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Obduskey v. McCarthy & Holthus LLP, Case No. 17–1307 (2019).
Non-judicial mortgage foreclosures are not subject to the requirements of the Fair Debt Collection Practices Act, 15 U. S. C. §1692a(6), as the Act does not apply to those merely engaged in enforcement of security interests.

Managed Care of North America, Inc. v. Florida Healthy Kids Corporation, Case No. 1D16-5700 (Fla. 1st DCA 2019).
A party is entitled to the protection of Florida Statute section 812.081(1)(c) (trade secrets are not subject to Florida's open records laws) once it proves certain information is used in the operation of its business, that the information provides an advantage or the opportunity for an advantage, and that measures are taken to prevent its disclosure; there is no need to independently prove the information's value as such information is deemed "of value" under the statute.

Topalli v. Feliciano, Case No. 2D18-617 (Fla. 2d DCA 2019).
Although describing the process as "problematic," the Second District declines to prohibit the practice of granting motions for continuance conditioned upon a movant paying the fees and costs of the non-movant.

Kendall Healthcare Group, Ltd. v. Madrigal, Case No. 3D18-132 (Fla. 3d DCA 2019).
A trial court's almost verbatim adoption of one party's proposed final judgment does not demonstrate an improper delegation of the trial court's independent judgment when the record clearly reflects the trial court participated in the trial, asked meaningful questions, provided both sides the opportunity to comment, and appeared to understand the issues in the case.

MTGLQ Investors, L.P. v. Davis, Case No. 4D18-1618 (Fla. 4th DCA 2019).
Certified mail is deemed "first class mail" for purposes of contractual requirements that notices be sent via "first class mail."

Crawford v. Federal National Mortgage Association, Case No. 5D17-307 (Fla. 5th DCA 2019).
A lender who fails to obtain a spouse's signature for a mortgage on homestead property may, under the principles of Palm Beach Sav. & Loan Ass'n v. Fishbein, 619 So. 2d 267 (Fla. 1993), be entitled to an equitable lien on the homestead property if necessary to avoid unjust enrichment.

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Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

OBDUSKEY *v.* MCCARTHY & HOLTHUS LLP

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

No. 17–1307. Argued January 7, 2019—Decided March 20, 2019

Law firm McCarthy & Holthus LLP was hired to carry out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. McCarthy sent Obduskey correspondence related to the foreclosure. Obduskey responded with a letter invoking a federal Fair Debt Collection Practices Act (FDCPA or Act) provision, 15 U. S. C. §1692g(b), which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, McCarthy initiated a nonjudicial foreclosure action. Obduskey sued, alleging that McCarthy failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that McCarthy was not a "debt collector" within the meaning of the FDCPA, and the Tenth Circuit affirmed.

Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of §1692f(6). Pp. 6–14.

(a) The FDCPA regulates "'debt collector[s].'" §1692a(6). Relevant here, the definition of debt collector has two parts. The Act first sets out the primary definition of the term "debt collector": a "'debt collector,'" it says, is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." *Ibid.* The Act then sets forth the limited-purpose definition, which states that "[f]or the purpose of section 1692f(6) . . . [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." It is undisputed that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in §1692f(6). But only if McCarthy

falls within the primary definition's scope do the Act's other provisions, including those at issue here, apply. Pp. 6–7.

(b) Three considerations lead to the conclusion that McCarthy is not subject to the Act's main coverage. *First*, and most decisive, is the text of the Act itself. The limited purpose definition says that "[*f*]*or the purpose of section 1692f(6)*" a debt collector "*also* includes" a business, like McCarthy, "the principal purpose of which is the enforcement of security interests." §1692a(6) (emphasis added). This phrase, particularly the word "also," strongly suggests that security-interest enforcers do not fall within the scope of the primary definition. If they did, the limited purpose definition would be superfluous. By contrast, under a reading that gives effect to every word of the limited-purpose definition, the FDCPA's debt-collector-related prohibitions (with the exception of §1692f(6)) do not apply to those who, like McCarthy, are engaged in no more than security-interest enforcement. *Second*, Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. *Third*, this Court's reading is supported by legislative history, which suggests that the Act's present language was the product of a compromise between competing versions of the bill, one which would have totally excluded security-interest enforcement from the Act, and another which would have treated it like ordinary debt collection. Pp. 7–10.

(c) Obduskey's counterarguments are unconvincing. *First*, he suggests that the limited-purpose definition is not superfluous because it was meant to cover "repo men"—a category of security-interest enforcers who he says would not otherwise fall within the primary definition of "debt collector." The limited-purpose definition, however, speaks broadly of "the enforcement of security interests," §1692a(6), not "the enforcement of security interests *in personal property*." *Second*, Obduskey claims that the Act's venue provision, §1692i(a), which covers legal actions brought by "debt collectors" to enforce interests in real property, only makes sense if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. The venue provision, however, does nothing to alter the definition of a debt collector. *Third*, Obduskey argues that McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt. Here, however, the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest, and the Act's (partial) exclusion of "the enforcement of security interests" must also exclude the legal means required to do so. *Finally*, Obduskey fears

that this Court's decision will permit creditors and their agents to engage in a host of abusive practices forbidden by the Act. But the Court must enforce the statute that Congress enacted, and Congress is free expand the FDCPA's reach if it wishes. Pp. 10–14.

879 F. 3d 1216, affirmed.

BREYER, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–1307

DENNIS OBDUSKEY, PETITIONER *v.* MCCARTHY & HOLTHUS LLP

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

[March 20, 2019]

JUSTICE BREYER delivered the opinion of the Court.

The Fair Debt Collection Practices Act regulates "'debt collector[s].'" 15 U. S. C. §1692a(6); see 91 Stat. 874, 15 U. S. C. §1692 *et seq.* A "'debt collector,'" the Act says, is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." §1692a(6). This definition, however, goes on to say that "[f]or the purpose of section 1692f(6)" (a separate provision of the Act), "[the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The question before us concerns this last sentence. Does it mean that one principally involved in "the enforcement of security interests" is *not* a debt collector (except "[f]or the purpose of section 1692f(6)")? If so, numerous other provisions of the Act do not apply. Or does it simply reinforce the fact that those principally involved in the enforcement of security interests are subject to §1692f(6) in addition to the Act's other provisions?

In our view, the last sentence does (with its §1692f(6)

exception) place those whose "principal purpose . . . is the enforcement of security interests" outside the scope of the primary "debt collector" definition, §1692a(6), where the business is engaged in no more than the kind of security-interest enforcement at issue here—nonjudicial foreclosure proceedings.

I

A

When a person buys a home, he or she usually borrows money from a lending institution, such as a bank. The resulting debt is backed up by a "mortgage"—a security interest in the property designed to protect the creditor's investment. Restatement (Third) of Property: Mortgages §1.1 (1996) (Restatement). (In some States, this security interest is known as a "deed of trust," though for present purposes the difference is immaterial. See generally *ibid.*) The loan likely requires the homeowner to make monthly payments. And if the homeowner defaults, the mortgage entitles the creditor to pursue foreclosure, which is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 B. Dunaway, Law of Distressed Real Estate §15:1 (2018) (Dunaway).

Every State provides some form of *judicial* foreclosure: a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds. *Id.*, §16:1. These procedures offer various protections for homeowners, such as the right to notice and to protest the amount a creditor says is owed. *Id.*, §§16:17, 16:20; Restatement §8.2. And in the event that the foreclosure sale does not yield the full amount due, a creditor pursuing a judicial foreclosure may sometimes obtain a deficiency judgment, that is, a judgment against the homeowner for the unpaid balance of a debt. National Consumer Law Center (NCLC), Foreclosures and Mortgage Servicing §§12.3.1–2 (5th ed. 2014).

About half the States also provide for what is known as *nonjudicial* foreclosure, where notice to the parties and sale of the property occur outside court supervision. 2 Dunaway §17:1. Under Colorado's form of nonjudicial foreclosure, at issue here, a creditor (or more likely its agent) must first mail the homeowner certain preliminary information, including the telephone number for the Colorado foreclosure hotline. Colo. Rev. Stat. §38–38–102.5(2) (2018). Thirty days later, the creditor may file a "notice of election and demand" with a state official called a "public trustee." §38–38–101. The public trustee records this notice and mails a copy, alongside other materials, to the homeowner. §§38–38–102, 38–38–103. These materials give the homeowner information about the balance of the loan, the homeowner's right to cure the default, and the time and place of the foreclosure sale. §§38–38–101(4), 38–38–103. Assuming the debtor does not cure the default or declare bankruptcy, the creditor may then seek an order from a state court authorizing the sale. Colo. Rule Civ. Proc. 120 (2018); see Colo. Rev. Stat. §38–38–105. (Given this measure of court involvement, Colorado's "nonjudicial" foreclosure process is something of a hybrid, though no party claims these features transform Colorado's nonjudicial scheme into a judicial one.) In court, the homeowner may contest the creditor's right to sell the property, and a hearing will be held to determine whether the sale should go forward. Colo. Rules Civ. Proc. 120(c), (d).

If the court gives its approval, the public trustee may then sell the property at a public auction, though a homeowner may avoid a sale altogether by curing the default up until noon on the day before. Colo. Rev. Stat. §§38–38–110, 38–38–104(VI)(b). If the sale goes forward and the house sells for more than the amount owed, any profits go first to lienholders and then to the homeowner. §38–38–111. If the house sells for less than what is owed, the

creditor cannot hold the homeowner liable for the balance due unless it files a separate action in court and obtains a deficiency judgment. See §38–38–106(6); *Bank of America* v. *Kosovich*, 878 P. 2d 65, 66 (Colo. App. 1994). Other States likewise prevent creditors from obtaining deficiency judgments in nonjudicial foreclosure proceedings. Restatement §8.2. And in some States, pursuing nonjudicial foreclosure bars or curtails a creditor's ability to obtain a deficiency judgment altogether. NCLC, Foreclosures and Mortgage Servicing §12.3.2.

B

In 2007, petitioner Dennis Obduskey bought a home in Colorado with a $329,940 loan secured by the property. About two years later, Obduskey defaulted.

In 2014, Wells Fargo Bank, N. A., hired a law firm, McCarthy & Holthus LLP, the respondent here, to act as its agent in carrying out a nonjudicial foreclosure. According to the complaint, McCarthy first mailed Obduskey a letter that said it had been "instructed to commence foreclosure" against the property, disclosed the amount outstanding on the loan, and identified the creditor, Wells Fargo. App. 37–38; see *id.*, at 23. The letter purported to provide notice "[p]ursuant to, and in compliance with," both the Fair Debt Collection Practices Act (FDCPA) and Colorado law. *Id.*, at 37. (The parties seem not to dispute that this and other correspondence from McCarthy was required under state law. Because that is a question of Colorado law not briefed by the parties before us nor passed on by the courts below, we proceed along the same assumption.) Obduskey responded with a letter invoking §1692g(b) of the FDCPA, which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor.

Yet, Obduskey alleges, McCarthy neither ceased collect-

ing on the debt nor provided verification. App. 22–23. Instead, the firm initiated a nonjudicial foreclosure action by filing a notice of election and demand with the county public trustee. *Ibid.*; see *id.*, at 39–41. The notice stated the amount due and advised that the public trustee would "sell [the] property for the purpose of paying the indebtedness." *Id.*, at 40.

Obduskey then filed a lawsuit in federal court alleging that the firm had violated the FDCPA by, among other things, failing to comply with the verification procedure. *Id.*, at 29. The District Court dismissed the suit on the ground that the law firm was not a "debt collector" within the meaning of the Act, so the relevant Act requirements did not apply. *Obduskey* v. *Wells Fargo*, 2016 WL 4091174, *3 (D Colo., July 19, 2016).

