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Manuel Farach

Yovino v. Rizo, Case No. 18–272 (2019).
Federal judges are appointed for life, not eternity, and a federal circuit may not count the vote of a deceased judge in deciding cases.

Windsor Falls Condominium Association, Inc. v. Davis, Case No. 1D17-5355 (Fla. 1st DCA 2019).
An award of fees for litigating the amount of attorney's fees to be awarded is not permitted in a condominium assessment case when the relevant portion of the instruments provided for "costs of collection thereof, including Legal Fees"; *Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386, 388 (Fla. 4th DCA 2012), is distinguished.

Leon County v. Lakeshore Gardens Homeowners' Association, Inc., Case No. 1D18-2703 (Fla. 1st DCA 2019).
A homeowner's association may be named in an eminent domain case as class representative for all owners; it is not necessary to individually name all members of the association.

National Collegiate Student Loan Trust 2006-4 v. Meyer, Case No. 2D17-4158 (Fla. 2d DCA 2019).
Standing is merely a sufficient interest in the outcome of a case that warrants the court entertaining it. Unless the complaint demonstrates an affirmative defense on its face, standing is an affirmative defense requiring proof.

Tejera v. Lincoln Lending Services, LLC, Case No. 3D16-2746 (Fla. 3d DCA 2019).
An action for civil conspiracy to perpetrate fraud in the inducement is an action founded upon fraud, and thus is subject to the Delayed Discovery Doctrine.

Cone v. U.S. Bank Trust, N.A., Case No. 4D17-2285 (Fla. 4th DCA 2019).
Fraud or egregious misconduct is not a requirement for an equitable subrogation lien.

First Church of The Nazarene of Gainesville, Florida, Inc. v. Site Concepts, Inc., Case No. 4D18-2846 (Fla. 4th DCA 2019).
The rule that place of payment is a proper venue is inapplicable when the debt due is unliquidated.

Darden Restaurants, Inc. v. Singh, Case No. 5D16-4049 (Fla. 5th DCA 2019).
The 2009 amendment to Florida Statute section 194.301 mandated that value of property must be determined by an appraisal methodology that meets the criteria of Florida Statute section 193.011, and professionally accepted appraisal practices; *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85, 89 (Fla. 2002) ("[t]he property appraiser's determination of assessment value is an exercise of administrative discretion within the officer's field of expertise"), is overruled.

Per Curiam

SUPREME COURT OF THE UNITED STATES

JIM YOVINO, FRESNO COUNTY SUPERINTENDENT OF SCHOOLS v. AILEEN RIZO

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

No. 18–272. Decided February 25, 2019

PER CURIAM.

The petition in this case presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?

A judge on the United States Court of Appeals for the Ninth Circuit, the Honorable Stephen Reinhardt, died on March 29, 2018, but the Ninth Circuit counted his vote in cases decided after that date.* In the present case, Judge Reinhardt was listed as the author of an en banc decision issued on April 9, 2018, 11 days after he passed away. By counting Judge Reinhardt's vote, the court deemed Judge Reinhardt's opinion to be a majority opinion, which means that it constitutes a precedent that all future Ninth Circuit panels must follow. See *United States* v. *Caperna*, 251 F. 3d 827, 831, n. 2 (2001). Without Judge Reinhardt's vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed.

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*In *Altera Corp.* v. *Commissioner,* 2018 WL 3542989 (CA9, July 24, 2018), decided four months after Judge Reinhardt died, his vote was initially counted as one of the two judges in the majority. A footnote in the opinion stated: "Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death." *Id.*, at *1, n. **. Later, however, the court vacated the opinion and issued an order reconstituting the panel. *Altera Corp.* v. *Commissioner*, 898 F. 3d 1266 (CA9 2018). No similar action was taken in this case.

Although the other five living judges concurred in the judgment, they did so for different reasons. The upshot is that Judge Reinhardt's vote made a difference. Was that lawful?

I

Aileen Rizo, an employee of the Fresno County Office of Education, brought suit against the superintendent of schools, claiming, among other things, that the county was violating the Equal Pay Act of 1963, 77 Stat. 56–57, 29 U. S. C. §206(d). The District Court denied the county's motion for summary judgment, and the Ninth Circuit granted the county's petition for interlocutory review. A three-judge panel of the Ninth Circuit vacated the decision of the District Court based on a prior Ninth Circuit decision, *Kouba* v. *Allstate Ins. Co.*, 691 F. 2d 873 (1982), that the panel "believed it was compelled to follow." 887 F. 3d 453, 459 (2018) (en banc). The court then granted en banc review "to clarify the law, including the vitality and effect of *Kouba*." *Ibid.* Like other courts of appeals, the Ninth Circuit takes the position that a panel decision like that in *Kouba* can be overruled only by a decision of the en banc court or this Court, see *Naruto* v. *Slater*, 888 F. 3d 418, 421 (2018), and therefore a clear purpose of the en banc decision issued on April 9 was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. The opinion authored by Judge Reinhardt and issued 11 days after his death purports to do that, but its status as a majority opinion of the en banc court depends on counting Judge Reinhardt's vote.

The opinions issued by the en banc Ninth Circuit state that they were "Filed April 9, 2018," and they were entered on the court's docket on that date. A footnote at the beginning of the en banc opinion states:

> "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority

opinion and all concurrences were final, and voting was completed by the en banc court prior to his death." 887 F. 3d, at 455, n. *.

II

The Ninth Circuit did not expressly explain why it concluded that it could count Judge Reinhardt's opinion as "[t]he majority opinion" even though it was not endorsed by a majority of the living judges at the time of issuance, but the justification suggested by the footnote noted above is that the votes and opinions in the en banc case were inalterably fixed at least 12 days prior to the date on which the decision was "filed," entered on the docket, and released to the public. This justification is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent.

As for judicial practice, we are not aware of any rule or decision of the Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released.

We endorsed this rule in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), which interpreted an earlier version of 28 U. S. C. §46(c), the statutory provision authorizing the courts of appeals to hear cases en banc. The current version of this provision permits a circuit to adopt a rule allowing a senior circuit judge to sit on an en banc case under certain circumstances, but at the time of our decision in *American-Foreign S. S. Corp.*, this was not allowed. Instead, only active judges could sit en banc. See 28 U. S. C. §46(c) (1958 ed.).

In *American-Foreign S. S. Corp.*, Judge Harold Medina was one of the five active judges on the Second Circuit when the court granted a petition for rehearing en banc. After briefing was complete but before an opinion issued,

Judge Medina took senior status. When the en banc court issued its decision, the majority opinion was joined by Judge Medina and two active Circuit Judges; the two other active Circuit Judges dissented. We vacated the judgment and remanded the case, holding that "[a]n 'active' judge is a judge who has not retired 'from regular active service,'" and "[a] case or controversy is 'determined' when it is decided." 363 U. S., at 688. Because Judge Medina was not in regular active service when the opinion issued, he was "without power to participate" in the en banc decision. *Id.*, at 687, 691; cf.*, id.,* at 691–692 (Harlan, J., dissenting).

Our holding in *American-Foreign S. S. Corp.* applies with equal if not greater force here. When the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court's decision at the time it was rendered.

In addition to §46(c), §46(d) also shows that what the Ninth Circuit did here was unlawful. That provision states:

> "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

Under §46(c), a court of appeals case may be decided by a panel of three judges, and therefore on such a panel two judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree. Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree. See, *e.g., United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957); *Murray* v. *National Broadcasting Co.,* 35 F. 3d 45,

47 (CA2 1994); *Singh* v. *Ashcroft*, 121 Fed. Appx. 471, 472, n. (CA3 2005); *ASW Allstate Painting & Constr. Co.* v. *Lexington Ins. Co.*, 188 F. 3d 307, 309, n. (CA5 1999); *Clark* v. *Metropolitan Life Ins. Co.*, 67 F. 3d 299, n. ** (CA6 1995); *Kulumani* v. *Blue Cross Blue Shield Assn*, 224 F. 3d 681, 683, n. ** (CA7 2000). See also *Nguyen* v. *United States*, 539 U. S. 69, 82 (2003) ("[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified."). With the exception of one recent decision issued by the Ninth Circuit after Judge Reinhardt's death but subsequently withdrawn, see *supra*, at 1 n., we are aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time.

* * *

Because Judge Reinhardt was no longer a judge at the time when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

We therefore grant the petition for certiorari, vacate the judgment of the United States Court of Appeals for the Ninth Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR concurs in the judgment.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-5355

WINDSOR FALLS CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation,

Appellant,

v.

BRENDAN DAVIS; JANET DAVIS; UNKNOWN TENANT 31 k/n/a SHAWNA ANDERSON,

Appellees.

On appeal from the Circuit Court for Duval County.
Robert M. Dees, Judge.

February 28, 2019

B.L. THOMAS, C.J.

