Real Property and Business Litigation Report

Volume X, Issue 28
July 17, 2017
Manuel Farach

Holmes Regional Medical Center, Inc. v Allstate Insurance Company, Case No. SC15-1555 (Fla. 2017).
A judgment debtor is not entitled to seek equitable subrogation against a subsequent tortfeasor until the debtor has satisfied the judgment.

Forero v. Green Tree Servicing, LLC, Case No. 1D16-2151 (Fla. 1st DCA 2017).
The two-dismissal rule does not bar subsequent suits, it merely makes the prior suit res judicata as to subsequent suits. Additionally, "all subsequent defaults" defeats a statute of limitations argument if any subsequent defaults occurred within the statute of limitations.

Deutsche Bank Trust Company Americas v. Maas, Case No. 2D15-898 (Fla. 2d DCA 2017).
A court may relieve a party from technical admissions when evidence in the record contradicts the admissions and the party seeking to enforce the technical admission cannot demonstrate prejudice if the technical admissions were to be vacated.

Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P., Case No. 2D15-5492 (Fla. 2d DCA 2017).
A deficiency decree arising out of foreclosure of a Florida property is controlled by Florida law notwithstanding loan documents choosing the law of another state.

Building B1, LLC v. Component Repair Services, Inc., Case No. 3D16-1286 (Fla. 3d DCA 2017).
A challenge to a party's inactive corporate status must be raised prior to final judgment otherwise it is waived.

Mukamal v. Marcum LLP, Case No. 3D17-104 (Fla. 3d DCA 2017).
An earlier agreement to arbitrate is abandoned only if there is a clear manifestation to do so; standard merger and integration clauses are not sufficient to do so.

Kebreau v. Bayview Loan Servicing, LLC, Case No. 4D16-2010 (Fla. 4th DCA 2017).
The Fourth District joins the First, Second, and Third Districts in holding that "all subsequent defaults" cures possible statute of limitations issues if any subsequent defaults occurred within the statute of limitations.

Sears, Roebuck & Co. v. Forbes/Cohen Florida Properties, L.P., Case No. 4D16-2314 (Fla. 4th DCA 2017).
A local government ordinance which by its effect restricts subleasing may impair existing contractual rights and may be a violation of the tenant's constitutional rights.

City of Pompano Beach, Florida v. Beatty, Case Nos. 4D16-2621 and 4D16-3699 (Fla. 4th DCA 2017).
A land-lease which provides for re-appraisal of rental payments at specific times limits re-appraisal rights to only those specific dates.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

BONITA REAL ESTATE PARTNERS, LLC, a Florida limited liability company; ALICO RETAIL HOLDINGS, LLC, a Florida limited liability company; SCOTT A. CHAPPELLE, an individual; and CHARLES W. CROUCH, an individual, Appellants, v. SLF IV LENDING, L.P., a Texas limited partnership, Appellee.	)	Case No. 2D15-5492

Opinion filed July 14, 2017.

Appeal from the Circuit Court for Lee County; John E. Duryea, Jr., Judge.

Christopher D. Donovan of Roetzel & Andress, LPA, Naples, for Appellants.

Landis V. Curry, III, and Mark M. Wall of Hill, Ward & Henderson, P.A., Tampa, for Appellee.

MORRIS, Judge.

The appellants—the borrowers and guarantors of a commercial real estate loan—appeal a final judgment entered in favor of the lender, SLV IV Lending, L.P. The

trial court concluded that the parties agreed to apply Texas law to the lender's claim for deficiency and that under Texas law, the appellants waived their right to challenge the amount of the deficiency. We agree with the appellants' argument that the trial court erred in applying Texas law because the loan documents state that Florida law applies to foreclosures and the claim for deficiency in this case was a continuation of the foreclosure. Accordingly, we reverse the decision of the trial court in that regard.

I. Background

In 2011, appellants Bonita Real Estate Partners, LLC, and Alico Retail Holdings, LLC, (the borrowers) borrowed $6,100,000 from the lender to develop real property in Lee County. The borrowers executed a promissory note and a mortgage, and appellants Scott A. Chappelle and Charles W. Crouch (the guarantors) executed guarantees by which they agreed to be personally liable for certain "recourse obligations" under the note.

The promissory note provided that the note and other loan documents would be governed by Texas law but that Florida law would govern foreclosure:

> THIS NOTE AND THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY, AND CONSTRUED, APPLIED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS AND APPLICABLE LAWS OF THE UNITED STATES OF AMERICA, WITHOUT REGARD TO CONFLICTS OF LAW, EXCEPT THAT THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED (IF DIFFERENT FROM THE STATE OF TEXAS) SHALL GOVERN THE CREATION, PERFECTION, PRIORITY AND FORECLOSURE OF THE LIENS CREATED BY THE MORTGAGE ON THE PROPERTY OR ANY INTEREST THEREIN.

(Emphasis added.) The mortgage provides:

> LENDER SHALL COMPLY WITH THE APPLICABLE LAW OF THE STATE OF FLORIDA, TO THE EXTENT REQUIRED IN CONNECTION WITH THE FORECLOSURE OF THE SECURITY INTERESTS AND LIENS CREATED HEREBY; PROVIDED, HOWEVER, THIS SUBSECTION SHALL IN NO EVENT BE CONSTRUED TO PROVIDE THAT THE SUBSTANTIVE LAW OF THE STATE OF FLORIDA SHALL APPLY TO THE OBLIGATIONS SECURED BY THIS MORTGAGE WHICH ARE AND SHALL CONTINUE TO BE GOVERNED BY THE SUBSTANTIVE LAW OF THE STATE OF TEXAS. THE PARTIES FURTHER AGREE THAT LENDER MAY ENFORCE ITS RIGHTS UNDER THIS MORTGAGE AND THE LOAN DOCUMENTS IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.

(Emphasis added.)

The mortgage and the guarantees also contain waivers of certain remedies or defenses under Texas law. The mortgage provides that the borrowers "waive[] all rights, remedies, claims and defenses based upon or related to [s]ections 51.003, 51.004 and 51.005 of the Texas Property Code to the extent the same pertains or may pertain to any enforcement of the [n]ote, this [m]ortgage or any of the other [l]oan [d]ocuments." And the guarantees provide that the guarantors "waive . . . any and all rights under [s]ections 51.003, 51.004 and 51.005 of the Texas Property Code." These statutes address deficiency judgments and permit a borrower or a guarantor to request that the deficiency amount be offset by the fair market value of the property if the fair market value is greater than the sale price of the property. Tex. Prop. Code Ann. §§ 51.003, .004, .005 (West 2011). Thus, by waiving their rights under those Texas statutes, the appellants waived their right to offset the deficiency by the fair market value of the property, which is permitted under Texas law. See Moayedi v.

Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 6 (Tex. 2014). This is pertinent to the issue on appeal which we address.

The borrowers defaulted on the loan, and the lender filed an action in Florida circuit court against the borrowers and the guarantors. The original complaint alleged a count against the borrowers to foreclose on the mortgage (count I), a count against the borrowers seeking money due on the promissory note (count II), and a count against the guarantors seeking money damages pursuant to the terms of the guarantees (count III). The trial court entered a judgment of foreclosure in favor of the lender in the amount of $6,983,325 in May 2012, and in the judgment, the trial court reserved jurisdiction for the entry of a deficiency judgment. A foreclosure sale was conducted in June 2012, and the lender purchased the property for $91,200.

In March 2013, in the same underlying foreclosure action, the lender filed a motion for deficiency judgment pursuant to section 702.06, Florida Statutes (2012), claiming that the "fair market value of the [m]ortgaged property on the date of the foreclosure sale was less than the total indebtedness owed to [the lender] under the [f]oreclosure judgment." The parties disputed whether the lender had already foreclosed the development rights to the property, so the lender sought and obtained permission to file an amended complaint to allege a count to foreclose against the borrowers' non-real estate interests in the property, i.e., the development rights. The dispute on that issue was resolved after a bench trial with the trial court concluding that the development rights had been foreclosed in the prior judgment. Regarding the lender's claim for deficiency, the appellants amended their answer and affirmative defenses to argue that the property's value exceeds the indebtedness. The appellants

asserted that the property was worth $7,550,000, whereas the lender argued that the property was worth $4,500,000 and that the deficiency was $2,500,000.

The lender's claims for damages against the borrowers under the note (count III) and against the guarantors under the guarantees (count IV) were set for trial in November 2014. In a brief filed before trial, the lender argued for the first time that Texas law applies to the lender's claims to collect money damages on the debt. The parties disputed whether Texas law applies to the lender's claims on counts III and IV and for deficiency. If Texas law applies, the borrowers and guarantors waived their right under Texas law to have the fair market value of the property considered when determining the amount of deficiency. See Moayedi, 438 S.W.3d at 6. But if Florida law applies, the borrowers and guarantors had not waived such right and could present evidence concerning the property's fair market value. See Vantium Capital, Inc. v. Hobson, 137 So. 3d 497, 499 (Fla. 4th DCA 2014) ("[O]nce the party seeking a deficiency judgment introduces evidence of the foreclosure sale price, the burden shifts to the judgment debtor to present evidence concerning the property's fair market value." (quoting Liberty Bus. Credit Corp. v. Schaffer/Dunadry, 589 So. 2d 451, 452 (Fla. 2d DCA 1991))). The appellants argued that Florida law should apply to the deficiency claim because it is a continuance of the foreclosure and that the lender's reliance on Texas law was not asserted in a timely manner. The trial court determined that Texas law applies to the lender's claims for damages based on the language of the documents and that while Florida law applies to the foreclosure, Texas law applies to the claim for deficiency. The parties and trial court interpreted that ruling to mean that the appellants could not present evidence of fair market value to offset the deficiency, since they had

waived their right to do so in the language of the mortgage and guarantees. The trial court also rejected the appellants' argument that the lender had waived its claim that Texas law applies by not asserting it earlier in the proceedings.

The appellants moved for reconsideration of the issue of whether Texas law applies to the deficiency, and the trial court denied the motion. The trial judge then granted the appellants' motion to disqualify her, and a new judge was assigned to the case. The appellants asked the successor judge to reconsider the issue of whether Texas law applies, and after two hearings, the judge denied the appellants' motion for reconsideration, confirming the earlier ruling that Texas law applies.

The lender then moved for partial summary judgment on counts III and IV, claiming that Texas law applies to the damages portions of those claims and that the appellants waived their right under Texas law to offset the fair market value against the total indebtedness owed. The lender acknowledged that whether the appellants were liable based on a recourse event would need to be determined at a trial. The trial court entered an order granting partial summary judgment on the damages portions of counts III and IV, concluding that pursuant to Texas law, the deficiency should be calculated as the difference between the amount of the judgment of foreclosure and the bid price, with the difference being $6,892,125.

The trial court conducted a trial on whether recourse events had occurred that would render the appellants liable, and the trial court found in favor of the lender on those events. The trial court entered a forty-nine-page judgment detailing the full recourse events and limited recourse events establishing liability on the part of the appellants. The trial court found the appellants jointly and severally liable for the

amount of $6,892,125 plus interest in the amount of $1,117,562.79, for a total "deficiency" of $8,009,687.79.[1]

II. Analysis

The appellants argue that the trial court erred in applying Texas law to the lender's claim for deficiency because the loan documents provide for the application of Florida law to foreclosure and a claim for deficiency is a continuation of a claim for foreclosure.[2] The lender responds that it was pursuing its legal claims on the note and guarantees and that its claims were not for a deficiency judgment. The lender also argues that the parties agreed that its claims on the note and guarantees would be governed by Texas law.

We must first determine whether the final judgment entered is a deficiency judgment. Typically, a judgment of foreclosure and the resulting sale of the property encompass both the remedy at law and the equitable remedy of mortgage foreclosure. Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 773 (Fla. 2d DCA 2016) (recognizing that "the note and mortgage merge into the foreclosure judgment where the foreclosure suit is both an action at law for the balance due under the note and an action in equity to foreclose the mortgage"). But here, the count for foreclosure resulted in a judgment of foreclosure in May 2012 and a foreclosure sale in June 2012, while the count on the note did not proceed to trial until two years later, resulting in a final judgment exceeding $8 million.

---

[1]The trial court also found that the appellants are liable for limited recourse events in the amount of $192,943.53. The appellants do not challenge this amount or the trial court's findings regarding the recourse events.

[2]We find no merit in the three other issues raised by the appellants on appeal.

A party "has the right to pursue both a claim for foreclosure of the mortgage and a claim for damages on the note." Hammond v. Kingsley Asset Mgmt., LLC, 144 So. 3d 673, 675 (Fla. 2d DCA 2014). However, "[i]t is axiomatic that a party can only recover once on the same debt." Id. (quoting Century Grp., Inc. v. Premier Fin. Servs. E., L.P., 724 So. 2d 661, 662 (Fla. 2d DCA 1999)); see Royal Palm Corp. Ctr. Ass'n v. PNC Bank, N.A., 89 So. 3d 923, 933 (Fla. 4th DCA 2012) (recognizing that it is impermissible for a judgment to "simultaneously allow[] the plaintiff to execute on the money judgment and foreclose on the subject property"). Once the party has obtained a foreclosure sale of the property, it cannot collect on the note other than to pursue the appropriate deficiency amount. See Hammond, 144 So. 3d at 676.

"A deficiency decree is one for the balance of the indebtedness after applying the proceeds of a sale of the mortgaged property to such indebtedness." L.A.D. Prop. Ventures, Inc. v. First Bank, 19 So. 3d 1126, 1127 (Fla. 2d DCA 2009) (quoting Commercial Bank of Ocala v. First Nat'l Bank of Gainesville, 87 So. 315, 316 (Fla. 1920)). The lender in this case filed a motion for deficiency under section 702.06, which authorizes a trial court to enter a deficiency decree "[i]n all suits for the foreclosure of mortgages." Thus, while a judgment of foreclosure is a final order, " 'the law contemplates a continuance of the proceedings for entry of a deficiency judgment' as a 'means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor.' " Id. (quoting Timmers v. Harbor Fed. Sav. & Loan Ass'n, 548 So. 2d 282, 283 (Fla. 1st DCA 1989)); see Grace v. Hendricks, 140 So. 790, 794 (Fla. 1932) ("The order for deficiency judgment is so dependent on, and merely ancillary to, the foreclosure and sale . . . ." (quoting City Bank

of Portage v. Plank, 124 N.W. 1000 (Wis. 1910))). Indeed, a deficiency does not exist without a foreclosure judgment and sale. See, e.g., Singleton v. Greymar Assocs., 882 So. 2d 1004, 1007 (Fla. 2004) ("[A] necessary predicate for a deficiency is an adjudication of foreclosure." (quoting Capital Bank v. Needle, 596 So. 2d 1134, 1134 (Fla. 4th DCA 1992))); Chrestensen v. Eurogest, Inc., 906 So. 2d 343, 345 (Fla. 4th DCA 2005) ("[T]here can be no action for a deficiency where there has been no foreclosure judgment and sale.").

We note that section 702.06 provides in relevant part that a party "shall also have the right to sue at common law to recover [a] deficiency." The lender in this case filed a motion for deficiency—and obtained a determination of deficiency—in the same underlying foreclosure suit. Thus, it is clear in this case that "[t]he motion for deficiency was a continuance of the foreclosure proceedings." L.A.D. Prop. Ventures, Inc., 19 So. 3d at 1128; see also Timmers, 548 So. 2d at 283-84 (holding that "motion for a deficiency was part in parcel to the foreclosure proceedings"). Thus, the final judgment on the note in this case must be treated as a deficiency determination. This is consistent with how the trial court treated the lender's claim for monetary damages, referring to the amount as the "deficiency." The language of the note and the mortgage provide that Florida law governs the foreclosure of the lien created by the mortgage, and we conclude that this includes the lender's claim for deficiency. Thus, the trial court erred in applying Texas law to the deficiency determination, and we reverse the portion of the final judgment that determines the deficiency.

The lender argues that its claims on the note and guarantees did not arise out of the foreclosure. As discussed above, because the lender had already obtained a

foreclosure and had purchased the property at a foreclosure sale, its claim for damages on the note was limited to the amount of the deficiency.[3] We recognize that the borrowers' liability on the note had not been determined prior to the 2014 trial, which resulted in the 2014 final judgment. But to the extent that the final judgment awards the lender an amount due on the note, representing a difference between the sale price and the indebtedness, that portion of the final judgment operates as a deficiency judgment. Even if the final judgment were not considered a deficiency judgment or determination, the final judgment in this case is the continuation of the lender's claim for "foreclosure, which encompassed both a remedy at law and the equitable remedy of mortgage foreclosure," Aluia, 205 So. 3d at 773, because the lender proceeded on the mortgage and note and had already obtained a foreclosure judgment and sale. Either way, the lender's claim on the note is part of the foreclosure in this case.

We recognize that a party may pursue a claim on a guaranty along with a foreclosure claim as long as the party has not received full satisfaction of either claim. See Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C., 438 So. 2d 408, 409 (Fla. 2d DCA 1983). However, the language of the guarantees in this case make clear that the guarantees were made in connection with the note and mortgage and that the guarantors are liable for the borrowers' "obligations . . . to [l]ender under the [n]ote, [m]ortgage, and all other [l]oan [d]ocuments with respect to, and to the full extent of, any and all losses, damages, costs, expenses, liabilities, claims or other obligations of, to, incurred or suffered by [l]ender." On remand, the parties will have an opportunity to

[3]While the mortgage contained a waiver under Texas law of the borrowers' right to offset the deficiency by the fair market value of the property, the note did not contain such a waiver.

address how a new determination on the issue of deficiency under Florida law affects the lender's claims on the guarantees.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

LUCAS and BADALAMENTI, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed July 12, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1286
Lower Tribunal No. 12-19622

Building B1, LLC,
Appellant,

vs.

Component Repair Services, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Arzola, Judge.

Downs Law Group, P.A. and Jeremy D. Friedman, for appellant.

Fuerst Ittleman David & Joseph, Christopher M. David and Jeffrey J. Molinaro, for appellee.

Before SUAREZ, EMAS and LOGUE, JJ.

EMAS, J.

Appellant Building B1, LLC, appeals from an amended final judgment in favor of Component Repair Services (CRS), following a nonjury trial on appellant's claim (and appellee's counterclaim) for breach of a commercial lease agreement. For the reasons that follow, we affirm.

On November 22, 2000, Building B1 (the landlord) and CRS (the tenant) entered into a commercial lease for a warehouse in Miami.[1] The lease was for a term of five years commencing in January 2001 and terminating on December 31, 2005. The terms provided CRS an option to renew the lease for an additional five-year term beginning in January 2006 and ending on December 31, 2010. The exercise of this option was required to be made in writing and sent by certified mail to Building B1 120 days before the end of the five-year lease period.

In October of 2005, Hurricane Wilma caused damage to the warehouse. CRS spoke to Baitinger about the damage and Building B1 instructed CRS to make and pay for the repairs, and represented that Building B1 would reimburse CRS for the expenses related to the repairs. CRS made the necessary repairs.

On January 1, 2006 (after expiration of the five-year lease period), CRS remained in the warehouse. Several discussions were held and written correspondence exchanged in an unsuccessful attempt to formally renew the lease

[1] David Baitinger was the original landlord and signatory to the 2000 lease. In April of 2004, Baitinger created Building B1 and assigned the lease to Building B1.

or enter into a new lease. From January 1, 2006 through July 31, 2009, CRS remained in the warehouse and continued to pay rent on a monthly basis. On July 31, 2009, CRS vacated the warehouse without notice to Building B1.