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal, concluding that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under" the Act. *Obduskey* v. *Wells Fargo*, 879 F. 3d 1216, 1223 (2018).

Obduskey then petitioned for certiorari. In light of different views among the Circuits about application of the FDCPA to nonjudicial foreclosure proceedings, we granted the petition. Compare *ibid.* and *Vien-Phuong Thi Ho* v. *ReconTrust Co.*, *NA*, 858 F. 3d 568, 573 (CA9 2016) (holding that an entity whose only role is the enforcement of security interests is not a debt collector under the Act), with *Kaymark* v. *Bank of America*, *N. A.*, 783 F. 3d 168, 179 (CA3 2015) (holding that such an entity is a debt collector for the purpose of all the Act's requirements), *Glazer* v. *Chase Home Fin. LLC*, 704 F. 3d 453, 461 (CA6 2013) (same), and *Wilson* v. *Draper & Goldberg*, *P. L. L. C.*, 443 F. 3d 373, 376 (CA4 2006) (same).

II

A

The FDCPA's definitional section, 15 U. S. C. §1692a, defines a "debt" as:

> "*any obligation* or alleged obligation of a consumer *to pay money* arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." §1692a(5) (emphasis added).

The Act then sets out the definition of the term "debt collector." §1692a(6). The first sentence of the relevant paragraph, which we shall call the primary definition, says that the term "debt collector":

> "means any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another." *Ibid.*

The third sentence, however, provides what we shall call the limited-purpose definition:

> "For the purpose of section 1692f(6) [the] term [debt collector] also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." *Ibid.*

The subsection to which the limited-purpose definition refers, §1692f(6), prohibits a "debt collector" from:

> "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
>
> "(A) there is no present right to possession of the property . . . ;
>
> "(B) there is no present intention to take possession of the property; or

"(C) the property is exempt by law from such dispossession or disablement."

The rest of the Act imposes myriad other requirements on debt collectors. For example, debt collectors may not use or threaten violence, or make repetitive annoying phone calls. §1692d. Nor can debt collectors make false, deceptive, or misleading representations in connection with a debt, like misstating a debt's "character, amount, or legal status." §1692e. And, as we have mentioned, if a consumer disputes the amount of a debt, a debt collector must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. §1692g(b).

No one here disputes that McCarthy is, by virtue of its role enforcing security interests, at least subject to the specific prohibitions contained in §1692f(6). The question is whether *other* provisions of the Act apply. And they do if, but only if, McCarthy falls within the scope of the Act's primary definition of "debt collector."

B

Three considerations lead us to conclude that McCarthy is not subject to the main coverage of the Act.

First, and most decisive, is the text of the Act itself. As a preliminary matter, we concede that if the FDCPA contained *only* the primary definition, a business engaged in nonjudicial foreclosure proceedings would qualify as a debt collector for all purposes. We have explained that a home loan is an obligation to pay money, and the purpose of a mortgage is to secure that obligation. See *supra*, at 2. Foreclosure, in turn, is "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 Dunaway §15:1. In other words, foreclosure is a means of collecting a debt. And a business pursuing nonjudicial foreclosures would, under the capacious language of the Act's primary definition, be one that "regularly collects or attempts to collect, directly or indirectly, debts."

§1692a(6).

It is true that, as McCarthy points out, nonjudicial foreclosure does not seek "a payment of money *from the debtor*" but rather from sale of the property itself. Brief for Respondent 17 (emphasis added). But nothing in the primary definition requires that payment on a debt come "from a debtor." The statute speaks simply of the "collection of any debts . . . owed or due." §1692a(6). Moreover, the provision sweeps in both "direc[t]" and "indirec[t]" debt collection. *Ibid.* So, even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt.

The Act does not, however, contain only the primary definition. And the limited-purpose definition poses a serious, indeed an insurmountable, obstacle to subjecting McCarthy to the main coverage of the Act. It says that *"[f]or the purpose of section 1692f(6)"* a debt collector "*also* includes*"* a business, like McCarthy, "the principal purpose of which is the enforcement of security interests." §1692a(6) (emphasis added). This phrase, particularly the word "also," strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition. Otherwise why add this sentence at all?

It is logically, but not practically, possible that Congress simply wanted to emphasize that the definition of "debt collector" includes those engaged in the enforcement of security interests. But why then would Congress have used the word "also"? And if security-interest enforcers are covered by the primary definition, why would Congress have needed to say anything special about §1692f(6)? After all, §1692f(6), just like all the provisions applicable to debt collectors, would have already applied to those who enforce security interests. The reference to §1692f(6)

would on this view be superfluous, and we "generally presum[e] that statutes do not contain surplusage." *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006). By contrast, giving effect to every word of the limited-purpose definition narrows the primary definition, so that the debt-collector-related prohibitions of the FDCPA (with the exception of §1692f(6)) do *not* apply to those who, like McCarthy, are engaged in no more than security-interest enforcement.

Second, we think Congress may well have chosen to treat security-interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes. As Colorado's law makes clear, *supra*, at 3–4, state nonjudicial foreclosure laws provide various protections designed to prevent sharp collection practices and to protect homeowners, see 2 Dunaway §17:1. And some features of these laws are in tension with aspects of the Act. For example, the FDCPA broadly limits debt collectors from communicating with third parties "in connection with the collection of any debt." §1692c(b). If this rule were applied to nonjudicial foreclosure proceedings, then advertising a foreclosure sale—an essential element of such schemes—might run afoul of the FDCPA. Given that a core purpose of publicizing a sale is to attract bidders, ensure that the sale price is fair, and thereby protect the borrower from further liability, the result would hardly benefit debtors. See 2 Dunaway §17:4. To be sure, it may be possible to resolve these conflicts without great harm to either the Act or state foreclosure schemes. See *Heintz* v. *Jenkins*, 514 U. S. 291, 296–297 (1995) (observing that the FDCPA's protections may contain certain "implici[t] exception[s]"). But it is also possible, in light of the language it employed, that Congress wanted to avoid the risk of such conflicts altogether.

Third, for those of us who use legislative history to help

interpret statutes, the history of the FDCPA supports our reading. When drafting the bill, Congress considered a version that would have subjected security-interest enforcers to the full coverage of the Act. That version defined a debt collector as "any person who engages in any business the principal purpose of which is the collection of any debt *or enforcement of security interests*." S. 918, 95th Cong., 1st Sess., §803(f) (1977) (emphasis added). A different version of the bill, however, would have totally excluded from the Act's coverage "any person who enforces or attempts to enforce a security interest in real or personal property." S. 1130, 95th Cong., 1st Sess., §802(8)(E) (1977). Given these conflicting proposals, the Act's present language has all the earmarks of a compromise: The prohibitions contained in §1692f(6) will cover security-interest enforcers, while the other "debt collector" provisions of the Act will not.

These considerations convince us that, but for §1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act.

III

Obduskey makes several arguments to the contrary. But, on balance, we do not find them determinative.

First, Obduskey acknowledges that unless the limited-purpose definition is superfluous, it must make some kind of security-interest enforcer a "debt collector" who would not otherwise fall within the primary definition. Reply Brief 11–13. But, according to Obduskey, "repo men"—those who seize automobiles and other personal property in response to nonpayment—fit the bill. See Black's Law Dictionary 1493 (10th ed. 2014) (explaining that "repo" is short for "repossession," which means "retaking property; esp., a seller's retaking of goods sold on credit when the buyer has failed to pay for them"). This is so, he says, because repossession often entails only "limited communi-

cation" with the debtor, as when the repo man sneaks up and "tows a car in the middle of the night." Brief for Petitioner 25–26, and n. 13. And because, according to Obduskey, the language of §1692f(6), which forbids "[t]aking or threatening to take any nonjudicial action to effect *dispossession or disablement* of property," applies more naturally to the seizure of personal property than to nonjudicial foreclosure. (Emphasis added.)

But we do not see why that is so. The limited-purpose provision speaks broadly of "the enforcement of security interests," §1692a(6), not "the enforcement of security interests *in personal property*"; if Congress meant to cover only the repo man, it could have said so. Moreover, Obduskey's theory fails to save the limited-purpose definition from superfluity. As we have just discussed, *supra*, at 7–8, if the Act contained only the primary definition, enforcement of a security interest would at least be an indirect collection of a debt. The same may well be true of repo activity, a form of security-interest enforcement, as the point of repossessing property that secures a debt is to collect some or all of the value of the defaulted debt. And while Obduskey argues that the language of §1692f(6) fits more comfortably with repossession of personal property than nonjudicial foreclosure, we think it at least plausible that "threatening" to foreclose on a consumer's home without having legal entitlement to do so is the kind of "nonjudicial action" without "present right to possession" prohibited by that section. §1692f(6)(A). (We need not, however, here decide precisely what conduct runs afoul of §1692f(6).)

We are also unmoved by Obduskey's argument that repossession would not fall under the primary definition because it generally involves only limited communication with the debtor. For one thing, while some of the FDCPA's substantive protections apply where there has been a "communicat[ion]" with a consumer, see, *e.g.*,

§1692c, the primary definition of debt collector turns on the "collection of . . . debts," without express reference to communication, §1692a(6). For another, while Obduskey imagines a silent repo man striking in the dead of night, state law often requires communication with a debtor during the repossession process, such as notifying a consumer of a sale. NCLC, Repossessions §10.4 (9th ed. 2017).

Second, Obduskey points to the Act's venue provision, 15 U. S. C. §1692i(a), which states that "[a]ny *debt collector* who brings any legal action on a debt against any consumer shall . . . in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district" where the "property is located." (Emphasis added.) This provision, he says, makes clear that a person who *judicially* enforces a real-property-related security interest is a debt collector; hence, a person who *nonjudicially* enforces such an interest must also be a debt collector. Indeed, he adds, this subsection "only makes sense" if those who enforce security interests in real property are debt collectors subject to all prohibitions and requirements that come with that designation. Brief for Petitioner 21.

This argument, however, makes too much of too little. To begin with, the venue section has no direct application in this case, for here we consider *nonjudicial* foreclosure. And whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day. See 879 F. 3d, at 1221–1222 (noting that the availability of a deficiency judgment is a potentially relevant distinction between judicial and nonjudicial foreclosures).

More to the point, the venue provision does nothing to alter the definition of a debt collector. Rather, it applies whenever a "debt collector" brings a "legal action . . . to enforce an interest in real property." §1692i(a)(1). In

other words, the provision anticipates that a debt collector can bring a judicial action respecting real property, but it nowhere says that an entity is a debt collector *because* it brings such an action. Obduskey suggests that under our interpretation this provision will capture a null set. We think not. A business that qualifies as a debt collector based on *other* activities (say, because it "regularly collects or attempts to collect" unsecured credit card debts, §1692a(6)) would have to comply with the venue provision if it also filed "an action to enforce an interest in real property," §1692i(a)(1). Here, however, the only basis alleged for concluding that McCarthy is a debt collector under the Act is its role in nonjudicial foreclosure proceedings.

Third, Obduskey argues that even if "simply enforcing a security interest" falls outside the primary definition, McCarthy engaged in *more* than security-interest enforcement by sending notices that any ordinary homeowner would understand as an attempt to collect a debt backed up by the threat of foreclosure. Brief for Petitioner 15–16; see Reply Brief 13. We do not doubt the gravity of a letter informing a homeowner that she may lose her home unless she pays her outstanding debts. But here we assume that the notices sent by McCarthy were antecedent steps required under state law to enforce a security interest. See *supra*, at 4. Indeed, every nonjudicial foreclosure scheme of which we are aware involves notices to the homeowner. See 2 Dunaway §17:4 (describing state procedures concerning notice of sale). And because he who wills the ends must will the necessary means, we think the Act's (partial) exclusion of "the enforcement of security interests" must also exclude the legal means required to do so. This is not to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity

from the Act. But given that we here confront only steps required by state law, we need not consider what *other* conduct (related to, but not required for, enforcement of a security interest) might transform a security-interest enforcer into a debt collector subject to the main coverage of the Act.

