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Schaw v. Habitat for Humanity of Citrus County, Inc., Case No. 17-13960 (11th Cir. 2019).
Failure to consider an applicant's ability to meet a minimum income threshold by obtaining money from family members and other sources constitutes a failure to make "reasonable accommodations" under the Fair Housing Amendments Act, 42 U.S.C. § 3601 et. seq.

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An order merely granting a motion to dismiss is not a final, appealable order.

Dana v. Eilers, Case No. 2D18-2353 (Fla. 2d DCA 2019).
Use of another's land is considered permissive, and a party's use of a shared driveway for many years is insufficient by itself to demonstrate a use that is sufficiently adverse, exclusive, or inconsistent with the owner's use to establish a prescriptive easement.

Hullick v. Gibraltar Private Bank & Trust Company, Case No. 3D18-0203 (Fla. 3d DCA 2019).
The fact that a company's board of directors comprises outside directors who are not company employees does not diminish the rule of American Airlines, Inc. v. Geddes, 960 So. 2d 830 (Fla. 3d DCA 2007), that intra-corporate communications are not "publications" to third parties for defamation purposes.

Baker v. The Courts at Bayshore I Condominium Association, Inc., Case No. 3D18-1669 (Fla. 3d DCA 2019).
Florida Rule of Civil Procedure 1.530 may be used to correct an incorrect legal description when the error occurs in the final judgment itself and not as the result of an error in the underlying legal instrument.

Everglades Law Center, v. Inc. South Florida Water Management District, Case Nos. 4D18-1220, 4D18-1519 & 4D18-2124 (Fla. 4th DCA 2019).
The statutory mediation communication exemption under Florida Statute sections 44.102(3) and 44.405(1) provides a permanent exemption from the requirement to disclose "shade meetings" (conferences between a governmental board and its attorney to discuss settlement and litigation strategy which are not open to the public) conducted under Florida Statute section 286.011(8).

Schroeder v. MTGLQ Investors, L.P., Case No. 4D18-3177 (Fla. 4th DCA 2019).
Documentary stamp taxes must be paid on the increased amount of a promissory note; otherwise, the note is unenforceable.

Williams v. River Bend of Cocoa Beach, Inc., Case No. 5D18-912 (Fla. 5th DCA 2019).
Boundary lines established by federal government surveyors are "unchangeable and control all references in deeds and other documents describing parcels of land by reference to the federal government of sections, townships and ranges," but a trial judge may order that survey markers be placed to show the updated boundary between parcels.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13960

D.C. Docket No. 5:16-cv-00311-JSM-PRL

ALBERT SCHAW,

Plaintiff - Appellant,

versus

HABITAT FOR HUMANITY OF CITRUS COUNTY, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 18, 2019)

Before TJOFLAT, MARCUS, and NEWSOM, Circuit Judges.

NEWSOM, Circuit Judge:

Albert Schaw, a quadriplegic, applied for a home with Habitat for Humanity of Citrus County. Because his annual social-security-disability income didn't meet

Habitat's minimum-income threshold, Schaw requested an accommodation that would allow him to supplement those funds with either food stamps or a notarized letter memorializing the financial support that he received from his family. When Habitat refused, Schaw sued under the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et. seq*., which prohibits an entity from discriminating against a disabled individual by failing to make "reasonable accommodations" in policies and practices that are "necessary to afford" the individual an "equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B). Schaw separately alleged that Habitat's minimum-income requirement has a disparate impact on disabled individuals receiving social-security-disability income.

The district court granted Habitat summary judgment on the basis that Schaw's requested accommodation wasn't "necessary" within the meaning of the Act, reasoning that it would alleviate only his "financial condition—not his disability." The court also concluded that Schaw had failed to state a disparate-impact claim. After careful review, we conclude that while the district court correctly rejected Schaw's disparate-impact claim, it failed to properly analyze his failure-to-accommodate claim. Accordingly, we vacate and remand for further proceedings consistent with this opinion as to Schaw's failure-to-accommodate claim.

I

A

Shortly after he graduated from high school, Albert Schaw was in a wrestling accident that left him completely paralyzed. Schaw is now wheelchair-bound, and his current abode is ill-suited to accommodate his quadriplegia—it isn't wheelchair accessible, and there's no way for him to close the bathroom door for privacy. After seeing a television advertisement for Habitat for Humanity, a nonprofit that builds new homes for low-income individuals, Schaw decided to apply.

When Schaw met to discuss the application process with Habitat's Family Services Director, Rose Strawn, he learned that Habitat imposes a minimum-gross-annual-income requirement of $10,170, presumably to ensure that potential homeowners will be able to pay their mortgages. According to Schaw, his disability prevents him from working, so his main source of income is a Social Security Disability Insurance stipend of $778 per month, which equates to a gross annual income of $9,336. Given the fixed nature of his SSDI, Schaw asked Habitat to consider one of two other sources of income toward its requirement. First, Schaw receives $194 per month in food stamps. With the food stamps, Schaw's gross annual income would be $11,664—enough to qualify. Second, Schaw receives $100 per month in familial support from his father. With that gift,

his gross annual income (even excluding the food stamps) would be $10,536—also enough to qualify. On Strawn's recommendation, Schaw provided a notarized letter from his father confirming that he gives Schaw $100 each month.

Habitat's Board of Directors reviewed Schaw's application and determined that it couldn't accept either of the two additional sources of income. It wouldn't consider the food stamps because Habitat follows HUD guidelines, which provide that food stamps don't count as income. And it wouldn't accept the notarized letter from Schaw's father because the letter wasn't a legally enforceable guarantee that the monthly support would continue. The Board therefore rejected Schaw's application. It did, however, indicate that it would reconsider if the familial support took the form of a trust or an annuity.

Shortly thereafter, Schaw's attorney, Rebecca Bell, contacted Strawn to explain that a trust wouldn't work because it could jeopardize Schaw's ability to receive government benefits. When Strawn then suggested an annuity, Bell explained that she didn't handle annuities but knew financial advisors who did, and Strawn took that to mean that Bell would discuss the annuity option with Schaw. Strawn then sent Schaw a "Letter of Intent" explaining the conditions he needed to meet in order to qualify. One of those requirements was that he "[p]rovide documentation for [an] Annuity Plan, (for minimum of five years), as verification of monthly support provided by [his] Father." Later, Schaw (through his aunt,

Susan Hale) sent an email to Habitat inquiring as to the status of his application. George Rusaw, Habitat's president and CEO, responded that Schaw needed to provide "legally codified" evidence of the familial support and that "the notarized letter from [Schaw's] father [was] legally insufficient."

B

Schaw sued Habitat under the Fair Housing Amendments Act, 42 U.S.C. § 3604(f), bringing two separate claims. First, he asserted that Habitat violated § 3604(f)(3)(B), which requires "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Habitat failed to provide a reasonable accommodation for his disability, Schaw asserted, by refusing to consider his food stamps or familial support as income in lieu of wages earned. Second, Schaw alleged that Habitat's minimum-income requirement has a disparate impact on applicants receiving SSDI.

After discovery, the parties filed cross-motions for summary judgment on both claims. Habitat accepted the facts alleged by Schaw and conceded (1) that Schaw is disabled within the meaning of the Act, (2) that Schaw asked Habitat to consider his food stamps and familial support as supplemental income, and (3) that Habitat refused to consider the food stamps and the familial support—other than in the form of a trust or annuity—as income for purposes of his application. Habitat

disputed, however, that the accommodation that Schaw requested was "reasonable" within the meaning of the Act.