In May of 2012, Building B1 filed a one-count complaint against CRS, alleging that, through discussion and correspondence, the parties had agreed to renew the lease for the period of January 1, 2006 through December 31, 2010, and that CRS breached the renewed lease agreement by vacating the premises on July 31, 2009 and failing to pay, inter alia, rents that were due and unpaid through December 31, 2010.

CRS filed its answer and affirmative defenses. CRS also filed a counterclaim, seeking damages for Building B1's breach of the lease for failing to return the security deposit and for failing to reimburse CRS for repairs made to the warehouse following Hurricane Wilma.

On September 28, 2012, CRS was administratively dissolved by the State of Florida for failing to file its annual report.[2] In April of 2015, the matter proceeded to a nonjury trial, and thereafter, the trial court found that the lease was not renewed, and that the discussions and correspondence between the parties merely constituted competing offers and counteroffers, the terms of which were never agreed upon by the parties.

[2] CRS was reinstated on October 20, 2016.

The trial court concluded that Building B1 could not prevail on its breach of lease claim, because the lease expired by its terms on December 31, 2005, and on January 1, 2006, became a month-to-month tenancy pursuant to section 83.01, Florida Statutes (2006).[3] However, the trial court found that, because CRS vacated the warehouse on July 31, 2009 without giving proper notice, Building B1 was entitled to one month's rent (August 2009), pursuant to section 83.03(3), Florida Statutes (2009).[4]

As to CRS's counterclaim, the trial court found that, because the lease agreement had not been renewed, CRS was not entitled to reimbursement for the warehouse repairs on a breach-of-lease-agreement theory. The trial court determined, however, that based on the evidence presented at trial by CRS,

---

[3] Section 83.01 provides:

> Any lease of lands and tenements, or either, made shall be deemed and held to be a tenancy at will unless it shall be in writing signed by the lessor. Such tenancy shall be from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable. If the rent is payable weekly, then the tenancy shall be from week to week; if payable monthly, then from month to month; if payable quarterly, then from quarter to quarter; if payable yearly, then from year to year.

[4] Section 83.03 provides:

> A tenancy at will may be terminated by either party giving notice as follows:
>
> . . .
>
> (3) Where the tenancy is from month to month, by giving not less than 15 days' notice prior to the end of any monthly period. . . .

Building B1 had orally agreed to reimburse CRS for the Hurricane Wilma repairs pursuant to a "gentlemen's agreement." The trial court determined that CRS was thus entitled to be reimbursed for the cost of repairs to the warehouse, as well as return of its security deposit.[5] Finally, the trial court found that Building B1 was entitled to a setoff (asserted as an affirmative defense to CRS's counterclaim) for unpaid property taxes which CRS failed to pay during the relevant period.

The trial court applied the amounts to which Building B1 was entitled (August rent and property taxes) against the amounts to which CRS was entitled (security deposit and warehouse repairs) and thereafter entered a judgment (and later, an amended judgment) in favor of CRS for the net amount of $7,553.10. This appeal followed.

Building B1 first argues that the amended final judgment in favor of CRS must be reversed because CRS was administratively dissolved by the State of Florida and therefore, pursuant to section 607.1622(8), Florida Statutes (2012), CRS was prohibited from defending against Building B1's claims or maintaining its own counterclaim.

Section 607.1622(8) provides:

> Any corporation failing to file an annual report which complies with the requirements of this section shall not be permitted to maintain or defend any action in any court of this state until such a report is filed

[5] The lease required that the security deposit be returned to CRS within ten days after termination of the tenancy.

> and all fees and taxes due under this act are paid and shall be subject to dissolution or cancellation of its certificate of authority to do business as provided in this act.

In the instant case, CRS was an active corporation at the time the cause of action accrued and at the time it filed its answer, affirmative defenses and counterclaim. CRS could therefore defend against Building B1's complaint and maintain its counterclaim. Building B1's challenge to CRS's corporate status, raised for the first time after final judgment and after notice of appeal, comes too late. Seay Outdoor Advert., Inc. v. Locklin, 965 So. 2d 325 (Fla. 1st DCA 2007) (rejecting challenge raised for the first time in a post-judgment motion seeking to set aside judgment as void, and holding that, under section 607.1405(2)(e), Florida Statutes (2012), cause of action filed prior to administrative dissolution could continue where such cause of action had accrued prior to dissolution). By not timely raising CRS's corporate status and securing a ruling on the issue from the trial court, Building B1 failed to properly preserve this issue for our review. Sierra by Sierra v. Pub. Health Tr. of Dade Cty., 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) (recognizing that, as a general rule, "[a]ppellate courts may not decide issues that were not ruled on by a trial court in the first instance.")

Further, and while not necessary to our resolution of this issue, we note that had Building B1 timely raised this issue during the pendency of the action, the trial court could have simply abated the action to allow CRS to reinstate (which CRS

did on October 20, 2016), and such reinstatement "'relates back to and takes effect as of the effective date of the administrative dissolution,' and treats the corporation as though it had never been dissolved." Allied Roofing Indus., Inc. v. Venegas, 862 So. 2d 6, 8 (Fla. 3d DCA 2003) (quoting § 607.1442(3), Fla. Stat. (2012)). This court further observed in Allied Roofing:

> The sanctions authorized for failing to file an annual report-involuntary dissolution and the inability to carry on any business, including bringing or defending a lawsuit, other than that necessary to wind up its affairs . . . are intended to benefit the State, not third parties outside the corporation/State relationship. Hence, the Venegases, "who are strangers to the dealings between plaintiff and the State, should not be allowed to take advantage of the plaintiff's default . . . to escape their own obligations to the plaintiff . . . ."

Id. at 9 (quoting Cosmopolitan Distribs., Inc. v. Lehnert, 470 So. 2d 738, 739 (Fla. 3d DCA 1985) (additional citations omitted)).

Building B1 next argues that the trial court erred by failing to award double rent, as damages under the lease for CRS's status as a holdover tenant. We find no error, as Building B1 never pleaded any entitlement to such damages. In its one-count complaint, Building B1 did not allege that CRS was a holdover tenant who failed to surrender the premises, but instead that Building B1 and CRS had renewed their lease for a new five-year period, and that CRS thereafter breached this renewed lease by vacating the premises before the end of the renewed term.[6]

[6] We find that there was competent substantial evidence presented at the nonjury trial to support the trial court's determination that the parties did not renew the lease. Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889 (Fla. 3d DCA 2010).

In its complaint, Building B1 alleged in detail the specific amount of unpaid rent to which it was entitled based upon CRS's alleged breach of the renewed lease. At no time did those damages include double rent based upon a theory that CRS was a holdover tenant, and Building B1 cannot recover on this unpled claim. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 562 (Fla. 1988); Michael H. Bloom v. Dorta-Duque, 743 So. 2d 1202 (Fla. 3d DCA 1999).

Alternatively, Building B1 asserts that this issue was tried by consent of the parties, under Florida Rule of Civil Procedure 1.190.[7] The record, however,

---

[7] Rule 1.190(a) and (b) provide:

> **(a) Amendments.** A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.
>
> **(b) Amendments to Conform with the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial

establishes that when Building B1 raised the issue of double rent (and implicitly, CRS's purported status as a holdover tenant) for the first time during the trial in this cause, CRS objected. CRS argued that Building B1 never pleaded any such claim, and that CRS would be prejudiced if Building B1 were permitted to do so during trial. The trial court sustained the objection and did not permit Building B1 to amend its pleadings to assert the claim at trial.

While public policy generally favors application of rule 1.190 to permit amendment of pleadings, the rule's "liberal amendment policy diminishes as a case progresses to trial." Morgan v. Bank of N.Y. Mellon, 200 So. 3d 792, 795 (Fla. 1st DCA 2016). Ultimately, the decision is vested in the broad discretion of the trial court, and the touchstone consideration of this analysis is prejudice to the opposing party. Id. We find no abuse of discretion in the trial court's ruling, given the lateness of the request, CRS's objection and the ensuing prejudice resulting from its inability to prepare for or defend against this newly-advanced theory. See Designers Tile Int'l Corp. v. Capitol C Corp., 499 So. 2d 4 (Fla. 3d DCA 1986); Santi v. Zack Co., 287 So. 2d 127 (Fla. 3d DCA 1973).

> of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.

Finally, Building B1 asserts that the trial court erred in finding in favor of CRS on its counterclaim and in finding Building B1 liable on an unpled theory of a breach of an oral agreement. The substance of the oral agreement was that Building B1 assured CRS it would reimburse CRS for expenses incurred in making the necessary repairs to the premises following Hurricane Wilma.

While it is true that CRS's counterclaim did not plead a breach of an oral agreement,[8] it is also true that the record supports the trial court's determination that this unpled theory was tried by consent of the parties. At trial, CRS presented testimony and evidence regarding the oral agreement between the parties. Building B1 raised no objection to the introduction of testimony regarding this oral agreement,[9] and Baitinger conceded in his own testimony that he had no basis to dispute the reasonableness of the repairs or the amount of money CRS spent in making the repairs. Further, Building B1 had a fair opportunity to defend against the unpleaded issue.[10] Dey v. Dey, 838 So. 2d 626, 627 (Fla. 1st DCA 2003).

---

[8] CRS's counterclaim instead alleged that Building B1's failure to reimburse CRS for repairs constituted a breach of the lease agreement.

[9] In fact, Building B1's counsel objected only to the cost of repairing the air conditioner, because that item of repair was outside the scope of CRS's pleadings. The trial court sustained the objection.

[10] More than two years before trial, Building B1 took the deposition of Steve Johnson (of CRS) who testified regarding the details of the oral agreement, including the fact that Baitinger orally promised Building B1 would reimburse CRS for expenses related to the repairs made following the hurricane. During trial, when CRS presented testimony regarding the existence and details of this oral agreement, Building B1 did not object, and thereafter had the opportunity to

An issue is tried by consent where the parties fail to object to the introduction of evidence on the issue. Rosenberg v. Guardian Life Ins. Co., 510 So. 2d 610 (Fla. 3d DCA 1987); Dep't of Revenue of State of Fla. v. Vanjaria Enters., Inc., 675 So. 2d 252 (Fla. 5th DCA 1996). See also Fla. R. Civ. Pro. 1.190(b) (providing: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). We find no error in the trial court's posttrial determination that this issue was tried by consent, and find no merit in the remaining issues raised by Building B1.

Affirmed.

---

question CRS's witness about it, and to present contrary evidence through its own trial witness, Baitinger.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CITY OF POMPANO BEACH, FLORIDA,
Appellant,

v.

NANCY C. BEATTY, As Trustee of the **NANCY C. BEATTY REVOCABLE LIVING TRUST,** Dated October 26, 1990, and As Successor Co-Trustee of the **WILLIAM K. BEATTY REVOCABLE LIVING TRUST,** Dated October 26, 1990, and **WILLIAM K. BEATTY, JR.,** As Successor Co-Trustee of the **WILLIAM K. BEATTY REVOCABLE LIVING TRUST,** Dated October 26, 1990,
Appellees.

Nos. 4D16-2621 and 4D16-3699

[July 12, 2017]

Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dale Ross, Judge; L.T. Case No. 09-020579 CACE (08).

Scott C. Cochran and W. Tucker Craig of Billing, Cochran, Lyles, Mauro & Ramsey, P.A., Fort Lauderdale, for appellant.

Nancy Little Hoffmann of Nancy Little Hoffmann, P.A., Fort Lauderdale, for appellees.

HANZMAN, MICHAEL A., Associate Judge.

I. INTRODUCTION

On May 1, 1974, Appellee, Nancy C. Beatty (and her husband William K. Beatty), as lessors, and Daniel L. Garnsey, as lessee, entered into a ninety-nine-year lease encumbering real property located in Broward County. In October 1989, Appellant, the City of Pompano Beach, assumed the lessee's interest. The lease required specified rental payments for years one through five, with increases after the fifth year based on the cost of living index commencing "on the first (1st) day of the 61st month of the basic term of this Lease, and on every 37th month thereafter." The contract also provided that:

> Rental payments shall be subject to reappraisal every twenty (20) years by independent MAI of land and improvements at the option of the Lessors and at their expense to show return of 12% of land value, and 6% of improvements but in no event less than rental payment for the *19th year, 39th year, and 59th year, etc.*

(Emphasis added).

Appellees first sought to exercise this reappraisal option in 2006 – the thirty-third (33) year of the lease term. Based upon this reappraisal, Appellees then demanded increased rent. When Appellant failed to accede to this demand, Appellee filed suit for breach of contract. Appellant, as an affirmative defense, predictably insisted that the property was subject to reappraisal only in years twenty, forty, sixty, and eighty and, as a result, it was not in breach for failing to pay increased rent based upon a reappraisal that was done in year thirty-three.

Appellant eventually moved for summary judgment based upon what it maintained was the clear and unambiguous language of section 2.2(e) of the lease. Appellees cross-motioned on the identical issue, arguing they were entitled to a rent increase because a first reappraisal was permitted at any time so long as twenty years had elapsed from the date the lease was executed (1974), and successive reappraisals were permitted so long as twenty years had elapsed since the most recent reappraisal.

The trial court granted the Appellees' motion, agreeing with their interpretation of the contract. We do not, and conclude that § 2.2(e) of the lease clearly and unambiguously granted the lessor a right to reappraise the property at specified dates, and *only* those dates. We therefore reverse.

II. ANALYSIS

As this court has said before, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014). That freedom is indeed a constitutionally protected right. *Nw. Nat'l Life Ins. Co. v. Riggs,* 203 U.S. 243, 252–53 (1906); *Hoffman v. Boyd*, 698 So. 2d 346, 348 (Fla. 4th DCA 1997). And when parties choose to agree upon certain terms and conditions of their contract, it is not the province of the court to second-guess their wisdom or "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d

DCA 1973). Rather, the court's task is to apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) ("Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning.") (quoting *Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A.*, 771 So. 2d 628, 631 (Fla. 4th DCA 2000)); *Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract.").

The contract here could not be clearer. First, it says that the property is subject to reappraisal "every twenty years," not any time the lessor desires "so long as" twenty years has passed since inception or a prior appraisal. And if that were not enough, it specifies that a reappraisal may not result in a rental obligation "less than [the] rental payment for the 19th year, 39th year, 59th year, etc." – not less than the rental payment for the year "prior to reappraisal," whatever year that may be. Thus, reading this provision as a whole we have no difficulty concluding that it clearly and unambiguously permits reappraisal only at years twenty, forty, sixty, and eighty.[1]

Although the clarity of the provision in dispute ends the analysis, we also point out that Appellees' tortured "interpretation" amounts to a re-write of the lease on terms significantly more favorable to the lessor only. At the time this contract was entered into, neither party knew – or had any way to predict – what the condition of the real estate market would be at the time reappraisal was authorized (i.e., years twenty, forty, sixty, and eighty). So a reappraisal might benefit the lessor and it might not. The parties would simply have to accept the "market" as they found it. But under Appellees' "interpretation" they could sit back and exercise the

[1] Nor is the provision ambiguous simply because the litigants ascribe different meanings to the language employed – something that occurs every time the interpretation of a contract is litigated. Incorrect and even absurd interpretations of unambiguous contracts are often advanced in these types of disputes. But a true ambiguity exists only when the language at issue "is reasonably susceptible to more than one interpretation." *Lambert v. Berkley S. Condo. Ass'n*, 680 So. 2d 588, 590 (Fla. 4th DCA 1996); *Campaniello v. Amici P'ship*, 832 So. 2d 870, 872 (Fla. 4th DCA 2002) ("[W]hen the terms of a written instrument are disputed and rationally susceptible to more than one construction, an issue of fact is presented . . . ."); *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. 4th DCA 1984) ("[F]anciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations.").

.

reappraisal option whenever the market would benefit them the most, so long as twenty years had elapsed since the execution of the lease. So if the market was weak in year twenty (or forty, sixty, or eighty), Appellees could just accept the cost of living increases, wait for the market to rise, and then – at the most opportune time – elect to reappraise. Of course if the market was strong in years twenty, forty, sixty, and eighty, the lessee would have no corresponding right to delay reappraisal.

The bottom line is that Appellees' interpretation gives it something the contract does not – an "option" to reappraise when – in its view – to do so would be most advantageous. We will not sanction such a one way judicial re-write.

The trial court's final judgment in favor of Appellees is reversed with directions to enter final judgment in favor of Appellant. Given our reversal of the final judgment, we likewise reverse the final judgment awarding Appellees' attorney's fees and costs. *See City of Hollywood v. Witt*, 939 So. 2d 315, 319 (Fla. 4th DCA 2006) ("[W]here an award of attorney's fees is dependent upon the judgment obtained, the reversal of the underlying judgment necessitates the reversal of the fee award").

Reversed and remanded.

DAMOORGIAN and CIKLIN, 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

DEUTSCHE BANK TRUST COMPANY AMERICAS as trustee for RALI 2005QA8,

Appellant,

v.

BECKI RUTH MAAS and RYAN DAVID MAAS,

Appellees.

Case No. 2D15-898

Opinion filed July 14, 2017.

Appeal from the Circuit Court for Pasco County; W. Douglas Baird, Judge.

Jeremy W. Harris and David F. Knobel of Morris, Laing, Evans, Brock & Kennedy, Chartered, West Palm Beach, for Appellant.

Michael Alex Wasylik of Ricardo & Wasylik, PL, Dade City, for Appellees.

KELLY, Judge.

Deutsche Bank Trust Company Americas appeals from the final order involuntarily dismissing its foreclosure complaint against Becki and Ryan Maas on the ground that the Bank's attorney failed to appear at a hearing. Because the trial court

abused its discretion in denying the attorney's motion for reconsideration based on excusable neglect and its motion for relief from admissions, we reverse.

The involuntary dismissal was predicated on technical admissions resulting from the Bank's failure to timely respond to requests for admissions. Pursuant to Florida Rule of Civil Procedure 1.370(b), the Bank filed a verified motion seeking relief from the admissions, and it scheduled the matter for a hearing. The Bank's attorney, who was scheduled to appear telephonically, did not telephone at the designated time, although the court reporter the Bank had scheduled did appear. The appearance of the court reporter on behalf of the Bank ought to have signaled to the Maases' counsel that something was amiss. However, when the trial court asked how he wanted to proceed, the Maases' counsel asked the court to "dismiss" the motion without giving the Bank an opportunity to be heard on its motion. The court obliged, and it denied the motion.

On receiving the order denying its motion based on its failure to appear at the hearing, the Bank promptly moved for reconsideration citing excusable neglect. Its motion was supported by the affidavit of the attorney who had been tasked with covering the hearing. In it she explained her failure to appear was due to an error on the part of her firm's scheduling department. She explained that she had been sick, that she had advised the scheduler of her illness, that she had asked not to be scheduled, and that she had not been notified that she had nevertheless been assigned to cover the hearing. The trial court denied the motion for reconsideration saying the affidavit was inadequate to show excusable neglect. At trial, the court again refused to grant relief from the admissions, and it also refused to allow the Bank to put on evidence, or

even proffer the evidence, that would have established its entitlement to foreclose. The Maases' counsel sought and was granted an involuntary dismissal.

The trial court erred in two respects. First, it should have granted the Bank's motion for reconsideration. The Bank provided a sworn affidavit establishing that its attorney's failure to appear at the motion hearing was inadvertent (which is further borne out by the presence of the court reporter). This type of mistake has routinely been found to amount to excusable neglect, and it was error for the trial court to find otherwise. See Somero v. Hendry Gen. Hosp., 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985) ("[W]here inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on the merits.").

