedy was suggested by Ms. Newell's attorney and recommended by the magistrate. "A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent." *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945 (Fla. 4th DCA 2015). Further, "granting relief, which was neither requested by appropriate pleadings, nor tried by consent, is a violation of due process." *Bank of Am., N.A. v. Nash*, 200 So. 3d 131, 135 (Fla. 5th DCA 2016) (citing *Posti*, 166 So. 3d at 945-46). The money judgment on the note in this case amounts to the trial court's *sua sponte* conversion of Bayview's foreclosure claim into an unpled claim for monetary relief. Accordingly, the portion of the final order entering a money judgment on the note must be reversed. *See Heartwood 2, LLC, v. Dori*, 208 So. 3d 817 (Fla. 3d DCA 2017).

The denial of Bayview's foreclosure claim must also be reversed. The magistrate's finding that Bayview proved the elements for foreclosure, including its standing, was not challenged by exception and not rejected by the trial court.

Ms. Newell never claimed, via affirmative defense or otherwise, that the typographical errors in the metes and bounds description of the real property rendered the mortgage ineffective to encumber the property with a lien for the mortgage. *See* § 697.02, Fla. Stat. (lien of mortgage covers the property described therein). The street address and property appraiser's parcel identification number were never contested, and the defense never suggested that the omission of the degree symbols in the metes and bounds description would prevent either party or a surveyor from locating the property affected by the lien using the lot and tract information, address, or parcel identification number. *See Dori*, 208 So. 3d at 821 (holding that "for a mortgage to create a valid lien, the mortgage must contain a sufficient description of the property to enable the parties to ascertain and locate the property affected by the lien") (*citing Sickler v. Melbourne State Bank*, 118 Fla. 468, 159 So. 678, 679 (1935)).

Even if such defense had been raised, "Florida courts have repeatedly held descriptions of property in mortgages sufficient despite minor mistakes and irregularities where the description of the property intended to be encumbered could be determined from a review of the entire instrument." *Regions Bank v. Deluca*, 97 So. 3d 879, 884-85 (Fla. 2d DCA 2012). It was undisputed here that the correct lot and tract as well as street address were stated on both the note and the mortgage, and in addition the mortgage listed the parcel identification number.

In light of the foregoing, the final order denying Bayview's action for foreclosure and entering a money judgment on the note is reversed, and this cause is remanded for entry of a judgment of foreclosure in favor of Bayview.

REVERSED and REMANDED.

ROBERTS and KELSEY, JJ., CONCUR.

Third District Court of Appeal
State of Florida

Opinion filed December 6, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1396
Lower Tribunal No. 13-4048

Flatirons Bank,
Appellant,

vs.

The Alan W. Steinberg Limited Partnership,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Stanford Blake and Barbara Areces, Judges.

Perez & Rodriguez, P.A., and Javier J. Rodriguez, Johanna Castellon-Vega, and Freddy X. Muñoz, for appellant.

Schwed Kahle & Kress, P.A., and Lloyd R. Schwed and Douglas A. Kahle (Palm Beach Gardens), for appellee.

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

SCALES, J.

Appellant, plaintiff below, Flatirons Bank ("Flatirons") appeals the trial court's final judgment in favor of Appellee, defendant below, The Alan W. Steinberg Limited Partnership ("Steinberg"). We affirm because the trial court's determination that Steinberg was not unjustly enriched is supported by competent, substantial evidence; and because Flatirons's unjust enrichment claim against Steinberg was filed beyond the applicable statute of limitations. Further, Flatirons's claim under the Colorado civil theft statute was properly dismissed.

I. Facts

While somewhat complicated, the relevant facts are not in dispute. Flatirons is a small community bank located in Boulder, Colorado. In early 2009, Flatirons's former board chairman and president, Mark Yost, arranged for Flatirons to issue bogus lines of credit which enabled Yost to steal approximately $3,845,000.00 from Flatirons.

Flatirons discovered Yost's fraud in August of 2010. In March of 2012, Flatirons's resulting investigation revealed that, on January 20, 2009, Yost transferred $1,000,000.00 from one of the bogus lines of credit to an account at Elevations Credit Union in Colorado. The Elevations account receiving the funds was owned by ICP II LP, an entity controlled by Yost.

Later on January 20, 2009, Yost transferred the sum of $1,050,000.00 from the ICP II LP account at Elevations to another account at Elevations owned by the

Yost Partnership. The Yost Partnership was a Colorado limited partnership that operated from October of 1991 until August of 2010. The Yost Partnership was an investment vehicle controlled by Yost. Limited partners of the Yost Partnership invested cash into the Yost Partnership with the expectation that their investments would be responsibly managed by Yost and would realize positive returns.

Later that same day on January 20, 2009, the Yost Partnership transferred $1,000,000.00 from the Yost Partnership account, through an account at Merrill Group in New York, to a Florida bank account owned by Steinberg. Steinberg is a New York limited partnership that also was a limited partner and investor in the Yost Partnership.[1] From January of 2000 through January of 2004, Steinberg invested a total of $2,200,000.00 into the Yost Partnership.

As it turns out, not only was Yost embezzling funds from Flatirons, he was grossly misleading the Yost Partnership investors and limited partners regarding the status of their investments. For example, in 2005, the total assets for the Yost Partnership were approximately $11,500,000.00, but were reported to investors at over $30,000,000.00. In January of 2009, total Yost Partnership assets were approximately $1,200,000.00, but were reported at over $28,000,000.00.

Indeed, on January 20, 2009, the date on which the Yost Partnership transferred $1,000,000.00 to Steinberg, the actual value of Steinberg's interest in

[1] Yost had no ownership in Steinberg.

the Yost Partnership was only $138,179.90 – a far cry from the $2,200,000.00 Steinberg had invested in the Yost Partnership.[2]

Seeking to recoup some of the stolen funds, on February 1, 2013, Flatirons filed a three-count complaint against Steinberg in the Miami-Dade Circuit Court. Flatirons alleged that: (i) Steinberg was unjustly enriched by Yost's conduct (Count I); (ii) under Colorado's civil theft statute, Steinberg was required to repay the $1,000,000.00 to Flatirons (Count II); and (iii) Steinberg had converted Flatirons's funds and was therefore liable to Flatirons (Count III).

The trial court dismissed Flatirons's statutory and conversion claims. The case proceeded to a bench trial on Flatirons's unjust enrichment claim, and Steinberg's two principal affirmative defenses to same (that Flatirons's claim was barred by Florida's four-year statute of limitations and that Flatirons had unclean hands).

After the trial, the trial court made several findings of fact:

- Flatirons and Steinberg had no relationship with each other;
- Steinberg received the $1,000,000.00 in good faith and without knowledge of Yost's fraud;

[2] The Yost Partnership's $1,000,000.00 transfer to Steinberg was only part of Yost's efforts to mollify Yost Partnership investors and limited partners. The record reflects that, of the $3,845,000.00 Yost stole from Flatirons, approximately $2,650,000.00 was used to make payments to Yost Partnership investors and limited partners.

- Upon receiving the $1,000,000.00 transfer, Steinberg actually suffered a net loss of approximately $1,200,000.00 as a result of the Yost Partnership's fraud and misconduct;
- As a result of Steinberg's investment into the Yost Partnership, Steinberg had paid adequate consideration for the $1,000,000.00 that the Yost Partnership transferred to Steinberg; and
- Flatirons conferred no direct benefit on Steinberg.

Ultimately, the trial court entered final judgment for Steinberg, determining that Flatirons failed to establish its unjust enrichment claim against Steinberg. The trial court also determined that Flatirons's unjust enrichment claim against Steinberg was barred by Florida's four-year statute of limitations. Flatirons timely appealed this final judgment, including the trial court's earlier dismissal of Flatirons's claim under Colorado's civil theft statute.[3]

II. Standard of Review

We review de novo both the trial court's dismissal of Flatirons's statutory civil theft claim and the trial court's determination that Flatirons's unjust enrichment claim was barred by Florida's statute of limitations. Saltponds Condo. Ass'n, Inc. v. Walbridge Aldinger Co., 979 So. 2d 1240, 1241 (Fla. 3d DCA 2008). We review the trial court's findings of fact regarding Flatirons's unjust

[3] Flatirons did not appeal the trial court's dismissal of Flatirons's conversion claim.

enrichment claim to determine whether those findings are supported by competent, substantial evidence. Reimbursement Recovery, Inc. v. Indian River Mem'l Hosp., Inc., 22 So. 3d 679, 682 (Fla. 4th DCA 2009).

III. Analysis

A. Flatirons's claim based on Colorado's civil theft statute

The trial court dismissed Flatirons's claim under Colorado's civil theft statute,[4] holding that Colorado's civil theft statute was inapplicable to claims based primarily on activity occurring in Florida. The trial court reasoned that because the Florida Legislature has enacted a civil theft statute,[5] Florida's statute – rather than Colorado's – would apply because Flatirons's claim against Steinberg was premised entirely upon Steinberg's receipt of the stolen funds occurring exclusively in Florida.[6]

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[4] Colorado's civil theft statute reads, in relevant part, as follows:

> All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. The owner may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property.

Colo. Rev. Stat. § 18-4-405 (2013).

[5] See § 772.11, Fla. Stat. (2013).

[6] Understandably, Flatirons did not seek recovery against Steinberg under Florida's civil theft statute. Unlike the Colorado statute, Florida's civil theft statute provides no right of action against an innocent third party in possession of stolen property.

On appeal, Flatirons argues that the trial court erred by not applying Florida "conflict of laws" tort jurisprudence to determine which civil theft statute applied. Flatirons argues that the trial court should have performed the "significant relationships test" required by Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) (adopting the significant relationships test to determine which forum's law applies in a tort action brought in Florida); and that, had the trial court correctly applied the Bishop test, Colorado's civil theft statute would govern Flatirons's claim because Colorado, rather than Florida, has the most significant relationships to the occurrence and the parties.

The record reflects that the trial court reviewed the four corners of Flatirons's complaint, along with its extensive exhibits, in search of a nexus between the state of Colorado and Flatirons's claim against Steinberg. We engage in the same exercise, de novo, Morejon v. Mariners Hosp., Inc., 197 So. 3d 591, 593 (Fla. 3d DCA 2016), and agree with the trial court. While Yost's theft of Flatirons's funds may have occurred in Colorado, *nothing* alleged in Flatirons's complaint or reflected in its exhibits, reveals *any* conduct, activity or omission by Steinberg that would warrant subjecting Steinberg to a Colorado statutory cause of action. Because Flatirons's complaint is devoid of allegations establishing *any* nexus between Steinberg and Colorado, we need not speculate on what allegations may be sufficient to require a party, in a Florida state court, to defend against

another state's purely statutory cause of action. Suffice to say that when, as here, a complaint is devoid of allegations of conduct, activities or omissions occurring in another state, a Florida trial court has no basis to subject a defendant to a cause of action created by another state's legislature.[7]

The dissent adopts Flatirons's argument and suggests that the trial court reversibly erred by not conducting the significant relationships test established in Bishop. See dissenting opinion at 18. Bishop holds that, in a personal injury case, the law of the state where the injury occurred generally determines the rights and liabilities of the parties, except that the law of another state will govern a particular issue in the case if that other state has a more significant relationship to that issue. Bishop, 389 So. 2d at 1001.