Shortly after the parties filed their motions, Schaw moved for leave to amend his complaint, seeking to clarify the effect that a trust or annuity would have on his government benefits. At the time he filed the complaint, Schaw believed that a trust or annuity would render him ineligible for SSDI benefits. He then learned that while a trust or annuity wouldn't affect his SSDI, it could risk his eligibility for other needs-based assistance, such as Medicare. Because the district court didn't believe that these changes would affect its analysis as to the relevant questions of law, it declined to address the motion for leave to amend before ruling on the summary-judgment motions.

The district court granted Habitat's motion for summary judgment. The court didn't address the "reasonable[ness]" of Schaw's request, concluding instead that the accommodation wasn't "necessary" within the meaning of the Act because it "went solely to his financial condition—not his disability." The court also concluded that summary judgment was appropriate because Schaw had failed to attempt in good faith to take advantage of Habitat's proposed "alternative accommodation"—namely, to have his father set up familial support in the form of a trust or annuity. As to Schaw's second claim, the court determined that he had

failed to provide any evidence that Habitat's requirements had a disparate impact on SSDI recipients. This appeal followed.

II

The Fair Housing Amendments Act of 1988 exists "to prohibit discrimination based on handicap and familial status." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 (11th Cir. 2008). As relevant here, discrimination includes refusing "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

To prevail on a failure-to-accommodate claim, a plaintiff must prove (1) that he is disabled, (2) that he requested a "reasonable accommodation," (3) that the requested accommodation was "necessary to afford [him an] equal opportunity to use and enjoy the dwelling," and (4) that the defendant refused to make the requested accommodation. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1225–26 (11th Cir. 2016). The first and last elements are undisputed in this case—no one here disputes that Schaw is disabled or that Habitat refused to accommodate his request that it consider his supplemental sources of income. Accordingly, we focus on the middle two elements—whether the accommodation that Schaw requested was "reasonable" and whether it was "necessary to afford [him] an equal

opportunity to use and enjoy a dwelling." *Id.* at 1225. The district court skipped the first question and decided the case solely on the basis of the second. But because we find that a genuine issue of material fact exists as to both, we will address each in turn.[1]

A

1

First, what do we mean when we talk about a "reasonable accommodation" under the Act? The reasonableness inquiry considers "whether the requested accommodation 'is both efficacious and proportional to the costs to implement it.'" *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1289 (11th Cir. 2014) (quoting *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002)).[2] Assessing reasonableness "require[s] a balancing of the parties' needs." *Id.* An accommodation isn't reasonable if it requires "a fundamental alteration in the nature of a program" or imposes "undue financial and administrative burdens." *Southeastern Comm. Coll. v. Davis*, 442 U.S. 397, 410,

[1] We review *de novo* the district court's grant of summary judgment. *Loren v. Sasser*, 309 F.3d 1296, 1301 (11th Cir. 2002) (per curiam) (citation omitted). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[2] Although our case law addressing reasonable accommodations under the Fair Housing Amendments Act is rather thin, "Congress imported the reasonable-accommodation concept" from case law interpreting the Americans with Disabilities Act and the Rehabilitation Act. *Schwarz*, 544 F.3d at 1220. Because "we have applied [these] reasonable-accommodation requirements on numerous occasions," we can "look to case law" under the ADA and RA for "guidance on what is reasonable under the [Fair Housing Amendments Act]." *Id.*

412 (1979) (interpreting the term "reasonable accommodation" in the analogous Rehabilitation Act context); *see also Schwarz*, 544 F.3d at 1220. This Court has explained—in imaginative terms—that "[t]he difference between [an] accommodation that is required and [a] transformation that is not is the difference between saddling a camel and removing its hump." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1260 (11th Cir. 2001) (interpreting the term "reasonable accommodation" in the analogous Americans with Disabilities Act context).

A plaintiff carries the initial burden of showing that his proposed accommodation is reasonable; however, on a showing of a facially reasonable request, it's up to the defendant to demonstrate why the requested accommodation would cause undue hardship. *U.S. Airways v. Barnett*, 535 U.S. 391, 401–02 (2002).[3] The Supreme Court has explained that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Id*. at 401 (citation omitted). This doesn't necessarily mean that a defendant is required "to accommodate a [plaintiff] in any manner in which that

[3] There is, of course, some overlap between these inquiries. But "[t]hat the evidence probative of the issue of whether an accommodation for the [plaintiff] is reasonable will often be similar (or identical) to the evidence probative of the issue whether a resulting hardship for the [defendant] is undue, does not change the fact that establishing that a reasonable accommodation exists is a part of a [FHAA] plaintiff's case, whereas undue hardship is an affirmative defense to be pled and proven by a [FHAA] defendant." *Willis v. Conopco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997).

[plaintiff] desires." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997) (quotation omitted). It does mean, though, that the initial threshold presents a relatively low bar. *See Willis*, 108 F.3d at 286 & n.2 (11th Cir. 1997) ("As a general matter, a reasonable accommodation is one employing a method of accommodation that is reasonable in the run of cases . . . .") (quoting *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)); *see also Hunt*, 814 F.3d at 1226 (assuming that a mother's request for accommodation was reasonable when she sought an exception to an apartment complex's lease-nonrenewal policy while making arrangements for her disabled son to be placed in offsite care).

If a plaintiff's request is facially reasonable, the burden shifts to the defendant, who must prove that the accommodation would nonetheless impose an "undue burden" or result in a "fundamental alteration" of its program. *Schwarz*, 544 F.3d at 1220. An accommodation requires a "fundamental alteration" if it would "eliminate an 'essential' aspect of the relevant activity," *id*. at 1220–21—or, if you prefer, would "remov[e] [the camel's] hump," *Lucas*, 257 F.3d at 1260. Whether a particular aspect of an activity is "essential" will turn on the facts of each case. *Schwarz*, 544 F.3d at 1221; *see also Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that

considers, among other factors, the effectiveness of the modification . . . and the cost to the organization that would implement it.").

While that may sound a little squishy, we aren't without guidance in this area. In *Schwarz v. City of Treasure Island*, we acknowledged that the Supreme Court had determined that the analogous ADA required the PGA Tour to allow a contestant to use a golf cart rather than walk during a tournament. 544 F.3d at 1221 (discussing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001)). While riding in a golf cart arguably provides an advantage of sorts, the Court explained that the Tour's walking rule was not "an essential rule of competition" but was "at best peripheral to the nature of [its] athletic events." *See Martin*, 532 U.S. at 689.

Another way to look at the "essential"-ness (or "fundamental"-ness) issue might be to ask, "What is the basic purpose of the rule or policy at issue?" In *Schwarz*, we considered a request for a variance to allow several halfway houses—which are classified as tourist-dwellings because of their high turnover rates—to operate, some in a designated single-family residential zone and others in a zone that allowed multi-family dwellings. 544 F.3d at 1205–06. In the process of evaluating the City's defense, we examined the basic purpose of zoning—"to bring complementary land uses together, while separating incompatible ones." *Id*. at 1221. We held that the low-turnover rule embodied in the prohibition on tourist dwellings went to the basic purpose of the single-family zoning restrictions—to

provide quiet, safety, and permanence in single-family residential neighborhoods. *Id*. at 1223. We also concluded, however, that the same rule was not an "essential" aspect of multi-family zones. *Id*. at 1223–24. Despite the City's arguments about traffic congestion, noise, and other potential problems, we determined that allowing short-term recovery homes to operate in multi-family zones didn't effect the same kind of "fundamental alteration" that it would in single-family zones. *Id*. at 1225. *Compare also*, *e.g*., *Se. Cmty. Coll.*, 442 U.S. at 410 (requiring a nursing school to waive all clinical requirements for a deaf applicant would fundamentally alter the nature of the nursing program), *with*, *e.g.*, *Anderson v. City of Blue Ash*, 798 F.3d 338, 363 (6th Cir. 2015) (allowing a miniature therapy horse to reside in disabled girl's backyard wouldn't necessarily fundamentally alter the nature of single-family neighborhoods).