Further, the trial court abused its discretion in refusing the Bank's request for relief from the technical admissions. Reflecting Florida courts' longstanding preference to decide cases on the merits, this court and others have repeatedly held that relief from technical admissions is to be liberally granted. See, e.g., Wells Fargo Bank, Nat'l Ass'n v. Voorhees, 194 So. 3d 448, 451 (Fla. 2d DCA 2016); Pennymac Corp. v. Labeau, 180 So. 3d 1216, 1219 (Fla. 3d DCA 2015); Habib v. Maison Du Vin Francais, Inc., 528 So. 2d 553, 553 (Fla. 4th DCA 1988). Where the record contains evidence that contradicts the admissions and the opposing party has not shown it will be prejudiced by the withdrawal of the admissions, we have held it is an abuse of discretion for the trial court to deny relief. Voorhees, 194 So. 3d at 451.

Here, the Bank's technical admissions were contradicted by evidence in the record, and the Maases did not demonstrate any prejudice to their ability to defend the foreclosure action. See Fla. R. Civ. P. 1.370(b) ("[T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits."). Under these circumstances, the Bank should have been afforded relief from the admissions.

Accordingly, we reverse the order dismissing the Bank's complaint and remand for further proceedings consistent with this opinion.

Reversed and remanded.

VILLANTI and KHOUZAM, JJ., Concur.

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

SANDRA A. FORERO and WILLIAM L. FORERO,

Appellants,

v.

GREEN TREE SERVICING, LLC,

Appellee.

_____/

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

CASE NO. 1D16-2151

Opinion filed July 14, 2017.

An appeal from the Circuit Court for Leon County.
John C. Cooper, Judge.

Daniel W. Hartman of Hartman Law Firm, P.A.; Eric S. Haug of Eric S. Haug Law & Consulting, P.A., Tallahassee, for Appellants.

Michael Ruff of the Law Office of Timothy D. Padgett, P.A., Tallahassee, for Appellee.

BILBREY, J.

Sandra and William Forero appeal the final judgment of foreclosure entered in favor of Ditech Financial LLC, as successor by merger to Green Tree Servicing, LLC, which determined $158,459.30 as the amount due and payable to Ditech and

ordered the foreclosure of the lien on the real property. Because the foreclosure action was not rendered res judicata by the two previously dismissed foreclosure suits on the same note, and because the statute of limitations in section 95.11(2)(c), Florida Statutes, did not bar the action due to the inclusion within the allegations of at least some defaulted installment payments within five years of the date the complaint was filed, the judgment is affirmed.

We review de novo the trial court's application of the law to the pleadings, other filings in the record, and the uncontroverted evidence admitted at trial. See Bartram v. U. S. Bank Nat'l Ass'n, 211 So. 3d 1009, 1015 (Fla. 2016).

On December 3, 2002, William Forero executed a promissory note in favor of the lender, Bank of America (BOA), for a loan of $171,992.00. The note was secured by a mortgage on residential real property, also executed on December 3, 2002, by Mr. Forero and his wife, Sandra Forero. Based on the Foreros' failure to pay on "December 1, 2008 and all subsequent payments," BOA filed suit for foreclosure on February 18, 2010. Bank of America v. Forero, Case No. 2010 CA 000582 (Fla. 2d Cir., Leon Cnty.). BOA voluntarily dismissed this action on December 13, 2011. See Fla. R. Civ. P. 1.420(a)(1).

BOA filed a second foreclosure action on February 14, 2013, against the Foreros and based on the same allegation of default for failure to pay on "December 1, 2008 and all subsequent payments." Bank of America v. Forero,

Case No. 2013 CA 000467 (Fla. 2d Cir., Leon Cnty.). BOA voluntarily dismissed this second action on April 4, 2013. Pursuant to rule 1.420(a)(1), Florida Rules of Civil Procedure, this second voluntary dismissal "operates as an adjudication on the merits . . . based on or including the same claim."

The mortgage was assigned by BOA to Green Tree Servicing, LLC, on September 19, 2013, "together with the note(s) and obligations therein described," and the Assignment was filed in the public records in Leon County, Florida. By letters dated July 29, 2013, and addressed to both of the Foreros individually, Green Tree notified the Foreros of the default, their options to cure the default, and the acceleration of "all amounts due under the loan agreement" if the default was not cured within 30 days.[1]

On April 7, 2014, Green Tree filed the third foreclosure action against the Foreros on the same note and mortgage and based on the same allegation of default upon the December 1, 2008, payment "and all subsequent payments." Green Tree Servicing, LLC v. Forero, Case No. 2014 CA 000921 (Fla. 2d Cir., Leon Cnty.). The copy of the note attached to the complaint in the 2014 case included an undated blank indorsement, making the note payable to bearer and negotiable by transfer of possession alone. See § 673.2051(2), Fla. Stat.; see also §§ 671.201(21), 673.3011, Fla. Stat.

[1] The notice of default predating the assignment is not material here.

The Foreros raised several affirmative defenses in their responsive pleading, including res judicata due to the previous adjudication on the merits by operation of rule 1.420, Florida Rules of Civil Procedure. The Foreros also asserted that the 5-year statute of limitations had expired by the time the third foreclosure complaint against them was filed. See § 95.11(2)(c), Fla. Stat. (action to foreclose mortgage must be commenced within 5 years).

During the pendency of the litigation, Green Tree merged with Ditech Financial, LLC. The plaintiff's witness, Mr. Kevorkian, had been an employee of Green Tree, and at the time of trial was employed as a foreclosure and mediation specialist by Ditech. Mr. Kevorkian testified that Ditech was the servicer of the loan in the case. Numerous documents were admitted into evidence at trial, and Mr. Forero testified on his own behalf. Mr. Forero admitted at trial that the monthly payment due December 1, 2008, was not made and no additional payments were made after November 2008.

At the conclusion of the evidence and argument of counsel, the trial court granted foreclosure and determined that the principal balance due was $158,459.30. The court denied any award for interest, late fees, and other sums due to Ditech's failure to prove amounts for these items.

On appeal, the Foreros challenge the final judgment of foreclosure on grounds that the action was barred by operation of rule 1.420(a)(1), Florida Rules

of Civil Procedure, and by the statute of limitations provided by section 95.11(2)(c), Florida Statutes.[2]

Under rule 1.420, a second voluntary dismissal of a suit by the plaintiff "operates as an adjudication on the merits." This provision is often referred to as the "two dismissal rule." See, e.g., Edmondson v. Green, 755 So. 2d 701, 704 (Fla. 4th DCA 1999). However, rule 1.420 itself does not actually preclude subsequent actions. As explained in Olympia Mortgage Corp. v. Pugh, 774 So. 2d 863, 867 (Fla. 4th DCA 2000):

> The two dismissal rule does not bar a subsequent suit. The two dismissal rule merely states that when the rule applies the dismissal of the second suit operates as an adjudication on the merits. Once there is an adjudication on the merits, it is the doctrine of res judicata which bars subsequent suits on the same cause of action.

In Olympia, the court found a lack of identity between the first and second causes of action because, in addition to the default alleged in the first action, the subsequent missed payments and possible new default resulting from these missed payments at issue in the second action did not yet exist and thus could not have been at issue in the first suit. Id. at 867. Because new facts were at issue regarding the new missed payments, the Fourth District Court of Appeal found an absence of

[2] The Foreros also challenge Green Tree/Ditech's proof of standing to enforce the promissory note and compliance with the notice of default requirements in the note and mortgage. The record shows no error by the trial court on these issues and we affirm on these grounds without further comment.

identity of the first and second causes of action, and thus the two-dismissal rule did not render the third suit res judicata so as to bar the third action.[3] Id.

The Florida Supreme Court addressed the viability of subsequent foreclosure actions on the same note and mortgage, but with different occurrences of default, in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004). There, the Court held:

> We agree with the position of the Fourth District that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata.
>
> * * *
>
> While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue.
>
> * * *
>
> We conclude that the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. In this case the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.

Id. at 1006-08.

---

[3] We note the opinion in Nolan v. MIA Real Holdings, LLC, 185 So. 3d 1275 (Fla. 4th DCA 2016), where the appellate court reversed the judgment of foreclosure in the third action on the same note and mortgage. However, the opinion stated that the third action was upon "the same breach" of the promissory note without specifying the date or dates of non-payment alleged in the lawsuits and thus not identifying the particular defaults at issue in the different actions. Id. at 1276. Nolan does not require dismissal of a subsequent suit where the defaults at issue in the actions are not identical.

In this case and the two previous, dismissed cases, the period of default alleged is open-ended—"December 1, 2008 and all subsequent payments." The actual number of individual monthly payments missed as of the filing date of each complaint differed due to the passage of time between the 2010 suit, the 2013 suit, and this 2014 complaint. It was undisputed that the first missed installment payment, and thus the first default on the note and mortgage, occurred December 1, 2008. It was also undisputed that no payments were made for each month thereafter. Accordingly, the actual defaults upon which the previous foreclosure actions were based did not include the additional defaults for the subsequent months at issue in this third action, even though the same language was used in each complaint to describe the period of default. Furthermore, the note was accelerated anew based upon failure of the Foreros to cure the default. Applying the rationales of Olympia Mortgage Corp. and Singleton, this third foreclosure action was not barred as res judicata, even in light of rule 1.420(a), because the open-ended series of defaults included different missed payments at issue in each suit.

The Foreros' position that this third action was barred as untimely by the statute of limitations must also fail on appeal. The purpose of a statute of limitations "is to protect unwitting defendants from the unexpected enforcement of stale claims brought by plaintiffs who have slept on their rights." Maynard v.

Household Fin. Corp. III, 861 So. 2d 1204, 1207 (Fla. 2d DCA 2003). On the other hand, as recognized in Singleton, the equitable nature of the remedy of foreclosure, the "unique nature of the mortgage obligation," and the possibility that debtors could be unjustly enriched if allowed to escape repayment due merely to the passage of time and an initial plaintiff's inability to prove the initial default must be considered before the right to enforce a promissory note may be cut off. Singleton, 882 So. 2d at 1007-08.

Balancing these purposes, the Florida Supreme Court applied the concept of a series of actionable defaults in Bartram. Summarizing the post-Singleton case law, the Court agreed "with the reasoning of both our appellate courts and the federal district courts that our analysis in Singleton equally applies to the statute of limitations context present in this case." Bartram, 211 So. 3d at 1019. The Court held, "with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage." Id.

Applying Singleton to this case, the voluntary dismissals of the two previous foreclosure actions did not bar Ditech's subsequent action for foreclosure as res judicata because the causes of action are not identical. The additional payments missed by the time the third action was filed, which were not bases for the previous actions because they had not yet occurred, constitute separate defaults upon which

the third foreclosure action may be based. Additionally, acceleration of the note occurred at a different time. Accordingly, even though the same phrase was used to describe the default in each action — "December 1, 2008 and all subsequent payments" — the meaning of the phrase expanded as time progressed and additional payments were missed. At most, the doctrine of res judicata affected Ditech's ability to bring suit on the certain installment payments at issue in the second suit prior to the voluntary dismissal. But Singleton makes clear that enforcement of the note via a foreclosure action is not barred by res judicata for the defaults occurring after April 4, 2013, the date the second suit was dismissed.

Likewise, this third foreclosure action was not barred by the 5-year statute of limitations. Under the facts of this case, where it was alleged and established at trial that no payments had been made on the mortgage since November 2008, each missed payment constituted a new default. As stated in Bartram, "the statute of limitations runs from the date of each new default providing the mortgagee the right . . . to accelerate all sums then due under the note and mortgage." 211 So. 3d at 1019; see also Bollettieri Resort Villas Condo. Ass'n v. Bank of New York Mellon, 198 So. 3d 1140, 1142-43 (Fla. 2d DCA 2016) (holding complaint based on initial default over five years prior to complaint, but also alleging "no subsequent payments have been made," sufficient to state timely cause of action based on any missed payments since the initial breach), *certifying conflict with*

Hicks v. Wells Fargo Bank, N.A., 178 So. 3d 957 (Fla. 5th DCA 2015).[4]

Because this third foreclosure action upon the same note and mortgage and against the same defendants was not barred as res judicata or by the applicable statute of limitations, the final judgment of foreclosure is AFFIRMED.

LEWIS and WINOKUR, JJ., CONCUR.

[4] The effect of the passage of time, if any, upon the amount recoverable via foreclosure judgment when the initial default in a continuous series of defaults occurred more than five years before the filing of the complaint, was not raised by the parties at trial or on appeal. Accordingly, we do not reach the issue of whether the equitable concerns that debtors not be unjustly enriched by a plaintiff's previously dismissed actions should be balanced on the other hand by the purpose of the statute of limitations and other doctrines designed to impose consequences for stale claims and failure to timely and diligently prosecute legal action by the proper party. See U. S. Bank Nat'l Assoc. v. Bartram, 140 So. 3d 1007, 1013-1014 (Fla. 5th DCA 2014), *approved*, 211 So. 3d 1009 (Fla. 2016) (discussing federal cases suggesting that "defaults that are now more than five years old may be subject to the statute of limitations" while the later defaults were still actionable).

Supreme Court of Florida

No. SC15-1555

HOLMES REGIONAL MEDICAL CENTER, INC., et al.,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, et al.,
Respondents.

[July 13, 2017]

QUINCE, J.

This case is before the Court for review of the decision of the Fifth District Court of Appeal in Allstate Insurance Co. v. Theodotou, 171 So. 3d 163 (Fla. 5th DCA 2015). In its decision, the district court ruled upon the following question which the court certified to be of great public importance:

> IS A PARTY THAT HAS HAD JUDGMENT ENTERED AGAINST IT ENTITLED TO SEEK EQUITABLE SUBROGATION FROM A SUBSEQUENT TORTFEASOR WHEN THE JUDGMENT HAS NOT BEEN FULLY SATISFIED?

Id. at 168. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we answer the certified question in the negative and quash the decision of the Fifth District.

FACTS AND PROCEDURAL HISTORY

Benjamin Edward Hintz sustained head injuries when his scooter collided with an automobile driven by Respondent Emily Boozer. Theodotou, 171 So. 3d at 164. The car belonged to Boozer's father, Otto, who was insured by Respondent Allstate. Id. Hintz received medical treatment at Holmes Regional Medical Center (medical provider defendants) where, according to Respondents, his injuries were "exacerbated by medical negligence." Id.

Petitioner Douglas Stalley, guardian of Hintz's property, filed suit against Emily and Otto Boozer for damages. Id. Stalley successfully argued that Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977), "precluded the Boozers from presenting evidence that medical negligence was a contributing cause of Hintz's injuries." Id. The jury found the Boozers liable for Hintz's injuries and awarded Stalley $14,905,585.29, which was reduced by twenty-five percent to $11,179,188.98 due to Hintz's comparative negligence. Id. In August 2012, judgment was entered and Allstate paid $1.1 million, its policy limit. Id. The Boozers have not paid the remainder of the judgment. Id.

Following the personal injury verdict, Stalley filed a separate medical malpractice lawsuit against the medical provider defendants, who are also

Petitioners in this proceeding. Id. at 165. Stalley "sought recovery for the same injuries involved in the initial lawsuit against the Boozers."[1] Id.

Respondents Allstate and Emily Boozer were granted leave to intervene in the lawsuit, and both parties filed complaints claiming they were entitled to equitable subrogation from the medical provider defendants. Id. In response, the medical provider defendants sought dismissal of the complaints because neither Allstate nor Boozer had paid Hintz's damages in full. Id. The trial court agreed with the medical provider defendants and dismissed Respondents' complaints with prejudice. Id.

On appeal, the Fifth District considered whether

> [A]n initial tortfeasor or her insurer may assert an equitable subrogation claim against a subsequent tortfeasor when: (1) the initial tortfeasor was precluded from bringing the subsequent tortfeasor into the original personal injury action under Stuart v. Hertz, 351 So. 2d 703 (Fla. 1977); (2) judgment was entered against the initial tortfeasor for the full amount of the injured person's damages, regardless of the initial tortfeasor's portion of fault; and (3) that judgment has not been completely paid by the initial tortfeasor or her insurer.

Id. at 164. In reversing the trial court's order, the district court found that "the right to equitable subrogation arises when payment has been made or judgment has

1. Stalley also filed a bad faith action against Allstate. The case was tried in June 2016 and a jury found that Allstate did not act in bad faith. See Stalley v. Allstate Ins. Co., No. 6:14-cv-1074-Orl-28DAB, 2016 WL 3282371 (M.D. Fla. June 10, 2016). Stalley appealed, and the Eleventh Circuit affirmed. See Stalley v. Allstate Ins. Co., No. 16-14816, 2017 WL 1033670 (11th Cir. Mar. 17, 2017).

been entered, so long as the judgment represents the victim's entire damages." Id. at 167. The court reasoned that "equity favors justice and fairness over formalistic legal rules," and that the need for liability to be correctly apportioned must be considered along with the victim's need to be made whole. Id. at 167-68. Recognizing that Florida courts have allowed subrogation claims to proceed on a contingent basis, the district court saw "no reason why Appellants' subrogation claim in this case should not be allowed to proceed in a similar manner." Id. at 167.

Petitioners Holmes Regional Medical Center and Douglas Stalley now argue that under this Court's long-standing precedent, an initial tortfeasor only has a subrogation claim against a subsequent tortfeasor after fully compensating the injured party. In response, Allstate and Emily Boozer contend that equitable subrogation is a flexible doctrine and equity requires that liability be properly apportioned among all negligent parties. Because the certified question presents a pure issue of law, the standard of review is de novo. Special v. West Boca Med. Ctr., 160 So. 3d 1251, 1255 (Fla. 2014).

ANALYSIS

In Stuart, this Court addressed "whether or not an active tortfeasor in an automobile accident may bring a third party action for indemnity against a physician for damages directly attributable to malpractice which aggravated the

plaintiff's injuries." 351 So. 2d at 704. The respondent in that case, Hertz, owned the automobile that collided with an automobile belonging to Mrs. Johnson. Id. Mrs. Johnson suffered orthopedic injuries from the crash and underwent surgery performed by the petitioner, Dr. Stuart. Id. During the surgery, Dr. Stuart accidentally severed Mrs. Johnson's carotid artery, which caused a neurological disability. Id. When Mrs. Johnson filed suit against Hertz, Hertz sought indemnity for any damages recovered because of the neurological injuries. Id. Dr. Stuart moved to dismiss the third party complaint, which the trial court denied. Id.

In reversing the trial court's order, we held that an initial tortfeasor is prohibited from presenting evidence of subsequent medical malpractice or filing a third-party complaint for alleged aggravation of injuries by medical providers. Id. at 706. We stated:

> An active tortfeasor should not be permitted to confuse and obfuscate the issue of his liability by forcing the plaintiff to concurrently litigate a complex malpractice suit in order to proceed with a simple personal injury suit. To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiff's action for malpractice. This decision eliminates the traditional policy of allowing the plaintiff to choose the time, forum and manner in which to press his claim. (citation omitted).
>
> The choice of when and whether to sue his treating physician for medical malpractice is a personal one, which rightfully belongs to the patient. A complete outsider, and a tortfeasor at that, must not be allowed to undermine the patient-physician relationship, nor make the plaintiff's case against the original tortfeasor longer and more complex through the use of a third-party practice rule which was adopted for the purpose of expediting and simplifying litigation.

Id. We also expressed concern about "confusion and nonuniformity of application by the lower courts," complication of the issues, and prolonging the litigation. Id.

Justice Boyd concurred in part and dissented in part. Id. at 707. He explained:

> I dissent to the view that any active tortfeasor sued should be unable to shift an equitable portion of the judgment obligation to others causing or increasing the injuries and damages.
>
> Although respondent Hertz Corporation must not be permitted to join petitioner as a third party defendant, it should be permitted to allege and prove any malpractice and have the judgment amount reduced to the extent the malpractice contributed to the total amount of damages. It is fundamentally unfair and unjust to require Hertz to pay for the negligence of petitioner, if any. If the injured person, Mrs. Johnson, does not wish to join her doctor in the suit that should be her privilege, but she should not recover from Hertz the full damages unless Hertz is the only tortfeasor.