Flatirons neither provides authority that would expand Bishop's significant relationships test to a cause of action based on a state statutory remedy nor

[7] We note that, from a practical perspective, had Steinberg engaged in activity in, or had sufficient minimum contacts with, Colorado so to establish personal jurisdiction, Flatirons surely would have brought this suit in Colorado. While we need not, and do not, reach any constitutional issue, we do note that subjecting Steinberg to Colorado's civil theft statute – when it would defy a reasonable expectation to hale Steinberg into a Colorado court – may implicate the same due process principles upon which modern personal jurisdiction jurisprudence is based. In both its general jurisdiction jurisprudence, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) and its specific jurisdiction jurisprudence, Bristol Meyers Squibb Co. v. Super. Ct. of Cal. San Francisco Cty., 137 S. Ct. 1773 (2017), the United States Supreme Court's recent trend has been to limit the reach of a court over a defendant where the activity has minimal affiliation with or connection to the forum state.

provides authority that would expand Bishop's significant relationships test to a contract action. Flatirons mis-focuses its analysis on Yost's fraudulent conduct occurring in Colorado, rather than on Steinberg's innocent conduct resulting from its contractual relationship with the Yost Partnership, i.e., its receipt of funds in Florida.[8] Absent at least some controlling, or even persuasive, authority, we are not inclined to subject a Florida defendant to another state's civil theft statute when there is no allegation or inference that the Florida defendant undertook (or omitted) any activity in the other state; and of further consideration, when Florida maintains its own civil theft statute.

B. Flatirons's unjust enrichment claim

After conducting an extensive evidentiary hearing on Flatirons's unjust enrichment claim, the trial court entered a detailed final judgment in Steinberg's favor. Essentially, the trial court found that Flatirons had failed to establish the elements of unjust enrichment.[9] We affirm because the trial court's findings are

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[8] The dissent engages in the same analysis. In citing to Hertz Corp. v. Piccolo, 453 So. 2d 12 (Fla. 1984), the dissent seeks to establish that Bishop's significant relationships test controls the instant case because Colorado's civil theft statute is substantive in nature rather than procedural. See dissenting opinion at 19-20. This detour, though, ignores the cause of action underlying Hertz Corp's conflict of laws analysis: a tort alleging personal injury that arises from a motor vehicle accident.

[9] The elements of a cause of action for unjust enrichment are: (i) plaintiff has conferred a direct benefit on the defendant, who has knowledge thereof; (ii) defendant voluntarily accepts and retains the conferred benefit; and (iii) the circumstances are such that it would be inequitable for the defendant to retain the

supported by competent, substantial evidence. Specifically, the record supports the trial court's factual finding that Steinberg had no knowledge that the sums it received on January 20, 2009, were tainted in any way, or, for that matter, originated from Flatirons. Thus, the trial court correctly determined that Flatirons had not established that Steinberg knowingly and voluntarily accepted any direct benefit conferred upon it by Flatirons. E & M Marine Corp. v. First Union Nat'l Bank, 783 So. 2d 311, 312-13 (Fla. 3d DCA 2001); Coffee Pot Plaza P'ship v. Arrow Air Conditioning & Refrigeration, Inc., 412 So. 2d 883, 884 (Fla. 2d DCA 1982); Nursing Care Servs., Inc. v. Dobos, 380 So. 2d 516, 518 (Fla. 4th DCA 1980).[10]

Additionally, and alternately, the trial court held that Flatirons's unjust enrichment claim was precluded by Florida's four-year statute of limitations.[11] The

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benefit without paying the value thereof to the plaintiff. Extraordinary Title Servs., LLC v. Fla. Power & Light Co., 1 So. 3d 400, 404 (Fla. 3d DCA 2009).

[10] The dissent suggests that the trial court's unjust enrichment verdict in Steinberg's favor was not supported by competent, substantial evidence. See dissenting opinion at 27-31. While different triers of fact certainly can reach different conclusions, our standard of review requires affirmance if competent, substantial evidence supports the trial court's findings. Reimbursement Recovery, Inc., 22 So. 3d at 682. The record supports Steinberg's good faith belief that its account held the sum of $1,814,824.56, and that the $1,000,000 it received from Yost was not tainted. The record also supports the inference that Flatirons's negligence contributed to Yost's fraudulent activities and that Flatirons was in a far better position than Steinberg to minimize Yost's damage. Thus, competent, substantial evidence exists in the record to support the trial court's conclusion that it would not be inequitable for Steinberg to retain the funds it received from Yost.

trial court concluded that Flatirons's cause of action accrued on January 20, 2009, when the Yost Partnership transferred the funds to Steinberg's Florida account. Flatirons's filed its complaint on February 1, 2013, more than four years after the alleged benefit was conferred.

The statute of limitations for an unjust enrichment claim begins to run at the time the alleged benefit is conferred and received by the defendant. Beltran, M.D., 125 So. 3d at 859; Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A., 938 So. 2d 571, 577 (Fla. 4th DCA 2006); Swafford v. Schweitzer, 906 So. 2d 1194, 1195-96 (Fla. 4th DCA 2005).

As it did below, Flatirons argues on appeal that, because its cause of action against Steinberg was "founded upon fraud," Florida's delayed discovery doctrine[12]

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[11] Section 95.11 reads, in relevant part, as follows:

> Actions other than for recovery of real property shall be commenced as follows:
>
> **(3) Within four years.--**
>
> (k) A legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts.

§ 95.11(3)(k), Fla. Stat. (2013); Beltran, M.D. v. Vincent P. Miraglia, M.D., P.A., 125 So. 3d 855, 859 (Fla. 4th DCA 2013).

[12] Florida's delayed discovery doctrine is codified in section 95.031(2)(a), and reads, in relevant part, as follows:

> An action *founded upon fraud* under s. 95.11(3) . . . must be begun

applies, and the statute of limitations did not begin to run until Flatirons knew or should have known of Yost's theft, which at the earliest occurred in August of 2010. While a feature of Flatirons's unjust enrichment claim might have been Yost's fraud and deceit, Flatirons's unjust enrichment claim *against Steinberg* is not "founded upon fraud" so as to implicate Florida's delayed discovery doctrine.[13] Further, our Supreme Court has made clear that the delayed discovery doctrine is inapplicable to extend the limitations period for unjust enrichment claims. Davis v. Monahan, 832 So. 2d 708 (Fla. 2002); Brooks Tropicals, Inc. v. Acosta, 959 So. 2d 288, 296 (Fla. 3d DCA 2007).[14] Therefore, the trial court correctly ruled that Flatirons's unjust enrichment claim was barred by Florida's four-year statute of limitations.

> within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3) . . . .

§ 95.031(2)(a), Fla. Stat. (2013) (emphasis added).

[13] In this respect, we disagree with the dissent's view on the applicability of the delayed discovery doctrine to this case. See dissenting opinion at 31-35. We also disagree with the dissent's view on the applicability of equitable tolling. See dissenting opinion at 35-37. Neither Yost's nor Steinberg's actions prevented Flatirons from a timely asserting of its rights.

[14] Without citation to any authority, Flatirons suggests that Davis has been abrogated by the Legislature's 2003 amendment to section 95.031(2)(a). We reject this argument without further comment.

IV. Conclusion

The trial court properly dismissed Flatirons's statutory claim against Steinberg and correctly ruled that Flatirons's unjust enrichment claim was precluded by Florida's statute of limitations. Additionally, the trial court's factual findings regarding Flatirons's unjust enrichment claim are supported by competent, substantial evidence.

Affirmed.

SALTER, J., concurs.

ROTHENBERG, C.J. (dissenting).

Flatirons Bank ("Flatirons"), a Colorado bank and the plaintiff below, appeals: (1) the trial court's order dismissing Count II of the amended complaint, which asserts a claim for civil theft under Colorado's rights in stolen property statute, Colo. Rev. Stat. §18-4-404 (2013), against the defendant below, the Alan W. Steinberg Limited Partnership ("Steinberg"); and (2) a final judgment entered in favor of Steinberg following a non-jury trial as to Flatirons' claim for unjust enrichment pled in Count I of the amended complaint. As will be demonstrated in this dissent, the trial court clearly erred by dismissing Count II and by entering final judgment in favor of Steinberg as to Count I.

First, the trial court erred by dismissing Count II without first performing a conflict of laws analysis, which requires the court to determine which state has the most significant relationship to the matter and, thus, which state's law should be applied. The majority attempts to cure this obvious error, but it too has erred because it has failed to follow clear precedent from the Florida Supreme Court and this Court specifying the analysis that must be performed and instead applies its own test. The record, however, reflects that had the requisite analysis been performed, the unassailable conclusion would have been that Colorado has the most significant relationship to the matter, and therefore, Colorado law should be

applied. And, under Colorado law, Flatirons has a viable "rights in stolen property" claim. Second, as to Count I, Flatirons' unjust enrichment claim, the majority affirms the trial court's findings that Flatirons failed to meet its burden of proof and that Flatirons' unjust enrichment claim is precluded by Florida's statute of limitations. I respectfully disagree as to both findings.

THE FACTS

I agree with the majority opinion that the relevant facts are not in dispute. Yost Partnership, LP ("the Yost Partnership") was an investment vehicle that operated from October 1991 until August 2010. At all times relevant to this case, the Yost Partnership was managed and operated by Mark Yost ("Yost") in Colorado. The Yost Partnership accepted money from investors for the purpose of trading securities, sometimes on margin, and making other investments in companies and real estate. Steinberg, which is located in Florida, began making investments in the Yost Partnership in 2000. Steinberg's investments with the Yost Partnership from January 10, 2000 through January 2, 2004 totaled $2,200,000, and these investments were sent to, accepted by, and managed by Yost in Colorado.

By all accounts, the Yost Partnership was a legitimate company that suffered a sharp decline in 2005 due to bad investment decisions made by Yost, who is the President, the Chairman of the Board, and the largest shareholder of the Yost

Partnership, and who was domiciled in Colorado. In order to hide this decline, the Yost Partnership began defrauding its investors by misrepresenting the company's assets and the value of each of the limited partner's assets.

On September 29, 2008, Yost and other investors purchased Flatirons, a bank in Boulder, Colorado, through a holding company. Yost, who held the largest shares in the holding company, was able to secure the positions of president, Chairman of the Board, and loan officer, and he also became the contact person for Flatirons. Based on these roles, Yost opened two lines of credit at Flatirons—one on January 16, 2009 for L. John Drahota, and the other on February 12, 2009 for Peter Gotsch. Neither Drahota nor Gotsch, who were personal friends of Yost, were aware of or authorized these lines of credit. Yost forged their signatures on the documents that were necessary to open these lines of credit and on the subsequently issued promissory notes and loan agreements. After fraudulently securing these lines of credit, Yost submitted false collateral information, financial statements, and tax returns. Thereafter, by using the Drahota and Gotsch lines of credit, Yost fraudulently caused Flatirons to transfer a total of $3,845,000 from Flatirons to various accounts that Yost controlled, an amount which was then used by Yost to make payments to the Yost Partnership investors in order to conceal the declining value of their Yost Partnership membership interests. All of these acts were committed in Colorado.

This appeal relates to the $1 million Yost caused Flatirons to transfer to Steinberg in Florida, through the use of the Colorado Drahota line of credit, as a purported "redemption" of a portion of Steinberg's investments in the Yost Partnership. On January 20, 2009, using the Drahota line of credit, Yost had $1 million transferred to an account at Elevations Credit Union ("the credit union") in Colorado in the name of an entity controlled by Yost; transferred $1,050,000 from the first credit union account to another account at the credit union in Colorado in the name of the Yost Partnership; and then transferred $1 million from the Yost Partnership account in Colorado to Steinberg in Florida. However, on January 20, 2009, when Steinberg received the $1 million, Steinberg was clearly not entitled to the $1 million return on its investments because, at the time, Steinberg's membership interest in the Yost Partnership was worth only $138,179.90.

Yost's fraudulent activities were not discovered until August 2010, when Flatirons contacted Gotsch to inquire about a missed loan payment. This phone call led to a full investigation and the revelation of Yost's fraud. It was not until March 2012, however, that Flatirons discovered that Steinberg had received $1 million of the stolen funds. Based upon a request by the Receiver appointed during the Yost Partnership investigation, Flatirons did not immediately initiate its action against Steinberg. However on February 1, 2013, less than one year after the

discovery of the $1 million transfer to Steinberg, Flatirons filed its complaint seeking the return of the fraudulently transferred $1 million to Steinberg.