When evaluating whether an accommodation would impose an undue burden, courts also weigh the respective costs and benefits of the accommodation to the parties, performing a "balancing of the parties' needs." *Bhogaita*, 765 F.3d at 1288 (citation omitted). In *Oconomowoc Residential Programs v. City of Milwaukee*, the Seventh Circuit evaluated a plaintiff's request for a variance from a municipal ordinance restricting community living facilities from operating within 2,500 feet of similar facilities. 300 F.3d at 777. The plaintiff demonstrated the reasonableness of the accommodation by pointing to a shortage of area residential

facilities for brain-injured individuals and to court orders requiring two individuals to be transferred to a group home as soon as possible. *Id*. at 779. Although the City pointed to a slew of potential issues in return, including increased traffic and adverse effects on neighborhood parking, the Court found that none of those inconveniences could be construed as an undue administrative or financial burden. *Id*. at 785–87.

Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998), is an illustrative decision to the contrary. There, two disabled individuals who qualified for low-income housing assistance under the federal government's "Section 8" program applied for apartments at Stratford Greens. *Id*. at 296. Both were turned away, however, because the apartment manager "d[id] not want to get involved with the federal government and its rules and regulations." *Id*. In response, the applicants filed a complaint under the Fair Housing Amendments Act, alleging that Stratford Greens had discriminated against them by "refusing to make 'reasonable accommodations' to facilitate the rental." *Id*. The Second Circuit determined, though, that "the burden of participating in the Section 8 program" could not be viewed as imposing "only reasonable costs or insubstantial burdens." *Id*. at 301. Requiring an apartment complex to accept Section 8 applicants, the court explained, would impose an undue burden because participation in a federal program "will or may entail" a number of encumbrances,

including "financial audits, maintenance requirements, inspection of the premises, reporting requirements, [and] an increased risk of litigation." *Id*. Having to rework its leasing program to accommodate these numerous requirements, the court concluded, would effect "a fundamental alteration" of the complex's rental policies. *Id*.

So, what's the upshot? From these decisions, we glean the following principles. First, a plaintiff need only demonstrate a facially reasonable request—or one that seems reasonable in "the run of cases." *Willis*, 108 F.3d at 286; *Barth*, 2 F.3d at 1187. Second, a defendant may then proffer evidence that the plaintiff's request would nonetheless cause an undue burden or a fundamental alteration of its policy or program. Third, in evaluating the evidence, a court may consider whether the plaintiff's requested accommodation would eliminate an "essential aspect" of the defendant's policy or program or simply inconvenience it, keeping in mind the "basic purpose" of the policy or program at issue, and weighing the benefits to the plaintiff against the burdens on the defendant.

2

Back to Schaw. The district court didn't address whether Schaw's requested accommodation was of a type likely to be reasonable in the "run of cases," preferring to grant judgment primarily on the ground that any accommodation was not, within the meaning of the Act, "necessary to afford [him an] equal opportunity

to use and enjoy a dwelling." (Much more on necessity below—but reasonableness first.) Let's begin, then, by looking at the nature of Schaw's request: to submit food stamps or familial support in lieu of W-2 income for the purpose of meeting Habitat's minimum-income requirement. Recall that Habitat requires its program applicants to demonstrate a minimum gross annual income of $10,170, or $847.50 per month. Schaw receives a gross annual income of $9,336, or $778 in SSDI per month. He also receives $100 per month in familial support, increasing his gross annual income to $10,536. Factoring in his $194 in food stamps, he brings in a total of $12,864. If Habitat credited *either* the food stamps *or* the familial support, Schaw would meet the minimum-income requirement.

Is Schaw's request that Habitat accept food stamps or familial support toward its minimum-income requirement in lieu of ordinary wages facially "reasonable"? Seems so to us. To be clear, Schaw didn't ask Habitat to lower its minimum-income requirement or to accept any less than usual in terms of payment or interest. Instead, Schaw—who is unable to work—asked Habitat to accept proof that he brings in the same amount of money as any other Habitat homeowner, but in a different form. This request strikes us as the type of accommodation that the Supreme Court has deemed at least facially reasonable. It is more akin, we think, to allowing a golfer to use a cart—completing the essential aspects of the game in a different way—than requiring a nursing program to waive

all clinical requirements—removing the essential aspects of a program. *Compare PGA Tour*, 532 U.S. at 689, *with Se. Cmty. Coll.*, 442 U.S. at 410. Rather than seeking a waiver of a basic requirement of Habitat's housing program, Schaw asks to meet those basic requirements in his own way. That seems to us sufficient to meet the relatively low facial-reasonableness bar adopted in *Barnett*. *See* 535 U.S. at 401–02.

It's a separate question, though—one that we decline to decide in the first instance—whether Habitat can nonetheless demonstrate "special . . . circumstances that demonstrate undue hardship." *Id.* at 401–02. Would Schaw's requested accommodation modify a core aspect of Habitat's program (*i.e.*, remove the camel's hump) or merely inconvenience (*i.e.*, saddle) it? The answer depends on the basic purpose of the income requirement and the relative benefits and burdens to the parties of implementing Schaw's request. The record indicates that Habitat's requirements exist to ensure an applicant's ability to pay the mortgage. At least as matters currently stand, we can't say that Schaw's proposal would meaningfully thwart Habitat's minimum-income threshold. (Consider that the typical at-will employee can't guarantee an ongoing ability to pay, either.) It's possible, of course, that on closer inspection it will become clear that the accommodation would constitute "a fundamental alteration in the nature" of Habitat's program in another way or impose "undue financial or administrative burdens." *Schwarz*, 544

F.3d at 1218, 1220. And it's also possible that it won't. Because the record is silent as to the likely effect of Schaw's request, we think it prudent to remand to allow the district court to determine, in the first instance, whether the accommodation constitutes an undue burden on or fundamental alteration of Habitat's program.

We should clarify one thing before we move on to the "necessity" prong of Schaw's claim. Although the record is devoid of evidence pertaining to whether Schaw's requested accommodation would impose "undue financial or administrative burdens," the district court held that Habitat was entitled to summary judgment because it had provided a sufficient "*alternative* accommodation" in suggesting that Schaw's father set up a trust or an annuity to disburse the familial-support funds.[4] The district court suggested, per *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1294 (11th Cir. 2012), that "[o]nce Habitat offered a reasonable accommodation to Mr. Schaw, the burden shifted to him to make a good faith attempt to accommodate his needs through the proffered accommodation." In so holding, the district court erred. In particular, it

[4] What Habitat asks for is essentially a guarantee that Schaw's income will continue. That's understandable enough—Habitat wants assurance that if it risks accepting an alternate form of income, it will continue to be paid. But providing "insurance" in the form of a trust or annuity costs money and takes time, and the record does not reflect that Habitat requires the same level of assurance from non-disabled applicants. We also know—or are told—that trust or annuity payments could negatively affect Schaw's other government-based assistance—specifically, Medicare costs and premiums from which he is currently exempted. These are facts of the sort that a court might take into consideration when weighing the benefits and burdens to the parties.

transposed the proper burden of proof, seemingly confusing the Fair Housing Amendments Act's reasonable-accommodation inquiry with a religious-accommodation inquiry. Whereas *Walden* suggests that in the religious-accommodation context "[a]ny reasonable accommodation by the employer is sufficient to meet its accommodation obligation," 669 F.3d at 1294 (citation omitted), *Barnett* makes clear—as we've explained—that when it comes to reasonable accommodation of a disability, a court at the summary-judgment stage must consider first whether the plaintiff's own requested accommodation "seems reasonable on its face" before turning to consider a defendant's objections and counterproposals, *see* 535 U.S. at 401–02. Accordingly, the district court's alternative holding, shifting to Schaw the burden of proving a good-faith effort to make use of Habitat's proffered alternative accommodation, was premature. The court should have looked first to the reasonableness of *Schaw's* own proposed accommodation before considering any outside evidence.