Id. at 707-08.

Justice Overton also dissented and wrote:

> A plaintiff should not be allowed to recover for the same wrong from both tortfeasors, which may be possible under the majority opinion as I understand it. Clearly one tortfeasor should not be responsible for all the injuries without the right of indemnification for the identifiable consequences of another's wrong.

Id. at 708.

We later addressed the concerns raised by Justice Boyd and Justice Overton in Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702 (Fla. 1980). In Lloyds, the City of Lauderdale Lakes settled with a victim for all injuries

flowing from an automobile accident and for the treatment thereof. Id. at 703. Following settlement, the City sought indemnification from the doctor. Id. Due to this Court's decision in Stuart, the City attempted to amend its complaint and sue the doctor under a theory of subrogation. Id. "The trial court denied the city's motion to amend and granted summary judgment for the defendant insurance company." Id. The Fourth District reversed the trial court and certified the following question as one of great public interest:

> DOES THE DECISION IN STUART V. HERTZ BAR A SEPARATE LAWSUIT BY THE INITIAL TORTFEASOR AGAINST A SUCCESSOR TORTFEASOR WHO AGGRAVATES THE ORIGINAL INJURIES?

Id.

In answering the certified question in the negative, we considered whether "it is fair and equitable for such a tortfeasor to have to pay a sum greater than should have flowed from an accident without thereafter giving him some recourse against the agency exacerbating his liability?" Id. at 704. In order to "preclude a negligent doctor from escaping the responsibilities for his actions," we provided the remedy of equitable subrogation. Id. We explained that subrogation is an equitable doctrine that allows the initial tortfeasor to be placed in "the shoes of" the plaintiff. Id. (citing 30 Fla. Jur. Subrogation § 11). It is a legal device "founded on the proposition of doing justice without regard to form, and was designed to afford relief where one is required to pay a legal obligation which

ought to have been met, either wholly or partially, by another." Id. (citations omitted). Additionally, "a subrogation suit is a separate, independent action against a subsequent tortfeasor by the initial tortfeasor. The injured party, having received full compensation for all injuries, is not a party to the litigation and is spared the trauma of an extensive malpractice trial." Id. In so holding, we "aligned Florida with jurisdictions relying upon subrogation as a remedy of affording an initial tortfeasor equitable apportionment of liability when a victim's injuries have been negligently aggravated by an attending doctor." Id. (citations omitted).

We later expounded on what was required for an initial tortfeasor to assert an equitable subrogation claim in Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999), where we held that equitable subrogation is "generally appropriate" when five factors are satisfied:

> (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party.

Id. at 646. In that case, we resolved a conflict between the Third District in Dade County School Board v. Radio Station WQBA, 699 So. 2d 701 (Fla. 3d DCA 1997) and the Fifth District in West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So. 2d 204 (Fla. 5th DCA 1986). In WQBA, the Third District

had concluded that partial payment was enough to allow a remedy of equitable subrogation. 699 So. 2d at 703. The Fifth District in West American, however, stated that the party claiming subrogation had to pay the debt in full. 495 So. 2d at 207. Because we "disagree[d] with the [Third District's] liberal application of the equitable subrogation doctrine," we approved the decision of the Fifth District. WQBA, 731 So. 2d at 646.

We pointed out that, in West American, "central to the court's application of equitable subrogation was the fact that West American secured a release which included Yellow Cab and that West American paid one hundred percent of the debt." WQBA, 731 So. 2d at 647. We reasoned that, because equitable subrogation puts "the person discharging the debt . . . in the shoes of the person whose claim has been discharged, [it] would only be proper if it can be established that [WQBA] paid the entire debt owed to a particular plaintiff and that in doing so, [WQBA] obtained a release for DCSB [Dade County School Board] from the plaintiff." Id.

Our decision in WQBA was consistent with long-established law that "[u]ntil the obligation is fully discharged, the obligee is himself entitled to enforce the balance of his claim, and the person whose property has been used in discharging only a part of the claim is not entitled to occupy his position." Restatement (First) of Restitution §162 com. c. (Am. Law Inst. 1937). Other

district courts have held similarly. See U.S. Fid. & Guar. Co. v. Essex Ins. Co., 188 So. 3d 906, 907 (Fla. 1st DCA 2016) (no equitable subrogation where excess insurer "did not pay the entire settlement in the underlying tort litigation"); Goldberg v. State Farm Auto. Mut. Ins. Co., 922 So. 2d 983 (Fla. 4th DCA 2005) (insurer that paid insured's passenger not entitled to subrogation against second driver where it did not show that it paid all of the passenger's damages and obtained release of second driver); Collins v. Wilcott, 578 So. 2d 742, 744 (Fla. 5th DCA 1991) ("[T]he right of subrogation does not exist until one tort-feasor has completely discharged the obligation of all tort-feasors."); Fla. Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827 (Fla. 1st DCA 1979) (no subrogation for fire insurer where insured recovered less from tortfeasor than insured's total damages).

In the instant case, the Fifth District distinguished cases cited by Petitioners for the proposition that equitable subrogation requires full payment by stating that the cases either (1) involved settlements "where the party seeking equitable subrogation settled with the victim for only the portion of the injury directly attributable to it," or (2) did "not involve a Stuart initial tortfeasor/subsequent tortfeasor situation" where the victim's injuries were made worse by a doctor's negligence. Theodotou, 171 So. 3d at 166. In doing so, the Fifth District ignored the underlying principle of those cases: that the victim had been fully compensated by the initial tortfeasor before the initial tortfeasor could assert an equitable

subrogation claim. While there was no settlement offer in this case, in order for the Respondents to "step in[to] the shoes" of the plaintiff, they must first fully discharge the debt. Although Respondents argue that some district courts have held that an equitable subrogation claim arises once judgment has been entered, that language, as acknowledged by the Fifth District, is dicta. See, e.g., Caccavella v. Silverman, 814 So. 2d 1145, 1147 (Fla. 4th DCA 2002) ("When an initial tortfeasor is held liable for the entirety of the plaintiff's damages, his remedy is an action for equitable subrogation against the subsequent tortfeasor."); Nat'l Union Fire Ins. Co. v. Se. Bank, N.A., 476 So. 2d 766, 767 (Fla. 3d DCA 1985) ("A right to subrogation does not arise until judgment is entered or payment has been made.").

Because a claim of equitable subrogation requires payment of the entire debt, Respondent Boozer's argument that she may be substituted for Hintz in the malpractice action is meritless, as she has paid no part of the $11 million judgment against her. Additionally, Respondent Allstate's argument that it has a claim by virtue of its $1.1 million dollar payment fails, as partial payment does not discharge the entire debt to the injured party and therefore does not give rise to an equitable subrogation claim. See Cleary Bros. Constr. Co. v. Upper Keys Marine Constr., Inc., 526 So. 2d 116, 117 (Fla. 3d DCA 1988) ("No rights of subrogation arise from a partial satisfaction of an obligation."); see also Rubio v. Rubio, 452

So. 2d 130, 132 (Fla. 2d DCA 1984) ("[T]he insurer has no right as against the insured where the compensation received by the insured is less than his loss." quoting Couch on Insurance, 2d § 61.64 (rev. ed. 1983)). This is because "the creditor cannot equitably be compelled to split his or her securities and give up control of any part until he or she is fully paid." 16 Couch on Ins. 3d § 223:22 (Rev. ed. 2016).

Furthermore, allowing Petitioner Stalley, on behalf of Hintz, to pursue a medical malpractice claim against the medical provider defendants without Respondents' intervention would neither violate the doctrine of election of remedies nor permit Hintz to obtain a double recovery. Although the Fifth District did not expressly use the term "election of remedies," it was at the foundation of the court's reasoning in the instant case:

> Stuart makes clear that an injured party can choose to sue only the initial tortfeasor and seek recovery for all the injuries resulting from both torts . . . Or the injured party can first recover from the initial tortfeasor for the injuries caused solely by the original tort and then seek recovery from the subsequent tortfeasors for the injuries caused, or aggravated by, their negligence.

Theodotou, 171 So. 3d at 165 (emphasis added).

> Under Stuart, Stalley made a decision to recover from only the initial tortfeasor.

Id. (emphasis added) (citations omitted).

> Here, the plaintiff chose the manner of the litigation. He elected to sue only the Boozers, presumably knowing that they could not afford

> to pay a multi-million dollar judgment. He then chose to sue the Medical provider defendants, leading to, ironically, his involvement in what could become an "extensive" medical-malpractice trial. The intervention of the initial tortfeasor into that lawsuit is a consequence of these choices.

Id. at 168 n.3 (emphasis added). The Fifth District here inaccurately described Hintz's decision to sue Boozer first as "a decision to recover from only the initial tortfeasor." Id. at 166. However, a plaintiff is not precluded from suing an initial tortfeasor before suing a negligent medical provider. See, e.g., Barnes v. Meece, 530 So. 2d 958, 959 (Fla. 4th DCA 1988) (holding plaintiff entitled to bring separate, simultaneous suits against initial tortfeasor and negligent treatment providers without having to litigate the malpractice issue in the tort suit); Am. Process Co. v. Florida White Pressed Brick Co., 47 So. 942, 944 (Fla. 1908) ("Where the law affords several distinct, but not inconsistent, remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies."). Contrary to the Fifth District's reasoning, Hintz did not decide to recover only from the initial tortfeasor. Instead, he decided to sue the initial tortfeasor first. That was not an election of remedies. Hintz's remedy against Boozer is not inconsistent with the remedy he seeks now against the medical provider defendants, and the judgement remains unsatisfied.

The election of remedies doctrine is intended "to prevent double recoveries for a single wrong." Liddle v. A.F. Dozer, Inc., 777 So. 2d 421, 422 (Fla. 4th DCA 2000) (quoting Goldstein v. Serio, 566 So. 2d 1338, 1339 (Fla. 4th DCA 1990)). It applies in two circumstances, neither of which are present in this case. First, it can apply when the plaintiff has obtained a judgment on one of two inconsistent theories. The facts underlying the claims must be "opposite and irreconcilable." See Barbe v. Villenueve, 505 So. 2d 1331, 1333 (Fla. 1987). Remedies are only inconsistent if they cannot logically exist on the same facts. Heller v. Held, 817 So. 2d 1023, 1026 (Fla. 4th DCA 2002). Where, as here, the claims rely on the same facts and the plaintiff seeks further relief consistent with the relief already given, the remedies are not inconsistent. See Klondike, Inc. v. Blair, 211 So. 2d 41, 42-43 (Fla. 4th DCA 1968) (holding that unsatisfied judgment on note was not inconsistent with claim for foreclosure of mortgage securing it and was not an election).

Second, if the remedies are consistent, only "full satisfaction" of the claim will constitute an election of remedies. Thus, a party may get more than one judgment, so long as there is only one recovery. In Rodriguez ex rel Rodriguez v. Yount, 623 So. 2d 618, 619 (Fla. 4th DCA 1993), the court quashed the abatement of a medical malpractice action pending resolution of a bad faith action against the insurer of an initial tortfeasor, holding that, "even if the damages were identical,

there is no bar to proceed against a concurrent or subsequent [tortfeasor] where the prior judgment remains uncollected." Id. at 619. See also Heller, 817 So. 2d at 1027 (holding no election where "record suggests that the judgment cannot be collected"). Satisfaction of the judgment is required because the doctrine "can serve as an instrument of injustice when an election of a remedy turns out to be unavailable." Sec. & Inv. Corp. of the Palm Beaches v. Droege, 529 So. 2d 799, 802 (Fla. 4th DCA 1988). Thus, we held in Junction Bit & Tool Co. v. Village Apartments, Inc., 262 So. 2d 659, 660 (Fla. 1972), that "the issue of an election of remedies was . . . of no consequence when no real remedy resulted." As applied to the instant case, Hintz has received only an unsatisfied judgment and a payment from Allstate of less than one tenth of his total damages. There has been no "full satisfaction."

Moreover, the "one-action rule" on which Allstate relies does not support its argument for intervention into Hintz's medical malpractice action. The rule against splitting a cause of action applies only to a "single wrongful act." Tyson v. Viacom, Inc., 890 So. 2d 1205, 1210-11 (Fla. 4th DCA 2005) (quoting Froman v. Kirkland, 753 So. 2d 1116 (Fla. 4th DCA 1999)). Here, Boozer's negligence and the medical provider defendants' malpractice are separate wrongful acts. Hintz was injured by both. As previously stated, Hintz is allowed to sue the initial

tortfeasor and the medical provider defendants separately. See Barnes, 530 So. 2d at 9; see also Rodriguez, 623 So. 2d at 618.

Similarly, Respondent Allstate's reliance on developments in the law, such as the law surrounding D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001), and the comparative fault statute do not entitle it or Boozer to equitable subrogation without first paying the judgment in full. First, D'Amario is an automobile crashworthiness case. There, we held that apportionment of fault generally will not apply in such situations, as the manufacturer "may not be held liable for the injuries caused by the initial accident." 806 So. 2d at 426. The Legislature thereafter amended the comparative fault statute to require the jury, "in a products liability action," to "consider the fault of all persons who contributed to the accident when apportioning fault." Ch. 2011-215 § 1, Laws of Florida (codified at § 768.81(3)(b), Fla. Stat. (2011)).

Second, the comparative fault statute has nothing to do with the certified question before this Court. Respondents did not base their appeal to the Fifth District on an argument that this Court should recede from Stuart in light of the comparative fault statute or for reasons of fairness. Nor did the Fifth District, in its certified question to this Court, ask whether Stuart should be receded from in light of the comparative fault statute. However, Florida appellate courts that have had the opportunity to address the issue directly have concluded that the comparative

fault statute did not legislatively overrule Stuart. See, e.g., Caccavella, 814 So. 2d at 1149 (holding § 768.81, Fla. Stat. was not broad enough to overrule Stuart, because Stuart context does not involve joint and several liability). The Fourth District then certified this question in Caccavella, and again in Letzter v. Cephas, 792 So. 2d 481, 488 (Fla. 4th DCA 2001) (posing question but not passing upon it). We dismissed review of Cephasv. Letzter, 843 So. 2d 871 (Fla. 2003), and Caccavella was voluntarily dismissed, Caccavella v. Silverman, 860 So. 2d 976 (Fla. 2003).

Finally, while the Fifth District held that "the right to equitable subrogation arises when payment has been made or judgment has been entered," it did not state that Boozer could substitute Hintz, or that Boozer and Allstate alone could pursue the medical provider defendants. Theodotou, 171 So. 3d at 167. Instead, the Fifth District found that Respondents' subrogation claims could proceed on a contingent basis. Id. In so holding, the district court relied on the Fourth District's decision in Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, 769 So. 2d 484 (Fla. 4th DCA 2000). In Gortz, the district court allowed a defendant law firm that was sued for legal malpractice to bring a third party claim against another law firm alleging equitable subrogation without having paid the entire claim. Id. at 485. However, in Gortz, the party claiming subrogation was already a defendant in the case, and was bringing the claim as a third party claim under Florida Rule of Civil

Procedure 1.180, which allows a defendant to sue a third party "who may be liable" for all or part of the plaintiff's claim.

Gortz does not apply here, in part because no third party complaint is involved and because this Court ruled in Stuart that Rule 1.180 does not allow an initial tortfeasor to file a third party complaint against subsequent medical provider defendants for equitable subrogation. Stuart, 351 So. 2d at 706. That issue was not present in Gortz. Even though not applicable, the court took pains to point out that the trial court had discretion to sever the claims if the defendants "overly complicate the litigation," or if they "unfairly prejudice plaintiffs in the orderly presentation of their claims." Gortz, 769 So. 2d at 488 (quoting Attorneys' Title Ins. Fund Inc. v. Punta Gorda Isles, Inc., 547 So. 2d 1250, 1252-53 (Fla. 2d DCA 1989)). In the case before us, allowing the Respondents to bring contingent subrogation claims would, Petitioners argue, overly complicate the litigation and unfairly prejudice Hintz. We agree.

CONCLUSION

The Fifth District erred in holding that Respondents could assert claims for contingent equitable subrogation without first paying the judgment in full. As such, we answer the certified question in the negative, reverse the district court's decision, and remand the case to reinstate the dismissal of the equitable subrogation claims.

It is so ordered.

LABARGA, C.J., and PARIENTE, and LEWIS, JJ., concur.
PARIENTE, J., concurs with an opinion, in which LEWIS, J., concurs.
POLSTON, J., dissents with an opinion.
LAWSON, J., dissents with an opinion, in which CANADY, J., concurs.

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

PARIENTE, J., concurring.

I concur fully in the majority opinion. I write separately to address the argument advanced by Justice Lawson in his dissent concerning fairness and efficiency as a reason to allow "contingent equitable subrogation." Dissenting op. at 25 (Lawson, J.). In this case, a seriously injured plaintiff obtained a judgment against the initial tortfeasor, Emily Boozer, of over $11 million. However, to date, the only portion of the judgment that has been paid came from the initial tortfeasor's insurer, Allstate, which paid its policy limit of $1.1 million, leaving an unsatisfied judgment of over $10 million. The vast majority of the damages were economic, with the jury allocating $9 million to future care and treatment.

Justice Lawson mainly contends that the majority opinion is unfair to the initial tortfeasor. His arguments, however, all flow from an incorrect assumption—that the initial tortfeasor has been "legally 'placed "in the shoes" of the plaintiff.' " Dissenting op. at 38 (Lawson, J.) (quoting Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980)). That assumption is

belied by the critical fact upon which the majority's reasoning is based—the initial tortfeasor has yet to satisfy the judgment. Yet, Boozer and Allstate took the position before the trial court that they, and not the injured plaintiff, were entitled to be substituted as the sole plaintiffs in the injured plaintiff's medical malpractice action.

With a substantial unsatisfied judgment against the initial tortfeasor, the seriously injured plaintiff with millions of dollars in future medical care has not yet begun to be made whole. Boozer, the initial tortfeasor, has paid nothing and will likely never be able to fully satisfy the judgment against her. According to a deposition in this case, Boozer is a young mother of two, a student, and has no current income of her own. As Boozer stated in her initial brief before the Fifth District Court of Appeal she, "[l]ike most Floridians, . . . does not have the financial means to pay such an enormous judgment."

Boozer has not earned the right to stand in the plaintiff's shoes. The injured plaintiff still occupies his own shoes. As the injured plaintiff argues, "it is Mr. Hintz who is walking in those painful shoes, suffering the continuing effects—economic and emotional—of Ms. Boozer's negligence, and who has not been compensated." Initial Br. of Pet'r Douglas Stalley, at 38-39.

The plaintiff has never opposed intervention, just the assertion that the tortfeasors should be substituted for the plaintiff or allowed to litigate alongside of

the plaintiff. While the plaintiff objects to the initial tortfeasor and her insurer being permitted to litigate alongside him, the plaintiff in his brief concedes that Boozer and Allstate have an interest in the litigation:

> Nor does Mr. Hintz have any interest in depriving the Respondents of an opportunity to be heard. From the outset, Mr. Hintz has agreed that Respondents should be allowed to intervene. They should be entitled to notice of any settlement. If there is an actual recovery of money against the medical providers, Allstate may assert a lien or setoff, the details of which can be litigated post trial, taking into account how much of the damages were actually caused by the medical providers, how much Mr. Hintz is actually able to recover, the cost of procuring the recovery, and the extent to which the Respondents assisted or interfered with Mr. Hintz's recovery efforts, and any other equitable considerations that might apply. Once Mr. Hintz's damages have been paid in full, Ms. Boozer may also have a remedy under Fla. R. Civ. P. 1.540(b)(5), which provides for relief from a judgment if it has been satisfied, or if it "is no longer equitable that the judgment or decree should have prospective application."

