McGLINCHEY STAFFORD
Where Business & Law Intersect SM

Florida Real Property and Business Litigation Report

Volume XII, Issue 30
July 29, 2019
Manuel Farach

Highpoint Tower Technology Inc. v. Commissioner of Internal Revenue, Case No. 18-10394 (11th Cir. 2019).
The Tax Court presiding over partner-level deficiency proceedings does not have jurisdiction over gross valuation misstatement penalties imposed against a partnership previously determined to be a "sham" and "lacking economic substance."

Rivera v. The Bank Of New York Mellon, Case No. 2D17-4417 (Fla. 2d DCA 2019).
A witness who did not create certain business records may lay the predicate for the introduction of the records, but only so long as the witness has sufficient knowledge regarding the records themselves or how the records were created.

Heredia v. John Beach & Associates, Inc., Case No. 2D18-4127 (Fla. 2d DCA 2019).
A contractor's subcontractors performing work on a construction site are entitled to "horizontal immunity" under worker's compensation law.

City of Fort Lauderdale v. Hinton, Case No. 4D18-2089 (Fla. 4th DCA 2019).
State and local government do not enjoy sovereign immunity from constitutional violation and inverse condemnation suits.

Collection and Recovery of Assets, Inc. v. Patel, Case No. 5D18-3154 (Fla. 5th DCA 2019).
Florida Rule of Civil Procedure 1.540(b)(5) (". . . the court may relieve a party from a final judgment . . . [when] it is no longer equitable that the judgment or decree should have prospective application.") relieves a defendant from collection under a joint and several guarantee when the party seeking to collect on the guarantee is a former co-guarantor who assigned the guarantee judgment to a solely held corporation, and then attempted to use the corporation to collect the entire amount of the guarantee from his former co-guarantor.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10394

Agency No. 2828-16

HIGHPOINT TOWER TECHNOLOGY INC.,

Petitioner - Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

Petition for Review of a Decision of the
U.S. Tax Court

(July 24, 2019)

Before ED CARNES, Chief Judge, ANDERSON and JULIE CARNES, Circuit Judges.

ANDERSON, Circuit Judge:

This is an appeal by Highpoint Tower Technology, Inc. ("Highpoint") of the Tax Court's denial of its Motion to Restrain Collection of the gross valuation-misstatement penalty, I.R.C. § 6662(h)(1), which was determined to be applicable during relevant partnership proceedings.[1] The issue in this case is whether, under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"),[2] a Tax Court presiding over partner-level deficiency proceedings has jurisdiction over a gross valuation-misstatement penalty previously determined to be applicable at the partnership level where the partnership was determined to be a "sham" and "lacking economic substance." The Internal Revenue Code, as in effect during the relevant time, applicable regulations, and Supreme Court precedent make clear that the valuation-misstatement penalty at issue here relates to an adjustment to a

[1] Although the Tax Court's order did not resolve all pending claims, we have appellate jurisdiction over this interlocutory appeal pursuant to I.R.C. § 7482(a)(3), authorizing an immediate appeal of "[a]n order of the Tax Court which is entered under authority of I.R.C. § 6213(a) and which resolves a proceeding to restrain assessment or collection." Section 6213(a) authorizes the Tax Court to enjoin any premature assessment or collection and is treated as a decision of the Tax Court "subject to the same review by the United States Court of Appeals as a similar order of a district court." § 7482(a)(3).

[2] This case focuses on the 1997 amendments to TEFRA. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1238(a), 111 Stat. 788, 1026–27. The TEFRA partnership procedures applicable in this case were prospectively repealed by the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101(a), 129 Stat. 584, 625, effective for taxable years beginning on or after January 1, 2018. Unless otherwise indicated, all United States Code and Treasury Regulations cited in this opinion refer to those in effect at the time in question, namely the time of Highpoint filing its return.

We recognize that our decision in this case will have little impact with respect to taxable years beginning on or after January 1, 2018. However, the instant dispute suggests that our decision may well be relevant for several years until disputes with respect to taxable years beginning before January 1, 2018 have all been resolved.

partnership item and, consequently, is explicitly excluded from the Tax Court's deficiency jurisdiction. We hold that a Tax Court presiding over partner-level deficiency proceedings does not have jurisdiction over gross valuation-misstatement penalties imposed against a partnership previously determined to be a "sham" and "lacking economic substance." We accordingly affirm the Tax Court's order denying taxpayer's Motion to Restrain Collection to the extent it related to the gross valuation-misstatement penalty.

I. BACKGROUND

A. Factual Background

This case involves a tax shelter known as "Son-of-BOSS." "Like many of its kin, this tax shelter employs a series of transactions to create artificial financial losses that are used to offset real financial gains, thereby reducing tax liability." Petaluma FX Partners, LLC v. Comm'r, 591 F.3d 649, 650 (D.C. Cir. 2010), abrogated on other grounds by United States v. Woods, 571 U.S. 31, 134 S. Ct. 557 (2013).

> There are a number of different types of Son-of-BOSS transactions, but what they all have in common is the transfer of assets encumbered by significant liabilities to a partnership, with the goal of increasing basis in that partnership. The liabilities are usually obligations to buy securities, and typically are not completely fixed at the time of transfer. This may let the partnership treat the liabilities as uncertain, which may let the partnership ignore them in computing basis. If so, the result is that the partners will have a basis in the partnership so great as to provide for large—but not out-of-pocket—losses on their

> individual tax returns. Enormous losses are attractive to a select group of taxpayers—those with enormous gains.

Kligfeld Holdings v. Comm'r, 128 T.C. 192, 194 (2007); see also I.R.S. Notice 2000–44, 2000–2 C.B. 255.

In 1999, Highpoint joined Arbitrage Trading, LLC ("Arbitrage") as a partner. In exchange for a membership interest in Arbitrage, Highpoint contributed $62,500 in cash and a pair of Euro options that it had purchased from AIG International, Inc. By disregarding the potential obligations under the Euro options as a potential liability, Highpoint reported its outside basis as $13,295,980. A few months after entering the partnership, Highpoint withdrew in exchange for a liquidated distribution of the Euros. It then sold the Euros and reported a related capital loss of $13,111,783 on its 1999 federal income tax return.

B. Procedural Background

Before outlining the legal proceedings that ensued after Highpoint filed its 1999 income tax return reflecting artificial losses generated by its participation in this tax shelter, we first pause to outline the statutory framework governing taxation of partnerships at the time in question. After this overview, we outline the partnership-level proceedings concerning Arbitrage and the partner-level proceedings concerning Highpoint that have spanned the twenty years or so since Highpoint filed its income tax return reporting the losses at issue, which ultimately resulted in this appeal.

1. Overview of statutory scheme

"A partnership does not pay federal income taxes; instead, its taxable income and losses pass through to the partners." United States v. Woods, 571 U.S. 31, 38, 134 S. Ct. 557, 562 (2013) (citing I.R.C. § 701). Partnerships file informational returns, § 6031(a), and individual partners report their shares of the partnership's income or losses on their respective income tax returns, § 702. Prior to TEFRA

> the IRS had no way of correcting errors on a partnership's return in a single, unified proceeding. Instead, tax matters pertaining to all the members of a partnership were dealt with just like tax matters pertaining only to a single taxpayer: through deficiency proceedings at the individual-taxpayer level. See generally §§ 6211–6216 (2006 ed. and Supp. V). Deficiency proceedings require the IRS to issue a separate notice of deficiency to each taxpayer, § 6212(a) (2006 ed.), who can file a petition in the Tax Court disputing the alleged deficiency before paying it, § 6213(a). Having to use deficiency proceedings for partnership-related tax matters led to duplicative proceedings and the potential for inconsistent treatment of partners in the same partnership. Congress addressed those difficulties by enacting [TEFRA]. 96 Stat. 648 (codified as amended at 26 U.S.C. §§ 6221–6232 (2006 ed. and Supp. V)).

Woods, 571 U.S. at 38, 134 S. Ct. at 562–63. TEFRA created a two-step process for addressing partnership-related tax matters:

> First, the IRS must initiate proceedings at the partnership level to adjust "partnership items," those relevant to the partnership as a whole. §§ 6221, 6231(a)(3). It must issue [a Final Partnership Administrative Adjustment] notifying the partners of any adjustments to partnership items, § 6223(a)(2), and the partners may seek judicial review of those adjustments, § 6226(a)–(b). Once the adjustments to partnership items have become final, the IRS may undertake further

> proceedings at the partner level to make any resulting "computational adjustments" in the tax liability of the individual partners. § 6231(a)(6). Most computational adjustments may be directly assessed against the partners, bypassing deficiency proceedings and permitting the partners to challenge the assessments only in post-payment refund actions. § 6230(a)(1), (c). Deficiency proceedings are still required, however, for certain computational adjustments that are attributable to "affected items," that is, items that are affected by (but are not themselves) partnership items. §§ 6230(a)(2)(A) (i), 6231(a)(5).

Id. at 39, 134 S. Ct. at 563. With this framework in mind, we next outline the partnership-level proceedings concerning Arbitrage.

2. Partnership-level proceedings

In October 2005, the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") to Arbitrage, proposing adjustments to partnership items for the 1999 tax year. The FPAA reported that the IRS had determined that Arbitrage "was formed and availed of solely for the purposes of tax avoidance by artificially overstating basis in the partnership interests of its purported partners." The IRS had determined that Arbitrage "was a sham" and "lacked economic substance." Accordingly, the IRS had determined that (a) Arbitrage would be disregarded and all transactions engaged in by the purported partnership would be treated as engaged in directly by its purported partners; (b) the foreign currency options would be treated as if never contributed to Arbitrage; (c) the purported partners would not be treated as partners of Arbitrage; and (d) contributions to Arbitrage would be adjusted to reflect the partnership's or

purported partner's income. Purported partners were determined to have "not established adjusted bases in their respective partnership interests in an amount greater than zero." The IRS further determined, among other things, that "a 40 percent penalty shall be imposed on the portion of any underpayment attributable to the gross valuation misstatement."

I.R.C. § 6662(a) imposes a 20% accuracy-related penalty to the portion of underpaid tax attributable to, among other things, negligence, any substantial understatement of income tax, or any substantial valuation misstatement. § 6662(a), (b)(1)–(3). The penalty increases to 40% if there is a gross valuation misstatement. § 6662(h)(1). "A gross valuation misstatement exists if 'the value of any property (or the adjusted basis of any property) claimed on any return of tax . . . is [400] percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be).'" Gustashaw v. C.I.R., 696 F.3d 1124, 1135 (11th Cir. 2012) (citing § 6662(e)(1)(A), (h)(2)(A)(i)). A treasury regulation relatedly provides:

> The value or adjusted basis claimed on a return of any property with a correct value or adjusted basis of zero is considered to be 400 percent or more of the correct amount. There is a gross valuation misstatement with respect to such property, therefore, and the applicable penalty rate is 40 percent.

26 C.F.R. § 1.6662-5(g); see also Gustashaw, 696 F.3d at 1135.

In March 2006, Arbitrage sought judicial review of the FPAA pursuant to § 6226(a). In October 2014, the Court of Federal Claims issued an amended judgment sustaining all adjustments of partnership items contained in the FPAA and stating that the explanations offered in the FPAA are "conceded to be correct." It sustained all penalties contained in the FPAA but noted that "partners of Arbitrage, LLC reserve their right to pursue partner-level defenses to these penalties." This concluded the partnership-level proceedings involving Arbitrage. We next outline the partner-level proceedings initiated by Highpoint as well as other interactions between the parties during that timeframe.