As previously stated, Flatirons appeals the trial court's dismissal of Count II filed under Colorado's rights in stolen property statute, Colo. Rev. Stat. § 18-4-405, and the final judgment entered in favor of Steinberg as to Flatirons' unjust enrichment claim pled in Count I. Each ruling and the majority's findings regarding Counts I and II will be addressed below.

ANALYSIS

I. **Dismissal of Count II**

The trial court dismissed Count II of Flatirons' amended complaint, which alleges statutory civil theft and seeks recovery under Colorado's rights in stolen property statute, C.R.S. § 18-4-405. The trial court dismissed Count II based on its conclusion that because the lawsuit was filed in Florida, and there exists a similar statute in Florida, a claim under the Colorado statute could not proceed in Florida. However, as will be fully discussed below, the trial court clearly and reversibly erred by dismissing Flatirons' Colorado rights in stolen property claim without first performing a conflict in laws analysis and applying the "significant relationships test" as set forth in the Restatement (Second) of Conflict of Laws §145-146 (1971), adopted by the Florida Supreme Court in Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980).

In adopting the Restatement (Second), the Florida Supreme Court in Bishop specifically stated as follows:

> Instead of clinging to the traditional lex loci delicti rule, we now adopt the "significant relationships test" as set forth in the Restatement (Second) of Conflict of Laws §145-146 (1971):
>
> s 145. The General Principle
>
> (1) The rights and liabilities of the parties with respect to an issue
> in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in s 6.
>
> (2) Contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Bishop, 389 So. 2d at 1001.

Several years after Bishop was decided, the Florida Supreme Court clarified that when determining whether to apply Florida law or the law of another state under Florida's conflict of laws jurisprudence, the court must first determine if substantial rights and duties are affected or, in other words, if substantive law is an issue. Hertz Corp. v. Piccolo, 453 So. 2d 12, 14 (Fla. 1984). "[I]f substantive law

be an issue, the rule adopted by this court in [Bishop] applies: '[T]he local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship.'" Id. at 14 (internal citations omitted) (some alteration in original). In other words, the Court held that if the alternative state's statute is substantive, then the significant relationships test adopted in Bishop controls.

This Court and other appellate courts of this state have performed the conflict of laws analysis and have applied the significant relationships test adopted in Bishop with respect to tort issues. For example, this Court applied the test set forth in Bishop in Avis Rent-A-Car Systems, Inc. v. Abrahantes, 517 So. 2d 25 (Fla. 3d DCA 1987), and concluded that, although the lawsuit was filed in Florida, Cayman Island law should have been applied, and therefore, the trial court's failure to apply Cayman Island law was reversible error. See also Barker v. Anderson, 546 So. 2d 449, 450 (Fla. 1st DCA 1989) (concluding that the significant relationships test controlled the issue of which state's law was applicable, where the lawsuit was filed in Florida but the injury occurred in Georgia and, after performing the Bishop analysis, finding that the trial court correctly applied Georgia law).

The trial court erred by failing to follow Bishop, Abrahantes, and Barker, and by dismissing Flatirons' rights in stolen property claim filed pursuant to

Colorado law, Colo. Rev. Stat. §18-4-405, based on its mistaken conclusion that because there is a similar Florida statute, Florida law must be applied in the Florida court. The issue is not whether Florida law **could** be applied, but rather, the issue is whether Florida law **should** be applied.

Colorado Revised Statute section 18-4-405, Colorado's rights in stolen property statute, provides that the transfer of stolen property to another does not divest the owner of his right to the property, and the owner may maintain an action against **any person in whose possession he finds the property**. Colorado's rights in stolen property statute differs from Florida law because Florida law protects innocent third parties in possession of stolen property while Colorado's law does not. Because the difference between Colorado law and Florida law regarding this issue is substantive, as opposed to procedural, the trial court was required to perform a conflict of laws analysis to determine whether Colorado or Florida has the most significant relationship to the occurrence and the parties. See Hertz Corp., 453 So. 2d at 14 ("The controlling question therefore is whether the Louisiana direct action statute is substantive. If it is, then the *Bishop* rule dictates that the Louisiana statute controls the question of indispensable parties. If the Louisiana statute is procedural, then Florida Law controls.").

Had the trial court performed the significant relationships test, it would have been required to consider the following undisputed record evidence. Flatirons is a

Colorado bank with its principal place of business in Boulder, Colorado. Over $3 million was stolen from Flatirons in Colorado by Yost, who resided in Colorado. The fraudulent lines of credit that were opened by Yost, were opened in Colorado. One million dollars of the $3 million stolen by Yost from Flatirons in Colorado was transferred from Flatirons to a Colorado credit union account in the name of an entity controlled by Yost, and then the funds were transferred from that account to another account at the same Colorado credit union in the name of the Yost Partnership. The Yost Partnership is an Illinois limited partnership, which was managed and operated by Yost in Colorado since 2000. One million dollars of the stolen funds were ultimately transferred to an account controlled by Steinberg. Steinberg, a New York limited partnership with its principal place of business in Florida, was an investment vehicle with over $60 million in assets, and it made several investments in the Yost Partnership, investments which were managed by Yost in Colorado between January 2000 and January 2004.

As these undisputed facts clearly reflect, the theft and the injury occurred in Colorado; the party who committed the theft resided in Colorado; and the entity the funds were stolen from was located in Colorado. Thus, under Bishop, the law of Colorado **must** be applied unless Florida has a more significant relationship to the theft and resulting loss. **"[T]he local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the**

particular issue, some other state has a more significant relationship. . . .” Bishop, 389 So. 2d at 999 (emphasis added); see also Hertz Corp., 453 So. 2d at 14. The only relationship Florida has to the theft is that the stolen funds were transferred to Steinberg, whose principal place of business was in Florida. Because Florida does not have a more significant relationship to the case and the injury occurred in Colorado, Colorado law controls.

The trial court erred by failing to perform a conflict of laws analysis, and for that reason alone, the dismissal of Count II must be reversed as a matter of law. The majority, however, performs its own analysis, affirms the dismissal of Count II, Flatirons' claim under Colorado's rights in stolen property statute, and concludes that based on the four corners of the amended complaint and the extensive exhibits, there is **no nexus** between the state of Colorado and Flatirons' claim against Steinberg. The majority's "no nexus" conclusion is premised on its finding that there is nothing alleged in the amended complaint or reflected in the exhibits that would **warrant** subjecting Steinberg to a Colorado statutory cause of action.

The majority is, however, confusing personal jurisdiction jurisprudence with a conflict of laws analysis. The issue is not whether Flatirons could have or should have filed its complaint against Steinberg in Colorado. The complaint was filed in Florida, and there is no dispute that venue in Florida is proper. The issue is,

whether, after performing a conflict of laws analysis, as adopted by the Florida Supreme Court in Bishop, Colorado law should be applied in Count II.

To reiterate, under section 145 of the Restatement (Second) of Conflict of Laws, adopted by the Florida Supreme Court in Bishop, when determining which state has the most significant relationship to the "occurrence and the parties," the court is required to consider:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

Bishop, 389 So. 2d at 1001. Had the trial court and the majority performed the significant relationships test, they would have been required to consider the following undisputed record evidence as it relates to the four factors above.

(a) The place where the injury occurred

The $1 million transferred to Steinberg was stolen from Flatirons in Colorado. Flatirons is a Colorado financial institution located in Colorado and thus the injury occurred in Colorado. Therefore, as to the first factor, only Colorado has a significant relationship to the occurrence.

(b) The place where the conduct causing the injury occurred

The conduct that caused the injury to Flatirons also occurred in Colorado, not Florida. Yost opened fraudulent lines of credit at Flatirons in Colorado, and he

forged the signatures on the documents necessary to open these lines of credit and on the promissory notes and loan agreements in Colorado. After submitting this false collateral information, financial statements, and tax returns in Colorado, Yost fraudulently caused Flatirons to transfer $3,845,000 from Flatirons to various accounts in Colorado. The $1 million ultimately transferred to Steinberg was transferred from the funds stolen in Colorado. Thus, as to this factor, only Colorado has a significant relationship to the occurrence.

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties

This factor is weighted equally as to Colorado and Florida. Yost was domiciled in Colorado, where all of these acts and the injury occurred. The Yost Partnership was managed and operated by Yost in Colorado since 2000. On the other hand, Steinberg is a New York limited partnership with its principal place of business in Florida. Thus, as to this factor, both Colorado and Florida have a significant relationship to the occurrence and the parties.

(d) The place where the relationship, if any, between the parties is centered

Colorado is also the place where the relationship between the parties was centered. Steinberg, an investment vehicle, invested substantial money with the Yost Partnership. These investments were sent to the Yost Partnership, and Yost managed the investments in Colorado. In order to hide the results of Yost's poor investment decisions, Yost began defrauding the Yost Partnership investors by

issuing false reports regarding the company's assets and creating fraudulent lines of credit to funnel money into the Yost and Yost Partnership accounts. The $1 million Yost wired to Steinberg was not earned by the Yost Partnership's investments. Rather, it was stolen from Flatirons. Thus, the relationship between Yost, the Yost Partnership, and Steinberg was based on Steinberg's investments in the Colorado-based Yost Partnership, and the relationship between Flatirons and Steinberg was as a result of Yost's attempt to hide the poor health of the Yost Partnership and Yost's misrepresentation of the company's assets.

In summary, the trial court erred by dismissing Count II without performing a conflict in laws analysis as mandated by Bishop. The majority has also erred by (1) failing to apply Bishop, Abrahates, and Barker, decisions from the Florida Supreme Court, this Court, and the First District Court of Appeal; (2) applying its own "nexus" analysis; and (3) incorrectly determining that the allegations and the exhibits were insufficient to "warrant" subjecting Steinberg to a Colorado statutory cause of action. The allegations and exhibits clearly establish that Colorado has the most significant relationship to the occurrence at issue in Count II—Yost's theft of money from a Colorado bank and his transfer of that money to Steinberg in Florida.

II. **Count I—unjust enrichment**

After conducting a non-jury trial on Flatirons' unjust enrichment claim, the trial court entered a final judgment in favor of Steinberg, finding that: (1) Flatirons failed to satisfy its burden of proof; and (2) the unjust enrichment claim was barred by the statute of limitations. The majority affirms these findings. For the following reasons, I disagree.

(a) Flatirons met its burden of proof

To prevail on its claim for unjust enrichment, Flatirons was required to prove that: (1) Flatirons conferred a benefit upon Steinberg; (2) Steinberg had knowledge of the benefit conferred; (3) Steinberg voluntarily accepted and retained the conferred benefit; and (4) the circumstances are such that it would be inequitable for Steinberg to retain the benefit conferred without paying Flatirons the value of that benefit. Fla. Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1242 n.4 (Fla. 2004); Extraordinary Title Servs., LLC v. Fla. Power & Light Co., 1 So. 3d 400, 404 (Fla. 3d DCA 2009).

(1) Flatirons conferred a benefit upon Steinberg

At trial, the parties stipulated that the $1 million Steinberg received from Yost came from (was stolen from) Flatirons. Direct contact or privity between Flatirons and Steinberg is not required. See Aceto Corp. v. TherapeuticsMD, Inc., 953 F. Supp. 2d 1269, 1288 (S.D. Fla. 2013); Williams v. Wells Fargo Bank N.A., 2011 WL 4368980, at *9 (S.D. Fla. 2011).

(2) Steinberg had knowledge of the benefit conferred

It was undisputed that Steinberg had full knowledge of the transfer of $1 million into its account. The majority concludes that the record supports the trial court's finding that Steinberg had no knowledge that the money it received was tainted. However, the majority does not provide any authority in support of its position that Florida law requires that the recipient of the conferred benefit, Steinberg, must have had knowledge that the benefit conferred was **fraudulent**. The only citation provided by the majority, E & M Marine Corp. v. First Union National Bank, 783 So. 2d 311, 312-13 (Fla. 3d DCA 2001), does not support that position. The issue in E & M Marine was whether First Union, which held a promissory note on a thirty-two foot vessel and which took possession of the vessel after the vessel was repaired, should be required to pay for the repairs when the owner failed to pay for the repairs and the owner defaulted on the note. This Court concluded that First Union was not liable for the repairs because it did not request, authorize, or have knowledge of the repairs.