Initial Br. of Pet'r Douglas Stalley, at 49.

On the other hand, allowing the initial tortfeasor to intervene in the medical malpractice case before the jury, without the plaintiff's agreement, carries the real potential of complicating the issues and confusing the jury in this new, separate case. There is no doubt that the jury would speculate as to why the initial tortfeasor is not also being sued, or whether there had been a previous lawsuit against the initial tortfeasor. Would the presence of the initial tortfeasor be explained to the jury? Would the initial tortfeasor be able to relitigate the issue of damages? While Justice Lawson makes the assumption that the initial tortfeasor

would assist the injured party in his lawsuit against the Medical Provider defendants, it remains unclear what the rights of the initial tortfeasor would be in the subsequent litigation—would she be entitled to her own set of experts; or could she ride on the plaintiff's coattails bearing none of the economic burden of the cost of the litigation; would she have a right to examine and cross-examine the witnesses; would the plaintiff be required to partner with her throughout the litigation such that the plaintiff would lose the ability to control the litigation? Justice Lawson's proposed solution of crafting a limiting instruction to alleviate this confusion is unsatisfactory in light of the myriad problems that could arise. See dissenting op. at 41 (Lawson, J.).

Apparently, Justice Lawson's primary concern is the possibility of a settlement with the Medical Provider defendants, such that the plaintiff would receive a windfall and the initial tortfeasor would not receive the benefit of a reduction in the outstanding judgment. But of course, any amount paid by the Medical Provider defendants, either through judgment or settlement, would result in a reduction in the overall amount owed by the initial tortfeasor. As the plaintiff points out, nothing will prevent the initial tortfeasor or Allstate from participating in and arguing for a proportionate reduction in the judgment against the initial tortfeasor, if there is a settlement with or judgment against the Medical Provider defendants. Further, because there is a guardianship over the plaintiff's property,

any settlement must be approved by the probate court at which point the initial tortfeasor and Allstate could intervene.

In addition, Justice Lawson fails to consider that the injured plaintiff has a real incentive to obtain the maximum amount against the Medical Provider defendants, which would inure to the benefit of the tortfeasor by reducing the total amount of the judgment against her. Conversely, as pointed out by Holmes Medical Center, one of the Medical Provider defendants, a holding allowing contingent equitable subrogation would be a disincentive to the initial tortfeasor and her insurer to first pay the entire judgment and discharge the debt if they could, instead, intervene in the medical malpractice case by filing a contingent equitable subrogation claim.[2]

When all of the equitable considerations are taken into account, the balance of the equities fall to the injured plaintiff. Arguing this case both before the Fifth District Court of Appeal and before this Court, Boozer and Allstate quoted case law stating that the purpose of equitable subrogation is to "do perfect justice." "What [Boozer and Allstate] seek here is not perfect and it is not justice." Initial Br. of Pet'r Douglas Stalley, at 46. I fully concur in the majority opinion.

LEWIS, J., concurs.

---

2. Both the severely injured plaintiff, Benjamin Edward Hintz, who appears through his guardian, Douglas Stalley, as well as the Medical Provider defendants, and the Florida Hospital Association as amicus, oppose the intervention of Emily Boozer and Allstate in the malpractice action.

POLSTON, J., dissenting.

As explained by the Fifth District,

> Here, the Boozers did not settle with Stalley, nor were they held liable, for only their portion of liability. Rather, they were held liable for all of Hintz's injuries resulting from the accident. Judgment was entered against them for over $11 million. That judgment is fully enforceable by Stalley and has various severe consequences for Boozer. If Boozer was not solely liable, then, in fairness, she ought to be able to seek subrogation from the subsequent tortfeasors. Allstate should also have the opportunity to seek equitable subrogation because it has potentially paid more than its fair share. Put simply, we agree with Appellants that the right to equitable subrogation arises when payment has been made or judgment has been entered, so long as the judgment represents the victim's entire damages.

Allstate Ins. Co. v. Theodotou, 171 So. 3d 163, 167 (Fla. 5th DCA 2015); see, e.g., Caccavella v. Silverman, 814 So. 2d 1145, 1147 (Fla. 4th DCA 2002) ("When an initial tortfeasor is held liable for the entirety of the plaintiff's damages, his remedy is an action for equitable subrogation against the subsequent tortfeasor."); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Se. Bank, N.A., 476 So. 2d 766, 767 (Fla. 3d DCA 1985) ("A right to subrogation does not arise until judgment is entered or payment has been made.").

I agree with the Fifth District's above explanation and would answer the certified question in the affirmative.

LAWSON, J., dissenting.

I dissent because the Court answers the wrong question and because the answer, which effectively leaves the initial tortfeasor without a remedy, is contrary to the basic tenets underlying common law tort theory. I would rephrase the question to match the facts of this case, to read as follows:

> WHEN AN INJURED PARTY SECURES A JUDGMENT AGAINST AN INITIAL TORTFEASOR AND THEN SUES A SUBSEQUENT TORTFEASOR TO RECOVER THE SAME DAMAGES, MAY THE INITIAL TORTFEASOR JOIN THE ACTION AND FILE A CONTINGENT EQUITABLE SUBROGATION CLAIM?

I would answer this rephrased question affirmatively. To explain why, I will first define two relevant terms; then, explore the "first principles" of Florida tort law and related policy decisions that lay the framework within which we must decide this case; and, finally, address how, only by disregarding these principles and the policy choices that they informed, does the majority deny the initial tortfeasor access to a contingent equitable subrogation claim.

I. RELEVANT TERMS

"Joinder" is "[t]he uniting of parties or claims in a single lawsuit." Black's Law Dictionary 965 (10th ed. 2014).

"Subrogation" is "[t]he substitution of one party for another whose debt the party pays . . . ." Id. at 1654. "Conventional subrogation" is "[s]ubrogation that arises by contract." Id. at 1655. "Equitable subrogation" is "[s]ubrogation that arises by operation of law or by implication in equity to prevent fraud or injustice."

Id. Similar to other equitable remedies, equitable subrogation is "founded on the proposition of doing justice without regard to form." Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980). The theory is that because the initial tortfeasor has become legally liable for damages that should rightly be owed by the subsequent tortfeasor to the plaintiff, the initial tortfeasor "is placed 'in the shoes' of the plaintiff" and can bring what would have been the plaintiff's cause of action against the subsequent tortfeasor. Id. (quoting 30 Fla. Jur. Subrogation § 11).

II. RELEVANT LAW

A. First Principles of Tort Law

The "first principles"[3] undergirding our modern tort system are clear: "Tort law represents the way in which we draw lines around acceptable and unacceptable non-criminal behavior in our society. Torts are designed to encourage socially beneficial conduct and deter wrongful conduct." Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1105 (Fla. 2008) (quoting Denver Publ'g Co. v. Bueno, 54 P.3d 893, 897-98 (Colo. 2002)). " '[T]he primary purpose of tort law is "that wronged

3. See generally David G. Owen, The Moral Foundations of Products Liability Law: Toward First Principles, 68 Notre Dame L. Rev. 427, 501 n.324 (1993) (quoting Aristotle for the point that "first principles" (i.e., the reasons for a legal theory) have "a vital influence upon all that follows from them . . . and [are] a means at arriving at a clear conception of many points which are under investigation") (citation omitted).

persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct." ' " Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1190 (Fla. 2003) (quoting Weinberg v. Dinger, 524 A.2d 366, 375 (N.J. 1987)). Most basically, when someone is harmed by the wrongful acts of others, we try to adjudicate the dispute as fairly as possible to all parties and as efficiently as possible for society. Id.

I will focus first on the goal of fairness to all parties. That basic goal breaks down into two principles that are often at odds. The first is that an injured party should be "made whole" or fully and fairly compensated for the harm caused by others. See 25 C.J.S. Damages § 118 (June 2017 Update) ("The level of compensatory damages is determined with reference to the plaintiff's loss, and damages should compensate for an individual's loss and no more. The law will not put the injured party in a better position than he or she would be in had the wrong not been done. Thus, an injured party is to be made as nearly whole as possible . . . .") (footnotes omitted). The second is that a tortfeasor should not be required to pay for harm that he or she did not cause. See Restatement (Third) of Torts: Apportionment of Liab. § 26 cmt. a (2000) ("No party should be liable for harm it did not cause . . . ."). These appear to be the most basic "first principles" of fairness to the parties in modern tort law. In section III of this opinion, I will refer

to these principles using the labels "fair recovery" and "fair apportionment," respectively.

There also seems to be a somewhat unrelated basic principle that an injured party should not be forced to bring a claim against a party that the injured party does not want to sue. I will refer to this as the "plaintiff's choice" principle. See Stuart v. Hertz Corp., 351 So. 2d 703, 706 (Fla. 1977) ("The choice of when and whether to sue his treating physician for medical malpractice is a personal one which rightfully belongs to the patient.").

Finally, there appears to be a general preference that related claims be adjudicated in one proceeding when possible. See 35A C.J.S. Federal Civil Procedure § 134 (June 2017 Update) (explaining that courts generally have a strong policy favoring the inclusion of "all persons materially interested, either legally or beneficially, in the subject matter of a suit . . . so that there can be a complete decree which will bind them all and so that the court can do complete justice") (footnote omitted); 5 Fla. Prac., Civil Practice §15:8 (2016-17 ed.) ("Florida courts have expressed a general preference for the resolution of multiple claims in a single trial."). Although this preference appears primarily rooted in society's concern for efficiency, it also strongly serves the interests of the parties by avoiding the risk of inconsistent verdicts and saving costs for them as well. Id. I will refer to this last principle in section III as the "joinder" principle.

B. The Swing Between Competing Principles & General Choice of Comparative Negligence

To fully understand the rephrased question, it is extremely helpful to have at least some basic understanding of how the law has shifted over time as our courts and legislatures—guided by the "first principles" discussed above—have attempted to be as fair as possible to all parties and to the public. I start with the rule of "contributory negligence" that "arose in England in the early nineteenth century, soon spread to the United States, and flowered throughout the common law world with the growth of the industrial revolution." David C. Sobelsohn, Comparing Fault, 60 Ind. L.J. 413, 413 (1985) (footnotes omitted). The "contributory-negligence doctrine" is a rule of law that "completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault." Black's Law Dictionary 403 (10th ed. 2014). This rule protected tortfeasors from liability for harm that they did not cause and reduced costs for the civil justice system. But, these goals, achieved through "all-or-nothing" recovery, Sobelsohn, supra, at 413, were met at a complete cost of the other "first principle" of making the injured party whole for damages caused by others.

Between 1945 and the mid-1970s, England and most jurisdictions in the United States replaced the contributory negligence doctrine with a doctrine of "comparative negligence" by which a plaintiff's recovery against a single tortfeasor would be reduced to the extent that his or her own actions caused the

injury for which he or she sought to recover from the defendant. Id. at 414-15 & n.16; see also Black's Law Dictionary 341-42 (10th ed. 2014) (defining the "comparative-negligence doctrine" as "[t]he principle that reduces a plaintiff's recovery proportionally to the plaintiff's degree of fault in causing the damage, rather than barring recovery completely" and noting that most states have statutorily adopted the doctrine). Florida abandoned contributory negligence for comparative negligence in 1973. See Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

Cases involving two or more tortfeasors are more complicated and have spawned various rules in various jurisdictions at various times to address the "first principles." Focusing on a desire to make the injured party whole, a doctrine of joint and several liability began to be widely applied in many contexts involving multiple tortfeasors. See generally, Gerald W. Boston, Apportionment of Harm in Tort Law: A Proposed Restatement, 21 U. Dayton L. Rev. 267 (1996). Under this doctrine, a tortfeasor is held fully liable for all damages caused by all tortfeasors. This doctrine promotes the principle of making an injured party whole but usually results in a tortfeasor compensating the plaintiff for harm that the tortfeasor did not cause. See Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1257 (Fla. 1996) (explaining that joint and several liability "allows a

claimant to recover all damages from one of multiple defendants even though that defendant may be the least responsible defendant in the cause").

While some jurisdictions applied joint and several liability, other jurisdictions applied comparative negligence principles to the multiple-tortfeasor problem. See Boston, supra, at 291. And, ultimately, almost all jurisdictions ended up selecting comparative negligence principles over joint and several liability as the fairest system overall, in most cases. See, e.g., 86 C.J.S. Torts § 96 (June 2017 Update) ("Where the tortfeasors have not acted in concert and have caused separate and distinct harms or injuries, each tortfeasor is only severally liable for the damage caused by its own tortious conduct."). Now, in most cases, "an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility." Restatement (Third) of Torts: Apportionment Liab. § 26 cmt. a. (2000). In Florida, these general principles were codified in statute when the Legislature adopted the "Uniform Contribution Among Tortfeasors Act" in 1975. See ch. 75-108, Laws of Fla. (creating § 768.31, Fla. Stat. (1975)).[4]

4. I fully understand that I am blurring important concepts here and that there is a vast difference between apportioning damages based upon cause (the common law approach) and apportioning damages based upon fault (the statutory approach in Florida and most states). But, that is a complicated subject that would take us far afield of the question posed in this case.

The law in Florida also appears to have developed to address the competing efficiency and plaintiff's choice concerns in a fair way. A plaintiff can join all tortfeasors in one action (assuming that the tortfeasor can be found and a Florida court has personal jurisdiction over the party). See Fla. R. Civ. P. 1.210. And, if a plaintiff has no desire to sue a tortfeasor, the other defendant tortfeasors can still have the absent tortfeasor included on the verdict form so that each defendant is held responsible only for the harm attributable to its conduct. See Fabre v. Marin, 623 So. 2d 1182, 1185-87 (Fla. 1993), receded from on other grounds by Wells v. Tallahassee Mem'l Reg'l Med. Ctr., 659 So. 2d 249 (Fla. 1995).

If these rules applied in this case, there would be no question to answer. The plaintiff could have chosen if and when to sue his medical providers, but Boozer (the initial tortfeasor) would not have been held responsible for damages caused by the medical providers (the subsequent tortfeasors).[5] However, these general rules do not apply because of a long-standing common law exception to the general common law rule that "each tortfeasor is only severally liable for the damage caused by its own tortious conduct," 86 C.J.S. Torts § 96 (June 2017 Update)—an

5. Although the Medical Provider defendants' negligence has not been established, "[b]ecause this case is before the Court on a motion to dismiss, the factual allegations stated in the [plaintiff's medical negligence] complaint[, as well as the facts alleged in the complaints filed by Boozer and her insurance company seeking equitable subrogation from the medial providers,] are accepted as true." S. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 320 (Fla. 2005).

exception that applies where, as here, the medical provider whose care is necessitated by the initial tortfeasor's negligence renders care negligently, further damaging the plaintiff.

C. Exception for Initial Tortfeasor & Subsequent Negligence by Medical Provider

Even as jurisdictions rejected joint and several liability in most multiple-tortfeasor situations, they almost uniformly kept the rule that when a tortfeasor causes "another's bodily injury" and "additional bodily harm result[s] from . . . efforts of third persons in rendering aid which the other's injury reasonably requires, [the initial tortfeasor is held fully liable for the additional bodily harm,] irrespective of whether such acts are done in a proper or a negligent manner." Restatement (Second) of Torts § 457 (Mar. 2017 Update). The Restatement (Second) of Torts explains the basis for this rule as it relates to medical treatment as follows:

> It would be stretching the idea of probability too far to regard it as within the foresight of a negligent actor that his negligence might result in harm so severe as to require such services and therefore that he should foresee that such services might be improperly rendered. However, there is a risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staffs which is inherent in the necessity of seeking their services. If the actor knows that his negligence may result in harm sufficiently severe to require such services, he should also recognize this as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk.

Id. at cmt. b.

As in almost all states, this was the long-standing rule in Florida. See J. Ray Arnold Lumber Corp. v. Richardson, 141 So. 133, 135 (Fla. 1932). And, the Legislature did not change this rule when it adopted section 768.81, Florida Statutes. See Assoc. for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So. 2d 520, 525 (Fla. 5th DCA 1999). As noted in several district court of appeal opinions,[6] this rule is contrary to Florida's general comparative negligence policy choice that favors not holding a person legally responsible for injuries that he or she did not legally cause.[7] However, I see no reason to question the Legislature's decision to stick with the near-universal rule in this context that favors fairness to

6. See, e.g., Caccavella v. Silverman, 814 So. 2d 1145, 1149 (Fla. 4th DCA 2002), review dismissed, 860 So. 2d 976 (2003); Letzter v. Cephas, 792 So. 2d 481, 488 (Fla. 4th DCA 2001).

7. Under basic tort "causation" principles, a person is not generally held liable for injury resulting from the independent negligent actions of a subsequent tortfeasor unless those actions are a reasonably foreseeable consequence of the initial tortfeasor's negligence. See Rawls v. Ziegler, 107 So. 2d 601, 605-06 (Fla. 1958) ("Where injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are regarded as the proximate cause and recovery can be had against either or both. But where . . . an independent force or act intervenes to bring about a result that the defendant's negligence would not otherwise have produced, it is generally held that the defendant is liable only where the intervening force or act was reasonably foreseeable.") (citation omitted).

the plaintiff over the initial tortfeasor whose wrongful actions forced the plaintiff to seek medical care.

D. The Initial Tortfeasor's Remedy

As a balance, however, the law also almost universally recognizes the need to provide a legal avenue for an initial tortfeasor, once liable for injuries attributable to subsequent medical negligence, to seek recourse from the medical provider(s) who legally caused the damages. See generally, M. Flaherty, Right of Tortfeasor Initially Causing Injury to Recover Indemnity or Contribution from Medical Attendant Aggravating Injury or Causing New Injury in Course of Treatment, 72 A.L.R. 4th 231 (1989). As indicated by the title of this article, most states rely upon an indemnity or contribution theory as the means through which the initial tortfeasor made liable for medical negligence can pursue a claim against the negligent medical provider(s).[8] Id. at § 2[b]. Florida is virtually alone in its reliance upon equitable subrogation as the applicable legal theory. Id.; see also Lloyds, 382 So. 2d at 704 (recognizing that "the doctrines of indemnity and contribution among subsequent tortfeasors are not cognizable under Florida law"

8. Some of these jurisdictions allow the initial tortfeasor to join the medical provider in the original suit, while others require an independent action brought after judgment is rendered against the initial tortfeasor. Flaherty, supra, at § 2[b]. In some jurisdictions requiring a separate action, the second trial is permitted to proceed shortly after rendition of the initial verdict—using "the same jury that heard the initial action" or by the court (without a jury). Id.

and opting to "align[] Florida with [two] jurisdictions relying upon subrogation as a remedy of affording an initial tortfeasor equitable apportionment of liability when a victim's injuries have been negligently aggravated by an attending doctor").

III. ANSWERING THE REPHRASED QUESTION

With the proper framework in place, resolution of the question raised by the facts of this case easily flows from a reference back to the first principles of tort law and a simple step-by-step review of Florida's policy choices that have placed us in a position of needing to address the question at all.

First, Florida chose fairness to the injured party when it rejected contributory negligence in favor of comparative negligence. See Hoffman, 280 So. 2d at 438. This is particularly significant here because common sense suggests that the most significant damages flow from the brain injury and also suggests a fair probability that the brain injury could have been avoided had Hintz chosen to wear a helmet.[9]

Second, Florida chose fairness to the injured party by choosing the fair recovery principle over the fair apportionment principle in this narrow category of multiple-tortfeasor cases and thereby allowed the plaintiff to recover a judgment

9. Because Florida generally apportions damages based upon fault rather than cause, the jury was not asked to link the initial head injury to the respective breaches of duty by the plaintiff and the initial tortfeasor. See generally § 768.81(2)-(3), Fla. Stat. (2015).

from the initial tortfeasor for damages attributable to the subsequent tortfeasor. See Stuart, 351 So. 2d at 706.

