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Knick v. Township of Scott, Case No. 17–647 (2019).
The state litigation requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985) (parties must first sue in state court when seeking just compensation for a Fifth Amendment claim under 42 U. S. C. §1983) is overruled. A property owner may bring Fifth Amendment claims in federal court when government takes property without just compensation without first seeking relief in state court.

Braden Woods Homeowners Association, Inc. v. Mavard Trading, Case No. 2D17-3795 (Fla. 2d DCA 2019).
A plaintiff challenging a development permit decision need not exhaust administrative remedies prior to filing suit if the government action is ultra vires, i.e., the government lacks the authority to take the action under governing law.

YS Catering Holdings, Inc. v. Attollo Partners LLC, Case No. 3D18-1790 (Fla. 3d DCA 2019).
A party who enters into a settlement agreement and release after having asserted prior to settlement that the opposing party had defrauded them cannot argue oral misrepresentations of the opposing party to set aside the settlement.

Laptopplaza, Inc. v. Wells Fargo Bank, NA, Case No. 3D18-131 (Fla. 3d DCA 2019).
A lender, under Florida Statute section 701.04(1)(a), can be held responsible for "deliberate inflation of the amounts 'properly due under or secured by a mortgage.'"

Hurchalla v. Lake Point Phase I, LLC, Case Nos. 4D18-1221 & 4D18-1632 (Fla. 4th DCA 2019).
Citizens have a qualified privilege under both the United State Constitution and Florida common law to speak with government requesting the discontinuation of a real estate development project, but the privilege may be overcome by a showing of "actual malice" (knowledge of falsity or reckless disregard of truth, or falsity as shown by clear and convincing evidence) in cases under the First Amendment, and by "express malice" (where the primary motive, as shown by a preponderance of the evidence, is shown to be an intention to injure the plaintiff) under Florida common law.

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

KNICK *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

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

No. 17–647. Argued October 3, 2018—Reargued January 16, 2019—Decided June 21, 2019

The Township of Scott, Pennsylvania, passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." Petitioner Rose Mary Knick, whose 90-acre rural property has a small family graveyard, was notified that she was violating the ordinance. Knick sought declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property, but she did not bring an inverse condemnation action under state law seeking compensation. The Township responded by withdrawing the violation notice and staying enforcement of the ordinance. Without an ongoing enforcement action, the court held, Knick could not demonstrate the irreparable harm necessary for equitable relief, so it declined to rule on her request. Knick then filed an action in Federal District Court under 42 U. S. C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment. The District Court dismissed her claim under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, which held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983. The Third Circuit affirmed.

Held:

1. A government violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under §1983 at that time. Pp. 5–20.

(a) In *Williamson County*, the Court held that, as relevant here, a property developer's federal takings claim was "premature" because

he had not sought compensation through the State's inverse condemnation procedure. 473 U. S., at 197. The unanticipated consequence of this ruling was that a takings plaintiff who complied with *Williamson County* and brought a compensation claim in state court would—on proceeding to federal court after the unsuccessful state claim—have the federal claim barred because the full faith and credit statute required the federal court to give preclusive effect to the state court's decision. *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 347. Pp. 5–6.

(b) This Court has long recognized that property owners may bring Fifth Amendment claims for compensation as soon as their property has been taken, regardless of any other post-taking remedies that may be available to the property owner. See *Jacobs* v. *United States*, 290 U. S. 13. The Court departed from that understanding in *Williamson County* and held that a taking gives rise not to a constitutional right to just compensation, but instead gives a right to a state law procedure that will eventually result in just compensation. Just two years after *Williamson County*, however, the Court returned to its traditional understanding of the Fifth Amendment, holding that the compensation remedy is required by the Constitution in the event of a taking. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304. A property owner acquires a right to compensation immediately upon an uncompensated taking because the taking itself violates the Fifth Amendment. See *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654 (Brennan, J., dissenting). The property owner may, therefore, bring a claim under §1983 for the deprivation of a constitutional right at that time. Pp. 6–12.

(c) *Williamson County*'s understanding of the Takings Clause was drawn from *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, where the plaintiff sought to enjoin a federal statute because it effected a taking, even though the statute set up a mandatory arbitration procedure for obtaining compensation. *Id.*, at 1018. That case does not support *Williamson County*, however, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims. *Williamson County* also analogized its new state-litigation requirement to federal takings practice under the Tucker Act, but a claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. *Williamson County* also looked to *Parratt* v. *Taylor*, 451 U. S. 527. But *Parratt* was not a takings case at all, and the analogy from the due process context to the takings context is strained. The poor reasoning of *Williamson County* may be partially explained by the cir-

cumstances in which the state-litigation issue reached the Court, which may not have permitted the Court to adequately test the logic of the state-litigation requirement or consider its implications. Pp. 12–16.

(d) Respondents read too broadly statements in prior opinions that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659. Those statements concerned requests for injunctive relief, and the availability of subsequent compensation meant that such an equitable remedy was not available. Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time. The history of takings litigation provides valuable context. At the time of the founding, there usually was no compensation remedy available to property owners, who could obtain only retrospective damages, as well as an injunction ejecting the government from the property going forward. But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. Congress enabled property owners to obtain compensation for takings by the Federal Government when it passed the Tucker Act in 1887, and this Court subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government action effecting a taking. Pp. 16–19.

2. The state-litigation requirement of *Williamson County* is overruled. Several factors counsel in favor of this decision. *Williamson County* was poorly reasoned and conflicts with much of the Court's takings jurisprudence. Because of its shaky foundations, the rationale for the state-litigation requirement has been repeatedly recast by this Court and the defenders of *Williamson County*. The state-litigation requirement also proved to be unworkable in practice because the *San Remo* preclusion trap prevented takings plaintiffs from ever bringing their claims in federal court, contrary to the expectations of the *Williamson County* Court. Finally, there are no reliance interests on the state-litigation requirement. As long as post-taking compensation remedies are available, governments need not

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fear that federal courts will invalidate their regulations as unconstitutional. Pp. 20–23.

862 F. 3d 310, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 17–647

ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

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

[June 21, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.

The *Williamson County* Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a "ripe" federal takings claim in federal court. See *id.*, at 194. But as we later held in *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a

Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U. S. C.] §1983.'" *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994) (quoting *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 501 (1982)). But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time.

I

Petitioner Rose Mary Knick owns 90 acres of land in Scott Township, Pennsylvania, a small community just north of Scranton. Knick lives in a single-family home on

the property and uses the rest of the land as a grazing area for horses and other farm animals. The property includes a small graveyard where the ancestors of Knick's neighbors are allegedly buried. Such family cemeteries are fairly common in Pennsylvania, where "backyard burials" have long been permitted.

In December 2012, the Township passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours." The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." The ordinance also authorized Township "code enforcement" officers to "enter upon any property" to determine the existence and location of a cemetery. App. 21–23.

In 2013, a Township officer found several grave markers on Knick's property and notified her that she was violating the ordinance by failing to open the cemetery to the public during the day. Knick responded by seeking declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. Knick did not seek compensation for the taking by bringing an "inverse condemnation" action under state law. Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant." *United States* v. *Clarke*, 445 U. S. 253, 257 (1980) (quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1971)). Inverse condemnation stands in contrast to direct condemnation, in which the government initiates proceedings to acquire title under its eminent domain authority. Pennsylvania, like every other State besides Ohio, provides a state inverse condemnation action. 26 Pa. Cons.

Stat. §502(c) (2009).[1]

In response to Knick's suit, the Township withdrew the violation notice and agreed to stay enforcement of the ordinance during the state court proceedings. The court, however, declined to rule on Knick's request for declaratory and injunctive relief because, without an ongoing enforcement action, she could not demonstrate the irreparable harm necessary for equitable relief.

Knick then filed an action in Federal District Court under 42 U. S. C. §1983, alleging that the ordinance violated the Takings Clause of the Fifth Amendment.[2] The District Court dismissed Knick's takings claim under *Williamson County* because she had not pursued an inverse condemnation action in state court. 2016 WL 4701549, *5–*6 (MD Pa., Sept. 8, 2016). On appeal, the Third Circuit noted that the ordinance was "extraordinary and constitutionally suspect," but affirmed the District Court in light of *Williamson County*. 862 F. 3d 310, 314 (2017).

We granted certiorari to reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under §1983. 583 U. S. ___ (2018).

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[1] A property owner in Ohio who has suffered a taking without compensation must seek a writ of mandamus to compel the government to initiate condemnation proceedings. See, *e.g.*, *State ex rel. Doner* v. *Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N. E. 2d 1235.

[2] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

II

In *Williamson County*, a property developer brought a takings claim under §1983 against a zoning board that had rejected the developer's proposal for a new subdivision. *Williamson County* held that the developer's Fifth Amendment claim was not "ripe" for two reasons. First, the developer still had an opportunity to seek a variance from the appeals board, so any taking was therefore not yet final. 473 U. S., at 186–194. Knick does not question the validity of this finality requirement, which is not at issue here.

The second holding of *Williamson County* is that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." *Id.*, at 194. That is the holding Knick asks us to overrule. According to the Court, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." *Id.*, at 195. The Court concluded that the developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. *Id.*, at 197.

The unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. 545 U. S., at 331. The complaint made clear that the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. *Id.*, at 331–332. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit

statute, 28 U. S. C. §1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. 545 U. S., at 347. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.

The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. *Dolan* v. *City of Tigard*, 512 U. S. 374, 392 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under §1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." *San Remo*, 545 U. S., at 350 (Rehnquist, C. J., concurring in judgment). Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

III

A

Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings. And the property owner may sue the gov-

ernment at that time in federal court for the "deprivation" of a right "secured by the Constitution." 42 U. S. C. §1983.

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution" or any federal law or contract for damages "in cases not sounding in tort." 28 U. S. C. §1491(a)(1). We have held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States* v. *Causby*, 328 U. S. 256, 267 (1946). And we have explained that "the act of taking" is the "event which gives rise to the claim for compensation." *United States* v. *Dow*, 357 U. S. 17, 22 (1958).

The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs* v. *United States*, 290 U. S. 13 (1933), where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time. *Id.*, at 17 (quoting *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 306 (1923)). We rejected the view of the lower court that a property owner is entitled to interest only when the government provides a particular remedy—direct condemnation proceedings—and not when the owner brings a takings suit under the Tucker Act. "The form of the remedy d[oes] not qualify the right. It rest[s] upon the Fifth Amendment." 290 U. S., at 16.

Jacobs made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it. Whether the government does nothing, forcing the owner to bring a takings suit under the Tucker Act, or whether it provides the owner with a statutory compensation remedy by initiating direct condemnation proceedings, the owner's claim for compensation "rest[s] upon the Fifth Amendment."

Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force. The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right. And that is key because it is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under §1983.

Williamson County had a different view of how the Takings Clause works. According to *Williamson County*, a taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state law procedure that will eventually result in just compensation. As the Court put it, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." 473 U. S., at 195. In the absence of a state remedy, the Fifth Amendment right to compensation

would attach immediately. But, under *Williamson County*, the presence of a state remedy qualifies the right, preventing it from vesting until exhaustion of the state procedure. That is what *Jacobs* confirmed could not be done.

Just two years after *Williamson County*, in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), the Court returned to the understanding that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth Amendment precedents neglected by *Williamson County*, *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" 482 U. S., at 315. Because of "the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. *Ibid.* (quoting 6 P. Nichols, Eminent Domain §25.41 (3d rev. ed. 1972)). The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." 482 U. S., at 321.[3]

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[3] *First English* distinguished *Williamson County* in a footnote, explaining that the case addressed only "whether the constitutional claim was ripe for review" before the State denied compensation. 482 U. S., at 320, n. 10. But *Williamson County* was based on the premise that there was no Fifth Amendment claim *at all* until the State denies compensation. Having rejected that premise, *First English* eliminated the rationale for the state-litigation requirement. The author of *First*

In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. See *id.*, at 315, 318 (quoting and citing *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U. S. 621, 654, 657 (1981) (Brennan, J., dissenting)).[4] In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." *Id.*, at 654.

First English embraced that view, reaffirming that "in the event of a taking, the compensation remedy is required by the Constitution." 482 U. S., at 316; see *ibid.*, n. 9 (rejecting the view that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government" (quoting Brief for United States as *Amicus Curiae* 14)). Compensation under the Takings Clause is a remedy for the "constitutional violation" that "the landowner has *already* suffered" at the time of the uncompensated taking. *San Diego Gas & Elec. Co.*,

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English later recognized that it was "not clear . . . that *Williamson County* was correct in demanding that . . . the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323, 349 (2005) (Rehnquist, C. J., concurring in judgment).

[4]Justice Brennan was joined by Justices Stewart, Marshall, and Powell. The majority did not disagree with Justice Brennan's analysis of the merits, but concluded that the Court lacked jurisdiction to address the question presented. Justice Rehnquist, concurring on the jurisdictional issue, noted that if he were satisfied that jurisdiction was proper, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion." 450 U. S., at 633–634. The Court reached the merits of the question presented in *San Diego* in *First English*, adopting Justice Brennan's view in an opinion by Chief Justice Rehnquist.

450 U. S., at 654 (Brennan, J., dissenting); see *First English*, 482 U. S., at 315.

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.

In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. Just as someone whose property has been taken by the Federal Government has a claim "founded . . . upon the Constitution" that he may bring under the Tucker Act, someone whose property has been taken by a local government has a claim under §1983 for a "deprivation of [a] right[] . . . secured by the Constitution" that he may bring upon the taking in federal court. The "general rule" is that plaintiffs may bring constitutional claims under §1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." D. Dana & T. Merrill, Property: Takings 262 (2002); see *McNeese* v. *Board of Ed. for Community Unit School Dist. 187*, 373 U. S. 668, 672 (1963) (observing that it would defeat the purpose of §1983 "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). This is as true for

takings claims as for any other claim grounded in the Bill of Rights.

B

Williamson County effectively established an exhaustion requirement for §1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit. But the Court did not phrase its holding in those terms; if it had, its error would have been clear. Instead, *Williamson County* broke with the Court's longstanding position that a property owner has a constitutional claim to compensation at the time the government deprives him of his property, and held that there can be no uncompensated taking, and thus no Fifth Amendment claim actionable under §1983, until the property owner has tried and failed to obtain compensation through the available state procedure. "[U]ntil it has used the procedure and been denied just compensation," the property owner "'has no claim against the Government' for a taking." 473 U. S., at 194–195 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018, n. 21 (1984)).

Williamson County drew that understanding of the Clause from *Ruckelshaus* v. *Monsanto Co.*, a decision from the prior Term. *Monsanto* did not involve a takings claim for just compensation. The plaintiff there sought to enjoin a federal statute because it effected a taking, even though the statute set up a special arbitration procedure for obtaining compensation, and the plaintiff could bring a takings claim pursuant to the Tucker Act if arbitration did not yield sufficient compensation. 467 U. S., at 1018. The Court rejected the plaintiff's claim because "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.*, at 1016 (footnote

omitted). That much is consistent with our precedent: Equitable relief was not available because monetary relief was under the Tucker Act.

That was enough to decide the case. But *Monsanto* went on to say that if the plaintiff obtained compensation in arbitration, then "no taking has occurred and the [plaintiff] has no claim against the Government." *Id.*, at 1018, n. 21. Certainly it is correct that a fully compensated plaintiff has no further claim, but that is because the taking has been *remedied* by compensation, not because there was *no taking* in the first place. See *First English*, 482 U. S., at 316, n. 9. The statute in *Monsanto* simply required the plaintiff to attempt to vindicate its claim to compensation through arbitration before proceeding under the Tucker Act. The case offers no support to *Williamson County* in this regard, because Congress—unlike the States—is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims. See *McCarthy* v. *Madigan*, 503 U. S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required.").

Williamson County also relied on *Monsanto* when it analogized its new state-litigation requirement to federal takings practice, stating that "taking[s] claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U. S., at 195. But the Court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim. A party who loses a Tucker Act suit has nowhere else to go to seek compensation for an alleged taking.

Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a

takings case at all. *Parratt* held that a prisoner deprived of $23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. 451 U. S., at 543–544. But the analogy from the due process context to the takings context is strained, as *Williamson County* itself recognized. See 473 U. S., at 195, n. 14. It is not even possible for a State to provide pre-deprivation due process for the unauthorized act of a single employee. That is quite different from the taking of property *by the government* through physical invasion or a regulation that destroys a property's productive use.

The poor reasoning of *Williamson County* may be partially explained by the circumstances in which the state-litigation issue reached the Court. The Court granted certiorari to decide whether the Fifth Amendment entitles a property owner to just compensation when a regulation temporarily deprives him of the use of his property. (*First English* later held that the answer was yes.) As *amicus curiae* in support of the local government, the United States argued in this Court that the developer could not state a Fifth Amendment claim because it had not pursued an inverse condemnation suit in state court. Neither party had raised that argument before.[5] The Court then adopted the reasoning of the Solicitor General in an alternative holding, even though the case could have been resolved solely on the narrower and settled ground that no

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[5]The Solicitor General continues this tradition here, arguing for the first time as *amicus curiae* that state inverse condemnation claims "aris[e] under" federal law and can be brought in federal court under 28 U. S. C. §1331 through the *Grable* doctrine. Brief for United States as *Amicus Curiae* 22–24; see *Grable & Sons Metal Products*, *Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308 (2005). Because we agree with the Solicitor General's principal contention that federal takings claims can be brought immediately under §1983, we have no occasion to consider his novel §1331 argument.

taking had occurred because the zoning board had not yet come to a final decision regarding the developer's proposal. In these circumstances, the Court may not have adequately tested the logic of the state-litigation requirement or considered its implications, most notably the preclusion trap later sprung by *San Remo*. That consequence was totally unanticipated in *Williamson County*.

The dissent, doing what respondents do not even dare to attempt, defends the original rationale of *Williamson County*—that there is no Fifth Amendment violation, and thus no Fifth Amendment claim, until the government denies the property owner compensation in a subsequent proceeding.[6] But although the dissent makes a more thoughtful and considered argument than *Williamson County*, it cannot reconcile its view with our repeated holdings that a property owner acquires a constitutional right to compensation at the time of the taking. See *supra*, at 7–11. The only reason that a taking would automatically entitle a property owner to the remedy of compensation is that, as Justice Brennan explained, with the uncompensated taking "the landowner has *already* suf-

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[6]The dissent thinks that respondents still press this theory. *Post*, at 6 n. 3. But respondents instead describe *Williamson County* as resting on an understanding not of the elements of a federal takings claim but of the scope of 42 U. S. C. §1983. They even go so far as to rewrite petitioner's question presented in such terms. Brief for Respondents i. For respondents, it does not matter whether a property owner has a Fifth Amendment claim at the time of a taking. What matters is that, in respondents' view, no constitutional violation occurs for purposes of §1983 until the government has subsequently denied compensation. That characterization has no basis in the *Williamson County* opinion, which did not even quote §1983 and stated that the Court's reasoning applied with equal force to takings by the Federal Government, not covered by §1983. 473 U. S., at 195. Respondents' attempt to recast the state-litigation requirement as a §1983-specific rule fails for the same reason as the logic of *Williamson County*—a property owner has a Fifth Amendment claim for a violation of the Takings Clause as soon as the government takes his property without paying for it.

fered a constitutional violation." *San Diego Gas & Elec. Co.*, 450 U. S., at 654 (dissenting opinion). The dissent here provides no more reason to resist that conclusion than did *Williamson County*.

C

The Court in *Williamson County* relied on statements in our prior opinions that the Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890). Respondents rely on the same cases in contending that uncompensated takings for which compensation is subsequently available do not violate the Fifth Amendment at the time of the taking. But respondents read those statements too broadly. They concerned requests for injunctive relief, and the availability of subsequent compensation meant that such an equitable remedy was not available. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 107, 149 (1974) (reversing a decision "enjoin[ing]" the enforcement of a federal statute because "the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur"); *Hurley* v. *Kincaid*, 285 U. S. 95, 99, 105 (1932) (rejecting a request to "enjoin the carrying out of any work" on a flood control project because the Tucker Act provided the plaintiff with "a plain, adequate, and complete remedy at law"). Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time.

The history of takings litigation provides valuable context. At the time of the founding there usually was no compensation remedy available to property owners. On occasion, when a legislature authorized a particular gov-

ernment action that took private property, it might also create a special owner-initiated procedure for obtaining compensation. But there were no general causes of action through which plaintiffs could obtain compensation for property taken for public use. Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 69–70, and n. 33 (1999).

Until the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or government official. The official would then raise the defense that his trespass was lawful because authorized by statute or ordinance, and the plaintiff would respond that the law was unconstitutional because it provided for a taking without just compensation. If the plaintiff prevailed, he nonetheless had no way at common law to obtain money damages for a permanent taking—that is, just compensation for the total value of his property. He could obtain only retrospective damages, as well as an injunction ejecting the government from his property going forward. See *id.*, at 67–69, 97–99.

As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that "a fair compensation must, in all cases, be *previously* made to the individuals affected." *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 166 (N. Y. 1816) (emphasis added). If a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal Government from *taking* property without paying for it. Allowing the government to *keep* the property pending subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.

Antebellum courts, which had no means of compensating a property owner for his loss, had no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give him back his property. See *Callender* v. *Marsh*, 18 Mass. 418, 430–431 (1823) ("[I]f by virtue of any legislative act the land of any citizen should be occupied by the public . . . , without any means provided to indemnify the owner of the property, . . . because such a statute would be directly contrary to the [Massachusetts takings clause]; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation."). But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. See, *e.g.*, *Stetson* v. *Chicago & Evanston R. Co.*, 75 Ill. 74, 78 (1874) ("What injury, if any, [the property owner] has sustained, may be compensated by damages recoverable by an action at law."); see also Brauneis, *supra*, at 97–99, 110–112. On the federal level, Congress enabled property owners to obtain compensation for takings in federal court when it passed the Tucker Act in 1887, and we subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself. See *First English*, 482 U. S., at 316 (collecting cases).

Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking. But that is because, as the Court explained in *First English*, such a procedure is a remedy for a taking that violated the Constitution, not because the availability of the procedure

somehow prevented the violation from occurring in the first place. See *supra*, at 9–11.[7]

The dissent contends that our characterization of *Cherokee Nation* effectively overrules "a hundred-plus years of legal rulings." *Post*, at 6 (opinion of KAGAN, J.). But under today's decision every one of the cases cited by the dissent would come out the same way—the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation. The premise of such a suit for compensation is that the property owner has already suffered a violation of the Fifth Amendment that may be remedied by money damages.[8]

* * *

We conclude that a government violates the Takings Clause when it takes property without compensation, and

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[7] Among the cases invoking the *Cherokee Nation* language that the parties have raised, only one, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), rejected a demand for compensation. *Yearsley* concerned a state tort suit alleging a taking by a contractor building dikes for the Federal Government. In ruling for the contractors, we suggested that the taking did not violate the Fifth Amendment because the property owner had the opportunity to pursue a claim for just compensation under the Tucker Act. As explained, however, a claim for compensation brought under the Tucker Act *is* a claim for a violation of the Fifth Amendment; it does not prevent a violation from occurring. Regardless, *Yearsley* was right to hold that the contractors were immune from suit. Because the Tucker Act provides a complete remedy for any taking by the Federal Government, it "excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking," barring the plaintiffs from seeking any relief from the contractors themselves. *Id.*, at 22.

[8] The dissent also asserts that today's ruling "betrays judicial federalism." *Post*, at 15. But since the Civil Rights Act of 1871, part of "judicial federalism" has been the availability of a federal cause of action when a local government violates the Constitution. 42 U. S. C. §1983. Invoking that federal protection in the face of state action violating the Fifth Amendment cannot properly be regarded as a betrayal of federalism.

that a property owner may bring a Fifth Amendment claim under §1983 at that time. That does not as a practical matter mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. But because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.

IV

The next question is whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error. The doctrine of *stare decisis* reflects a judgment "that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). The doctrine "is at its weakest when we interpret the Constitution," as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings. *Agostini*, 521 U. S., at 235.

We have identified several factors to consider in deciding whether to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35). All of these factors counsel in favor of overruling *Williamson County*.

Williamson County was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of

our takings jurisprudence. See *supra*, at 12–14. Its key conclusion, which it drew from unnecessary language in *Monsanto*—that a property owner does not have a ripe federal takings claim until he has unsuccessfully pursued an initial state law claim for just compensation—ignored *Jacobs* and many subsequent decisions holding that a property owner acquires a Fifth Amendment right to compensation at the time of a taking. This contradiction was on stark display just two years later in *First English*.

The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators. See *San Remo*, 545 U. S., at 348 (Rehnquist, C. J., joined by O'Connor, Kennedy, and THOMAS, JJ., concurring in judgment); *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. ___ (2016) (THOMAS, J., joined by Kennedy, J., dissenting from denial of certiorari); Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630, 1647–1649 (2015); McConnell, *Horne* and the Normalization of Takings Litigation: A Response to Professor Echeverria, 43 Env. L. Rep. 10749, 10751 (2013); Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1264 (2004); Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979, 989 (1986). Even the academic defenders of the state-litigation requirement base it on federalism concerns (although they do not reconcile those concerns with the settled construction of §1983) rather than the reasoning of the opinion itself. See Echeverria, *Horne* v. *Department of Agriculture*: An Invitation To Reexamine "Ripeness" Doctrine in Takings Litigation, 43 Env. L. Rep. 10735, 10744 (2013); Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006).

Because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for

over 30 years. We eventually abandoned the view that the requirement is an element of a takings claim and recast it as a "prudential" ripeness rule. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 733–734 (1997). No party defends that approach here. See Brief for Respondents 37; Brief for United States as *Amicus Curiae* 19–20. Respondents have taken a new tack, adopting a §1983–specific theory at which *Williamson County* did not even hint. See n. 6, *supra*. The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*. See *Janus*, 585 U. S., at ___ (slip op., at 23).

The state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under §1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that §1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*.

The dissent argues that our constitutional holding in *Williamson County* should enjoy the "enhanced" form of *stare decisis* we usually reserve for statutory decisions, because Congress could have eliminated the *San Remo* preclusion trap by amending the full faith and credit statute. *Post*, at 17 (quoting *Kimble* v. *Marvel Entertainment, LLC*, 578 U. S. ___, ___ (slip op., at 8)). But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*,

a property owner had no federal claim until a state court denied him compensation.

Finally, there are no reliance interests on the state-litigation requirement. We have recognized that the force of *stare decisis* is "reduced" when rules that do not "serve as a guide to lawful behavior" are at issue. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995); see *Alleyne* v. *United States*, 570 U. S. 99, 119 (2013) (SOTOMAYOR, J., concurring). Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed. For the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedure Act. 5 U. S. C. §706(2)(B). Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act.

In light of all the foregoing, the dissent cannot, with respect, fairly maintain its extreme assertions regarding our application of the principle of *stare decisis*.

* * *

The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under §1983 upon the taking of his property without just compensation by a local government. The judgment of the United States Court of Appeals for the Third Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–647

ROSE MARY KNICK, PETITIONER *v.* TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

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

[June 21, 2019]

JUSTICE THOMAS, concurring.

The Fifth Amendment's Takings Clause prohibits the government from "tak[ing]" private property "without just compensation." The Court correctly interprets this text by holding that a violation of this Clause occurs as soon as the government takes property without paying for it.

The United States, by contrast, urges us not to enforce the Takings Clause as written. It worries that requiring payment to accompany a taking would allow courts to enjoin or invalidate broad regulatory programs "merely" because the program takes property without paying for it. Brief for United States as *Amicus Curiae* 12. According to the United States, "there is a 'nearly infinite variety of ways in which government actions or regulations can affect property interests,'" and it ought to be good enough that the government "implicitly promises to pay compensation for any taking" if a property owner successfully sues the government in court. Supplemental Letter Brief for United States as *Amicus Curiae* 5 (Supp. Brief) (citing the Tucker Act, 28 U. S. C. §1491). Government officials, the United States contends, should be able to implement regulatory programs "without fear" of injunction or invalidation under the Takings Clause, "even when" the program is so far reaching that the officials "cannot determine whether a taking will occur." Supp. Brief 5.

This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC* v. *Durham*, 578 U. S. ___, ___ (2016) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 2). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." *Ibid.* A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." *Id.*, at ___ (slip op., at 3). If this requirement makes some regulatory programs "unworkable in practice," Supp. Brief 5, so be it—our role is to enforce the Takings Clause as written.

Of course, as the Court correctly explains, the United States' concerns about injunctions may be misplaced. *Ante,* at 15–18. Injunctive relief is not available when an adequate remedy exists at law. *E.g.*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 156 (2010). And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory "program," Supp. Brief 5, by granting relief "beyond the parties to the case," *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 6); see *id.*, at ___ (slip op., at 2) (expressing skepticism about "universal injunctions").

Still, "[w]hen the government repudiates [its] duty" to pay just compensation, its actions "are not only unconstitutional" but may be "tortious as well." *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 717 (1999) (plurality opinion). I do not understand the Court's opinion to foreclose the application of ordinary remedial principles to takings claims and related common-law tort claims, such as trespass. I therefore join it in full.

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[June 21, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court formally overrules *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985). But its decision rejects far more than that single case. *Williamson County* was rooted in an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact. No longer. The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay. That conclusion has no basis in the Takings Clause. Its consequence is to channel a mass of quintessentially local cases involving complex state-law issues into federal courts. And it transgresses all usual principles of *stare decisis*. I respectfully dissent.

I

Begin with the basics—the meaning of the Takings Clause. The right that Clause confers is not to be free from government takings of property for public purposes.

Instead, the right is to be free from those takings when the government fails to provide "just compensation." In other words, the government *can* take private property for public purposes, so long as it fairly pays the property owner. That precept, which the majority does not contest, comes straight out of the constitutional text: "[P]rivate property [shall not] be taken for public use, without just compensation." Amdt. 5. "As its language indicates, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). And that constitutional choice accords with ancient principles about what governments do. The eminent domain power—the capacity to "take private property for public uses"—is an integral "attribute of sovereignty." *Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (1879); see *Kohl* v. *United States*, 91 U. S. 367, 371 (1876) (The power is "essential to [the Government's] independent existence and perpetuity"). Small surprise, then, that the Constitution does not prohibit takings for public purposes, but only requires the government to pay fair value.

In that way, the Takings Clause is unique among the Bill of Rights' guarantees. It is, for example, unlike the Fourth Amendment's protection against excessive force—which the majority mistakenly proposes as an analogy. See *ante*, at 8. Suppose a law enforcement officer uses excessive force and the victim recovers damages for his injuries. Did a constitutional violation occur? Of course. The Constitution prohibits what the officer did; the payment of damages merely remedied the constitutional wrong. But the Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government "takes and pays," it is not violating the Constitution at all. Put another way, a Takings

Clause violation has two necessary elements. First, the government must take the property. Second, it must deny the property owner just compensation. See *Horne* v. *Department of Agriculture*, 569 U. S. 513, 525–526 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation" (emphasis in original)). If the government has not done both, no constitutional violation has happened. All this is well-trod ground. See, *e.g.*, *United States* v. *Jones*, 109 U. S. 513, 518 (1883); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 586 (1923). Even the majority (despite its faulty analogy) does not contest it.