In the instant case, Steinberg was aware of and accepted the fraudulent transfer. Although Steinberg might not have initially known that the money transferred to its account had been stolen from Flatirons and that Steinberg was not entitled to a $1 million return on its investment in the Yost Partnership, Steinberg was ultimately made aware of the stolen nature of the funds, and it is undisputed

that despite Steinberg's full appreciation of the theft and its lack of entitlement to any appreciation or return on its lost investment in the Yost Partnership, it still refused to return the illegally transferred funds to which Steinberg clearly was not entitled.

(3) Steinberg voluntarily accepted and retained the benefit conferred

It is undisputed that between January 2000 and January 2004, Steinberg invested $2.2 million in the Yost Partnership. Gary Frohman, the corporate representative of Steinberg, testified at trial that he was aware that the Yost Partnership had the ability to trade on margin and that Steinberg could lose all or part of its capital investment, and this is exactly what happened. By 2009, when Steinberg received the $1 million stolen from Flatirons, the Yost Partnership's assets totaled only $1.2 million, and Steinberg's $2.2 million investment had shrunk to $138,179.90. Thus, the $1 million "redemption" payment made to Steinberg was a benefit that Steinberg was not entitled to receive.

Although Steinberg was unaware that Yost had lost most of Steinberg's investment at the time it received the $1 million "redemption" payment, when Steinberg learned the truth—that when it received the $1 million transfer its investment was valued at only $138,179.90, and thus it was not entitled to a $1 million return or a redemption of its investment—it refused to return the funds that it then knew had been stolen from Flatirons.

(4) The circumstances are such that it would be inequitable for Steinberg to retain the $1 million

Although a thief can transfer legal title to money to a good faith recipient who has given good and adequate consideration for the money, Steinberg gave absolutely no consideration for the $1 million windfall it received. That is because when it received the $1 million from Yost, the actual value of its investment totaled only $138,179.90, and thus it had realized only a loss, not a profit from its investment. Steinberg had **lost** over $2 million. It did not **earn** $1 million from its $2.2 million investment.

To allow Steinberg to retain the $1 million it clearly is not entitled to would be inequitable because the $1 million Steinberg received was stolen from Flatirons by Yost. The Yost Partnership operated as a legitimate investment company for many years. It was only after Yost's poor investment decisions resulted in a sharp decline of the company's assets that Yost began defrauding the investors and stealing money from Flatirons to hide the true value of the company and the investors' assets. Yost's transfer of the stolen funds to Steinberg, whose investment shrank from $2.2 million to $138,179.90, was made in furtherance of Yost's scheme to hide the true value of Steinberg's investment. To allow Steinberg to keep the $1 million it is clearly not entitled to would result in an unjustified windfall for Steinberg to the detriment of an innocent victim—Flatirons.

It is important to note that Flatirons is an innocent victim. This was not a Ponzi scheme, and Flatirons was not an investor. Steinberg was aware of the risk associated with its investment; Yost attempted to make investment decisions that would generate a profit for the Yost Partnership investors; Yost's investment decisions resulted in the loss of most of Steinberg's $2.2 million investment, not a profit of $1 million; and if Steinberg is permitted to retain this $1 million windfall, Flatirons, an innocent victim, will be made to pay for Yost's poor investment decisions. This is a classic unjust enrichment claim.

(b) Flatirons' unjust enrichment claim is not barred by the statute of limitations

The trial court and the majority have concluded that Flatirons' unjust enrichment claim is barred by Florida's four-year statute of limitations. The majority correctly notes that the statute of limitations for an unjust enrichment claim begins to run when the alleged benefit is conferred and received by the defendant. See § 95.11, Fla. Stat. (2013); Beltran, M.D. v. Vincent P. Miraglia, M.D., P.A., 125 So. 3d 855, 859 (Fla. 4th DCA 2013). The monies at issue were transferred to Steinberg on January 20, 2009, but Flatirons filed its lawsuit on February 1, 2013, four years and eleven days after the money was transferred. In other words, eleven days too late. Thus, unless either the delayed discovery doctrine or equitable tolling applies, Flatirons' unjust enrichment claim is barred by the statute of limitations.[15]

(1) The delayed discovery doctrine

The majority concludes that the delayed discovery doctrine is inapplicable to unjust enrichment claims and cites to Davis v. Monahan, 832 So. 2d 708 (Fla. 2002), and Brooks Tropicals, Inc. v. Acosta, 959 So. 2d 288, 296 (Fla. 3d DCA 2007). However, neither Davis nor Brooks prohibit application of the delayed discovery doctrine to unjust enrichment claims **founded on fraud**. In fact, the Florida Supreme Court in Davis specifically noted the fraud exception to the limitation of the application of the delayed discovery doctrine. Davis, 832 So. 2d at 709. In quashing the Fourth District Court of Appeal's decision applying the delayed discovery doctrine to evaluate the plaintiff's claims for breach of fiduciary duty, civil theft, conspiracy, conversion, and unjust enrichment, the Florida Supreme Court specifically recognized that although "the Florida Legislature has stated that a cause of action accrues or begins to run when the last element of the cause of action occurs," there is an exception "for claims of fraud and products liability in which the accrual of the causes of action is delayed until the plaintiff

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[15] Flatirons correctly does not rely on the doctrine of equitable estoppel, which requires misconduct by the opposing party, because Flatirons does not contend that Steinberg was guilty of any misconduct. See Major League Baseball v. Morsani, 790 So. 2d 1071, 1076-77 (Fla. 2001) (noting that equitable estoppel differs from other legal theories that may relieve a party of the statute of limitations, such as equitable tolling, in that "[e]quitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct").

either knows or should know that the last element of the cause of action occurred." Id. at 709 (footnote omitted).

Section 95.11(3), Florida Statutes (2013), is the applicable statute governing the limitations period for Flatirons' unjust enrichment claim, which the parties agree is four years. Florida's delayed discovery doctrine, as codified in section 95.031(2)(a), Florida Statutes (2013), provides, in relevant part, as follows:

> An action **founded upon fraud** under s. 95.11(3) . . . must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3) . . . .

(emphasis added).

Flatirons' unjust enrichment claim against Steinberg is founded upon fraud. Yost fraudulently misappropriated over $3 million from Flatirons and transferred $1 million of the $3 million to Steinberg in 2009. Yost concealed the fraudulent nature of his acts. Flatirons first discovered the misappropriation in 2010 and the fraudulent transfer to Steinberg in 2012. Flatirons filed its lawsuit against Steinberg within one year of discovering the fraudulent transfer to Steinberg, well within the four-year statute of limitations of its initial discovery of Yost's wrongdoing.

The Florida Supreme Court and other courts have applied the delayed discovery doctrine to similar facts. For example, the Florida Supreme Court in

Miami Beach First National Bank v. Edgerly, 121 So. 2d 417 (Fla. 1960), affirmed this Court's decision to apply delayed discovery principles in an action filed by the Edgerlys (the depositors) against the bank for cashing a check drawn from their account which allegedly contained a forged endorsement. The Court held that the statute of limitations did not begin to run until discovery of the fact that a right, which will support a cause of action, has been invaded. Id. at 420. "[T]he statute [of limitations] did not begin to run until the depositors knew, or in the exercise of ordinary business care would have discovered, that the endorsement on the subject check was forged, which is a question of fact to be determined by the trier of fact." Id.

In Butler University v. Bahssin, 892 So. 2d 1087 (Fla. 2d DCA 2004), the Second District Court of Appeal applied the delayed discovery doctrine to Butler University's ("Butler") action founded on the misappropriation of Butler's property by George Verdak, a former employee of Butler, to an innocent recipient, Jennifer Bahssin. The complaint alleged that when Verdak left Butler, he took valuable dance costumes, sets, and other items belonging to Butler with him and sold them to Bahssin, an art dealer. In applying the delayed discovery doctrine, the Second District noted that "[t]he facts contained in Butler's proposed amended complaint are that it was prevented from discovering the loss of its property

through the active concealment of Verdak's original misappropriation by his successors in interest until Bahssin purchased the costumes in 2002." Id. at 1092.

In both Edgerly and Butler, the delayed discovery doctrine was applied to causes of action to recover property from a third party **who had not committed the fraud** that resulted in a loss to the owner of the property. Although the bank in Edgerly did not endorse the check, the Florida Supreme Court applied the delayed discovery doctrine to allow the account holder to seek recovery of its misappropriated funds from the bank that cashed the allegedly forged check. In Butler, the Second District applied the delayed discovery doctrine to allow Butler to seek recovery of its misappropriated costumes, etc. from Bahssin, who innocently purchased the stolen costumes from Verdak.

It is therefore error to preclude the application of the delayed discovery doctrine to Flatirons' unjust enrichment claim against Steinberg. Although Steinberg did not commit the fraud, neither did Butler or Bahssin. However, in all three cases, the action was "founded upon fraud," and the injured party did not immediately discover the theft due to the fraudster's concealment of the fraud.

(2) Equitable tolling

The majority fails to address Flatirons' alternative equitable tolling argument. "The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a

limitations period." Machules v. Dep't of Admin., 523 So. 2d 1132, 1133 (Fla. 1988) (footnote omitted).

> The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.

Id. at 1134 (citations and quotation omitted) (alteration in original). Equitable tolling, unlike equitable estoppel, does not require active deception or misconduct, and "[g]enerally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Id.

In the instant case, Yost concealed the fraudulent transfer of monies from various Flatirons accounts to the Yost Partnership investors in order to deceive the investors about the sharp decline in the company's and the investors' assets. Based on his position of trust, Yost was able to open lines of credit by submitting forged documents and false supporting documents without garnering suspicion or a high level of scrutiny. When Flatirons discovered the thefts, it conducted an investigation and eventually learned that $1 million of the stolen funds had been transferred into Steinberg's account. Based on a request by the Receiver, Flatirons

delayed the filing of its complaint for approximately eleven months. Due to the concealment by Yost and because Flatirons honored the Receiver's request, Flatirons filed its complaint on February 1, 2013. The filing of the complaint was within one year of Flatirons' discovery of the $1 million transfer to Steinberg, but eleven days too late if the limitations period is calculated to run from the date of the **transfer** as opposed to the date of the **discovery of the transfer.**

Steinberg is clearly not entitled to the $1 million it received from Yost. At the time of the transfer, Steinberg's investment had shrunk to $138,179.90 due to poor investment decisions made by Yost, not due to any fraud. Thus, the $1 million represents a windfall to which Steinberg is not entitled, to the detriment of Flatirons, an innocent victim. Under these circumstances, the doctrine of equitable tolling should be applied to allow Flatirons to pursue its unjust enrichment claim against Steinberg.

CONCLUSION

The trial court erred by dismissing Count II, a claim brought by Flatirons under Colorado Revised Statutes, section 18-4-405, without performing a conflict of laws analysis as required by Florida law. The majority also errs by failing to properly perform the same conflict of laws analysis. Thus, the dismissal of Count II should be reversed and remanded with directions to the trial court to perform a

conflict of laws analysis under the test adopted by the Florida Supreme Court in Bishop.

The trial court erred by entering judgment in favor of Steinberg on Count I, unjust enrichment, because Flatirons met its burden of proof and the unjust enrichment claim is not barred by the statute of limitations. Under the delayed discovery doctrine, the unjust enrichment claim was timely filed, or in the alternative, equitable tolling is applicable based on the circumstances of this case, and therefore, Flatirons should be permitted to pursue its unjust enrichment claim against Steinberg.

Accordingly, I respectfully disagree with the majority opinion.

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

HAMER *v.* NEIGHBORHOOD HOUSING SERVICES OF CHICAGO ET AL.