Finally, Obduskey fears that our decision will open a loophole, permitting creditors and their agents to engage in a host of abusive practices forbidden by the Act. States, however, can and do guard against such practices, for example, by requiring notices, review by state officials such as the public trustee, and limited court supervision. See *supra*, at 3–4, 9. Congress may think these state protections adequate, or it may choose to expand the reach of the FDCPA. Regardless, for the reasons we have given, we believe that the statute exempts entities engaged in no more than the "enforcement of security interests" from the lion's share of its prohibitions. And we must enforce the statute that Congress enacted.

For these reasons, the judgment of the Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 17–1307

DENNIS OBDUSKEY, PETITIONER *v.* MCCARTHY & HOLTHUS LLP

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

[March 20, 2019]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion, which makes a coherent whole of a thorny section of statutory text. I write separately to make two observations: First, this is a close case, and today's opinion does not prevent Congress from clarifying this statute if we have gotten it wrong. Second, as the Court makes clear, "enforcing a security interest does not grant an actor blanket immunity from the" mandates of the Fair Debt Collection Practices Act (FDCPA), 15 U. S. C. §1692 *et seq*. See *ante*, at 13–14.

This case turns on two sentences that, put together, read in relevant part:

> "[1] The term 'debt collector' means any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts . . . . [2] For the purpose of section 1692f(6) of this title, such term also includes any person . . . in any business the principal purpose of which is the enforcement of security interests." §1692a(6).

As the Court recognizes, if the first sentence were the only text before us, nonjudicial foreclosure plainly would qualify as debt collection—after all, foreclosure itself "is a means of collecting a debt," *ante*, at 7, whether "directly or

indirectly," §1692a(6). That may be because a house can be sold—thus satisfying the debt with the proceeds—but it may also be because the initiation of a foreclosure itself sends a clear message: "[P]ay up or lose your house." Brief for Petitioner 17; see *Alaska Trustee, LLC* v. *Ambridge*, 372 P. 3d 207, 217–218 (Alaska 2016); *Glazer* v. *Chase Home Finance LLC*, 704 F. 3d 453, 461 (CA6 2013).

The problem for Obduskey's reading, as the Court explains, is the second sentence, which then becomes superfluous if all security-interest enforcement is already covered by sentence one. See *ante*, at 8–9. To be clear, there is a reasonable argument that the second sentence covers security-interest enforcers who are not already covered by the first sentence: Under this argument, those additional security-interest enforcers are "people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts," *Piper* v. *Portnoff Law Assoc., Ltd.*, 396 F. 3d 227, 236 (CA3 2005); see also *Alaska Trustee*, 372 P. 3d, at 219–220; *Glazer*, 704 F. 3d, at 463–464, such as "the repo man [who] sneaks up and 'tows a car in the middle of the night,'" *ante*, at 11. But, as the Court explains, that reading does not resolve the surplusage problem, because even such repossession agencies engage in a means of collecting debts "indirectly"—which means that they are similarly situated to entities pursuing nonjudicial foreclosures after all. See *ante*, at 10–12.

All the same, this is too close a case for me to feel certain that Congress recognized that this complex statute would be interpreted the way that the Court does today. While States do regulate nonjudicial foreclosures, see *ante*, at 9, the extent and method of those protections can vary widely, and the FDCPA was enacted not only "to eliminate abusive debt collection practices" but also "to promote consistent State action to protect consumers against debt collection abuses," §1692(e); see also §1692n (pre-empting

inconsistent state laws while exempting state consumer protections that are "greater than the protection provided by [the FDCPA]"). Today's opinion leaves Congress free to make clear that the FDCPA fully encompasses entities pursuing nonjudicial foreclosures and regulates security-interest enforcers like repossession agencies in only the more limited way addressed in §1692f(6). That too would be consistent with the FDCPA's broad, consumer-protective purposes. See §1692(e).

Separately, I note that the Court's opinion recognizes that the question before us involves "no more than the kind of security interest enforcement at issue here," *ante*, at 2, which means an entity that takes "only steps required by state law," *ante*, at 14. The Court rightly notes, therefore, that nothing in today's opinion is "to suggest that pursuing nonjudicial foreclosure is a license to engage in abusive debt collection practices like repetitive nighttime phone calls; enforcing a security interest does not grant an actor blanket immunity from the Act." *Ante*, at 13–14. Indeed, in addition to the unnecessary and abusive practices that the Court notes, I would see as a different case one in which the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following through. There would be a question, in such a case, whether such an entity was in fact a "business the principal purpose of which is the enforcement of security interests," see §1692a(6), or whether it was simply using that label as a stalking horse for something else.

Because the Court rightly cabins its holding to the kinds of good-faith actions presented here and because we are bound to apply Congress' statutes as best we can understand them, I concur in the Court's opinion.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-5700

MANAGED CARE OF NORTH AMERICA, INC.,

Appellant,

v.

FLORIDA HEALTHY KIDS CORPORATION and DELTA DENTAL INSURANCE COMPANY,

Appellees.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

March 20, 2019

M. K. THOMAS, J.

Managed Care of North America, Inc. ("MCNA"), seeks review of an order compelling disclosure of alleged trade secrets to a business rival. Because the trial court erred, as a matter of law, in application of section 812.081(1)(c), Florida Statutes, and portions of the order are not supported by competent, substantial evidence, we affirm in part, and reverse in part, for the reasons set forth below.

I. Factual and Procedural History

In late 2015, Florida Healthy Kids Corporation ("FHKC"), a non-profit corporation established by the State of Florida to facilitate children's dental care, began soliciting proposals from administrators of dental programs by issuing an Invitation to Negotiate ("ITN"). MCNA manages dental benefits for Medicaid participants and the Children's Health Insurance Program in Florida, among other states. MCNA and Delta Dental Insurance Company ("Delta"), a competitor, along with two other dental program administrators, submitted proposals for consideration.

MCNA compiled a proposal packet for FHKC which encompassed, among other documents, provider information in two forms: excel spreadsheets and geoaccess maps. In an effort to maintain the secrecy of the provider information, MCNA designated both as protected trade secrets, marking each page as confidential in accordance with section 624.4213, Florida Statutes, and as instructed by the ITN.[1]

After considering all proposals, FHKC awarded contracts to three of four bidders. Delta's proposal was the only bid not chosen. In response, Delta served a public records request on FHKC to "inspect, examine, and copy all of the documents related to MCNA's response to Florida Healthy Kids Dental ITN 2015, including documents that MCNA claimed as 'trade secret' or identified as 'confidential.'"

The matter then took a procedural detour from a traditional public records dispute. Delta did not initiate the litigation under chapter 119, Florida Statutes, to compel production of the documents. Upon receiving notice of the public records request to FHKC, MCNA immediately filed a Verified Complaint requesting a declaratory judgment as to whether the records at issue were

[1] MCNA designated other materials as protected trade secrets as well. However, Delta eventually withdrew its challenge regarding all materials with the exception of the excel spreadsheet and geoaccess maps encompassed within proposal packet "Volume II."

exempt from disclosure as “trade secrets.” Delta responded by filing an opposed motion to intervene as “an interested party on the side of Defendant, Florida Healthy Kids Corporation,” which the trial court ultimately granted. After an evidentiary hearing, the trial court issued an omnibus order finding the subject documents were not protected trade secrets, requiring full disclosure and awarding attorney’s fees and costs to Delta as the “prevailing party,” but retaining jurisdiction as to amount. MCNA filed this appeal.

II. Analysis

Section 119.01(1), Florida Statutes, which establishes Florida’s broad public records policy, provides “that all state, county, and municipal records are open for personal inspection and copying by any person.” *See also* Art. I, § 24(a), Fla. Const. However, the right to inspect or copy public records is not without limitation; the Florida Constitution permits the Legislature to exempt certain public records from disclosure as long as any such laws “state with specificity the public necessity justifying the exemption” and “are no broader than necessary to accomplish the stated purpose of the law.” Art. I, § 24(c), Fla. Const.

At issue here is the legislatively created exemption to the public records law under section 815.045, Florida Statutes, which protects trade secrets from disclosure. Section 815.045, establishes that it is a public necessity that trade secrets “as defined in s. 812.081 . . . be expressly made confidential and exempt from public records law. . .” Section 812.081(1)(c), Florida Statutes, defines “trade secret” as:

> [T]he whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of

> novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
>
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> *when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.*

§ 812.081(1)(c), Fla. Stat. (emphasis added).

Here, our limited role is to strictly construe section 812.081(1)(c), including its definition of "trade secret," and to determine if competent, substantial evidence exists to support the factual findings of the trial court.[2] The trial court's interpretation of a statute and its application of law to facts are subject to *de novo* review. *See Coventry First, LLC v. State, Office of Ins. Regulation*, 30 So. 3d 552, 556 (Fla. 1st DCA 2010); *Reinish v. Clark*, 765 So. 2d 197, 203 (Fla. 1st DCA 2000). "We apply the competent, substantial evidence standard of review to a trial court's factual determination that documents do or do not contain trade secrets." *Surterra Fla., LLC v. Fla. Dep't of Health*, 223 So. 3d 376, 379 (Fla. 1st DCA 2017) (citing *Sepro Corp. v. Fla. Dep't of Envtl. Prot.*, 839 So. 2d 781, 785 (Fla. 1st DCA 2003)).

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[2] Florida law establishes multiple trade secret exemptions which arguably set forth different criteria. MCNA has restricted its arguments to the definition of trade secret in section 812.081(1)(c), Florida Statutes. Delta also stipulates to its exclusive applicability.

A. *Excel Spreadsheets*

The excel spreadsheets created by MCNA present provider information separated into the following categories: 1) those providers affiliated with MCNA and treating FHKC patients; 2) providers affiliated with MCNA but who were not yet treating FHKC patients; and 3) "prospective providers" who had yet to contract with MCNA. As to the first two categories, the trial court determined the excel spreadsheets did not constitute trade-secrets because the providers were either known to the public through the MCNA website or were readily accessible to the public by phone request to MCNA. We decline to disturb the trial court's factual findings as to these categories, as competent, substantial evidence supports the determination that the information was readily accessible to the public, and no efforts were taken to protect this information. As to the third category, "prospective providers" not affiliated with MCNA, we find the trial court erred, as a matter of law, in denying the exemption from disclosure.

The trial court improperly interpreted the enumerated portion of section 812.081(1)(c), as setting forth the criteria, inclusive of proof of "value," to prove entitlement to a trade secret exemption. Instead, the enumerated portion of the statutory subsection establishes a presumption of what a trade secret is "considered to be" once the required elements of a trade secret are established, as set forth in the first sentence of the statutory subsection. The first sentence in section 812.081(1)(c) defines "trade secret" as: (1) a "compilation of information"; (2) "for use or is used in the operation of a business"; (3) "which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it"; and (4) the owner of the information "takes measures to prevent it from becoming available to persons other than those selected." § 812.081(1)(c), Fla. Stat.; *see also Sepro Corp.*, 839 So. 2d at 783-84.

Once MCNA met its burden of proving that the spreadsheets were used in the operation of its business, that the information provided an advantage or the opportunity for an advantage, and that MCNA had taken measures to prevent its disclosure, the information is deemed protected trade secrets; and, by its very nature, the trade secrets are considered, as a matter of law, to be

"of value." § 812.081(1)(c), Fla. Stat. Thus, the trial court erred in requiring MCNA to prove "value" as a separate and statutorily required element.