Similarly well-settled—until the majority's opinion today—was the answer to a follow-on question: At what point has the government denied a property owner just compensation, so as to complete a Fifth Amendment violation? For over a hundred years, this Court held that advance or contemporaneous payment was not required, so long as the government had established reliable procedures for an owner to later obtain just compensation (including interest for any time elapsed). The rule got its start in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641 (1890), where the Tribe argued that a federal statute authorizing condemnation of its property violated the Fifth Amendment because the law did not require advance payment. The Court disagreed. It held that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken" so long as the government made available to the owner "reasonable, certain and adequate provision for obtaining compensation" afterward. *Id.*, at 659. Decade after decade, the Court repeated that principle.[1] As another case put the point: The Takings Clause

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[1] See also, *e.g.*, *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 21–22

does not demand "that compensation should be made previous to the taking" so long as "adequate means [are] provided for a reasonably just and prompt ascertainment and payment of the compensation." *Crozier* v. *Krupp A. G.*, 224 U. S. 290, 306 (1912). And the Court also made clear that a statute creating a right of action against the responsible government entity generally qualified as a constitutionally adequate compensatory mechanism. See, *e.g.*, *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 20–21 (1940).[2]

Williamson County followed from those decisions as night the day. The case began when a local planning commission rejected a property owner's development proposal. The owner chose not to seek compensation through the procedure the State had created—an "inverse condemnation" action against the commission. Instead, the owner sued in federal court alleging a Takings Clause violation under 42 U. S. C. §1983. Consistent with the century's worth of precedent I have recounted above, the Court found that no Fifth Amendment violation had yet occurred. See 473 U. S., at 195. The Court first recognized that "[t]he Fifth Amendment does not proscribe the

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(1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *Dohany* v. *Rogers*, 281 U. S. 362, 365 (1930); *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923); *Albert Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 587 (1923); *Hayes* v. *Port of Seattle*, 251 U. S. 233, 238 (1920); *Bragg* v. *Weaver*, 251 U. S. 57, 62 (1919); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, 251–252 (1905); *Williams* v. *Parker*, 188 U. S. 491, 502 (1903); *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568 (1898); *Sweet* v. *Rechel*, 159 U. S. 380, 400–402 (1895).

[2] In many of these cases, the Court held as well that if payment occurs later, it must include interest. See, *e.g.*, *id.*, at 407; *Albert Hanson Lumber Co.*, 261 U. S., at 586. That requirement flows from the constitutional demand for "just" compensation: As one of the early cases explained, the property owner must be placed "in as good position pecuniarily as he would have been if his property had not been taken." *Ibid.*

taking of property; it proscribes taking without just compensation." *Id.*, at 194. Next, the Court stated (citing no fewer than five precedents) that the Amendment does not demand that "compensation be paid in advance of, or contemporaneously with, the taking." *Ibid.* "[A]ll that is required," the Court continued, is that the State have provided "a 'reasonable, certain and adequate provision for obtaining compensation.'" *Ibid.* (quoting *Cherokee Nation*, 135 U. S., at 659). Here, the State had done so: Nothing suggested that the inverse condemnation procedure was inadequate. 473 U. S., at 196–197. So the property owner's claim was "not yet ripe": The owner could not "claim a violation of the [Takings] Clause until it [had] used the procedure and been denied." *Id.*, at 194–195.

So contrary to the majority's portrayal, *Williamson County* did not result from some inexplicable confusion about "how the Takings Clause works." *Ante*, at 8. Far from it. *Williamson County* built on a long line of decisions addressing the elements of a Takings Clause violation. The Court there said only two things remotely new. First, the Court found that the State's inverse condemnation procedure qualified as a "reasonable, certain and adequate" procedure. But no one in this case disputes anything to do with that conclusion—including that the equivalent Pennsylvania procedure here is similarly adequate. Second, the Court held that a §1983 suit could not be brought until a property owner had unsuccessfully invoked the State's procedure for obtaining payment. But that was a direct function of the Court's prior holdings. Everyone agrees that a §1983 suit cannot be brought before a constitutional violation has occurred. And according to the Court's repeated decisions, a Takings Clause violation does not occur until an owner has used the government's procedures and failed to obtain just compensation. All that *Williamson County* did was to put the period on an already-completed sentence about when a takings

claim arises.[3]

Today's decision thus overthrows the Court's long-settled view of the Takings Clause. The majority declares, as against a mountain of precedent, that a government taking private property for public purposes must pay compensation at that moment or in advance. See *ante*, at 6–7. If the government fails to do so, a constitutional violation has occurred, regardless of whether "reasonable, certain and adequate" compensatory mechanisms exist. *Cherokee Nation*, 135 U. S., at 659. And regardless of how many times this Court has said the opposite before. Under cover of overruling "only" a single decision, today's opinion smashes a hundred-plus years of legal rulings to smithereens.

II

So how does the majority defend taking down *Williamson County* and its many precursors? Its decision rests on four ideas: a comparison between takings claims and other constitutional claims, a resort to the Takings Clause's

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[3] Contrary to the majority's description, see *ante*, at 15, and n. 6, the respondents have exactly this view of *Williamson County* (and of the cases preceding it). The respondents discuss (as I do, see *supra*, at 3–4) the "long line of precedent" holding that "the availability of a reasonable, certain, and adequate inverse-condemnation procedure fulfills the duty" of a government to pay just compensation for a taking. Brief for Respondents 22–23. The respondents then conclude (again, as I do, see *supra*, at 4–6) that *Williamson County* "sound[ly]" and "straightforwardly applied that precedent to hold that a property owner who forgoes an available and adequate inverse-condemnation remedy has not been deprived of any constitutional right and thus cannot proceed under Section 1983." Brief for Respondents 22. (Again contra the majority, the respondents' only theory of §1983 is the one everyone agrees with—that a §1983 suit cannot be brought before a constitutional violation has occurred.) So while I appreciate the compliment, I cannot claim to argue anything novel or "dar[ing]" here. *Ante*, at 15. My argument is the same as the respondents', which is the same as *Williamson County*'s, which is the same as all the prior precedents'.

text, and theories about two lines of this Court's precedent. All are misguided. The majority uses the term "shaky foundations." *Ante*, at 21. It knows whereof it speaks.

The first crack comes from the repeated assertion (already encountered in the majority's Fourth Amendment analogy, see *supra*, at 2) that *Williamson County* treats takings claims worse than other claims founded in the Bill of Rights. See *ante*, at 6, 8, 11–12, 20. That is not so. The distinctive aspects of litigating a takings claim merely reflect the distinctive aspects of the constitutional right. Once again, a Fourth Amendment claim arises at the moment a police officer uses excessive force, because the Constitution prohibits that thing and that thing only. (Similarly, for the majority's other analogies, a bank robber commits his offense when he robs a bank and a tortfeasor when he acts negligently—because that conduct, and it alone, is what the law forbids.) Or to make the same point a bit differently, even if a government could compensate the victim in advance—as the majority requires here—the victim would still suffer constitutional injury when the force is used. But none of that is true of Takings Clause violations. That kind of infringement, as explained, is complete only after *two* things occur: (1) the government takes property, and (2) it fails to pay just compensation. See *supra*, at 2–3. All *Williamson County* and its precursors do is recognize that fact, by saying that a constitutional claim (and thus a §1983 suit) arises only after the second condition is met—when the property owner comes away from the government's compensatory procedure empty-handed. That is to treat the Takings Clause exactly as its dual elements require—and because that is so, neither worse nor better than any other right.

Second, the majority contends that its rule follows from the constitutional text, because the Takings Clause does not say "[n]or shall private property be taken for public

use, without an available procedure that will result in compensation." *Ante*, at 6. There is a reason the majority devotes only a few sentences to that argument. Because here's another thing the text does not say: "Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures." In other words, the text no more states the majority's rule than it does *Williamson County*'s (and its precursors'). As constitutional text often is, the Takings Clause is spare. It says that a government taking property must pay just compensation—but does not say through exactly what mechanism or at exactly what time. That was left to be worked out, consistent with the Clause's (minimal) text and purpose. And from 1890 until today, this Court worked it out *Williamson County*'s way, rather than the majority's. See *supra*, at 3–4. Under our caselaw, a government could use reliable post-taking compensatory mechanisms (with payment calculated from the taking) without violating the Takings Clause.

Third, the majority tries to explain away that mass of precedent, with a theory so, well, inventive that it appears in neither the petitioner's nor her 15-plus *amici*'s briefs. Don't read the decisions "too broadly," the majority says. *Ante*, at 16. Yes, the Court in each rejected a takings claim, instructing the property owner to avail herself instead of a government-created compensatory mechanism. But all the Court meant (the majority says) was that the plaintiffs had sought the wrong kind of relief: They could not get injunctions because the available compensatory procedures gave an adequate remedy at law. The Court still believed (so says the majority) that the cases involved constitutional violations. Or said otherwise (again, according to the majority), the Court still understood the Takings Clause to prohibit delayed payment.

Points for creativity, but that is just not what the deci-

sions say. Most of the cases involved requests for injunctions, but the equity/law distinction played little or no role in our analyses. Instead, the decisions addressed directly what the Takings Clause requires (or not). And as already shown, *supra*, at 3–4, they held that the Clause does not demand advance payment. Beginning again at the beginning, *Cherokee Nation* decided that the Takings Clause "does not provide or require that compensation shall be actually paid in advance." 135 U. S., at 659. In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 567–568 (1898), the Court declared that a property owner had no "constitutional right to have the amount of his compensation finally determined and paid before yielding possession." By the time of *Williams* v. *Parker*, 188 U. S., at 502, the Court could state that "it is settled by repeated decisions" that the Constitution allows the taking of property "prior to any payment." Similarly, in *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 677 (1923), the Court noted that "[i]t has long been settled that the taking of property . . . need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when" there is a pledge of "reasonably prompt ascertainment and payment." In *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932), the Court repeated that the "Fifth Amendment does not entitle [a property owner] to be paid in advance of the taking." I could go on—there are eighty more years to cover, and more decisions in the early years too—but by now you probably get the idea.

Well, just one more especially good demonstration. In *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18 (1940), the plaintiffs sought money damages for an alleged Takings Clause violation. For that reason, the Court's theory about suits seeking injunctions has no possible application. Still, the Court rejected the claim: The different remedy requested made no difference in the result. And yet more important: In refusing to find a Takings Clause

violation, the Court used the exact same reasoning as it had in all the cases requesting injunctions. Once again, the Court did not focus on the nature of the relief sought. It simply explained that the government had provided a procedure for obtaining post-taking compensation—and that was enough. "The Fifth Amendment does not entitle him [the owner] to be paid in advance of the taking," held the Court, quoting the last injunction case described above. *Id.*, at 21 (quoting *Hurley*, 285 U. S., at 104; brackets in original). Because the government had set up an adequate compensatory mechanism, the taking was "within [the government's] constitutional power." 309 U. S., at 22. Once again, the opposite of what the majority pronounces today.[4]

Fourth and finally, the majority lays claim to another line of decisions—involving the Tucker Act—but with no greater success. The Tucker Act waives the Federal Government's sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. See 28 U. S. C. §1491(a)(1). According to

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[4]The majority's supposed best case to the contrary, *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304 (1987), is not so good, as is apparent from its express statement that it accords with *Williamson County*. See 482 U. S., at 320, n. 10. In *First English*, the Court held that a property owner was entitled to compensation for the temporary loss of his property, occurring while a (later-repealed) regulation was in effect. See *id.*, at 321. The Court made clear that a government's duty to compensate for a taking—including a temporary taking—arises from the Fifth Amendment, as of course it does. See *id.*, at 315. But the Court nowhere suggested that a Fifth Amendment violation happens even before a government denies the required compensation. (You will scan the majority's description of *First English* in vain for a quote to that effect—because no such quote exists. See *ante*, at 9–11.) To the contrary, the Court went out of its way to recognize the *Williamson County* principle that "no constitutional violation occurs until just compensation has been denied." 482 U. S., at 320, n. 10 (internal quotation marks omitted).

the majority, this Court's cases establish that such an action "*is* a claim for a violation of the Fifth Amendment"—that is, for a constitutional offense that has already happened because of the absence of advance payment. *Ante*, at 19, n. 7 (emphasis in original); see *ante*, at 13. But again, the precedents say the opposite. The Tucker Act is the Federal Government's equivalent of a State's inverse condemnation procedure, by which a property owner can obtain just compensation. The former, no less than the latter, *forestalls* any constitutional violation by ensuring that an owner gets full and fair payment for a taking. The Court, for example, stated in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 128 (1985), that "so long as [post-taking Tucker Act] compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." Similarly, we held in *Preseault* v. *ICC*, 494 U. S. 1, 4–5 (1990) that when "compensation is available to [property owners] under the Tucker Act[,] the requirements of the Fifth Amendment are satisfied." And again, in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984) we rejected a takings claim because the plaintiff could "seek just compensation under the Tucker Act" and "[t]he Fifth Amendment does not require that compensation precede the taking." All those decisions (and there are others) rested on the premise, merely reiterated in *Williamson County*, that the "availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 697, n. 18 (1949).[5]

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[5] *Jacobs* v. *United States*, 290 U. S. 13 (1933), the Tucker Act case the majority cites to support its argument, says nothing different. The majority twice notes *Jacobs*' statement that a Tucker Act claim "rest[s] upon the Fifth Amendment." *Ante*, at 7–8 (quoting 290 U. S., at 16). And so it does, because the compensatory obligation that the Tucker

To the extent it deals with these cases (mostly, it just ignores them), the majority says only that they (like *Williamson County*) were "confused" or wrong. See *ante*, at 13, 19, n. 7. But maybe the majority should take the hint: When a theory requires declaring precedent after precedent after precedent wrong, that's a sign the theory itself may be wrong. The majority's theory is just that.

III

And not only wrong on prior law. The majority's overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism.

To begin with, today's decision means that government regulators will often have no way to avoid violating the Constitution. There are a "nearly infinite variety of ways" for regulations to "affect property interests." *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). And under modern takings law, there is "no magic formula" to determine "whether a given government interference with property is a taking." *Ibid.* For that reason, a government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use

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Act vindicates arises from—or "rests upon"—the Fifth Amendment. But that is a far cry from saying, as the majority does, that the Government has already violated the Fifth Amendment when the Tucker Act claim is brought—before the Government has denied fair compensation.

regulation (and what government doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

Still more important, the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. The regulation of land use, this Court has stated, is "perhaps the quintessential state activity." *FERC* v. *Mississippi*, 456 U. S. 742, 768, n. 30 (1982). And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues. In that respect, takings claims have little in common with other constitutional challenges. The question in takings cases is not merely whether a given state action meets federal constitutional standards. Before those standards can come into play, a court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998); see also Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006) ("[I]f background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property"). Often those questions—how does pre-existing state law define the property right?; what interests does that law grant?; and conversely what interests does it deny?—are nuanced and complicated. And not a one of them is familiar to federal courts.

This case highlights the difficulty. The ultimate constitutional question here is: Did Scott Township's cemetery ordinance "go[] too far" (in Justice Holmes's phrase), so as to effect a taking of Rose Mary Knick's property? *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). But to answer that question, it is first necessary to address an issue about background state law. In the Township's view,

the ordinance did little more than codify Pennsylvania common law, which (the Township says) has long required property owners to make land containing human remains open to the public. See Brief for Respondents 48; Brief for Cemetery Law Scholars as *Amici Curiae* 6–26. If the Township is right on that state-law question, Knick's constitutional claim will fail: The ordinance, on that account, didn't go far at all. But Knick contends that no common law rule of that kind exists in Pennsylvania. See Reply Brief 22. And if she is right, her takings claim may yet have legs. But is she? Or is the Township? I confess: I don't know. Nor, I would venture, do my colleagues on the federal bench. But under today's decision, it will be the Federal District Court for the Middle District of Pennsylvania that will have to resolve this question of local cemetery law.

