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Manuel Farach

Meruelo v. Commissioner of Internal Revenue, Case No. 18-11909 (11th Cir. 2019).
Transfers between different real estate companies owned by a taxpayer lack "actual economic outlay" and thus are not a "bona fide indebtedness" that "runs directly" to the taxpayer such that the losses created by the transfers can be deducted by the taxpayer.

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A trial court determining whether to allow intervention must conduct an evidentiary hearing to determine, or must otherwise set forth in an order how it considered, the factors set forth in *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992).

Plaza La Mer, Inc. v. Delray Property Investments, Inc., Case Nos. 4D16-2462, 4D18-1068, and 4D18-1099 (Fla. 4th DCA 2019).
A trial court is not required to apportion an award of fees where work on one claim cannot be distinguished from work on other claims, and accordingly, is not required to apportion work between joint parties when they proceeded as one party in the litigation.

Manney v. MBV Engineering, Inc., Case No. 5D18-1773 (Fla. 5th DCA 2019).
A party hired to inspect completed construction, including a structural engineer, is not hired with regard to the design, planning, or construction of a structure, and thus, may not invoke the ten-year statute of repose under Florida Statutes section 95.11(3)(c). Said party instead may be liable, under the Delayed Discovery Doctrine, until four years after a plaintiff discovers the negligence.

U.S. Bank National Association v. Williamson, Case No. 5D18-3992 (Fla. 5th DCA 2019).
The corporate party who is producing the witness for deposition under Florida Rule of Civil Procedure 1.310(b)(6) is permitted to designate the person who will testify; the deposing party is not entitled under the Rule to choose the person who will testify on behalf of the corporate party.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11909

Agency No. 001795-13

HOMERO F. MERUELO,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Petition for Review of a Decision of the
United States Tax Court

(May 6, 2019)

Before WILLIAM PRYOR and NEWSOM, Circuit Judges, and VRATIL,* District Judge.

WILLIAM PRYOR, Circuit Judge:

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* Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

This appeal from the disallowance of a taxpayer's claimed deduction for his share of losses suffered by an S corporation presents the following issue: whether monetary transfers between various business entities partly owned by the taxpayer and an S corporation that were later reclassified as loans from the taxpayer to the S corporation established a "bona fide indebtedness" that "runs directly" to the taxpayer. Treas. Reg. § 1.1366-2(a)(2)(i); *see also* 26 U.S.C. § 1366. Homero Meruelo was a shareholder of Merco of the Palm Beaches, Inc., which suffered a nearly $27 million loss after banks foreclosed on its condominium complex. Meruelo asserted that he had a sufficient basis in Merco's indebtedness for him to deduct $13 million as his share of the loss. Meruelo claimed basis from a $5 million capital contribution he made to Merco and more than $9 million of indebtedness from net transfers through various other business entities in which he held an interest. The Internal Revenue Service determined that he could claim only the $5 million basis and not the $9 million because any debt ran from Merco to the other entities. The Tax Court later ruled that Meruelo had failed to establish a bona fide indebtedness of $9 million running directly to him and that he failed to establish that he made an "actual economic outlay" toward the debt. Because the Tax Court correctly determined that Meruelo did not establish a bona fide indebtedness that ran directly to him, we affirm.

I. BACKGROUND

Meruelo, a real estate developer in south Florida, owns interests in several S corporations, partnerships, and limited liability companies. One of these entities was Merco of the Palm Beaches, Inc., an S corporation Meruelo incorporated in March 2004. Meruelo held 49 percent of Merco's stock.

Subchapter S of the Internal Revenue Code provides "a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders in a manner akin to the tax treatment of partnerships." *Buffered v. Comm'r*, 506 U.S. 523, 525 (1993). A shareholder's ability to deduct his proportionate share of a corporation's net operating losses is limited by the sum of his basis in his stock and the corporate indebtedness to him. *See* 26 U.S.C. § 1366(d)(1). In other words, the shareholder can increase his basis by contributing capital to the corporation or by lending money to it.

Meruelo incorporated Merco to purchase a condominium complex in a bankruptcy sale. In early 2004, the bankruptcy court approved the sale and required Merco to pay a $10 million non-refundable deposit to secure the property. To raise funds for his share of the deposit, Meruelo obtained a personal loan.

Meruelo transferred $4,985,035 of the loan proceeds to Merco Group at Akoya, an S corporation in which he and his mother each held a 50 percent interest. In March 2004, Akoya transferred into Merco's escrow account $5

million—$4,985,035 of Meruelo's loan proceeds and $14,965 of Akoya's own funds—to cover half the required deposit. Akoya had also previously transferred to Merco enough funds to cover the $5 million balance of the deposit. The Commissioner does not dispute that the $4,985,035 transfer gave Meruelo a shareholder basis in that amount in Merco.

From 2004 to 2008, Merco entered into hundreds of transactions with various partnerships, S corporations, and limited liability companies in which Meruelo held an interest. These Merco affiliates often paid expenses, such as payroll costs, for each other or for Merco to simplify accounting and enhance liquidity. The payor company recorded these payments to its affiliates as accounts receivable, and the payee company recorded them as accounts payable. Between 2004 and 2008, Merco affiliates made more than $15 million in payments to or on behalf of Merco, and Merco repaid its affiliates less than $6 million of these payments. On December 31 of each year, Merco's books and records showed substantial net accounts payable to its affiliates.

Luis Carreras, a certified public accountant, prepared the tax returns filed by Meruelo, Merco, and the Merco affiliates. When preparing Merco's tax return for a given year, Carreras would net Merco's accounts payable to its affiliates, as shown on Merco's books as of the preceding December 31, against Merco's accounts receivable from its affiliates. If Merco had net accounts payable, Carreras reported

that amount as a "shareholder loan" on Merco's tax return. Carreras then allocated a percentage of this indebtedness to Meruelo based on Meruelo's ownership interests in the various affiliates that had transferred funds to Merco.

In March 2004, Carreras drafted a promissory note for Meruelo purportedly to make a $10 million unsecured line of credit available to Merco at a six percent interest rate. Carreras testified that, when he prepared Meruelo's and Merco's tax returns for tax years 2004 to 2008, he made an annual charge to Merco's line of credit for an amount equal to Meruelo's calculated share of Merco's net accounts payable to its affiliates for the preceding year.

In 2008, Merco incurred a loss of $26,605,840 when banks foreclosed on the condominium complex it purchased in 2004. Merco reported this loss on its income tax return, and Merco allocated 49 percent of the loss to Meruelo.

Meruelo filed income tax returns for 2005 and 2008. On his 2005 return, he reported taxable income of $13,895,731 and tax due of $4,843,976. On his 2008 return, he claimed an ordinary loss deduction of $11,795,109. This deduction reflected a $13,036,861 flow-through loss from Merco ($26,605,840 × 49 percent) netted against gains of $1,241,752 from two other S corporations in which he held interests. After accounting for other income and deductions, Meruelo reported a net operating loss of $11,793,865 on his 2008 return. In October 2009, he applied for a tentative refund asserting a net operating loss carryback of $11,793,865 from 2008

to 2005. After applying this net operating loss carryback, his original tax lability for 2005, $4,843,976, was reduced by $3,897,470, to $946,506. In January 2010, the Internal Revenue Service issued Meruelo a refund of $3,897,470.

The Internal Revenue Service selected Meruelo's 2005 and 2008 returns for examination. It determined that his basis in Merco was only $4,985,035 based on the proceeds of the bank loan that Meruelo contributed to Merco through Akoya. It disallowed, for lack of a sufficient basis, $8,051,826 of the $13,036,861 flow-through loss claimed for 2008.