B

In addition to showing that he sought a "reasonable accommodation," a plaintiff attempting to prove a failure-to-accommodate claim under the Fair Housing Amendments Act must demonstrate that the requested accommodation was "necessary to afford [him an] equal opportunity to use and enjoy a dwelling."

42 U.S.C. § 3604(f)(3)(B). For clarity's sake, we'll assess the separate-but-related elements of necessity and equality—and how they apply here—one at a time.

1

According to our precedent, a "'necessary' accommodation is one that alleviates the effects of a disability." *Bhogaita*, 765 F.3d at 1288 (citation omitted). The Fair Housing Amendments Act defines "handicap" (which our caselaw uses interchangeably with the term "disability") as an impairment that "substantially limits one or more of a person's major life activities," 42 U.S.C. § 3602(h), which, according to the implementing regulations, include "walking, seeing, hearing, speaking, breathing, learning and working," 24 C.F.R. § 100.201(b). So, linking these ideas together, an accommodation is "necessary" if it "alleviates the effects" of an impairment that limits a person's ability to, among other things, walk, see, hear, or work. The district court here granted summary judgment in Habitat's favor based primarily on this prong, concluding that, because the requested accommodation "went solely to [Schaw's] financial condition—not his disability," it wasn't "necessary" within the meaning of the Act. We find this too simplistic an explanation.

Schaw asserts that the "effect[] of [his] disability" relevant to this case, *Bhogaita*, 765 F.3d at 1288, is his inability to work. Because of this limitation, Schaw says, his income consists largely of SSDI—a fixed monthly amount.

Schaw contends that because he is unable to work and therefore unable to supplement his SSDI himself, he should be granted an accommodation allowing him to demonstrate additional income in another form: either his food stamps or a notarized letter indicating familial support. The district court, however, strictly separated Schaw's "financial condition" from his "disability," holding that financially oriented accommodations could not, as a rule, be necessary to alleviate the effect of a disability. We will address this issue in two parts: (1) whether an accommodation can be necessary, within the meaning of the Act, to alleviate the economic effects of a disability; and (2) whether Schaw has shown that the particular accommodation that he has requested is in fact necessary to alleviate the effect of *his* disability.

In concluding that Schaw's requested accommodation "went solely to his financial condition—not his disability," and thus wasn't "necessary" for purposes of the Act, the district court relied on the Second Circuit's pronouncement in *Salute v. Stratford Greens Garden Apartments* that the Act "addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps." 136 F.3d at 301. Not in this Circuit. As we explained in *Bhogaita v. Altamonte Heights Condominium Association*, a "necessary" accommodation is one that alleviates not "handicaps" *per se*, but rather "the *effects* of" those handicaps. 765 F.3d at 1288. This distinction is

important here. Consider, for example, the HUD Guidelines, which list as an illustrative accommodation an exception to a "no pets" rule for a seeing-eye dog. *See* 24 C.F.R. § 100.204(b). In such a case, it's not the handicap itself, but rather the effect of the handicap, that is being accommodated. Blindness (the handicap) creates an inability to walk around safely (the effect on a major life activity) and thus a need for a waiver of the prohibition on pets (the accommodation). Likewise, we might say, Schaw's quadriplegia (the handicap) creates an inability to work (the effect on a major life activity) and thus a need for a waiver of the usual type-of-income requirement (the accommodation). In both instances an accommodation is being provided to alleviate the effects of a disability on a major life activity.

Given the specifics of this case, we think it significant that federal law lists "working" as a major life activity alongside "seeing, hearing, speaking, and walking." 42 U.S.C. § 3602(h); 24 C.F.R. § 100.201(b). It would be odd, then, if the Act deemed "necessary" those accommodations that "alleviate[] the effects of" an inability to see, hear, speak, or walk, but not those that alleviate the effects of an inability to work. As even the *Salute* court recognized, "the duty to make reasonable accommodations is framed by the *nature of the particular handicap*." 136 F.3d at 301 (emphasis added). In *Schwarz*, for instance, we recognized that "the 'need' created by a substance addiction"—the handicap—was "help with

breaking that addiction and maintaining sobriety." 544 F.3d at 1227. With that in mind, we proceeded to examine whether short stays in halfway houses were an accommodation necessary to address that need. *Id*.

Turning to the case before us, the proper question is whether Schaw's inability to meet the minimum-income requirement through wages earned is an "effect" of his quadriplegia—whether there is some causal relationship between the two. Habitat argues that it isn't—that there's no causal connection—and that even under the Ninth Circuit's somewhat similar decision in *Giebeler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003), Schaw would lose. We're not so sure. To briefly explain, in *Giebeler*, the plaintiff worked for five years as a psychiatric technician before being diagnosed with AIDS. *Id*. at 1145. After his diagnosis, he sought to rent an apartment for $875 per month, but was refused because he received only around $1200 per month in disability benefits—much less than the requisite three times the rent. *Id*. When the plaintiff's mother—who made plenty—attempted to sign a lease on her son's behalf, the apartment management rejected her on the basis that it didn't allow co-signors. *Id*. The plaintiff sued, and the Ninth Circuit agreed that the request—that his financially qualified mother be allowed to rent the apartment on his behalf—was clearly an accommodation within the meaning of the Act: "*Barnett* indicates that accommodations may adjust for the practical impact of a disability," the court explained, and "not only for the

immediate manifestations of the physical or mental impairment giving rise to the disability." *Id*. at 1150, 1154–55. The court then remanded to the district court for factual findings as to whether the request was reasonable and would provide him an equal opportunity to use and enjoy a dwelling.

To be sure, *Giebeler* is an easier case. The court there had definitive evidence that the plaintiff was a well-established working professional at the time he contracted HIV, providing a direct causal link between the impairment and the inability to meet the minimum-income requirement. *See id*. at 1145. The record here isn't so clear concerning whether Schaw would have been able to meet Habitat's income requirement via wages earned prior to becoming paralyzed—it doesn't tell us his pre-accident salary, or whether he lived independently or paid rent anywhere before the accident. Complicating the inquiry, Schaw is classified for SSDI purposes as an "adult disabled child"—a designation indicating that, as a recent high-school graduate at the time of his injury, he hadn't yet reached full earning potential. Accordingly, we're lacking evidence here of the clear causal connection present in *Giebeler*. We just don't know.[5]

That said, Schaw's complaint alleges that his inability to meet Habitat's minimum-income threshold through W-2 income is a result of his quadriplegia.

[5] For a bit of context, though, a person could exceed Habitat's minimum-income requirement by working 40 hours per week at $5.00 per hour, or 20 hours per week at $10.00 per hour.