Delta defends the trial court's interpretation of section 812.081(1)(c) as requiring the party seeking protection from disclosure to prove "of value" as otherwise, all materials would be exempt if simply branded as "secret." Unquestionably, a reading of section 812.081(1)(c) as automatically entitling a party to a trade secret exemption by merely labelling information as confidential, has been previously condemned, and we do not retreat from sound precedent. *James, Hoyer, Newcomer, Smiljanich, & Yanchunis, P.A. v. Rodale Inc.,* 41 So. 3d 386, 387 (Fla. 1st DCA 2010) (a party may not render public records exempt from disclosure merely by designating information it furnishes a governmental agency as confidential); *See also* *Sepro Corp.*, 839 So. 2d at 784 (citing *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So. 2d 633, 635 (Fla. 1980)). For entitlement to the exemption under 812.081(1)(c), the requesting party must not only label the information as secretive, but must also prove a business advantage or an opportunity to obtain an advantage. [3]

Here, uncontroverted testimony showed the life-blood of MCNA's business is winning competitive solicitations in Florida and other states for contracts to manage dental benefits. The documents Delta seeks from FHKC are MCNA's compilation of information about dental services available and potentially available through MCNA's network of providers. MCNA's witnesses confirmed this compilation of information was created solely for FHKC's consideration in the competitive ITN process. This unique listing of provider information was generated with MCNA proprietary software and gives MCNA a competitive business advantage in winning solicitations. In fact, over fifty percent of the available points for the bid proposal scoring were tied to the available provider network, establishing that FHKC

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[3] Proof of business advantage may be argued as synonymous with evidence "of value." However, this issue is not before us as the parties stipulated the only exemption applicable is section 812.081(1)(c), Florida Statutes.

prefers to award contracts to a company that has not only built an impressive provider network, but is also actively working to expand and grow its provider network by targeting new prospective providers. Thus, the non-public information is important to winning the contract; and, failing to protect the confidentiality of this information would reveal MCNA's regional marketing and contracting strategies to its competitors, thereby, destroying the business advantage this information gives MCNA.

The trial court's erroneous statutory elements test inexorably led to its improper consideration of the evidence presented. The trial court fundamentally misapplied section 812.081(1)(c) to require MCNA, as part of its burden of proof, to prove the information was "of value." In doing so, the trial court diverged from the plain language of the statute at issue, conflated separate and distinct public record exemptions, and perused Webster's dictionary for a definition of "value." The trial court concluded the materials were not protected, in part, because MCNA not only failed to prove the materials were "of value" but of "independent economic value," a definition of "trade secret" improperly extracted from section 688.002(4), Florida Statutes. [4]

Having satisfied the burden of putting forth evidence establishing MCNA compiled the information and that the compilation gave a business advantage, the prospective provider information is, as a matter of law and by its very nature, considered "of value." *Rodale,* 41 So. 3d at 388. Applying the definition of "trade secret" under section 812.081(1)(c), this Court finds the evidence establishes MCNA's entitlement to the exemption and those portions of the excel spreadsheets containing prospective providers are exempt from disclosure.

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[4] The trial court considered the exemption under section 688.002(4), Florida Statutes, and its definition of "trade secret," although never raised by the parties. The inapplicability of section 688.002(4) to this case distinguishes it from *Office of Insurance Regulation v. State Farm Ins. Co.*, 213 So. 3d 1104 (Fla. 1st DCA 2017) where, by consent of the parties, the "independent economic value" of the information was a required element of proof.

B. *Geoaccess Maps*

MCNA's geoaccess maps showed FHKC where its members were concentrated in relation to all of the various provider categories included on the excel spreadsheets. The maps do not include "prospective provider" information. The trial court reasoned that, because the geoaccess maps only indicated those providers who could be obtained by the public on MCNA's website or by phone request, "there is no trade secret provision applicable to that information." The trial court erred, as a matter of law, in determining that information available to the public can never be considered a protected trade secret. Public information can be subject to trade secret protection, as the time and effort spent compiling and the unique presentation thereof, may render the product a trade secret. *See Surterra*, 223 So. 3d at 380.

Further, the trial court ignored the uncontroverted testimony of MCNA witnesses explaining that the trade secret nature of the geoaccess maps is independently derived from the unique composition of the maps themselves, not just the underlying information utilized to create the maps. More fundamentally, the trial court wholly ignored the uncontroverted evidence that the geoaccess maps cannot be recreated using only publicly available information because these maps are generated using proprietary software unavailable to MCNA's competitors. Thus, while some providers' actual locations may be searchable online or by calling MCNA's offices, the unique formatting and display of that information, as compiled and presented by MCNA specifically for FHKC, cannot be replicated without a competitor obtaining MCNA's Florida geoaccess maps from FHKC and reverse engineering its specialized software. MCNA invested significant time, resources and capital in generating a submittal which would be attractive to FHKC. This investment included not only the labor intensive market research necessary to assemble a proffered provider network that would stand out compared to MCNA's competitors, but also the forethought to create a visually appealing compilation and arrangement of the material itself. As such, the geoaccess maps constitute trade secrets wholly exempt from disclosure.

III. Attorney's Fees & Costs

MCNA challenges the trial court's award of attorney's fees and costs to Delta as the "prevailing party." We recognize the portion of the trial court's order granting fees is a non-final, non-appealable order, as it granted entitlement to fees, but withheld jurisdiction as to the amount to be awarded. *See R.J. Reynolds Tobacco v. Ward*, 141 So. 3d 236, 240 (Fla. 1st DCA 2014). However, we write to assist the trial court in its considerations on remand.

The order, in its current form, fails to specify the party liable for the payment of the fees and costs or the statutory or contractual basis for fee entitlement. Presumably, the trial court relied upon section 119.12, Florida Statutes, as a basis for the award. However, this statutory subsection is not applicable, and the parties conceded as much during oral argument.[5] Delta did not initiate the action under the Public Records Act. The litigation resulted from MCNA's request for a declaratory judgment which Delta joined as a third party intervenor. Accordingly, this is not an action under section 119, Florida Statutes, but a request for a declaratory judgment to determine if the documents at issue constitute trade secrets. Thus, there does not appear to be a basis upon which to award attorney's fees. As portions of the order have been reversed and the attorney fee order is not properly before us, the trial court must reconsider this issue on remand.

IV. Conclusion

We affirm the trial court's order compelling production of those portions of the excel spreadsheets revealing providers currently affiliated with MCNA, provider categories (1) and (2). We reverse the order on appeal compelling disclosure of those portions of excel spreadsheets which reveal "prospective providers" and the geoaccess maps, in their entirety. We do not rule as to the entitlement of attorney's fees and costs as that portion of the order

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[5] FHKC further asserts that section 119.12, Florida Statutes, does not apply as a basis for attorney fees and costs as it is not an "agency."

is a non-final, non-appealable order. The case is remanded for entry of an order consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

BILBREY, J., concurs; RAY, J., concurs in result with opinion.

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

RAY, J., concurs in result only.[6]

I agree with the result reached by the majority on the trade-secret-exemption issues. But because the portion of the trial court's order determining Delta's entitlement to attorney's fees is not properly before this Court to review, I would decline to provide guidance on that issue.

Kenneth B. Bell, Michael R. Cavendish, and Lauren V. Purdy of Gunster, Yoakley & Stewart, P.A., Tallahassee, for Appellant.

Nathan A. Adams, IV, of Holland & Knight LLP, Tallahassee, for Florida Healthy Kids Corporation; Thomas P. Crapps, Timothy G. Schoenwalder, and Joy M. Ryan of Meenan P.A., Tallahassee, for Appellees.

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[6] Judge Ray substituted for Judge Winsor after oral argument in this case.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EDIOL TOPALLI and IRIDA TOPALLI,

Appellants,

v.

Case No. 2D18-617

EDDIE FELICIANO and BAY COLONY
COMMUNITY ASSOCIATION, INC.,

Appellees.

Opinion filed March 22, 2019.

Appeal from the Circuit Court for Collier
County; James R. Shenko, Judge.

James M. Moran of Marc L. Shapiro, P.A.,
Naples, for Appellants.

Michael R. D'Lugo of Wicker Smith O'Hara
McCoy & Ford, P.A., Orlando, for
Appellees.

LUCAS, Judge.

Eriol and Irida Topalli, the plaintiffs below, appeal the entry of a final judgment assessing attorney's fees against them.[1] The fee judgment arose from their

[1]In case no. 2D17-3993, they appeal a separate judgment that assessed related costs against them; both appeals arise from the same case and circumstances. Neither party requested consolidation of the appeals.

"agreement" (a term we use loosely) to pay some measure of the costs incurred by the defendants below, Eddie Feliciano and Bay Colony Community Association, Inc., in connection with a requested continuance of the jury trial by the Topallis. The Topallis make several arguments in this appeal. Unfortunately, we are precluded from considering most of the issues they have raised because of the very sparse appellate record the Topallis have chosen to present. However, there is error on the face of the judgment that requires reversal for the reasons we will explain below.

I.

From what we can glean from the record, Mr. Topalli was allegedly injured while riding a bicycle when he collided with Mr. Feliciano, who was driving a motor vehicle that belonged to Bay Colony Community Association, Inc. The Topallis filed a complaint against both defendants on January 22, 2016. The defendants, who were represented by the same counsel, filed an answer and affirmative defenses, and the case proceeded in due course. It appears that the matter was originally set for trial in October of 2016, then reset to January 10, 2017; however, based on the representations of the Topallis' lawyer that the trial would likely take between eight to ten days, the circuit court entered an order resetting the case again for the week of April 4, 2017.

According to the circuit court's docket entries, the parties appeared to be well on their way to trying the case in April. A not inconsiderable amount of discovery and depositions were taken and transcribed, various related discovery motions were filed and set for hearing, witness and exhibit lists were exchanged, and the parties filed

motions in limine. Then, on March 25, 2017, a Saturday, the Topallis' attorney filed a handwritten motion to withdraw as counsel.

We do not have the motion in our record. However, from a transcript of a hearing convened on March 27, 2017, the Topallis' attorney represented that he and his client had irreconcilable differences that made him "extremely concerned" with his responsibility in the matter. In response to the circuit court's question whether the rules of professional conduct necessitated counsel's withdrawal but without divulging further details, the attorney replied, "yes, sir, that's correct."

This apparently came as a surprise to Mr. Topalli. When he appeared at the hearing, Mr. Topalli (who speaks English as a second language) testified:

> I don't know what's happened for — because I remember well what's — but I know and I was telling to him, to my lawyer, I want to go before the judge about the case. If the judge find with the right wisdom, lawyer has always I was angry with him or whatever, always. As I want to go there, as I wanted to go there before the judge. I would say let the judge decide what's the call (phonetic). Because I don't know who (sic) I did. Did I did anything wrong?

For her part, Ms. Topalli explained to the circuit court that her husband had a brain injury, "and that's the reason that he takes it — he's very nervous when he argue with his lawyers, but I don't think that we have any big issue that his lawyers want to withdraw from the case."

Whatever may have transpired between attorney and client, the circuit court granted the motion to withdraw. In so ruling, the court recognized a dilemma the withdrawal created: with only a week remaining until its commencement, the upcoming jury trial would either have to be continued (which would impose a burden upon the defendants who had been preparing for the trial all along), or the Topallis would have to

represent themselves (which would, to put it mildly, impose a rather daunting burden upon the Topallis). In a case where, the court noted, the plaintiffs had included on their witness list seven emergency room doctors, seven radiologists, two neurologists, three EMT's, two orthopedists, and two neurosurgeons, the defendants would incur undue prejudice if the trial were delayed, and so the court ruled that the jury trial would remain set for the following week. As the circuit court explained to the Topallis, the Topallis had three options: first, they could attempt to try the case without a lawyer; second, they could hire a lawyer to try the case with a week of preparation; or third, they could voluntarily dismiss their complaint without prejudice and refile their lawsuit since they were still well within the statute of limitations period.