And if the majority thinks this case is an outlier, it's dead wrong; indeed, this case will be easier than many. Take *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). There, this Court held that a South Carolina ban on development of beachfront property worked a taking of the plaintiff's land—unless the State's nuisance law already prohibited such development. See *id.*, at 1027–1030. The Court then—quite sensibly—remanded the case to the South Carolina Supreme Court to resolve that question. See *id.*, at 1031–1032. (And while spotting the nuisance issue, the Court may have overlooked other state-law constraints on development. In some States, for example, the public trust doctrine or public prescriptive easements limit the development of beachfront land. See Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L. J. 203, 227 (2004).) Or consider *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702 (2010). The federal constitutional issue there was whether a decision of the Florida Supreme Court relating to beachfront prop-

erty constituted a taking. To resolve that issue, though, the Court first had to address whether, under pre-existing Florida property law, "littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." *Id.*, at 730. The Court bit the bullet and decided that issue itself, as it sometimes has to (though thankfully with the benefit of a state high court's reasoning). But there is no such necessity here—and no excuse for making complex state-law issues part of the daily diet of federal district courts.

State courts are—or at any rate, are supposed to be—the "ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975). The corollary is that federal courts should refrain whenever possible from deciding novel or difficult state-law questions. That stance, as this Court has long understood, respects the "rightful independence of the state governments," "avoid[s] needless friction with state policies," and promotes "harmonious relation[s] between state and federal authority." *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500–501 (1941). For that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 77 (1997) (encouraging certification of "novel or unsettled questions of state law" to "hel[p] build a cooperative judicial federalism"); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 28 (1959) (approving federal-court abstention in an eminent domain proceeding because such cases "turn on legislation with much local variation interpreted in local settings"). We may as well not have bothered. Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism.

IV

Everything said above aside, *Williamson County* should stay on the books because of *stare decisis*. Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). *Stare decisis*, of course, is "not an inexorable command." *Id.*, at 828. But it is not enough that five Justices believe a precedent wrong. Reversing course demands a "special justification—over and above the belief that the precedent was wrongly decided." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8) (internal quotation marks omitted). The majority offers no reason that qualifies.

In its only real stab at a special justification, the majority focuses on what it calls the "*San Remo* preclusion trap." *Ante*, at 2. As the majority notes, this Court held in a post-*Williamson County* decision interpreting the full faith and credit statute, 28 U. S. C. §1738, that a state court's resolution of an inverse condemnation proceeding has preclusive effect in a later federal suit. See *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005); *ante*, at 1–2, 5–6, 22. The interaction between *San Remo* and *Williamson County* means that "many takings plaintiffs never have the opportunity to litigate in a federal forum." *Ante*, at 22. According to the majority, that unanticipated result makes *Williamson County* itself "unworkable." *Ibid.*

But in highlighting the preclusion concern, the majority only adds to the case for respecting *stare decisis*—because that issue can always be addressed by Congress. When "correction can be had by legislation," Justice Brandeis once stated, the Court should let stand even "error[s on]

matter[s] of serious concern." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting)). Or otherwise said, *stare decisis* then "carries enhanced force." *Kimble*, 576 U. S., at ___ (slip op., at 8); see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ___, ___ (2018) (ROBERTS, C. J., dissenting) (slip op., at 2) (The *stare decisis* "bar is even higher" when Congress "can, if it wishes, override this Court's decisions with contrary legislation"). Here, Congress can reverse the *San Remo* preclusion rule any time it wants, and thus give property owners an opportunity—*after* a state-court proceeding—to litigate in federal court. The *San Remo* decision, as noted above, interpreted the federal full faith and credit statute; Congress need only add a provision to that law to flip the Court's result. In fact, Congress has already considered proposals responding to *San Remo*—though so far to no avail. See Brief for Congressman Steve King et al. as *Amici Curiae* 7. Following this Court's normal rules of practice means leaving the *San Remo* "ball[in] Congress's court," so that branch can decide whether to pick it up. *Kimble*, 576 U. S., at ___ (slip op., at 8).[6]

And the majority has no other special justification. It says *Williamson County* did not create "reliance interests." *Ante,* at 23. But even if so, those interests are a *plus-factor* in the doctrine; when they exist, *stare decisis* becomes "superpowered." *Kimble*, 576 U. S., at ___ (slip op., at 10); *Payne*, 501 U. S., at 828 (*Stare decisis* concerns are "at their acme" when "reliance interests are involved"). The absence of reliance is not itself a reason for overruling

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[6] Confronted with that point, the majority shifts ground. It notes that even if Congress eliminated the *San Remo* rule, takings plaintiffs would still have to comply with *Williamson County*'s "unjustified" demand that they bring suit in state court first. See *ante*, at 22. But that argument does not even purport to state a special justification. It merely reiterates the majority's view on the merits.

a decision. Next, the majority says that the "justification for [*Williamson County*'s] state-litigation requirement" has "evolve[d]." *Ante*, at 22. But to start with, it has not. The original rationale—in the majority's words, that the requirement "is an element of a takings claim," *ante*, at 22—has held strong for 35 years (including in the cases the majority cites), and is the same one I rely on today. See, *e.g., Horne*, 569 U. S., at 525–526 (quoting *Williamson County*'s rationale); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 734 (1997) (same); *supra*, at 2–3. And anyway, "evolution" in the way a decision is described has never been a ground for abandoning *stare decisis*. Here, the majority's only citation is to last Term's decision overruling a 40-year-old precedent. See *ante*, at 22 (citing *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___ (2018) (slip op., at 23)). If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all.

What is left is simply the majority's view that *Williamson County* was wrong. The majority repurposes all its merits arguments—all its claims that *Williamson County* was "ill founded"—to justify its overruling. *Ante*, at 20–21. But the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014); see *supra*, at 16. For it is hard to overstate the value, in a country like ours, of stability in the law.

Just last month, when the Court overturned another longstanding precedent, JUSTICE BREYER penned a dissent. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___, ___ (2019). He wrote of the dangers of reversing legal course "only because five Members of a later Court" decide that an earlier ruling was incorrect. *Id.*, at ___ (slip op., at

13). He concluded: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Ibid.* Well, that didn't take long. Now one may wonder yet again.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BRADEN WOODS HOMEOWNERS ASSOCIATION, INC., a Florida not for profit corporation; and LAKEWOOD RANCH MEDICAL CENTER, a Florida for profit corporation,

Appellants,

v.

MAVARD TRADING, LTD., a BVI corporation registered to transact business in Florida; DOCTORS HOSPITAL OF SARASOTA, a Florida for profit corporation; JOHN R. BARNOTT in his official capacity as the Director of Building and Development Services for Manatee County; and MANATEE COUNTY, a political subdivision of the State of Florida,

Appellees.

Case No. 2D17-3795

Opinion filed June 21, 2019.

Appeal from the Circuit Court for Manatee County; Lon S. Arend, Judge.

Robert K. Lincoln of the Law Office of Robert K. Lincoln, P.A., Sarasota, for Appellant Braden Woods Homeowners Association, Inc.

Jay Cohen of Cohen, Blostein & Ayala, P.A., Fort Lauderdale, for Appellant Lakewood Ranch Medical Center.

Christopher M. De Carlo and Anne M. Morris of Manatee County Attorney's Office, Bradenton, for Appellees Manatee County and John R. Barnott.

Raoul G. Cantero, David P. Draigh and Ryan A. Ulloa of White & Case, LLP, Miami; and Walter J. Taché and Jennifer Christianson of Taché, Bronis, Christianson & Descalzo, P.A., Miami, for Appellee Doctors Hospital of Sarasota.

Laurie A. Thompson, Susan H. Aprill and Kirsten I. Baier of Fowler White Burnett P.A., West Palm Beach, for Appellee Mavard Trading, Ltd.

SILBERMAN, Judge.

Braden Woods Homeowners Association, Inc., and Lakewood Ranch Medical Center (the Plaintiffs) appeal a partial final judgment that dismissed with prejudice counts one, two, and three of their four-count amended complaint that seeks declaratory and injunctive relief.[1] The Plaintiffs filed this action against Mavard Trading, Ltd. (Mavard), Doctors Hospital of Sarasota (Doctors), Manatee County (the County), and John R. Barnott in his official capacity as the Director of Building and Development Services for Manatee County (Barnott). The Plaintiffs challenge the trial court's dismissal of Barnott as a defendant as well as the dismissal of counts one and two on appeal. We affirm the trial court's order to the extent that it dismisses count three and dismisses Barnott from the lawsuit with prejudice, and we reverse the dismissal of

[1]We review the partial final judgment pursuant to Florida Rule of Appellate Procedure 9.110(k).

counts one and two and remand for further proceedings against Defendants Mavard, Doctors, and the County.

This action arose from the application to construct and operate a freestanding emergency room (FSER) on property owned by Mavard and leased to Doctors (the Property). Barnott administratively approved the final site plan (FSP) for the Property. Braden Woods represents the subdivision that abuts the shopping center where the property for the FSER is located. Lakewood Ranch is a competitor business that operates an emergency room as part of its licensed hospital, located within five miles of the FSER property.

The Manatee County Board of County Commissioners (the Board) approved a preliminary site plan (PSP) for the Property for a retail site by a 2009 ordinance (the 2009 PSP Ordinance). Upon Mavard and Doctors' application and after a public hearing on June 2, 2016, the Board amended the PSP only to extend the expiration of the PSP until April 2, 2018 (the 2016 PSP Ordinance). In May 2016, Mavard and Doctors applied for FSP approval for the FSER.

The Property is in the future land use category of Retail/Office/Residential. The Property is in a planned development district and is zoned as Planned Development Commercial (PDC) which allows clinics but prohibits hospitals. The Manatee County Land Development Code (LDC) did not define an FSER as it was a new business concept in Manatee County.

Robin Meyer, a division manager, reviewed the FSP application and correspondence. Meyer believed the FSER use would be a hospital and would not be a permitted use. Meyer requested a legal opinion from the Office of the County Attorney.

In a June 2016 email, Sarah Schenk, an assistant county attorney, stated that it was "unclear what analysis was applied to allow the change in use from retail as stated in Section 2 of [the 2009 PSP Ordinance] to a clinic or some form of emergency service facility without going through the public hearing process to amend the ordinance." Meyer told Doctors' representatives in July 2016 that the project would need a public hearing before the Board to change the retail use. Doctors' representatives complained to Barnott of the cost and delay of a hearing. Barnott fired Meyer in August 2016.

Barnott obtained additional information from Doctors about the FSER and reviewed the LDC and Florida Statutes. He issued a written letter of interpretation dated September 16, 2016 (the Code Interpretation). Barnott determined that the proposed FSER would fall within the category of clinic because, as detailed in the letter, the FSER was more like an urgent care facility or clinic than a hospital. He relied on sections 311 and 401.2 of the LDC in his interpretation. Relying on section 401.2, he stated the following:

> [W]henever there is any uncertainty as to the classification of a use, the Department Director shall determine the classification, if any, within which the use falls, based on its characteristics and similarity to other uses in the district. If a use has characteristics similar to more than one classification, the use shall be construed as the classification having the most similar characteristics.

But section 401.2 applies to standard districts, not planned development districts, as discussed in our analysis below. Because Barnott determined that an FSER was more like a clinic, he concluded that this would allow the proposed use at the site to be approved and reviewed by administrative permit rather than requiring approval by the Board.

Barnott, through staff, administratively approved the FSP on November 23, 2016. On December 7, 2016, Braden Woods sent a letter to the Board about the application for the FSER and stated its concerns regarding traffic and noise. In an email response on December 14, 2016, from the County's Building and Development Services Department, Braden Woods was informed of the timeline of the development of the FSER. Braden Woods was advised of the Code Interpretation of September 16, 2016, and the FSP approval of November 23, 2016. The County issued a building permit for the FSER on December 16, 2016.

The Plaintiffs filed the original complaint on February 17, 2017, and on April 13, 2017, filed the operative First Amended Complaint (the Amended Complaint). Count one of the Amended Complaint seeks relief pursuant to chapter 86, Florida Statutes (2016), the declaratory judgment statute, and the injunction provision in section 106.3.A of the LDC to declare Barnott's FSP approval and the FSP void and ultra vires and to enjoin the resulting violations of the LDC from the construction or operation of the FSER. Count two seeks relief pursuant to (1) chapter 86; (2) section 125.66(4), Florida Statutes (2016), the notice statute; and (3) section 106.3.A to declare Barnott's FSP approval and the FSP void and ultra vires because the County and Barnott violated the notice statute and to enjoin the resulting violations of the LDC from the construction or operation of the FSER. Count three, which is not at issue on appeal, deals with the extension of the time period for the PSP. Count four by Braden Woods, based on a settlement agreement, remains pending against Mavard and Doctors.

The Defendants filed motions to dismiss the Amended Complaint and asserted, among other things, that the Plaintiffs had failed to exhaust the administrative

remedies provided for in the LDC and that Barnott was not a proper party. After conducting a hearing on the motions, the trial court dismissed counts one through three against Barnott in his official capacity based on qualified immunity and because any declaratory or injunctive relief that the court might grant against the County would provide the Plaintiffs with the relief they seek against Barnott. The trial court dismissed counts one through three against all Defendants based on the Plaintiffs' failure to exhaust their administrative remedies and the failure to timely seek certiorari review. The trial court denied the motion to dismiss count four. As mentioned, the Plaintiffs challenge on appeal the dismissal of Barnott and the dismissal of counts one and two.

I. DISMISSAL WITH PREJUDICE AS TO BARNOTT

The trial court erred in determining that Barnott was entitled to qualified immunity. However, the trial court's decision dismissing the counts against Barnott with prejudice is supported by the trial court's additional determination that because Barnott is an employee of Manatee County, any declaratory or injunctive relief that the trial court might grant against the County would provide the Plaintiffs the relief they seek against Barnott. Thus, suing Barnott in his official capacity is redundant to suing the County.

Our review of the dismissal of a complaint with prejudice is de novo. Neapolitan Enters., LLC v. City of Naples, 185 So. 3d 585, 589 (Fla. 2d DCA 2016). A motion to dismiss challenges the legal sufficiency of a complaint. Id. In considering a ruling on the motion to dismiss, we accept the allegations of the complaint as true. Id.

A. Qualified Immunity

"Qualified immunity protects government actors performing discretionary functions from liability and suit for civil damages unless their conduct violates clearly established federal statutory or constitutional rights." Bd. of Regents v. Snyder, 826 So.

2d 382, 389-90 (Fla. 2d DCA 2002) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In Harlow, the Supreme Court specifically limited its decision to suits for civil damages and "express[ed] no view as to the conditions in which injunctive or declaratory relief might be available." 457 U.S. at 819 n.34. Qualified immunity is a shield from liability for civil damages. See Vermette v. Ludwig, 707 So. 2d 742, 745 (Fla. 2d DCA 1997); Town of Southwest Ranches v. Kalam, 980 So. 2d 1121, 1123 (Fla. 4th DCA 2008). And qualified immunity is a shield from personal liability. Dep't of Envtl. Prot. v. Envtl. Corp. of Am., 720 So. 2d 273, 274 (Fla. 2d DCA 1998).

Qualified immunity is not a defense to a claim seeking injunctive relief. See Pearson v. Callahan, 555 U.S. 223, 242 (2009); Welch v. Theodorides-Bustle, 753 F. Supp. 2d 1223, 1228 (N.D. Fla. 2010). Qualified immunity is also not a defense to claims seeking declaratory relief. Welch, 753 F. Supp. 2d at 1228. "Because qualified immunity is only a defense to personal liability for monetary awards resulting from government officials performing discretionary functions, qualified immunity may not be effectively asserted as a defense to a claim for declaratory or injunctive relief." Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 997 F. Supp. 1476, 1479-80 (M.D. Fla. 1998) (quoting Ratliff v. DeKalb County, 62 F.3d 338, 340 n.4 (11th Cir.1995)). In addition, when defendants are sued in their official capacities rather than their individual capacities, they are not entitled to raise a qualified immunity defense. Id. at 1480.

To the extent that the County relies upon Fuller v. Truncale, 50 So. 3d 25, 30 (Fla. 1st DCA 2010), to support the proposition that qualified immunity is applicable

even though the Plaintiffs are seeking only equitable relief, Fuller dealt with judicial immunity, not qualified immunity.