3. Partner-level proceedings

In November 2015, the IRS issued a Notice of Deficiency to Highpoint. This notice reflected a deficiency of $5,222,675, based upon the following adjustments: (1) a $13,191,937 increase in capital gains income representing the disallowed short-term capital loss for the sale of the Euro option distributed from Arbitrage when Highpoint left the partnership, (2) a disallowance of $1,573,727 in claimed professional fee deductions relating to these transactions, and (3) an increase of $72,053 in "other income" representing a disallowed loss from the partnership. The notice also reflected a 40% gross valuation-misstatement penalty

pursuant to I.R.C. § 6662(h) amounting to $2,089,070. Highpoint filed a petition in the Tax Court for redetermination of its deficiency in February 2016.[3]

A few days later, the IRS issued a Notice of Tax Due reflecting the same amount contained in the Notice of Deficiency as well as $12,755,355.16 in interest, resulting in a total of $20,067,100.16 due. In June 2016, the IRS notified Highpoint that it intended to levy Highpoint's property and apply the proceeds to the $20,067,100.16 owed. A few days after that, Highpoint filed a Motion to Restrain Collection in the United States Tax Court. In July 2016, the IRS objected to Highpoint's Motion to Restrain Collection. The IRS asserted that, while the Tax Court had jurisdiction over adjustments relating to capital gains income and the professional fee deductions, it did not have jurisdiction over the valuation-misstatement penalty and the adjustment to "other income." In September 2016, the IRS moved to dismiss the portions of the case before the Tax Court relating to the adjustment to other income and the valuation-misstatement penalty, asserting that neither were subject to deficiency proceedings under I.R.C. § 6230(a).

On July 17, 2017, the Tax Court ordered further briefing on the adjustment to other income issue and denied Highpoint's Motion to Restrain Collection to the

[3] Highpoint's Notice of Appeal only seeks review of the Tax Court's July 17, 2017 order denying Highpoint's Motion to Restrain to the extent that it related to the valuation-misstatement penalty. Because Highpoint's petition for redetermination of its deficiency is not at issue in this appeal, we do not discuss it further.

extent that it related to the penalty. As to the valuation-misstatement penalty, the Tax Court stated:

> In United States v. Woods, 134 S. Ct. 557, 565–566 (2013), the Supreme Court stated that where the partnership is a sham, no partner-level determinations are needed to determine outside basis because "once the partnerships were deemed not to exist for tax purposes, no partner could legitimately claim an outside basis greater than zero." See also Greenwald v. Commissioner, 142 T.C. 308, 315 (2014). It is not possible for petitioner to have an outside basis greater than zero in Arbitrage, a partnership that does not exist for tax purposes. The final decision in the partnership-level proceeding applied the section 6662 penalty. It is well settled that the penalty may be directly assessed as a computational adjustment that we lack jurisdiction over, notwithstanding the need for partner-level determinations. See sec. 6230(a)(2), (c)(4); Woods, 571 S. Ct. at 565, n.2; Thompson v. Commissioner, T.C. Memo. 2014–154 at *8; Logan Tr., 616 Fed. Appx. 426 (D.C. Cir. 2015).

In August 2017, Highpoint filed a Motion for Reconsideration of the Tax Court's July 17 order. In support of its motion, Highpoint asserted that:

> In the July 17 Order, the Court denied Petitioner's Motion to Restrain Assessment with respect to the gross valuation misstatement penalty. To assert the gross valuation misstatement penalty, the Code requires a comparison of the correct value versus the reported value of the adjusted basis of the Euros that Highpoint sold in 1999. A determination of the correct value, which Respondent admits must be determined in a deficiency proceeding, cannot be completed without the Court first completing partner-level factual determinations.

In November 2017, the Tax Court denied Highpoint's Motion for Reconsideration and granted the IRS's motion to dismiss in full.[4] As to the valuation-misstatement

[4] The Tax Court held that it lacked jurisdiction not only over the valuation-misstatement penalty but also over the "other income." However, on appeal, Highpoint challenges the Tax

penalty, the Tax Court determined that Highpoint had not established that reconsideration should be granted and further noted that:

> Deficiency proceedings do not apply to the assessment of penalties determined to be applicable at the partnership level, regardless of whether partner level determinations are required to assess the penalty. I.R.C. sec. 6230(a)(2)(A)(i); sec. 301.6231(a)(6)-1, Proced. & Admin. Regs. In the Amended Judgment relating to prior partnership proceeding (Arbitrage Trading, LLC v. United States, docket No. 06-202T), partnership items, including the application of the penalty, were conclusively determined. See I.R.C. secs. 6221 and 6320(c)(4). As such, this Court lacks jurisdiction over the penalty, and we stand by our decision.

Highpoint now appeals the Tax Court's July 17 order denying its Motion to Restrain Collection to the extent that it found it had no jurisdiction over the gross valuation-misstatement penalty.

II. ISSUE

The sole issue in this appeal is whether the Tax Court erred in denying Highpoint's Motion to Restrain Collection of the gross valuation-misstatement penalty, and in holding that it lacked deficiency jurisdiction over the penalty.

III. STANDARD OF REVIEW

We review the Tax Court's legal conclusions de novo, and its factual findings for clear error. See Campbell v. Comm'r, 658 F.3d 1255, 1258 (11th Cir.

Court's ruling only with respect to the valuation-misstatement penalty. Accordingly, this opinion considers only the issue of whether the Tax Court had jurisdiction over the valuation-misstatement penalty.

2011). "[W]e review questions of subject matter jurisdiction and statutory interpretation de novo." Lindley v. F.D.I.C., 733 F.3d 1043, 1050 (11th Cir. 2013).

IV. DISCUSSION

Highpoint's primary argument on appeal is that, because the valuation-misstatement penalty is an "affected item[] which require[s] partner level determinations," it is necessarily subject to deficiency jurisdiction. Highpoint contends that, because the penalty at issue is an "affected item[] which require[s] partner level determinations," it cannot also be a "penalt[y] . . . that relate[s] to adjustments to partnership items." See I.R.C. § 6230(a)(2)(A)(i). For the reasons that follow, we conclude that the relevant statutory text, applicable regulations, and Supreme Court precedent make clear that Highpoint's arguments are without merit, and that the Tax Court correctly held that it did not have deficiency jurisdiction over the penalty. We begin our analysis by focusing on the statutory provision that specifically addresses which partnership-related matters are subject to Tax Court deficiency jurisdiction—and which are not. See I.R.C. § 6230(a).

A. Statutory Deficiency Jurisdiction

1. I.R.C. § 6230(a)(1)

Internal Revenue Code Chapter 63, subchapter B provides for Tax Court deficiency proceedings. See I.R.C. §§ 6211–6216 (entitled "Deficiency

Procedures in the Case of Income, Estate, Gift, and Certain Excise Taxes"). When the IRS issues a notice of deficiency, notifying a taxpayer that the IRS has determined that additional taxes are due, a taxpayer ordinarily has an option to pay the additional taxes and file a claim for refund, or to challenge the IRS determination without prepayment by filing a petition to the Tax Court seeking a redetermination of the deficiency pursuant to the Tax Court's deficiency jurisdiction. See 13 Mertens Law of Federal Income Taxation § 49C:1 (2019) ("Upon receipt of a notice of deficiency, a taxpayer may either file a petition with the Tax Court to contest the amount of the deficiency or pay the amount of the deficiency and sue for a refund in either the Claims Court or the appropriate District Court."). However, that general provision is modified by I.R.C. § 6230(a), which specifically addresses the partnership-related issues before us and specifically provides that some partnership-related matters are within the Tax Court's deficiency jurisdiction, and some are not. We begin with § 6230(a)(1), which provides:

> Except as provided in paragraph (2) or (3), subchapter B of this chapter shall not apply to the assessment or collection of any computational adjustment.

From § 6230(a)(1) alone we know that Tax Court deficiency proceedings (i.e., subchapter B) will not apply to—or in other words, the Tax Court will not have deficiency jurisdiction over—assessment or collection of any computational

adjustments other than those provided for in paragraphs two or three of § 6230(a)(1). We must therefore determine whether the penalty at issue is a computational adjustment, and if so, whether it is otherwise provided for in § 6230(a)(2) or (a)(3).

We pause to define statutory terms necessary to understand § 6230(a)(1). "Computational adjustment" is defined as "the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item. All adjustments required to apply the results of a proceeding with respect to a partnership under this subchapter to an indirect partner shall be treated as computational adjustments." I.R.C. § 6231(a)(6). In turn, a "partnership item" is defined as "any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level." § 6231(a)(3).

Considering these definitions in conjunction with the text of § 6230(a)(1), we know that if a change in tax liability of a partner reflects treatment of a partnership item (an item required to be taken into account for the partnership's taxable year and more appropriately determined at the partnership level), then deficiency proceedings will not apply to the assessment of that adjustment unless

otherwise provided for in § 6230(a)(2) or (a)(3). Treasury regulations in effect at the time in question state that "[a]ny penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item, shall be determined at the partnership level." Treas. Reg. § 301.6221-1T(c). The FPAA issued by the IRS to Arbitrage stated that the valuation-misstatement penalty at issue relates to adjustments to partnership items. It provided in pertinent part that "at a minimum, the accuracy-related penalty under Section 6662(a) of the Internal Revenue Code applies to all underpayments of tax attributable to adjustments of partnership items of Arbitrage Trading, LLC."

We agree with the IRS's characterization of the penalty at issue as relating to an adjustment to a partnership item. Treasury Regulation § 301.6231(a)(3)-1(b) includes within its "partnership item" definition "the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." Treas. Reg. § 301.6231(a)(3)-1(b) (emphasis added). The underlying legal determination that a partnership is a sham lacking economic substance—which caused the penalty to be applied in this case—falls within this "partnership item" definition. See id. (listing as examples of such legal and factual determinations deemed "partnership items," among other things, "whether partnership activities have been engaged in with the intent to make a profit"); accord RJT Invs. X v. Comm'r, 491 F.3d 732, 737–38

(8th Cir. 2007) (holding that the determination that a partnership is a sham is a "legal determination" that "falls squarely within" the definition of a partnership item pursuant to Treas. Reg. § 301.6231(a)(3)-1(b)). Indeed, as demonstrated in Part IV.B. below, the Supreme Court made clear in United States v. Woods that a gross valuation-misstatement penalty—just like the one at issue in this case—relates to a determination that the underlying partnerships are shams and, in turn, relates to an adjustment to a partnership item. See Woods, 571 U.S. at 39–44, 134 S. Ct. at 563–66. For a more detailed discussion of Woods, see infra Part IV.B.[5] Accordingly, the penalty in question relates to an adjustment to a partnership item and is therefore a computational adjustment not subject to deficiency jurisdiction under § 6230(a)(1) unless otherwise provided for.

[5] Many other courts have treated sham determinations, which can justify imposing a valuation-misstatement penalty, as relating to adjustments to partnership items. See, e.g., Petaluma FX Partners, LLC v. Comm'r, 792 F.3d 72, 77 (D.C. Cir. 2015) ("[C]ourts retain jurisdiction in partnership-level proceedings to determine whether any partnership-level adjustments—such as the determination in this case that Petaluma was a sham—carry 'the potential to trigger a penalty' against the partners." (quoting Woods, 571 U.S. at 41, 134 S. Ct. at 565)); NPR Invs., L.L.C. ex rel. Roach v. United States, 740 F.3d 998, 1010 (5th Cir. 2014) (holding that the partnership-level court had jurisdiction to adjudicate the applicability of the valuation-misstatement penalties where the partnership was a sham, and stating that "we conclude that the District Court had jurisdiction to determine the applicability of the valuation-misstatement penalty—to determine, that is, whether the partnerships' lack of economic substance (which all agree was properly decided at the partnership level) could justify imposing a valuation-misstatement penalty on the partners." (quoting Woods, 571 U.S. at 42, 137 S. Ct. at 564)); RJT Invs., 491 F.3d at 737–38 (holding that a determination that a partnership is a sham is a partnership item).