In the next few days, the Topallis were able to retain new counsel. On March 30, the Topallis' new attorney filed a motion to continue the trial. The motion was originally denied by a written order in which the court stated that the Topallis "have elected to proceed to trial pro se."[2] On the morning of April 4, before the venire panel had been brought into the courtroom, the Topallis' counsel renewed their motion for a continuance and explained: "This is a case that involves multiple expert witnesses, a reconstruction expert, an economist, vocational rehabilitationist and multiple doctors[.] [I]t's a case that involves a closed-head injury and a surgery to the neck[.] [I]t is just a physical impossibility for me to have prepared to do this trial." The Topallis' lawyer further argued that the defendants would incur only a minimal cost if the case were simply rolled over to the next available trial docket, while the Topallis would experience

[2]In all likelihood, the court was inferring that the Topallis' new attorney, who had filed a "limited notice of appearance," had not been retained as trial counsel. The status of representation was clarified later when counsel appeared at the trial.

a tremendous hardship if they had to dismiss their complaint and "start all over again" because they were already living on borrowed funds. Then, counsel brought up an idea, almost innocuously, that would become the feature of this appeal: "So I would ask the Court to respectfully grant a short continuance. My client has said at the previous pretrial conference that they would agree to be responsible for any costs associated with the delay that the Defendant incurred."

Defense counsel strenuously opposed a continuance because, as he pointed out, his clients and their witnesses were ready and fully prepared to try the case at that time. However, defense counsel allowed, if the court were inclined to grant the Topallis' motion, the court should award the defendants their attorney's fees and costs that were incurred as a result of the continuance. As counsel pointed out: "There are expenses. The [d]efense, like I said, has moved mountains to get this case ready for trial." In response, the Topallis' attorney again represented that his client would not object to paying the costs associated with the defense having to "re-prepare" for the case. The Topallis' lawyer emphasized it would not be appropriate "to charge [the Topallis] for costs all the way back to the beginning, but I think it would be appropriate for the costs associated with the delay."

Following the attorneys' cues, the circuit court granted the Topallis' motion, but elected to make the relief contingent upon the Topallis' payment of the defendants' attorney's fees and costs. The court found that the defendants would be entitled to recover their costs, but reserved deciding the amount of costs until it could convene an evidentiary hearing. Similarly, the court reserved on making a decision as

to the defendants' entitlement and amount of attorney's fees, but seemed to indicate that some amount of attorney's fees would be appropriate.

The circuit court stayed the litigation in order to convene two evidentiary hearings on the defendants' request to recover fees and costs. At the conclusion of these hearings, the circuit court entered not an order, but a judgment, the final judgment now on appeal. In its Final Judgment Taxing Attorney's Fees Against Plaintiffs, the court determined that the defendants were entitled to recover attorney's fees of 164.3 hours at a billing rate of $500 per hour, 50.8 hours at $350 per hour, and 3.5 hours at $250 per hour, and paralegal's fees of 34.4 hours at $150 per hour for a total of $105,965. The court also tacked on the fee of a fee expert who apparently testified at the hearing for an additional $3000. After it had added prejudgment interest, the final total of the judgment—which had ostensibly been entered to effectuate a short continuance of a jury trial—was $110,817.32.

We do not have a transcript of what transpired at these evidentiary hearings. However, two aspects of the judgment on appeal are readily apparent: first of all, it is an executable money judgment (that conspicuously omits a preface stating what precipitated the judgment's entry); and second, the amount of fees awarded in the judgment is extraordinarily large given the context in which the judgment was entered. There is no explanation, no finding, and no legal citation within the judgment that might explain what prompted the circuit court to impose a money judgment against the plaintiffs for the continuance they had requested. Nor is it explained within the judgment why the defendants' attorneys, whose billing invoices (which were filed and included

within our record) generally reflected a billing rate of $180 an hour, had become entitled to $500 and $350 per hour for purposes of the fee judgment.

The circuit court has continued to stay the proceedings, and the Topallis filed the appeal now before us.

In their appeal, the Topallis variously argue that the circuit court should never have granted their prior lawyer's motion to withdraw, or that, having allowed the withdrawal, the court should have granted the Topallis' repeated motions for a continuance without imposing any fee or cost conditions (which, relatedly, the Topallis claim were only agreed to "under duress"), or that the entry of any judgment like this infringes upon their constitutional right of access to the courts and due process. Some of their arguments might have been availing had the Topallis properly raised them and then appealed any of those rulings at the conclusion of a trial.[3] They did not do that. Instead, they received the relief they had requested from the circuit court, conditioned upon a payment their attorney represented they would make. Their trial was continued. But the condition their lawyer had proposed turned out to be much more onerous than they expected. They now have a rather substantial money judgment recorded against them. The only question we can consider, then, is whether the Topallis are entitled to appellate relief from that judgment.

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[3]Indeed, at oral argument, Appellees' counsel very candidly stated that had the Topallis gone forward with the trial and then appealed the denial of their requested continuance, Appellees would have conceded the circuit court had abused its discretion. As to the constitutional arguments, the Topallis never raised them below; hence, we will not consider them here.

II.

Preliminarily, we are faced with a difficult question of categorizing this fee judgment. What source of law predicated the entry of an $110,817.32 judgment for attorney's fees against the Topallis in a lawsuit that has never been adjudicated on the merits? The answer to that question is not at all obvious. In fact, we have found it necessary to employ the process of elimination to arrive at a conclusion on the matter.

A.

Under the "American Rule," attorney's fees in civil litigation are ordinarily borne by the party who incurs them, and a court cannot award the recovery of attorney's fees from an opposing litigant unless "authorized by statute or by agreement of the parties." See Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985); see also Trytek v. Gale Indus., Inc., 3 So. 3d 1194, 1198 (Fla. 2009) ("It is well-settled that attorney's fees can derive only from either a statutory basis or an agreement between the parties." (citing State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993))). "Agreement of the parties" is ordinarily understood in this context to mean an agreement akin to an enforceable contract; "statute" means just what the term implies—a duly enacted act of the legislature.

This small list of exceptions to the American Rule has expanded—albeit ever so slightly—over time. Cf. Reiterer v. Monteil, 98 So. 3d 586, 587 (Fla. 2d DCA 2012) (observing that "[w]e hesitate to create exceptions" to the American Rule that "generally, a litigant pays for his or her own fees in a lawsuit"). In litigation to establish or benefit a "common fund," a party may recover its attorney's fees from the proceeds of the fund. See, e.g., Fid. & Cas. Co. of N.Y. v. O'Shea, 397 So. 2d 1196, 1198 (Fla. 2d

DCA 1981) (recognizing the "common fund rule" that permits an attorney's fee award "from a fund or estate which has been benefitted by the rendering of legal services" (quoting Estate of Hampton v. Fairchild-Fla. Constr. Co., 341 So. 2d 759, 761 (Fla. 1976))). The Florida Supreme Court's rules of procedure may also provide litigants with recourse to recover their attorney's fees and costs during the course of litigation. See, e.g., Fla. R. Civ. P. 1.380; Fla. R. App. P. 9.400, .410. And in cases of especially pernicious litigation or inequitable conduct, courts have the "inherent authority" to award attorney's fees as a sanction. See Moakley v. Smallwood, 826 So. 2d 221, 226 (Fla. 2002); Rowe, 472 So. 2d at 1148.

None of those bases are present here, however.

First, there was no contract between the Topallis and the defendants that provided for the payment of the defendants' attorney's fees. Indeed, none of the parties in this appeal have suggested that the fee judgment was predicated upon a contractual agreement. Given that the only "consideration" (a continuance of a jury trial) would have been something only the circuit court could have provided as an exercise of its judicial discretion, that the actual amount of fees and costs that were the subject of this purported agreement has been in continuous dispute, and how highly unlikely it was that the Topallis' lawyer ever had the authority to agree to the entry of a money judgment against his clients, we can dispense with that as a basis fairly easily.[4]

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[4]See Land Co. of Osceola Cty., LLC v. Genesis Concepts, Inc., 169 So. 3d 243, 247 (Fla. 4th DCA 2015) ("An enforceable contract, requires 'an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained.' " (quoting W. Constr., Inc. v. Fla. Blacktop, Inc., 88 So. 3d 301, 304 (Fla. 4th DCA 2012))); see also Harris v. Dep't of Revenue ex rel. Insixiengmay, 191 So. 3d 921, 924 (Fla. 2d DCA 2016) ("Trial courts enjoy broad discretion in ruling on motions for continuance." (citing Neal v. Swaby, 975 So. 2d 431,

Second, there is no applicable statute that could form the basis of the fee judgment the circuit court entered. Here as well, no one has argued otherwise in this appeal.

Third, this is a personal injury case in which the Topallis claim to have sustained damages as a result of a motor vehicle accident. It is not a proceeding that concerns a common fund in any way.

Fourth, nothing within Florida Rule of Civil Procedure 1.460, the rule that governs continuances, authorizes a court to condition a continuance upon the payment of an opposing party's attorney's fees or costs. The final judgment does not recite, and we have not found, any rule of procedure that could have authorized the entry of a fee judgment under these circumstances.

Fifth, the fee judgment was not entered as a sanction. The Topallis (perhaps confronting the very characterization issue we are struggling through now) argue that we should liken the fee judgment to a bad faith sanction that the circuit court imposed against them. We decline to do so because, from our view of the record, it was no such thing. Nor will we, as the Topallis urge us, ascribe some hidden motive behind the presiding judge's ruling in this case. Whatever error he might have made, the circuit judge capably and dutifully considered what our court has described as the

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433 (Fla. 2d DCA 2007))); cf. Dixie Operating Co. v. Exxon Co., U.S.A., 493 So. 2d 61, 63 (Fla. 1st DCA 1986) ("It is well-settled in Florida that a settlement agreement entered into by an attorney is enforceable only when it has been determined that the attorney was given 'clear and unequivocal' authority by the client to compromise the claim." (quoting Nehleber v. Anzalone, 345 So. 2d 822, 823 (Fla. 4th DCA 1977))).

We are not suggesting that a litigant could not contractually agree to *support* an opposing litigant's motion for a continuance in exchange for compensation of some agreed upon amount of attorney's fees. That is not at all what happened here, though.

"Hobson's choice" that arises when an attorney is permitted to withdraw on the eve of a trial. See Garden v. Garden, 834 So. 2d 190, 193 (Fla. 2d DCA 2002).

And finally, the final judgment was obviously not the product of an adjudication on the merits of a claim. To the contrary, its entry—and presumably, its satisfaction—has effectively become a precondition to convening a trial in this litigation.

What, then, was the basis for this fee judgment?

B.

The answer to that question may be found in a small niche of case law that has gradually formed, a current and concise summation of which appears in this pronouncement from the Fifth District Court of Appeal: "A trial court has the authority to assess attorney's fees when one party moves for a continuance on the eve of trial and the resulting order is reviewed for an abuse of discretion." See Kay v. Kay, 988 So. 2d 1273, 1275-76 (Fla. 5th DCA 2008) (reversing award of $15,000 of attorney's fees and $481 of costs attributed to the grant of a continuance because, although expert testimony was not required to support the award, "the court abused [its] discretion by awarding fees and costs without evidence regarding the reason for the continuance and the amount of the fees and costs"). The Kay court's stated rule was not at all unprecedented. Accord Dep't of Children & Families v. M.G., 838 So. 2d 703, 704 (Fla. 5th DCA 2003) ("Under these circumstances, the trial court had the authority to assess attorney's fees occasioned by the belated request for a continuance. Because the attorney's fees were awarded in conjunction with the granting of the Department's motion for continuance, we reject the Department's contention that the absence of a contractual or statutory basis for the recovery of attorney's fees is fatal to the award.");

Brake v. Murphy, 693 So. 2d 663, 666 (Fla. 3d DCA 1997) ("[T]here is no abuse of discretion in conditioning an eve of trial continuance on payment of attorney's fees caused by delay."). For lack of a better term, we may call this category of pretrial rulings—whereby a party obtains a requested continuance from a court upon the condition of paying an opposing party's attorney's fees and costs—a conditional continuance. Where it has been recognized, the conditional continuance has simply been stated as a rule of authorization, without further rationale, usually by reference to a prior case citation, without further elaboration. Our court has never expressly held that a trial court has the authority to condition a continuance upon the payment of an opposing party's attorney's fees. But we must acknowledge the pronouncements from our sister districts which have. From the record in the case at bar, it appears that the attorneys for the litigants were able to persuade the court below that it could enter a conditional continuance based on some of these pronouncements.