We conclude that the trial court erred in applying qualified immunity to claims for declaratory and injunctive relief against Barnott in his official capacity. Thus, the counts against him should not have been dismissed on that basis.

B. Suit Against Barnott in his Official Capacity

The County also argued that Barnott was not a proper party and that the remedy sought against the County would adequately address the relief the Plaintiffs sought. The trial court found that as a County employee "Mr. Barnott is subject to the authority of the [Board] and the County Administrator. Any declaratory or injunctive relief granted by the Court against the County would afford the Plaintiffs the relief they seek against Mr. Barnott." Because suing Barnott was redundant to suing the County, we affirm the dismissal with prejudice as to Barnott.

"A suit against a defendant in his official capacity is, in actuality, a suit against the governmental entity which employs him." Stephens v. Geoghegan, 702 So. 2d 517, 527 (Fla. 2d DCA 1997); see also Geidel v. City of Bradenton Beach, 56 F. Supp. 2d 1359, 1369 (M.D. Fla. 1999) (analyzing state law claims as being against the defendant city and dismissing the claims with prejudice against the officers in their official capacities). In De Armas v. Ross, 680 So. 2d 1130, 1131 (Fla. 3d DCA 1996), involving a suit filed under the Florida Whistle-blower's Act, the appellate court affirmed the dismissal of police officers sued in their official capacity when the City of Miami was also named as a defendant. The court stated that "[b]ecause suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally

equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly." Id. at 1131-32 (quoting Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991)). The court recognized that it would be redundant to keep both the City of Miami and the officers in their official capacity as defendants. See id. at 1132; see also Bright v. City of Tampa, No. 8:16-CV-1035-T-17MAP, 2017 WL 5248450, at *10 (M.D. Fla. May 17, 2017) ("The United States Supreme Court has ruled that a suit against a person in their 'official capacity' is merely an alternative means of pleading against the governmental entity, in the instant case, the City of Tampa." (citing Hafer v. Melo, 502 U.S. 21, 25 (1991))), aff'd on other grounds sub nom. Bright v. Thomas, 754 Fed. App'x 783 (11th Cir. 2018).

In Hatcher ex rel. Hatcher v. DeSoto County School District Board of Education, 939 F. Supp. 2d 1232, 1236 (M.D. Fla. 2013), aff'd on other grounds sub nom. Hatcher ex rel. Hatcher v. Fusco, 570 Fed. App'x 874 (11th Cir. 2014), the Middle District recognized that when the entity is named as a defendant, an official capacity claim may be redundant. However, the court refused to grant the defendant principal's motion to dismiss in a case involving the alleged violation of a student's First Amendment rights and claims seeking damages and injunctive relief. Id. at 1234-35. The court explained that the school board was "contesting any liability based on Fusco's conduct, and therefore it remains plausible at this stage of the proceedings that a separate official capacity claim can be maintained against Fusco." Id. at 1236.

Here, the Plaintiffs are not seeking damages, and they are seeking the same injunctive and declaratory relief against Barnott and the County. Barnott and the County have filed a joint brief and make the same arguments. In this case, the suit

against Barnott in his official capacity is redundant, and he would be bound as an employee of the County by any injunctive or declaratory relief granted. Thus, the trial court properly dismissed Barnott as a party with prejudice because the claims against him are redundant to the claims against the County.

II. FAILURE TO EXHAUST ADMINISTRATIVE REMEDY OR SEEK CERTIORARI REVIEW

A party must exhaust available administrative remedies before seeking relief in the circuit court regarding the issuance of a building permit or review of a county's interpretation of its land development code. See Vanderbilt Shores Condo. Ass'n v. Collier County, 891 So. 2d 583, 585-86 (Fla. 2d DCA 2004). The failure to exhaust administrative remedies is typically an affirmative defense. See Wilson v. County of Orange, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). But when the facts comprising "the defense affirmatively appear on the face of the complaint and establish conclusively that the defense bars the action as a matter of law, a motion to dismiss raising the defense is properly granted." Grove Isle Ass'n v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) (dealing with affirmative defenses of statute of limitations and laches). Because a plaintiff may plead facts in a reply in avoidance of an affirmative defense, "the allegations of the complaint must also conclusively negate the plaintiff's ability to allege facts in avoidance of the defense by way of reply or dismissal is inappropriate." Id. at 1089.

The trial court dismissed counts one and two on the basis that the Plaintiffs failed to timely seek certiorari review under section 371 of the LDC and failed to exhaust their remedy under section 370. First we address section 371 regarding judicial review, and second we address section 370 regarding administrative appeal.

A. Section 371

Section 371 of the LDC provides as follows:

> **Section 371. Appeals of Quasi-Judicial Decisions.**
>
> Any final action, including final order, and/or any alleged impropriety of the approving authority may be appealed, within thirty (30) days of the date of the action taken, by any aggrieved person, including Manatee County, or any officer, or department thereof, with the appropriate court of record as provided by law. All such appeals shall be filed with the court of record and shall include a petition, duly verified, setting forth that such decision is illegal, and/or improper, and specifying the grounds of the illegality.

The trial court determined that the Plaintiffs could have used this remedy, a judicial remedy, to challenge the Code Interpretation dated September 16, 2016, and the approval of the FSP on November 23, 2016. We cannot agree because the Plaintiffs had no quasi-judicial decision for which they could seek certiorari review.

Relying on Board of County Commissioners v. Snyder, 627 So. 2d 469, 474-75 (Fla. 1993), the trial court stated "that decisions of local governments on building permits, site plans and other development orders are quasi-judicial action that may only be challenged by a petition for certiorari." But in Snyder, a board of county commissioners conducted a hearing with input from citizens. Id. at 471. The Snyder court recognized that quasi-judicial action occurs at a hearing under certain circumstances. See id. at 474. An executive decision made by a single city official without a hearing is not quasi-judicial action. See Pleasures II Adult Video, Inc. v. City of Sarasota, 833 So. 2d 185, 189 (Fla. 2d DCA 2002). "A decision is judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required and the

judgment of the administrative agency is contingent on the showing made at the hearing." City of St. Pete Beach v. Sowa, 4 So. 3d 1245, 1247 (Fla. 2d DCA 2009).

Because the issue here arises from an executive decision made by a County official without a hearing, there was no quasi-judicial action to review in this case, and certiorari review was not appropriate. See id. Thus, the trial court erred in concluding that the Plaintiffs had a remedy by certiorari review.

B. Section 370

Section 370 of the LDC provides as follows:

> **Section 370. Appeals of Administrative Decisions.**
>
> Appeals from decisions from any written order, requirement, decision, determination or interpretation made by an administrative official in the enforcement of these regulations shall be heard by the Board.

The trial court determined that the Plaintiffs could have used section 370 to appeal the Code Interpretation dated September 16, 2016, and the administrative approval of the FSP dated November 23, 2016. The Plaintiffs, a neighboring homeowners association and a hospital, did not seek the Code Interpretation or apply for the FSP. Thus, the County did not provide them with those decisions at the time they were made, and the Plaintiffs were never informed of any right to appeal. The Plaintiffs argue that the plain language of section 370 does not give a third party the right to appeal an administrative decision to the Board, while the Defendants argue that a plain reading of section 370 does not deny standing to third parties.

Section 370 does not specifically state who can appeal. But even if a third party to the Code Interpretation could not take an appeal to the Board, section 311.3 does allow "any person" to request a letter of interpretation. A person who seeks a

letter of interpretation can clearly appeal that interpretation under section 370, and as was done in this case, would be given notice of the right to appeal under section 370.

This court has determined that neighboring associations were required to seek an interpretation of a land development code themselves and then appeal to the board when they had previously challenged a development for the same property. Vanderbilt Shores Condo. Ass'n v. Collier County, 891 So. 2d 583, 584, 586 (Fla. 2d DCA 2004) (affirming the dismissal of a suit for declaratory relief and mandamus to challenge a building permit issued to property owners because the neighboring associations failed to exhaust their administrative remedies). Based on Vanderbilt Shores, the Plaintiffs arguably failed to exhaust their administrative remedies because there was an opportunity to seek a written interpretation under section 311.3 and to then take an administrative appeal of that decision under section 370.

But even if the Plaintiffs had an administrative remedy that they failed to exhaust, we determine below that the exception for ultra vires acts applies based on the facts pleaded. Thus, the trial court should not have granted the Defendants' motions to dismiss counts one and two as to all Defendants.

1. Ultra Vires Acts

The Plaintiffs argue that they did not need to exhaust any administrative remedy in order to challenge the Code Interpretation and the FSP approval as ultra vires acts. A local government "engages in an 'ultra vires' act when it lacks the authority to take the action under statute or its own governing laws." Neapolitan Enters., LLC v. City of Naples, 185 So. 3d 585, 593 (Fla. 2d DCA 2016) (quoting Liberty Counsel v. Fla. Bar Bd. of Governors, 12 So. 3d 183, 191–92 (Fla. 2009)); see also Corona Props. of

Fla., Inc. v. Monroe County, 485 So. 2d 1314, 1317 (Fla. 3d DCA 1986) (stating in an appeal from a final judgment declaring a building permit void that because the code did not grant a zoning official "the authority to determine when a property owner's rights have vested, the vested rights letter and the 1983 permit issued pursuant to such letter are *ultra vires* and *void ab initio*").

A judicially created exception to the exhaustion of remedies doctrine "provides that it is permissible to pursue declaratory relief in a circuit court—without first pursuing and exhausting administrative remedies—if 'an agency acts without colorable statutory authority that is clearly in excess of its delegated powers.' " Baker Cty. Med. Servs., Inc. v. State, 178 So. 3d 71, 75 (Fla. 1st DCA 2015) (quoting Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So. 2d 539, 546 (Fla. 4th DCA 2001)). Court intervention is justified when the "agency action is unmistakably and irretrievably in excess of delegated powers." Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 689 So. 2d 1127, 1129 (Fla. 1st DCA 1997). "[J]udicial intervention with administrative action is justified only in those instances where the invalidity of the administrative act is not subject to reasonable differences of opinion." Dep't of Envtl. Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 797 (Fla. 1st DCA 1982) (quoting Odham v. Foremost Dairies, Inc., 128 So. 2d 586, 593 (Fla. 1961)).

In Baker, the plaintiff hospital sought declaratory relief regarding the duration of a certificate of need that was issued for a new hospital. 178 So. 3d at 72. The defendants filed a motion to dismiss in which they argued that the plaintiff had not asserted its claim in the administrative forum. Id. at 74. The trial court dismissed the action with prejudice and stated that the Agency for Health Care Administration "did not

act without colorable statutory authority" in entering its challenged order. Id. At issue was whether the agency's actions were "clearly beyond the statutory boundaries" that regulated certificates of need. Id. at 75. The appellate court reversed the dismissal of the action because the statutory authority did not "allow an effective quadrupling of the statutorily set validity period" for the certificate of need. Id. at 78.

Here, section 311.1 of the LDC generally allows Barnott to make a formal letter interpretation of the LDC or Comprehensive Plan as it relates to a particular type of development on a particular property. Barnott made the Code Interpretation under section 311.2.A which provides for

> [a] determination of whether a particular use, which does not clearly fall under the definition of one of the uses specified in this Code and is not specifically allowed in the zoning district, is substantially similar to one of the permitted uses, Special Permit, or Administrative Permit uses allowed in the district and therefore should be allowed as such[.]

The Defendants argue that sections 311 and 401.2 allowed Barnott to issue written interpretations of the LDC or Comprehensive Plan. But section 401.2 applies to standard districts, not planned development districts which are governed by section 402. The Plaintiffs argue that Barnott had no authority under section 311 to interpret uses in planned development districts, citing to section 402.5 and Table 4-9, the "PD Use Table" (formerly Table 4-7). Section 402.5 is entitled "Schedule of Uses for PD Districts" and provides that "[u]ses of land or structures not expressly listed in the table are prohibited and shall not be established in that district." Table 4-9 shows that the PDC district allows clinics but not hospitals and does not mention FSERs. It also allows medical or professional offices and general retail sales.

Although section 311 allows Barnott to determine a classification, section 402.5 prohibits any uses in a planned development district that are not expressly listed. Furthermore, section 311.4.B provides that "no interpretation shall have the effect of amending, abrogating or waiving any standard or requirement established in this Code." Thus, Barnott did not have authority to determine that an FSER was similar to and falls within the category of a clinic in a PDC district.

The 2009 PSP Ordinance provides that the PSP was approved for a retail site. The title of the 2009 and 2016 ordinances also reference a Burger King and retail store. As to approval of an FSP, section 323.1.B provides that "[t]he Department Director shall review the Final Site Plan for conformance with the land development code." But that does not mean he could allow a use that effectively changed the permitted use that the Board allowed in the 2009 PSP Ordinance.

The Department Director may approve certain enumerated changes to an approved site plan. Manatee Cty. Land Dev. Code, § 324.2.A. For instance, Barnott had authority to add certain uses such as family care homes or change the use from multi-family to single family under specific circumstances. See id. at § 324.2.A.11, .12. All other changes require approval by the Board at a noticed public hearing. Id. at § 324.2.B. A substantial modification requires submission of a new application for PSP approval. Id. at § 324.2.C. One of the substantial modifications is "[a]ny change in use from the approved use, except as noted in subsection A, above." Id. at § 324.2.C.2.

The Plaintiffs argue that Barnott changed the use provided in the 2009 PSP Ordinance from retail to clinic or hospital. The 2016 PSP Ordinance amended the PSP only to extend the expiration date. Under section 324.2.C.2, a change of use

requires a new application and hearing before the Board. The Defendants contend that the PSP allowed a retail building on the property in the Retail/Office/Residential future land use category and that the Comprehensive Plan's definitions for retail uses include office uses for personal or professional services. See Manatee Cty. Comp. Plan, Element 1. But a clinic use and retail uses are separately listed on Table 4-9, and an FSER, interpreted by Barnott as similar to an urgent care clinic, is not listed on Table 4-9 at all. In a June 2016 email, Sarah Schenk, an assistant county attorney, stated that it was "unclear what analysis was applied to allow the change in use from retail as stated in Section 2 of [the 2009 PSP Ordinance] to a clinic or some form of emergency service facility without going through the public hearing process to amend the ordinance."

Here, there is no reasonable difference of opinion as to the invalidity of Barnott's acts discussed above. The LDC clearly did not allow him to find a use that was not expressly listed for a planned development district to be similar to another permitted use so as to allow the unlisted use. He also had no authority to administratively change the PSP permitted use from retail to an FSER, or something that he determined was similar to an urgent care clinic. Thus, the alleged ultra vires acts provide an exception to the requirement to exhaust available administrative remedies. See Baker, 178 So. 3d at 75. Therefore, the trial court erred in dismissing counts one and two for the failure to exhaust administrative remedies.

The Plaintiffs asserted two other exceptions to the exhaustion requirement. As discussed below, we conclude that they do not apply to this case.

2. Notice Statute

Count two of the amended complaint sought declaratory and injunctive relief based upon an alleged violation of section 125.66(4), Florida Statutes (2016) (the Notice Statute). The Plaintiffs sought a declaration "that Barnott's FSP Approval and the FSP are void because the County failed to provide the noticed public hearing required by the Notice Statute" and that the defense of failure to exhaust administrative remedies did not apply to claims for violation of the Notice Statute.

Section 125.66(4) provides in part as follows:

> (4) Ordinances or resolutions, initiated by other than the county, that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to subsection (2). Ordinances or resolutions that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances or resolutions initiated by the county that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure:

The remainder of section 125.66(4) includes provisions for public hearings before the Board and the requirements for providing notice. Section 125.66(2)(a) also provides for a public hearing with notice when the Board amends any ordinance.