The district court didn't explicitly consider whether that was so; instead, it summarily determined that the requested accommodation "went solely to [Schaw's] financial condition—not his disability." Under our precedent, however, it's clear that an accommodation addressing an inability to demonstrate wages earned *could* in some cases be "necessary"—that is, could "alleviate the effects of a disability." *Bhogaita*, 765 F.3d at 1288. Accordingly, the district court should have considered here whether Schaw's inability to demonstrate the minimum required income through W-2 wages was an effect of his disability.

2

Of course, it's not enough that an accommodation be "necessary" in the abstract—the Act pairs the word with the object of providing a disabled person an "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Equal, according to one dictionary, means "receiving or entitled to the same treatment or privileges any other individual has or is entitled to." Webster's Third New International Dictionary 766 (2002). According to another, it denotes "having the same status, rights, or opportunities" and "uniform in application or effect; without discrimination on any grounds." Oxford Dictionary of English 591 (3d ed. 2010).

The Supreme Court has clarified that, in this context, our focus should be (in Oxford-speak) on uniformity of "effect" rather than "application," with the end

goal of ensuring that disabled individuals receive the same opportunities as other individuals. In *U.S. Airways v. Barnett*, the Court explained that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not 'reasonable.'" 535 U.S. at 398 (discussing accommodations under the analogous ADA standard). Indeed, the Court explained that accommodations are themselves a type of preference, and that such "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *Id*. at 397; *see also id*. ("By definition any special 'accommodation' requires . . . different[], *i.e.*, preferential[]" treatment.). As now-Justice Gorsuch explained during his time on the Tenth Circuit, "under the FHA it is sometimes necessary to dispense with formal equality of *treatment* in order to advance a more substantial equality of *opportunity*." *Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012) (emphasis added).

This doesn't mean, of course, that under the Act a person with a disability is entitled to an accommodation that would place him in a *better* position to enjoy a dwelling than a member of the general public. *See id*. ("[W]hile the FHA requires accommodations necessary to ensure the disabled receive the same housing opportunities as everybody else, it does not require *more or better* opportunities.").

As we explained in *Schwarz*, when accommodations "start addressing problems *not caused by a person's handicap*," a handicapped person receives not "an 'equal,' but rather a better opportunity to use and enjoy a dwelling,"—"a preference that the plain language of this statute cannot support." 544 F.3d at 1226 (emphasis added).

The district court here determined that "Schaw's requested accommodation[] went solely to his financial condition—not his disability," and, accordingly, that it would've given him "a *better opportunity*—as opposed to *equal opportunity*—to use and enjoy one of Habitat's dwellings." But again, we're not so sure. For one thing, the district court rested its conclusion that the accommodation would provide a "better" opportunity on the flawed premise that it would remedy *only* Schaw's financial status—which, for reasons already explained, may or may not be true. Moreover, the district court neglected to acknowledge an important nuance—that the "financial" aspect of the accommodation here concerns only the *form* of funding and not the *amount*. Schaw didn't request, for example, that Habitat lower its minimum-income standards or allow him to get away with doing or paying any less than other applicants. He stood ready to pay the monthly mortgage in full and to demonstrate a gross annual income exceeding the minimum required level. He requested only that he—an individual allegedly limited to a fixed income as a result, he says, of his disability—be allowed to prove that income in part

through familial support or food stamps, putting him in the same position as an able-bodied person who could (theoretically) increase his income through W-2 wages. This request—to show an equal income from a different source—could be construed as an invitation to "dispense with formal equality of treatment in order to advance a more substantial equality of opportunity." *Cinnamon Hills*, 685 F.3d at 923.

Of course, as Habitat points out, we could look at this another way: that Schaw seeks an advantage that other applicants don't enjoy. For instance, if an able-bodied comparator happened to bring in $778 monthly from his job and $100 in familial support, he too would have been denied a home. But nothing in the statute indicates that the fact that a theoretical non-disabled person also could potentially benefit from an accommodation renders that accommodation improper. Again, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not 'reasonable.'" *Barnett*, 535 U.S. at 398. The inquiry is whether the requested accommodation would provide a disabled person an opportunity to enjoy a dwelling that would otherwise—due to his disability—elude him.

* * *

Having (hopefully) provided some clarification regarding failure-to-accommodate claims under the Fair Housing Amendments Act, we think it prudent to remand for the district court to consider whether, in light of this opinion, Schaw has stated a failure-to-accommodate claim—specifically (1) whether Habitat has shown that Schaw's facially reasonable request would nonetheless result in an undue burden on or fundamental alteration to its program and (2) whether the requested accommodation is necessary to afford Schaw an equal opportunity to use and enjoy a dwelling. *See* 42 U.S.C. § 3604(f)(3)(B).

III

Schaw separately claims that Habitat's minimum-income requirement has a disparate impact on SSDI recipients. Here, we agree with the district court—Schaw fails to state a claim.

In contrast to a disparate-treatment case in which a plaintiff seeks to establish that a defendant had "a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect" and are otherwise unjustified by a legitimate rationale. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (quotation omitted). A plaintiff can demonstrate a discriminatory effect by showing that a policy "makes housing options

significantly more restrictive for members of a protected group than for persons outside that group." *Hallmark Developers, Inc. v. Fulton Cty.*, 466 F.3d 1276, 1286 (11th Cir. 2006) (quotations omitted). Evidence demonstrating a "significant discriminatory effect suffices to demonstrate a [prima facie] violation of the Fair Housing Act." *Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1543 (11th Cir. 1994). That said, it's not enough to show that a few people are affected by a policy—rather, the disparity must be substantial enough to raise an inference of causation. *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994); *see Schwarz*, 544 F.3d at 1218 (holding that a district court correctly rejected a disparate-impact claim because the plaintiff failed to present any relevant comparative evidence).

We needn't go any farther here, because Schaw failed to provide any evidence of discriminatory effect in the district court. Schaw alleged that Habitat's minimum-impact requirement has a disparate impact on persons with disabilities because the requirements make it impossible for a person receiving SSDI to qualify for a home. In response, Habitat provided evidence of numerous applicants receiving SSDI who'd been approved for a Habitat home. Rather than provide any evidence to the contrary, Schaw sought to amend his complaint to clarify that the minimum-income requirement has a disparate impact on "SSDI applicants who receive $847.50 or less in SSDI per month." Still, though, he offered no evidence.

This reverse-engineered claim—tailored specifically to Schaw's particular circumstances—still fails. Schaw didn't submit any evidence to prove that Habitat's requirements disproportionately exclude those receiving SSDI (no matter the amount) as compared with able-bodied individuals making the same amount of money from non-SSDI sources. Accordingly, the district court properly found that Schaw failed to state a disparate-impact claim.

IV

In sum, we hold (1) that a court must first consider whether a plaintiff has shown that a requested accommodation is facially reasonable and then whether a defendant has demonstrated that the accommodation would result in an undue burden or fundamental alteration to its program or policy; (2) that a plaintiff's financial state in any particular case could be unrelated, correlated, or causally related to his disability and that, in some cases, an accommodation with a financial aspect—even one that appears to provide a preference—could be "necessary to afford [an] equal opportunity to use or enjoy a dwelling" within the meaning of the Act; and (3) that Schaw failed to create a genuine issue of material fact as to whether Habitat's minimum-income requirement disproportionately excludes SSDI recipients.

Accordingly, we affirm the district court as to Schaw's disparate-impact claim and vacate and remand the district court's order for further proceedings

consistent with this opinion as to Schaw's failure-to-accommodate claim—to determine, perhaps among other issues, whether Habitat has shown that Schaw's facially reasonable accommodation would result in an undue burden or a fundamental alteration to its program and whether Schaw's financial state is a result of his disability such that the requested accommodation is "necessary to afford [him an] equal opportunity to use or enjoy a dwelling."