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

No. 16–658. Argued October 10, 2017—Decided November 8, 2017

An appeal filing deadline prescribed by statute is considered "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. See *Bowles* v. *Russell*, 551 U. S. 205, 210–213. In contrast, a time limit prescribed only in a court-made rule is not jurisdictional. It is a mandatory claim-processing rule that may be waived or forfeited. *Ibid.* This Court and other forums have sometimes overlooked this critical distinction. See *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 161.

Petitioner Charmaine Hamer filed an employment discrimination suit against respondents. The District Court granted respondents' motion for summary judgment, entering final judgment on September 14, 2015. Before October 14, the date Hamer's notice of appeal was due, her attorneys filed a motion to withdraw as counsel and a motion for an extension of the appeal filing deadline to give Hamer time to secure new counsel. The District Court granted both motions, extending the deadline to December 14, a two-month extension, even though the governing Federal Rule of Appellate Procedure, Rule 4(a)(5)(C), confines such extensions to 30 days. Concluding that Rule 4(a)(5)(C)'s time prescription is jurisdictional, the Court of Appeals dismissed Hamer's appeal.

Held: The Court of Appeals erred in treating as jurisdictional Rule 4(a)(5)(C)'s limitation on extensions of time to file a notice of appeal. Pp. 5–10.

(a) The 1948 version of 28 U. S. C. §2107 allowed extensions of time to file a notice of appeal, not exceeding 30 days, "upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment," but the statute said nothing about extensions when

Syllabus

the judgment loser did receive notice of the entry of judgment. In 1991, the statute was amended, broadening the class of prospective appellants who could gain extensions to include all who showed "excusable neglect or good cause" and reducing the time prescription for appellants who lacked notice of the entry of judgment from 30 to 14 days. §2107(c). For other cases, the statute does not say how long an extension may run. Rule 4(a)(5)(C), however, does prescribe a limit: "No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date [of] the order granting the [extension] motion . . . , whichever is later." Pp. 5–6.

(b) This Court's precedent shapes a rule of decision that is both clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category.

In concluding otherwise, the Court of Appeals relied on *Bowles*. There, Bowles filed a notice of appeal outside a limitation set by Congress in §2107(c). This Court held that, as a result, the Court of Appeals lacked jurisdiction over his tardy appeal. 551 U. S., at 213. In conflating Rule 4(a)(5)(C) with §2107(c) here, the Seventh Circuit failed to grasp the distinction between jurisdictional appeal filing deadlines and deadlines stated only in mandatory claim-processing rules. It therefore misapplied *Bowles*. *Bowles*'s statement that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,' " *id.,* at 209, is a characterization left over from days when the Court was "less than meticulous" in using the term "jurisdictional," *Kontrick* v. *Ryan*, 540 U. S. 443, 454. The statement was correct in *Bowles,* where the time prescription was imposed by Congress, but it would be incorrect here, where only Rule 4(a)(5)(C) limits the length of the extension. Pp. 7–10.

835 F. 3d 761, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 16–658

CHARMAINE HAMER, PETITIONER *v.* NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, ET AL.

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

[November 8, 2017]

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment. In *Bowles* v. *Russell*, 551 U. S. 205, 210–213 (2007), this Court clarified that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. But a time limit prescribed only in a court-made rule, *Bowles* acknowledged, is not jurisdictional; it is, instead, a mandatory claim-processing rule subject to forfeiture if not properly raised by the appellee. *Ibid.*; *Kontrick* v. *Ryan*, 540 U. S. 443, 456 (2004). Because the Court of Appeals held jurisdictional a time limit specified in a rule, not in a statute, 835 F. 3d 761, 763 (CA7 2016), we vacate that court's judgment dismissing the appeal.

I

A

"Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick*, 540 U. S., at 452 (citing U. S. Const., Art. III, §1); *Owen Equipment &*

Erection Co. v. *Kroger*, 437 U. S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."). Accordingly, a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time. See *Bowles*, 551 U. S., at 211–212 (noting "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress"); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"). A time limit not prescribed by Congress ranks as a mandatory claim-processing rule, serving "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 562 U. S. 428, 435 (2011).

This Court and other forums have sometimes overlooked this distinction, "mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 161 (2010). But prevailing precedent makes the distinction critical. Failure to comply with a jurisdictional time prescription, we have maintained, deprives a court of adjudicatory authority over the case, necessitating dismissal—a "drastic" result. *Shinseki*, 562 U. S., at 435; *Bowles*, 551 U. S., at 213 ("[W]hen an 'appeal has not been prosecuted . . . within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.'" (quoting *United States* v. *Curry*, 6 How. 106, 113 (1848))). The jurisdictional defect is not subject to waiver or forfeiture[1] and may be raised at any time in the court of first

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[1]The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'inten-

instance and on direct appeal. *Kontrick*, 540 U. S., at 455.[2] In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative. *Shinseki*, 562 U. S., at 434.

Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited. *Manrique* v. *United States*, 581 U. S. ___, ___ (2017) (slip op., at 4). "[C]laim-processing rules . . . [ensure] relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Eberhart* v. *United States*, 546 U. S. 12, 19 (2005) (*per curiam*).[3]

B

Petitioner Charmaine Hamer filed a complaint against respondents Neighborhood Housing Services of Chicago and Fannie Mae alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U. S. C. §621 *et seq.* The District Court granted respondents' motion for summary judgment on September 10, 2015, and entered final judgment on September 14, 2015. In the absence of a time extension, Hamer's notice of appeal would have been due by October 14, 2015. Fed. Rule App. Proc. 4(a)(1)(A).

On October 8, 2015, before the October 14 deadline for filing Hamer's notice of appeal, her attorneys made two

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tional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)).

[2] Subject-matter jurisdiction cannot be attacked collaterally, however. *Kontrick* v. *Ryan*, 540 U. S. 443, 455, n. 9 (2004) (citing *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557–559 (1887)).

[3] We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions. See *Kontrick*, 540 U. S., at 457.

motions.[4] First, they sought to withdraw as counsel because of their disagreement with Hamer on pursuit of an appeal. Second, they sought a two-month extension of the notice of appeal filing date, so that Hamer would have adequate time to engage new counsel for her appeal. App. to Pet. for Cert. 57–59. The District Court granted both motions on the same day and ordered extension of the deadline for Hamer's notice of appeal from October 14 to December 14, 2015. *Id.,* at 60. Respondents did not move for reconsideration or otherwise raise any objection to the length of the extension.

In the docketing statement respondents filed in the Court of Appeals, they stated: "The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U. S. C. §1291, in that on December 11, 2015, [Hamer] filed a timely Notice of Appeal from a final judgment of the United States District Court for the Northern District of Illinois that disposed of all of [Hamer's] claims against [respondents]." *Id.,* at 63. Respondents' statement later reiterated: "On December 11, 2015, [Hamer] timely filed a Notice of Appeal . . . ." *Id.,* at 64. Nevertheless, the Court of Appeals, on its own initiative, questioned the timeliness of the appeal and instructed respondents to brief the issue. 835 F. 3d, at 762. Respondents did so and, for the first time, asserted that the appeal was untimely, citing the relevant Rule confining extensions to 30 days. *Id.,* at 762–763 (citing Fed. Rule App. Proc. 4(a)(5)(C)). Concluding that it lacked jurisdiction to reach the merits, the Court of Appeals dismissed Hamer's appeal. 835 F. 3d, at 763.[5] We granted certio-

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[4]Movants were the attorney appointed by the court to represent Hamer and two other attorneys who entered appearances as co-counsel. App. to Pet. for Cert. 57–59.

[5]The Court of Appeals incorrectly stated that respondents, answering the Seventh Circuit's inquiry, asserted that the appeals court "lack[ed] jurisdiction over [Hamer's] appeal." 835 F. 3d, at 763. In fact, respond-

rari. 580 U. S. ___ (2017).

II

A

Section 2107 of Title 28 of the U. S. Code, as enacted in 1948, allowed extensions of the time to file a notice of appeal, not exceeding 30 days, "upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment." Act of June 25, 1948, §2107, 62 Stat. 963.[6] Nothing in the statute provided for extension of the time to file a notice of appeal when, as in this case, the judgment loser did receive notice of the entry of judgment. In 1991, Congress broadened the class of persons who could gain extensions to include all prospective appellants who showed "excusable neglect or good cause." §12, 105 Stat. 1627. In addition, Congress retained a time prescription covering appellants who lacked notice of the entry of judgment: "[A] party entitled to notice of the entry of a judgment . . . [who] did not receive such notice from the clerk or any party within 21 days of [the judgment's] entry" qualifies for a 14-day extension,[7] if "no party would be prejudiced [thereby]." §2107(c). In full, §2107(c) now provides:

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ents maintained that "the timeliness of Hamer's appeal d[id] not appear to be jurisdictional according to [Circuit] law." App. to Pet. for Cert. 71 (capitalization and footnote omitted). That was so, respondents explained, because "the time limits found [in] Fed. R[ule] App. P[roc.] 4(a)(5)(C) . . . lack a statutory basis." *Id.,* at 77. Even if not jurisdictional, respondents continued, the Rule is mandatory and must be observed unless forfeited or waived. *Ibid.*

[6] As enacted, the pertinent paragraph of §2107 provided in full: "The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." Act of June 25, 1948, §2107, 62 Stat. 963.

[7] The 14-day prescription cuts back the original limit of 30 days.

> "(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> "(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> "(2) that no party would be prejudiced,
>
> "the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal."

In short, current §2107(c), like the provision as initially enacted, specifies the length of an extension for cases in which the appellant lacked notice of the entry of judgment.[8] For other cases, the statute does not say how long an extension may run.

But Federal Rule of Appellate Procedure 4(a)(5)(C) does prescribe a limit: "No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date [of] the order granting the [extension] motion . . . , whichever is later." Unlike §2107(c), we note, Rule 4(a)(5)(C) limits extensions of time to file a notice of appeal in *all* circumstances, not just in cases in which the prospective appellant lacked notice of the entry of judgment.

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[8]The statute describes the 14-day extension permitted in lack-of-notice cases as a "reopening [of] the time for appeal." §2107(c). The "reopening" period is the functional equivalent of an extension. See Brief for American Academy of Appellate Lawyers as *Amicus Curiae* 5–6.

B

Although Rule 4(a)(5)(C)'s limit on extensions of time appears nowhere in the text of §2107(c), respondents now contend that Rule 4(a)(5)(C) has a "statutory basis" because §2107(c) once limited extensions (to the extent it did authorize them) to 30 days. Brief for Respondents 17. No matter, respondents submit, that Congress struck the 30-day limit in 1991 and replaced it with a 14-day limit governing, as the 30-day limit did, only lack-of-notice cases; deleting the 30-day prescription, respondents conjecture, was "probably inadverten[t]." *Id.,* at 1. In support of their argument that Congress accidentally failed to impose an all-purpose limit on extensions, respondents observe that the 1991 statute identifies Congress' aim as the enactment of "certain technical corrections in . . . provisions of law relating to the courts." 105 Stat. 1623. They also note the caption of the relevant section of the amending statute: "Conformity with Rules of Appellate Procedure." *Id.,* at 1627. Because striking the 30-day limit from §2107 made the statute *less* like Rule 4(a)(5)(C), respondents reason, Congress likely erased the relevant paragraph absentmindedly. Hence, respondents conclude, "there is no reason to interpret the 1991 amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance." Brief for Respondents 2.