Third, Florida chose fairness to the plaintiff by choosing the plaintiff's choice principle over the joinder principle and barring the initial tortfeasor from joining the medical provider in the initial suit. See id.

Fourth, Florida chose fairness to the plaintiff by choosing the plaintiff's choice principle over the fair apportionment principle and barring the initial tortfeasor from bringing an action independent of the original plaintiff and against the subsequent tortfeasor, even after entry of the judgment against it for damages attributable to the subsequent tortfeasor, without first fully satisfying the judgment (which the initial tortfeasor in this case clearly cannot do). See Lloyds, 382 So. 2d at 703-704 (holding initial tortfeasor could state a claim for equitable subrogation against the allegedly negligent medical provider on facts where the initial tortfeasor had previously "settl[ed] with the victim for all injuries flowing from the accident and her treatment thereof").

But the facts of the case before us necessitate another policy choice. At this juncture, if the goal really is to be as fair as possible to all parties and as efficient as possible for society, it is time to consider fairness to the initial tortfeasor and society's interest in efficiency. Barring the initial tortfeasor's action now that the injured party has filed suit against his medical providers does nothing to satisfy any

first principle. Allowing the action honors both the joinder principle and the fair apportionment principle. The answer is clear. Now that the injured party has sued his medical providers, the initial tortfeasor who has been legally "placed 'in the shoes' of the plaintiff" must be allowed to join the plaintiff's action to protect its interests.[10] Id. at 704 (quoting 30 Fla. Jur. Subrogation § 11).

The majority's contrary result seems to be grounded in two concerns. First, the majority seems to imply that something in the nature of the equitable subrogation doctrine itself prevents this fair result. It does not. Despite the fact that subrogation is generally described as an equitable remedy for those who "pay" the debts of others, "[m]ost courts . . . appear to be permitting . . . contingent subrogation claims as a matter of right, in accordance with [federal and state procedural joinder rules]." Gregory R. Veal, Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited, 28 Torts & Ins. L.J. 69, 84 (1992). The same is true in Florida, at least in other contexts. See Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc., 547 So. 2d 1250, 1251

10. Justice Pariente correctly notes that Boozer and her insurer initially requested to substitute for the plaintiff. See concurring op. at 20 (Pariente, J.). However, the trial court denied that request, and Boozer does not challenge that decision. Boozer then filed an amended complaint seeking to join with plaintiff in claiming what is sought by the plaintiff's complaint (on the theory that since plaintiff made her legally liable for the same damages plaintiff now seeks from the medical providers, equity should allow her to join the action and protect her rights vis-à-vis the subsequent tortfeasors whose negligence caused the damages for which she is now liable).

(Fla. 2d DCA 1989) (holding that Florida law permits the filing of contingent subrogation claims because it is more convenient than requiring a second suit and because Florida Rule of Civil Procedure 1.180 (Florida's procedural joinder rule) permits it); see also Essex Builders Grp., Inc. v. Amerisure Ins. Co., 429 F. Supp. 2d 1274, 1289 (M.D. Fla. 2005) ("Florida decisions hold that contingent claims of equitable subrogation and contribution can be asserted prior to making payment."). More importantly, the very nature of this equitable doctrine is flexibility to promote fairness, as the Fifth District correctly recognized below. See Allstate Ins. Co. v. Theodotou, 171 So. 3d 163, 167-68 (Fla. 5th DCA 2015) (relying on equity's favor of "justice and fairness over formalistic legal rules" and Lloyds' policy goal of "ensur[ing] that liability is correctly apportioned and [the initial tortfeasor] is not held liable for more than her fair share" to authorize the contingent equitable subrogation claim against the Medical Provider defendants).

As explained by this Court more than eighty years ago,

> [t]he doctrine of subrogation . . . has long been an established branch of equity jurisprudence. It does not owe its origin to statute or custom, but it is a creature of courts of equity, having for its basis the doing of complete and perfect justice between the parties without regard to form. It is a doctrine, therefore, which will be applied or not according to the dictates of equity and good conscience, and considerations of public policy, and will be allowed in all cases where the equities of the case demand it.

Dantzler Lumber & Exp. Co. v. Columbia Cas. Co., 156 So. 116, 119 (Fla. 1934) (quoting 25 R.C.L. 1313) (emphasis added). We followed this declaration of the limits and contours of the doctrine with another declaration: "Our court is committed to a liberal application of the rule of equitable subrogation." Id. at 120. The majority's narrow, formalistic holding stands in odd juxtaposition with the nature of the remedy that it purports to apply—a "remedy" that on the actual facts of this case provides no remedy at all. "[E]quity and good conscience" demand a different result—a result that is consistent with the first principles of Florida's tort law and the policy choices they have informed, including this Court's commitment to liberal application of the rule of equitable subrogation. Lloyds, 382 So. 2d at 704.

The majority's second concern seems to be fairness to the plaintiff, although this concern does not seem to be grounded in any recognized general policy principle. Rather, the majority observes that permitting joinder of the initial tortfeasor would "overly complicate the litigation and unfairly prejudice Hintz." Majority op. at 18. I have three responses to this unexplained and unsupported claim.

First, joinder is universally favored in every jurisdiction in this nation, in most instances despite the fact that adding parties will always in some vague sense

complicate the litigation and thereby "prejudice" the party who would rather exclude the to-be-joined party.

Second, I do not see the complication here where Boozer "stands in the shoes" of Hintz and has the same interest in having the Medical Provider defendants held fully responsible for the damages caused by their negligence. If the matter goes to trial, it should be easy to devise an instruction that explains Boozer's presence in a way that prejudices no one. The only real complication for Hintz is that he will not be able to settle with the Medical Provider defendants without negotiating a release of some kind with Boozer (and her insurance company). But, is that unfair? It was Hintz himself who made Boozer a co-owner of his claim against the Medical Provider defendants by first securing a judgment against Boozer for damages attributable to them. If Hintz decides that he is willing to accept less than the full value of the damages claim against the Medical Provider defendants in full settlement of the claim, it seems intolerably unfair to suggest that Boozer should be left holding the bag and denied a seat at the table to assure that her liability for those same damages is fairly reduced as well.[11] In short, it is only Boozer who stands to suffer any real (legal) prejudice from the majority's rule.

---

11. It is for this reason that I disagree with Justice Pariente's argument that Boozer's interests will be fully protected as a non-party simply because "the injured plaintiff has a real incentive to obtain the maximum amount against the Medical Provider defendants," as Justice Pariente argues. See concurring op. at 23 (Pariente, J.). The vast majority of cases settle for less than the "maximum

Third, the fairness or policy decision that we make at this juncture should not be made in isolation, but with reference to the policy decisions that proceeded this one and landed us here. As with all policy decisions, it should also be made by reference to the basic principles underlying this area of the law. As explained above, to this point we have chosen first principles that favor the plaintiff with every decision. Of course, each prior choice involved a balancing of competing principles, and I do not take issue with any of the prior choices. I do, however, take issue with the majority's decision, as expounded by Justice Pariente's concurrence, that Boozer's inability to satisfy the judgment is the death knell of the contingent equitable subrogation claim. For all the "equitable considerations" the majority purports to weigh, see concurring op. at 23 (Pariente, J.), this inequitable holding underscores the majority's failure to account for first principles that demand a different outcome in this case. With the fair apportionment and joinder

---

amount" or full value of a claim. That is the nature of compromise and settlement. The allegation in this case is that medical negligence occurred and is the legal cause of plaintiff's permanent brain injury—which would account for most of the $10 million or so in unpaid damages for which Boozer is still responsible. If we (or the plaintiff) had chosen fair apportionment and joinder in the first place, a jury would have already made the determination as to who—between Boozer and the medical providers—is primarily responsible for most of plaintiff's damages. Because we did not—and made Boozer liable for all damages—Boozer should be allowed to fully participate in the proceeding where that determination will now be made. If she is not, plaintiff and the Medical Provider defendants could compromise and settle for less than full value, as most parties do, dismissing the suit and leaving Boozer still liable for millions of dollars in damages attributable to the negligence of the Medical Provider defendants.

principles on Boozer's side of the scale and no first principle on the other, there is only one way the scale can now tip, if it is calibrated evenly: allow the contingent equitable subrogation claim.

IV. CONCLUSION

I would answer the rephrased question in the affirmative and approve the result reached by the Fifth District Court of Appeal. Therefore, I respectfully dissent.

CANADY, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

Fifth District - Case Nos. 5D14-1291, 5D14-1352, and 5D14-1436

(Brevard County)

Sylvia H. Walbolt and Steven M. Blickensderfer of Carlton Fields Jorden Burt, P.A., Tampa, Florida; and Henry W. Jewett, II, and Karissa L. Owens of Rissman, Barrett, Hurt, Donahue & McLain, P.A., Orlando, Florida,

for Petitioner Holmes Regional Medical Center

Angela E. Rodante and Dale M. Swope of Swope Rodante, P.A., Tampa, Florida; Hendrik Uiterwyk and John C. Hamilton of Abrahamson & Uiterwyk, Tampa, Florida; and Barbara Green of Barbara Green, P.A., Coral Gables, Florida,

for Petitioner Douglas Stalley, as Guardian of the Property of Benjamin Edward Hintz

Thomas E. Dukes, III, and Wilbert R. Vancol of McEwan, Martinez, Dukes & Hall, P.A., Orlando, Florida,

for Petitioners David Packey, M.D., and Neurology Clinic, P.A.

Stephen B. Sambol of Mateer & Harbert, P.A., Orlando, Florida,

for Petitioners Basil Theodotou, M.D., and Basil Theodotou, M.D., P.A.

Daniel A. Martinez, Weslee L. Ferron, Inguna Varslavane-Callahan, and Jennifer C. Worden of Martinez Denbo, L.L.C., Saint Petersburg, Florida,

for Respondents Allstate Insurance Company and Allstate Indemnity Company

Jane Anderson and Kansas R. Gooden of Boyd & Jenerette, PA, Jacksonville, Florida,

for Respondent Emily Boozer

Andrew S. Bolin of Beytin, McLaughlin, McLaughlin, O'Hara, Bocchino & Bolin, Tampa, Florida,

for Amicus Curiae Florida Hospital Association

Roy D. Wasson of Wasson & Associates, Chartered, Miami, Florida,

for Amicus Curiae Florida Justice Association

Michael C. Clarke and Betsy E. Gallagher of Kubicki Draper, P.A., Tampa, Florida,

for Amici Curiae American Insurance Association and Florida Insurance Council

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARIE CARMEN KEBREAU,
Appellant,

v.

BAYVIEW LOAN SERVICING, LLC, in substitution for the original Plaintiff **CHRISTIANA TRUST,** a division of **WILMINGTON SAVINGS FUND SOCIETY, FSB,** as Trustee for **NORMANDY MORTGAGE TRUST, SERIES 2013-18,**
Appellee.

No. 4D16-2010

[July 12, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dale Ross, Judge; L.T. Case No. CACE15014137 (11).

Catherine A. Riggins, Miami, for appellant.

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

WARNER, J.

A homeowner appeals a final judgment of foreclosure, raising multiple issues. We address briefly the homeowner's argument that the foreclosure action was barred by the statute of limitations, as well as her contention that the mortgage was invalid because the deed to her was legally insufficient. We hold that the complaint was not barred by the statute of limitations where it alleged continuing defaults. As to the deed, the homeowner failed to properly raise her claim of its invalidity, and in any event, its defect was cured through the after-acquired title doctrine. We reverse, however, the attorney's fees award, as the appellee concedes that it did not present sufficient evidence to support the attorney's fees in the final judgment.

The homeowner argues that the final judgment of foreclosure should be reversed as barred by the statute of limitations because the complaint alleges that the homeowner defaulted in failing to make the payment due in July 2010, which occurred more than five years prior to the complaint

being filed. The appellee counters that the complaint also alleged that the homeowner had failed to make all subsequent payments. Thus, the complaint alleged defaults that fell within the five-year limitations period. The Second District Court of Appeal addressed nearly identical facts in both *Bollettieri Resort Villas Condominium Ass'n, Inc. v. Bank of New York Mellon*, 198 So. 3d 1140 (Fla. 2d DCA 2016), and *Desylvester v. Bank of New York Mellon*, No. 2D15-5053, 2017 WL 2562370 (Fla. 2d DCA June 14, 2017). It concluded that "the allegations of the complaint in the underlying action that the borrowers were in a continuing state of default at the time of the filing of the complaint was sufficient to satisfy the five-year statute of limitations." *Desylvester,* at *3. We agree with *Bollettieri* and *Desylvester. Accord Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 945 (Fla. 3d DCA 2016) (en banc); *Kaan v. Wells Fargo Bank, N.A.,* 981 F.Supp. 2d 1271, 1274 (S.D. Fla. 2013). *Contra Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015) (holding that a foreclosure complaint alleging a default in payment in 2006 and all subsequent payments was barred by statute of limitations because the date of default was more than five years prior to filing complaint).

The homeowner also contends that the mortgage was invalid because she failed to acquire legal title to the property due to a defect in the legal description in the deed to homeowner. The homeowner waived this defense, however, by not raising it in her answer. *See Heartwood 2, LLC v. Dori*, 208 So. 3d 817, 821 (Fla. 3d DCA 2017). Moreover, under the after-acquired title doctrine, any error in the original deed was corrected by a subsequent corrective deed. *See Layne v. Layne*, 74 So. 3d 161, 163 (Fla. 1st DCA 2011); *BCML Holding LLC v. Wilmington Tr., N.A.*, 201 So. 3d 109, 112 (Fla. 3d DCA 2015) ("The doctrine of after-acquired title applies to mortgages."); *Rose v. Lurton Co.*, 149 So. 557, 558 (1933).

The homeowner argues that there was insufficient evidence presented to support the award of attorney's fees in the final judgment of foreclosure. The appellee concedes this point, as there was no testimony from counsel as to time spent. We therefore reverse the award of attorney's fees.

As to all other issues raised, we affirm without further comment.

Affirmed in part; reversed in part.

GERBER, C.J., and FORST, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed July 12, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-104
Lower Tribunal No. 16-10167

Barry E. Mukamal,
Appellant,

vs.

Marcum LLP and Jeffrey Weiner,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Michael Hanzman, Judge.

Dorta Law and Gonzalo R. Dorta, for appellant.

Pathman Lewis, LLP and John A. Moore; Davidoff Hutcher & Citron, LLP and Larry Hutcher (New York, NY), for appellees.

Before LAGOA, SCALES and LUCK, JJ.

LUCK, J.

Barry E. Mukamal, a former partner at accounting firm Marcum LLP, sued his old firm and its managing partner for fraud. Mukamal appeals the trial court's

nonfinal order staying the case and compelling him to arbitrate his fraud claim as required by his partnership agreement (and the amendments to the partnership agreement). We have jurisdiction, Fla. R. App. P. 9.130(a)(3)(C)(iv),[1] and affirm.

Factual Background and Procedural History

Mukamal, from 1997 to 2009, was a partner at the now-defunct accounting firm of Rachlin LLP. Marcum LLP, in 2009, merged with the Rachlin accounting firm, and as part of the merger Mukamal became a partner at Marcum LLP. Marcum LLP had an existing partnership agreement with its partners from 2002. The Marcum LLP 2002 partnership agreement had this arbitration provision:

> Arbitration. Any and all controversies, disputes or claims arising out of or relating to any provision of this Agreement or the breach thereof shall, at the election of any party to the controversy, dispute or claim, be settled by final and binding arbitration in Nassau County by three arbitrators in accordance with the rules then in effect of the American Arbitration Association . . . .

When Mukamal joined the partnership in 2009, he signed three agreements with the Marcum LLP accounting firm. First, he agreed to be subject to, and bound by, all of the terms and conditions of the 2002 partnership agreement.

Second, Mukamal signed a special rider to the 2002 partnership agreement granting him certain rights in connection with the merger of the two accounting firms. The rider amended for Mukamal provisions in the 2002 partnership

[1] "Appeals to the district courts of appeal of non-final orders are limited to those that . . . determine . . . the entitlement of a party to arbitration . . . ."

agreement regarding the distribution of shares in the merged company, how the merged company would be governed, his compensation, benefits, and what would happen if he was terminated or withdrew from the merged company. The rider also contained the following arbitration provision:

> Governing Law; Arbitration. This Rider and the interpretation of its terms will be governed by the laws of the State of New York without application of conflicts of law principles. The parties to this Rider will make their best efforts to resolve amicably, by mutual consultation, any dispute arising out of or in connection with this Rider. If such dispute cannot be resolved by mutual agreement, then such dispute will be finally resolved by arbitration pursuant to the provisions of Section 19.5 of the [2002 partnership agreement].

On the same day, Mukamal signed a third agreement, called an addendum to the special rider. The purpose of the addendum was to "amend certain provisions" of the rider, including those provisions allowing Mukamal to retire and further refining the decision-making structure of the merged company. The addendum, like the 2002 partnership agreement and the rider, had a governing law provision (New York law would govern), but, unlike the two other agreements, the addendum did not have an arbitration clause.

In 2012, according to his amended complaint for fraud, Mukamal learned the following about the merged company and its principals. Prior to the merger, Mukamal's old firm, Rachlin LLP, had made undisclosed payments to its marketing director, in-house counsel, and the head of the Florida office, adding up to more than five million dollars. After these undisclosed pre-merger payments

had been discovered, the Marcum LLP principals paid out an unapproved severance package to Rachlin LLP's former managing partner, and made the former Rachlin LLP partners pay for it.

After the merger, Mukamal learned that Marcum LLP's principals changed the way bonuses were calculated and distributed to hurt the partners in Miami (and help those in New York). Marcum LLP also did not disclose a secret bonus structure that would have benefited Mukamal had he known about it.

In July 2012, Mukamal presented his pre- and post-merger findings to the Marcum LLP executive committee. The committee, however, took no action. As a result, in April 2013, Mukamal gave his one year notice that he was resigning from the merged company.

In 2016, Mukamal filed two lawsuits. In one, this case, Mukamal sued Marcum LLP and its managing partner for fraud. In the other, Mukamal filed a statement of claim for arbitration against Marcum LLP alleging that the merged company breached the 2002 partnership agreement, rider, and addendum.[2]

The Marcum LLP defendants moved to compel arbitration on the fraud claim, and stay the case, because Mukamal's fraud arose out of the partnership

[2] The parties have not argued the legal implications of Mukamal, on the one hand, invoking the arbitration clauses in the 2002 partnership agreement and rider to litigate breach of contract disputes he has with Marcum LLP arising out of the three agreements, and, on the other hand, arguing in this court that the language of the addendum is an intent to cancel or abandon the right to arbitrate his fraud claim against Marcum LLP. For that reason, we too will not address this irony.

agreement, and, thus fell under the broad arbitration provisions contained in the 2002 partnership agreement and rider. Mukamal responded that: (1) his tort claim did not arise out of his various agreements with Marcum LLP; and (2) the absence of an arbitration clause in the addendum, which represented the parties' last writing on the matter, clearly indicated an intent to forgo arbitration.

The trial court, in a well-reasoned order, granted the Marcum LLP defendants' motion to stay and compel arbitration. The trial court concluded, first, that "the claim [was] arbitrable because every allegation in [Mukamal's] [a]mended [c]omplaint advance[d] a claim arising out of and related to the parties professional relationship." Mukamal does not appeal this conclusion, and we do not address it in this appeal. As to Mukamal's argument that the absence of an arbitration clause in the addendum indicated the parties' intent to forego arbitration, the trial court concluded that the addendum "did not eliminate the parties' arbitration agreement by 'implication.' . . . The [a]ddendum – executed on the same day – does not evince an intent to abandon the arbitration clause, something the parties could easily have accomplished if they desired (or intended) to do so." Mukamal has appealed the trial court's conclusion on this issue.