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2640

THEODORE J. THOMPSON,

Appellant,

v.

ADMIRAL MANUFACTURING HOUSING COMMUNITY; BRANDI PARKER,

Appellees.

On appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

September 20, 2019

PER CURIAM.

DISMISSED. *Dedge v. Crosby*, 914 So. 2d 1055 (Fla. 1st DCA 2005) (holding mere phrase "with prejudice" does not make a final order of an order merely granting a motion); *Johnson v. First City Bank of Gainesville*, 491 So. 2d 1217 (Fla. 1st DCA 1986) (holding that an order granting a motion to dismiss with prejudice is "an order granting a motion, not an order dismissing the action" and is not final or appealable).

ROWE, OSTERHAUS, and KELSEY, JJ., concur.

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

Theodore J. Thompson, pro se, Appellant.

No appearance for Appellees.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

GREGORY DANA and JESSICA S. DANA, as trustees for the Gregory Dana and Jessica S. Dana Revocable Trust U/A/D DATED April 30, 2002, Appellants, v. LORRIE N. EILERS and MARK EILERS, Appellees.	)	Case No. 2D18-2353

Opinion filed September 20, 2019.

Appeal from the Circuit Court for Hillsborough County; Richard A. Nielsen, Judge.

Diane H. Tutt of Conroy Simberg, Hollywood; and Nicole F. Soto of Conroy Simberg, Tampa, for Appellants.

Daniel J. Fleming and Daniel A. Hoffman of Johnson, Pope, Bokor, Ruppel & Burns, LLP; and W. Campbell McLean of GrayRobinson, P.A., Tampa, for Appellees.

CASANUEVA, Judge.

Gregory Dana and Jessica S. Dana, as trustees for the Gregory Dana and Jessica S. Dana Revocable Trust u/a/d dated April 30, 2002, appeal a final judgment

denying the Danas' action for declaratory judgment and granting Lorrie N. Eilers and Mark Eilers' counterclaim for a prescriptive easement. Because the Eilers failed to establish entitlement to a prescriptive easement, we reverse.

I. FACTS

The parties own adjacent parcels of land on Lake Ellen Drive in Hillsborough County, which parcels were once owned by Gladys D. Braddock as a single ten-acre tract. The Danas own the western five acres, the Eilers own the eastern five acres, and a twenty-foot-wide private driveway extends south from Lake Ellen Drive for 875 feet, centered along the parcels' shared boundary.[1]

Since 1938, the parties and their predecessors in title have used the private driveway to access their properties. The trial court found that the owners of the eastern and western parcels used the driveway as their sole means of ingress and egress to their properties. However, the parties seem to agree that this finding does not mean that the driveway provides the only possible means of accessing the property, as with a landlocked property, or that another reasonable means of access could not be developed.[2]

In 2014, less than a year after purchasing their property, the Danas filed an action for a declaratory judgment seeking to prevent the Eilers from using the portion of the driveway that is within their property boundary. The Eilers, who acquired their

[1]Originally a dirt driveway, the center ten feet of the driveway was paved between 1976 and 1980.

[2]In fact, the Eilers subdivided their parcel, and all lots except theirs use a separate access road.

property in 1998, responded by filing a counterclaim for a prescriptive easement over the disputed property.

Following a bench trial, the trial court denied the Danas' complaint for declaratory judgment and granted a reciprocal prescriptive easement to both the Eilers and the Danas, each for the ten-foot-wide strip of driveway running along the others' property line.[3]

II. LAW ON PRESCRIPTIVE EASEMENTS

"In Florida an easement is an incorporeal hereditament and, as such, is an interest in land." Crigger v. Fla. Power Corp., 436 So. 2d 937, 941 (Fla. 5th DCA 1983) (footnote omitted). It "is an intangible right to make a certain use of the lands of another." Id. To establish a prescriptive easement, claimants must prove the following:

> (1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; (2) that during the whole prescribed period the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner; (3) that the use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width, and termini; and (4) that during the whole prescribed period the use has been adverse to the lawful owner; that is, (a) the use has been made without the permission of the owner and under some claim of right other than permission from the owner, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment, and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.

[3]The Danas did not seek a prescriptive easement in their pleadings or at trial.

Dan v. BSJ Realty, LLC, 953 So. 2d 640, 642 (Fla. 3d DCA 2007); see also Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958); Phelps v. Griffith, 629 So. 2d 304, 305 (Fla. 2d DCA 1993); Stackman v. Pope, 28 So. 3d 131, 133 (Fla. 5th DCA 2010).[4]

It has long been recognized that the "[a]cquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted." Downing, 100 So. 2d at 65. Thus, the use or possession of the lands of another "is *presumed to be in subordination* to the title of the true owner, and *with his permission* and the burden is on the claimant to prove that the use or possession is adverse." Id. at 64 (emphasis added); see also Dan, 953 So. 2d at 642 ("Because the law does not favor the acquisition of prescriptive rights, use or possession of another's land is presumed to be subordinate to the owner's title and with the owner's permission."). Consistent with the presumption of permissive use, "[a]ll doubts as to the adverse character of a claimant's pattern of use must be resolved in favor of the lawful owner of the property." Phelps, 629 So. 2d at 306. This presumption "encourages a neighborly consent and indulgence by owners to the use of their land by others by preventing such permissive use from ripening into a right in favor of the wrongful users as against the title of the friendly, congenial landowner." Crigger, 436 So. 2d at 943.

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[4]Florida jurisprudence has defined the term "easement" as "a privilege without profit which the owner of one tenement has the right to enjoy in respect to that tenement in or over the tenement of another person, whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." J. C. Vereen & Sons, Inc. v. Houser, 167 So. 45, 47 (Fla. 1936) (quoting Burdine v. Sewell, 109 So. 648, 652 (Fla. 1926)).

The claimant must establish adversity, as well as the other elements of a prescriptive easement, by clear and positive proof, and the elements "cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture." Downing, 100 So. 2d at 64. The Fifth District discussed the reasoning for this elevated burden of proof in Crigger:

> Because under Downing v. Bird prescriptive rights are gained by an adverse user asserting a right based on his own wrongdoing, the law does not favor the acquisition of prescriptive rights and requires a high burden as to allegations and proof in order to overcome historical and well-founded presumptions against wrongdoing.

436 So. 2d at 943.

The enunciated level of proof is consistent with the jurisprudential definition of clear and convincing evidence. See Goss v. Dunbar, 834 So. 2d 185, 187 (Fla. 2d DCA 2002) ("The plaintiff must prove this [adverse possession] cause of action, not by the greater weight of the evidence, but by 'clear and positive proof' or by 'clear and convincing evidence.' "); Bentz v. McDaniel, 872 So. 2d 978, 981-82 (Fla. 5th DCA 2004) (applying "clear and positive proof" and "clear and convincing proof" standards interchangeably in reviewing evidence of adverse possession); Lyndes v. Green, 325 P.3d 1225, 1229 (Mont. 2014) ("A party seeking to establish a prescriptive easement must prove, by clear and convincing evidence, that there was open, notorious, exclusive, adverse, continuous and uninterrupted use for five years."). Clear and convincing evidence or proof is an intermediate level of proof between the "preponderance of the evidence" standard and the "beyond a reasonable doubt" standard. It "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the

sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

> [T]he facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. (citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

III. ANALYSIS

With these rules in mind, we turn to the evidence presented at trial to determine whether the presumption of permissive use was overcome by clear and positive proof. In this case, as in many others, it is the element of adversity that is primarily in dispute, and it is Florida's presumption of permissive use that proves fatal to the Eilers' claim of prescriptive easement.[5]

The evidence shows that the disputed property was used as a common driveway by owners of the eastern and western parcels for over sixty years. However, such continuous and long-term open use is not enough—it must also be either exclusive or inconsistent with the owner's use and enjoyment of the land. See Guerard v. Roper, 385 So. 2d 718, 721 (Fla. 5th DCA 1980). "If the use of an alleged easement is not exclusive and not inconsistent with the rights of the owner of the land to its use and enjoyment, it would be presumed that such use is permissive rather than adverse.