Overlooked by respondents, pre-1991 §2107 never spoke to extensions for reasons other than lack of notice. In any event, we resist speculating whether Congress acted inadvertently. See *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. ___, ___–___ (2017) (slip op., at 9–10) ("[W]e will not presume with [respondents] that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" (quoting *Dodd* v. *United States*, 545 U. S. 353, 357 (2005))); *Magwood* v. *Patterson*, 561 U. S. 320,

334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."). The rule of decision our precedent shapes is both clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, *supra,* at 2; otherwise, the time specification fits within the claim-processing category, *ibid.*[9]

In dismissing Hamer's appeal for want of jurisdiction, the Court of Appeals relied heavily on our decision in *Bowles*. We therefore reiterate what that precedent conveys. There, petitioner Keith Bowles did not receive timely notice of the entry of a postjudgment order and consequently failed to file a timely notice of appeal. *Bowles* v. *Russell*, 432 F. 3d 668, 670 (CA6 2005). When Bowles learned of the postjudgment order, he moved for an extension under Federal Rule of Appellate Procedure 4(a)(6), which implements §2107(c)'s authorization of extensions in lack-of-notice cases. *Ibid.* The District Court granted Bowles's motion, but inexplicably provided a 17-day exten-

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[9]In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule: "A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Gonzalez* v. *Thaler*, 565 U. S. 134, 141 (2012) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515 (2006)). See also, *e.g., Henderson* v. *Shinseki*, 562 U. S. 428, 431 (2011) (statutory deadline for filing notice of appeal with Article I tribunal held not jurisdictional). "This is not to say that Congress must incant magic words in order to speak clearly," however. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013). In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress' intent]." *Id.,* at 153–154 (quoting *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 168 (2010)). Even so, "in applying th[e] clear statement rule, we have made plain that most [statutory] time bars are nonjurisdictional." *United States* v. *Kwai Fun Wong*, 575 U. S. ___, ___ (2015) (slip op., at 6).

sion, rather than the 14-day extension authorized by §2107(c). *Bowles*, 551 U. S., at 207. Bowles filed his notice of appeal within the 17 days allowed by the District Court but outside the 14 days allowed by §2107(c). *Ibid.* "Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in §2107(c)," we explained, the Court of Appeals lacked jurisdiction over Bowles's tardy appeal. *Id.,* at 213.

Quoting *Bowles* at length, the Court of Appeals in this case reasoned that "[l]ike Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which §2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." 835 F. 3d, at 763. In conflating Rule 4(a)(5)(C) with §2107(c), the Court of Appeals failed to grasp the distinction our decisions delineate between jurisdictional appeal filing deadlines and mandatory claim-processing rules, and therefore misapplied *Bowles*.

Several Courts of Appeals,[10] including the Court of Appeals in Hamer's case, have tripped over our statement in *Bowles* that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" 551 U. S., at 209 (quoting *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 61 (1982) (*per curiam*)). The "mandatory and jurisdictional" formulation is a characterization left over from days when we were "less than meticulous" in our use of the term "jurisdictional." *Kontrick*, 540 U. S., at 454.[11] The statement was correct as applied in *Bowles*

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[10] See *Freidzon* v. *OAO LUKOIL*, 644 Fed. Appx. 52, 53 (CA2 2016); *Peters* v. *Williams*, 353 Fed. Appx. 136, 137 (CA10 2009); *United States* v. *Hawkins*, 298 Fed. Appx. 275 (CA4 2008).

[11] Indeed, the formulation took flight from a case in which we mistakenly suggested that a claim-processing rule was "mandatory and jurisdictional." See *United States* v. *Robinson*, 361 U. S. 220, 224 (1960). We have since clarified that "*Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because

because, as the Court there explained, the time prescription at issue in *Bowles* was imposed by Congress. 551 U. S., at 209–213. But "mandatory and jurisdictional" is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U. S. Code. Because Rule 4(a)(5)(C), not §2107, limits the length of the extension granted here, the time prescription is not jurisdictional. See *Youkelsone* v. *FDIC*, 660 F. 3d 473, 475 (CADC 2011) ("Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U. S. Code.").

* * *

For the reasons stated, the Court of Appeals erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal. We therefore vacate that court's judgment and remand the case for further proceedings consistent with this opinion. We note, in this regard, that our decision does not reach issues raised by Hamer, but left unaddressed by the Court of Appeals, including: (1) whether respondents' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture, see Brief for Petitioner 21–22; (2) whether respondents could gain review of the District Court's time extension only by filing their own appeal notice, see *id.*, at 23–27; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint, see *id.*, at 29–43.

It is so ordered.

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district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Eberhart* v. *United States*, 546 U. S. 12, 17 (2005) (*per curiam*).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOHN MCCOY,
Appellant,

v.

R.J. REYNOLDS TOBACCO COMPANY, Individually and As Successor By Merger To **BROWN & WILLIAMSON TOBACCO CORPORATION,** Individually and As Successor By Merger To **THE AMERICAN TOBACCO COMPANY,** A Foreign Corporation; **PHILIP MORRIS - USA, INC.,** A Foreign Corporation; **LORILLARD TOBACCO COMPANY,** A Foreign Corporation; **LIGGETT GROUP LLC,** (f/k/a Liggett Group, Inc., f/k/a Liggett & Myers Tobacco Company); and **VECTOR GROUP LTD., INC.,** (f/k/a Brooke Group, Ltd.), A Foreign Corporation,
Appellees.

No. 4D16-1378

[October 25, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy III, Judge; L.T. Case No. 08-25806 CACE (19) and 08-80000 CACE (19).

Celene H. Humphries, Shea T. Moxon, Maegen P. Luka and Thomas J. Seider of Brannock & Humphries, Tampa; and Scott Schlesinger, Steven Hammer, Jonathan R. Gdanski and Brittany Chambers of Schlesinger Law Offices, P.A., Fort Lauderdale, for appellant.

Scott Michael Edson of King & Spalding LLP, Washington, D.C.; Val Leppert, William L. Durham II, and Chad A. Peterson of King & Spalding LLP, Atlanta, Georgia; and Stephanie E. Parker and John M. Walker of Jones Day, Atlanta, Georgia, for appellees, R.J. Reynolds Tobacco Company and Lorillard Tobacco Company.

Geoffrey J. Michael of Arnold & Porter LLP, Washington, D.C., for appellee, Philip Morris USA Inc.

GROSS, J.

We reverse the circuit court's order denying a motion for attorney's fees based upon a 2014 proposal for settlement under section 768.79, Florida Statutes (2015).[1]

On July 24, 2014, the plaintiff/appellant served a proposal for settlement on each of three defendants. The proposals were served by U.S. certified mail. The plaintiff also filed a Notice of Serving Proposal for Settlement via e-mail on the same date.

The defendants had actual knowledge of the proposals for settlement and did not accept them.

After a trial, the plaintiff obtained a verdict that entitled him to attorney's fees under section 768.79. The plaintiff moved for attorney's fees. The defendants opposed an award on procedural grounds — that he failed to e-mail the proposals under Florida Rule of Judicial Administration 2.516.

The circuit court denied the motion for fees for the failure to comply with Rule 2.516.

Where a party has actual notice of an offer of settlement, and the offering party has satisfied the requirements of section 768.79 on entitlement, to deny recovery because the initial offer was not e-mailed is to allow the procedural tail of the law to wag the substantive dog. *See Kuhajda v. Borden Dairy Co. of Ala., LLC.,* 202 So. 3d 391, 395-96 (Fla. 2016). We agree with the analysis of Judge Badalamenti in *Boatright v. Philip Morris USA Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017).

The focus of the statute is on actual notice — an offer of judgment is required to be "served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." § 768.79(3), Fla. Stat. (2014). Echoing the requirements of the statute, Florida Rule of Civil Procedure 1.442(d) provides that an offer "shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule."

Identifying those documents for which e-mail service is required, Rule 2.516(a) provides, in pertinent part:

> **(a) Service; When Required.** Unless the court otherwise orders, or a statute or supreme court administrative order specifies a different means of service, every *pleading*

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[1] Because we find the 2014 proposal for settlement to be valid, we do not reach the validity of separate proposals for settlement served by e-mail in 2015.

> *subsequent to the initial pleading and every other document* ***filed in any court proceeding*** *. . . must be served in accordance with this rule on each party.*

(Emphasis added). An offer of judgment is not a pleading. *See* Fla. R. Civ. P. 1.100(a). At the time it is initially served, an offer of judgment is not a document "filed in any court proceeding"; both section 768.79(3) and Rule 1.442(d) expressly state that it is *not* to be filed. Under the plain language of Rule 2.516(a), then, the initial offer of judgment is outside of the e-mail requirements of that rule.

To arrive at a different conclusion, *Wheaton v. Wheaton* imports language from rule 2.516(b) to add words to the plain language of 2.516(a). 217 So. 3d 125, 126 (Fla. 3d DCA 2017). Instead of focusing on subsection 2.516(a), which specifies when e-mail service is "required," the *Wheaton* court looked to subsection 2.516(b) to hold that e-mail service was required for the initial delivery of an offer of judgment.

We disagree with *Wheaton; s*ubsection (a) is not ambiguous, so a court should not add words to manipulate its meaning. Even a strict construction of Rule 2.516(a) should consider "only the literal words of [the] writing." Strict Construction, Black's Law Dictionary (8th ed.) (Brian Garner ed.) p. 332.[2]

We reverse the circuit court order insofar as it applies to the 2014 offers of judgment.

CIKLIN and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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[2] Section 768.79, Florida Statutes (2014) was enacted in 1986 by the legislature for the purpose of "encourag[ing] parties' to settle claims without going to trial." *Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990). After three decades of litigation, most lawyers and judges question whether Rule 1.442 and the statute are "fulfilling [their] intended purpose of encouraging settlement or at times is having the opposite effect of increasing litigation." *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (Pariente, J., specially concurring). For an excellent discussion about the tension between the substantive law and procedural rules in this area, *see* Lauren Rehm, *A Proposal for Settling the Interpretation of Florida's Proposals for Settlement*, 64 Fla. L. Rev. 1811 (2012).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NIAGARA INDUSTRIES, INC. and **RHEEM SALES COMPANY,**
Petitioners,

v.

GIAQUINTO ELECTRIC LLC, a Florida Limited Liability Company,
GUARDIAN AMERICAN PROPERTIES, LLC, f/k/a **GUARDIAN AMERICAN RESIDENTIAL PROPERTIES OF BROWARD COUNTY, LLC,** a Florida Limited Liability Company,
H20 PLUMBING SERVICES, INC., a Florida Corporation,
FUENMAYOR & LINDA ENTERPRISES, LLC, d/b/a **ACE FLOOD & INSPECTIONS, LLC,** a Florida Limited Liability Company,
MARK BECKERMAN, individually, and
SCOTT WESLEY FRANK, Sr., individually,
Respondents.

No. 4D17-1473

[December 6, 2017]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englander-Henning, Judge; L.T. Case No. CACE 16-11632 05.

Diane H. Tutt, Thomas J. McCausland, and Evan Roberts of Conroy Simberg, Hollywood, for Petitioners.

Daniel M. Schwarz of Cole, Scott & Kissane, P.A., Plantation, for Respondent H20 Plumbing Services, Inc.

Glen R. Goldsmith of Glen R. Goldsmith, P.A., Miami, for Respondent Giaquinto Electric, LLC.

Armando P. Rubio of Fields Howell LLP, Miami, for Respondent Guardian American Properties, LLC.

KUNTZ, J.

In this proceeding, the Petitioners—Niagara Industries, Inc. and Rheem Sales Company—challenge the second prong of the two-part test for disclosure of trade secrets. The issue before us is whether the production

of material containing trade secrets was "reasonably necessary." We conclude the circuit court departed from the essential requirements of law when it ordered the Petitioners to disclose their trade secrets, because the party requesting the disclosure failed to present any evidence to establish that the production of the privileged information was reasonably necessary. We therefore quash the order.

Background

Scott Wesley Frank, Sr. purchased a tankless water heater from Rheem Sales Company, and designed by Niagara Industries, Inc. At some point later, Mr. Frank experienced problems with the water heater and hired H2O Plumbing Services, Inc. While an employee of H20 repaired the water heater, it exploded, causing Mr. Frank physical injury. As a result of the injuries, he filed a four-count complaint against the Petitioners, asserting claims of negligence and strict liability against both.

During the pendency of Mr. Frank's lawsuit against the Petitioners, the court required them to disclose what they describe as "their confidential and highly confidential documents, including Niagara's trade secrets, relating to the manufacturing and testing of the subject tankless water heater." Pursuant to a protective order that permitted only certain people to view them, the Petitioners disclosed the documents. Testimony indicates the documents were disclosed to a total of four people. The case proceeded to a jury trial; however, the documents were not presented to the jury. Prior to the jury returning a verdict, the parties filed a stipulation of dismissal, which the court accepted. At the conclusion of the case, the previously-disclosed documents were returned to the Petitioners.