In this appeal of an award of attorney's fees, Appellant argues that the trial court erred by: 1) failing to include Rowe* findings in the final judgment; 2) not awarding all costs incurred by Appellant; 3) not awarding attorney's fees incurred in litigating the amount and reasonableness of fees; and 4) relying on the arbitrary opinion of Appellee's expert to determine the award. We

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* *Florida Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1151-52 (Fla. 1985).

reject Appellant's second and fourth issues raised without further discussion.

As to Appellant's argument that it is entitled to attorney's fees for litigating the amount of fees, the Fourth District has held that a trial court did not err in awarding fees-for-fees under a contract broadly written to allow the prevailing party to recover fees for "any litigation between the parties under this Agreement." *Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386, 388 (Fla. 4th DCA 2012) (emphasis removed). In *Pretka v. Kolter City Plaza II Inc.*, the Southern District of Florida distinguished *Waverly at Las Olas*, observing that the contract in *Waverly* provided a fee award for "any litigation," whereas the contract in *Pretka* provided a fee award for "litigation to enforce" the agreement. 2013 WL 12080754 at *1 (S.D. Fla. Dec. 10, 2013). The Southern District held that this language did not encompass an award of fees-for-fees. *Id.*

The contract here provides that Appellee is responsible for condominium assessments and the "costs of collection thereof, including Legal Fees." Because the trial court had already determined that Appellant was the prevailing party, and the parties had stipulated to Appellant's entitlement to legal fees and costs, the ensuing litigation over the amount of reasonable attorney's fees did not constitute litigating the collection of condominium assessments. *See State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993) (holding that litigating the amount of legal fees "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment"). Although we do not reject the argument that a contract can provide for an award of attorney's fees, including fees incurred for litigating the fee amount itself, we hold that the trial court did not err in denying Appellant such an award.

As to Appellant's argument that the trial court failed to include *Rowe* findings in the final judgment, we reverse and remand for further proceedings, as the trial court failed to make certain necessary findings in the final judgment, as required under Florida law. "Appellate courts apply the abuse of discretion standard to review a lower court's award of attorney's fees." *Mitchell v. Mitchell*, 141 So. 3d 1228, 1229 (Fla. 1st DCA 2014). In

Rowe, the supreme court found the lodestar approach to be the appropriate method for determining an attorney fee award. 472 So. 2d at 1151-52, *holding modified by Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). "The first step in the lodestar process requires the court to determine the number of hours reasonably expended on the litigation." *Id.* at 1150. "The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees." *Id.* at 1151.

A final judgment must include specific findings as to the hourly rate, the number of hours expended, whether those hours were reasonable, and any reduction factors. *Mitchell*, 141 So. 3d at 1230 (reversing a final judgment that did not include findings as to the number of hours expended or whether those hours were reasonable); *Rowe*, 472 So. 2d at 1151. "'The lack of findings constitutes reversible error, even if there is competent, substantial evidence to support the award.'" *Norman v. Norman*, 939 So. 2d 240, 242 (Fla. 1st DCA 2006) (quoting *Hamlin v. Hamlin*, 722 So. 2d 851, 852 (Fla. 1st DCA 1998)); *see also Hysmith v. Hysmith-Graham*, 948 So. 2d 974, 975 (Fla. 1st DCA 2007) ("Although a reduction in attorney's fees might ultimately be appropriate in this case, we must reverse the present order because the trial court failed to set forth specific findings regarding the attorney's hourly rate, the number of hours reasonably expended, and the appropriateness of reduction or enhancement factors.").

In *Wilkerson v. Johnson*, 139 So. 3d 965, 967 (Fla. 1st DCA 2014), this Court reversed and remanded a final order awarding fees and costs, because the trial court did not make findings as to why the award differed from the amount requested by the prevailing party. Here, the final judgment included no findings regarding the reasonable number of hours expended. Although the trial court found that "the hourly rates sought by Plaintiff's attorneys are reasonable and appropriate," there are no findings as to what those rates were, and such findings are required under *Rowe*. 472 So. 2d at 1151-52. Instead, the final judgment simply contained a line stating "Reasonable Attorney's Fees $3,933.00," which is an amount significantly lower than the amount requested by Appellant's attorneys, even excluding any so-called "fees-for-

fees" issues. We therefore reverse and remand to allow the trial court to make the requisite findings. *See Wilkerson*, 139 So. 3d at 967; *Mitchell*, 141 So. 3d at 1230; *Norman*, 939 So. 2d at 242.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

WETHERELL and WINSOR, JJ., concur.

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

James J. Roche of McCabe & Ronsman, Ponte Vedra Beach, for Appellant.

Matthew C. Bothwell, Neptune Beach, for Appellees Brendan Davis and Janet Davis.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2703

LEON COUNTY, FLORIDA,

Petitioner,

v.

LAKESHORE GARDENS HOMEOWNERS' ASSOCIATION, INC., a Florida not for profit corporation; LAKESHORE GARDENS HOMEOWNERS' ASSOCIATION, INC., a Florida not for profit corporation, as the representative for the class of all lot owners of Lakeshore Gardens, as per plat thereof recorded in Plat Book 12, Page 2, of the Official Records of Leon County, Florida; LEON COUNTY TAX COLLECTOR; and LEON COUNTY PROPERTY APPRAISER,

Respondents.

Petition for Writ of Certiorari—Original Jurisdiction.

February 28, 2019

PER CURIAM.

Leon County has filed a petition for writ of certiorari in this Court seeking review of the circuit court's nonfinal order granting the motion to dismiss its Petition in Eminent Domain filed by Lakeshore Gardens Homeowners' Association, Inc. Through its petition filed below, Leon County sought to exercise its eminent domain authority over certain common area property in the Lakeshore Gardens neighborhood for use as an easement. The neighborhood reportedly has more than 100 property owners, all of which have an interest in the common area.

The circuit court dismissed the petition on the basis it was reliant only upon Florida Rule of Civil Procedure 1.221 in naming the homeowners association rather than joining, as indispensable parties, each individual property owner as specified in section 73.021, Florida Statutes. In granting the association's motion to dismiss, the circuit court ruled that while the homeowners association contended "it does not have authority to act on behalf of the homeowners . . . at this stage of the proceedings, it is more significant that the [petition] contain[ed] no allegations that the Association has the needed legal authority." Accordingly, the circuit court granted Leon County twenty days to submit an amended petition, presumably to list "[t]he names, places of residence, legal disabilities, if any, and interests in the property of all owners . . . " in the affected area, as prescribed by section 73.021(4), Florida Statutes.

We grant Leon County's petition for writ of certiorari. Despite the general directions in section 73.021(4) for naming indispensable parties, section 720.303(1), Florida Statutes, provides in relevant part that "the [homeowners] association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members . . . [and] *may defend* actions in eminent domain or bring inverse condemnation actions." (Emphasis added.) In like manner, rule 1.221 expressly permits a homeowners association to "institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members, including, but not limited to: . . . (6) defense of actions in eminent domain or

prosecution of inverse condemnation actions." Because, to date, Florida's appellate courts have not addressed the propriety of naming the homeowners association as the sole party representing the class of homeowners under the statute and rule just cited, we turn to the decisions of the Second District in *Tedeschi v. Surf Side Tower Condominium Ass'n*, 35 So. 3d 915 (Fla. 2d DCA 2010), and the Third District in *Trintec Construction Inc. v. Countryside Village Condominium Ass'n*, 992 So. 2d 277 (Fla. 3d DCA 2008). Both *Tedeschi* and *Trintec Construction* addressed the issue as it relates to condominium associations in the context of petitions for writs of certiorari and both held that rule 1.221 authorizes a plaintiff to name only the condominium association, rather than having to name all the condominium unit owners as indispensable parties. We apply the logic expressed in *Tedeschi* and *Trintec Construction* to reach the same conclusion in the instant case.

As a preliminary matter,

> [b]efore a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the following three elements: "'(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'"

Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (quoting *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002))). "The last two elements are jurisdictional and must be analyzed before the court may even consider the first element." *Id.*

In *Tedeschi*, the Second District held that by failing to acknowledge the provisions of rule 1.221, "[t]he circuit court departed from the essential requirements of the law by requiring the [petitioners/plaintiffs] to include the more than eighty other members of the condominium association in their lawsuit . . . ." 35 So. 3d at 919. Significantly, it went on to find that the circuit court's order improperly requiring the petitioners/plaintiffs "to file their complaint against over eighty additional defendants, [] would cause a material injury for the remainder of the proceedings for which there is no adequate remedy on appeal." *Id.* at 920 (citing *Trintec Constr., Inc.*, 992 So. 2d at 280). The Second District

expressed its logic in the following discussion of case law, including *Trintec Construction*:

> In *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649-50 (Fla. 2d DCA 1995), this court noted that where the issues to be resolved address procedures designed *to avoid* litigation, those issues can be reviewed by certiorari. For example, "an order dispensing with a statutorily mandated presuit procedure, which is a condition precedent to a legal proceeding," is reviewable by certiorari "because the purpose of the presuit screening is to avoid the filing of the lawsuit in the first instance." *Id.* at 649. In *Parkway Bank*, this court further noted that limited certiorari review was permitted to consider cases involving "the statutory procedures for amending a complaint to allege punitive damages because those safeguards cannot be remedied postjudgment." *Id.*
>
> In *Trintec Construction, Inc.*, 992 So. 2d at 280, the court concluded that "the cost and delay inherent in identifying, pleading against, and serving a multitude of owners (and then substituting a new owner for a predecessor during the pendency of the case as units are sold or otherwise transferred) would be substantial." *See also Mantis v. Hinckley*, 547 So. 2d 292, 293 (Fla. 4th DCA 1989) (concluding that circuit court erred in denying motion to dismiss where mortgagee failed to join a dissolution receiver as an indispensable party, and therefore, the petitioners established the circuit court departed from the essential requirements of law and there was a lack of an adequate remedy on appeal).