Had the Topallis preserved and argued the issue, we might have parted ways with those courts that have authorized conditional continuances upon the payment of attorney's fees. As has already been noted, there is simply no organic legal authority—no statute, contract, or claim—to support a fee order as a condition for a continuance. The applicable procedural rule, rule 1.460, says nothing at all about awarding attorney's fees or costs as a component of a trial court's discretion when considering granting a continuance, unlike other rules of civil procedure that, in other contexts, do. Cf. Fla. R. Civ. P. 1.380. Given the presumptive aversion against

ordering the payment of an opposing party's attorney's fees under the American Rule,[5] the pronouncements we find from the district courts of appeal in this regard would seem somewhat puzzling or, at least, counterintuitive.

Moreover, when we trace the origin of this rule's current iteration—that "[a] trial court has the authority to assess attorney's fees when one party moves for a continuance on the eve of trial," Kay, 988 So. 2d at 1275—we find a rule that, without a ratio decidendi to guide or constrain its course in the common law, has drifted far from its point of origin. Most of the recent decisions recognizing conditional continuances tend to cite to the case of Flea Market U.S.A., Inc. v. Cohen, 490 So. 2d 210 (Fla. 3d DCA 1986), as authority. We note that the litigants before us have also spent a considerable amount of time in their briefing and oral arguments discussing the Flea Market decision. But Flea Market's single paragraph opinion contains precisely one line and one case citation germane to that court's recognition of conditional continuances: "We find no abuse of discretion in the order under review, which conditioned granting the appellant's eve-of-trial motion for continuance upon the payment of the appellees' attorney's fees caused by the delay." Id. at 210. The case that the Flea Market court relied upon was Western Union Telegraph Co. v. Suit, 15 So. 2d 33 (Fla. 1943), which, as best as we can tell, appears to be the case of origin in Florida for this singular rule.[6]

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[5]Cf. Talbott v. Am. Isuzu Motors, Inc., 934 So. 2d 643, 650 (Fla. 2d DCA 2006) (Kelly, J., dissenting) (discussing federal law and explaining that, "[w]hen the Supreme Court states that in construing attorney's fees provisions it is 'mindful of the fact that Congress legislates against the strong background of the American Rule,' Fogerty[v. Fantasy Sports, 510 U.S. 517, 533 (1994)], what it means is that any analysis of what Congress intended starts with the presumption that fees are not recoverable").

Insofar as this is the wellspring of authority for conditional continuances in Florida Law, the Suit opinion merits closer reading.

In Suit, a defendant's counsel had become incapacitated on the day of trial. Id. at 34. The defendant moved for a continuance, but the plaintiff's attorney objected, arguing

> he could not agree to any further postponement; that the case had been twice continued at defendant's request and that it had been agreed between counsel that the case would not be further continued but would be set for trial at the next term of the court without further notice; that the plaintiff and his witnesses were present in court and that all of them had to secure releases from their employment, and that one was employed by the railway, making it difficult and inconvenient for him to attend the trial.

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[6]The Flea Market opinion also included citations to the legal encyclopedia Florida Jurisprudence Second, and an article from the American Law Reports fourth edition, neither of which are, in and of themselves, of any binding, precedential force. Cf. Martin v. Ritcheson, 306 So. 2d 582, 586 (Fla. 1st DCA 1975) (rejecting insurance company's quotation from Florida Jurisprudence and observing that "[w]e are cited to no Florida case supporting the above quoted statement and our independent research has revealed none. Our interpretation of the statutory provisions . . . lead to a different conclusion."). We note that the Florida Jurisprudence section cited in Flea Market references only the Suit opinion (which does not support the proposition Flea Market asserted) and section 54.07, Florida Statutes (which, at the time of this edition of the Florida Jurisprudence's publication, had already been repealed). See 11 Fla. Jur. 2d Continuances § 40 (1979); ch. 67-254, § 49, Laws of Fla. (1967). The American Law Reports article discusses cases in which trial courts in other jurisdictions were found to have abused, or not abused, their discretion by imposing attorney's fees as a condition for granting a continuance. Romualdo P. Eclavea, Annotation, Continuances of Civil Case as Conditioned Upon Applicant's Payment of Costs or Expenses Incurred by Other Party, 9 A.L.R. 4th 1144 (1981). None of the cases discussed in the A.L.R. article, however, were from Florida. Id.

Id. at 34-35. The circuit court denied the motion and the trial was held in the absence of defense counsel. Id. at 35. On appeal, the Florida Supreme Court suggested an alternative to denying the motion for continuance:

> We realize that the trial judge had a rather delicate situation to deal with, and that in view of the fact that the court had already twice continued the case at the request of defendant's counsel, and the plaintiff and his witnesses being present when the case was called, and demanding a trial, he felt it to be his judicial duty, in spite of the request of defendant's counsel for at least a brief postponement on account of his illness, to go ahead and try the case, and also to deny the motion for new trial. But our analysis of this record convinces us that the absence of defendant and its counsel was due entirely to a providential cause—the actual, not feigned, illness of defendant's counsel. This being the case, there was 'another way out' for the trial judge. He could { "pageset": "S22 have granted an adjournment of the trial for such time as he thought proper and entered at once a judgment against the defendant for the per diem and mileage of plaintiff and his witnesses.

Id. (emphasis added).

There is, of course, a categorical difference between awarding per diem and mileage costs of a party and its witnesses occasioned by a canceled trial and awarding that party's attorney's fees for preparing for a canceled trial. Cf. First Protective Ins. Co. v. Featherston, 978 So. 2d 881, 884 (Fla. 2d DCA 2008) ("Unlike costs, ordinarily attorney's fees are not recoverable and thus are not at issue. . . . The availability of a recovery of costs is part of the warp and woof of litigation."); Jennings v. Habana Health Care Ctr., 183 So. 3d 1131, 1134 (Fla. 1st DCA 2015) ("But entitlement to costs is distinct from entitlement to attorney's fees."). The latter award would require "a statute or . . . agreement of the parties." Rowe, 472 So. 2d at 1148. Yet, over the years in Florida jurisprudence these two distinct categories of expenses—travel costs

and attorney's fees—somehow became conflated when it comes to granting continuances. See Kay, 988 So. 2d at 1275; M.G., 838 So. 2d at 704; Flea Market, 490 So. 2d at 210. And no court has yet explained why or how that happened.

C.

We make these observations to ensure that our decision today is not mistakenly construed as our having tacitly adopted the notion that a trial court may condition an order continuing a trial upon the payment of an opponent's attorney's fees. Indeed, in the absence of a statute, contract, or rule, we have some reservations about this practice—substantively, there is little support for it; procedurally, there is no guidance how to implement it; and pragmatically, it could, in some cases, pose a significant impediment upon a party's constitutional right of access to the courts.[7] But whether such an order was within the ambit of a trial court's power is not an argument the Topallis can make. Having represented to the court below that they would agree to pay a measure of the defendants' costs if the court granted a short continuance—and having received the continuance from the court on that representation—the Topallis cannot challenge in this appeal the ruling that they asked for. Cf. Tate v. Tate, 91 So. 3d 199, 204 (Fla. 2d DCA 2012) ("[T]he invited error rule prevents [a party] from complaining on appeal about a ruling [it] invited the trial court to make."). Nor can the Topallis raise an argument against the amount of fees in the judgment because they failed to provide a transcript of the evidentiary hearings in which the trial court

[7]Cf. art. I, § 21, Fla. Const. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."). The case at bar provides a cautionary example: the Topallis are effectively charged to pay over a hundred thousand dollars of their opponents' attorney's fees for the "privilege" of having the trial they were constitutionally entitled to.

determined the judgment amount. Cf. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court [cannot] properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory."); Thomas v. Perkins, 723 So. 2d 293, 294 (Fla. 3d DCA 1998) (affirming a fee and cost award where the appellant failed to include a transcript of the fee and cost hearing in the record: "In the absence of a record of the evidence considered by the trial court in making this award, we cannot find that the trial court abused its discretion and must therefore affirm").

The only issue we may consider in this appeal is whether an error of law appears on the face of the judgment. See generally Boone v. Boone, 3 So. 3d 403, 404 (Fla. 2d DCA 2009) ("Without a transcript, this court's review is limited to any errors that appear on the face of the trial court's order."); 7550 Bldg., Inc. v. Atl. Rack & Shelving, Inc., 999 So. 2d 663, 664 (Fla. 3d DCA 2008) ("Absent a transcript, this Court may reverse the decision 'only if an error of law appears on the face of the final judgment.' " (quoting Whelan v. Whelan, 736 So. 2d 732, 733 (Fla. 4th DCA 1999))). And in that, we do find error.

We have before us an executable final judgment. There is no stated legal basis for its entry,[8] no underlying claim, or counterclaim, or court sanction from which it sprung. Its very existence is an anomaly for a pending civil case in which a trial on the

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[8]The Final Judgment Taxing Attorney's Fees Against Plaintiffs states only that it was entered "upon Defendants' Sworn Motion for Court to Determine Amount of Attorney's Fees"—which, of course, only begs the question of why the defendants were entitled to such a judgment.

merits has never occurred, the judgment holders have never pled a claim for relief, and a sanction was never ordered. See Makar v. Inv'rs Real Estate Mgmt., Inc., 553 So. 2d 298, 299 (Fla. 1st DCA 1989) ("A judgment is a court's decision on the merits as to whether the plaintiff shall obtain the relief sought in the litigation." (first citing Francisco v. Victoria Marine Shipping, Inc., 486 So. 2d 1386, 1391 (Fla. 3d DCA 1986); then citing George Vining & Sons, Inc. v. Jones, 498 So. 2d 695, 697 (Fla. 5th DCA 1986))). No Florida court has ever imposed such an onerous condition, an adverse fee judgment, upon a litigant seeking a continuance; rather, for those courts that have recognized the payment of attorney's fees as an appropriate condition for a continuance, the underlying ruling appears to have been effectuated as a pretrial order. At most, that was what the Topallis acquiesced to in the case below, the entry of an order, which is markedly different from an executable final judgment. Indeed, in this case, there appears to be a facial inconsistency between this judgment's entry and the only articulated basis for its existence (the granting of a continuance)—this final judgment's enforcement is not conditioned on having a trial at all. The defendants could initiate collection proceedings against the Topallis even if their trial never happens. This civil judgment had no attendant legal basis for its entry and, as such, was erroneous.

III.

Accordingly, we must reverse the final judgment below. Although we would question why a continuance needed to be conditioned upon anything at all (in light of the circumstances that were reported to us in this appeal), we do not reach the issue of whether a trial court may enter an order granting a continuance conditioned

upon the payment of an adversary's attorney's fees. It is a problematic notion, as we have already discussed, but one we must leave for another day.

Reversed and remanded.

ROTHSTEIN-YOUAKIM, J., Concurs.
MORRIS, J., Concurs in result only.

Third District Court of Appeal

State of Florida

Opinion filed March 20, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-132
Lower Tribunal No. 15-25652

Kendall Healthcare Group, Ltd., d/b/a Kendall Regional Medical Center, et al.,
Appellants,

vs.