Section 125.66 applies when the Board takes action to enact an ordinance or resolution. See Op. Att'y Gen. Fla. 85-259, *5 (1985) (stating that section 125.66's provisions "regarding the enactment of ordinances and resolutions by a county would apply generally to such action when taken by the board of county commissioners"). The Plaintiffs basically argue that the challenged matters should have gone before the Board at a public hearing, but the Board did not enact or amend any ordinance or resolution. In David v. City of Dunedin, 473 So. 2d 304, 306 (Fla. 2d DCA 1985), which the Plaintiffs rely upon, this court stated that the plaintiffs "may make a general attack on

the validity of the ordinance through an injunction in circuit court, without exhausting their administrative remedies." There, the city actually enacted two ordinances. Id. at 305. Again, in White v. Town of Inglis, 988 So. 2d 163, 164 (Fla. 1st DCA 2008), which the Plaintiffs also cite, the town commission actually enacted a resolution. See also Bhoola v. City of St. Augustine Beach, 588 So. 2d 666, 667 (Fla. 5th DCA 1991) (stating that the city enacted a void ordinance because it did not comply with notice and hearing requirements); Linville v. Escambia County, 436 So. 2d 293, 294 (Fla. 1st DCA 1983) (dealing with county commission that enacted ordinance without proper notice).

Here, the Board did not enact or amend any ordinance or resolution, and section 125.66 does not apply. Thus, the notice statute does not excuse any failure to exhaust administrative remedies.

3. Injunctive relief under section 106.3.A

The Plaintiffs contend that they can seek injunctive relief pursuant to section 106.3.A of the LDC which deals with remedies for code violations and that the provision does not impose any requirement to exhaust administrative remedies. Section 106.3.A states the following:

> **Remedies.** The Board of County Commissioners or any aggrieved person may have recourse to such remedies in law and equity as may be necessary to insure compliance with the provisions of this Code, including injunctive relief to enjoin and restrain any person violating the provisions of this Code, and any rules and regulations adopted under this Code, and the court shall, upon proof of the violation of the Code, have the duty to forthwith issue such temporary and permanent injunctions as are necessary to prevent the violation of the Code.

However, reading section 106 as a whole indicates that it does not apply to an allegedly ultra vires act by a county official or employee.

Section 106.3.B. provides that "[e]ach day that the violation shall continue shall constitute a separate violation." This normally would apply to a situation where a property owner had a condition on his property that was in violation of an ordinance. In addition, section 106.2.A provides, "In this section 'violation of this Code' does not include the failure of a County officer or County employee to perform an official duty unless it is provided that the failure to perform the duty is to be punished as provided in this Section." The Plaintiffs have made no allegation that there is a code provision to punish the failure to perform a duty as provided in section 106. Section 106.3.A is inapplicable to this action.

III. CONCLUSION

Although the trial court erred in determining that Barnott was entitled to qualified immunity, the court correctly determined that the claims against Barnott are redundant to the claims against the County. Thus, we affirm the trial court's dismissal of Barnott as a party as well as the dismissal of count three. And while section 125.66(4) of the Florida Statutes and section 106.3.A of the LDC do not excuse the Plaintiffs' failure to exhaust any available administrative remedies, the alleged ultra vires acts do provide an exception to the exhaustion requirement. Thus, we reverse the trial court's dismissal of counts one and two as to Defendants Mavard, Doctors, and the County and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

VILLANTI and ROTHSTEIN-YOUAKIM, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed June 19, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1790
Lower Tribunal No. 17-7504

YS Catering Holdings, Inc., etc., et al.,
Appellants,

vs.

Attollo Partners LLC, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Daryl E. Trawick, Judge.

The Bernstein Law Firm and Michael I. Bernstein and Jordan C. Kaplan, for appellants.

Solowsky & Allen and Richard L. Allen and Lauren Kain Whaley, for appellees.

Before EMAS, C.J., and SALTER, J., and LEBAN, Senior Judge.

SALTER, J.

YS Catering Holdings, Inc. ("YSCH") and Scher Duchman ("Duchman") appeal from a final order granting a motion by the appellees, Attollo Partners, LLC ("Attollo"), Rajesh Rawal ("Rawal"), and Roy Heggland ("Heggland"), to dismiss the second amended complaint by YSCH and Duchman with prejudice.

The underlying dispute involves complex business transactions and the detailed documents memorializing the parties' agreements. The trial court correctly concluded that the written documents precluded the artfully pled tort claims and other theories of liability advanced by YSCH and Duchman. We affirm the dismissal of those claims with prejudice.

Background and Procedural History

The circuit court lawsuit filed by YSCH and Duchman alleged, in its third formulation (the second amended complaint, referred to here as the "Complaint"), a long litany of claims for breach of fiduciary duty; aiding and abetting breaches of fiduciary duty; fraud in the inducement; civil conspiracy to commit fraud; declaratory judgment; injunctive relief; breach of contract; and breach of the covenant of good faith and fair dealing.[1]

The parties on both sides were experienced, sophisticated investors and entrepreneurs. Duchman founded a company, YS Catering, Inc., which provided

[1] These claims were detailed in 66 pages, as 38 separate counts, in 375 numbered paragraphs, and with 15 attached exhibits comprising another 93 pages.

ready-to-eat meals to customers under the trade name of "The Fresh Diet, Inc." That company, referred to here as "Fresh Diet," entered into a series of bank loans for $1.2 million, personally guaranteed by Duchman. Under New York law, Duchman was also personally responsible for assuring that Fresh Diet made the required state tax filings and payments.

In 2013, Duchman met appellees Rawal and Heggland, who were members of Attollo. Following negotiations between Duchman and Attollo, Attollo acquired an 18% ownership interest in Fresh Diet. Duchman was a shareholder of YSCH, and that company owned a 46% interest in Fresh Diet. Rawal became the chief executive officer, and Heggland became general counsel, of Fresh Diet.

In 2014, Duchman introduced a principal of Attollo to the chief executive officer of a publicly-traded company, Innovative Food Holdings, Inc. ("IVFH"). IVFH engaged in a line of business similar to that of Fresh Diet, and soon the two companies agreed to a merger. Duchman approved and signed an Agreement and Plan of Merger ("Merger Agreement") in August 2014. The 31-page, detailed Merger Agreement (subsequently an attachment to the Complaint), contained several terms pertinent here:

- A rather typical, boilerplate merger/integration provision, section 6.3, acknowledging that the Merger Agreement and related written agreements "constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof." The provision also disclaimed any intention to benefit non-parties, and

precluding amendment or waiver "except by execution of an instrument in writing signed on behalf of each Party hereto."

- Extensive representations and warranties by Fresh Diet in section 2.8, confirming the timely filing and payment of all tax returns.

- A separate Article III and thirteen sections within that Article containing detailed representations and warranties of IVFH to Fresh Diet regarding the acquiring entities. These included statements regarding the absence of undisclosed liabilities and the absence of undisclosed developments and commitments other than as set forth in the Merger Agreement and IVFH financials. As but one example pertinent to the claims in the later Complaint, section 3.10 represented that IVFH had not entered into any agreement other than in the ordinary course of business consistent with past practice.

- A section 4.4 addressing employment agreements by IVFH and Fresh Diet employees, disclaiming any guarantee of permanent or long-term employment to designated "Transferred Employees" and stating a general intention (but not a commitment) to enter into employment agreements with key employees.

- The Merger Agreement is governed by Florida law.

In 2016, Duchman (through an entity he controlled) bought back Fresh Diet. To facilitate this transaction and obtain the release of restrictions on transfer of their restricted shares in IVFH, Duchman and other shareholders of YSCH signed a "Share Issuance Agreement" (the "2016 Agreement"), containing a broad and mutual release and covenant not to sue, for themselves and their successors, affiliates, heirs, beneficiaries, agents, assigns and representatives. Those persons and entities agreed not to "sue or bring any action or other proceeding of any nature against, and fully release [IVFH] and each of its subsidiaries, predecessors, affiliated entities, successor and assigns, together with its and each of those entities' respective

owners, officers, directors, members, partners, shareholders, employees, agents, representatives, attorneys, fiduciaries and administrators (collectively, "Releasees"), from any and all known and unknown claims, complaints, causes of action, demands or rights of any nature whatsoever which any Releaser has against any Releasee. . . except, as it relates to claims arising from a breach of [the 2016 Agreement]."

Fresh Diet did not prosper and grow as the parties had hoped. As President of Fresh Diet, Duchman executed an assignment by Fresh Diet for the benefit of creditors,[2] and the assignee filed a petition in the circuit court for Miami-Dade County to provide for the payment of Fresh Diet's debts "as far as it is possible." The assignment had the effect, whether intended or not, of assigning Fresh Diet's assets, including claims, demands, and choses in action, to the assignee (a non-party to the present proceedings).

In 2017, YSCH and Duchman commenced the present proceedings in the circuit court in Miami-Dade County, contending that the defendants breached their fiduciary duties, fraudulently induced YSCH and Duchman to enter into the agreements and transactions relating to Fresh Diet, engaged in a conspiracy to harm them, and aided and abetted others in those unlawful activities. Following motions to dismiss and orders of dismissal of the complaint and first amended complaint,

[2] See Chapter 727, Florida Statutes (2016).

YSCH and Duchman filed the third and final incarnation of the Complaint at issue here, the 66-page, 38 count litany of claims described previously.

Taking these allegations as true, but distilling them to their essence, YSCH and Duchman primarily claim that the defendants falsely promised: to remove Duchman as a guarantor of bank loans to Fresh Diet; to remove Duchman as a responsible party to file and pay New York state taxes; to be named a member of IVFH's board of directors; and to give Duchman a new employment agreement (or provide additional stock to Duchman). The defendants moved to dismiss the Complaint with prejudice, which was heard and granted, and this appeal followed.

Analysis

The parties properly agree that the dismissal of the Complaint with prejudice is reviewed de novo, citing Bensoussan v. Banon5 LLC, 252 So. 3d 298 (Fla. 3d DCA 2018). We assume the allegations of the Complaint and attachments to be true, and construe all reasonable inferences in favor of YSCH and Duchman. See United Auto. Ins. Co. v. Law Offices of Michael I. Libman, 46 So. 3d 1101, 1103-04 (Fla. 3d DCA 2010).

The claims of YSCH and Duchman are belied by multiple and independent legal principles. First, the claims are antithetical to the contractual representations and disclaimers of oral understandings or agreements as provided in the Merger Agreement. Although Duchman argues that he is not bound by those terms because

he was not individually a party to the Merger Agreement, the recitals evidence his approval of the terms as a director, and his signature as a shareholder expressly evidences his consent to the terms in that additional capacity.

Having approved those terms and attached the documents to their Complaint, YSCH and Duchman cannot prevail on the alleged oral misrepresentations claimed to overcome their later written agreements. See B&G Aventura, LLC v. G-Site Ltd. P'ship, 97 So. 3d 308 (Fla. 3d DCA 2012).

But there is more. After the Merger Agreement and closing, YSCH did not obtain the relief from bank guaranties and tax payments they allege they were promised, nor did they obtain the employment agreement sought by Duchman. Nevertheless, in 2016, they executed the 2016 Agreement containing the sweeping release of all claims, known and unknown, and against numerous parties (but certainly including the defendants in the Complaint), as excerpted in a prior section of this opinion.

We have followed a common sense principle enunciated by the Florida Supreme Court many years ago; Columbus Hotel Corp. v. Hotel Management Co., 156 So. 893 (Fla. 1934). If the plaintiffs were defrauded by an allegedly fraudulent inducement (and conspiracy) to enter into the Merger Agreement in 2014, and the performance that was promised was not forthcoming, they certainly could not justifiably rely on further inducements to enter into the 2016 Share Issuance

Agreement and its sweeping release. The principle is that "after the assertion of claims involving dishonesty, the claimant in negotiations culminating in a settlement and release cannot rely on oral representations made by the party already asserted to have been dishonest." Sugar v. Estate of Stern, 201 So. 3d 103, 108 (Fla. 3d DCA 2015).

Finally, the assignment for the benefit of creditors assigned away any claims, including choses in action, of Fresh Diet, to the assignee for the benefit of creditors, a non-party. See Akin Bay Co. v. Von Kahle, 180 So. 3d 1180 (Fla. 3d DCA 2015).

For all these reasons, the final order dismissing the Complaint with prejudice is affirmed.

Third District Court of Appeal

State of Florida

Opinion filed June 19, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-131
Lower Tribunal No. 14-12224

Laptopplaza, Inc., etc., et al.,
Appellants,

vs.

Wells Fargo Bank, NA,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Law Offices of Charlton Stoner, P.A., and Charlton Stoner, for appellants.

The Lehman Law Firm, PLLC, and Gary E. Lehman; Nelson Mullins Broad and Cassel, and Beverly A. Pohl and Christina Lehm (Fort Lauderdale), for appellee.

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

SCALES, J.

Appellants, plaintiffs below, 345 Carnegie Avenue LLC ("345 Carnegie"), Iwebmaster.net, Inc. ("Iwebmaster") and Iwebmaster's successor, Laptopplaza, Inc.,

along with Vladimir Galkin and Yakov Baraz, appeal a December 12, 2017 order dismissing with prejudice their Second Amended Complaint against Wells Fargo Bank, N.A. for failure to state a cause of action. We dismiss the appeal as to appellants Laptopplaza and Iwebmaster as premature. We reverse and remand the dismissal order as to 345 Carnegie, Galkin and Baraz because we conclude that Florida recognizes a statutory cause of action for a lender's alleged deliberate inflation of the amounts "properly due under or secured by" a mortgage. § 701.04(1)(a), Fla. Stat. (2014).

I. RELEVANT FACTS[1] AND PROCEDURAL BACKGROUND

On or about December 14, 2007, 345 Carnegie executed a promissory note memorializing a loan from Wells Fargo's predecessor, Wachovia Bank, to 345 Carnegie in the amount of $1,237,500.00. This note was secured by a mortgage on commercial property owned by 345 Carnegie. As additional security for the note, Iwebmaster, along with Galkin and Baraz, executed separate guarantees of 345 Carnegie's obligations under the note. On November 16, 2012, Iwebmaster's successor, Laptopplaza, assumed Iwebmaster's guaranty obligation.

[1] This opinion's recitation of the relevant facts is based on the allegations of the Second Amended Complaint which, for the purposes of this opinion, are taken as true. See W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 728 So. 2d 297 (Fla. 1st DCA 1999).

On March 31, 2014, Wells Fargo, through counsel, declared appellants in default of the loan documents based on various alleged non-monetary defaults.[2] The default letter outlined the amounts Wells Fargo claimed were due and owing as a result of the alleged defaults as follows:

- Principal due in the amount of $1,091,744.24;
- Accrued and unpaid interest at the default rate in the amount of $1,554.21, with a per diem accrual of $155.42; and
- Attorney's fees and costs through March 27, 2014, in the amount of $92,910.79.

In response to Wells Fargo's default letter, appellants, pursuant to section 701.04(1) of the Florida Statutes (2014), requested Wells Fargo to provide an estoppel letter itemizing the exact amount Wells Fargo claimed it was due. In response to appellants' request, Wells Fargo sent an April 21, 2014 estoppel letter setting the full payoff amount at $1,343,065.76, itemizing the amounts due as follows:

- Principal due in the amount of $1,089,057.63;
- Accrued and unpaid interest through April 22, 2014, in the amount of $1,084.68, with a per diem accrual of $154.95;
- Phase I environmental fees in the amount of $2,850.00;
- Appraisal fees for the years 2010, 2011, and 2013 totaling $9,070;
- Attorney fees in the amount of $100,403.50;

[2] The alleged non-monetary defaults, which are not relevant to this appeal, include: (1) appellants' failure to provide copies of leases to Wells Fargo; (2) appellants' failure to deliver Wells Fargo a current flood insurance policy with respect to the property securing the note; and (3) the administrative dissolution of Iwebmaster and the closing of a Wells Fargo account maintained by Iwebmaster. The default letter did not assert that 345 Carnegie had failed to make any payments due under the note.