Id. at 919-20 (emphasis added).

We perceive no legal impediment to applying the rationales expressed in *Tedeschi* and *Trintec Construction* to cases involving homeowners associations. Accordingly, in the present case, we conclude that by dismissing Leon County's petition for failure to join indispensable parties—namely, all one hundred or more of the property owners—the circuit court departed from the essential requirements of the law by failing to apply Section 720.303(1) and

rule 1.221, which would permit Lakeshore Homeowners' Association, Inc., to be named as the proper party to defend against an eminent domain proceeding on behalf of the individual homeowners. Moreover, as in *Tedeschi* and *Trintec Construction,* we hold the circuit court's action in dismissing Leon County's petition for failure to join indispensable parties caused a material injury to Leon County for which there would be no adequate remedy on appeal.

Consequently, for the reasons expressed, we grant Leon County's petition for writ of certiorari and quash the order of the circuit court.

RAY, KELSEY, and JAY, JJ., concur.

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

Daniel J. Rigo and Katherine Vernet, Assistant County Attorneys, Tallahassee, for Petitioner.

John A. Grant of The Law Office of John A. Grant, P.A, Tallahassee; Edwin R. Hudson of Henry Buchanan, P.A., Tallahassee, for Respondent Lakeshore Gardens Homeowners' Association, Inc.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4, a Delaware Statutory Trust, Appellant, v. KERRY MEYER, Appellee.	)	Case No. 2D17-4158

Opinion filed March 1, 2019.

Appeal from the Circuit Court for Hillsborough County; Claudia R. Isom, Judge.

Kenneth L. Salomone of Aldridge, Pite & Haan, LLP, Atlanta, Georgia; Kenneth L. Salomone of Salomone Law Group, Deerfield Beach (substituted as counsel of record), for Appellant.

Jared M. Krukar and Dineen Pashoukos Wasylik of DPW Legal, Tampa; and M. Vincent Pazienza of Law Firm of M. Vincent Pazienza, P.A., Lutz, for Appellee.

BLACK, Judge.

National Collegiate Student Loan Trust 2006-4, a Delaware Statutory Trust (NCSLT), challenges the order dismissing with prejudice its second amended complaint for breach of a loan agreement between Bank of America, N.A., and Kerry Meyer, as a cosignor and guarantor on the loan. We reverse the order of dismissal and remand for further proceedings.

Following the dismissal of its first two complaints for breach of a loan agreement, NCSLT filed its second amended complaint on May 1, 2017. The second amended complaint alleged that Sean Meyer, the borrower, and Kerry Meyer, a cosignor, executed a "loan request/credit agreement" with Bank of America for the purpose of obtaining a private education loan for the borrower to attend college; that the loan request/credit agreement specified that Ms. Meyer would be jointly liable for repayment of the loan; and that the loan was approved and a check payable to the borrower and Ms. Meyer was mailed to, endorsed, and deposited by the borrower and Ms. Meyer. NCSLT alleged that the borrower and Ms. Meyer agreed to the terms of the loan by endorsing and depositing the loan check and that the borrower and Ms. Meyer defaulted on the loan by failing to make the initial payment due on November 17, 2011. NCSLT also asserted that it is the entity entitled to enforce the terms of the loan as an assignee of the debt and that it is the owner of the loan debt pursuant to the "Pool Supplement and Deposit and Sale Agreement."

Multiple documents, including some unnecessary to the resolution of this appeal, were attached to and referenced in the second amended complaint. The loan request/credit agreement "information page" was the first attachment. The information page provides that it is a "Non-Negotiable Credit Agreement" and a "Consumer Credit

Transaction." The information page identifies the lender as Bank of America and the loan amount requested as $30,000 for an "education maximizer undergraduate loan." It bears an identification number, BK.06-07.CSX1.10DC.0206, and a secondary identification containing "Meyer" and ending in A104473793. The second page of the document bears the signatures of both the borrower and the cosignor, and it provides that "the holder of the loan can collect this debt from [the cosignor] without first trying to collect from the borrower" and that "by signing this credit agreement . . . [the cosignor] intends to (I) apply for joint credit and (II) be jointly liable with the borrower for this loan."

A "Note Disclosure Statement" was also attached to the complaint, identifying the loan number as 04473793, the amount financed as $30,000, and the borrowers as Sean Meyer and Kerry Meyer. Additionally, a copy of the endorsed check for $30,000, was attached to the complaint; it was drawn on a Bank of America check for The Education Resources Institute (TERI).

To support NCSLT's standing to enforce the terms of the loan agreement, it attached a document titled "2006-4 Pool Supplement," dated December 7, 2006, which provides that The First Marblehead Corporation, the servicer, and Bank of America (collectively, the Program Lender) "transfers, sells, sets over and assigns to The National Collegiate Funding LLC" (the LLC) the student loans set forth in the schedule identified as the Transferred Bank of America Loans, along with all of the Program Lender's rights and "any agreement pursuant to which TERI granted collateral for its obligations."[1] The LLC "in turn will sell the [loans] to [NCSLT]." A single page

[1]The relationship between The First Marblehead Corporation and Bank of America was established by reference and incorporation of the April 1, 2006, Note Purchase Agreement in the 2006-4 Pool Supplement.

"roster" for NCSLT then identifies a loan with the borrower's social security number (redacted) and a "GUARREF" number matching the loan number previously identified (04473793). The roster also provides that the disbursement date was November 3, 2006, and that the amount disbursed was $30,000. The deposit and sale agreement between the LLC and NCSLT was also attached, and it identifies loans by the pool supplements originating with a bank as part of one of its loan programs. One of those supplements is Bank of America's 2006-4 Pool Supplement, matching the roster's "loan product" information.

In moving to dismiss NCSLT's complaint for the third time, Ms. Meyer cited Florida Rule of Civil Procedure 1.140(b), and she argued that NCSLT failed to state a cause of action and that it lacked standing to bring the action.

The standard of review on an order granting a motion to dismiss is de novo. Belcher Ctr., LLC v. Belcher Ctr., Inc., 883 So. 2d 338, 339 (Fla. 2d DCA 2004). Because the order on appeal does not include findings of fact or conclusions of law and we do not have a transcript of the hearing to determine if one or both of the bases raised in Ms. Meyer's motion to dismiss resulted in the dismissal, we consider both arguments.

I. Standing

"In determining whether to dismiss a complaint for lack of standing, [the court] must confine [its] review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept all well-pled allegations in the complaint as true." Llano Fin. Grp., LLC v. Yespy, 228 So. 3d 108, 111 (Fla. 4th DCA 2017) (quoting Gordon v. Kleinman, 120 So. 3d 120, 121 (Fla. 4th DCA 2013)). Generally, dismissals

with prejudice based upon the affirmative defense of a lack of standing are not proper. See, e.g., Lawson v. Frank, 197 So. 3d 1269, 1271 (Fla. 2d DCA 2016) ("Indeed, the substantive issue underlying the court's ruling—whether Mr. Lawson held sufficient standing to maintain this cause of action—is an affirmative defense that, unless raised in a responsive pleading, would be deemed waived."); Hartford Ins. Co. of Midwest v. O'Connor, 855 So. 2d 189, 190 n.1 (Fla. 5th DCA 2003) ("The issue of standing and the effect of the assignment were matters to be raised by Hartford as affirmative defenses, not in a motion to dismiss the complaint."). However, "[i]f the face of the complaint contains allegations which demonstrate the existence of an affirmative defense, then such a defense may be considered on a motion to dismiss." Papa John's Int'l, Inc. v. Cosentino, 916 So. 2d 977, 983 (Fla. 4th DCA 2005); see also Fla. R. Civ. P. 1.110(d) ("Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained.").