Rafael Madrigal, M.D., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

White & Case LLP, and Raoul G. Cantero, David P. Draigh, and Ryan A. Ulloa; Taché Bronis Christianson and Descalzo P.A., and Walter J. Taché and Marissel Descalzo, for appellants.

Ross & Girten, and Lauri Waldman Ross and Theresa L. Girten; Marcus Neiman & Rashbaum, LLP, and Michael A. Pineiro and Daniel Lawrence Rashbaum, for appellees.

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

HENDON, J.

The respondents below, Kendall Healthcare Group, Ltd. d/b/a Kendall Regional Medical Center, et al. (collectively, "Kendall Regional"), appeal from a final judgment entered under section 620.2122, Florida Statutes, of the Florida Revised Uniform Limited Partnership Act ("the Act"), awarding each petitioner, Dr. Rafael Madrigal, Dr. Juan Suarez, and Dr. Jorge Suarez Melendez (collectively, "the physicians"), $3.34 million as the "fair value" for each limited partnership interest ("LP interest(s)") in Kendall Regional plus prejudgment interest, compounded quarterly. For the reasons that follow, we affirm the final judgment except for the calculation of the prejudgment interest and remand for a recalculation consistent with this opinion.

I. <u>Facts and Procedural History</u>

In 1991, each of the three physicians purchased one LP interest in Kendall Regional. Following a squeeze-out merger at the end of 2014, the physicians were informed that each LP interest had been converted into the right to receive $1.1 million and each physician had the option to either accept the $1.1 million offer or exercise his right to have the "fair value" of his LP interest determined by a court. The physicians declined the offers and demanded a greater amount as the estimated fair value for each LP interest. After the physicians' demands were rejected, they filed a petition for appraisal against Kendall Regional to determine the "fair value" of their LP interests under section 620.2122 of the Act.

At the non-jury trial on the physicians' petition for appraisal, both sides presented expert testimony as to the fair value of each LP interest. The experts utilized the same valuation method, which required each expert to take into account numerous factors, including the "cost of capital" and whether a "company-specific risk premium" ("CSRP") should be added to the discount rate.

The record before this Court indicates that the trial judge actively participated during the bench trial by asking several questions relating to the assessment of the fair value of each LP interest. At the conclusion of the trial, the trial judge made one specific finding as to the equity debt capital. Further, the trial judge instructed the parties to submit proposed orders, and in doing so, made statements indicating that he had not made a final determination as to the CSRP and the cost of capital. For example, the trial court stated: "If you want to address those issues in your judgments, I would be happy to entertain them."

In their proposed orders, each party set forth figures relating to the cost of capital and the CSRP that favored their respective positions. Approximately two weeks after the proposed orders were submitted, the trial judge adopted the physicians' proposed order verbatim, except for changing the title of the order. The order valued each LP interest at $3.34 million and awarded prejudgment interest to the physicians, compounded quarterly. Thereafter, the trial court entered a final judgment. Kendall Regional's appeal ensued.

II. Analysis

A. Trial Judge's Verbatim Adoption of the Physicians' Proposed Order

Kendall Regional contends that the trial judge failed to exercise its independent judgment because it adopted verbatim the physicians' proposed order. Based on the record before this Court, we disagree.

In Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), the Florida Supreme Court did not prohibit a trial judge from adopting verbatim the proposed order of one of the parties. However, the Court did caution that a party's proposed order "cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." Id. at 390. In Perlow, the trial judge adopted verbatim the proposed order of one party without giving the other party an opportunity for comments or objections. In reversing the order under review, the Florida Supreme Court stated:

> When the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding is fair to neither the parties involved in a particular case nor our judicial system.

Id. (footnote omitted). Further, the Florida Supreme Court provided the following guidance to trial judges when requesting proposed orders:

> (1) the trial judge may ask both parties or one party to submit a

> proposed final judgment; (2) if proposed final judgments are filed, each party should be given an opportunity to review the other party's proposed final judgment and make objections; (3) if only one party submits a proposed final judgment, there must be an opportunity for review and objections by the opposing party; and (4) prior to requesting proposed final judgments, the trial judge should, when possible, indicate on the record the court's findings of fact and conclusions of law.

Id. at 384.

Based on our review of the record, we reject Kendall Regional's argument that the trial judge failed to exercise his independent judgment merely because he adopted verbatim the physicians' proposed order. The transcript reflects, and Kendall Regional has acknowledged, that the trial judge actively participated in the non-jury trial. The trial judge asked pertinent questions relating to the valuation of the physicians' LP interests, and based on those questions and other statements made by the trial judge during the bench trial, it appears that the trial judge understood the expert testimony regarding the valuation of the LP interests. See Cabrera v. Cabrera, 987 So. 2d 753, 755 (Fla. 3d DCA 2008) ("[T]he record before us indicates that the trial court actively participated in the final hearing. The trial court's active participation in the proceedings supports our conclusion that there is no appearance that the trial court did not exercise its independent judgment when entering the final judgment in the instant case."). Further, at the conclusion of the non-jury trial, the trial court made only one definitive finding of fact—the use of a 30/70 capital structure—and that finding is included in the final order. The

transcript also indicates that the trial court did not make definitive findings as to the "cost of capital" or whether a CSRP should be added to the discount rate. The judge informed the parties that he was leaning in certain directions as to those factors and informed the parties as follows: "If you want to address those issues in your judgments, I would be happy to entertain them." Further, the trial judge allowed both parties to submit proposed orders, and by doing so, each party's submissions likely "apprise[d] the judge of their positions and their disagreements with the opposing party's" position. See In re T.D., 924 So. 2d 827, 830 n.2 (Fla. 2d DCA 2005).

Based on the above analysis, although the trial judge adopted verbatim the physicians' proposed order, the record before this Court reflects that the trial judge did not delegate its independent judgment. See Empire World Towers, LLC v. CDR Créances, S.A.S., 89 So. 3d 1034, 1046 (Fla. 3d DCA 2012). Accordingly, reversal is not warranted on this basis.

B. Award of Prejudgment Interest, Compounded Quarterly

Kendall Regional does not challenge the trial court's determinations that the physicians are entitled to prejudgment interest as of the date of the merger or the interest rate the trial court applied. However, Kendall Regional contends that the trial court erred by determining that the prejudgment interest should be compounded quarterly and argues that the prejudgment interest should be

calculated using simple interest. We agree.

The physicians have acknowledged that the general rule in Florida is that interest should not be permitted on a sum that is interest itself—"interest on interest"—but argue that the general rule is not applicable. In making this argument, the physicians rely on (1) section 620.2122(1), which requires the trial court to "determine the fair value of the partnership interests and **accrued interest**" (emphasis added); (2) section 620.2122(5), which provides that "[e]ach partner made a party to the proceeding is entitled to judgment for the amount of the fair value of such limited partner's limited partner partnership interests, plus interest, **as found by the court**" (emphasis added); and (3) section 620.1107(1) which provides that "the principles of law and equity supplement [the Act]." We do not interpret any of these provision as authorizing the trial court to award compounded prejudgment interest.

In finding that the prejudgment interest should be compounded, the trial court relied on Computer Task Group, Inc. v. Peierls, 810 So. 2d 977 (Fla. 5th DCA 2002). The trial court's reliance was misplaced. First, Computer Group was decided under section 607.247(8), Florida Statute (1987), which "governs the interest to be awarded dissenting shareholders in an appraisal proceeding." Computer Task, 810 So. 2d at 978. In contrast, in the instant case, prejudgment interest was awarded pursuant to section 620.2122(1), (5) of the Act, which applies

to limited partnerships. Second, the language in section 607.247(8) differs substantially from the language in sections 620.2122(1) and (5). Unlike the language in sections 620.2122(1) and (5), the language in section 607.247(8) indicates that the Legislature granted the trial court discretion in determining the rate of interest based on what "the court may find to be fair and equitable in all the circumstances."

Finally, the trial court's reliance on In re Sunbelt Beverage Corp. Shareholder Litigation, 2010 WL 26539 (Del. Ch. 2010), was also misplaced. Unlike section 620.2122, the applicable Delaware statute specifically provides that, "[u]nless the Court in its discretion determines otherwise for good cause shown, interest . . . shall be compounded quarterly . . . . " As the Delaware statute indicates, if a legislature intends to have interest compounded or to give the trial court discretion to do so, it knows how to clearly set forth its intent in a statute. Therefore, based on the above analysis, we reverse the portion of the final judgment that provides that the prejudgment interest should be compounded quarterly and remand for a recalculation of prejudgment interest utilizing simple interest.

Accordingly, we affirm all portions of the final judgment except for the portion stating that the prejudgment interest should be compounded quarterly and remand for a recalculation.

Affirmed, in part; reversed, in part, and remanded for a recalculation of prejudgment interest.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MTGLQ INVESTORS, L.P.,
Appellant,

v.

BARBARA NINA DAVIS,
Appellee.

No. 4D18-1618

[March 20, 2019]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; William L. Roby, Judge; L.T. Case No. 10000301CAAXMX.

Brian A. Wahl of Bradley Arant Boult Cummings LLP, Birmingham, Alabama, for appellant.

John J. Anastasio, Stuart, for appellee.

PER CURIAM.

MTGLQ Investors, L.P. ("the Bank") appeals a final judgment dismissing its foreclosure complaint, entered in favor of Barbara Nina Davis ("the Homeowner"). We agree with the Bank that the trial court erred in finding that it failed to substantially comply with conditions precedent to bringing a foreclosure suit. We reverse and remand for further proceedings.

The mortgage contract at issue requires notice of default before a foreclosure action may be brought[1] and further provides in paragraph 15

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[1] Paragraph 20 provides in relevant part:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action . . . that arises from . . . this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. . . .

that "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." The lender sent a default notice to the Homeowner in December 2009. The letter indicates that it was sent via certified mail with a return receipt requested. The corresponding return receipt indicates the letter was sent via first-class mail with return receipt requested and was returned to the lender as "unclaimed" and "unable to forward."

The Bank brought a complaint for foreclosure in February 2010. The Homeowner asserted in her responsive pleading that the Bank did not serve and she did not receive a presuit notice "that was either served by regular mail or actually received if delivered by other means, including but not limited to certified mail, certified mail return receipt requested . . . ."

At trial, the Bank admitted a copy of the default notice along with the postmark indicating "First-Class Mail" and the return receipt indicating that the letter was returned to the sender and unclaimed by the intended recipient. At the close of evidence, the Homeowner moved to dismiss the action for the Bank's failure to comply with presuit notice requirements. Specifically, she contended that the notice was sent by certified mail, not first class mail and therefore, the Bank had to prove actual delivery, which it did not. The Bank responded that certified mail is a type of first class mail, and that the evidence reflected the letter was designated first class mail.

The trial court stated that it did not believe certified mail was the same thing as first class mail, and it found that because the letter was returned as undelivered, the Bank did not establish compliance with the condition of presuit notice of default. The trial court dismissed the case.

We hold that the trial court erred in dismissing the case based on failure to satisfy the presuit notice requirement. The return receipt indicates on its face that the default notice was sent by first class mail. Thus, under paragraph 15 of the mortgage, the notice was "deemed to have been given to Borrower."