After disallowing part of the net operating loss for 2008, the Commissioner determined that Meruelo's carryback to 2005 was limited to $3,706,272 and that his correct tax due for 2005 was $3,546,781. Because Meruelo had reported a tax liability of only $946,506 for 2005, the Commissioner concluded that Meruelo's tax deficiency for that year was $2,600,275 and sent Meruelo a notice of deficiency.

Meruelo petitioned the Tax Court for redetermination of his tax deficiency. He alleged that he had a sufficient basis in Merco for him to fully deduct his share of its 2008 losses. Meruelo alleged that his basis in Merco consisted of $2.7 million of Akoya's first deposit of $5 million, all $5 million of Akoya's second deposit, and $6,616,857 for his share of intercompany transfers.

Meruelo offered two theories to claim credit for the affiliated companies' transfers to Merco: the "back-to-back loan" theory and the "incorporated pocketbook theory." Under the back-to-back-loan theory, he argued the affiliated companies should have been treated as lending funds to him that he then lent to Merco. And under the incorporated-pocketbook theory, Meruelo argued that he should have been treated as using his funds, which were held by the affiliated companies, to pay Merco's expenses on his behalf.

After a trial, the Tax Court ruled for the Commissioner. The Tax Court acknowledged that Meruelo had an undisputed basis of $4,985,035 in Merco, and it explained that only $8,051,826 of the $13,036,9861 flow-through loss was in dispute. But the Tax Court determined that Meruelo was not entitled to any of the disputed basis.

The Tax Court explained that section 1366(d)(1)(B) of the Internal Revenue Code allows a shareholder to increase his basis by the amount of the adjusted basis of any indebtedness owed by the S corporation to the shareholder. Because the Code "does not specify how a shareholder may acquire basis in an S corporation's indebtedness to him," the Tax Court turned to the legislative history of the predecessor to section 1366 for guidance. The Tax Court explained that earlier decisions relied on this legislative history and construed language about "a shareholder's investment in a corporation" to require an "actual economic outlay"

by the shareholder. In other words, the Tax Court ruled that a shareholder must show that he incurred a cost in making a loan or that he was left poorer in a material sense after the transaction.

The Tax Court decided that the test for determining a shareholder's basis in an S corporation under Treasury Regulation § 1.1366-2(a)(2)—which was amended in 2014 and limits debt basis to "bona fide indebtedness of the S corporation that runs directly to the shareholder"—was effectively the same as that under the "actual economic outlay" doctrine. The Tax Court explained that it had long required that a shareholder prove an S corporation's indebtedness running directly to him to deduct his proportionate share of the corporation's net operating loss. And the Tax Court reasoned that because the 2014 regulation states that "bona fide indebtedness" is to be determined by "general Federal tax principles," the 2014 regulation incorporates the actual economic outlay doctrine.

The Tax Court rejected Meruelo's back-to-back-loan theory because there was no evidence that funds had been lent to Meruelo and then lent back to Merco. The Tax Court acknowledged that bona fide back-to-back loans, first from an affiliated company to a shareholder and then from the shareholder to the debtor S corporation, can increase a shareholder's basis. But it explained that a shareholder is bound by the form of the transaction he initially chose and that transactions directly among related companies (and not involving the shareholder) do not

qualify as back-to-back loans. The Tax Court clarified that a taxpayer-shareholder cannot reclassify intercompany loans as shareholder loans for tax purposes when preparing his return. The Tax Court then ruled that, because there was no evidence that the Merco affiliates had contemporaneously booked transfers between them as shareholder loans—the affiliates instead labeled them as accounts receivable and payable, wage payments, or capital contributions—Meruelo's back-to-back-loan theory failed. The Tax Court also ruled that, because Meruelo made no actual economic outlay toward the monetary transfers from the Merco affiliates to Merco, he could not claim that these transfers amounted to a shareholder loan.

The Tax Court likewise rejected Meruelo's incorporated-pocketbook theory. The Tax Court explained that, although some of its rulings allowed basis increases under an incorporated-pocketbook theory, the facts here were a "far cry" from those decisions. The Tax Court explained that in other incorporated-pocketbook decisions, the taxpayer habitually used a single, wholly owned corporation to pay third parties on his behalf. But many of the Merco affiliates had co-owners besides Meruelo, and Meruelo had not shown that these affiliates had a "habitual practice" of paying his personal expenses. And the Tax Court explained that the "incorporated pocketbook" corporations contemporaneously booked the disbursements as shareholder loans. The Merco affiliates, by contrast, booked their transactions as capital contributions, payroll expenses, or intercompany accounts

payable and receivable, and only relabeled the disbursements as shareholder loans at the close of each year. The Tax Court upheld the Commissioner's determination of a $2,600,275 deficiency.

II. STANDARD OF REVIEW

We "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1). "The interpretation of a statutory section of the Internal Revenue Code by the tax court is a question of law reviewed *de novo*." *McLaulin v. Comm'r*, 276 F.3d 1269, 1272 (11th Cir. 2001).

III. DISCUSSION

Section 1366 permits a shareholder of an S corporation to deduct his *pro rata* share of a net operating loss sustained by the corporation:

> **(a) Determination of shareholder's tax liability.—**
>
> **(1) In general.**—In determining the tax under this chapter of a shareholder for the shareholder's taxable year in which the taxable year of the S corporation ends . . . , there shall be taken into account the shareholder's pro rata share of the corporation's—
>
> **(A)** items of income (including tax-exempt income), loss, deduction, or credit the separate treatment of which could affect the liability for tax of any shareholder, and
>
> **(B)** nonseparately computed income or loss.
>
> . . .
>
> **(d) Special rules for losses and deductions.—**
>
> **(1) Cannot exceed shareholder's basis in stock and debt.**—The aggregate amount of losses and deductions taken into account by a shareholder under subsection (a) for any taxable year shall not exceed the sum of—

> **(A)** the adjusted basis of the shareholder's stock in the S corporation . . . , and
> **(B)** the shareholder's adjusted basis of any indebtedness of the S corporation to the shareholder . . . .

26 U.S.C. § 1366. Under section 1366(a)(1), an S corporation's income and operating losses are passed through to its shareholders in a similar way to the tax treatment of partnerships. *Buffered*, 506 U.S. at 525; *Ellinger v. United States*, 470 F.3d 1325, 1329 n.2 (11th Cir. 2006). A shareholder may deduct his portion of an S corporation's net operating losses only to the extent that the loss does not exceed the sum of "the adjusted basis of the shareholder's stock in the S corporation," 26 U.S.C. § 1366(d)(1)(A), and "the shareholder's adjusted basis of any indebtedness of the S corporation to the shareholder," *id.* § 1366(d)(1)(B). This appeal concerns only a shareholder's adjusted basis of indebtedness under section 1366(d)(1)(B).

Meruelo argues, and the Commissioner agrees, that the governing regulation, Treas. Reg. § 1.1366-2, as amended in 2014, provides a standard of "bona fide indebtedness" that must run "directly to the shareholder" for determining a shareholder's debt basis in an S corporation:

> **(2) Basis of indebtedness—(i) In general.** The term basis of any indebtedness of the S corporation to the shareholder means the shareholder's adjusted basis . . . in any *bona fide indebtedness* of the S corporation *that runs directly to the shareholder*. Whether indebtedness is bona fide indebtedness to a shareholder is determined under general Federal tax principles and depends upon all of the facts and circumstances.