There is nothing on the face of the second amended complaint to suggest that NCSLT does not have standing such that the affirmative defense should have been decided by a motion to dismiss. See Wildflower, LLC v. St. Johns River Water Mgmt. Dist., 179 So. 3d 369, 373 (Fla. 5th DCA 2015). The affirmative defense requires factual proof supporting it; this is a burden not on NCSLT, having sufficiently alleged that it is due the debt, but on Ms. Meyer. See Hess v. Philip Morris USA, Inc., 175 So. 3d 687, 695 (Fla. 2015) ("The defendant has the burden to prove an affirmative defense." (citing Hough v. Menses, 95 So. 2d 410, 412 (Fla. 1957))); Nunez v. Alford, 117 So. 2d 208, 210 (Fla. 2d DCA 1960).

Substantively, "[s]tanding is . . . that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) (quoting Gen. Dev. Corp. v. Kirk, 251 So. 2d 284, 286 (Fla. 2d DCA 1971)). Here, NCSLT attached documents supporting its allegation of ownership by establishing the transfer or purchase of student loans from Bank of America to the LLC and from the LLC to NCSLT. Cf. Llano Fin., 228 So. 3d at 112 (affirming dismissal and concluding that alleging assignment of the note to the plaintiff was "not equivalent to alleging that the original lender assigned its right to pursue negligence claims"). This is sufficient to overcome a rule 1.140 motion to dismiss based on standing. See Landmark Funding, Inc. ex rel. Naples Syndications, LLC v. Chaluts, 213 So. 3d 1078, 1079 (Fla. 2d DCA 2017) ("The operative complaint in this case alleged ultimate facts demonstrating Landmark's membership both at the time of the suit and at the time of the alleged misconduct. The complaint contained no attachments that contradicted those allegations. As such, it was legally sufficient insofar as Landmark's standing is concerned and not properly subject to a motion to dismiss on that basis."). We note, however, that it may not be sufficient on a motion for judgment on the pleadings or summary judgment or to succeed at trial. Cf. Lovette v. Nat'l Collegiate Student Loan Tr. 2004-1, 149 So. 3d 735, 737 (Fla. 5th DCA 2014) (reversing final summary judgment where Trust failed to establish standing).

II. Failure to state a cause of action

The cause of action alleged in the second amended complaint is a breach of contract—Ms. Meyers' failure to comply with the terms of the loan. NCSLT is seeking damages only.

"For . . . purposes of a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." Swope Rodante, P.A. v. Harmon, 85 So. 3d 508, 509 (Fla. 2d DCA 2012) (quoting Wallace v. Dean, 3 So. 3d 1035, 1042-43 (Fla. 2009)). "A motion to dismiss tests the legal sufficiency of the complaint and does not determine factual issues." Haskel Realty Grp., Inc. v. KB Tyrone, LLC, 253 So. 3d 84, 85 (Fla. 2d DCA 2018) (quoting Gann v. BAC Home Loans Servicing LP, 145 So. 3d 906, 908 (Fla. 2d DCA 2014)). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." Havens v. Coast Fla., P.A., 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013) (citing Fla. R. Civ. P. 1.110(b)).

"The elements of a breach of contract cause of action are: (1) a valid contract, (2) a material breach, and (3) damages." Ferguson Enters. v. Astro Air Conditioning & Heating, Inc., 137 So. 3d 613, 615 (Fla. 2d DCA 2014) (citing Havens, 117 So. 3d at 1181). Rule 1.130(a) requires that "[a]ll bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading." Attachments to the pleading are "considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b). The purpose of rule 1.130(a) "is to apprise the defendant of the nature and extent of the cause of action

so that the defendant may plead with greater certainty." Amiker v. Mid-Century Ins. Co., 398 So. 2d 974, 975 (Fla. 1st DCA 1981) (citing Sachse v. Tampa Music Co., 262 So. 2d 17, 19 (Fla. 2d DCA 1972)). "A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint." Glen Garron, LLC v. Buchwald, 210 So. 3d 229, 233 (Fla. 5th DCA 2017) (quoting Contractors Unlimited, Inc. v. Nortrax Equip. Co. Se., 833 So. 2d 286, 288 (Fla. 5th DCA 2006)). "Rule 1.130 does not require attachment of the entire contract, but only the attachment or the incorporation into the pleading of the material portions of the contract on which the action is based." Id.

Here, NCSLT alleged that (1) Ms. Meyer, as a cosignor and guarantor, had entered into a valid student loan agreement, attaching relevant pages of the signed credit agreement; (2) no payments on the student loan had been made, breaching the agreement; and (3) Ms. Meyer owed NCSLT damages in the amount of the loan principal plus interest. This was sufficient to state a cause of action for breach of the agreement such that the second amended complaint should not have been dismissed. See Ferguson Enters., 137 So. 3d at 615 ("In count V, Ferguson alleged that the Hegeduses personally guaranteed repayment of Astro's debt, that the Hegeduses breached the guaranty by refusing to pay that debt, and that Astro and the Hegeduses owed Ferguson more than $90,000. The allegations in count V were sufficient to state a cause of action for breach of the guaranty."); Student Loan Mktg. Ass'n v. Morris, 662 So. 2d 990, 991-92 (Fla. 2d DCA 1995) (reversing order dismissing complaint for failure to state a cause of action where complaint sufficiently complied with the rules of civil procedure).

The trial court erred in granting Ms. Meyer's motion to dismiss on either basis raised in the motion. Accordingly, we reverse the order of dismissal and remand for further proceedings.

Reversed and remanded.

NORTHCUTT and BADALAMENTI, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed February 27, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2746
Lower Tribunal No. 09-76467

Luis Tejera, et al.,
Appellants,

vs.

Lincoln Lending Services, LLC, et al.,
Appellees.

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

Corona Law Firm, P.A., and Ricardo Corona and Ricardo M. Corona, for appellants.

Dorta & Ortega, P.A., and Omar Ortega and Rosdaisy Rodriguez; David M. Rogero, P.A., and David M. Rogero and Yvette H. Ayala, for appellees.

Before EMAS, C.J., and SALTER and FERNANDEZ, JJ.[1]

[1] Judge Salter and Judge Fernandez did not participate in oral argument.

EMAS, C.J.

I. INTRODUCTION

Luis Tejera appeals the trial court's order dismissing with prejudice counts 19 and 21 of the operative complaint against Omar Romay ("Romay") and America-CV Network, LLC ("ACV"), as barred by the statute of limitations. We affirm without further discussion the trial court's dismissal of count 19 (alleging a claim for civil conspiracy to commit civil theft), as the trial court properly determined that count was barred by the statute of limitations.

However, we reverse the trial court's order dismissing count 21 (alleging a claim for civil conspiracy *to perpetrate fraud* in the inducement). Upon our de novo review, see Nationstar Mortg., LLC v. Sunderman, 201 So. 3d 139, 140 (Fla. 3d DCA 2015), we hold that count 21, as alleged against Romay and ACV, is an "action founded upon fraud," thereby permitting application of the delayed discovery doctrine in determining when the statute of limitations period began to run.

II. THE ALLEGATIONS OF THE COMPLAINT

"A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006); Susan Fixel, Inc. v.

Rosenthal & Rosenthal, Inc., 842 So. 2d 204 (Fla. 3d DCA 2003).[2] Accepting as true all allegations of the operative complaint, Luis Tejera and others were victims of an illegal mortgage rescue scheme devised and perpetrated by Lincoln Lending Services, LLC, and several related individuals and entities (collectively "the Lincoln Defendants"). This scheme consisted of collecting illegal up-front fees from individuals, such as Tejera, who were in need of "mortgage rescue services," but after collecting payment, those services were never provided because the scheme was "designed to steal money from consumers."

In furtherance of this scheme, the Lincoln Defendants advertised their services on Channel 41 in Miami, Florida, which was operated by Okeechobee Television Corporation,[3] a company owned by Romay, and alleged to be Romay's "alter ego." This television advertising provided the medium for the scheme, and enticed Tejera and the purported class members to use the services offered by the Lincoln

[2] The affirmative defense of statute of limitations is generally a matter to be raised in an answer and not a motion to dismiss. However, where the facts constituting that defense affirmatively appear on the face of the complaint and establish conclusively that the action is barred as a matter of law, it may be raised and considered in a motion to dismiss. Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014). But because an affirmative defense may be avoided by facts alleged in a reply to the affirmative defense, dismissal is warranted only if the allegations of the complaint conclusively negate a plaintiff's ability to plead facts in avoidance of the statute of limitations defense. Id.; Rigby v. Liles, 505 So. 2d 598, 601 (Fla. 1st DCA 1987).

[3] Tejera alleged that ACV's corporate predecessor was Okeechobee.

Defendants. The success of the scheme depended on this "heavy rotation of advertising."

At some point, Romay was made aware that the Lincoln Defendants were not performing any of the advertised services, but Romay became "a willing co-conspirator in the mortgage rescue fraud scheme" and "continued to air the heavy rotation of advertisements for the fraudulent mortgage rescue conspiracy." In March 2009, the Florida Attorney General commenced a civil action against Lincoln Lending and its managing member for this fraudulent scheme and obtained a temporary injunction prohibiting Lincoln Lending from operating a mortgage rescue business.