The plain text of § 6230(a)(1), when read in conjunction with definitional statutory provisions and applicable regulations, makes clear that unless otherwise provided in § 6230(a)(2) or (a)(3), the Tax Court does not have deficiency jurisdiction over the penalty at issue. Highpoint argues that § 6230(a)(2)(A)(i) nonetheless provides the Tax Court deficiency jurisdiction over the penalty because the penalty is an "affected item[] which require[s] partner level determinations." We address that argument next.[6]

2. I.R.C. § 6230(a)(2)(A)(i)

Section 6230(a)(2)(A) provides that:

> Subchapter B shall apply to any deficiency attributable to affected items which require partner level determinations (other than penalties, additions to tax, and additional amounts that relate to adjustments to partnership items) . . . .

I.R.C. § 6230(a)(2)(A)(i). From the face of § 6230(a)(2)(A)(i), we know that, even with respect to affected items requiring partner-level determinations, Tax Court deficiency proceedings will not apply to—or in other words, will not have jurisdiction over—"penalties . . . that relate to adjustments to partnership items." Highpoint's argument focuses on the penalty being an "affected item[] which require[s] partner level determinations," but this argument ignores the exclusion within the same sentence. The parenthetical exclusion makes clear that, even if the

[6] Highpoint does not argue that other provisions of § 6230(a)(2) or (a)(3) provide the Tax Court with deficiency jurisdiction over the penalty.

deficiency at issue is attributable to an affected item which requires partner-level determinations, deficiency proceedings will not apply to "penalties . . . relat[ing] to adjustments to partnership items." § 6230(a)(2)(A)(i). The issue, again, is whether the penalty at issue "relates to [an] adjustment[] to [a] partnership item."

"Affected item" is defined as "any item to the extent such item is affected by a partnership item," § 6231(a)(5), while "partnership item" is defined as "any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level," § 6231(a)(3). As outlined above, Treas. Reg. § 301.6231(a)(3)-1(b) and the Supreme Court's decision in Woods make clear that the penalty in question relates to an adjustment to a partnership item. Accordingly, the penalty is not subject to Tax Court deficiency jurisdiction under § 6230(a)(2)(A)(i).[7]

[7] The Tax Court has frequently held that penalties deemed to apply in partnership-level proceedings are not subject to Tax Court deficiency jurisdiction under § 6230(a)(2)(A)(i). See, e.g., Domulewicz v. Comm'r, 129 T.C. 11, 21–23 (2007) ("Under a plain reading of [§ 6230(a)(2)(A)(i)], the effect of the amendment was to remove partnership-item penalties from the deficiency procedures effective for partnership taxable years ending after August 5, 1997."), aff'd in part remanded in part on other grounds Desmet v. Comm'r, 581 F.3d 297 (6th Cir. 2009); Fears v. Comm'r, 129 T.C. 8, 10 (2007); Estate of Simon v. Comm'r, T.C. Memo. 2013-174, 2013 WL 3879804, at *4 (2013); Bedrosian v. Comm'r, T.C. Memo. 2007-376, 2007 WL 4526479, at *3 (2007).

In addition to contradicting the plain language of § 6230(a)(2)(A)(i), Highpoint's argument that the penalty is subject to Tax Court deficiency jurisdiction because it is an "affected item[] which require[s] partner level determinations" is undermined by Treasury Regulations in effect during the time in question.

> Changes in a partner's tax liability with respect to affected items that require partner level determinations . . . are computational adjustments subject to deficiency procedures. Nevertheless, any penalty, addition to tax, or additional amount that relates to an adjustment to a partnership item may be directly assessed following a partnership proceeding, based on determinations in that proceeding, regardless of whether partner level determinations are required.

Treas. Reg. § 301.6231(a)(6)-1T(a)(2). This only confirms what is unambiguous from the plain meaning of § 6230(a)(1) and (a)(2)(A)(i)—namely, that penalties relating to adjustments to partnership items are treated differently (i.e., not subject to Tax Court deficiency jurisdiction) even if they are affected items requiring partner level determinations. See also Woods, 571 U.S. at 41, 134 S. Ct. at 564 (holding that "a penalty can relate to a partnership-item adjustment even if the penalty cannot be imposed without additional, partner-level determinations").

Highpoint argues that preventing it from addressing the penalty in Tax Court deficiency proceedings—and forcing it to raise challenges to the penalty in refund

or Collection Due Process ("CDP") proceedings instead[8]—is duplicative and contrary to the congressional intent behind the 1997 amendments to TEFRA that sought to streamline partnership tax litigation. "We have . . . said . . . frequently that '[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.'" CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (quoting Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000) (en banc)). Because we find that § 6230(a)(1) and (a)(2)(A)(i)

[8] Even though Highpoint may not challenge the penalty in the instant partner-level Tax Court deficiency proceedings, it still has the opportunity to raise partner-level defenses regarding the penalty (including the good faith and reasonable cause defenses it alludes to throughout its brief) in refund proceedings. See § 6230(c)(4) ("[T]he partner shall be allowed to assert any partner level defenses that may apply or to challenge the amount of the computational adjustment."). Highpoint argues that it would be unfair not to provide Tax Court deficiency jurisdiction over the penalty because that would require Highpoint, and similarly situated taxpayers, to pay large sums of tax liability before challenging the penalty in refund proceedings. "[E]ven if we agree that the statute allows for harsh or unfair consequences, that does not give us license to ignore the plain meaning of the text. We will look beyond the unambiguous plain meaning of the text only if the plain meaning produces absurd results." Patel v. U.S. Attorney Gen., 917 F.3d 1319, 1330 (11th Cir. 2019). We will not ignore the plain meaning of I.R.C. § 6230 in this case.

Moreover, there is an opportunity for Highpoint to challenge the penalty other than through refund proceedings and prior to payment—i.e., in a prepayment proceeding other than refund proceedings. Highpoint can challenge the penalty in a prepayment Collection Due Process ("CDP") hearing as provided for by § 6330(a)(1), which states "[n]o levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made." At this hearing, Highpoint may raise "challenges to the underlying tax liability for any tax period if the person . . . did not otherwise have an opportunity to dispute such tax liability." § 6330(c)(2)(B).

clearly exclude the penalty at issue from Tax Court deficiency jurisdiction, we need not entertain Highpoint's legislative intent arguments.[9]

We conclude that the Internal Revenue Code unambiguously excludes from the Tax Court's deficiency jurisdiction Highpoint's challenge to the penalty at issue. Nevertheless, Highpoint relies on United States v. Woods to argue that the Tax Court has jurisdiction over the penalty. Quite contrary to Highpoint's argument, however, Woods only provides further and significant support for what

[9] Highpoint also argues that "imposing the 40 percent basis penalty before determining the basis or the resulting deficiency works an algebraic absurdity" because it is impossible to calculate the penalty without first determining the basis and deficiency in partner-level deficiency proceedings. We are not convinced that holding that there is no Tax Court deficiency jurisdiction over the penalty produces such absurd results as to justify ignoring the unambiguous plain meaning of § 6230. See Patel, 917 F.3d at 1330. The Supreme Court in Woods noted that the district court presiding over partnership-level proceedings "was not required to shut its eyes to the legal impossibility of any partner's possessing an outside basis greater than zero in a partnership that, for tax purposes, did not exist." Woods, 571 U.S. at 42, 134 S. Ct. at 565. The Woods Court also noted in dicta that "it is not readily apparent why additional partner-level determinations would be required before adjusting outside basis in a sham partnership." Id. at 42 n.2, 134 S. Ct. at 565 n.2 (citing Petaluma, 591 F.3d at 655 ("If disregarding a partnership leads ineluctably to the conclusion that its partners have no outside basis, that should be just as obvious in partner-level proceedings as it is in partnership-level proceedings")).

We acknowledge the problem to which Highpoint points. The applicability of the 40% penalty has been determined during partnership-level proceedings. However, that 40% penalty is to be applied to the appropriate portion of the deficiency which Highpoint is ultimately determined to owe. That deficiency amount would ordinarily be determined in Tax Court deficiency proceedings. It might well have been preferable, in an ideal world, had Congress permitted the precise amount of the penalty to be determined also in the same deficiency proceedings. However, Congress clearly did not permit that. But, there are at least two other partner-level proceedings available in which the appropriate deficiency and precise amount of the penalty can be determined—CDP proceedings or refund proceedings. In any event, the problem about which Highpoint complains falls far short of the kind of absurdity that might warrant assuming that Congress intended the opposite of which it plainly stated.

the Internal Revenue Code makes unambiguous—that the Tax Court does not have deficiency jurisdiction over the penalty.

B. *United States v. Woods*

The Supreme Court, in United States v. Woods, addressed a related but distinct question of whether "the penalty for tax underpayments attributable to valuation misstatements, 26 U.S.C. § 6662(b)(3), is applicable to an underpayment resulting from a basis-inflating transaction subsequently disregarded for lack of economic substance." Woods, 571 U.S. at 33, 134 S. Ct. at 560. Woods arose from partnership-level proceedings considering an appeal of an FPAA. Id. at 37, 134 S. Ct. at 562. The respondent taxpayer in Woods participated in a Current Options Bring Reward Alternatives ("COBRA") tax shelter. Id. at 34, 134 S. Ct. at 560. This tax shelter used offsetting options to give respondent taxpayer an artificially high basis in partnership interests so that he could claim significant losses on paper, thereby reducing taxable income. Id. at 33–35, 134 S. Ct. at 560–61. The IRS did not treat these COBRA-generated losses as valid and issued an FPAA stating that the partnerships lacked economic substance, the partnerships would be disregarded for tax purposes, and the losses would be disallowed. Id. at 36–37, 134 S. Ct. at 561–62. Having determined that there was no partnership for tax purposes, the IRS also concluded that the partners had "not established adjusted bases in their respective partnership interests in an amount greater than zero" and

that any underpayment of tax would be subject to the 40% gross valuation-misstatement penalty—the exact same penalty at issue in this case. Id. at 37, 134 S. Ct. at 562.

Pursuant to § 6226(a)(2), respondent (the tax matters partner for the partnerships) appealed the FPAA's determination that the 40% penalty was applicable when the underlying transaction is disregarded for lack of economic substance. Id. Both the district court and the court of appeals held that, although the partnerships were shams, the valuation-misstatement penalty did not apply. Id. The Supreme Court, in addition to considering this question, also ordered briefing on whether the district court presiding over the partnership-level proceedings had "jurisdiction to consider the valuation-misstatement penalty." Id. at 37–38, 134 S. Ct. at 562. The jurisdictional question before the Court in Woods is distinct from the one currently before us because it considered whether the district court had partnership-level jurisdiction over a valuation-misstatement penalty, whereas we are asked to determine whether the Tax Court had partner-level deficiency jurisdiction over a valuation-misstatement penalty. Despite the different procedural postures, Woods's discussion of the same penalty at issue in this case is instructive.