Treas. Reg. § 1.1366-2(a)(ii)(2) (emphasis added). The Commissioner also agrees that this regulation applies to Merco's losses for the 2005 and 2008 tax years because those tax years were still open for assessment in July 2014. *See id.* § 1.1366-5(b) (explaining that the regulation applies "with respect to indebtedness between an S corporation and its shareholder that resulted from any transaction that occurred in a year" that was still open for assessment on July 23, 2014).

An S corporation's debt does not run directly to the shareholder if it instead flows through "an entity with passthrough characteristics which advanced the funds and is closely related to the taxpayer." *Hitchins v. Comm'r*, 103 T.C. 711, 715 (1994). But the 2014 regulation provides that if a shareholder engages in genuine "back-to-back" loans—in which an affiliated entity loans the shareholder funds that he then loans directly to the S corporation—those loans can establish bona fide indebtedness running directly to the shareholder. *See* Treas. Reg. § 1.1366-2(a)(2)(iii) ("**Example 2.** Back-to-back loan transaction. A is the sole shareholder of two S corporations, S1 and S2. S1 loaned $200,000 to A. A then loaned $200,000 to S2 . . . If A's loan to S2 constitutes bona fide indebtedness from S2 to A, A's back-to-back loan increases A's basis of indebtedness in S2 . . . ."). So to claim a deduction under section 1366(a), Meruelo had to establish that a bona fide indebtedness of Merco ran directly to him.

Meruelo presents two alternative arguments that the Tax Court erred in disallowing his deduction. First, he contends that Merco's debt ran directly to him under a back-to-back-loan theory. Second, he contends that the debt ran directly to him under an incorporated-pocketbook theory. Both arguments fail.

A. Meruelo's Back-to-Back-Loan Theory Fails Because Merco's Debt Ran to the Merco Affiliates, Not to Meruelo.

Meruelo argues that he can claim a debt basis based on his back-to-back-loan theory for two reasons. First, he argues that we should treat the monetary transfers between the Merco affiliates as back-to-back loans based on the economic substance of the transactions rather than the form they took. Second, he alternatively contends that the form of the transactions was sufficient to establish that they amounted to back-to-back loans.

Meruelo's argument for substance over form is a nonstarter. Taxpayers are ordinarily "liable for the tax consequences of the transaction they actually execute and may not reap the benefit of some other transaction that they might have made." *Selfe v. United States*, 778 F.2d 769, 773 (11th Cir. 1985). "In other words, taxpayers ordinarily are bound by the 'form' of their transaction and may not argue that the 'substance' of their transaction triggers different tax consequences." *Id.* The Supreme Court has explained that although "a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, and may not enjoy the

benefit of some other route he might have chosen to follow but did not." *Comm'r v. Nat'l Alfalfa Deyhdrating & Milling Co.*, 417 U.S. 134, 149 (1974) (citations omitted).

The parties cite, and we are aware of, only a single decision in which we have agreed with a taxpayer that an exceptional circumstance could warrant looking to the substance of a transaction instead of its form as having a different tax consequence. *See Selfe*, 778 F.2d at 774. The taxpayer-shareholder in *Selfe* had initially obtained a loan in her individual capacity to fund her fledgling retail clothing business and pledged her personal assets as collateral. *See id.* at 770. At the bank's request, she agreed to convert her loan into one from the bank to the S corporation where she guaranteed the corporation's indebtedness to the bank and continued to pledge her assets as collateral. *Id.* at 770–71. We concluded that, in the light of the circumstances suggesting that the bank looked to the shareholder as the primary obligor on the loan instead of the thinly capitalized S corporation, genuine issues of material fact existed as to whether the guaranteed loan was effectively a back-to-back loan through the shareholder. *Id.* at 774–75. We remanded to determine whether the shareholder's guaranty amounted to either a shareholder loan or an equity investment. *Id.* at 775.

Nothing akin to the exceptional circumstance in *Selfe* occurred here. Only an "unusual set[] of facts" can warrant judging a transaction based on its substance

instead of its form. *Sleiman v. Comm'r*, 187 F.3d 1352, 1359 (11th Cir. 1999) (refusing to extend the approach from *Selfe* to treat a shareholder-guaranteed loan to an S corporation as if it were a back-to-back loan where the lender looked to the shareholder as only a secondary obligor). Meruelo's argument about the substance of his transaction—that a portion of the funds the affiliates transferred to Merco could be considered profits that Meruelo was otherwise entitled to receive and that the funds were used to pay Merco's business expenses—hardly presents an "unusual set of facts" about intercompany monetary transfers, and it does not justify setting aside our ordinary rule that the taxpayer is bound by the form his transactions. *See Shebester v. Comm'r*, 53 T.C.M. (CCH) 824 (1987) (rejecting taxpayer's contention that loans from one controlled S corporation to another controlled S corporation were in substance a series of dividends to the shareholder from one corporation followed by loans from the shareholder to the other corporation).

Meruelo also argues that his accountant's end-of-year reclassification of the intercompany transfers, as reflected on his tax returns and on the annual adjustments to the line-of-credit from the 2004 Note, were sufficient to establish that the transactions amounted to shareholder, but we disagree. "After-the-fact reclassification cannot satisfy the requirement that the debt run directly from the S corporation to the taxpayer/shareholder, and courts have previously rejected efforts

by taxpayers to establish debt basis in an S corporation using this method." *Broz v. Comm'r*, 727 F.3d 621, 627 (6th Cir. 2013); *Ruckriegel* v. *Comm'r*, 91 T.C.M. (CCH) 1035 (2006) (ruling that yearend reclassification of intercorporate loans as back-to-back loans through the taxpayer was insufficient to provide debt basis); *Burnstein v. Comm'r*, 47 T.C.M. (CCH) 1100 (1984) (same). Because the transactions were contemporaneously classified as transactions between the affiliates and Merco, the designation Meruelo's accountant gave them at the end of the year does not govern. And we agree with the Tax Court that the accountant's adjustments to "a notional line of credit, uniformly made after the close of each relevant tax year, do not suffice to create indebtedness to [Meruelo] where none in fact existed."

B. Meruelo's Incorporated-Pocketbook Theory Fails Because the Merco Affiliates Were Not His Incorporated Pocketbook.

Meruelo alternatively contends that he can claim debt basis based on his incorporated-pocketbook theory. This theory holds that "[a] taxpayer can obtain debt basis in an S corporation through payments made by a wholly owned corporate entity if that entity functions as the shareholder's 'incorporated pocketbook,' meaning that the taxpayer has a 'habitual practice of having his wholly owned corporation pay money to third parties on his behalf.'" *Broz*, 727 F.3d at 627–28 (citation omitted). In two decisions, the Tax Court has ruled that payments made to an S corporation by a taxpayer's "incorporated pocketbook"

company were sufficient to establish the shareholder's debt basis. *See Yates v. Comm'r*, 82 T.C.M. (CCH) 805 (2001); *Culnen v. Comm'r*, 79 T.C.M. (CCH) 1933 (2000), *rev'd on other grounds*, 28 F. App'x 116 (3d Cir. 2002).