Tejera filed the instant lawsuit as a class action against the Lincoln Defendants, alleging claims of unfair and deceptive trade practices and civil theft. After several amendments, a fifth amended complaint was filed alleging claims against Romay and ACV for civil conspiracy to commit civil theft (count 19) and civil conspiracy to perpetrate fraud in the inducement (count 21). Tejera further alleged that he could not have discovered the facts giving rise to an action against Romay and ACV until April 2012.[4]

[4] Tejera first added Romay and ACV as defendants in an amended complaint filed in October 2013.

ACV and Romay filed motions to dismiss these counts, contending that the claims were barred by the four-year statute of limitations for civil conspiracy. As to count 21, alleging civil conspiracy to perpetrate fraud in the inducement, Tejera acknowledged a four-year statute of limitations applied, but contended that the delayed discovery doctrine also applied, and that the four-year limitations period did not begin to run until the date when the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence (which, as Tejera alleged in the complaint, was not until April 2012). Following a hearing, the trial court dismissed, with prejudice, count 21 against Romay and ACV.

III. DISCUSSION

a. The Delayed Discovery Doctrine

While fraud claims are subject to a four-year statute of limitations (see section 95.11(3), Fla. Stat. (2009)), when that four-year limitations period *begins to run* depends upon the application of the delayed discovery doctrine. The Florida Legislature enacted section 95.031(2)(a), which codified the delayed discovery doctrine, and provides:

> **An action founded upon fraud** under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, **with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence**, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date

> of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

(Emphasis added).

This court and others have expressly held that the delayed discovery doctrine applies to a claim for fraud in the inducement. See Brooks Tropicals, Inc. v. Acosta, 959 So. 2d 288 (Fla. 3d DCA 2007); Tyson v. Viacom, Inc., 890 So. 2d 1205 (Fla. 4th DCA 2005).

Romay and ACV contended below, and on appeal, that because count 21 is a civil *conspiracy* claim, it is subject to a four-year statute of limitations.[5] More to the point, they contend that the delayed discovery doctrine is inapplicable because, if properly characterized as a civil conspiracy claim, count 21 is necessarily not an "action founded upon fraud."

b. *Monahan, Young, Olson and Flatirons*

For this proposition, Romay and ACV rely upon Davis v. Monahan, 832 So. 2d 708 (Fla. 2002). However, Monahan does not support, and in fact undercuts, this legal proposition. Further, appellees' argument avoids the central issue here: regardless of what period of limitations applies to a civil conspiracy claim, the discrete question presented is whether count 21 is an "action founded upon fraud,"

[5] For this assertion, Romay and ACV rely upon section 95.11(*o*), Florida Statutes (2009) which provides a four-year limitations period for an "action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort . . . ."

which is key to determining the applicability of delayed discovery doctrine. Indeed, this much is clear from the Florida Supreme Court's discussion in Monahan.

In Monahan, the plaintiff filed suit against her sister and niece, alleging claims for "breach of fiduciary duty, civil theft, conspiracy, conversion and unjust enrichment, arising from the wrongful taking of cash, stocks, bonds, interest, dividends, and pension and social security payments." Id. at 708-09. The question presented was "whether the delayed discovery doctrine, which delays the commencement of the statute of limitations, is applicable to these causes of action." The Florida Supreme Court held:

> The delayed discovery doctrine does not apply **to the claims alleged in this case**. The Florida Legislature has stated that a cause of action accrues or begins to run when the last element of the cause of action occurs. **An exception is made for claims of fraud** and products liability in which the accrual of the causes of action is delayed until the plaintiff either knows or should know that the last element of the cause of action occurred.

Id. at 709. (Emphasis added.)

Importantly, the Court did not hold that the delayed discovery doctrine is inapplicable to every claim of civil conspiracy, noting that the doctrine did not apply in the instant claim because "Monahan did not allege fraud, so there was no specific allegation that [the defendants'] actions caused Monahan's delayed discovery." Id. at 712 (emphasis added). This analysis was followed in Young v. Ball, 835 So. 2d 385, 386 n.3 (Fla. 2d DCA 2003), in which our sister court held that the delayed

discovery doctrine did not apply to the plaintiff's claim for civil conspiracy, noting: "On appeal, all parties address Young's causes of action as if they sounded in fraud. However, the complaint alleges civil conspiracy and does not mention fraud." Id. at 386 n.3 (emphasis added).

This much is implicit in the Monahan and Young decisions: the mere fact that the claim is framed as a civil conspiracy (and therefore subject to a four-year statute of limitations) does not end the analysis. The next and separate question is when did that four-year limitations period *begin to run*? In answering that question, we must determine whether the claim as alleged is an "action founded upon fraud." We answer that question in the affirmative, and hold that the trial court erred in dismissing count 21 with prejudice based upon the expiration of the statute of limitations.

Appellees also rely upon Olson v. Johnson, 961 So. 2d 356 (Fla. 2d DCA 2007) for their contention that the delayed discovery doctrine does not apply to this cause of action for conspiracy to commit fraud in the inducement. This reliance, however, is misplaced. In Olson, the plaintiff sued for, *inter alia*, malicious prosecution and civil conspiracy to commit malicious prosecution. In addressing whether these actions were barred by the statute of limitations, our sister court observed, unremarkably, that "[t]he statute of limitations for both malicious prosecution and civil conspiracy is four years." Id. at 359.

However, the question presented in this case is not whether a four-year statute of limitations applies to this claim; Tejera concedes this very point, because whether count 21 is characterized for limitations purposes as a claim for conspiracy or one for fraud, each is subject to a four-year statute of limitations. See § 95.11(3)(*o*) (establishing four-year statute of limitations for intentional torts not otherwise covered by this section); § 95.11(3)(j) (establishing four-year statute of limitations for fraud). Rather, the relevant question is *when* that four-year period *began to run*, and whether Tejera is authorized by section 95.031(2)(a) to rely on the delayed discovery doctrine because this claim, regardless of its conspiratorial character, is an "action founded upon fraud." There can be no doubt that Tejera's claim for conspiracy to perpetrate fraud in the inducement alleges an action founded upon fraud, and this conclusion is buttressed by case law addressing the concept of civil conspiracy in Florida.

Nor does our recent decision in Flatirons Bank v. Alan W. Steinberg Ltd. P'ship., 233 So. 3d 1207 (Fla. 3d DCA 2017) lend support to appellees' position. Here are the salient facts taken from the majority opinion in Flatirons:

Mark Yost was the former board chairman and president of Flatirons Bank. In 2009, Yost arranged for Flatirons to issue bogus lines of credit, enabling Yost to steal nearly $4 million from Flatirons. These funds were then transferred to entities owned or controlled by Yost, including an entity called the Yost Partnership, a

limited partnership and investment vehicle which operated from 1991 until 2010. The Alan W. Steinberg Limited Partnership (Steinberg) was a limited partner of, and investor in, the Yost Partnership. From 2000 to 2004, Steinberg had invested $2.2 million in the Yost Partnership.

Flatirons discovered Yost's fraud in 2010, and their investigation revealed that a year earlier Yost had transferred $1 million to Steinberg. In an attempt to recoup the funds embezzled by Yost, Flatirons filed a claim against Steinberg for unjust enrichment, seeking the $1 million Yost had transferred to Steinberg.

Steinberg answered and, as an affirmative defense, asserted that Flatirons's unjust enrichment claim was barred by the four-year statute of limitations. The matter proceeded to trial and, following trial, the trial court determined that the action was barred by the statute of limitations. The trial court found that the delayed discovery doctrine did not apply to Flatirons's unjust enrichment claim against Steinberg.

This court affirmed the trial court's determination. In doing so, however, we noted the following findings by the trial court, which distinguish Flatirons from the instant case:

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

- Upon receiving the $1,000,000.00 transfer, Steinberg actually suffered a net loss of approximately $1,200,000.00 as a result of the Yost Partnership's fraud and misconduct;

- As a result of Steinberg's investment into the Yost Partnership, Steinberg had paid adequate consideration for the $1,000,000.00 that the Yost Partnership transferred to Steinberg; and

- Flatirons conferred no direct benefit on Steinberg.

Flatirons, 233 So. 2d at 1210 (emphasis added).

While these findings are relevant to the determination that Flatirons failed to establish unjust enrichment, the first two (highlighted) findings also reveal why we concluded that the delayed discovery doctrine did not apply to the claim against Steinberg:

> While a feature of Flatirons's unjust enrichment claim might have been Yost's fraud and deceit, Flatirons's unjust enrichment claim *against Steinberg* is not "founded upon fraud" so as to implicate Florida's delayed discovery doctrine.

Id. at 1213.