Under TEFRA, a court presiding over a partnership-level proceeding has jurisdiction to determine both partnership items and "the applicability of any

penalty . . . which relates to an adjustment to a partnership item." § 6226(f). We take note that the phrase "penalty . . . which relates to an adjustment to a partnership item" that appears in § 6226(f) is nearly identical to the phrase "penalties . . . that relate to adjustments to partnership items" in § 6230(a)(2)(A)(i), which is at issue in this case. The Woods Court framed the jurisdictional issue before it as follows:

> As both sides agree, a determination that a partnership lacks economic substance is an adjustment to a partnership item. Thus, the jurisdictional question here boils down to whether the valuation-misstatement penalty "relates to" the determination that the partnerships Woods and McCombs created were shams.

Woods, 571 U.S. at 39, 134 S. Ct. at 563. The Government argued that the valuation-misstatement penalty "logically and inevitably" flowed from the economic-substance (or sham) determination. See id. at 39–40, 134 S. Ct. at 563. Because there can be no outside basis in a sham partnership, the Government contended, any partner who reports an outside basis greater than zero commits a valuation misstatement. See id. The respondent taxpayer argued that, because outside basis is an affected item and not a partnership item, a penalty resting on a misstatement of an outside basis could not be considered at the partnership level. See id. at 40, 134 S. Ct. at 563. The Court summarized his argument as follows: "He maintains, in short, that a penalty does not relate to a partnership-item adjustment if it 'requires a partner-level determination,' regardless of 'whether or

not the penalty has a connection to a partnership item.'" Id. This argument made by the taxpayer in Woods is nearly identical to the one Highpoint advances before this Court—i.e., that because the penalty at issue is an affected item requiring partner-level determinations, it cannot also relate to adjustments to partnership items.

The Court rejected the taxpayer's arguments, and held that

> TEFRA gives courts in partnership-level proceedings jurisdiction to determine the applicability of any penalty that could result from an adjustment to a partnership item, even if imposing the penalty would also require determining affected or non-partnership items such as outside basis.

Id. at 41, 134 S. Ct. at 564. The Court explained that even though every penalty must be imposed after partner-level determinations are made at the partner level, "TEFRA provides that the applicability of some penalties must be determined at the partnership level. The applicability determination is therefore inherently provisional; it is always contingent upon determinations that the court in a partnership-level proceeding does not have jurisdiction to make."[10] Id. at 41, 134

[10] Highpoint focuses on this passage from Woods in arguing that imposing the penalty is merely provisional at the partnership stage and that the penalty can actually be imposed only after determining the outside basis and deficiency in partner-level proceedings. By stating that the partnership-level determination that a penalty is "provisional," however, the Woods Court was indicating that the district court did not have jurisdiction to consider partner-level defenses in a partnership-level proceeding. The Court did not state that the "provisional" nature of this penalty at the partnership level indicated that partner-level Tax Court deficiency proceedings would have jurisdiction. In other words, the Court's suggestion that the penalty would have to be actually imposed in partner-level proceedings did not indicate that the appropriate partner-level forum would be Tax Court deficiency proceedings. There are at least two other partner-

S. Ct. at 564. The Court in Woods explained that several provisions of TEFRA make clear that courts presiding over partnership-level proceedings have jurisdiction to consider the applicability of some penalties that cannot be imposed without partner-level inquiries. Id.

> One requires the IRS to use deficiency proceedings for computational adjustments that rest on "affected items which require partner level determinations (other than penalties . . . that relate to adjustments to partnership items)." § 6230(a)(2)(A)(i). Another states that while a partnership-level determination "concerning the applicability of any penalty . . . which relates to an adjustment to a partnership item" is "conclusive" in a subsequent refund action, that does not prevent the partner from "assert[ing] any partner level defenses that may apply." § 6230(c)(4). Both these provisions assume that a penalty can relate to a partnership-item adjustment even if the penalty cannot be imposed without additional, partner-level determinations.

Id. In other words, the Court made clear that penalties relating to partnership-item adjustments and penalties that cannot be actually imposed without additional, partner-level determinations are not mutually exclusive. See id.

In sum, the Court in Woods rejected the argument of the taxpayer Woods—i.e., "that a penalty does not relate to a partnership-item adjustment if it requires a partner-level determination." Id. at 40, 134 S. Ct. at 563 (internal quotation marks omitted). The Court held that the gross valuation-misstatement penalty at issue

---

level proceedings—refund proceedings and CDP proceedings. Indeed, previously in the opinion, the Woods Court indicated that "[m]ost computational adjustments may be directly assessed against the partners, bypassing deficiency proceedings and permitting the partners to challenge the assessments only in post-payment refund actions." Woods, 571 U.S. at 39, 134 S. Ct. at 563 (citing § 6230(a)(1), (c)).

there related to the determination that the partnerships were a sham, which determination was an adjustment to a partnership item. Id. at 39–42, 134 S. Ct. at 563–64. Thus, the Court held that, under § 6226(f), the partnership-level court at issue there had jurisdiction over the gross valuation-misstatement penalty because the penalty related to an adjustment to a partnership item. Id. The Court's reasoning proceeded as follows. The Court first set out the issue before it:

> Under the TEFRA framework, a court in a partnership-level proceeding like this one has jurisdiction to determine not just partnership items, but also "the applicability of any penalty . . . which relates to an adjustment to a partnership item." § 6226(f). As both sides agree, a determination that a partnership lacks economic substance is an adjustment to a partnership item. Thus, the jurisdictional question here boils down to whether the valuation-misstatement penalty "relates to" the determination that the partnerships . . . created were shams.

Id. at 39, 134 S. Ct. at 563. The Court then set out the Government's position:

> In the Government's view, there can be no outside basis in a sham partnership . . . , so any partner who underpaid his individual taxes by declaring an outside basis greater than zero committed a valuation misstatement. In other words, the penalty flows logically and inevitably from the economic-substance determination.

Id. at 39–40, 134 S. Ct. at 563. The Court next set out the argument of taxpayer Woods:

> He maintains, in short, that a penalty does not relate to a partnership-item adjustment if it requires a partner-level determination, regardless of whether or not the penalty has a connection to a partnership item.

Id. at 40, 134 S. Ct. at 563 (internal quotation marks omitted). The Court then noted that several provisions in the Internal Revenue Code, including § 6230(a)(2)(A)(i) and § 6230(c)(4), indicate that:

> A penalty can relate to a partnership-item adjustment even if the penalty cannot be imposed without additional partner-level determinations.

Id. at 41, 134 S. Ct. at 564. The Court then rejected the argument of taxpayer Woods, and held:

> that TEFRA gives courts in partnership-level proceedings jurisdiction to determine the applicability of any penalty that could result from an adjustment to a partnership item, even if imposing the penalty would also require determining affected or non-partnership items such as outside basis. . . .
>
> Applying the foregoing principles to this case, we conclude that the District Court had jurisdiction to determine the applicability of the valuation-misstatement penalty—to determine, that is, whether the partnerships' lack of economic substance (which all agree was properly decided at the partnership level) could justify imposing a valuation-misstatement penalty on the partners.

Id. at 41–42, 134 S. Ct. at 564.

Woods strongly supports what we already determined to be unambiguous from the relevant Internal Revenue Code provisions. The valuation-misstatement penalty at issue can be an affected item requiring partner-level determinations while also relating to adjustments to partnership items. Woods directly rejects Highpoint's argument that these categories are mutually exclusive. Woods leaves no doubt that the valuation-misstatement penalty at issue is related to an

adjustment to a partnership item so as to clearly fall within § 6230(a)(2)(A)(i)'s exclusion of such items from deficiency jurisdiction.

V. CONCLUSION

For the foregoing reasons, we conclude that the relevant statutory provisions, applicable regulations, and precedent—including in particular the Supreme Court decision in Woods—indicate clearly that the valuation-misstatement penalty at issue, which was triggered by the partnership-level determination that Arbitrage lacked economic substance, relates to an adjustment to a partnership item, and thus is excluded from the Tax Court's deficiency jurisdiction under § 6230(a)(2)(A)(i). We hold that the Tax Court presiding over partner-level deficiency proceedings did not have jurisdiction over the valuation-misstatement penalty at issue.[11] The Tax Court's order denying Highpoint's Motion to Restrain Collection to the extent it related to the valuation-misstatement penalty is therefore

AFFIRMED.

[11] Other arguments raised by Highpoint on appeal need not be addressed in light of our jurisdictional holding.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CATHERINE M. RIVERA a/k/a CATHERINE RIVERA,

Appellant,

v.

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK as successor in interest to JP Morgan Chase Bank, N.A., as Trustee for Structured Asset Mortgage Investments II Trust 2006-AR6 Mortgage Pass-Through Certificates Series 2006-AR6; ANTONIO RIVERA-JARAMILLO a/k/a MARCO A. RIVERA; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., acting solely as nominee for Countrywide Bank, N.A.; UNITED STATES OF AMERICA, DEPARTMENT OF TREASURY; and BALLANTRAE HOMEOWNERS ASSOCIATION, INC.,

Appellees.

Case No. 2D17-4417

Opinion filed July 24, 2019.

Appeal from the Circuit Court for Pasco County; Kemba Johnson Lewis, Judge.

Mark P. Stopa of Stopa Law Firm, LLC, Tampa (withdrew after briefing); Latasha Scott of Lord Scott, PLLC, Tampa (withdrew after briefing); Richard J. Mockler of Stay In My Home, P.A., St. Petersburg (withdrew after briefing);

Brendan R. Riley of Stewart & Riley, New Port Richey (substituted as counsel of record), for Appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee; William P. Heller of Akerman LLP, Fort Lauderdale; and Brandon G. Forgione of Akerman LLP, West Palm Beach, for Appellee The Bank of New York Mellon.

No appearance for remaining Appellees.

SILBERMAN, Judge.

Catherine M. Rivera appeals a final judgment of foreclosure in favor of The Bank of New York Mellon f/k/a The Bank of New York as successor in interest to JPMorgan Chase Bank, N.A., as Trustee for Structured Asset Mortgage Investments II Trust 2006-AR6 Mortgage Pass-Through Certificates Series 2006-AR6 ("the Bank"). The final judgment was entered after a summary judgment hearing, and Rivera contends that summary judgment was improper because genuine issues of material fact remain on two subjects. We reject without further comment Rivera's argument that there was an issue of material fact regarding the Bank's standing at the time of judgment. But because a genuine issue of material fact remains as to whether a default letter was mailed, we reverse the final judgment and remand for further proceedings.

In support of its motion for summary judgment, the Bank submitted the affidavit of Edward Hyne, a litigation resolution analyst for Nationstar Mortgage LLC. Hyne asserted that Nationstar was the loan servicer for the Bank, and attachments to the affidavit include the default letter and a log that was a business record of Nationstar. The log reflects that on November 2, 2015, "DEMAND LETTER SENT BY WALZ." With

respect to the log, Hyne asserted that it is "a true and correct copy of Nationstar's business records showing the letter was mailed by regular and certified first class mail. This information was transmitted by a person with personal knowledge of the mailing at the time the mailing occurred."

At the summary judgment hearing, the Bank's counsel acknowledged that Walz was a third-party vendor. Nothing in Hyne's affidavit indicates that he was familiar with Walz's regular business practice regarding mailing or that Hyne had personal knowledge that the default letters were mailed. Although his affidavit states that "a person with personal knowledge of the mailing" transmitted the information, he did not assert that he was that person.

Rivera contends that the Bank failed to meet its summary judgment burden to prove that it complied with the condition precedent of giving notice of default under paragraph 22 of the mortgage. Specifically, she contends that the Bank failed to prove that a default letter was mailed as required by paragraph 15 of the mortgage and that a genuine issue of material fact remains. Under paragraph 15, notice is "deemed to have been given to Borrower when mailed by first class mail or when actually delivered."