Even if we assume that the incorporated-pocketbook theory comports with the requirement that a debt run "directly to the shareholder," Meruelo failed to establish that the Merco affiliates constituted his incorporated pocketbook. Unlike the shareholders in *Yates* and *Culnen*—who used a single, wholly owned entity to pay third parties on the shareholder's behalf—Meruelo seeks to treat eleven distinct Merco affiliates, many of which he only partially owned, as his incorporated pocketbook. Many of the Merco affiliates acted more like ordinary business entities than as incorporated-pocketbook companies because they both disbursed and received funds for business expenses from Merco. As the Tax Court explained, no court has ever ruled that a group of non-wholly owned entities that both receive and disburse funds in this fashion can constitute an incorporated pocketbook. And Meruelo failed to establish that he habitually paid third parties on his behalf through the putative incorporated-pocketbook companies. Meruelo's evidence established only that the Merco affiliates regularly paid the expenses of other companies within the affiliate group—not his personal expenses. *See Broz*, 727 F.3d at 628 (affirming Tax Court's rejection of taxpayers' "incorporated pocketbook" argument where the taxpayers failed to establish that they habitually

paid third parties through the entities); *Messina v. Comm'r*, 114 T.C. Memo. 2017-213, at *32–33 (2017) (rejecting theory on the same ground); *Ruckriegel*, 91 T.C.M. (CCH) 1035 (same).

IV. CONCLUSION

We **AFFIRM** the judgment of the Tax Court in favor of the Commissioner.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DAVID WILSON, Appellant, v. AMERILIFE OF EAST PASCO, LLC (f/k/a AMERI-LIFE AND HEALTH SERVICES OF EAST PASCO, LLC), a Delaware Limited Liability Company, Appellee.	)	Case No. 2D18-2431

Opinion filed May 8, 2019.

Appeal from the Circuit Court for Pinellas County; George M. Jirotka, Judge.

Christopher L. DeCort and Nicole Deese Newlon of Johnson & Cassidy, P.A., Tampa, for Appellant.

Ryan M. Scully, Clearwater (withdrew after briefing); R. Nathan Hightower, Clearwater, for Appellee.

MORRIS, Judge.

David Wilson appeals a nonfinal order compelling arbitration of his counterclaims, thereby staying the litigation of them, in an action brought by AmeriLife

of East Pasco, LLC, f/k/a Ameri-Life and Health Services of East Pasco, LLC.[1] We conclude that the trial court erred in compelling arbitration because the filing of AmeriLife's complaint resulted in a waiver of its right to seek arbitration and the filing of Wilson's counterclaims did not revive that right to arbitration. We therefore reverse the order on appeal.

BACKGROUND

AmeriLife is an insurance company. Wilson worked as a sales agent for AmeriLife from November 2008 until August 2016, when his employment was terminated. AmeriLife filed a complaint against Wilson in November 2017 alleging that after Wilson's employment was terminated, he violated provisions of an independent agent agreement (agent agreement) and an independent agent noncompete agreement (noncompete agreement). As a result, AmeriLife sought damages for breach of contract, tortious interference with contractual and advantageous business agreements, and misappropriation and use of confidential trade secrets. AmeriLife also sought an injunction and restitution for unjust enrichment.

The agent agreement specifically includes a section entitled "ARBITRATION," which provides in relevant part that if the parties did not settle any dispute within sixty calendar days after the initiation of negotiation, then all claims (except for claims made under paragraphs 10 and 12) "arising out of or relating to" the agreement shall be resolved by arbitration. The arbitration provision provides the exception that "[n]othing herein contained shall in any way deprive either party of its

[1]We have jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(1)(B) and 9.130(a)(3)(C)(iv).

right to seek a temporary restraining order, preliminary or permanent injunction or other equitable relief in a court of competent jurisdiction."

Conversely, the noncompete agreement does not include an arbitration provision. This fact is not in dispute. On the issue of remedies, the noncompete agreement provides, in relevant part, that "[i]n addition to any remedies otherwise available at law, . . . the Agency shall be entitled to recover damages for your replacement of, or interference with, business of Agency, whether done directly or indirectly, by you or to which you are a participant in any manner." The remedies provision of the noncompete agreement also sets forth a liquidated damages amount for each day that Wilson is found to be in violation of that agreement.

The noncompete agreement prohibited Wilson from competing with AmeriLife within thirty-five miles of AmeriLife's offices for a period of twenty-four months following the effective date of his termination. This meant that Wilson could not sell certain insurance products or solicit or deal with AmeriLife's customers regarding the sale of insurance products of the type sold by AmeriLife during the stated period. The noncompete agreement also prohibited Wilson from misappropriating AmeriLife's confidential information and trade secrets both during and following his termination. Similarly, the agent agreement also contained terms prohibiting Wilson from contacting and soliciting AmeriLife's customers for the purpose of obtaining their business regarding certain insurance products and prohibiting Wilson from using or disclosing AmeriLife's trade secrets and confidential information.

AmeriLife alleged that shortly after Wilson's termination, it learned that he was violating both the agent agreement and the noncompete agreement by attempting

to establish business relationships with current and potential AmeriLife customers and/or contractors and by attempting to move their business to him in lieu of beginning or continuing their business relationship with AmeriLife.

Wilson filed an answer and affirmative defenses which included counterclaims for declaratory and injunctive relief, breach of contract based on improper termination and vested renewal commissions or commission account statements, an accounting (relating to the commissions), and for violations of the Fair Labor Standards Act (based on an alleged overtime violation).

Instead of responding to the counterclaims, AmeriLife filed its motion to compel arbitration and to stay litigation of Wilson's counterclaims.[2] AmeriLife acknowledged that the agent agreement contained an arbitration provision that applied to "all claims" arising out of that agreement, and it argued that all of Wilson's counterclaims "arise out of what Wilson alleges was the improper termination of his Agent Agreement and damages related to the termination of the Agent Agreement."

Wilson filed a response in opposition to the motion to compel arbitration, arguing that AmeriLife's claims were based on the agent agreement and that AmeriLife waived its right to seek arbitration by failing to confine its request for relief to injunctive or equitable relief and, instead, additionally seeking damages. Wilson further contended that AmeriLife acted inconsistently "with its purported intent to arbitrate" by requesting in January 2018 to take Wilson's deposition. Wilson then asserted that the filing of his counterclaims did nothing to revive AmeriLife's right to seek arbitration because his counterclaims did not "alter the scope and nature of the litigation."

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[2]AmeriLife requested that its claims be allowed to proceed.

The trial court held a hearing on the motion to compel arbitration but made no factual findings. Ultimately, the trial court entered an order granting AmeriLife's motion to compel arbitration of Wilson's counterclaims and to stay litigation related to those counterclaims only, though the order again failed to contain any factual findings.

ANALYSIS

In determining whether parties are required to arbitrate a dispute, courts must consider three elements: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). The outcome of this case rests on the third element: waiver.

We generally review an order granting or denying a motion to compel arbitration de novo, but the issue of "whether a party has waived the right to arbitrate is a question of fact, reviewed on appeal for competent, substantial evidence to support the lower court's findings." Chaikin v. Parker Waichman LLP, 253 So. 3d 640, 643 (Fla. 2d DCA 2017) (quoting Green Tree Servicing, LLC v. McLeod, 15 So. 3d 682, 686 (Fla. 2009) (en banc)).

"Waiver" has been defined "as the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005) (citing Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n.12 (Fla. 2001)). "This general definition of waiver is applicable to a right to arbitrate." Id. Therefore the issue of whether an arbitration agreement has been waived "should be analyzed in much the same way as in any other contractual context,"

and the focus is "whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." Id. (quoting Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987)).