In other words, in Flatirons, the bank did not contend that Steinberg had engaged in any fraudulent activity, but instead contended merely that Steinberg was the recipient of funds which were embezzled by Yost (the fraudster) and later transferred to Steinberg, a non-fraudster who acted in good faith and who had no relationship with Yost.

In the absence of any allegation of fraud or fraudulent conduct by Steinberg, or a conspiratorial relationship between Yost and Steinberg, the claim against Steinberg could not qualify as an "action founded upon fraud," and, accordingly, the delayed discovery doctrine could not be invoked as against a statute of limitations defense.

By contrast, the very different facts alleged here necessarily lead to a very different result. Tejera has alleged that Romay and ACV engaged in a conspiracy to perpetrate fraud; that they knowingly committed fraudulent acts in furtherance of that conspiracy; and that Tejera could not have discovered the facts giving rise to this cause of action against Romay and ACV until April 2012.

A final legal principle applies to our analysis: There is no freestanding cause of action in Florida for "civil conspiracy." In order to state a claim for civil conspiracy, a plaintiff must allege an underlying independent tort. The conspiracy is merely the vehicle by which the underlying tort was committed, and the allegations of conspiracy permit the plaintiff to hold each conspirator jointly liable for the actions of the coconspirators. As we reaffirmed in Banco de los Trabajadores v. Cortez Moreno, 237 So. 3d 1127, 1136 (Fla. 3d DCA 2018):

> Florida does not recognize civil conspiracy as a freestanding tort. SFM Holdings Ltd. v. Banc of Am. Secs., LLC, 764 F.3d 1327, 1338-39 (11th Cir. 2014) (applying Florida law). The gist of a civil conspiracy is not the conspiracy itself, but the underlying civil wrong occurring pursuant to the conspiracy and which results in the plaintiff's damages. Marriott Int'l, Inc., v. Am. Bridge Bahamas, Ltd., 193 So. 3d 902, 909

> (Fla. 3d DCA 2015). The conspiracy does not give rise to an independent cause of action, but is a device to allow a plaintiff to spread liability to those involved in causing the underlying tort. Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 80 (Fla. 3d DCA 2013) (observing: "Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortious acts of one coconspirator to another to establish joint and several liability.") (quoting Ford v. Rowland, 562 So. 2d 731, 735 n.2 (Fla. 5th DCA 1990)). The conspiracy therefore, is inextricably linked with the underlying tort. Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 950-51 (Fla. 3d DCA 1984).

Given that there is no freestanding cause of action for civil conspiracy, we must conclude that count 21, as pleaded by Tejera, is an action founded upon fraud.

IV. CONCLUSION

Because Tejera's claim of conspiracy to perpetrate fraud in the inducement alleged an action "founded upon fraud," section 95.031(2)(a)'s delayed discovery doctrine may properly be invoked in determining when the statute of limitations began to run on this claim. The trial court erred in dismissing this count with prejudice, as barred by the statute of limitations, where Tejera's complaint alleged that he could not have discovered the facts giving rise to this claim against Romay and ACV until April 2012.[6]

Affirmed in part, reversed in part, and remanded for further proceedings.

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[6] Because this issue was decided at the motion-to-dismiss stage, we must accept this allegation as true and all reasonable inferences must be construed in favor of Tejera. The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006). We express no opinion on the merits of this allegation or whether Tejera ultimately can establish he did not discover, and in the exercise of due diligence could not have discovered, the facts giving rise to his claim against Romay and ACV until April 2012.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LAURA LYNN CONE and **WILLIAM E. CONE,**
Appellants,

v.

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF8 MASTER PARTICIPANT TRUST, CHASE MANHATTAN BANK, USA, N.A., and **PRIORITY ONE CREDIT UNION OF FLORIDA,**
Appellees.

No. 4D17-2285

[February 27, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Eli Breger, Judge; L.T. Case No. 502016CA004740XXXXMB.

Allan L. Hoffman of Hoffman & Hoffman, P.A., West Palm Beach (withdrawn as counsel after filing brief), for appellants.

Shawn R. Horwick of Ritter Chusid, LLP, Coral Springs, for appellee U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust.

LEVINE, J.

Appellants appeal a final summary judgment on appellee U.S. Bank Trust's claims for reformation of mortgage and equitable subrogation. Appellants challenge both the merits of the equitable subrogation claim and the amount of the final summary judgment. As to the merits of the equitable subrogation claim, we affirm. However, we reverse in part because issues of fact remain as to the amount owed on the mortgage.

A husband and wife co-signed a mortgage in 2001. However, when they refinanced in 2003 and used $316,653.96 of the funds received to pay off the 2001 note, the wife did not sign the new refinance note and mortgage. The bank later sued seeking an equitable subrogation lien for the amount loaned to appellants in the refinance and asked the court to amend the new note and mortgage to include the signature of the wife. The trial court granted the bank an equitable subrogation lien for the full payoff amount, $316,653.96. It then foreclosed the lien, leading to a post-interest

judgment of $614,560.28 against appellants.

Appellants challenge the trial court's decision to grant an equitable subrogation lien, arguing that such a lien would be appropriate only if the bank could show fraud when the wife's name was left off the refinance documents. This argument is without merit. Contrary to appellants' assertions, fraud or egregious misconduct is not a prerequisite or requirement to the entry of an equitable subrogation lien. *See Flinn v. Doty*, 214 So. 3d 683, 685 (Fla. 4th DCA 2017) (observing that the purpose of the equitable lien doctrine is to prevent unjust enrichment). Because the bank could demonstrate that appellants benefited from the funds of the refinance, no showing of fraud or misconduct would be required and thus the trial court properly imposed an equitable subrogation lien.

Appellants also challenge the amount of the lien. Contrary to the bank's assertion, appellants preserved their damages argument for appeal by timely filing a motion for rehearing below. *See Matyjaszek v. Matyjaszek*, 255 So. 3d 372, 374 n.1 (Fla. 4th DCA 2018) (holding that an error appearing for the first time on the face of a final judgment is properly preserved by the filing of a motion for rehearing "or some other appropriate motion") (quoting *Williams v. Williams*, 152 So. 3d 702, 704 (Fla. 1st DCA 2014)). Our review is de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

The evidence introduced by the parties below left open a question as to how much appellants owed on the mortgage. Specifically, evidence introduced by the bank offered a different outstanding balance than what was reflected in the final judgment. Viewed "in the light most favorable to the non-moving party," this evidence created an issue of material fact. *See Fla. Dep't of Health v. Allan J. Dinnerstein, M.D., P.A.*, 78 So. 3d 26, 29 (Fla. 4th DCA 2011).

Under such circumstances, summary judgment was not proper as to the damages issue. *See Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985) ("A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."). We affirm the trial court's entry of judgment but reverse for the trial court to determine how much appellants owe on the mortgage.

Affirmed in part, reversed in part, and remanded.

WARNER and DAMOORGIAN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FIRST CHURCH OF THE NAZARENE OF GAINESVILLE, FLORIDA, INC., and **FLORIDA DISTRICT CHURCH OF THE NAZARENE, INC.,**
Appellants,

v.

SITE CONCEPTS, INC.,
Appellee.

No. 4D18-2846

[February 27, 2019]

Appeal of a non-final order from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; William L. Roby, Judge; L.T. Case No. 18-639-CA.

E. Blake Paul and Nicholas L. Sellars of Peterson & Myers, P.A., Lakeland, for appellants.

Tim B. Wright of Wright, Ponsoldt & Lozeau Trial Attorneys, L.L.P., Stuart, for appellee.

PER CURIAM.

We reverse an order denying a motion to dismiss or transfer venue.

Appellants are two churches. One is located in Alachua County; the other is in Polk County. The lawsuit below involves a cell phone tower located on church property in Alachua County. Appellee, Site Concepts, Inc. ("SCI"), is located in Martin County. SCI entered into a management agreement with the Alachua church to provide various services regarding the cell phone tower.

SCI filed a four-count complaint in Martin County setting forth breach of contract and implied contract claims against the Alachua church and two tortious interference counts against the Polk church. One of the claims of breach was that the Alachua church failed to cooperate in renegotiating a lease with Verizon by rejecting Verizon's offer to extend the term of the lease. The churches moved to dismiss or transfer the case for improper venue. SCI argued that venue was proper in Martin County

because it was entitled to liquidated damages payable in Martin County. The circuit court denied the motion.

A plaintiff may select the venue and that selection will not be disturbed as long as the selection is one of the alternatives in the venue statute. *Florida Gamco, Inc. v. Fontaine*, 68 So. 3d 923, 928 (Fla. 4th DCA 2011). A defendant contesting a plaintiff's facially proper venue selection has the burden of proving the selection is improper and must establish where venue actually lies. *Id.* Once a defendant has challenged venue with an affidavit controverting a plaintiff's venue allegation, the burden shifts to the plaintiff to prove the venue selection is proper. *Id.*

> When a complaint alleges a breach of contract for failing to pay money due and the contract does not specify where payment is to be made, the place of payment rule provides for venue in the county where the creditor resides. However, the place of payment rule does not apply when the damages sought in the breach of contract action are unliquidated. Damages are unliquidated if the complaint does not seek recovery of a specific sum and the damages must instead be determined through the presentation of evidence.