Our review of a summary judgment is de novo. Johnson v. Deutsche Bank Nat'l Tr. Co. Ams., 248 So. 3d 1205, 1207 (Fla. 2d DCA 2018). To prevail on summary judgment, the moving party must conclusively show "that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." Id. at 1208 (quoting Coral Wood Page, Inc. v. GRE Coral Wood, LP, 71 So. 3d 251, 253 (Fla. 2d DCA 2011)). "If the record reflects the existence of any genuine issue of material fact or

the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Id. (quoting Atria Grp., LLC v. One Progress Plaza, II, LLC, 170 So. 3d 884, 886 (Fla. 2d DCA 2015)). Affidavits in support of or opposition to summary judgment must be made on personal knowledge and contain facts that would be admissible in evidence. Fla. R. Civ. P. 1.510(e).

The notice requirement in paragraph 22 of the mortgage is a condition precedent to filing a foreclosure suit. Kamin v. Fed. Nat'l Mortg. Ass'n, 230 So. 3d 546, 548 (Fla. 2d DCA 2017); Green Tree Serv., LLC v. Milam, 177 So. 3d 7, 12 (Fla. 2d DCA 2015). In her answer, Rivera denied that the Bank complied with paragraphs 15 and 22 and alleged that it failed to give notice of default. Rivera submitted an affidavit stating that she never received any notice of default. Under paragraph 15, notice is "deemed to have been given to Borrower when mailed by first class mail or when actually delivered." To be entitled to summary judgment, the Bank must conclusively show that a default letter was mailed or delivered in compliance with paragraphs 15 and 22. See Kamin, 230 So. 3d at 549.

A default letter alone attached to a summary judgment affidavit is insufficient to prove that the letter was mailed. See id. To prove mailing, a party must "produc[e] additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." Allen v. Wilmington Tr., N.A., 216 So. 3d 685, 688 (Fla. 2d DCA 2017). To use routine business practice to prove mailing, "the witness must have personal knowledge of the company's general practice in mailing letters." Id.; see also Edmonds v. U.S. Bank Nat'l Ass'n, 215 So. 3d 628, 630 (Fla. 2d DCA 2017).

Of course, Nationstar's business records can be admissible in evidence under the business records exception to the hearsay rule. See § 90.803(6)(a), Fla. Stat. (2018). But if that "business record contains a hearsay statement, the admissibility of the record depends on whether the hearsay statement in the record would itself be admissible under some exception to the hearsay rule." Knight v. GTE Fed. Credit Union, 43 Fla. L. Weekly D348, D349 (Fla. 2d DCA Feb. 14, 2018)[1] (quoting Van Zant v. State, 372 So. 2d 502, 503 (Fla. 1st DCA 1979)). Hearsay information does not become admissible "merely because it has been recorded in the regular course of business." Id. (quoting Van Zant, 372 So. 2d at 503). Although a loan servicer's representative need not "have personal knowledge of the documents being authenticated," the witness "must be familiar with and have knowledge of how the" business produces its data. Id. (quoting Sanchez v. SunTrust Bank, 179 So. 3d 538, 541 (Fla. 4th DCA 2015)).

In Knight, a letter log produced by the loan servicer, Cenlar, FSB, was introduced in evidence under the business records exception. Id. at D348-49. Cenlar's representative testified that Cenlar prepares the default letters and sends them to About Mail, a third-party vendor, for mailing. Id. at D349. The Cenlar "witness admitted that the entry in the letter log 'is based on something that About Mail allegedly did and told to Cenlar.' " Id. The witness did not have any documents from About Mail indicating that

[1]GTE filed a notice to invoke discretionary jurisdiction of the Florida Supreme Court, and the Florida Supreme Court has stayed the proceedings pending the disposition of Jackson v. Household Finance Corp., Case No. SC18-357, which is pending in the Florida Supreme Court. See GTE Fed. Credit Union v. Knight, Case No. SC18-790 (Fla. May 29, 2018).

the default letter was mailed. Id. He also "testified that he did not work for About Mail, never visited About Mail's facility, [and] never spoke with an About Mail employee." Id.

Under these circumstances, this court determined that the plaintiff failed to introduce "admissible evidence that the default letter was actually mailed." Id. Thus, this court reversed the final judgment of foreclosure because the plaintiff failed to prove that it satisfied the condition precedent of giving the notice required by paragraph 22. Id.; see also Spencer v. Ditech Fin., LLC, 242 So. 3d 1189, 1191 (Fla. 2d DCA 2018) ("Ms. Knight admitted that she was never employed by EverHome and did not have firsthand knowledge of EverHome's mailing practices as of the date the default letter was generated. Therefore, her testimony was insufficient to establish that the default letter was mailed."); cf. Thorlton v. Nationstar Mortg., LLC, 257 So. 3d 596, 602 (Fla. 2d DCA 2018) (determining that there was sufficient evidence of mailing at a bench trial when a witness had "personal knowledge of a foreclosing entity's and third-party vendor's routine business practices and policies for drafting and mailing a default letter, coupled with the admission of the default letter itself").

Here, on a motion for summary judgment, the Bank failed to conclusively show that the default letter was mailed. Hyne's affidavit asserts that "[t]his information was transmitted by a person with personal knowledge of the mailing at the time the mailing occurred." But nothing in Hyne's affidavit indicates that he was that person, that he had ever been employed by Walz, or that he had personal knowledge of Walz's mailing practices. In summary, the affidavit fails to establish that Hynes had firsthand knowledge of Walz's "practices and policies for drafting and mailing a default letter." Thorlton, 257 So. 3d at 602.

Therefore, a genuine issue of material fact remains as to whether a default letter was mailed or delivered in compliance with paragraphs 15 and 22 of the mortgage. Accordingly, we reverse the final judgment of foreclosure and remand for further proceedings.

Reversed and remanded.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LEONIREZ HEREDIA, Appellant, v. JOHN BEACH & ASSOCIATES, INC., and MICHAEL MELENDES GROSS, Appellees.	))))))))))	Case No. 2D18-4127

Opinion filed July 24, 2019.

Appeal from the Circuit Court for Hillsborough County; Robert A. Foster, Jr., Judge.

Rolando J. Santiago and Gregory S. Grossman of RJS Law Group, Apollo Beach, for Appellant.

Carri S. Leininger of Williams, Leininger & Cosby, P.A., North Palm Beach, for Appellee John Beach & Associates, Inc.

No appearance for remaining Appellee.

LUCAS, Judge.

Leonirez Heredia appeals the circuit court's entry of a final summary judgment in favor of John Beach & Associates, Inc. (JBA) and Michael Gross, the defendants below. The circuit court was apparently persuaded that the plaintiff's

negligence claim was one between two subcontractors in horizontal privity under the Workers Compensation Law, §§ 440.01-60, Fla. Stat. (2017), and that, as such, the defendants were entitled to workers compensation immunity from the plaintiff's claim. Because the record does not support that determination, we reverse the circuit court's judgment.

In 2015, Lennar Homes, LLC (Lennar) was developing a tract of land it owned in Riverview into a residential community known as Oaks at Shady Creek. Although the record is somewhat sparse as to what were Lennar's precise plans for this property, it is undisputed that Lennar was, at all times relevant, the fee simple owner of Oaks at Shady Creek. That is, Lennar was developing Lennar's own property, not someone else's.

From the record before us, it appears that Mr. Heredia was an employee of QGS Development, Inc. (QGS), a company that Lennar had hired to perform road work in the Oaks at Shady Creek subdivision. On April 22, 2015, Mr. Heredia was working at the site, cleaning dirt from a road. Mr. Gross, an employee of JBA, was working in the same vicinity as Mr. Heredia. JBA had been retained by Lennar to provide surveying work for the Oaks at Shady Creek development.[1]

Mr. Heredia alleges that Mr. Gross drove his JBA truck negligently by backing it into him. He filed a complaint against JBA and Mr. Gross in the Hillsborough

---

[1]JBA was working under a "blanket contract" that covered multiple Lennar subdivisions, a document which describes JBA as a "subcontractor." However, John Beach, the owner of JBA, testified that he did not know whether Lennar owned any of the subdivisions JBA worked on, and that his company had also been referred to as a "vendor." QGS' contract with Lennar identifies Lennar as "Owner" and QGS as "Contractor."

County Circuit Court. JBA and Mr. Gross generally denied the complaint's allegations and, pertinent here, asserted the affirmative defense that Mr. Heredia's negligence claims were barred under the Worker's Compensation Law.

The parties engaged in discovery and eventually filed competing motions for summary judgment on the issue of worker's compensation immunity. In the defendants' motion, JBA and Mr. Gross argued that QGS and JBA were both subcontractors of Lennar for the Oaks at Shady Creek development. Further, JBA and Mr. Gross maintained that QGS, JBA, and Lennar had workers compensation insurance coverage for this project—QGS' policy provided coverage for its employees; JBA's policy covered JBA's employees; and Lennar's policy extended coverage that "would have provided coverage to the Plaintiff." As such, the defendants argued, there was horizontal privity between the subcontractors, JBA and QGS, so that JBA and Mr. Gross were immune from civil liability for QGS' employee's injuries.

Mr. Heredia's motion for summary judgment argued otherwise. He pointed out that the applicable subsection of the Workers Compensation Law, section 440.10(b), only creates horizontal privity when "a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors." Because Lennar was developing the Oaks at Shady Creek project for itself as the owner, and not under a contract Lennar had with any third party, Lennar could not be considered a "contractor" that was "subletting" work under this section. Accordingly, he argued, neither JBA nor Mr. Gross were immune from civil liability as a matter of law.

The circuit court agreed with the defendants. In an unelaborated order, it granted JBA and Mr. Gross' motion for summary judgment. In a separate and equally

sparse order, the court denied Mr. Heredia's competing motion for summary judgment. Those rulings became final in the circuit court's amended final judgment against Mr. Heredia, which was entered on September 14, 2018. Like the summary judgment orders that preceded it, the circuit court's amended final judgment contained no findings or any legal analysis. Mr. Heredia now appeals that judgment.

> We review a circuit court's entry of summary judgment under a de novo standard of review. Herendeen v. Mandelbaum, 232 So. 3d 487, 489 (Fla. 2d DCA 2017) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). A party is entitled to summary judgment only "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c).

Dyck-O'Neal, Inc. v. Norton, 267 So. 3d 478, 480 (Fla. 2d DCA 2019).

In the case at bar, we are called upon to examine the scope and application of a type of workers compensation immunity,[2] commonly known as "horizontal immunity," between two parties working on a construction project. The Fourth District succinctly summarized the concept in Ciceron v. Sunbelt Rentals, Inc., 163 So. 3d 609, 612 (Fla. 4th DCA 2015): "Workers' compensation immunity has been broadly expanded by the legislature to include subcontractors and sub-subcontractors

---

[2]Subject to limited exceptions, section 440.11(1) provides that

> [t]he liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

working at a construction site, precluding an employee of one contracting entity injured on the job from suing another contracting entity working at the same construction site in tort."

Section 440.10(1)(b) provides the contours of horizontal immunity:

> In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

The issue here is whether Lennar was a "contractor" that "sublet part or parts" of its "contract work to a subcontractor or subcontractors" for purposes of section 440.10(1)(b). If Lennar was a "contractor" and it "sublet" a part of its "contract work" to JBA and QGS to work at Oaks at Shady Creek, then JBA and its employee Mr. Gross would be immune from tort liability for Mr. Heredia's alleged injuries on the work site. If Lennar was not subletting contract work to subcontractors, then they would not have horizontal immunity.