An opinion of the Ohio Court of Appeals contains similar facts and is

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> The notice of acceleration and opportunity to cure given to Borrower pursuant to section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

instructive. In *Ocwen Loan Servicing, LLC v. Malish*, 109 N.E.3d 659, 668 (Ohio Ct. App. 2018), the mortgage contract contained the same language that is contained in the subject mortgage's paragraph 15, relied on by the Homeowner. The letter was sent via certified mail and was unclaimed. *Id.* The court declined to find that the conditions precedent were not satisfied merely because the notice was sent via certified mail and reasoned:

> [T]he evidence here shows that certified mail *is* first-class mail. The Malishes' tracking-information printout they submitted from the USPS website shows that certified mail is simply enhanced first-class mail. Under the heading "Postal Product" is stated "First-Class Mail." And beside this under the heading "Features" is stated "Certified Mail." This indicates that certified mail is basically a service that can be added-on to first-class mail. It stands to reason that a sender purchases this service if the sender wants to ensure that the first-class mail gets to the recipient. Therefore, because Ocwen sent the notice of default to the Malishes by first-class mail, the notice must be "deemed to have been given" when it was sent on August 14, 2015.

Id. at 668-69; *see also Md. State Bd. of Nursing v. Sesay*, 121 A.3d 140, 144 n.3 (Md. Ct. Spec. App. 2015) ("Certified mail . . . is an extra service that a mail sender may, by paying extra, add to first-class mail."); *Ming Kuo Yang v. City of Wyoming*, 31 F. Supp. 3d 925, 932 n.6 (W.D. Mich. 2014), *aff'd*, *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599 (6th Cir. 2015) (noting that "[a]ccording to the United States Postal Service, certified mail is an extra service option that may be combined with first class or priority mail. www.usps.com" and holding that "[t]here is nothing in the Ordinance [permitting notice by first class service] to suggest that combining first-class mail with the added certified mail service does not satisfy the Ordinance's requirement that notice be sent by first-class mail").

The Homeowner argues that the use of the word "deemed" in paragraph 15 is ambiguous. But our courts have held that such language is not ambiguous. In *Best Meridian Insurance Co. v. Tuaty*, 752 So. 2d 733, 735 (Fla. 3d DCA 2000), the court addressed a similar provision that stated, "All notices or reports . . . will be deemed delivered to the persons entitled to notices or reports when we mail them." The Third District concluded:

> Under this type of notice provision, notice to the insured is deemed to be complete upon mailing, even if the insured does not actually receive the notice. *See Service Fire Ins. Co. v.*

> *Markey*, 83 So. 2d 855, 856 (Fla. 1955); *Bradley v. Assocs. Discount Corp.*, 58 So. 2d 857, 859 (Fla. 1952); *Burgos v. Independent Fire Ins. Co.*, 371 So. 2d 539, 541 (Fla. 3d DCA 1979); *Allstate Ins. Co. v. Dougherty*, 197 So. 2d 563, 566 (Fla. 3d DCA 1967); *Aetna Cas. & Sur. Co. v. Simpson*, 128 So. 2d 420, 424 (Fla. 1st DCA 1961).
>
> The insurer need only establish that the required notices were actually mailed. The insurer need not establish that the insured actually received the notice.

Id.

Because the evidence in the instant case showed that the default notice was mailed via first class mail and there is nothing in the mortgage to suggest that adding a return receipt defeats first class mail status, the default notice "shall be deemed to have been given to Borrower when mailed" pursuant to the terms of the mortgage. Accordingly, the trial court erred in dismissing the case based on its determination that the Bank failed to comply with conditions precedent to bringing suit.

Reversed and remanded for further proceedings.

GERBER, C.J., CIKLIN and KUNTZ, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.

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

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

WILMA JANE CRAWFORD F/K/A
WILMA E. SATTERWHITE,
CODY CRAWFORD AND BROOKE CRAWFORD,

Appellants/Cross-Appellees,

v. Case No. 5D17-3027

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee/Cross-Appellant,

____/

Opinion filed March 22, 2019

Appeal from the Circuit Court
for Flagler County,
Scott C. Dupont, Judge.

Michael P. Nordman, of Taylor and
Nordman, P.A., DeLand, for
Appellants/Cross-Appellees.

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

PER CURIAM.

Wilma Jane Crawford ("Wilma"), Cody Crawford, and Brooke Crawford (collectively, the "Appellants") appeal the trial court's final judgment granting claims for mortgage foreclosure, equitable subrogation, and equitable lien, asserted by Federal National Mortgage Association ("Appellee"), and dismissing Appellants' counterclaims.

We affirm in part, reverse in part, and remand for the entry of a corrected final judgment consistent with this opinion.

Joseph Crawford ("Joseph") obtained sole title to certain real property located in Flagler County. In 1999, Joseph, as "a single man," executed a mortgage on the subject real property in the amount of $80,000. He married Wilma in early 2000, and Wilma made the property her homestead. However, Joseph did not add Wilma to the deed for the property. In 2001, Joseph and Wilma, as husband and wife, executed a second mortgage on the property in favor of Bank of America, securing a home equity line of credit.

More than five years later, Joseph applied for another loan from Bank of America, indicating on the application that he was unmarried, despite being married to Wilma at the time. In October 2006, Bank of America loaned Joseph $97,850.00 consistent with his request. In return, Joseph executed a note and mortgage ("refinance mortgage"), again indicating that he was "a single man." Of the $97,850.00 in loan proceeds, separate payments of $6,533.52 and $10,595.74 were disbursed to Bank of America, satisfying the balance owed on the Bank of America home equity loan, and $33,006.32 was disbursed to the then-holder of the note secured by the original mortgage for the property, thereby satisfying the original mortgage in its entirety. Joseph also received a cash disbursement of $44,576.31.

Joseph died in January 2014, and the last payment on the loan was made in June 2014. After notifying the "Estate of Joseph Crawford" that the refinance mortgage loan was in default due to the lack of payments, Bank of America assigned the refinance mortgage to Appellee who filed a foreclosure action and notice of lis pendens. Subsequently, Appellee filed a Third Amended Complaint for mortgage foreclosure,

equitable subrogation, imposition of and foreclosure upon an equitable lien, and mortgage reformation.

The case proceeded to a bench trial. Appellee moved the refinance mortgage loan payment history into evidence which demonstrated that the last payment was made in June 2014, the total unpaid principal amount at the time of trial was $87,678.95, the unpaid interest was $18,403.56, and the total amount of escrow advances was $6,990.01.

Following trial, the court entered a final judgment in favor of Appellee, finding it had proven the requisite elements of a foreclosure action and was entitled to foreclose on the refinance mortgage. The trial court also concluded that Appellee was entitled to relief via equitable subrogation, and to thereby "stand in the shoes" of the prior mortgagees due to the refinance mortgage loan proceeds being used to satisfy the prior loans. Additionally, the trial court ruled that Appellee was entitled to the imposition of an equitable lien upon the property to prevent Appellants from being unjustly enriched by the satisfaction of the prior loans and by Appellee's continuing payment of taxes and hazard insurance for the property after the default on the refinance loan.

The trial court also reasoned that Wilma received both direct and indirect benefits from the cash disbursement and therefore found Appellee entitled to the full amount of the refinance mortgage as part of the equitable lien. Additionally, the trial court dismissed Appellants' counterclaims, ruling that each failed to state a cause of action. Finally, the trial court awarded the Appellee $117,648.32 in damages, which included prejudgment interest. This appeal follows.

The parties raise numerous issues on appeal and cross-appeal. We affirm in all respects except for two issues raised by Appellants. We agree with Appellants that the

final judgment incorrectly awards Appellee a mortgage foreclosure and incorrectly applies funds to the equitable lien that did not benefit the homestead. We write to address these issues.

I. The trial court erred by entering a judgment for mortgage foreclosure against Wilma's homestead but did not err in imposing an equitable lien on the property.

This issue presents a question of law that is to be reviewed de novo. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010). Appellants argue that the trial court erred by entering a final judgment of *mortgage* foreclosure, noting that Wilma never executed the refinance mortgage. We agree.

The Florida Constitution provides that "[t]he owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift." Art. X, § 4(c), Fla. Const. Florida courts have consistently interpreted this constitutional provision as requiring spousal joinder in the execution of a mortgage on homestead property in order for the mortgage to encumber the property and be enforceable in foreclosure, even where only the signatory spouse is an owner of record on the property's deed. See Vera v. Wells Fargo Bank, N.A., 178 So. 3d 517 (Fla. 4th DCA 2015).

Wilma did not sign the refinance mortgage, and the subject property was Wilma's homestead. Thus, the trial court erred in finding that Appellee was entitled to foreclose on the refinance mortgage.

However, a trial court is authorized to impose an equitable lien on a homestead if necessary to prevent unjust enrichment. See Palm Beach Sav. & Loan Ass'n v. Fishbein, 619 So. 2d 267 (Fla. 1993). The evidence at trial fully supports the court's determination that some of the loaned funds associated with the refinance mortgage benefited the

homestead and that imposition of an equitable lien was necessary to prevent unjust enrichment. Thus, the trial court did not err in imposing an equitable lien on the homestead.

II. The trial court erred in finding the full amount of the refinance mortgage loan to be subject to the equitable lien.

This issue involves questions of both fact and law. We review the trial court's findings of fact to determine whether they are supported by competent substantial evidence, but we review questions of law de novo. See St. Vincent's Med. Ctr. v. Mem'l Healthcare Grp., Inc., 967 So. 2d 794, 799 (Fla. 2007).

Appellants argue that the trial court miscalculated the amount secured by the equitable lien because it included the $44,576.31 disbursed directly to Joseph that did not benefit the homestead. The Appellee counters by claiming that the trial court properly found that Wilma would be "unjustly enriched" since she had limited access to a portion of the funds and the homestead indirectly benefited from the disbursement. We agree with Appellants.

A trial court may impose an equitable lien to prevent unjust enrichment, but only for funds used to benefit the homestead. See Fishbein, 619 So. 2d at 270-71. Thus, it is not appropriate to include in an equitable lien funds disbursed to the signatory spouse that were "not used to benefit the homestead" but, instead were used by the signatory spouse "for other purposes." Id. at 271.

At trial, Appellee produced no evidence demonstrating that the $44,576.31 disbursed to Joseph either directly or indirectly benefited the homestead. The Appellee's speculation that the funds may have been used to make payments on the loan or provide

upkeep to the property does not justify the inclusion of the cash disbursement in the equitable lien. Therefore, it was error for the trial court to include the funds disbursed directly to Joseph in the amount of the equitable lien.[1]

Next, we address whether the equitable lien amount should be reduced based upon Joseph's monthly payments. Appellants argue that payments made by Joseph from the inception of the loan to the date of default exceeded the $50,135.58 disbursed to satisfy the prior loans, and should therefore extinguish the equitable lien. We reject this argument as it would undermine the principles of equity which support imposition of the equitable lien. Instead, the payments made by Joseph from 2006 to 2014 should be applied proportionally, reflecting the percentage of the refinance loan which was used to satisfy the prior loans. Since 51 percent[2] of the loan was used to benefit the homestead, 51 percent of each payment made by Joseph may be applied toward the equitable lien.

Based upon the foregoing, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. Upon remand, the trial court shall enter a final judgment of foreclosure on the equitable lien consistent with this opinion. The corrected judgment shall include damages in the amount of the refinance mortgage loan disbursed to satisfy the prior loans less any applied payments, all escrow advances, and any

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[1] Although evidence at trial may support a finding that Wilma had limited access to a portion of the cash disbursement, there was no evidence that these funds benefited the homestead.

[2] We derived this percentage by applying the following formula: ($50,135.58 [amount disbursed to satisfy prior loans] ÷ $97,850.00 [refinance mortgage loan amount]) × 100% = 51%, rounded to the nearest units of %.

prejudgment interest.[3]

AFFIRMED in part; REVERSED in part; and REMANDED with instructions.

GROSSHANS, SASSO,[4] JJ., and WILSON, T., Associate Judge, concur.

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[3] In calculating prejudgment interest, the trial court shall compute the interest that accrued by applying payments when they were actually made rather than applying all the payments as a lump sum on the date of trial.

[4] Judge Sasso did not participate in oral argument but reviewed the case in its entirety.