Discussion[3]

[3] "We review an order granting or denying a motion to compel arbitration de novo." Roth v. Cohen, 941 So. 2d 496, 499 (Fla. 3d DCA 2006).

Mukamal contends on appeal that the parties' decision to omit the arbitration clause from the addendum created an ambiguity as to the parties' intent to arbitrate disputes arising out of the three agreements. Under New York law,[4] Mukamal continues, the trial court erred in failing to hold an evidentiary hearing on the parties' ambiguous intent to arbitrate, where parole evidence would have been admitted.[5]

We disagree, for two reasons. First, under New York law, "[a]greements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one." PETRA CRE 2007-1 CDO, Ltd. v. Morgans Grp. LLC, 923 N.Y.S.2d 487, 488 (N.Y. App. Div. 2011) (citation omitted). We, therefore, read the rider and addendum, which were executed on the same day and pertain to the terms of Mukamal's employment with the merged accounting firm, together as one agreement.

The addendum, in its acknowledgements section, describes the rider as setting forth Mukamal's agreement with respect to certain rights to be granted by Marcum LLP to Mukamal in connection with the proposed merger. In the next recital, the addendum says that "[t]he parties have agreed to enter into this letter agreement in order to amend certain provisions" of the rider.

---

[4] The interpretation of the three agreements is governed by New York law.
[5] Mukamal proffers, for example, that earlier drafts of the addendum included the arbitration clause.

The "certain provisions" amended by the addendum were identified in section three, entitled "Amendments to Rider." The amendments were made to provisions in the rider related to employment benefits, retirement, and corporate governance. The rider's arbitration clause was not one of the provisions being amended; it was left untouched by the addendum. Reading the rider and addendum together, then, the arbitration clause applies to disputes arising out of both contemporaneous agreements.

The rider's language supports this reading. The rider provides that it "and any other contemporaneous documents entered into by the parties contain the sole and entire agreement among the parties with respect to their subject matter." In addition, the rider states that "[n]o amendment or modification" of its terms "will be valid unless in writing and duly executed by the . . . parties." These provisions show that the rider and addendum, executed on the same day, are the sole agreement between Mukamal and Marcum LLP, and the only way to alter the agreement is in a writing signed by the parties. Neither the addendum, nor any other agreement in the record, changed or modified the arbitration provision in the rider.

Even if the agreements are not read together, under New York law, a subsequent agreement cannot abandon or cancel an existing contractual right to arbitrate "absent a clear manifestation of contrary intent." Primex Int'l Corp. v.

Wal-Mart Stores, Inc., 679 N.E.2d 624, 628 (N.Y. 1997). Silence, in other words, is not an expression of intent to undo the right to arbitrate.

In Primex, for example, a company agreed to be Wal-Mart's exclusive buying agent for South American manufactured consumer goods in three successive three-year contracts. Primex, 679 N.E.2d at 625. The first contract had a New York choice of law provision, a broad arbitration clause, the right to opt out after six months, and the following merger clause:

> This Agreement may not be amended, changed, modified, or altered except by a writing signed by both parties. All prior discussions, agreements, understandings or arrangements, whether oral or written, are merged herein and this document represents the entire understanding between the parties.

Id. The second contract had the same provisions. Id. The third contract had the same provisions except that Wal-Mart's general counsel removed the arbitration clause. Id. After a kickback scandal involving the buying agent, Wal-Mart terminated the contract and sued the buying agent for fraud and breach of contract. Id. at 625-26. The buying agent moved to compel Wal-Mart to arbitrate the claims arising out of the two earlier contracts. Id. at 626.

The trial court denied the motion because "the presence of a general merger clause expressed the parties' intent to operate solely under the [third] [a]greement and represented the entire understanding of the parties." Id. The intermediate appellate court agreed that "it was 'not imperative that the latest agreement

expressly revoke the prior agreements' arbitration provisions to effectively cancel those provisions.'" Id. (quoting appellate division's order).

The New York Court of Appeals reversed, explaining that:

> [A] broad arbitration clause in an agreement survives and remains enforceable for the resolution of disputes arising out of that agreement subsequent to the termination thereof and the discharge of obligations thereunder, irrespective of whether the termination and discharge resulted from the natural expiration of the term of the agreement, a unilateral termination under a notice of cancellation provision, or the breach of the agreement by one of the parties.

Id. (citations omitted). "[T]he merger clause," the court concluded, "was insufficient to establish any intent of the parties to revoke retroactively their contractual obligations to submit disputes arising thereunder to arbitration." Id. at 627. "[A]bsent a more specific indication of intent to abandon contractual rights to an arbitration forum," the court continued, "a general release terminating the substantive rights of the parties to the contract will not nullify their obligation to submit to an arbitrator all of the disputes relating to that contract and its termination." Id. at 628. There must be, the New York court said, "a clear manifestation of contrary intent." Id.

Likewise, in Gadelkareem v. Blackbook Capital LLC, 46 Misc. 3d 149 (N.Y. App. Term 2015), after a securities firm hired a broker, the broker "executed a Uniform Application for Securities Industry Registration or Transfer Form (Form U--4), which contained a broad arbitration clause requiring plaintiff 'to arbitrate

any dispute, claim or controversy that may arise' between the parties." Id. The New York intermediate appellate court rejected the broker's contention that "the New York choice of law and consent to jurisdiction provisions of the parties' [subsequent] employment contract" negated the earlier arbitration agreement because "significantly, [it] contained 'no express denial of the agreement to arbitrate.'" Id. (citations omitted).

In sum, standard merger and choice of law provisions in a subsequent contract are not the kinds of "clear manifestation" or "express denial" needed to abandon an earlier agreement to arbitrate. On the other hand, the examples the New York courts have given of sufficient "clear manifestation" or "express denial" language are telling. In Primex, the New York Court of Appeals quoted this language as a "specific indication of intent to abandon contractual rights to an arbitration forum": "the prior agreement is hereby canceled and declared of no further force or effect, and said agreement shall be interpreted as though it had never been executed." Primex, 679 N.E.2d at 628 (quotation omitted). And in Applied Energetics, Inc. v. NewOak Capital Markets, LLC, 645 F.3d 522 (2d Cir. 2011), although the parties agreed to arbitrate any disputes as part of a preliminary letter agreement, the subsequent placement agreement provided that "[a]ny dispute arising out of this Agreement shall be adjudicated in the Supreme Court, New York County or in the federal district court for the Southern District of New York."

Id. at 523.[6] The language in the placement agreement, the federal appellate court said, stood in "direct conflict" with the letter agreement, and "specifically preclude" arbitration. Id. at 525.

Here, Mukamal contends that the choice of law provision in the addendum ("This letter agreement and the interpretation of its terms shall be governed by the laws of the State of New York without application of conflicts of law principles.") expressed an intent not to arbitrate, but this is not enough of a clear manifestation or express denial to abandon the clear right to arbitrate in the earlier 2002 partnership agreement and rider. In other words, general language in a subsequent agreement, like what is in the addendum, is insufficient to negate the parties' earlier agreement to arbitrate. The addendum's choice of law provision does not dictate the forum the parties must litigate in; it only provides that New York law shall be applied in the parties' chosen forum. The forum for litigation is not addressed in the addendum and, therefore, nothing in it directly conflicts or specifically precludes the contractual right to arbitrate in the two earlier agreements. As in Primex and Gadelkareem, the contractual right to arbitrate in the 2002 partnership agreement and rider is unaffected by, and survives, the subsequent addendum to the rider for any disputes that arise out of the two earlier agreements.

[6] The federal Second Circuit Court of Appeals, as we do here, was applying New York law.

Conclusion

For these reasons, the trial court properly granted the Marcum LLP defendants' motion to compel arbitration and stay the case. We, therefore, affirm.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SEARS, ROEBUCK & CO.,
Appellant,

v.

FORBES/COHEN FLORIDA PROPERTIES, L.P., a Michigan Limited Partnership, and **CITY OF PALM BEACH GARDENS, FLORIDA,** a Florida Municipal Corporation,
Appellees.

No. 4D16-2314

[July 12, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Donald W. Hafele, Judge, and Edward A. Garrison, Acting Circuit Court Judge; L.T. Case No. 50-2014-CA-011945-XXXX-MB.

Gerald F. Richman and Leora B. Freire of Richman Greer, P.A., West Palm Beach, and Natalie J. Spears and Steven L. Merouse of Dentons US LLP, Chicago, Illinois, for appellant.

Bruce S. Rogow and Tara A. Campion of Bruce S. Rogow, P.A., Fort Lauderdale, and Robert M. Carson and Jeffrey B. Miller of Carson Fischer, P.L.C., Bloomfield Hills, Michigan, for appellee Forbes/Cohen Florida Properties, L.P.

R. Max Lohman and Abigail F. Jorandby of Lohman Law Group, P.A., Jupiter, Florida, for appellee City of Palm Beach Gardens.

LEVINE, J.

Sears, Roebuck has a lease with Forbes/Cohen for a store within the Gardens Mall. It attempted to sublease part of its store to Dick's Sporting Goods. However, the landlord disapproved of the sublease and collaborated with the City of Palm Beach Gardens, unbeknownst to Sears, to enact a resolution to now require both the landlord and the City to agree to any subdivision of space within the Gardens Mall.

The issues presented in this case are whether the City's resolution unconstitutionally impairs Sears's contract rights and whether that

resolution violates substantive due process because it has no criteria stating when approval to subdivide Sears's leased space may be granted or denied. As a related issue, we consider whether Sears is owed attorney's fees as a result of the City's alleged violation of substantive due process. Finally, we consider whether Sears has a contractual right to sublease.

We conclude the City's resolution is unconstitutional both because it impairs Sears's right to contract—and the contract rights emanating from the lease between Sears and Forbes/Cohen—and deprives Sears of its substantive due process rights. Consequently, we find Sears is a prevailing party under 42 U.S.C. sections 1983 and 1988 and is owed attorney's fees. We further conclude that Sears has the contractual right to sublease without authorization from Forbes. The remaining issues are without merit and we affirm without comment.

FACTS

In 1984, Forbes/Cohen Florida Properties, L.P. ("Forbes") entered into a Land Lease to develop property within Palm Beach Gardens and construct a mall. Forbes then petitioned the City of Palm Beach Gardens (the "City") to approve construction for the mall. The City approved Forbes's petition and enacted the Palm Beach Gardens Planning Unit Development ("P.U.D.") through resolution.

The P.U.D. specifically requires that all anchor stores at the mall undergo architectural review "to achieve architectural design harmony and to maintain integrity throughout the project." Issuance of a building permit requires city council approval of any preliminary designs to ensure the proposed modifications do not "disrupt the architectural design, harmony and integrity" of the mall. Further, the P.U.D. restricts signage by limiting anchor tenants to "[o]ne wall sign for each anchor department store facade representing typical identification by sign logo, style, and illumination indigenous to that anchor department store . . . ."

In 1987, Forbes entered into a sublease with Sears, Roebuck & Co. ("Sears"). The thirty-year sublease gives Sears the option to extend its lease for four separate periods of ten years each so long as Sears was not in material default and was operating as a retail store. Additionally, the sublease gives Sears the "right" to sublease, stating:

> *[Sears] shall have the right to assign this Lease and to sublet from time to time the Demised Premises or any part thereof*; subject however, to the terms and provisions of the [Reciprocal

> Easement Agreement]. No such assignment or subletting shall relieve Tenant of its obligations under this Lease . . . .

(emphasis added). Lastly, the sublease requires Sears to "comply with all laws and ordinances and the orders, rules, and regulations and requirements of all Federal, State, County and municipal governments . . . which may be applicable from time to time to the Demised Premises." However, the sublease also allows Sears the "*right to contest the applicability* of any laws, ordinances, orders, rules, regulations or governmental requests . . . ." (emphasis added).

Concurrent with the sublease, Sears entered into a Reciprocal Easement Agreement (the "R.E.A."). The R.E.A. mandates that Sears initially operate as a department store, but after twenty years, Sears could use its space for "retail and service purposes and for no other purposes." As to subleasing, the R.E.A. indicates that "Majors," that being anchor tenants like Sears, could "lease all or any portion(s) of its building and/or license departments therein" so long as the sublease otherwise complied with the R.E.A. The R.E.A also sets forth criteria for signage. The R.E.A. requires signs to comply with aesthetic and safety standards, for example prohibiting blinking lights and rooftop signs and requiring compliance with electrical codes. The R.E.A. also prohibits tenants from creating dangerous hazards within the mall. Finally, the R.E.A. provides that it exists for the "exclusive benefit of the Parties and the Fee Owner" and nothing in the R.E.A. should "be construed to create any rights in or for the benefit of any space lessee of any part of the Shopping Center Parcel."

In 2011, Sears began seeking a subtenant to sublease part of its two-story store and entered into negotiations with Dick's Sporting Goods. Sears informed Sidney Forbes, a partner of Forbes, of its plans.

Without informing Sears, Sidney met with the City, told the City of Sears's plans, and personally requested that the City enact a resolution. Forbes submitted a development application along with a $1,650 fee and then collaborated with the City in crafting the proposed resolution. The City passed Resolution 20-2012 (the "Resolution") as part of its consent agenda without taking any testimony.

The Resolution states that its purpose was to clarify the P.U.D. The Resolution requires the following:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts

> and/or newly separate licensing of any kind whatsoever for the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

Sears, not knowing of the Resolution, informed Forbes of its plans to sublease to Dick's. Forbes claimed Dick's was inappropriate for the mall. Subsequently, Forbes sent Sears a letter stating that Sears's "contemplated actions . . . are beyond [Sears's] authority under the Sublease." The letter further stated that Forbes did "not consent to the marketing by Sears of any portion of its space within the Gardens and will not consent to any proposals that is not fully in compliance with all applicable restrictions and fully satisfies all of [Sears's] obligations." Then, at a subsequent meeting, Sidney told Sears that it was not within its rights to sublease to Dick's. Sidney believed Sears could not sublease to Dick's because Dick's was not a department store, Dick's did not have signage rights, and Dick's did not "belong" at the mall.

Sears filed a complaint seeking declaratory relief. As to Forbes, Sears sought a declaratory judgment stating that it had the right to sublease to Dick's. As to the City, Sears sought a declaratory judgment stating that the Resolution was an unconstitutional impairment of contract under the Florida and United States Constitutions and that the Resolution violated Sears's substantive due process rights. Lastly, Sears sought attorney's fees under 42 U.S.C. sections 1983 and 1988.[1]

During the pendency of litigation, Sears entered into a sublease with Dick's for one floor of Sears's two-floor lease. As per the sublease, Dick's was to operate as a sporting goods store. Furthermore, the sublease was contingent on Sears getting necessary government approvals, including approvals for signage as well as obtaining a favorable declaratory judgment.

Following the trial court's denial of the City's and Forbes's motions to dismiss and Sears's motion for summary judgment, the case went to trial. At trial, testimony established that Dick's was a "first-class" retailer. Further, Forbes conceded that Sears had the right to sublease so long as

---

[1] Sears also contended the Resolution was in fact an ordinance and was therefore void as the passing of the Resolution did not comply with statutory requirements for enacting ordinances. We find this argument to be without merit and affirm without comment.

it complied with the sublease and the R.E.A. Nevertheless, Forbes asserted the following reasons against the sublease: the proposed Dick's sublease was not compliant with the sublease and the R.E.A. because Dick's could not put up a sign, Sears could not exercise its option to extend its lease while subleasing to Dick's, Sears had not gotten the requisite architectural approvals for modification of the leased premises, and Dick's potential gun sales violated the R.E.A.'s prohibition on creating dangerous hazards.

Sears conceded that, under the sublease, the current signage plans were not compliant with municipal zoning standards. Sears noted that it would need to get city approvals and waivers, but that other anchor tenants at the mall had multiple signs and that it was a regular industry practice to work with municipalities in getting necessary approvals and waivers. Further, Sears conceded that it had not yet attained the necessary architectural approvals for the mall, but would do so upon favorable disposition of the declaratory judgment action. Finally, Sears had not exercised its option to renew its lease, which was set to expire in 2018.

The City's contention at trial was that the Resolution did not create new rights or obligations, but instead was administrative and merely interpreted, and reiterated, pre-existing requirements under the P.U.D. Further, the Resolution did not require approval for "subleasing," but required approval for "subdividing" anchor tenant space. Thus, the resolution did not impair Sears's contract rights nor did it violate substantive due process.

Sears argued that the prohibition on subdividing space without approval was tantamount to a prohibition on subleasing without approval. Further, the Resolution gave both the City and Forbes unfettered authority to decide whether to permit an anchor tenant, such as Sears, to sublease. This authority, as outlined in the Resolution, did not exist in the sublease, P.U.D., or R.E.A.

Following the conclusion of trial, the trial court did not make any findings of fact or conclusions of law nor did it declare the parties' rights with respect to the sublease, R.E.A. or P.U.D. Instead, the court found as follows:

> As to Count 1, the Court finds for the Defendant, [Forbes], who shall go hence without a day.

> As to Counts 3, 4, 5, and 6, the Court finds for the Defendant, [the City], who shall go hence without a day.

Sears appealed.

ANALYSIS

I. DECLARATORY JUDGMENT

As a preliminary issue, Sears argues that, although the trial court's order was deficient as it failed to determine the rights of the parties or make any factual findings, we may nevertheless consider the merits of this appeal without remanding to the trial court. We agree.

Florida's Declaratory Judgment Act provides as follows:

> The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment.

§ 86.011, Fla. Stat.

Under this Act, where a trial court denies a motion to dismiss, the trial court must "fully determine the rights of the respective parties, as reflected by the pleadings." *Local 532 of the Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO v. City of Fort Lauderdale*, 273 So. 2d 441, 445 (Fla. 4th DCA 1973). Thus, conclusory final judgments on declaratory judgment claims, which are devoid of factual findings or conclusions of law, are inadequate. *See id.*; *Hyman v. Ocean Optique Distribs., Inc.*, 734 So. 2d 546, 548 (Fla. 3d DCA 1999).

The final judgment in the present case simply found for Forbes and the City, stating they "shall go hence without a day." Consequently, the trial court failed to "fully determine the rights of the respective parties." *See Local 532*, 273 So. 2d at 445; *see also State Farm Mut. Auto. Ins. Co. v. Hinestrosa*, 614 So. 2d 633, 635 (Fla. 4th DCA 1993) (stating that the words "plaintiff take nothing and defendant go hence without day" are "words usually found in cases seeking only a money judgment rather than a declaratory judgment").

Review of a declaratory judgment generally requires adequate findings of fact and conclusions of law. *Trump Endeavor 12, LLC v. Fla. Pritikin Ctr., LLC*, 208 So. 3d 311, 312 (Fla. 3d DCA 2016). Thus, normally, we would remand for the trial court to make additional findings. *See Exotic Motorcars & Jewelry, Inc. v. Essex Ins. Co.*, 111 So. 3d 208, 209 (Fla. 4th DCA 2013). However, in the present case, the issues to be reviewed are purely legal in nature and the underlying facts are not in dispute. Therefore, we conclude remand is unnecessary, and find that we may consider the merits of Sears's appeal.

II. IMPAIRMENT OF CONTRACT

Sears argues that the Resolution passed by the City, at the prompting of Forbes, unconstitutionally impaired its contract rights. We agree with Sears and find that the City's Resolution unconstitutionally impaired Sears's right to contract.

We review the constitutionality of statutes and municipal enactments with the de novo standard. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 629 (Fla. 3d DCA 2010).