A party which seeks to rely on its right to arbitration must safeguard the right and not act inconsistently with it. McLeod, 15 So. 3d at 687 (citing Nat'l Found. for Cancer Research, 821 F.2d at 774). However, actively participating in a lawsuit is inconsistent with arbitration. Id. Thus, "a party may waive [its] right to arbitration by filing a lawsuit without seeking arbitration." Id. (citing Seville Condo. #1, Inc. v. Clearwater Dev. Corp., 340 So. 2d 1243, 1245 (Fla. 2d DCA 1976)); see also Chaikin, 253 So. 3d at 643. Notably, "once a party has waived the right to arbitration by active participation in a lawsuit, the party may not reclaim the arbitration right without the consent of [its] adversary." McLeod, 15 So. 3d at 687.

Here, by filing its complaint, AmeriLife actively participated in the lawsuit thereby waiving its right to arbitration of Wilson's counterclaims. If AmeriLife's complaint had sought only equitable relief on its claims arising out of the agent agreement, we might conclude that there was no waiver because the agent agreement clearly allowed AmeriLife to seek injunctive relief in court.[3]

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[3]Cf. Apartment Inv. & Mgmt. Co. v. Flamingo/S. Beach 1 Condo. Ass'n, 84 So. 3d 1090 (Fla. 3d DCA 2012). There, the Third District Court of Appeal reviewed a circuit court's construction of an arbitration provision similar to the one in the agent agreement in this case. The provision, while requiring arbitration of disputes arising out of an agreement between the parties, also contained exceptions. Id. at 1091-92. Specifically, the arbitration provision provided that the condominium association was not precluded from seeking and obtaining equitable relief in court. Id. at 1092. Thus, because all of the condominium association's claims were equitable in nature, the court held that all of the claims "may be resolved by the trial court without requiring resolution by arbitration." Id. at 1093.

But here, the claims in AmeriLife's complaint were not solely equitable in nature. Rather, AmeriLife sought both equitable and legal relief. See Swan Landing Dev., LLC v. Fla. Capital Bank, N.A., 19 So. 3d 1068, 1072 (Fla. 2d DCA 2009) (distinguishing between claim to foreclose a mortgage, which was equitable in nature and therefore an exception to the arbitration agreement contained within the note, and claims for breach of contract which were legal in nature and subject to arbitration provision). Crucial to our holding is the fact that AmeriLife's legal claims had a contractual nexus to the agent agreement that contained the arbitration provision. See Chaikin, 253 So. 3d at 644 (explaining that a claim has a contractual nexus to a contract "if it emanates from an inimitable duty created by the parties' unique contractual relationship"). By electing to sue and pursue relief in the circuit court on arbitrable claims arising out of the agent agreement, AmeriLife acted inconsistently with its right to arbitrate the legal claims and, as a result, waived its right to seek arbitration of any claims arising out the agent agreement. See id. at 645 (holding that by electing to sue and seek relief in the trial court on arbitrable claims arising out of a partnership agreement, appellee waived its right to seek arbitration).

We are not persuaded by AmeriLife's argument that its claim for misappropriation and misuse of trade secrets was an exception to the arbitration provision. The noncompete agreement, as we already explained, did not contain an arbitration provision, and paragraph 5 of the noncompete agreement incorporated paragraph 18 of the agent agreement which addresses misappropriation and misuse of trade secrets. However, the arbitration provision in the agent agreement makes clear that "all claims, (with the exception of claims arising out of Paragraphs 10 and 12),

arising out of or relating to this Agreement and the transactions contemplated hereunder to which the Agreement relates, . . . shall be resolved by arbitration." Thus the fact that the noncompete agreement incorporates paragraph 18 of the agent agreement does not remove paragraph 18 from being subject to arbitration. It merely means that a claim of misappropriation and misuse of confidential trade secrets is a violation of both paragraph 5 of the noncompete agreement and paragraph 18 of the agent agreement.

We likewise reject AmeriLife's argument that the references in paragraphs 15 and 18 of the agent agreement to the ability of AmeriLife to recover damages somehow implicitly except those paragraphs from the arbitration provision. Clearly, the parties knew how to *specifically* except types of claims as indicated by the specific exception to arbitration for claims brought under paragraphs 10 and 12. If the parties intended for claims brought under paragraphs 15 and 18 to also be excepted from arbitration, they could have stated so. They did not. Once AmeriLife sought damages for arbitrable claims arising out of the agent agreement, including those arising out of paragraphs 15 and 18, it waived its right to seek arbitration.[4]

Finally, we are not convinced by AmeriLife's argument that the references in the arbitration provision to a "court having jurisdiction" or AmeriLife "prevailing in court proceedings" indicates that the parties intended for certain claims, such as those arising out of paragraphs 15 and 18, to be addressed in court rather than through arbitration. We construe those references as relating to circumstances not present here, namely,

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[4]We note that in its answer brief, AmeriLife briefly referenced paragraph 20 of the agent agreement. Notably, however, AmeriLife made no substantive argument relating to that paragraph. Like paragraphs 15 and 18, paragraph 20 was not specifically excepted from the arbitration provision. Thus any claim arising out of a violation of that paragraph would also act as a waiver of the right to arbitrate.

an arbitration award being reduced to judgment or to court proceedings involving claims arising out paragraphs 10 and 12.

Having determined that AmeriLife waived its right to arbitrate claims arising out of the agent agreement, we must next determine whether Wilson, by filing his counterclaims, revived AmeriLife's right to arbitrate legal claims under the agent agreement. Owens & Minor Med., Inc. v. Innovative Mktg. & Distribution Servs., Inc., 711 So. 2d 176 (Fla. 4th DCA 1998), is instructive on this issue.

In Owens, the parties entered into a contract containing an arbitration provision that allowed the parties to submit any dispute arising out of the contract to arbitration by sending notice to the other party. Id. at 177. A dispute arose, and the appellant filed its action for breach of contract, foreclosure of a security agreement, and account stated. Id. After the appellee's motion to dismiss was denied, the appellee filed an answer, affirmative defenses, counterclaim, and third-party complaint; the counterclaims alleged fraudulent inducement and breach of contract. Id. The appellant's motion to stay the proceedings and compel arbitration was denied. Id.

On appeal, although the appellant argued that it had not participated in the litigation in relation to the counterclaims, the Fourth District Court of Appeal rejected that assertion and concluded that the appellant waived its right to arbitrate due to its active participation in the litigation. Id. The court explained that the counterclaims did "not involve issues separate and distinct from those raised in appellant's amended complaint" and "[t]he matters raised in the counterclaim[s] are intertwined with issues raised in the amended complaint." Id. The court also noted that "the counterclaim[s] did not significantly alter the scope and nature of the litigation, such that [they] revived a

previously waived right to demand arbitration." Id. Ultimately, the court concluded that the finder of fact would have to resolve factual issues that were common to both the amended complaint and the counterclaims, and it affirmed the denial of the motion to compel arbitration. Id.; see also Chaikin, 253 So. 3d at 645 (holding that appellee's decision to pursue relief in the trial court of arbitrable claims waived its right to compel arbitration of appellant's counterclaims which were based on same agreement, noting that "[w]hat is sauce for the goose is sauce for the gander").