After the dismissal of the lawsuit against the Petitioners, Mr. Frank filed a new lawsuit against Giaquinto Electric, which he later amended to add claims against Guardian American Properties, LLC, H20 Plumbing Services, Inc., Fuenmayor & Linda Enterprises, LLC, and Mark Beckerman.

Guardian American Properties, LLC, one of the defendants in the second lawsuit, served a notice of production from non-parties and a subpoena duces tecum without deposition, indicating they intended to seek various documents from the Petitioners. Among the documents at issue were those contained in the seventy-ninth category of documents sought, which asked for those documents from Mr. Frank's first lawsuit: "Any and all documents received pursuant to any subpoenas and/or request for copies in the case Scott Wesley Frank v. Niagara Industries, Inc. and Rheem Sales, Case. No. CACE 15-002998 (03)." Later, H2O

Plumbing, another defendant in the second lawsuit, served a notice of intent to subpoena similar information.

The Petitioners timely objected to the notices of production and the subpoenas. In their objections, they argued that: the documents contained trade secrets; the water heater's failure was not the result of a defectively-manufactured or defectively-designed product; and that Guardian and H2O, the requesting parties, was merely on a "fishing expedition" to escape an incident resulting from its installation of the water heater.

The court held an evidentiary hearing on the Petitioners' objections. The only witness to testify at the hearing was the owner of Niagara Industries, who testified that the release of the trade secrets "would be devastating" to his company. He also answered questions regarding the Petitioners' belief as to the cause of the water heater's explosion. Guardian and H2O relied upon the arguments of its counsel and did not present any testimony or evidence on its behalf.

During the hearing, the court expressed concern that different parties from the two lawsuits would not have access to the same materials. The court drew this concern from the fact that it was "not sure . . . why all of the defendants weren't brought in on the first trial." With that in mind, at the conclusion of the hearing the court orally ruled as follows:

> THE COURT: We're going to take it in some sort of baby steps.
>
> First, the Court find[s] that it is indeed a trade secret.
>
> Second, the Court finds that there's a reasonable necessity for [production] of some of the items because there is testimony that the product failed; there is no ability to test the specific heater in question. This is the exact case and issues of the product litigated before. That the Court finds really no other way regarding it that the parties that could have been even if not, should have been sued in the first trial would have had access to the information at that time. And it places all of the parties in a fair position to move forward.

The court subsequently issued a written order, specifying its previously stated reasons for the required production. The Petitioners now petition this Court for a writ of certiorari.

Analysis

Subject to certain limitations, trade secrets are privileged from disclosure. § 90.506, Fla. Stat. (2017). An improper order piercing this privilege and requiring the disclosure of trade secrets may cause irreparable harm to the disclosing party and, in some cases, a person not even aware of the proceeding. Because the protected information will be known once disclosed, the harm sustained cannot be remedied on appeal. Therefore, our certiorari jurisdiction is properly invoked when a circuit court improperly requires the disclosure of trade secrets. *Cooper Tire & Rubber Co. v. Cabrera*, 112 So. 3d 731, 733 (Fla. 3d DCA 2013) (citing *Grooms v. Distinctive Cabinet Designs, Inc.*, 846 So. 2d 652 (Fla. 2d DCA 2003)).

When a party asserts that material is protected by the trade-secrets privilege, the court must conduct a two-step inquiry. First, the court must determine if the documents at issue are, in fact, trade secrets. Second, if the court concludes the documents are trade secrets, the burden shifts to the requesting party to show that the disclosure is reasonably necessary. *See, e.g.*, *Am. Exp. Travel Related Services, Inc. v. Cruz*, 761 So. 2d 1206, 1208 (Fla. 4th DCA 2000)[1]; *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804, 809 (Fla. 3d DCA 2014).

Here, the court found the documents at issue were trade secrets. Therefore, the burden shifted to Guardian and H2O to establish that disclosure was reasonably necessary. But they did not present any evidence whatsoever. The Petitioners were the only ones to present testimony or evidence, and their witness testified as to the devastating impact on its business if the documents were to be released and also provided the Petitioners' theory on the cause of the explosion.

The court departed from the essential requirements of the law when it compelled the production of the privileged documents based upon the two grounds which it stated.[2] The court's reliance on the destruction of the specific tankless water heater at issue, without more, is insufficient.

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[1] If the court finds the requesting party has shown the disclosure of privileged material is reasonably necessary, the court is required to make written findings and take adequate measures to protect the disclosing party, the parties to the case, and the interests of justice. *See* § 90.506, Fla. Stat. (2017).

[2] The court's subsequent written order included four grounds to support its conclusion. However, the two additional findings in support can generally be grouped with the two findings provided at the hearing. Therefore, for clarity, we reference two reasons throughout this opinion.

Guardian and H2O did not present any evidence to support the conclusion that the information lost due to the destruction of the specific tankless water heater could only be remedied through access to trade secrets. They did not present evidence that the specific tankless water heater was necessary nor did they present evidence the purportedly necessary information could not be obtained by other means. If the mere destruction of a product is sufficient to breach the privilege, the trade-secret privilege could be breached any time a lawsuit involves a product or item that was destroyed. While it is possible the destruction of an actual item could justify requiring the disclosure of trade secrets, a party must present evidence or testimony to support that conclusion. Here, they did not. In fact, Guardian and H2O completely failed to establish why they needed the information at all.

It is also insufficient to base the disclosure of the privileged documents on the prior lawsuit. The court was clearly concerned with the fact that the plaintiff filed two separate lawsuits, stating: (i) "I still am not sure I completely understand why all of the defendants weren't brought in on the first trial"; (ii) "but had they all been in this first case"; (iii) "the Court finds really no other way regarding it that the parties that could have been even if not, should have been sued in the first trial"; and (iv) "And again, if all parties had been together at the first case."

We agree it may have been more efficient had the plaintiff chosen to bring all his claims in one lawsuit. But, the mere existence of the first lawsuit, without more, is not sufficient to invade the trade-secret privilege. Further, the Petitioners—defendants in the first lawsuit, but non-parties in the proceedings below—cannot be blamed for a plaintiff's litigation strategy and choice of defendants. Recognizing that fact, the court expounded on its concern and stated "I just don't understand why phase B of the same case and the same facts shouldn't have the same evidence."[3] However, again, the Petitioners cannot be faulted for this point. And, no party to this second lawsuit has the benefit of introducing evidence derived from the trade secrets at issue in the first lawsuit. Those materials were returned and the counsel that viewed them, under penalty of violating the court's order in the first lawsuit, cannot disclose the contents.

Conclusion

A party cannot obtain documents containing privileged trade secrets

[3] We also note the court's mischaracterization of this second lawsuit. The court's reference to "Phase B" is inaccurate, as the two suits were separate, distinct lawsuits.

without establishing a reasonable necessity for breaching the privilege. Here, the court departed from the essential requirements of the law when it found the requesting party had established a reasonable necessity to breach the privilege, even though the requesting party had failed to present any evidence. We do not hold that a requesting party must always present evidence. However, by failing to do so they are at risk of being unable to overcome the testimony of the movant.

Once the burden shifts to the requesting party, the court weighs the need for producing the document against protecting its confidentiality. Here, the Petitioners' witness testified that disclosure would be devastating and also provided the Petitioners' theory on the cause of the explosion. Having failed to produce any evidence, the requesting party failed to overcome this testimony. Beyond that, the requesting party never established why they needed the documents in the first place.

Petition granted; order quashed.

GROSS and TAYLOR, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

RBS CITIZENS N.A., Appellant, v. DOUGLAS S. REYNOLDS A/K/A DOUGLAS REYNOLDS AND RUTH A. REYNOLDS, Appellees.	)	Case No. 2D16-735

Opinion filed December 8, 2017.

Appeal from the Circuit Court for Pinellas County; Jack St. Arnold, Judge.

David Rosenberg, and Robert R. Edwards, of Robertson, Anschutz & Schneid, P.L., Boca Raton, for Appellant.

Mark P. Stopa of Stopa Law Firm, Tampa, for Appellees.

BADALAMENTI, Judge.

RBS Citizens N.A. filed a verified foreclosure complaint against homeowners Douglas and Ruth Reynolds. The trial court entered a nonfinal order granting the Reynoldses' motion to dismiss. We relinquished jurisdiction to allow the

trial court to enter an appealable, final order. The trial court subsequently entered an order dismissing RBS's complaint, without leave to amend, solely on the basis that RBS's certification of possession of the original promissory note was not notarized. We reverse because the operative statute imposes no such notarization requirement.

Section 702.015(4), Florida Statutes (2015), requires a foreclosure plaintiff in possession of the original promissory note to file under penalty of perjury a certification that it is in possession of the original promissory note:

> If the plaintiff is in possession of the original promissory note, the plaintiff must file under penalty of perjury a certification with the court, contemporaneously with the filing of the complaint for foreclosure, that the plaintiff is in possession of the original promissory note. The certification must set forth the location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession, and the time and date on which the possession was verified.

(Emphasis added.) Section 702.015(6) gives a trial court discretionary authority to sanction the plaintiff for failure to comply with this requirement.

Here, contemporaneously with the filing of its foreclosure complaint on April 16, 2015, RBS filed its certification of possession of the original promissory note. The certification included the location of the note; the name, title, and signature of the individual giving the certification who personally verified such possession; and the time and date on which the possession was verified. Directly above the signature appeared the statement: "Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true."

The trial court dismissed RBS's complaint "solely because the [section] 702.015(4) Certification of Possession attached to Plaintiff's Complaint is not notarized,

which could allow for false statements to be made." Section 702.015(4), however, merely requires a certification of possession of an original promissory note to be filed "under penalty of perjury" and does not require the certification to be notarized. Cf. § 92.525, Fla. Stat. (2015) (providing that when a document must be verified by law, such verification generally may be accomplished by either notarization or by the signing of the following written declaration: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true" (alteration in original)); In re Amendments to Fla. Rules of Civil Procedure, 153 So. 3d 258, 262 (Fla. 2014) (adding Florida Rule of Civil Procedure 1.115(c) to implement section 702.015(4), and amending form 1.944(a) to add a new section entitled "Certification of Possession of Original Note," which contains the following written declaration: "Under penalties of perjury, I declare that I have read the foregoing Certification of Possession of Original Note and that the facts stated in it are true"). Because section 702.015(4) does not require notarization, the trial court erred by dismissing RBS's verified foreclosure complaint. Accordingly, we reverse the order of dismissal and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SILBERMAN and SLEET, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARCIA SUPRIA,
Appellant,

v.

GOSHEN MORTGAGE, LLC, in substitution for the original Plaintiff **CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST, SERIES 2012-13,**
Appellee.

No. 4D16-4356

[December 6, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen D. Ireland, Judge; L.T. Case No. 13-027100 CACE (11).

Catherine A. Riggins, Miami, for appellant.

Thomas Wade Young and Joseph B. Towne of Lender Legal Services, LLC, Orlando, for appellee.

GROSS, J.

In this mortgage foreclosure case, the underlying mortgage was passed around like the flu, giving rise to a complexity of ownership that frustrated the appellee's attempts to demonstrate standing at trial. To the answer brief, the appellee attached a chart of the ownership lineage of the mortgage and note, with different types of arrows pointing in all directions, a valiant effort which demonstrated that the transfer history here defies pictorial representation.

On the original note, Centerpointe Financial, Inc. is the lender. There is no blank indorsement from Centerpointe. There was an allonge purporting to effect a transfer, but the allonge was lost and not produced at trial. Appellee conceded at trial that it was not a holder of the note, but contended that it qualified as a nonholder in possession with the rights of a holder.