As it happens, we have delved into this definitional issue before. In Derogatis v. Fawcett Memorial Hospital, 892 So. 2d 1079, 1083-84 (Fla. 2d DCA 2004), we explained that for a party to be considered a "contractor" pursuant to section 440.10(1)(b),

> its " 'primary obligation in performing a job or providing a service must arise out of a contract.' " Sotomayor v. Huntington Broward Assocs. L.P., 697 So. 2d 1006, 1007 (Fla. 4th DCA 1997) (quoting Gator Freightways, Inc. v. Roberts, 550 So. 2d 1117, 1119 (Fla. 1989)). This " 'primary obligation' . . . is 'an obligation under the prime contract

> between the contractor and a third party.' " Sotomayor, 697 So. 2d at 1007 (citing Miami Herald Publ'g v. Hatch, 617 So. 2d 380, 381 (Fla. 1st DCA 1993)). "Stated another way, the rule is that the entity alleged to be the contractor must have 'incurred a contractual obligation to a third party, a part of which obligation the entity has delegated or sublet to a subcontractor whose employee is injured.' " Antinarelli v. Ocean Suite Hotel, 642 So. 2d 661, 662 (Fla. 1st DCA 1994) (quoting Hatch, 617 So. 2d at 381).

Our court has emphasized that "[t]he statutory terms 'contractor' and 'contract work' *plainly and unambiguously posit a party performing work pursuant to a contract with another*." Slora v. Sun 'n Fun Fly-In, Inc., 173 So. 3d 1099, 1102 (Fla. 2d DCA 2015) (emphasis added).

There is no record evidence before us that Lennar was performing any work, of any kind, on behalf of any third party with respect to the Oaks at Shady Creek development. To the contrary, the evidence thus far tends to show that Lennar was acting on its own behalf as the owner of its own property.[3] See Cuero v. Ryland Grp., Inc., 849 So. 2d 326, 329 (Fla. 2d DCA 2003) (reversing summary judgment that deemed Ryland a "statutory employer" under section 440.10(1)(b) where "Ryland was the fee owner of the property upon which it was developing the Bayshore Townhomes to sell for profit" and "Ryland undertook to develop its own property acting as its own general contractor"). Therefore, the final summary judgment in favor of JBA and its employee Mr. Gross was entered in error and must be reversed.

Reversed and remanded.

---

[3]It appears from the transcript of the summary judgment hearing that the presiding judge simply misapprehended the distinction between an owner hiring parties to perform work on the owner's property and an owner hiring a general contractor who, in turn, hires parties to perform work on the owner's property.

CASANUEVA and VILLANTI, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CITY OF FORT LAUDERDALE,
Appellant,

v.

WALTER HINTON, et al.,
Appellee.

No. 4D18-2089

[July 24, 2019]

Appeal of nonfinal order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englander Henning, Judge; L.T. Case No. 07-30358 26.

William M. Droze of Troutman Sanders LLP, Atlanta, Georgia, and W. Tucker Craig and Jeffery R. Lawley of Billing, Cochran, Lyles, Mauro, Ramsey, P.A., Fort Lauderdale, for appellant.

Michelle D. Cofiño and Reginald J. Clyne of Quintairos, Prieto, Wood & Boyer, P.A., Miami, and Hunter Shkolnik, Louise R. Caro and Aaron R. Modiano of Napoli Shkolnik, PLLC, Coconut Grove, for appellees.

PER CURIAM.

The City of Fort Lauderdale ("the City") appeals two orders denying its motions for summary judgment. The City contends that these are appealable nonfinal orders under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi) because the orders determine, as a matter of law, that the City is not entitled to sovereign immunity. The City raises five points on appeal. We affirm in part and dismiss in part, concluding that some points, which do not involve immunity from suit as a matter of law, are not reviewable under the nonfinal appeal rule.

Background

In the underlying case, five members of the Hinton family ("the Hintons") are suing the City for actions and omissions that followed the City's operation of an incinerator before 1953 at the Lincoln Park

Complex.[1] The Hintons allege the City caused or allowed ash and other contaminants from the incinerator site to disburse throughout the neighboring community. The Hintons allege that the hazardous substances physically injured them and they have lost use of their property and suffered reduced market value.

The Lincoln Park Complex and Durrs Neighborhood

The City-owned Lincoln Park Complex includes three principal parcels: (1) a parcel which has been the site for a trash transfer and recycling station since 1997; (2) a parcel which is currently the site for the City's One Stop Shop for municipal services, and previously was the site of an elementary school until 2005; and (3) a grassy field that includes Lincoln Park. A portion of the first parcel served as a wastewater treatment plant from the 1920s until 1997, and another portion of the first parcel was the site for a municipal waste incinerator from 1936 until 1953 and thereafter a second wastewater treatment facility from 1971 until 1983. The area that is now a public park in the third parcel previously held piles of incinerator ash.

As to the two portions of the first parcel used as a wastewater treatment plant, the Hintons believe the wastewater treatment may have created high levels of dioxins that were released into the air, groundwater, and soil. The original wastewater treatment plant was demolished in 1997, and the trash transfer station was constructed in its place. Prior to the construction of the trash transfer station, the City had evaluated redevelopment of the incinerator-wastewater treatment plant site and conducted Phase I and Phase II environmental testing of the soil and water. Arsenic, barium, lead, and benzo(a)pyrene were detected in soil samples. The amounts detected allegedly exceeded some residential regulatory thresholds. At that time, the City decided not to redevelop and did not conduct any additional environmental testing or remediate any contamination.

Several years later, in 2000, the City discussed potential construction of the One Stop Shop at the former elementary school site and ordered Phase II testing for the site. The Florida Department of Environmental Protection ("FDEP") conducted independent testing at the Lincoln Park Complex. Sampling occurred between 2002 and 2003, and the park was closed for remediation activity. In 2003, FDEP allowed the construction to proceed, agreeing that the environmental conditions at the school

[1] There are approximately 113 plaintiffs with similar claims pending in the trial court.

property should not affect construction of the One Stop Shop. In 2003, the City dewatered the site to install utilities for the One Stop Shop, and contaminated ground water flooded the neighborhood. During a partial remediation and capping of Lincoln Park, piles of contaminated soil were left uncovered for extended periods, including when hurricanes struck the area.

The Hintons complain that the City did not remediate or notify residents after the 1997 testing revealed contamination. The park was not fenced until 2002, and the City only posted "no trespassing" signs. It did not warn of possible contamination, and children continued to play in the area.

Between 2004 and 2006, FDEP collected soil samples in the residential neighborhoods. Polycyclic aromatic hydrocarbons ("PAHs") exceeding State of Florida Soil Cleanup Target Levels ("SCTLs") were detected on one of the Hintons' properties. One sample also showed an arsenic level above residential regulatory thresholds. Sampling of other homeowners' lots detected other contaminants. Residents learned of the contamination from the State around 2005.

After evaluating soil sample results, the Florida Department of Health issued a report in 2007 concluding that chronic exposure to contamination in the surrounding neighborhoods could create elevated health risks for sensitive subpopulations, like children with developmental disabilities. Because contaminants were at higher concentrations below the surface, there was some indication that incinerator ash may have been used as fill for residential properties and digging in subsurface soils could increase exposure risk. Some contaminants were at concentrations above SCTLs, but the report found low to no apparent increased cancer risk from long term exposure to the highest levels of detected contaminants. Further soil testing was recommended. Residents with ash, glass, or metal pieces in their soil were advised to only grow fruits and vegetables in raised beds with clean soil. The report also concluded that based upon distribution and measured levels, PAHs in the Durrs neighborhood did not appear to be related to the Lincoln Park Complex. But, plaintiffs allege that FDEP reached a different conclusion, finding that the PAHs and arsenic were related to the complex.

In 2008 and 2009, FDEP worked with the City to address potential impacts on residents. FDEP recommended that surface soil at the incinerator site be remediated to residential SCTLs, covered with backfill, or removed. FDEP also required additional testing of the complex.

The Hintons allege that contamination was discharged from the complex on multiple occasions, during: (1) operation of the incinerator site; (2) operation of the wastewater treatment and waste transfer site; (3) demolition of the Lincoln Park Elementary School; (4) excavation of the school site during construction of the One Stop Shop; (5) release of ash and contaminated water during construction and remediation; and (6) residential development (if ash was used as fill in the Durrs neighborhood).

The Hintons further allege that they have ingested, inhaled, and touched contaminants from the soil and ground water through walking, playing, and gardening in the neighborhood or consuming well water or foods grown on their property. The Hintons' oldest daughter died from a rare uterine cancer in 2010, and experts disagree about whether her cancer could have been related to the incinerator site. The Hintons also allege that they have lost uses of their property and that home values have been damaged by the stigma.

The Hintons' complaint

The Hintons brought the underlying action in 2007. The operative complaint raises five counts. Count I seeks strict liability damages under section 376.313, Florida Statutes, for discharge of hazardous substances from the Lincoln Park Complex. Count II seeks damages for negligence from failing to warn of a hazardous condition; allowing discharge of contaminated soil; failing to remediate contamination and use reasonable care in remediation; and other breaches that have allegedly caused the Hintons physical injury, emotional distress, and property damage, including lost use and diminished value. Count III asks the court, through permanent injunction, to require the City to fund a court-supervised medical monitoring program. Count IV seeks compensation for inverse condemnation, alleging the discharge of contaminants onto the Hintons' properties constitutes a taking. Count V alleges a violation of substantive due process if the City's actions did not constitute a taking.[2]

The orders denying summary judgment

In October 2012, the trial court denied the City's motions for summary judgment against Walter and Joan Hinton. In part, the court rejected the City's argument that, because no waiver of sovereign immunity exists for a claim of strict liability against the government, the Hintons cannot maintain a claim for damages under section 376.313.

---

[2] The trial court granted summary judgment for the City on this count.

The City filed additional motions for summary judgment in March 2016 and July 2017. Following a hearing, the court denied these motions. In the first order on appeal, the court concluded that sovereign immunity does not apply to the claim for medical monitoring because this is a claim in equity, as recognized in *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. 3d DCA 1999). The court reasoned that, contrary to claims for money damages, claims in equity are not subject to the limitations for tort liability in section 768.28(5), Florida Statutes. The court concluded that the Hintons' claims for damages under section 376.313 and the negligence claim are subject to the sovereign immunity waiver caps in section 768.28(5). Inverse condemnation claims are not subject to the caps. The court also disagreed with the City that the Hintons' claims constitute a "single occurrence" for purposes of the sovereign immunity waiver caps.

In the second order on appeal, the trial court rejected the City's argument that it was entitled to immunity on claims that it failed to act following environmental testing in 1997 because this involved planning-level decisions related to site development. The court denied summary judgment as to the negligence claim, inverse condemnation claim, and claim for damages under section 376.313, finding no immunity. The court again concluded that the medical monitoring claim is not subject to the sovereign immunity caps and that the City has no immunity to this claim.

Appellate Analysis

The City raises five points on appeal: (1) the medical monitoring claim is completely barred because there is no waiver of sovereign immunity for a claim in equity; (2) a claim for strict liability for discharge of hazardous substances under section 376.313 is completely barred because the sovereign immunity waiver statute applies only to negligence and the discharge statute does not include an express waiver of sovereign immunity; (3) if medical monitoring is a negligence claim, then it is subject to the per occurrence cap, and the City believes damages for all of the Hintons' claims combined are capped at $200,000 because there is only a single occurrence – the operation of the incinerator; (4) the trial court erred in ruling that there is no sovereign immunity for the inverse condemnation claim without determining that the Hintons established a legally sufficient takings claim; and (5) sovereign immunity bars claims related to the City's failure to conduct further testing or remediation because these were planning-level functions related to site redevelopment.