Here, the entirety of this dispute involves Wilson's employment with AmeriLife. We reject the argument made by AmeriLife that Design Benefit Plans, Inc. v. Enright, 940 F. Supp. 200 (N.D. Ill. 1996), a case that the Owens court cited, requires an affirmance. Although the court in Design Benefit Plans, Inc. concluded that a defendant's counterclaim for unpaid commissions revived any waived right to arbitrate, the case is factually distinguishable. There, the plaintiff originally filed a complaint for breach of restrictive covenants in an agent agreement and included claims for a declaratory judgment, breach of contract, and tortious interference with contractual relations. 940 F. Supp. at 202. The defendant's counterclaim for unpaid commissions was deemed to significantly alter the nature of the litigation because it involved a claim that was separate and distinct from the plaintiff's claims. Id. at 203. Thus the court concluded that the plaintiff was entitled to seek arbitration of the defendant's counterclaims. Id. at 203, 207.[5]

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[5]Owens distinguished Design Benefit Plans, Inc. on the basis that it involved claims that were subject to arbitration because they were separate and distinct from claims for which arbitration had arguably been waived. Owens, 711 So. 2d at 177. AmeriLife makes much of the fact that this court then relied on Owens in Hawkins v. James D. Eckert, P.A., 738 So. 2d 1002, 1003 (Fla. 2d DCA 1999). In Hawkins, we

But here, AmeriLife's attempt to liken Wilson's counterclaims to the counterclaim made in Design Benefit Plans, Inc. is unavailing. Wilson's counterclaims included a claim for breach of contract for unlawful termination of the agent agreement, and his other claims also arise out of the agent agreement. At the very least, the breach of contract claim based on unlawful termination is inextricably intertwined with AmeriLife's claims for breach of contract. It matters not that the parties' claims may have arisen under different paragraphs of the agent agreement. The crucial fact is that both parties raised claims arising out of the agent agreement containing the arbitration provision. See Chaikin, 253 So. 3d at 644-45 (rejecting the appellee's argument that only the appellant's counterclaims were subject to arbitration and concluding that the claims made in the complaint and counterclaims were intertwined because "[t]he initial lawsuit and the counterclaims find their genesis in the Partnership Agreement" containing the arbitration provision). We conclude that the issues raised in Wilson's counterclaims were reasonably foreseeable in the context of AmeriLife's complaint. Accordingly, we conclude that Wilson's counterclaims did not revive AmeriLife's previously waived right to demand arbitration.

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rejected the argument that a party's right to arbitrate was revived by the filing of a counterclaim, as the court did in Owens, concluding that the counterclaim did not alter the scope and nature of the litigation to the extent that it revived the appellee's previously waived right to demand arbitration. Hawkins, 738 So. 2d at 1003. But that passing reference to Owens was not the holding of our case. And in any event, Design Benefit Plans, Inc. is two steps removed from our Hawkins opinion. Further, we are not bound by cases from federal district courts, and we hesitate to give much weight to the Design Benefit Plans, Inc. case when it provides no explanation for why the counterclaim was deemed separate and distinct from the claims made in the complaint such that it altered the nature of the litigation.

We therefore reverse the order staying litigation of Wilson's counterclaims in favor of arbitration and remand for proceedings in conformance with this opinion.

Reversed and remanded.

LUCAS and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed May 8, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-393
Lower Tribunal No. 13-24744

María Soledad Larraín Troncoso, et al.,
Appellants,

vs.

Manuel Antonio Ossandón Larraín,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Akerman, LLP, and Luis A. Perez, Sandra J. Millor, Jenny Torres, and Kristen M. Fiore (Tallahassee), for appellants.

Harper Meyer, and Patrick J. O'Connor, Patricia M. O'Connor and Bryan Morera, for appellee.

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

EMAS, C.J.

Maria Soledad Larraín Troncoso, Real State Golden Investments Inc., and Bernardo Ossandón Larraín, appeal the trial court's order summarily denying Maria Soledad Larraín Troncoso's motion to intervene pursuant to Florida Rule of Civil Procedure 1.230. That rule provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.[1]

The Florida Supreme Court explained the nature of the interest that will permit intervention:

> The interest which will entitle a person to intervene . . . must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of the litigation.

Union Cent. Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507 (Fla. 1992) (quoting Morgareidge v. Howey, 78 So. 14, 15 (Fla. 1918)). Importantly, and as the Carlisle court further explained:

> Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention. In deciding this question the court should consider a number of factors, including the derivation of the interest, any pertinent

[1] A decision on a motion to intervene is generally reviewed for an abuse of discretion. See Fed. Nat'l Mortg. Ass'n v. JKM Svcs., LLC, 256 So. 3d 961 (Fla. 3d DCA 2018).

> contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstances.

Id. at 507-08.

The record in this case would appear to establish the existence of a requisite interest and a valid basis for intervention.[2] In the instant case, however, we cannot know whether the trial court reached a contrary conclusion or whether it considered any of the above-described Carlisle factors, because the trial court did not conduct any hearing on the motion to intervene (or the motion for rehearing), and simply denied each in unelaborated orders.[3] We conclude that the failure to conduct a hearing, combined with the failure to articulate any findings in its order, requires reversal. See Farese v. Palm Beach Partners, Ltd., 781 So. 2d 419 (Fla. 4th DCA 2001) (reversing denial of motion to intervene where court failed to conduct an

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[2] On its face, the motion and the existing record would appear to support intervention. However, we do not reach the merits of the trial court's determination, but instead reverse and remand for further proceedings on the motion for intervention as may be appropriate.

[3] After appellant filed her motion to intervene, the parties—pursuant to the trial court's order—coordinated a special-set, thirty-minute hearing date for the motion. However, on the day before the special set hearing was to be held, appellee filed his response to the motion to intervene. Two hours after appellee's response was filed, the trial court entered its order denying the motion to intervene and cancelled the hearing specially set for the following day. Appellant thereafter filed her motion for rehearing in which she raised the trial court's decision to cancel the hearing, and also replied to (and took issue with) several of the factual allegations appellee asserted and relied upon in his response as a basis for the trial court to deny the motion to intervene.

evidentiary hearing to determine movant's interest in the litigation); Ownby v. Citrus Cty., 13 So. 3d 136 (Fla. 5th DCA 2009) (reversing order denying intervention where intervention appeared to be appropriate, trial court gave no reason for denying intervention, and no valid reason was apparent on the existing record). Compare Charry v. Torres, 263 So. 3d 238 (Fla. 3d DCA 2019) (holding that although a hearing on the motion to intervene was held, because appellant failed to provide this court with a transcript, it could not determine whether the trial court abused its discretion in denying the motion).

Reversed and remanded for the trial court to articulate its findings in denying the motion or, as may be appropriate, to conduct a hearing on the motion.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PLAZA LA MER, INC. and **SOUTH SQUARE DEVELOPMENT, INC.,**
Appellants,

v.

DELRAY PROPERTY INVESTMENTS, INC., SOSQ PROPERTY INVESTMENTS, INC., HATIM HASHWANI, HARRY HAHAMOVITCH, ROBERT GEISERMAN, HHH DEVELOPMENT GROUP, INC., and **HHH FINANCIAL CORPORATION, INC.,**
Appellees.

Nos. 4D16-2462, 4D18-1068, and 4D18-1099

[May 8, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Donald W. Hafele, Judge; L.T. Case No. 501995CA006336 AO.

Robert J. Hauser of Pankauski Hauser PLLC, West Palm Beach, and Robert A. Sweetapple of Sweetapple, Broeker & Varkas, P.L., Boca Raton, for appellants.

Stephen A. Mendelsohn of Greenberg Traurig, P.A., Boca Raton, and Elliot H. Scherker and Brigid F. Cech Samole of Greenberg Traurig, P.A., Miami, for appellees Delray Property Investments, Inc., and SOSQ Property Investments, Inc.

PER CURIAM.

In 2015, we described this case as the "oldest active case in Palm Beach County." *Hahamovitch v. Delray Prop. Invs., Inc.*, 165 So. 3d 676, 678 n.1 (Fla. 4th DCA 2015). The case returns but limited to the circuit court's final judgment awarding attorney's fees and costs to the appellees. We affirm.