[5]We decline the Eilers' invitation to rely on other states' laws to affirm the prescriptive easement. Florida's case law lends sufficient guidance for resolving this case; and many states do not share Florida's presumption of permissive use, and thus their case law is not on point.

Hence, such use will never ripen into easement." City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974).

Here, there is no dispute that the use of the driveway was shared, not exclusive. Thus, the Eilers were required to prove that their use of the disputed property was inconsistent with the owners' use or enjoyment thereof. See Guerard, 385 So. 2d at 721 ("The use in common with the owner is presumed to be in subordination of the owner's title and with her permission, and the burden is on the claimant to prove that the use is adverse." (citing Downing)); Gibson v. Buice, 394 So. 2d 451, 452 (Fla. 5th DCA 1981) ("Any use in common with the owner is presumed to be subordinate to the owner's title and with the owner's permission. The burden is on the claimant to show that the use is adverse.").

While none of the witnesses could recall prior owners giving express consent to use of their portion of the driveway, the evidence showed that the Danas and their predecessors allowed the Eilers and their predecessors to freely use the disputed property and that the driveway was used by both parties and their predecessors for the same common purpose.[6] Thus, we find there is evidence of implicit consent, supporting a presumption of permissive use. See Dan, 953 So. 2d at 642-43; compare Phelps, 629 So. 2d at 306 (reversing prescriptive easement where "there was at least implicit evidence of consent by the present and former owners of the land underlying Lemon Patch Road"), with Hunt Land Holding Co. v. Schramm, 121 So. 2d 697, 701 (Fla. 2d

[6]According to Mr. Eilers, he asked Mrs. Dibbs, then-owner of the western parcel, if the Eilers could record an easement over the portion of the driveway on her parcel. Mrs. Dibbs declined, saying there was no need because the owners of the parcels had jointly used the driveway since before the Dibbs purchased the property.

DCA 1960) (affirming prescriptive easement where owner presented no evidence to show that consent had been given and relied solely on the presumption of permissive use).[7]

Further, there was no evidence that the Eilers' use of the disputed property prevented the Danas or their predecessors from making use of the property as they desired. See Phelps, 629 So. 2d at 306 ("Although counsel for appellees represented that appellants were 'disallow[ed] the right to plant citrus trees' or make other use of the 15–foot strip, there was no showing appellants had ever attempted or desired to use this portion of their land for anything other than a road."). The Eilers presented no evidence of use of the property in a manner that was against the interest of, or injurious to, the Danas or their predecessors. See Tona-Rama, Inc., 294 So. 2d at 77 (concluding that no prescriptive easement was established where "[t]he use of the property by the public was not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property. Unless the owner loses something, the public could obtain no easement by prescription."); Guerard, 385 So. 2d at 721 ("[T]here is nothing to show that the use made by the appellee was inconsistent with the rights of the owner to her use and enjoyment of the land, which supports rather than overcomes the presumption that any such use is permissive.").

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[7]The Eilers argue that Hunt is the most persuasive Florida case in support of the finding of a prescriptive easement because Hunt also involved common use facts. However, Hunt is distinguishable in that the land owner offered no evidence that consent had been given, choosing to rely solely on the legal presumption of permissive use. Hunt, 121 So. 2d at 701. Further, Hunt makes a finding that the use was inconsistent with the rights of the owners without further discussion or elaboration, see id., and thus is of limited use in our analysis.

Though it appears that the trial court found evidence of interference in the fact that one car would have to move over some distance to allow another car to pass on the narrow paved portion of the driveway, the occasional "moving over" of the vehicles did not prevent the owners' use of the property as a driveway and is insufficient to establish clear and positive proof of adversity and overcome the permissive use presumption. Instances of moving over to allow another car to pass were far from a feature of the trial, and there was no evidence that this was a common occurrence or caused any injury, burden, or difficulty to the Danas or their predecessors.

The Eilers contend that their use of only this driveway to access their property requires a different result. Under the facts of this case, we disagree. It is undisputed that the property was consistently used as a driveway to access the Eilers' lot for over sixty years. While such evidence supports long-term, open, continuous use by the Eilers and their predecessors, under Florida law, they must still establish adversity. See Dan, 953 So. 2d at 642. The law has placed the burden on the claimant and protects the record title owner and those that may acquire the property in the future. Simply stated, the proof adduced is not clear and positive proof of adversity.

IV. CONCLUSION

In conclusion, we hold that the Eilers have failed to establish by clear and positive proof all the elements required for an award of a prescriptive easement. At best, the evidence of permission is in equipoise, as none of the witnesses could testify that an owner expressly granted or denied use of the disputed property. However, the owners made the same use of the disputed property, and thus the claimants' use was not inconsistent with the owners' use. All the evidence here is consistent with, and

reinforces, the existing presumption of permissive use. Under such facts, there is a lack of evidence of adversity, and the claimants have thus failed to overcome the presumption of permissive use afforded under Florida law.

The evidence sets forth a time where the property owners involved sought to get along and did not act to confront the status quo by undertaking conduct hostile to the owner. Obviously, the passage of time, change of circumstances, and change of ownership of the respective parcels brought an end to the status of neighborly consent and indulgence. If there is a moral to this story it is that Florida law favors titled owners and rights that appear in the public records that are properly recorded. Failing that, a buyer should follow the old notion of caveat emptor and seek to preserve its desires prior to purchase.

Reversed and remanded.

KELLY and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed September 18, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-0203
Lower Tribunal No. 12-43235

Jonathan Hullick,
Appellant,

vs.

Gibraltar Private Bank & Trust Company, and Steven D. Hayworth,
Appellees.

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

Weil Snyder Schweikert & Ravindran, P.A., and Ronald P. Weil, and Iva U. Ravindran; Joel S. Perwin, P.A., and Joel S. Perwin, for appellant.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., and Jose G. Sepulveda, Carlos J. Canino, and Julie Fishman Berkowitz; Wicker Smith O'Hara McCoy & Ford, P.A., and Dennis M. O'Hara, Alyssa M. Reiter, Lindsey A. Hicks, and Brandon J. Hechtman, for appellees.

Before SALTER, LOGUE, and LINDSEY, JJ.

LINDSEY, J.

Appellant Jonathan Hullick (Plaintiff below) appeals an order entering final summary judgment in favor of Appellee Steven Hayworth (Defendant below) on two counts of defamation per se. Hullick alleged that Hayworth, as Chief Executive Officer of Gibraltar Private Bank and Trust Company, made defamatory statements in front of Gibraltar's Board of Directors. Because Hullick failed to establish the essential element of publication to a third party, we affirm.