This Court has appellate jurisdiction to review a nonfinal order determining "as a matter of law" that a party is not entitled to sovereign immunity. Fla. R. App. P. 9.130(a)(3)(C)(xi). The rule is intended to allow

interlocutory review where material facts are not in dispute and a trial court has denied *immunity from suit* as a matter of law. Based on this jurisdictional standard, we do not agree that all of the City's points are reviewable by nonfinal appeal.

The medical monitoring claim

The trial court ruled that there is no sovereign immunity for the medical monitoring claim because it is a claim in equity. The City does not dispute that it is a claim in equity, but argues there is no equity exemption to sovereign immunity. Additionally, the City argues that there is no express statutory waiver of sovereign immunity for this claim because the claim is not based upon a statute.

Section 768.28 provides a limited waiver of sovereign immunity for torts for the negligent or wrongful acts or omissions of a municipality, but "only to the extent specified in this act." § 768.28(1), Fla. Stat. (1999). Section 768.28 does not include a waiver for claims in equity. The City argues alternatively that, if the claim is not barred by sovereign immunity, then the statutory caps on damages in section 768.28(5) apply.

The Hintons believe that the trial court correctly determined that sovereign immunity does not apply to a claim in equity. Relying on Justice Cantero's concurring opinion in *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005), the Hintons also argue that this Court should affirm because section 768.28 affects the State and its subdivisions differently from municipalities, and sovereign immunity for municipalities should be strictly construed. However, we rejected this argument in *Town of Gulf Stream v. Palm Beach County*, 206 So. 3d 721 (Fla. 4th DCA 2016), and instead adhered to the Florida Supreme Court's declaration in *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981), "that sovereign immunity should apply equally to all constitutionally-authorized governmental entities." 206 So. 3d at 725 n.2.

Like Judge Altenbernd in *City of Treasure Island v. Provident Management Corp.*, 738 So. 2d 357 (Fla. 2d DCA 1999), *quashed*, 796 So. 2d 481 (Fla. 2001), we have not found an equity exemption to sovereign immunity. *See id.* at 361.

The Hintons point to cases for declaratory or injunctive relief against governmental entities that proceeded without an express waiver of sovereign immunity. But, these examples, which relate to inverse condemnation and collection of unauthorized taxes or fees, involved constitutional violations. Sovereign immunity does not exempt the

government from a challenge to a constitutional violation. *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994). However, these examples are not comparable to the Hintons' medical monitoring claim.

The Hintons also contend that the denial of sovereign immunity to this claim should be affirmed where negligence is a necessary element for medical monitoring, and because the claim is grounded in negligence, the statute waiving sovereign immunity for tortious conduct (section 768.28) applies and the City is thus not immune from suit as a matter of law. We agree. Accordingly, although the trial court did not base its ruling on this basis, we affirm the denial of sovereign immunity as to this claim. *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

The statutory caps issue

If medical monitoring is not barred by sovereign immunity, the City argues this Court should hold that this claim and all other negligence claims are collectively subject to a $200,000 cap on all claims by the Hintons for single occurrence related to operation of the incinerator. The City contends that the Hintons cannot separate aggregate negligent acts in order to exceed the "incident or occurrence" caps. *See* § 768.28(5), Fla. Stat.

The Hintons disagree that there is only a single occurrence. They contend that separate and distinct acts and omissions by the City over more than 40 years have caused contamination to spread. They also disagree that the contamination is solely from the incinerator site and attribute it to three properties within the complex. The Hintons believe distinct acts of wrongdoing permit recovery for multiple incidents.

Questions about whether the statutory caps in section 768.28(5) apply to medical monitoring and questions about how many incidents or occurrences the Hintons can recover for exceed our nonfinal appeal jurisdiction. In expanding the nonfinal appeal rule, the Florida Supreme Court intended to allow interlocutory review of an order denying *immunity from suit*. *See Keck v. Eminisor*, 104 So. 3d 359, 364-66 (Fla. 2012) (discussing *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), explaining the rationale for allowing interlocutory review because immunity from suit cannot be restored once lost, and directing the rules committee to submit a proposed rule change); *see also Fla. Fish & Wildlife Conservation Comm'n v. Jeffrey*, 178 So. 3d 460, 465 (Fla. 1st DCA 2015) (dismissing certiorari

review of a sovereign immunity claim, recognizing that limited immunity from liability is not immunity from suit, and the benefit of immunity from liability is not lost if review has to await a final judgment). The parties have not cited any cases where the applicability of statutory damage caps was reviewed on nonfinal appeal.

In a footnote in *Department of Financial Services v. Barnett*, 262 So. 3d 750 (Fla. 4th DCA 2018), *review granted*, No. SC19-87, 2019 WL 1123751 (Fla. Mar. 12, 2019), we commented that a ruling on the number of occurrences for the sovereign immunity caps could be reviewed by nonfinal appeal because this relates to sovereign immunity as a matter of law. *Id.* at 752 n.2. But, we did not need to reach the issue because the declaratory judgment in that case was final and the ruling was reviewed on direct appeal. *Id.*

In *G4S Secure Solutions (USA), Inc. v. Morrow*, 210 So. 3d 92 (Fla. 2d DCA 2016), the Second District on nonfinal appeal reversed an order denying a motion for summary judgment based upon limited sovereign immunity. *Id.* at 93-94. The court concluded that an individual transporting a prisoner, who was killed by another inmate, and the transportation company were entitled to limited sovereign immunity under section 768.28(5) as agents of the State. *Id.* The court found that there were no questions of fact that precluded summary judgment. *Id.* at 96. The opinion did not discuss jurisdiction.

If the statutory caps in section 768.28(5) apply, then the City is not immune from suit. *See Gerard v. Dep't of Transp.*, 472 So. 2d 1170, 1172 (Fla. 1985) (holding that payment of the maximum permitted by section 768.28(5) did not preclude a negligence action to establish government liability to support a claims bill; in other words, the Department was not immune from suit above the cap); *Pub. Health Tr. of Miami-Dade Cty. v. Rolle*, 88 So. 3d 191, 193 (Fla. 3d DCA 2011) (recognizing that "even if the [plaintiffs] have been paid the statutory maximum permitted under the statute, the trial court still has jurisdiction to enter a judgment against the Trust for purposes of supporting a potential claims bill to the legislature."). The City still has to defend this action. Any error at trial in misconstruing the number of occurrences and the extent of the City's liability can be corrected on final appeal.

The strict liability claim

The trial court ruled on this issue in a 2012 order. Although the court revisited the City's arguments in the May 2018 orders, it did not change its ruling.

The City mistakenly argues that this issue can be reviewed at any time because it involves subject matter jurisdiction. The Florida Supreme Court has noted that sovereign immunity was once treated as a question of subject matter jurisdiction. *See Dep't of Educ. v. Roe*, 679 So. 2d 756, 758 (Fla. 1996); *see also Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 46 So. 3d 1051, 1052 (Fla. 1st DCA 2010), *approved*, 104 So. 3d 344 (Fla. 2012). However, recognizing that a claim of sovereign immunity was no longer treated as jurisdictional, the supreme court rejected this as a basis for extraordinary writ jurisdiction. *Citizens Prop. Ins.*, 104 So. 3d at 350-55. Moreover, if the issue was reviewable at any time as the City argues, then there would be no need to include it in the nonfinal appeal rule providing a limited time to appeal. *See* Fla. R. App. P. 9.130(b).

The trial court's ruling in 2012 was prior to the 2014 amendment adding a denial of sovereign immunity as a matter of law to rule 9.130. *In re Amendments to Fla. R. of App. P. 9.130*, 151 So. 3d 1217 (Fla. 2014). But, the City had an available remedy for interlocutory review. Prior to the rule amendment, a nonfinal order denying a claim of immunity from suit could be reviewed by certiorari. *See, e.g.*, *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687-88 (Fla. 1st DCA 2013); *see also Citizens Prop. Ins.*, 104 So. 3d at 353 n.6 (discussing situations where certiorari review would not be available and distinguishing those from cases of absolute immunity from suit).

We agree with the Hintons that interlocutory review of this issue is untimely. The City can raise this issue on final appeal if necessary.

The inverse condemnation claim

The City contends that the Hintons cannot state a sufficient claim for inverse condemnation because they cannot prove a permanent physical occupation of their land that effectively deprives them of all reasonable and beneficial use and enjoyment of the property. Citing *Florida Fish & Wildlife Conservation Commission v. Daws*, 256 So. 3d 907 (Fla. 1st DCA 2018), the City maintains that, unless the takings claim is facially sufficient, it is barred by sovereign immunity. The Hintons respond that their claim is facially sufficient and involves disputed issues of material fact, which are not appropriate for summary judgment.

We agree with Judge Lewis's dissent in *Daws* that the legal sufficiency of a takings claim is not reviewable by nonfinal appeal. *Id.* at 920 (Lewis, J., dissenting). The City is not immune from suit for inverse condemnation. *See Kuhnlein*, 646 So. 2d at 721 ("Sovereign immunity

does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.").

But, even if the sufficiency of a takings claim could be construed as the denial of sovereign immunity as a matter of law, there was no error in the trial court denying summary judgment on this claim. The Hintons have pleaded a facially sufficient takings claim and material facts are in dispute.

Actions for inverse condemnation include "situations where a continuing trespass or nuisance ripens into a constitutional taking of property." *Suarez v. City of Tampa*, 987 So. 2d 681, 684 (Fla. 2d DCA 2008) (quoting *State, Dep't of Health & Rehab. Servs. v. Scott*, 418 So. 2d 1032, 1034 (Fla. 2d DCA 1982)). The Hintons do not have to show that all beneficial use or all value was destroyed. *See, e.g.*, *Young v. Palm Beach Cty.*, 443 So. 2d 450, 451-52 (Fla. 4th DCA 1984); *Kendry v. State Rd. Dep't*, 213 So. 2d 23, 27 (Fla. 4th DCA 1968). A taking occurs when government action deprives a property owner of "*substantially* all economically beneficial or productive use of land." *Tampa-Hillsborough Cty. Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994) (emphasis added). Contrary to the City's argument, a temporary deprivation can constitute a taking. *Id.* (citing *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304 (1987)).

The Hintons have pleaded substantial interference with the beneficial use and enjoyment of their property and diminished property values. They allege that they are prevented from opening their windows, growing their own food, gardening, and other outdoor activities. At the summary judgment hearing, counsel pointed out that FDEP told residents not to let their children play in the yards. Potential buyers and mortgage companies have to be told about the contamination. The City responded that the best practices listed on a gardening card issued by the Florida Department of Health was merely a protective measure and did not confirm a problem. The City suggested that because only one soil sample from the Hintons' property showed a problem with arsenic, this did not show a problem with the entire property. Whether contamination found on different properties came from the City properties and whether acts or omissions by the City amount to a temporary or partial taking involve disputed questions of fact.

We conclude that the sufficiency of the takings claim is not reviewable by nonfinal appeal and dismiss this issue. But, even if jurisdiction could lie to review the issue, the trial court properly denied summary judgment.

The City's discretionary acts arguments

In its final point, the City argues that any claims for damages based upon the City's failure to remediate or failure to notify residents of the 1997 environmental testing results are barred by sovereign immunity because these are planning-level functions related to site development.

> [A] "discretionary," planning-level function involves "an exercise of executive or legislative power such that a court's intervention by way of tort law would inappropriately entangle the court in fundamental questions of policy and planning." *Mosby v. Harrell*, 909 So.2d 323, 328 (Fla. 1st DCA 2005). An "operational" function, on the other hand, "is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Dep't of Health & Rehabilitative Servs. v. B.J.M.*, 656 So.2d 906, 911 n. 4 (Fla.1995); *Mosby*, 909 So. 2d at 328. Operational decisions are not immune.