After we affirmed the court's final judgment, the case returned to the circuit court and both appellants and appellees sought attorney's fees and costs. The court held a hearing and entered an Order on Joint Motions on the Parties' Post-Trial Motions for Attorney's Fees. The court determined (i) the appellees were the prevailing parties on certain issues; and (ii) the

appellants did not prevail on any claim that included an entitlement to attorney's fees.

The appellants appealed. After oral argument, we concluded the court's order was final for the appellants but non-final for the appellees. As a result, we relinquished jurisdiction to the circuit court to determine the amount of fees due to the appellees for those claims on which the court had determined them to be the prevailing party.

The circuit court held several hearings after we relinquished jurisdiction. At the start of one of those hearings, counsel for the appellants stipulated that the appellants were not challenging the time entries, the hourly rate, or number of hours billed by counsel for the appellees. And the appellees agreed that they were not seeking any fees incurred before February 2008. Finally, the parties also stipulated that the appellants were not contesting the amount of costs due to the appellees. The appellants' cost challenge was limited to the "allocation" of those costs.

Ultimately, the court issued a final judgment awarding the appellees $1,203,852.47 in attorney's fees and costs. Of that amount, the appellees were awarded $969,571.88 from Plaza La Mer and South Square Development, Inc. The remaining $234,280.59 was due solely from Plaza La Mer.

We review the circuit court's allocation of attorney's fees for an abuse of discretion. *Glantz & Glantz, P.A. v. Chinchilla*, 17 So. 3d 711, 713 (Fla. 4th DCA 2009) (citations omitted).

The appellants challenge the court's allocation of fees and costs and argue that the "entire litigation was actually two similar but mis-joined cases." The appellees disagree and argue that the "appellants have asserted throughout this litigation that their accounting/declaratory judgment claims were integrated and could not be placed into separate categories." On the facts here, we conclude the court did not abuse its discretion when it awarded the appellees $969,571.88 in fees and costs from Plaza La Mer and South Square Development, Inc., and $234,280.59 solely from Plaza La Mer.

Here, the appellants jointly prosecuted claims against the appellees. They shared counsel and legal arguments. Since this case was filed in 1995, the case has proceeded jointly. The case effectively proceeded as one plaintiff against one defendant. The appellants themselves jointly sought an award of attorney's fees, and the appellants sought to recover

the fees and costs "incurred in the defense and prosecution of this action." The appellants jointly requested an evidentiary hearing to prove the time their attorney expended and to establish their costs.

From the start, the appellants presented singular arguments and shared a legal strategy, witnesses, lawyers, motions, and briefs. This case did not involve distinct parties presenting separate and distinct claims for damages. This involved two parties acting as one, making it nearly impossible to apportion fees absent arbitrarily assigning each half the burden. *See Franzen v. Lacuna Golf Ltd. P'ship*, 717 So. 2d 1090, 1093 (Fla. 4th DCA 1998) ("[T]he trial court is not required to apportion attorney's fees where work for one claim cannot be distinguished from work on other claims.").

The circuit court's final judgment is affirmed in all respects.

Affirmed.

TAYLOR, MAY 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

LILLIAN D. MANNEY,

Appellant,

v. Case No. 5D18-1773

MBV ENGINEERING, INC., F/K/A MOSBY, MOIA, BOWLES & ASSOCIATES, INC., F/K/A MOSBY & ASSOCIATES, INC., RANDALL L. MOSBY, JEAN-PAUL PINELLI, SPACE COAST BUILDERS AND CONTRACTORS, INC. AND LARRY CAVALIERE,

Appellees.
_____/

Opinion filed May 10, 2019

Appeal from the Circuit Court
for Brevard County,
Stephen R. Koons, Judge.

Patrick F. Roche, Melbourne Beach, for Appellant.

Scott A. Cole, of Cole, Scott & Kissane, P.A., Miami, for Appellees, MBV Engineering, Inc, f/k/a Mosby, MOIA, Bowles & Associates, Inc., f/k/a Mosby & Associates, Inc., a Florida Corporation.

No Appearance for Other Appellees.

SASSO, J.

Lillian D. Manney appeals from an order entering judgment on the pleadings in favor of MBV Engineering, Inc., f/k/a Mosby, Moia, Bowles & Associates, Inc., f/k/a Mosby

& Associates, Inc. (“MBV”), based on the application of a statute of repose. Manney argues that the trial court erred in applying the statute of repose because the plain language of the statute does not encompass Manney’s claim against MBV. We agree and reverse.

Prior to purchasing a newly constructed house in November 2002, Manney hired MBV to review construction drawings and inspect the house to determine whether there were any structural defects. MBV advised Manney that the structural integrity of the house was in excellent shape and there were no signs of structural distress. Thirteen years after purchasing the house, and with the assistance of another licensed structural engineer, Manney discovered that the house had significant latent structural defects, including a design defect of the foundation.

Six months after receiving the structural engineer's report identifying the latent defects, Manney filed a negligence complaint naming several defendants, including MBV. As to MBV, Manney's June 30, 2017 complaint alleged:

> [P]rior to purchasing the House, MANNEY hired MBV to provide her with professional engineering services by reviewing the original construction drawings and by preforming [sic] an on-site structural inspection of the House for the purpose of determining whether the House was correctly designed and constructed in order to determine if she should purchase the House.

Manney further alleged that she purchased the house in reliance on MBV's assurance of the structural integrity of the house, and but for MBV's assurance, she would not have purchased the house. Finally, she alleged that MBV breached its duty to her by negligently performing its review and inspection of the house and by negligently advising her that the overall structural integrity of the house was in excellent shape with no signs of structural distress.

MBV filed a motion for judgment on the pleadings, arguing that the claims against MBV were barred by the ten-year statute of repose contained in section 95.11(3)(c), Florida Statutes (2017), which provides:

> An action founded on the design, planning, or construction of an improvement to real property . . . must be commenced within 10 years after the date of actual possession by the owner . . . .

Manney disagreed, arguing that section 95.11(3)(c) was inapplicable. Instead, she argued that section 95.11(4)(a), which provides a two-year statute of limitations for an action for professional malpractice, applied. Under that statute, the limitations period begins to run "from the time the cause of action is discovered or should have been discovered with the exercise of due diligence." §95.11 (4)(a), Fla. Stat. (2017). As Manney filed her complaint well within two years of discovering the defects, she argued that her complaint was timely.

The trial court found that the work completed by MBV fell within the purview of section 95.11(3)(c) because "said work is related to the planning, design, and construction of the Plaintiff's structure"; therefore, the ten-year statute of repose precluded Manney's claim against MBV. We disagree.

We review the trial court's granting of a judgment on the pleadings de novo. *Plumbing Serv. Co. v. Progressive Plumbing, Inc.*, 952 So. 2d 1211, 1212 (Fla. 5th DCA 2007) (reviewing trial court's decision granting judgment on pleadings de novo and noting all well-pled allegations of complaint must be accepted as true). Applying the plain language of section 95.11(3)(c) to the allegations in the complaint, as we are obligated to do, the issue becomes whether Manney's action against MBV is "founded on" the design, planning, or construction of an improvement to Manney's house, as required by section

95.11(3)(c). “Founded on” means based upon, arising from, growing out of, or resting upon. *Avalon Assocs. of Del. Ltd. v. Avalon Park Assocs., Inc.*, 760 So. 2d 1132, 1135 (Fla. 5th DCA 2000) (citations omitted).