Patterson v. Teague Fin. Group, Inc., 135 So. 3d 573, 574 (Fla. 2d DCA 2014) (internal citations omitted). It is well-settled that

> [d]amages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law. . . . [D]amages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment.

Bowman v. Kingsland Dev., Inc., 432 So. 2d 660, 662-63 (Fla. 5th DCA 1983) (internal citations omitted); *see also Bodygear Activewear, Inc. v. Counter Intelligence Servs.*, 946 So. 2d 1148 (Fla. 4th DCA 2006).

The damages sought by the complaint are mostly unliquidated. We note that the written management agreement does not provide for payments to be made to SCI in Martin County; rather, it calls for SCI to collect monies, deduct a 10% fee, and to remit payment to the Alachua church. Under the complaint, the exact amount to which SCI is entitled, if any, cannot be determined from the pleadings, but requires the taking

of evidence. The damages suffered from the church's refusal to cooperate in renewing the Verizon lease, and the value of any services provided by SCI under the implied contract claim, are not fixed amounts that leap out from the face of the complaint. Like most tort claims, the intentional interference claims do not involve liquidated amounts.

Because the damages are unliquidated, the place of payment rule does not apply, and venue was improper in Martin County. We reverse the order of the circuit court and remand with directions to transfer venue to Alachua County. *See* § 47.011, Fla. Stat. (2018) (stating that "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located."); *Morales Sand & Soil, L.L.C. v. Kendall Props. & Invs.*, 923 So. 2d 1229, 1232 (Fla. 4th DCA 2006); *Magic Wok Int'l, Inc. v. Li*, 706 So. 2d 372, 374 (Fla. 5th DCA 1998).

GROSS, LEVINE and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

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

DARDEN RESTAURANTS, INC.
AND GMRI, INC.,

Appellants,

v. Case No. 5D16-4049

RICK SINGH, AS ORANGE COUNTY
PROPERTY APPRAISER AND
DEPARTMENT OF REVENUE,

Appellees.

_____/

Opinion filed March 1, 2019

Appeal from the Circuit Court
for Orange County,
Lawrence Kirkwood, Senior Judge.

Robert E.V. Kelley, Jr., of Hill, Ward &
Henderson, P.A., Tampa, and Nicholas A.
Shannin, of Shannin Law Firm, P.A.,
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Kenneth P. Hazouri, of de Beaubien,
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Ashley Moody, Attorney General, and
Robert P. Elson, Assistant Attorney
General, Office of the Attorney General
Revenue Litigation Bureau, Tallahassee,
for Appellee Leon M. Biegalski, as
Executive Director of the Florida
Department of Revenue.

Chris W. Altenbernd of Banker Lopez Gassler, P.A., and Joseph H. Lang, Jr., of Carlton Fields Jorden Burt, P.A., Tampa, Amicus Curiae for Chamber of Commerce of the United States of America, the Restaurant Law Center, and the Florida Restaurant & Lodging Association.

Robert S. Goldman, of Dean, Mead & Dunbar, Tallahassee, Amicus Curiae for Florida Chamber of Commerce, Inc.

Gaylord A. Wood, Jr., of Wood & Stuart, P.A., Bunnell, Amicus Curiae for Larry Bartlett, as Volusia County Property Appraiser.

Loren E. Levy, of The Levy Law Firm, Tallahassee, Amicus Curiae for The Property Appraisers' Association of Florida, Inc.

EVANDER, C.J.,

Darden Restaurants, Inc. and GMRI, Inc. (collectively "Darden") appeal a final judgment that vacated the Value Adjustment Board's ("VAB") rulings and reinstated the Orange County Property Appraiser's ("Property Appraiser") 2013 and 2014 tax assessments on tangible personal property ("TPP")[1] located in Darden's corporate headquarters. In accepting the Property Appraiser's assessments, the trial court determined that the Property Appraiser was not required to present competent,

[1] Tangible personal property is defined in section 192.001(11)(d), Florida Statutes (2013), as "all goods, chattels, and other articles of value (but does not include the vehicular items enumerated in s. 1(b), Art. VII of the State Constitution and elsewhere defined) capable of manual possession and whose chief value is intrinsic to the article itself."

substantial evidence that its appraisal methodology complied with professionally accepted appraisal practices. Rather, in setting forth the legal standards governing "fair market value determination" in its final judgment, the trial court cited to language from *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85, 89 (Fla. 2002), that "[t]he property appraiser's determination of assessment value is an exercise of administrative discretion within the officer's field of expertise." The *Mazourek* decision preceded the 2009 amendment to section 194.301, Florida Statutes, where the Legislature articulated that the value of property must be determined by an appraisal methodology that met the criteria of section 193.011 and professionally accepted appraisal practices. Because the trial court did not comply with section 194.301(2)(b)'s requirement that its assessment must be based on "competent, substantial evidence of value in the record which cumulatively meets the criteria of s. 193.011 and professionally accepted appraisal practices," we reverse.

In 2009, Darden constructed a new corporate headquarters facility in Orange County. The three-story, 469,000 square foot facility employed over one thousand people providing support for Darden's restaurants throughout the country. The facility contains a large amount of TPP, including computers, office furniture, fitness center equipment, test kitchen equipment, solar panels, signage, an alarm system, and a music system. The value of the TPP for 2013 and 2014 is the subject of the parties' litigation.[2]

In 2013, Darden filed a TPP tax return estimating the current fair market value of its TPP to be $20,503,172. However, the Property Appraiser valued Darden's TPP for

[2] Pursuant to section 192.042(2), the valuation date for both years was January 1. § 192.042(2), Fla. Stat. (2013).

2013 at $29,033,332, or $8,530,160 more than Darden's estimate. In 2014, Darden filed a TPP tax return estimating the current fair market value of its TPP to be $18,217,701, while the Property Appraiser valued it at $27,424,505 or $9,206,804 more than Darden's estimate. Darden timely challenged the Property Appraiser's valuations for both years by filing petitions with the VAB. In each case, the VAB sided with Darden and reduced the Property Appraiser's assessment.

The Property Appraiser timely challenged the VAB's decisions by filing complaints in the circuit court.[3] The two actions were consolidated and a multi-day, nonjury, trial took place, in which both sides presented expert witness testimony. During the trial, the trial court expressly rejected Darden's argument that the Property Appraiser was required to show that its appraisal methodology complied with professionally accepted appraisal practices. Subsequently, the trial court entered a final judgment reinstating the Property Appraiser's original assessments for both years. After the denial of Darden's motion for rehearing, this appeal followed.

Article VII, section 4 of the Florida Constitution directs the Legislature, subject to certain provisos and exceptions, to prescribe regulations "which shall secure a just valuation of all property for ad valorem taxation." The phrase "just valuation" has been construed to mean "fair market value." *See Mazourek*, 831 So. 2d at 88 (citing *Walter v. Schuler*, 176 So. 2d 81, 85–86 (Fla. 1965)); *see also* § 192.001(2), Fla. Stat. (2013)

[3] Section 194.036, Florida Statutes, states, in part, that if the property appraiser disagrees with the VAB decision, it "may appeal the decision to the circuit court." "While this process is referred to as an 'appeal' of the board's decision, actions brought in the circuit court pursuant to . . . section 194.036, are original actions, not appeals." *Crossings At Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 801 (Fla. 2008) (citing *Williams v. Law*, 368 So. 2d 1285, 1286 (Fla. 1979)).

(defining "assessed value of property" as annual determination of the "just or fair market value" of an item or property). Fair market value is "the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." *Smith v. Krosschell*, 937 So. 2d 658, 662 (Fla. 2006) (citing *Walter*, 176 So. 2d at 85–86); *see also* Fla. Admin. Code R. 12D-1.002(2) (defining just value).

Section 194.301 provides that in proceedings before the VAB or the circuit court, the value of property must be determined by an appraisal methodology that complies with the criteria set forth in section 193.011[4] and with professionally accepted appraisal practices:

> (1) In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment of value, the property appraiser's assessment is presumed correct if the appraiser proves by a preponderance of the evidence that the assessment was arrived at by complying with s. 193.011, any other applicable statutory requirements relating to classified use values or assessment caps, and professionally accepted appraisal practices, including mass appraisal standards, if appropriate. However, a taxpayer who challenges an assessment is entitled to a determination by the value adjustment board or court of the appropriateness of the appraisal methodology used in making the assessment. *The value of property must be determined by an appraisal methodology that complies with the criteria of s. 193.011 and professionally accepted appraisal practices. The provisions of this subsection preempt any prior case law that is inconsistent with this subsection.*
>
> (2) In an administrative or judicial action in which an ad valorem tax assessment is challenged, the burden of proof is on the party initiating the challenge.
>
> (a) If the challenge is to the assessed value of the property, the party initiating the challenge has the burden of

[4] Darden does not dispute that the Property Appraiser considered the criteria set forth in section 193.011.