City of Freeport, 108 So. 3d at 690. Decisions related to upgrades or improvements are a planning-level function for which there is no tort liability. *Kaweblum ex rel. Kaweblum v. Thornhill Estates Homeowners Ass'n*, 801 So. 2d 1015, 1016 (Fla. 4th DCA 2001).

Here, the City argues that it had no duty to test property that it never intended to develop. In 1997, it evaluated redevelopment of the incinerator and wastewater treatment site. It directed its engineers to perform Phase I and II environmental testing. One soil sample detected arsenic. The property was fenced to restrict access, which the Hintons' expert agreed is an acceptable control. The City decided not to redevelop at that time and did not revisit possible redevelopment until 2000.

The City contends that it has complete immunity for any failure to act beginning in 1997 because the decision not to develop at that time was discretionary and the decision not to conduct further testing was discretionary where there was no proof of migration of harmful contaminants. The City does not explain how this argument relates to each of the Hintons' claims. The City simply states that whether to redevelop the Lincoln Park site was a planning-level function and the Hintons have not identified any actions that could give rise to liability.

The Hintons answer that their claims are based upon the City's failure to contain the contamination, remediate the site, and notify residents of

contaminated conditions. Like any private property owner, the City had a duty to maintain the property in a reasonably safe condition. *See, e.g.*, *Avallone v. Bd. of Cty. Comm'rs of Citrus Cty.*, 493 So. 2d 1002, 1005 (Fla. 1986). Citing cases involving a duty to warn of a dangerous condition, the Hintons argue that at the very least there is a factual question about the City's responsibility for contamination on the Hintons' properties. The Hintons maintain that questions about the City's failure to warn and about liability for contamination spreading from City property are issues for a jury.

The City has not shown that any particular claim or specific allegations of negligence are completely barred as planning-level functions. The City suggested that it took appropriate action for a vacant industrial site by fencing it. But, the disputed area includes the former elementary school and a public park. Whether the results of the 1997 testing gave rise to a duty to test further, to warn of a hazardous condition, or to remediate or secure contamination involve disputed questions of fact. The City has not shown that it is entitled to immunity as a matter of law for planning-level decisions.

Conclusion

We affirm the denial of summary judgment on the medical monitoring claim and the trial court's ruling that the City is not entitled to summary judgment on its claim that it was engaged in planning-level functions. We dismiss for lack of jurisdiction questions about whether the damage caps in section 768.28(5) apply and as to how many incidents or occurrences the Hintons may be entitled to recover. We dismiss as untimely the City's challenge to the section 376.313 claim. Finally, we dismiss for lack of jurisdiction the challenge to the sufficiency of the takings claim.

Affirmed in part; dismissed in part.

CONNER, FORST and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

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

COLLECTION AND RECOVERY OF ASSETS, INC.,

Appellant,

v. Case No. 5D18-3154

BACHU C. PATEL, ZETA MEDICAL, LLC,
ALPHA PROPERTIES OF BREVARD, L.C.,
RAJIV CHANDRA, BHAVANI PUSKUR, M.D.
AND HEGEMAN-HARRIS COMPANY OF FLORIDA,

Appellees.

_____/

Opinion filed July 26, 2019

Appeal from the Circuit Court
for Brevard County,
Tonya B. Rainwater, Judge.

Stephen Joseph Biggie, of Arcadier, Biggie and Wood, PLLC, Melbourne, for Appellant.

James M. Talley, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, for Appellee, Bachu C. Patel.

No Appearance for Other Appellees.

ROBERSON, E.C., Associate Judge.

Collection and Recovery of Assets, Inc. ("CRA") challenges the trial court's limitation of its judgment against Dr. Bachu Patel pursuant to Florida Rule of Civil

Procedure 1.540(b)(5). Because we find that the trial court did not abuse its discretion, we affirm.

Dr. Rajiv Chandra and Patel were involved in multiple business ventures, including the loan and, ultimately, the judgment at issue in this case. Zeta Medical, LLC, of which Chandra and Patel had membership interests through other corporations they owned, purchased a medical office building. Zeta Medical took out a revolving line of credit through a note that was secured, in part, by a mortgage on the medical building. Chandra and Patel both personally guaranteed the debt owed by Zeta Medical. Wells Fargo Bank, N.A., ultimately acquired the note, mortgage, and guaranties.

When Zeta Medical defaulted on the loan, Wells Fargo obtained partial summary judgment against Chandra and Patel personally and jointly and severally on the guaranties. Wells Fargo's action for foreclosure remained pending as did cross-claims that Chandra and Patel filed against each other for fraud. Thereafter, Chandra formed CRA and was its sole owner. CRA then purchased the summary judgment and loan documents from Wells Fargo. After being substituted as the party plaintiff, CRA then began post-judgment collection efforts seeking to recover the entire amount from Patel.

Several years later, with the forced sale of his real property looming, Patel sought relief from the judgment under Rule 1.540(b)(5). Patel, relying on *Weitzman v. F.I.F. Consultants, Inc.*, 468 So. 2d 1085 (Fla. 3d DCA 1985), argued that CRA's purchase of the judgment was a change in circumstances that made it inequitable to enforce the entire amount of the judgment against him. The sale was stayed when Patel posted a bond, equaling nearly half of the judgment amount, into the court registry. A full evidentiary

hearing on Patel's Amended Motion for Relief from Judgment was held several months later.[1]

At the hearing, Patel argued that he and Chandra, as co-guarantors, were each liable to Wells Fargo for half of the total amount of the guaranteed loan. Thus, Patel claimed that it was inequitable to allow Chandra to shift that liability entirely to him through CRA's purchase of the judgment and loan documents.

CRA, on the other hand, argued that Patel had an adequate remedy at law by seeking contribution from Chandra's estate. However, CRA represented to the trial court (but not in its appellate briefing) that:

> [t]he real reason [Patel] will not file a contribution action is because he is so overwhelmingly indebted to Dr. Chandra, now the estate of Dr. Chandra, . . . that any claim for contribution would be reduced to zero by setoff.

The trial court held that CRA's purchase of the summary judgment and loan documents was a change in circumstances that warranted the court invoking its equitable powers. The court, relying on *Weitzman*, found that it was no longer equitable that the summary judgment should have prospective application and limited Patel's liability to CRA to half of the judgment amount plus accrued interest. This timely appeal followed.

We review a trial court's decision pursuant to Rule 1.540(b) for an abuse of discretion. *Ocwen Loan Servicing, LLC v. Brogdon*, 185 So. 3d 627, 629 (Fla. 5th DCA 2016); *see also LPP Mortg., Ltd. v. Bank of America, N.A.*, 826 So. 2d 462, 463–64 (Fla. 3d DCA 2002) ("[T]rial court's ruling [on Rule 1.540 relief] should not be disturbed on appeal absent a gross abuse of discretion."). Applying an abuse of discretion standard

[1] Prior to the evidentiary hearing, Chandra passed away. However, portions of his deposition testimony were read at the hearing.

of review means the trial judge's ruling is due to be affirmed unless it is "arbitrary, fanciful, or unreasonable." *Trease v. State*, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)). "[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Id*.

Rule 1.540 of the Florida Rules of Civil Procedure allows relief from a judgment "upon such terms as are just" when "it is no longer equitable that the judgment or decree should have prospective action." Fla. R. Civ. P. 1.540(b)(5). The rule contains no time limitation when seeking relief on this ground, but the motion must allege significant new circumstances affecting the decision made by the trial judge. *Gotham Ins. Co. v. Matthew*, 179 So. 3d 437, 442 (Fla. 5th DCA 2015).

Relevant to this case, Rule 1.540(b) authorizes the court to do what is "just" and "equitable." Equity is defined as "[t]he body of principles constituting what is fair and right." *Equity*, Black's Law Dictionary (11th ed. 2019). "An equity court will never be thwarted from fashioning a decree that will do right and justice between the parties." *Demorizi v. Demorizi*, 851 So. 2d 243, 246 (Fla. 3d DCA 2003).

On appeal, CRA first suggests that a trial court should not invoke Rule 1.540(b)(5) unless there is a finding of fraud or wrongdoing. Here, the trial court did not make any such findings against Chandra or CRA. Moreover, while there was substantial litigation history between Chandra and Patel involving several claims of wrongdoing, none were adjudicated in favor of Patel. Thus, CRA argues that the trial court erred in relying on *Weitzman*, without such misconduct.

Weitzman presents one of the clearest examples of when a court should invoke its equitable powers. Weitzman obtained a New York judgment against Stein and others for

"an outrageous stock fraud they had perpetrated upon him." *Weitzman*, 468 So. 2d at 1085. Stein's fraud also resulted in a Florida judgment against Weitzman and in favor of a stock brokerage firm. *Id*. Stein controlled F.I.F. Consultants, Inc., and that corporation purchased the Florida judgment against Weitzman. *Id*. When F.I.F. attempted to collect on the Florida judgment, Weitzman sought relief under Rule 1.540(b). His motion was denied, and he appealed.

The Third District Court of Appeal did not mince words, holding that "[s]uch a state of affairs cannot be countenanced." *Weitzman*, 468 So. 2d at 1086. Stein's conduct was "an archetypical example of the situation for which [Rule 1.540(b)(5)] was designed." *Id*. Allowing F.I.F. to pursue the Florida judgment would further two impermissible goals: rewarding the wrongdoer and penalizing Stein's victim. *Id*. For those reasons, the Florida judgment was cancelled in what the court described as a "happy event when justice under the law and poetic justice so nicely coincide." *Id*. at 1087. While *Weitzman* is a clear example of when it is appropriate to invoke equity; nothing in *Weitzman*, nor in Rule 1.540(b)(5) for that matter, limits a trial judge's discretion to grant equitable relief absent a finding of misconduct.

CRA's other argument is that it was inequitable and unfair to deprive CRA and Chandra's heirs of their "rights" by limiting the judgment. We disagree. Chandra formed CRA as an artifice to collect the entire amount of the judgment against Patel. There may have been many legitimate reasons for forming CRA, but at the end of the day, Patel would have been 100% liable for the judgment. CRA argues that equitable relief is unnecessary because Patel has a remedy at law; Patel had the right to seek contribution from Chandra’s estate. CRA's own words, though, shows this is merely illusory, as any

claim for contribution would allegedly be completely setoff. Such a right without a remedy is no right at all.

We hold that the trial court acted within its discretion by ensuring that Patel would only be responsible for half of the total judgment—just as he was before Chandra formed CRA and purchased the judgment. *See Schrank v. Pearlman*, 683 So. 2d 559, 561 (Fla. 3d DCA 1996) ("Where, as here, there is no express agreement covering rights of contribution, Florida law recognizes a right of equitable contribution. 'The [equitable contribution] principle attempts to distribute equally among those who have a common obligation, the burden of performing that obligation.'" (alteration in original) (quoting *Fletcher v. Anderson*, 616 So. 2d 1201, 1202 (Fla. 2d DCA 1993))). It would not be equitable for Chandra's heirs—as the current owners of CRA—to receive a windfall of the full amount of the purchased judgment when Chandra was liable for half of that amount. *See Lopez v. Lopez*, 90 So. 2d 456, 458 (Fla. 1956) ("The doctrine of equitable contribution is applied to prevent one of two, or more, joint obligors being required to pay more than his share of a common burden, or to prevent one obligor from being unjustly benefited or enriched at the expense of another.").

AFFIRMED.

COHEN and GROSSHANS, JJ., concur.