As is evident from the allegations in the complaint, section 95.11(3)(c) is not applicable to Manney’s claims against MBV. The crux of Manney’s complaint is that MBV negligently performed an inspection of a completed, albeit newly constructed, structure. As such, MBV did not design, plan, or construct an improvement to real property. And while the inspection may have required the observation of completed “construction,” this does not transform the claim into one founded on the “construction” of an improvement to real property, as that term is commonly understood. *See Construction*, Merriam-Webster’s Collegiate Dictionary 248 (10th ed. 2000) (defining “construction” as

“the process, art, or manner of constructing something”); *see also Construction*, The Oxford American College Dictionary 297 (2002) (defining “construction” as “the building of something, typically a large structure”). Thus, a review of the plain language of section 95.11(3)(c) does not encompass Manney’s claim against MBV.

In reaching a contrary conclusion, the trial court found, as urged by MBV, that section 95.11(3)(c) bars Manney’s claims because Manney’s action “relates to” the construction of new property. While it may be true that Manney’s claim “relates to” construction, that language is not found within section 95.11(3)(c). As such, that interpretation does not flow from a natural reading of the statute’s text.

Applying the plain language of 95.11(3)(c) to the claims against MBV in the complaint, we determine that the statute of repose contained within that section does not

apply. Thus, we reverse the trial court's final judgment against Manney and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

EISNAUGLE and GROSSHANS, JJ., concur.

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

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

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE CERTIFICATEHOLDERS
OF STRUCTURED ASSET MORTGAGE
INVESTMENTS II, INC., BEAR STEARNS ARM
TRUST, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-2,

Petitioner,

v. Case No. 5D18-3992

PAUL A. WILLIAMSON, INDIVIDUALLY AND
AS TRUSTEE OF THE PAUL A. WILLIAMSON
FAMILY TRUST DATED APRIL 15, 2004,
KRISTI WILLIAMSON AND SUNTRUST BANK,

Respondents.

_____/

Opinion filed May 10, 2019

Petition for Certiorari Review of Order
from the Circuit Court of Orange County,
Jose R. Rodriguez, Judge.

J. K. McDonough, of Spencer Fane, LLP,
Tampa, for Petitioner.

Andrew B. Greenlee, of Andrew B.
Greenlee, P.A., Sanford, and Anthony N.
Legendre, II, of Law Offices of Legendre &
Legendre, PLLC, Maitland, for
Respondents.

LAMBERT, J.

U.S. Bank National Association, as Trustee for the Certificateholders of Structured Asset Mortgage Investments, II, Inc., Bear Stearns Arm Trust, Mortgage Pass-Through Certificates, Series 2006-2 ("Bank"), seeks certiorari review of a nonfinal order that requires an individual who resides and works in Colorado to be deposed in Orange County, Florida. For the following reasons, we grant the petition and quash the order.

In 2011, Bank filed a verified complaint in Orange County to foreclose a mortgage against Paul Williamson and Kristi Williamson, among others. Five years later, Bank filed its first amended mortgage foreclosure complaint, which was verified by Nicholas Raab, an employee of Bank's loan servicer, Specialized Loan Servicing, LLC. *See Wells Fargo Del. Tr. Co., N.A. v. Petrov*, 230 So. 3d 575, 578 (Fla. 2d DCA 2017) (recognizing that "[s]ervicing agents routinely verify complaints filed by noteholder-plaintiffs"). Raab lives and works in Colorado.

Kristi Williamson responded to the amended complaint by moving to dismiss or for a more definite statement. In that same motion, Williamson alternatively moved to have Raab treated as Bank's "corporate officer" and that he be required to be deposed in Orange County "by mere notice alone." Bank objected, arguing that Raab was not its designated corporate representative and, thus, could not be compelled to appear in that capacity in Florida for his deposition. Following a non-evidentiary hearing, the trial court denied Williamson's motion to dismiss and for a more definite statement but granted her motion to compel Raab to be deposed in Orange County.

To obtain relief by certiorari, the petitioner must establish that the challenged order "depart[s] from the essential requirements of law and thus cause[s] material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no

adequate remedy on appeal." *CVS Caremark Corp. v. Latour*, 109 So. 3d 1232, 1234 (Fla. 1st DCA 2013) (alterations in original) (quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987)). Certiorari review is available to review a trial court order requiring that a deposition be taken at an erroneous location, *see Triple Fish Am., Inc. v. Triple Fish Int'l, L.C.*, 839 So. 2d 913, 914 n.1 (Fla. 5th DCA 2003) (citing *Donahoo v. Matthews*, 660 So. 2d 391, 392 (Fla. 5th DCA 1995)), because requiring an individual to appear at such a location "results in harm that cannot be remedied on appeal in that once the deposition is taken, it cannot be un-taken." *CVS Caremark*, 109 So. 3d at 1235 (citing *Dep't of High. Saf. & Motor Veh. v. Marks*, 898 So. 2d 1063, 1063 n.1 (Fla. 5th DCA 2005)).

Preliminarily, we note that Raab is not a party to the underlying lawsuit. Generally, a person may only be required to attend a deposition in the county where he or she resides, is employed, or transacts business in person. *See* Fla. R. Civ. P. 1.410(e)(2). Raab also appears to be an employee of Bank's servicing agent, which is a separate corporate entity, and is not employed by Bank. Nevertheless, Williamson seeks to depose Raab in Florida as Bank's designated corporate representative under Florida Rule of Civil Procedure 1.310(b)(6), which allows a party to depose a private corporation or association and to set forth with reasonable particularity in its notice of taking deposition the matters on which the corporate examination is requested. Bank does not contest that under this rule, it will be required to produce one of its officers, directors, managing agents, or other persons as its corporate representative for deposition in Orange County, Florida. *See Ormond Beach First Nat'l Bank v. J.M. Montgomery Roofing Co.*, 189 So. 2d 239, 243 (Fla. 1st DCA 1966) (holding that a plaintiff who has selected the forum in

which to institute the action must be prepared to appear in the forum to give a deposition if properly served with notice to do so by the defendant). Nor does it challenge Williamson's ability to depose Raab in Colorado. What Bank does object to, and for which it seeks certiorari relief here, is that the trial court's order improperly allows Williamson to determine unilaterally that Raab will be Bank's corporate representative at the deposition in Florida. *See Carriage Hills Condo., Inc v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 335 (Fla. 4th DCA 2013) ("When a Rule 1.310(b)(6) deposition is properly noticed and conducted, the testimony of the designee 'is deemed to be the testimony of the corporation itself.'").

Bank is correct. Under the plain and unambiguous language of rule 1.310(b)(6), Bank, and not Williamson, has the authority to designate one or more of its officers, directors, managing agents, or other persons as its corporate representative to testify at deposition on its behalf. We conclude that, at this stage of the proceedings, the trial court departed from the essential requirements of law in allowing Williamson to designate Raab unilaterally to be Bank's corporate officer and to compel his attendance in Orange County for deposition in this representative capacity. The order under review is quashed.[1]

PETITION GRANTED; ORDER QUASHED.

BERGER and EDWARDS, JJ., concur.

[1] In doing so, we do not preclude Williamson from separately deposing Raab in Colorado. Nor do we suggest that Williamson is limited to deposing only the rule 1.310(b)(6) witness. *See Sybac Solar, GMBN v. 6th Street Solar Energy Park of Gainesville, LLC*, 217 So. 3d 1068, 1071–72 (Fla. 2d DCA 2017).