> proving by a preponderance of the evidence that the assessed value:
>
> 1. Does not represent the just value of the property after taking into account any applicable limits on annual increases in the value of the property;
>
> 2. Does not represent the classified use value or fractional value of the property if the property is required to be assessed based on its character or use; or
>
> 3. Is arbitrarily based on appraisal practices that are different from the appraisal practices generally applied by the property appraiser to comparable property within the same county.
>
> (b) If the party challenging the assessment satisfies the requirements of paragraph (a), the presumption provided in subsection (1) is overcome, and the value adjustment board or *the court shall establish the assessment if there is competent, substantial evidence of value in the record which cumulatively meets the criteria of s. 193.011 and professionally accepted appraisal practices.* If the record lacks such evidence, the matter must be remanded to the property appraiser with appropriate directions from the value adjustment board or the court, and the property appraiser must comply with those directions.
>
> (c) If the revised assessment following remand is challenged, the procedures described in this section apply.
>
> (d) If the challenge is to the classification or exemption status of the property, there is no presumption of correctness, and the party initiating the challenge has the burden of proving by a preponderance of the evidence that the classification or exempt status assigned to the property is incorrect.

§ 194.301, Fla. Stat. (2013) (emphasis added).[5]

In an effort to fulfill the State's responsibility to secure a just valuation for ad valorem tax purposes and to provide uniform assessment throughout the state, *see*

[5] The statutes cited in this opinion were the same for both 2013 and 2014.

sections 195.0012 and 195.002, Florida Statutes (2013), Florida's Department of Revenue ("DOR") is required to establish and promulgate standard measures of value ("DOR Guidelines") to be used by property appraisers in all counties. *See* § 195.032, Fla. Stat. (2013). These standard measures of value "shall assist the property appraiser in the valuation of property and be deemed prima facie correct, but shall not be deemed to establish the just value of any property." *Id.* For purposes of this appeal, we accept the Property Appraiser's suggestion, without so holding, that the DOR Guidelines are reflective of professionally accepted appraisal practices to the extent that they specifically direct certain action by the Property Appraiser.

There are three recognized approaches to property valuations: cost, income, and market or sales-comparison. *Havill v. Scripps Howard Cable Co.*, 742 So. 2d 210, 212–13 (Fla. 1998). In the instant case, Darden and the Property Appraiser agreed that the income approach was not appropriate for valuing Darden's TPP. Darden's valuation expert utilized the market or sales-comparison approach in arriving at his valuation. By contrast, the Property Appraiser utilized a cost approach. Notably, Darden does not dispute that the use of a cost approach in the instant case was permissible under DOR Guidelines.

DOR Guidelines, which were admitted into evidence, recite that the "cost approach to value" involves the consideration of the reproduction or replacement cost of the subject TPP less the extent to which the value has been reduced by deterioration and obsolescence:

> *The **Cost Approach** to value involves consideration of*:
>
> (A) The reproduction or *replacement cost is the cost of replacing reproducible property with new property of similar*

> *utility, or of reproducing the property at its present site and at present price level, less the extent to which the value has been reduced by deterioration and obsolescence.*
>
> (B) The historical or original cost is sometimes used as a starting point to the calculation of value. *An appropriate appraisal depreciation rate reflecting economic, physical, and functional obsolescence must be determined and applied, as well as an appropriate trending factor to capture price changes from date of acquisition.* (This approach may not apply to all assets. See Section G, Replacement Cost New Less Depreciation Calculation.)
>
> (C) *The appraiser should consider the cost of any asset at the appropriate level of trade-the manufacturing level, the wholesale level, and the retail level-and value the property according to the trade level for which it is utilized.* Property normally increases in value as it progresses from the manufacturers' level (the lowest market value) to the retail level of trade (the highest level of trade). At each level a value is added to calculate a selling price which recovers for the current owner all direct costs to manufacture and install and indirect costs of overhead and profit. For example, the trade level concept must be considered when a manufacturer, who is operating at more than one trade level, transfers property to a subsidiary without the normal profit and costs. In order to maintain equity and uniformity in assessments of comparable property, the asset should be valued at a cost had the asset been acquired in an arm's length transaction from an outside supplier.

Fla. Dep't of Rev., S*tandard Measures of Value: Tangible Personal Property Appraisal Guidelines* 40 (1997) (emphasis added).

Here, the Property Appraiser presented sufficient evidence that its determination of (1) the reproduction or replacement cost of Darden's TPP, and (2) the extent which its value has been reduced by deterioration, was consistent with DOR Guidelines. Thus, our focus is on the Property Appraiser's calculation of the reduction of value of Darden's TPP resulting from obsolescence.

The DOR Guidelines reflect that obsolescence should be considered when appraising any type of property. Obsolescence is defined as the reduction in value due to technological changes or innovation, changes in demand for a product, or other causes:

> When the loss in value is due to technological change or innovation, it is usually referred to as *functional obsolescence*. It can be recognized by a lack of utility in the property, the location of the property, or inadequate capacity in use. Functional obsolescence can sometimes be overcome by remodeling or reconditioning.
>
> When the loss in value is due to change in product, demand, or location, it is customarily referred to as *economic obsolescence*. This type of obsolescence is brought about by external factors and cannot be overcome. Obsolescence of personal property is not too difficult to recognize, but it is difficult to accurately measure. Adequate market data to measure obsolescence cannot always be found for all types of personal property.

Id. at 41 (emphasis added). DOR Guidelines direct the Property Appraiser to "look to the market" for any change of value resulting from obsolescence, and specifically recite that "[t]he appraiser should always consider what an informed purchaser would be willing to pay for the property as an installed operating unit when employed at its highest and best use." *Id.* Significantly, the DOR Guidelines do not specify the manner in which obsolescence is to be calculated so as to ultimately determine just valuation.

At trial, the Property Appraiser presented evidence that it made continuous efforts to "look to the market" for changing values in TPP from obsolescence by having weekly meetings of appraisers and auditors, going into the field, studying sales and life years of assets, utilizing its own Life Assignment Guide and Present Worth Table, and making constant adjustments to those tables. Critically, the Property Appraiser did not present

testimony that the methodology it utilized in calculating obsolescence complied with professionally accepted appraisal practices.

In rebuttal, Darden presented expert testimony that the Property Appraiser's methodology was not consistent with professionally accepted appraisal practices. Darden's expert suggested, inter alia, that the Property Appraiser had failed to sufficiently examine comparable sales when "looking to the market."

Pursuant to section 194.301(2)(a), the Property Appraiser, as the party challenging the VAB assessment, had the burden of proving by a preponderance of the evidence that the VAB's assessed value did not represent the just value of Darden's TPP. We conclude that there was competent, substantial evidence to support the trial court's determination that the VAB's valuations of Darden's TPP for 2013 and 2014, respectively, were incorrect and less than the just or fair market value.

However, because the Property Appraiser failed to present evidence that it calculated obsolescence in accordance with professionally accepted appraisal practices, we conclude that the Property Appraiser failed to meet its additional burden, set forth in section 194.301(2)(b), of showing that there was competent, substantial evidence in the record to support the trial court's valuation of Darden's TPP for 2013 and 2014. That section expressly requires that the value found by the trial court be based on evidence in the record that established compliance with professionally accepted appraisal practices.[6]

[6] Our opinion should not be construed to require the Property Appraiser to present an independent, or outside, expert witness to testify that its valuations comply with professionally accepted appraisal practices. Furthermore, we recognize, as did the parties below, that TPP appraisers must exercise their professional judgment and discretion throughout the appraisal process. However, section 194.301 reflects an effort by the Legislature to ensure that they exercise that professional judgment and discretion in accordance with professionally accepted appraisal practices.

See also Crapo v. Vulcan Materials Co., No. 012013CA001001, 2016 WL 4366935 (Fla. 8th Cir. Ct. July 11, 2016) (finding that where property appraiser did not account for economic obsolescence in accordance with professionally accepted appraisal practices, property appraiser failed to meet its burden under section 194.301).

Section 194.301(2)(b) further provides that where the record lacks such evidence, the matter must be remanded to the Property Appraiser with appropriate directions. Here, the trial court should have remanded this cause to the Property Appraiser with directions that in determining the just valuation of Darden's TPP for 2013 and 2014, obsolescence must be calculated in accordance with professionally accepted appraisal practices. Accordingly, we reverse and remand for further proceedings consistent with this opinion.[7]

REVERSED and REMANDED.

GROSSHANS and SASSO, JJ., concur.

[7] We find the other issues raised on appeal by Darden to be without merit.