- Attorney costs in the amount of $1,289.95; and
- Estimated pre-payment penalty in the amount of $139,310.00

In response to the April 21, 2014 estoppel letter, appellants requested documentation of the legal fees claimed in the estoppel letter. Citing attorney-client privilege concerns, Wells Fargo refused to provide any substantiation as to the amount of legal fees or that the amount had actually been incurred by Wells Fargo for enforcement and collection of the note.

On May 5, 2014, appellants attempted to tender to Wells Fargo the sum of $1,243,231.71, i.e., the amount claimed in the estoppel letter less the approximate $100,000.00 in legal fees claimed in the estoppel letter. Wells Fargo rejected the tender. In response, on May 9, 2014, appellants filed the instant action against Wells Fargo seeking to enjoin Wells Fargo from collecting on the note and from foreclosing on the mortgage.

Wells Fargo answered appellants' complaint and filed a seven-count Counterclaim against appellants. Counts I through V of Wells Fargo's Counterclaim alleged appellants' default on the loan documents and sought to collect on the note. On October 22, 2014, appellants deposited into the court registry the total liquidated amount of damages (including legal fees) sought by Wells Fargo in counts I through V of Wells Fargo's Counterclaim.[3] Appellants thereafter collectively stipulated both

[3] In November 2014 and May 2016, appellants made subsequent deposits into the court registry to cover the claimed damages.

to their liability on counts I through V of Wells Fargo's Counterclaim and, except for the amount of legal fees, to entry of judgment against them for the amounts Wells Fargo alleged were due therein. Ultimately, on May 31, 2016, the trial court entered a partial final judgment in favor of Wells Fargo on counts I through V of Wells Fargo's Counterclaim and ordered that the funds held in the court registry with respect to the stipulated damages amount be released to Wells Fargo. The lower court "specifically reserve[d] jurisdiction to conduct an evidentiary hearing and determine the reasonableness of the amount of . . . attorneys' fees and costs" owed by appellants to Wells Fargo.

On September 13, 2016, appellants sought leave to file an Amended Complaint, which the trial court granted. On August 8, 2017, the lower court entered an order granting Wells Fargo's motion to dismiss the Amended Complaint, again giving appellants leave to amend. Appellants' Second Amended Complaint, filed on October 12, 2017, is the operative pleading in this appeal. Therein, both 345 Carnegie and the guarantors asserted various claims for breach of the loan documents and breach of Florida's covenant of good faith and fair dealing. While the pleading alleges a total of seven causes of action, the gravamen of each is that Wells Fargo inflated the April 21, 2014 estoppel letter to include over $100,000 of legal fees that appellants claim are grossly overstated and unreasonable. Appellants alleged that they "have suffered consequential damages of the costs and expenses of

having to continue carrying the mortgaged property and by their inability to sell the property to a ready, willing and able buyer or to refinance the property."

Wells Fargo moved to dismiss the Second Amended Complaint for failure to state a cause of action. The trial court conducted a hearing on December 12, 2017, and entered an order granting Wells Fargo's motion, dismissing the Second Amended Complaint with prejudice. Appellants appeal this dismissal order.

II. JURISDICTIONAL ISSUE

Counts VI and VII of Wells Fargo's Counterclaim against guarantor Iwebmaster and its successor, Laptopplaza, alleged that Iwebmaster had fraudulently transferred to Laptopplaza the real property securing 345 Carnegie's obligation to Wells Fargo in violation of sections 726.105 and 726.106 of Florida's Uniform Fraudulent Transfer Act (the "Act"). On September 27, 2018, the trial court entered a partial summary judgment in Wells Fargo's favor on counts VI and VII of Wells Fargo's Counterclaim, but those claims have not been finally adjudicated, and are still being litigated between the parties.[4]

The issues related to Wells Fargo's counterclaims that Laptopplaza and Iwebmaster violated the Act are inextricably intertwined with the allegations in

[4] Laptopplaza and Iwebmaster attempted to appeal the trial court's partial summary judgment regarding Wells Fargo's alleged violations of the Act. We dismissed that appeal as premature. See Laptopplaza, Inc. v. Wells Fargo Bank, NA, 264 So. 3d 1049 (Fla. 3d DCA 2019).

appellants' Second Amended Complaint. Therefore, we lack jurisdiction to review the trial court's dismissal order as it relates to the claims of appellants Laptopplaza and Iwebmaster and dismiss the appeal as to appellants Laptopplaza and Iwebmaster. See Bardakjy v. Empire Inv. Holdings, LLC, 239 So. 3d 146, 147 (Fla. 3d DCA 2018) (dismissing appeal from an order granting final judgment on complaint for breach of contract where the claims and defenses raised on appeal were intertwined with the issues and facts of the still pending counterclaims for unjust enrichment and breach of fiduciary duty); Fla. R. App. P. 9.110(k).

Because, however, appellants 345 Carnegie, Galkin and Baraz are not parties to Wells Fargo's counterclaims based upon the Act, the trial court's December 12, 2017 dismissal order is final as to them and the appeal of these appellants is ripe for our review.

III. ANALYSIS[5]

The transcript from the December 12, 2017 hearing on Wells Fargo's motion to dismiss – resulting in the entry of the dismissal order on appeal – reflects a significant amount of confusion regarding the actual nature of the claims being made

[5] We review an order dismissing a complaint for failure to state a cause of action *de novo*. W.R. Townsend Contracting, Inc., 728 So. 2d at 300 ("Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, the ruling on a motion to dismiss for failure to state a cause of action is subject to *de novo* standard of review.").

in appellants' Second Amended Complaint. While it is certainly not a model of clarity, as mentioned earlier, the Second Amended Complaint essentially alleges that Wells Fargo's April 21, 2014 estoppel letter was deliberately inaccurate in setting forth the amount of legal fees to which it was entitled to recover from appellants, and that appellants suffered consequential damages as a result of the inaccuracy. The hearing transcript reveals that the trial court conflated the issue of whether Wells Fargo was entitled to attorney's fees based on appellants' stipulated default on the loan documents, with the *different* issue of whether Wells Fargo's estoppel letter was inaccurate causing consequential damages to appellants. It is clear to us that this confusion resulted in the dismissal of a cognizable claim.

The trial court was, of course, correct in its pronouncement at the December 12, 2017 hearing, that the determination of the amount of fees to which a successful litigant is in entitled is generally determined at the end of the lawsuit. See Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 979 (Fla. 1987). But, the claims asserted in appellants' Second Amended Complaint are more than garden-variety challenges to a lender's fee claim in an action to collect on a note. Appellants alleged that, in the April 21, 2014 estoppel letter, Wells Fargo deliberately inflated the amount of fees to which Wells Fargo was entitled, thus causing appellants to suffer consequential damages that were separate and distinct from appellants being required to pay the claimed attorney's fees.

There is little doubt that Florida recognizes such a separate and discrete cause of action by a borrower against a lender.[6] Specifically, section 701.04(1)(a) of the Florida Statutes requires a holder of a mortgage to deliver to the mortgagor, upon request of the mortgagor, a written estoppel letter setting forth not only the unpaid balance of the loans secured by the mortgage but "any other charges *properly due* under or secured by the mortgage." § 701.04(1)(a), Fla. Stat. (2014) (emphasis added). And, the Legislature expressly contemplated a cause of action based on the parties' respective obligations under the statute: "In the case of a civil action arising out of this section, the prevailing party is entitled to attorney fees and costs." § 701.04(2), Fla. Stat. (2014). Indeed, one Florida bankruptcy court, applying Florida law, has held that section 701.04 becomes a part of a contract between a mortgagor and a mortgagee and that a mortgagor has a breach of contract action against a

[6] At oral argument, Wells Fargo's counsel seemed to concede that Florida recognizes a cause of action for a lender's deliberate inflation of an estoppel letter, but argued that such cause of action would exist only when the lender's deliberate falsification of the estoppel letter appeared "on the face" of the estoppel letter. While we agree, in concept, with Wells Fargo on this point, we find it problematic to craft an opinion that provides any meaningful guidance to trial courts and parties regarding such a "face of the document" test. From a practical perspective, however, we surmise that, rather than filing a statutory cause of action against their lender, most borrowers challenging the accuracy of an estoppel letter would likely tender the entire amount claimed in the estoppel letter, while reserving the right to challenge inaccuracies, thus avoiding foreclosure. Again, from a practical perspective, only in the most egregious cases would a borrower risk foreclosure by asserting a statutory cause of action against its lender.

mortgagee if the mortgagee provides an intentionally false estoppel letter. See In re Kraz, LLC, 570 B.R. 389, 406 (Bankr. M.D. Fla. 2017).

In this case, appellants allege in their Second Amended Complaint that the approximately $100,000.00 in attorney's fees claimed in Wells Fargo's estoppel letter were grossly inflated and inaccurate and, as a result, appellants suffered consequential damages separate and distinct from Wells Fargo's claimed entitlement to the fee amount. At this stage of the proceedings, we are required to accept these allegations as true. See W.R. Townsend Contracting, Inc., 728 So. 2d at 300 ("In reviewing an order granting a motion to dismiss for failure to state a cause of action, we must accept as true all well-pled allegations in Appellant's . . . complaint, and we must draw all reasonable inferences in favor of the pleader.").[7] Therefore, as to appellants 345 Carnegie, Galkin and Baraz we reverse the dismissal order with the instruction that the trial court allow these appellants twenty days in which to file an amended complaint consistent with this opinion. We dismiss the appeal as to appellants Laptopplaza and Iwebmaster for lack of jurisdiction.

Reversed in part and remanded with instructions; dismissed in part.

[7] We express no opinions as to whether appellants will ultimately be able to establish these allegations.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MAGGY HURCHALLA,
Appellant,

v.

LAKE POINT PHASE I, LLC, and **LAKE POINT PHASE II, LLC,**
Florida Limited Liability Companies,
Appellees.

Nos. 4D18-1221 & 4D18-1632

[June 19, 2019]

Consolidated appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; William L. Roby, Judge; L.T. Case No. 43-2013-CA-001321.

Richard J. Ovelmen, Rachel A. Oostendorp, Alix I. Cohen and Dorothy Kafka of Carlton Fields Jorden Burt, P.A., Miami, Virginia P. Sherlock and Howard K. Heims of Littman, Sherlock & Heims, P.A., Stuart, Talbot D'Alemberte of D'Alemberte & Palmer, PLLC, Tallahassee, and Jamie S. Gorelick, David W. Ogden, David Lehn and Justin Baxenberg of Wilmer Cutler Pickering Hale and Dorr, LLP, Washington, DC, for appellant.

Michael J. Labbee, Ethan J. Loeb and Jon P. Tasso of Smolker, Bartlett, Loeb, Hinds & Thompson, P.A., Tampa, for appellees Lake Point Phase I, LLC, and Lake Point Phase II, LLC.

Richard Grosso of Richard Grosso, P.A., Davie, for Amici Curiae Dr. Penelope Canan and George W. Pring.

Richard Grosso of Richard Grosso, P.A., Davie, for Amici Curiae Bullsugar.org, Florida Wildlife Federation, Friends of the Everglades, and the Pegasus Foundation.

Jack Schramm Cox, Hobe Sound, for Amicus Curiae The Guardians of Martin County, Inc.

Paul M. Crochet of Weber, Crabb & Wein, P.A., St. Petersburg, for Amici Curiae First Amendment Foundation, The League of Women Voters of Florida, Florida Press Association, Florida Society of News Editors, Natural

Resources Defense Council, Sierra Club, American Civil Liberties Union Foundation of Florida, Fane Lozman, and The Brechner Center.

CONNER, J.

Maggy Hurchalla ("Hurchalla") appeals the final judgment entered after a jury found in favor of Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "Lake Point"), on its claim of tortious interference. Prior to trial, the South Florida Water Management District ("the District") and Martin County ("the County") were co-defendants, but the claims against them were settled. Hurchalla argues the trial court erred by: (1) improperly instructing the jury on her defense of First Amendment privilege to petition the government; (2) entering the judgment against her when the evidence was insufficient to defeat her First Amendment privilege; (3) improperly instructing the jury on her defense of common law privilege to make statements to a governmental entity for mutual and public interest; (4) entering the judgment against her when the evidence was insufficient to defeat her common law privilege; (5) denying her motion for judgment notwithstanding the verdict (contending insufficient evidence of breach, causation, and damages); (6) giving an adverse inference jury instruction; and (7) ordering her to pay attorneys' fees as a sanction. We affirm on the issues regarding the First Amendment and common law privileges and explain our analysis. We affirm as to the other issues raised without discussion.

As to the jury instructions regarding the privilege defenses, we determine there was no reversible error. As to the evidentiary arguments, we determine that the jury was presented with sufficient evidence to conclude the privileges were negated by malice on the part of Hurchalla.

Background

This appeal involves a 2,266-acre tract of land in Martin County ("the Property"). The previous owners of the Property planned to develop a subdivision of twenty-acre "ranchettes," for which the County issued a development order ("the Development Order") for a large segment of the Property. The Development Order allowed the owners to mine limestone from the Property. When the real estate market started to decline in 2008, the previous owners looked to sell the Property. They contacted the District about buying the Property. The Property was of value to the District because of its unique location at the intersection of three different water basins and its potential for storing, cleansing, and then conveying water to different areas. However, the District was not able to acquire the funding to purchase the Property in a timely manner. Since Lake Point

had been a contractor building on the Property for the previous owners, it "realized that there was a very economical limestone on the [P]roperty" that the company could use for its heavy highway construction business, so it purchased the Property.

Lake Point approached the District with a concept for a public-private partnership to construct a stormwater treatment project ("the Project") on the Property. After the District oversaw an in-depth due diligence investigation, Lake Point and the District entered into an agreement titled "Acquisition and Development Agreement for Public Works Project" ("the ADA") in November 2008. The ADA addressed the Project in two phases, Phase I and Phase II, based on the fact that a portion of the Property was under the Development Order. As to the Phase I parcel, mining would continue under the Development Order. As to the Phase II parcel, which was not under the Development Order, it was contemplated that Lake Point would conduct mining to create stormwater treatment facilities, but as to that parcel, mining permits would be obtained from both the Florida Department of Environmental Protection ("FDEP") and the Army Corps of Engineers ("the Corps"). The Project envisioned that excavation of limestone would create the stormwater management lakes that could be used by the District for water storage and conveyance purposes. The agreement required Lake Point to donate the Property to the District in phases over a 20-year period, as Lake Point mined limestone from the property. Because the Development Order was an encumbrance on the Property, the ADA provided that Lake Point would have the Development Order vacated as to the portions of the Phase I parcel donated to the District.

Since the County was a necessary player in accomplishing the Project, the District and the County entered into an interlocal agreement ("the Interlocal Agreement") for the Project in May 2009. The Interlocal Agreement expressly acknowledged the Project's numerous "water related benefits." Mirroring the ADA, the Interlocal Agreement required that the Development Order (authorizing mining) had to be vacated as to any portion of the Phase I parcel donated to the District. The County expressly agreed that it would take no action to otherwise create any encumbrances on the Property. The agreement also provided that until portions of the Property were donated to the District, the Development Order would remain in full force and effect.

The Interlocal Agreement also allowed Lake Point to mine limestone on the Phase II portion of the Property, if it obtained permits from both the FDEP and the Corps. Once Lake Point obtained those permits, additional permission from the County to mine the Phase II parcel was not required

because the Project qualified as an exempt public stormwater project. The Interlocal Agreement also provided that Lake Point would pay the County an annual monetary contribution based on the amount of limestone mined.

Over the next several years, Lake Point worked to implement the Project. Lake Point commissioned additional engineering reports to ensure the Project's success. It applied for and obtained the necessary mining permits from the FDEP and the Corps. During this time, the County monitored the Project and never identified any problems with the Project.

Hurchalla served as a Martin County Commissioner from 1974 to 1994. She has received numerous awards for her long commitment to environmental issues and had served on state and regional environmental boards and committees. When the County entered into the Interlocal Agreement in 2009, Hurchalla knew of the Project and expressed a few concerns, but took no action in protest.