"A nonholder in possession may prove its right to enforce the note through: (1) evidence of an effective transfer; (2) proof of purchase of the debt; or (3) evidence of a valid assignment." *Bank of N.Y. Mellon Tr. Co., N.A. v. Conley*, 188 So. 3d 884, 885 (Fla. 4th DCA 2016). "A nonholder in possession must account for its possession of the instrument by proving the transaction (or series of transactions) through which it acquired the note." *Id.* (citing *Murray v. HSBC Bank USA*, 157 So. 3d 355, 358 (Fla. 4th DCA 2015)).

Therefore, "[t]o prove standing as a nonholder in possession with the rights of a holder, the plaintiff must prove the chain of transfers starting with the first holder of the note." *PennyMac Corp. v. Frost*, 214 So. 3d 686, 689 (Fla. 4th DCA 2017) (citing *Murray*, 157 So. 3d at 357-58). "Where the plaintiff 'cannot prove that [a transferor] had any right to enforce the note, it cannot derive any right from [the transferor] and is not a nonholder in possession of the instrument with the rights of a holder to enforce.'" *PennyMac*, 214 So. 3d at 689 (quoting *Murray*, 157 So. 3d at 359).

Here, the first assignment of the note was invalid, because nothing in evidence demonstrated that the assignor had the authority to transfer or assign an interest in the note. Similarly, a second assignment was also invalid because nothing demonstrated that the assignor had an interest in the note that it could transfer. Among other problems, the third and fifth assignments transferred the mortgage, but not the note. The fourth assignment was infirm because of the problems with the earlier assignments.

One legal problem created by the third and fifth assignment is that a "mortgage follows the assignment of the promissory note, but an assignment of the mortgage without an assignment of the debt creates no right in the assignee." *Tilus v. Michai LLC*, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015). "'[A] mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt'—not the other way around." *Peters v. Bank of N.Y. Mellon*, 227 So. 3d 175, 180 (Fla. 2d DCA 2017) (quoting *Johns v. Gillian*, 184 So. 140, 143 (Fla. 1938)). The oblique reference in the assignments of mortgage to "moneys now owing" was not sufficient to transfer an interest in the note. *See Jelic v. BAC Home Loans Servicing, LP*, 178 So. 3d 523, 525 (Fla. 4th DCA 2015).

Because appellee failed to establish its standing to foreclose, we reverse the final judgment and remand for the entry of judgment for the appellant.

MAY and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WAVERLY 1 AND 2, LLC, a Florida limited liability company,
Appellant,

v.

WAVERLY AT LAS OLAS CONDOMINIUM ASSOCIATION, INC.,
a Florida corporation, not-for-profit,
Appellee.

No. 4D16-2866

[December 6, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia G. Imperato and Barbara McCarthy, Judges; L.T. Case No. CACE15-005333 (21).

Joel D. Eaton of Podhurst Orseck, P.A., Miami, for appellant.

Darrin Gursky and Carolina Sznajderman Sheir of Gursky Ragan, P.A., Miami, for appellee.

SMALL, LISA, Associate Judge.

Waverly 1 and 2, LLC ("the Owner") appeals the trial court's final judgment entered in favor of Waverly at Las Olas Condominiums Association, Inc. ("the Association"). After a non-jury trial, the trial court concluded that the Declaration of Condominium ("the Declaration") required commercial unit owners to obtain the written consent of the Association's board before altering landscaping appurtenant to their condominium units. Finding that the Declaration does not require commercial unit owners to obtain written consent of the Association's board before altering landscaping appurtenant to their condominium units, we reverse the final judgment and remand with directions to enter judgment in favor of the Owner.

Background

Appellant is the owner of two commercial units at Waverly at Las Olas Condominiums. Waverly at Las Olas Condominiums is a mixed use condominium development which contains both residential and commercial units.

The Association sought declaratory relief, injunctive relief, and damages against the Owner for allegedly violating the Condominium's Declaration. The Association claimed that the Owner made unauthorized modifications to the property's landscaping scheme when the Owner removed two $18,000 canary palm trees without prior written approval from the Association's board.

The issue at trial was whether the Declaration requires commercial unit owners to obtain the written consent of the Association's board before altering landscaping appurtenant to their condominium units.

The Declaration states in pertinent part:

> 2.42 "Unit" means part of the Condominium Property which is subject to exclusive ownership, and except where specifically excluded, or the context otherwise requires, shall be deemed to include the Residential and the Commercial Units.
>
> . . . .
>
> 3.3(d) Patios, Balconies, Terraces, Lanais and/or Sidewalks appurtenant to Commercial Units. Any patios, balconies, terraces, lanais and/or sidewalks adjacent to a Commercial Unit, shall, subject to the provisions hereof, be a Limited Common Element of such Unit(s), so that the Commercial Unit Owner, from time to time, to the extent permitted by law, may incorporate and use such areas in connection with, or relating to, the operations from the Commercial Unit. . . .
>
> It is further understood and agreed that, anything herein contained to the contrary notwithstanding, the external surfaces, terraces, and balconies of each Commercial Unit shall be deemed Limited Common Elements thereof and the Owners thereof may place on such surfaces, or on the balconies appurtenant thereto such signage, mechanical equipment and/or other items thereon as they may desire, without requiring approval from the Association, the Board, or any other Unit Owner . . . and may further make any alterations or improvements, in the Commercial Unit Owner's sole discretion, to the Owner's Commercial Unit and/or Limited Common Elements appurtenant thereto or to the Common Elements. . . .
>
> 9.1 Consent of the Board of Directors. No Residential Unit Owner shall make any addition, alteration, or improvement in or to the Common Elements (including, without limitation, the Residential Limited Common Elements and/or Commercial Limited Common Elements), the Association Property, any structural addition, alteration, or improvement in or to his or her Residential

Unit. . . . Without limiting the generality of this subsection 9.1, no Unit Owner shall cause or allow improvements or changes to his or her Unit, or to any Limited Common Elements, Common Elements or any property of the Condominium Association which does or could in any way affect, directly or indirectly, the structural, electrical, plumbing, Life Safety Systems, or mechanical systems, or any landscaping or drainage, of any portion of the Condominium Property without first obtaining the written consent of the Board of the Association. . . . The Board shall have the obligation to answer, in writing, any written request by a Residential Unit Owner for approval of such an addition, alteration, or improvement. . . .

9.3 Improvements, Additions or Alterations by Developer or Commercial Unit Owners. Anything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units. . . . Additionally, each Commercial Unit Owner shall have the right, without the consent or approval of the Association, the Board of Directors or other Unit Owners, to make alterations, additions, or improvements, structural and non-structural, interior and exterior, ordinary and extraordinary, in, to and upon any Commercial Unit owned by it or them and Limited Common Elements appurtenant or adjacent thereto . . . .

17.4 Alterations. Without limiting the generality of section 9.1 . . . no Residential Unit Owner shall cause or allow improvements or physical or structural changes to any Residential Unit, Limited Common Elements appurtenant thereto, Common Elements or Association Property. . . .

The foregoing shall specifically not apply to Owners of the Commercial Units. *Specifically, the Owner of any Commercial Unit is expressly permitted (without requiring consent from the Association or any Unit Owner or any other party, other than applicable governmental authorities to the extent that prior approval from them is required), to install on the exterior walls of such Owner's Commercial Unit and any Limited Common Element or Common Element balconies, terraces, patios, lanais, decks, or other areas appurtenant thereto such signage, mechanical equipment, furniture, antennas, dishes, receiving, transmitting, monitoring, and/or other equipment thereon as it may desire and may further make any alterations or improvements, in the Commercial Unit Owner's sole discretion, to such Commercial Unit, Limited Common Elements or Common Elements.*

At trial, the Association did not dispute that the Owner, as a commercial unit owner, has extraordinary rights to alter the units. However, the Association claimed that the Owner did not have the right to alter the landscaping appurtenant to the condominium units before obtaining written approval from the Association's board. The Owner maintained that the Declaration allowed the Owner, as a commercial unit owner, to alter the landscaping without obtaining written consent from the Association's board.

The trial court found that the landscaping was a Common Element of the building. Additionally, the trial court found that section 9.1, when read in conjunction with section 2.42, required both residential and commercial unit owners to obtain written consent from the Association's board before altering the landscaping.

Analysis

A trial court's interpretation of a declaration of condominium is subject to *de novo* review. *See Thomas v. Vision I Homeowner's Ass'n*, 981 So. 2d 1, 2 (Fla. 4th DCA 2007). "The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." *Id.* (citation omitted). "Interpretation of a contract is a question of law, and an appellate court may reach a construction contrary to that of the trial court." *Id.* (citation omitted).

The principles governing contractual interpretation are well settled in Florida. "Generally, the intentions of the parties to a contract govern its construction and interpretation." *Id.* "The intent of the parties by their use of such terms must be discerned from within the 'four corners of the document.'" *Emerald Pointe Property Owners' Ass'n, Inc. v. Commercial Const. Indus., Inc.*, 978 So. 2d 873, 877 (Fla. 4th DCA 2008) (citation omitted). Furthermore, the language being interpreted must be read in conjunction with the other provisions in the contract. *Royal Oak Landing Homeowners Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993). "Where contractual terms are clear and unambiguous, the court is bound by the plain meaning of those terms." *Emerald Pointe*, 978 So. 2d at 877.

Upon our de novo review of the trial court's interpretation of the Declaration, we conclude that the trial court erred in finding that sections 2.42 and 9.1 of the Declaration require commercial unit owners to obtain the Association's board's written consent before altering a unit's landscaping. We find that section 9.3's first sentence, "Anything to the contrary notwithstanding, the foregoing restrictions of this section 9 shall not apply to Developer owned Units or Commercial Units," means section 9.1 does not apply to Commercial Unit Owners. Put simply, section 9.3 supersedes section 9.1 and any other restrictions set forth in section 9. Furthermore, we agree with the Owner that

section 9.1's requirement to obtain the Association's board's written approval before altering the landscaping clearly applies only to "residential unit owners." The Association's interpretation that sections 2.42 and section 9.1 require commercial unit owners to obtain written authorization to alter landscaping is not reasonable.

The Association relied on the following emphasized language contained within section 9.1:

> *Without limiting the generality of this subsection 9.1, no Unit Owner shall cause or allow improvements or changes to his or her Unit, or to any Limited Common Elements, Common Elements or any property of the Condominium Association which does or could in any way affect, directly or indirectly, the structural, electrical, plumbing, Life Safety Systems, or mechanical systems, or any landscaping or drainage, of any portion of the Condominium Property without first obtaining the written consent of the Board of the Association.* . . . The Board shall have the obligation to answer, in writing, any written request by a *Residential Unit Owner* for approval of such an addition, alteration, or improvement. . . .

However, the trial court erred in adopting the Association's interpretation of this language to the exclusion of, and consideration of, the remainder of section 9.1 and the pertinent Declaration provisions set forth in sections 9.3 and 17.4. Notably, section 9.1 only requires the Association's board to answer in writing any written request made by a residential unit owner for approval of such an addition, alteration or improvement.

Lastly, even if we were to find that the Declaration's provisions are in conflict or are ambiguous, the "rule of adverse construction" provides that where a contract is ambiguous, it will be interpreted against the drafter. "[T]he rule of adverse construction is a 'secondary rule of interpretation' or a 'rule of last resort,' which should not be utilized if the parties' intent can otherwise be conclusively determined." *Emerald Pointe*, 978 So. 2d at 878 n.1 (citations omitted). Here, the Association drafted the Declaration and, therefore, any ambiguity would be interpreted against the Association. If the Association wanted to prevent commercial unit owners from unilaterally altering the landscaping appurtenant to their units, such a prohibition should have been explicitly enumerated in the Declaration.

Conclusion

For the aforementioned reasons, the trial court erred in its finding that commercial unit owners are required to obtain the Association's board's written consent before altering landscaping appurtenant to their units. Thus, this Court

reverses the final judgment and remands with directions for the trial court to enter final judgment in favor of the Owner.

Reversed and remanded for proceedings consistent with this opinion.

LEVINE and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.