Both the state and federal constitutions prohibit the impairment of contract. *See* Art. I, § 10, cl. 1, U.S. Const.; Art. I, §10, Fla. Const. It is a hallmark of the law in Florida that contracts are protected from unconstitutional impairment, and the Florida Supreme Court has unequivocally stated that "[t]he right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution." *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993); *see also In re Advisory Opinion to the Governor*, 509 So. 2d 292, 314 (Fla. 1987) ("It is . . . indisputable . . . that rights existing under a valid contract enjoy protection under the Florida Constitution.").

The Florida Constitution offers greater protection for the rights derived from the Contract Clause than the United States Constitution. *See Sarasota Cty. v. Andrews*, 573 So. 2d 113, 115 (Fla. 2d DCA 1991) (citing *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979)); James W. Ely, Jr., The Contract Clause: A Constitutional History 253 (2016) ("[T]he Florida Supreme Court has signaled its willingness to protect contracts more fully than the federal courts."). Thus, the Florida Supreme Court has recognized that it is "not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal constitution." *Pomponio*, 378 So. 2d at 779.

"To impair a preexisting contract, a law must 'have the effect of rewriting antecedent contracts' in a manner that 'chang[es] the substantive rights of the parties to existing contracts.'" *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (citation omitted). "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984). Rather, impairment is defined as "to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken." *Pomponio,* 378 So. 2d at 781 n.41 (citation omitted); *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n*, 169 So. 3d 145, 150 (Fla. 4th DCA 2015).

"Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution." *In re Advisory Opinion*, 509 So. 2d at 314. For example, "[a] statute which retroactively turns otherwise profitable contracts into losing propositions is clearly such a prohibited enactment." *Id.* at 314-15. Indeed, it is a "well-accepted principle that virtually no degree of contract impairment is tolerable." *Pudlit*, 169 So. 3d at 150 (quoting *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.*, 30 So. 3d 579, 584 (Fla. 2d DCA 2010)); *see also Citrus Mem'l Health Found., Inc. v. Citrus Cty. Hosp. Bd.*, 108 So. 3d 675, 677 (Fla. 1st DCA 2013) ("[A]ny legislation that detracts from the value of a contract is subject to the constitutional proscription . . . .").

The conclusion, however, that "'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable," though not as much impairment as would be "acceptable under traditional federal contract clause analysis." *Pomponio*, 378 So. 2d at 780. "[S]ome impairment" may be "tolerable" where the governmental actor can demonstrate a "significant and legitimate public purpose behind the regulation." *Searcy*, 209 So. 3d at 1192 (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)).

In *Griffin v. Sharpe*, 65 So. 2d 751 (Fla. 1953), a piece of real property had a restriction whereby only residences and apartments could be built upon it. A few years before the restriction was set to expire, the legislature enacted a statute to extend the restriction. A purchaser subsequently purchased the property and sought to build a medical office on it. The Florida Supreme Court held that the legislative enactment violated the Contract Clause. The court described this legislative restriction as "legislative fiat," stating:

> The contested restriction is without doubt a private contract

> between private individuals, and its attempted extension by the Legislature can in no wise [sic] be related to the reasonable exercise of the police power of the state and is a futile effort to by-pass constitutional prohibitions and re-write the agreement through governmental authority.

Id. at 752.

The Resolution passed by the City, at the behest of Forbes, states the following:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts and/or newly separate licensing of any kind whatsoever for the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

It is clear that the Resolution diminished Sears's interest in the contract, namely Sears's right to sublease. Although the Resolution does not mention subleasing specifically, total destruction of Sears's interest in the contract is not required to claim an impairment of contract. *U.S. Fid. & Guar.*, 453 So. 2d at 1360. The Resolution has "made worse" Sears's rights emanating from the contract. *See Pudlit*, 169 So. 3d at 150. Sears, although it can still enter into a subleasing agreement, as it has with Dick's, must now get approvals from both Forbes and the City before it can subdivide the property to act on that agreement. Thus, the Resolution has depreciated and diminished the value of Sears's contract.

Having concluded the Resolution is an impairment of contract, we must consider "whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Searcy*, 209 So. 3d at 1192 (quoting *Pomponio*, 378 So. 2d at 780).

The City's public purpose justification for the Resolution is that it helps to strengthen and maintain the mall's aesthetic qualities. This justification is neither "significant" nor "legitimate," particularly where the P.U.D. *already* sets forth aesthetic standards for the mall and *already* requires architectural approvals. The City has failed to show how the

Resolution accomplishes anything to further its supposed purpose beyond what the P.U.D. already accomplishes. Additionally, the contract has been substantially impaired as it gives both the City and Forbes the unbridled discretion to disapprove of any attempts to divide property to effectuate a sublease. Thus, the impairment "unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Id.* It is clear that the Resolution is an effort to "re-write the agreement through governmental authority," and that governmental authority's intervention resulted in the diminishment of Sears's interest in a pre-existing contract. *Griffin*, 65 So. 2d at 752.

Finally, the City contends that Sears has contractually waived its impairment of contract claim. The sublease states that Sears "shall . . . promptly comply with all laws and ordinances and the orders, rules, and regulations and requirements of all Federal, State, County and municipal governments . . . which may be applicable from time to time to the Demised Premises . . . ." The City argues that the parties anticipated amendments and changes to laws and rules and that Sears agreed to follow those laws and rules, as amended. We note, however, that in the very same paragraph of the contract, Sears reserved "*the right to contest the applicability* of any laws, ordinances, orders, rules, regulations or governmental requests . . . ." (emphasis added).

We must read the entire agreement as a whole, and "[t]he language being construed should be read in common with other provisions of the contract." *Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993); *Am. K-9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238-39 (Fla. 5th DCA 2012). The two provisions, read together, indicate that Sears must follow all laws and ordinances, but that it has the right to challenge those laws and ordinances where they are illegal, or, as here, unconstitutional. Accordingly, Sears did not contractually waive this issue and is free to challenge the Resolution.

We therefore conclude that the Resolution is unconstitutional as it impairs Sears's contract and is not "reasonable and necessary to serve an important public purpose." *Searcy*, 209 So. 3d at 1192.

III. SUBSTANTIVE DUE PROCESS

Sears next contends that the Resolution, in addition to being an unconstitutional impairment of contract, also deprives it of substantive due process because it requires Forbes and the City to approve subdivisions of anchor tenant space without also setting forth any standards or criteria upon which the City and Forbes are to base such a

decision.

An individual's substantive due process rights protect against the "mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *WCI Cmtys., Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004). For a government policy to be unconstitutional, "it [is not] necessary that the record reveal that the governing body or its members have in fact acted capriciously or arbitrarily. It is the opportunity, not the fact itself, which will render an ordinance vulnerable." *ABC Liquors, Inc. v. City of Ocala*, 366 So. 2d 146, 150 (Fla. 1st DCA 1979). Thus, the Florida Supreme Court has instructed that

> [a]n ordinance whereby the city council delegates to itself the arbitrary and unfettered authority to decide where and how a particul[a]r structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment.

N. Bay Vill. v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956).

In *Drexel v. City of Miami Beach*, 64 So. 2d 317 (Fla. 1953), the plaintiff was denied a permit to build a parking garage. The applicable city ordinance stated that no parking garages should be built except "upon 'approval and permit by the City Council . . . after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use . . . .'" *Id.* at 318 (alteration in original). The court stated the ordinance was unconstitutional, reasoning:

> In the present ordinance there is found no guide whatever to aid the councilmen in deciding what permits should, and what permits should not, be granted. Reading the ordinance in a light most favorable to the city's position, each councilman was accorded the privilege of deciding in his own mind whether he had duly considered the traffic problem and when a majority of councilmanic minds concluded that such consideration had been duly given and that the proposed building would complicate traffic conditions, the composite thought would ripen into a power that would take away property. This, in our opinion, would be doing so in violation of the guaranties of the State and United States Constitutions.

Id. at 319.

Similarly, in *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972), the city enacted an ordinance in order to regulate rents. However, the ordinance failed to set "objective guidelines and standards for its enforcement . . . nor [could] such be reasonably inferred from the language of the Ordinance." *Id.* at 805. Further, the ordinance vested with a single individual, the City Rent Administrator, the "unbridled discretion to determine which accommodations are to be controlled and a number of other things." *Id.* at 806. The court concluded that the ordinance was unconstitutional because it failed to lay out any guidelines for its enforcement. *Id.* at 805-06; *see also Friends of the Great S., Inc. v. City of Hollywood ex rel. City Comm'n*, 964 So. 2d 827, 830 (Fla. 4th DCA 2007) ("In order for ordinances which provide decisional authority to be constitutional, they must have mandatory objective criteria to be followed when making a decision."); *ABC Liquors*, 366 So. 2d at 149 ("Any standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality.").

The City contends substantive due process protections do not apply to non-legislative zoning decisions such as the Resolution. It is true that substantive due process challenges are permitted for the alleged deprivation of *constitutional* rights, and not the alleged deprivation of rights arising under state law, such as zoning decisions. *See McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994); *Kantner v. Martin Cty.*, 929 F. Supp. 1482, 1486 (S.D. Fla. 1996). Thus, decisions based on the application of zoning regulations will not be susceptible to substantive due process challenges. *See Kantner*, 929 F. Supp. at 1486-87. However, a land use regulation *itself* may be challenged under substantive due process. *See Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213-15 (11th Cir. 1995) (addressing the merits of whether a zoning regulation prohibiting automobile sales violated the plaintiff's substantive due process rights); *Kantner*, 929 F. Supp. at 1487. In the present case, it is the Resolution itself, not the application of the Resolution, that is being challenged. Thus, the Resolution may be subject to a substantive due process challenge.

In the present case, the Resolution states:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts and/or newly separate licensing of any kind whatsoever for

> the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

The Resolution requires a tenant to "obtain approval" from both the City Council and "mall ownership," that being Forbes, to subdivide its anchor tenant space, but it fails to identify any standards or criteria that would govern when approval is to be granted or withheld. The Resolution, in other words, grants the City and Forbes with "unbridled discretion" in this matter. *See Fleetwood Hotel*, 261 So. 2d at 806. Therefore, we conclude that the Resolution violates substantive due process and "cannot be permitted to stand as a valid municipal enactment" because it permits the City and Forbes to arbitrarily and capriciously deprive Sears of its property rights as a Tenant pursuant to the contract negotiated and executed by the parties. *See N. Bay Vill.*, 88 So. 2d at 526.[2]

The City argues that it had a rational basis for enacting the Resolution, claiming the Resolution preserves the "form, function, and composition of the Gardens PUD" and promotes "the health, safety, and welfare of the public at large." Although the interests described may be a legitimate governmental interest, *see City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 366-67 (Fla. 1941), the Resolution's total lack of guidance would allow for arbitrary and capricious enforcement "having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *See WCI Cmtys.*, 885 So. 2d at 914; *cf. Estate of McCall v. United States*, 134 So. 3d 894, 901-03 (Fla. 2014) (stating a medical malpractice statute was irrational when it treated multiple claimants differently from a single claimant because there was no reason to treat the two categories differently).

We next address Sears's argument that it is entitled to an attorney's fee award against the City under 42 U.S.C. sections 1983 and 1988. Under section 1983,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

---

[2] We note that our opinion is limited to the Resolution itself. We express no comment as to the architectural review requirements found within the P.U.D. nor do we comment on any other municipal ordinance or code.

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1988 provides for attorney's fees, stating, "In any action or proceeding to enforce a provision of section[] . . . 1983, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

As a preliminary issue, municipalities are liable under section 1983 but only if a plaintiff shows: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). As discussed above, Sears's substantive due process rights were violated, thus satisfying the first prong. Furthermore, Sears has satisfied the second and third prongs because the City formally and expressly created and adopted the unconstitutional Resolution. *See Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) ("Policy, in the narrow sense of discrete, consciously adopted courses of governmental action may be fairly attributed to a municipality . . . because (1) it is directly 'made by its lawmakers,' i.e., its governing body . . . ." (quoting *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978))).

Section 1988 requires courts to conduct a two-part inquiry. First, "whether the plaintiff is a prevailing party," and second, "if the plaintiff is a prevailing party, what constitutes a reasonable fee award." *Boston's Children First v. City of Boston*, 395 F.3d 10, 14 (1st Cir. 2005). As to the first inquiry, "[a] plaintiff 'prevails' . . . 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Having a declaratory judgment entered in a party's favor will generally satisfy the "prevailing party" test. *See id.* A prevailing party is "ordinarily" entitled to recover attorney's fees "unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citation omitted).

As a consequence of the present appeal, Sears is a prevailing party under section 1988 as it has obtained the declaratory relief it sought.

Citing *Farrar*, the City argues that, even assuming Sears prevailed in

its appeal, any victory on Sears's part would be a merely nominal victory for which Sears would not be entitled attorney's fees. In *Farrar*, the plaintiff sought substantial monetary damages but received only a nominal award. The Court held that the plaintiff was not entitled to attorney's fees. Although the plaintiff was technically a "prevailing party," the plaintiff had failed to prove damages, "an essential element of his claim for monetary relief." *Id.* at 114-15. Thus, the Court stated that in such situations, "the only reasonable fee is usually no fee at all." *Id.*

The City contends that because Sears has not sought damages as part of its substantive due process claim, Sears should not be entitled to attorney's fees. We conclude, however, that *Farrar* is distinguishable. In *Farrar*, the plaintiff did not prevail in his attempt to secure substantial damages whereas in the present case Sears has received precisely what it requested: declaratory relief. The United States Supreme Court has "repeatedly held . . . an injunction or declaratory judgment" will satisfy the prevailing party test. *Lefemine*, 568 U.S. at 4; *see also Sanchez v. City of Austin*, 774 F.3d 873, 882-83 (5th Cir. 2014) (explaining that *Farrar* does not control where a party sues for, and obtains, declaratory or injunctive relief even if the party receives only nominal damages). Here, because Sears has "materially alter[ed] the legal relationship between the parties," we conclude Sears is entitled to attorney's fees.

On remand, the trial court should, in calculating Sears's fees, consider both the hours expended and the reasonableness of the hourly rate and "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 433-37; *see also Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997) ("A court will generally determine what fee is reasonable by first calculating the lodestar—the total number of hours reasonably expended multiplied by a reasonable hourly rate—and then adjust the lodestar upward or downward to account for the particularities of the suit and its outcome.").

IV. SUBLEASING RIGHTS

Sears also argues it has the contractual right to sublease and may do so without Forbes's approval. Thus, Sears asserts the trial court erred when it failed to award declaratory relief in its favor.

In interpreting the Sears-Forbes sublease, we must "give effect to the plain and ordinary meaning of its terms." *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004). "Words should be given their natural meaning or the meaning most commonly understood in relation to the subject matter and circumstances, and reasonable

construction is preferred to one that is unreasonable." *Id.* (citation omitted).

The Sears-Forbes sublease states, "[Sears] shall have the *right to assign this Lease and to sublet* from time to time the Demised Premises or any part thereof; subject however, to the terms and provisions of the R.E.A." (emphasis added). Although the sublease indicates certain restrictions apply should Sears seek to sublease "all or substantially all of the Demised Premises," these restrictions do not apply because Sears seeks to sublease less than "all or substantially all" of the premises, that being only one floor of its two story mall location. Similarly, the R.E.A. states that Sears may "lease all of any portion(s) of its building and/or license departments therein . . . ." While the R.E.A. states Sears's space must be used for "retail and service purposes and for no other purposes," this restriction is also not prohibitive as Dick's is a retailer. Therefore, we conclude Sears may sublease to Dick's without obtaining approval from Forbes.

Forbes contends that, even if Sears does have subleasing rights, Dick's would have no right to install a sign as it is not permitted under the R.E.A because Dick's is not a party to the R.E.A.

The R.E.A does not expressly prohibit sublessees, such as Dick's, from installing signs. Rather the R.E.A. puts in place criteria by which signs are to be installed and maintained. This signage criteria does not expressly prohibit a sublessee from installing a sign nor does it prohibit Sears from granting a sublessee the right to install a sign.

Generally, a sublessee can have no more rights to the subleased premises than the sublessor had. *See Thal v. S.G.D. Corp.*, 625 So. 2d 852, 853 (Fla. 3d DCA 1993). As a corollary to that rule, where a lease includes the right to sublease, the sublessor may grant any rights and privileges the sublessor has except where specifically prohibited. *See Max & Tookah Campbell Co. v. T. G. & Y. Stores*, 623 P.2d 1064, 1067 (Okla. Civ. App. 1981); Restatement (Second) of Prop.: Landlord & Tenant § 15.1 (Am. Law Inst. 1977) ("The interests of the landlord and of the tenant in the leased property are freely transferable, unless: . . . (3) the parties to the lease validly agree otherwise."). Consequently, Sears has the right to grant Dick's signage rights that Sears has under the Forbes-Sears sublease and the R.E.A.

Additionally, in interpreting an agreement, "the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose." *Am. K-9 Detection Servs., Inc. v. Cicero*,

100 So. 3d 236, 238-39 (Fla. 5th DCA 2012) (citation omitted). It would be unreasonable to conclude that both the Forbes-Sears sublease and R.E.A. expressly and unequivocally permit Sears to sublease to a retailer while at the same time conclude that the R.E.A.'s signage criteria impliedly prohibits a retail sublessee, such as Dick's, from installing a sign. Where the contract unambiguously gives Sears the right to sublease, we will not rewrite the parties' agreements to add to the agreement, such as in this case, a prohibition on signage. *See Peach State Roofing, Inc. v. 2224 S. Trail Corp.*, 3 So. 3d 442, 445 (Fla. 2d DCA 2009). To do so would effectively eviscerate Sears's right to sublease and render its express contractual rights merely illusory.

Forbes has also stated that the sublease is set to terminate soon and Sears would be unable to extend the sublease if it subleases to Dick's. However, no such limitation appears in the sublease. The sublease states that Sears "shall have the right to extend the term of this Lease for Four (4) separate periods of ten (10) years each" so long as Sears is not in "material default at the time of the exercise of such right" and Sears is "operating the Demised Premises for retail purposes." Further, nothing in the sublease indicates Sears's subleasing rights exist only for the initial thirty-year term. Thus, we conclude Sears may extend its lease so long as it is not in material default and is operating the leased premises for retail purposes.

Forbes contends that Sears has asked us to "approve" its sublease with Dick's. Sears has neither asked this court, nor the court below, to explicitly approve of its lease with Dick's *in toto*, nor do we do so here. Our opinion is limited to our interpretation of the Sears-Forbes sublease and the R.E.A., and our conclusion that nothing within those agreements requires Sears to seek approval before subleasing one floor of its two-story lease, within the mall, to either Dick's or any other retailer. We make no comment on whether aspects of the Sears-Dick's sublease, either as planned or as implemented in the future, violate existing contractual obligations, the P.U.D., or other any law or regulation.[3]

CONCLUSION

[3] Specifically, Forbes has argued (1) that Dick's potential sale of guns violates the R.E.A.'s prohibition on creating "dangerous hazards" and (2) Sears has not gotten the necessary approvals for signage. We do not consider the first argument as it has been made prematurely. As to the second argument, while we conclude Sears may grant its signage rights to Dick's as part of a sublease, we do not comment on whether any planned or implemented sign will in fact comply with the P.U.D. or any other local ordinance.

We conclude that the City unconstitutionally impaired Sears's right to contract and deprived Sears of its rights to substantive due process. Because the City's Resolution deprived Sears of substantive due process, Sears is also owed attorney's fees under 42 U.S.C. sections 1983 and 1988. Finally, we conclude that the trial court erred in not granting declaratory relief in Sears's favor, and we specifically find that Sears has a right to sublease, pursuant to the 1987 lease agreement.

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

WARNER and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.