In September 2012, local media published an article about a plan by Lake Point to convert the Project into one that would supply water to the City of West Palm Beach for consumptive use. The article alarmed Hurchalla. Prompted by the news article, by late 2012 Hurchalla became vehemently opposed to the Project. This was in the same time frame as the 2012 general election, which saw a change to the composition of the Board of the Martin County Commission ("BOCC") with the election of Hurchalla's good friend Anne Scott, joining another close friend, Sarah Heard on the BOCC. Hurchalla began expressing her disagreement with the Project in a series of emails sent to these close friends on the BOCC using their private email accounts; messages were also sent to the BOCC email address of Commissioner Ed Fielding. These emails encouraged the commissioners to copy and paste Hurchalla's statements and forward them in emails to the other county commissioners and county staff. Hurchalla also began giving explicit instructions in the emails to her commissioner friends as to how to stop the Project with various maneuvers.

As found by the jury, the emails resulted in the County changing course and moving to thwart, or at the least, significantly delay the Project.

In 2013, Lake Point sued the District and the County, asserting claims for declaratory relief, breach of contract, and tortious interference. In an amended complaint, Lake Point also asserted two counts against Hurchalla, individually; one for tortious interference seeking injunctive relief, the other for tortious interference seeking damages. Regarding

Hurchalla, Lake Point alleged that there were new members elected to serve on the BOCC, and that "[l]eading up to and in conjunction with this change in the BOCC's composition, Hurchalla started to engage in surreptitious activities targeted to interfere with Lake Point's interests." Lake Point alleged that Hurchalla scheduled and attended meetings, and also had email communications with various members of the BOCC, having a "plan to interfere with the" Interlocal Agreement and ADA. It was also alleged that Hurchalla "began making numerous false and misleading statements verbally and in writing to the BOCC, [the District] and others, outside of normal public meetings." Lake Point specifically listed in the amended complaint seven statements Hurchalla made in a January 4, 2013 email sent to all five county commissioners. Finally, Lake Point alleged that "[a]s a result of and in direct response to Hurchalla's efforts and false statements, the County and [the District] have begun breaching various obligations under the Interlocal Agreement and Development Agreement with Lake Point[.]"

The District and the County settled with Lake Point, which resulted in amendments to the ADA and Interlocal Agreement more favorable to Lake Point, and the County paid Lake Point $12 million. Lake Point abandoned its count against Hurchalla for an injunction. The only remaining count at the time of trial was against Hurchalla for damages, focusing on her alleged tortious interference with the Interlocal Agreement.

The jury returned a verdict for Lake Point, awarding $4.4 million in damages. The trial court denied Hurchalla's motion for judgment notwithstanding the verdict. Hurchalla gave notice of appeal.

Appellate Analysis

Hurchalla argues that the trial court improperly instructed the jury on her First Amendment privilege to petition her government and her common law privilege to make statements to a political authority regarding matters of public concern. Additionally, she argues the evidence presented to the jury was insufficient to defeat both privileges. We first address the arguments regarding the jury instructions.

Jury Instructions Regarding the Privilege Defense

On appeal, Hurchalla asserts the trial court erred in instructing the jury on her defense under the First Amendment privilege to petition her government and her defense under the Florida common law to make statements to a political authority regarding matters of public concern.

Our review of the trial transcript reveals that most of defense counsel's charge conference arguments focused on legal principles regarding the common law privilege. However, there were times when defense counsel would infuse arguments about the First Amendment privilege, thus blurring the distinction between the two privileges. It is clear there were no separate and distinct proposed jury instructions for each privilege submitted by Hurchalla for the trial court to consider. Similarly, there is nothing in the record suggesting that Hurchalla attempted to offer two separate privileges for the jury to consider. Instead, Hurchalla's counsel submitted "Defendant's Proposed Jury Instruction No. 10 First Amendment Privilege," which actually contained the elements of the common law privilege, rather than the First Amendment privilege.

There are important differences between the federal constitutional First Amendment privilege to petition government and the Florida common law privilege to speak to another about matters of mutual and public interest. Our supreme court, in *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984), explained the similarities and differences.

Both privileges are qualified, meaning they are not absolute. *Id.* at 806 (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), regarding the right of a public official to bring a defamation action and describing the Florida common law privilege as "conditional" and "qualified"). Both privileges can be overcome by a showing of malice. *Id.* However, the types of malice necessary to overcome the privileges are different. *Id.* To overcome the First Amendment privilege, *actual malice* must be shown. *Id.* In contrast, *express malice* must be shown to overcome the Florida common law privilege. *Id.* The supreme court described the difference in the malice standards:

> "Actual malice[]" . . . consists of knowledge of falsity or reckless disregard of truth or falsity, and must be shown by clear and convincing evidence. Express malice under the common law of Florida, necessary to overcome the common-law qualified privilege, is present where the primary motive for the statement is shown to have been an intention to injure the plaintiff. The plaintiff need only show this fact by a preponderance of the evidence, the ordinary standard of proof in civil cases.

Id. at 806-07 (internal citations omitted). Thus, not only are the standards of malice different, but so are the burdens of proof to establish the malice.

The differences between the two privileges are important for understanding the proper interplay between the First Amendment privilege and the common law privilege with the elements of tortious interference with contractual relationships. For example, the two privileges require different types of malice: actual malice or express malice. Hurchalla argued only express malice for her defense in the trial court. While she affirmatively requested an instruction discussing *express* malice below, on appeal, she argues the trial court failed to instruct on *actual* malice. Additionally, regarding the interplay of privilege with the elements of tortious interference and the burden of proof as to privilege, defense counsel briefly argued at one point that it was Lake Point's burden to negate Hurchalla's privileged statements; however, that argument was virtually abandoned or countermanded by defense counsel's repeated assertion that the privilege was an affirmative defense.

Because defense counsel's submissions and arguments during the charge conference failed to make important distinctions between the two privileges, we determine the trial court's instructions regarding privileged communication and the privilege defense were not reversible error.[1] *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) ("Fundamental error is waived where defense counsel requests an erroneous instruction."); *Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is 'invited,' . . . the appellate court will not consider the error a basis for reversal." (footnote omitted)).

Sufficiency of Evidence Concerning the First Amendment Privilege

We address the argument by Hurchalla's appellate counsel that "an appellate court has an obligation 'to make an independent examination of the whole record' to ensure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 80 L. Ed. 2d, 502, (1984) (quoting *Sullivan*, 376 U.S. at 284-86, 84 S. Ct. at 728-29); *see also Seropian v. Forman*, 652 So. 2d 490, 494 (Fla. 4th DCA 1995). In other words, we address Hurchalla's counsel's assertion that it is our responsibility to determine if there was clear and convincing evidence to support a determination that Hurchalla demonstrated *actual malice* by interfering with Lake Point's contract.

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[1] Because we determined above that there is no reversible error in the jury instructions due to the fact that separate instructions for each privilege were not requested, we do not address Hurchalla's argument on appeal that express malice must be the *sole*, rather than merely the *primary*, motive in a tortious interference case.

As discussed above, *actual malice* "consists of knowledge of falsity or reckless disregard of truth or falsity, and must be shown by clear and convincing evidence." *Nodar*, 462 So. 2d at 806. In this case, Hurchalla sent an email to all five county commissioners on January 4, 2013, expressing her concerns about the Project. We focus on two statements in the email that Lake Point contends were false (as alleged in the operative amended complaint). After discussing the status of the project back in 2008, Hurchalla made the following statement:

> At that point[,] [in 2008,] the District staff continued to suggest some vague storage value but changed the emphasis to the STA [stormwater treatment area] that would be built on site as the completion of the project in 20 years. A study was to follow that *documented the benefits* [of the stormwater treatment area]. *That study has not been provided.*

(emphases added). Several sentences later, Hurchalla wrote in a bullet point: "Neither the storage *nor the treatment benefits have been documented.*" (emphasis added).

These statements are examples of competent substantial evidence that clearly and convincingly proved that Hurchalla demonstrated actual malice in interfering with Lake Point's contracts with the County and the District, by making statements she either knew were false or with reckless disregard as to whether they were false. Hurchalla's comments were represented as statements of fact, as opposed to statements of pure opinion. Even if we viewed the statements as "mixed opinions," the statements would not be privileged under the First Amendment. *See Zambrano v. Devanesan*, 484 So. 2d 603, 606-07 (Fla. 4th DCA 1986) (determining statements were not privileged opinion "where the speaker or writer neglects to provide the audience with an adequate factual foundation prior to engaging in the offending discourse"). The evidence before the jury showed that Hurchalla *admitted* that there actually were documented treatment benefits. At trial, she stated: "As far as the treatment benefits, there is a study [documenting treatment benefits], and *I did review that study* . . . [but i]t's a preliminary study and other studies would need to be done." (emphasis added). Similarly, her expert agreed that 2008 models showed storage and treatment benefits of the stormwater treatment area. Therefore, even if Hurchalla thought there should have been more studies, she admitted that she had *reviewed* the study showing treatment benefits, and thus, she was aware that her statement that there were *no* documented benefits was false.

It is also significant that the false statements were emailed to two recently elected commissioners, Commissioners Scott and Haddox, who each admitted at trial that they had not read the permits or studies conducted on the Project, indicating that they were unfamiliar with the details about the Project (establishing reckless disregard for the truth). *See Zambrano*, 484 So. 2d at 606-07. Thus, upon our independent review of the record, we determine there was sufficient clear and convincing evidence to refute Hurchalla's First Amendment privilege to petition her government as to those two statements.

Sufficiency of Evidence Concerning the Florida Common Law Privilege

Hurchalla also argues the evidence was insufficient to prove she made false statements with express malice. We determine that Hurchalla has not shown reversible error.

Case law indicates that there are two ways that express malice can be proven. Some cases discuss that express malice is proven when the motive is characterized as "out of spite, to do harm, or for some other bad motive." *See Nodar*, 462 So. 2d at 811 (explaining that "[s]trong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position 'to gratify his malevolence'" (quoting *Myers v. Hodges*, 44 So. 357, 362 (Fla. 1907))); *Boehm v. Am. Bankers Ins. Grp., Inc.*, 557 So. 2d 91, 97 (Fla. 3d DCA 1990) (applying the description of express malice in *Nodar* to a tortious interference claim). Other cases contend that "even where the defendant's motive is not purely malicious, a tortious interference claim may succeed if improper methods were used," thus demonstrating the required express malice. *KMS Rest. Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1327 (11th Cir. 2004); *see also Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. 2d DCA 1995) (reversing dismissal of tortious interference complaint, holding that allegations of "the use of threats, intimidation, and conspiratorial conduct" were indicative of malice).

We agree with the proposition that in tortious interference cases, when a privilege is asserted for the interference, the express malice necessary to negate the privilege can be proven either by direct or circumstantial evidence of malice through malevolent intent to harm, or by harm accomplished by improper methods. In this case, we find that there was sufficient evidence as to both methods. We address the issue of proof of express malice by improper methods, followed by our analysis as to malevolent intent.

Express Malice – Improper Methods

In his dissent in *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So. 2d 492 (Fla. 2d DCA 1993), Judge Altenbernd expressed his view that "[i]mproper business methods seem to fall into three distinct categories: (1) acts which are already proscribed by statute, (2) acts which constitute separate independent torts, and (3) other ill-defined 'bad' acts." *Id.* at 494 (Altenbernd, J., dissenting). Here, the trial court's instruction to the jury included Judge Alternbernd's second category of improper methods, namely, misrepresentation. One of the instructions given to the jury regarding tortious interference was:

> You must render your verdict in favor of Hurchalla on Lake Point's tortious interference claim if you find that Hurchalla *used proper methods* to attempt to influence Martin County. . . . However, *deliberate misrepresentation* of facts are not considered a proper method.

(emphases added).

Florida Standard Jury Instruction 408.5 applies to intentional interference with a contract not terminable at will.[2] As Hurchalla noted in her brief, the notes to instruction 408.5 indicate that for most tortious interference cases there is no "justification" or "privilege"; "[h]owever, in certain relatively rare factual situations, interference with a contract not terminable at will may be justified or privileged," and in those situations, "instruction 408.5 will have to be modified." *See* Fla. Std. Jury Instr. (Civ.) 408.5 notes on use. The notes also point to several sources, including the Restatement (Second) of Torts § 767 (1979), titled "Factors in Determining Whether Interference is Improper." Section 767 states that "[t]he issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it *in the manner in which* he does cause it." *Id.* (emphasis added). "Thus physical violence, *fraudulent misrepresentation* and threats of illegal conduct are ordinarily wrongful means and subject their user to liability even though he is free to accomplish the same result by more suitable means." *Id.* (emphasis added). We focus on improper means by fraudulent misrepresentation in the instant case.

"Fraudulent misrepresentations are . . . ordinarily a wrongful means of interference and make an interference improper." *Id.* "A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient." *Id.* "[T]here are four elements of fraudulent misrepresentation: '(1) a false statement

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[2] The parties do not dispute that the contracts were not terminable at will.

concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation.'" *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (quoting *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)).

As we analyzed above, there were two statements in the January 4, 2013 email to all five county commissioners from which the jury could conclude that Hurchalla intentionally, or at the least, with reckless disregard, made purportedly factual statements to induce the BOCC not to go forward with its contract with Lake Point. Using the elements of misrepresentation described in *Butler*: (1) Hurchalla made two false statements concerning a material fact to the BOCC (effectively, the County); (2) Hurchalla knew that the representations were false; (3) Hurchalla intended that the representations induce the BOCC (the County) to act on them; and (4) the County was injured when the BOCC acted upon the representation and was subsequently sued for its actions based on the reliance.

The Restatement also discusses the situation where an actor "seek[s] to promote not solely an interest of his own but a public interest." Restatement (Second) of Torts § 767. In the instant case, Hurchalla put on evidence and maintained that she is a champion for environmental causes, and that she did not act with the purpose of harming Lake Point, but "to promote the public interest in the environment." However:

> If the actor [Hurchalla] causes a third person [the County] not to perform a contract or not to enter into or continue a contractual relation with the other [Lake Point] in order to protect the public interest affected by these practices, relevant questions in determining whether his [or her] interference is improper are: whether the practices are actually being used by the other [Lake Point], whether the actor [Hurchalla] actually believes that the practices are prejudicial to the public interest, whether his [or her] belief is reasonable, whether he [or she] is acting in good faith for the protection of the public interest, whether the contractual relation involved is incident or foreign to the continuance of the practices and *whether the actor* [Hurchalla] *employs wrongful means to accomplish the result*.

Id. (emphasis added). According to the evidence, several of the factors clearly weigh in favor of Hurchalla. However, as we discussed above, there was sufficient evidence presented for the jury to decide the issue of express

malice based on Hurchalla using wrongful means to interfere in Lake Point's contract with the County by the use of misrepresentations to the BOCC in her January 4, 2013 email to the commissioners.

Express Malice – Malevolent Intent to Harm

We also conclude that there was sufficient evidence presented to the jury to prove that Hurchalla demonstrated express malice toward Lake Point through malevolent intent to harm. In addition to her January 4, 2013 email, there were emails she sent to her commissioner friends instructing them in detail on what to do at board meetings to work towards voiding the Interlocal Agreement, signed by her as "Deep Rockpit," as well as references to herself in emails as "Ms. Machiavelli." That evidence, coupled with evidence of her significant influence with a majority of the commissioners and her ability over time to have them assert oppositional positions on a project they knew little-to-nothing about, was sufficient to support an inference of malevolent intent to harm Lake Point.

Conclusion

Having determined that Hurchalla has not demonstrated trial court error regarding the jury instructions on the defense of privilege, and the evidence was sufficient to allow the jury to find in favor of Lake Point on its claim of tortious interference by Hurchalla, we affirm the trial court rulings and the judgment entered against Hurchalla.

Affirmed.

DAMOORGIAN and FORST, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.