I. BACKGROUND[1]

In May 2007, Hayworth, former CEO, Executive President, and Chairman of Gibraltar's Board of Directors, hired Hullick to fill the recently-vacated Chief Operating Officer ("COO") position. Hullick's time with Gibraltar was, however, short-lived. In July 2007, Hullick wrote a memo in which he expressed concern over irregularities and other suspicious activity in a client's accounts. Over the next 15 months, Hullick reported his ongoing concerns to Hayworth, the Board of Directors, the Senior Managing Director, the Audit Committee, the Chief Risk Officer, the Bank Secrecy Act/Anti-Money Laundering Officer, and the Chief Credit Officer. In addition, Hullick reported his concerns regarding Senior Vice President John Harris,

[1] Because the specific facts establishing Hullick's defamation action are not at issue in this appeal, we need only provide a brief outline of the relevant factual background.

the Regional Market Manager at Gibraltar's Ft. Lauderdale branch, where the client's accounts were maintained. Hullick believed that Harris was aware of fraudulent activity in the accounts and was permitting it to continue. Conflict arose between Harris and Hullick, and Hullick was eventually terminated from his position as Gibraltar's COO.

Approximately two years later, Hullick filed the underlying action, alleging, inter alia, that Hayworth made multiple defamatory statements about him post-termination that destroyed his reputation in the banking community, making it difficult for him to find employment. Hullick further alleged Hayworth made these statements to the other members of Gibraltar's Board of Directors during a Board meeting. After numerous motions and orders from three different trial court judges, Hullick's twenty-count operative complaint was whittled down to just five counts: one count against Gibraltar for breach of contract and two counts each against Gibraltar and Hayworth for defamation per se.

Gibraltar and Hayworth filed motions for summary judgment, arguing that the element of publication was not established by the allegations in the Complaint based on this Court's holding in American Airlines, Inc. v. Geddes, 960 So. 2d 830 (Fla. 3d DCA 2007).[2] The prior trial court judge disagreed and denied the motions,

[2] Hullick, relying on Southern Bell Telephone & Telegraph Co. v. Barnes, 443 So. 2d 1085 (Fla. 3d DCA 1984), argues that under certain circumstances intra-corporate communication can be actionable. However, because Barnes, a brief per curiam

allowing the case to go forward.[3] Thereafter, Gibraltar and Hayworth renewed their motions for summary judgment with the successor trial judge, asserting the same grounds as previously argued. The trial court agreed and granted summary judgment in favor of Hayworth on both defamation counts (Counts XII and XVI) because Hullick had failed to establish the necessary element of publication to a third party.

This timely appeal followed.[4]

II. STANDARD OF REVIEW

When there are no disputed factual issues, the granting of summary judgment presents a pure question of law and is subject to the *de novo* standard of review. Bosem v. Musa Holdings, Inc., 46 So. 3d 42, 44 (Fla. 2010) ("Because this is a pure question of law, our standard of review is de novo."); So. Baptist Hosp. of Fla., Inc. v. Welker, 908 So. 2d 317, 319 (Fla. 2005); Siegel v. Tower Hill Signature Ins. Co., 225 So. 3d 974 (Fla. 3d DCA 2017).

III. ANALYSIS

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opinion, contains no facts, limited analysis, and involved an appeal from a jury verdict, we cannot glean its precedential value, if any, with respect to the instant appeal.

[3] Gibraltar and Hayworth moved to disqualify the trial court judge based on comments made at the motion for summary judgment hearing. The trial court granted the motion.

[4] The order on appeal is final only as to Hayworth because there are no remaining counts against Hayworth below. However, Gibraltar is properly a party to this appeal. See Fla. R. App. P. 9.020(g) (defining "Appellee" as "[e]very party in the proceeding in the lower tribunal other than an appellant").

The issue before us is whether publication to a third party occurred when Hayworth allegedly made defamatory statements as the CEO and Chairman of Gibraltar's Board of Directors to other members of the Board. It is undisputed that an essential element of a defamation claim is publication to a third party.[5] See Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc., 447 So. 2d 330, 331 (Fla. 3d DCA 1984). "A defamatory statement does not become actionable . . . until it is published or communicated to a third person; statements made to the person alleging the defamation do not qualify." Geddes, 960 So. 2d at 833 (Fla. 3d DCA 2007) (citing American Ideal Mgmt., Inc. v. Dale Village, Inc., 567 So. 2d 497, 498 (Fla. 4th DCA 1990); Granda–Centeno v. Lara, 489 So. 2d 142, 143 (Fla. 3d DCA 1986)).

In Geddes, this Court explained that, with respect to corporations, "statements made to corporate executive or managerial employees of that entity are, in effect, being made to the corporation itself, and thus lack the essential element of publication." 960 So. 2d at 833; see also Lopez v. Ingram Micro, Inc., 10 Fla. L. Weekly D635 (S.D. Fla. Mar. 18, 1997) ("[S]tatements 'made to a corporate

[5] The five required elements for defamation are: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." Jews For Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008).

executive or managerial employee . . . are, in effect, being made . . . to the corporation itself . . . .'" (quoting Hicks & Grayson, Inc., 447 So. 2d at 331)).

Gibraltar is a Federal Savings Association ("FSA"). As such, federal regulations require that "[a] majority of the directors must not be salaried officers or employees of the savings association or of any subsidiary thereof." 12 C.F.R. § 163.33(a)(1)(i). Hullick argues that because Gibraltar's Board of Directors is comprised of a majority of non-employee directors, Geddes does not apply. We disagree.

In Hoch v. Loren, 273 So. 3d 56, 57 (Fla. 4th DCA 2019), the Fourth District explained the rationale behind treating certain intra-corporate communications, even though apparently made to third persons, as not published for the purposes of a defamation claim: "To reach this conclusion, courts have employed the legal fiction that the party hearing or seeing the purported defamation is so closely connected with the potential defamation plaintiff or defendant that they merge into a single entity, so there is no publication to a 'third person' necessary to the cause of action."

Here, although Gibraltar's Board includes a majority of non-employee directors, these directors and Hayworth, the former CEO, were undoubtedly so closely connected with Gibraltar that communications among the Board and Hayworth were tantamount to the "corporation talking to itself." See Geddes, 960 So. 2d at 834. This conclusion is supported by the federal regulations governing

FSAs, which require non-employee directors to form an integral part of the FSA corporate structure. See 12 C.F.R. § 163.33(a)(1)(i).

Further, Florida law has long considered a board of directors to be a corporation's management and has provided that the acts of a corporation's board of directors are the acts of the corporation itself. See, e.g., Mease v. Warm Mineral Springs, Inc., 128 So. 2d 174, 179 (Fla. 2d DCA 1961) ("The board of directors of a corporation represents the corporate body, and the directors are entrusted with authority to conduct and manage the corporate affairs."); Jacksonville Am. Pub. Co. v. Jacksonville Paper Co., 197 So. 672, 677 (Fla. 1940) (corporation's business is "managed by a president, a board of directors . . . ."); Schein v. Caesar's World, Inc., 491 F.2d 17, 20 (5th Cir. 1974) ("[I]t is to be noted that the management of corporate business is vested in the directors of a corporation….") (applying Florida law); 19 C.J.S. Corporations § 538 ("A corporation's board of directors is the governing body of the corporation . . . the board . . . is vested with the control and management of the corporation, including the management of corporate business and affairs, the management of corporate property or assets, and litigation authority. All corporate power is vested in the board of directors . . . ."). We therefore conclude that the rationale underlying the rule set forth in Geddes is equally applicable here. Consequently, because federal regulations require a majority of Gibraltar's Board to be composed of non-employees, communications between Hayworth and Gibraltar's

non-employee directors is subject to the same no-publication rule set forth in Geddes.

IV. CONCLUSION

Because Hayworth's alleged defamatory statements made to Gibraltar's Board of Directors do not constitute publication to a third party, the trial court was correct in granting summary judgment as to Hullick's claims against Hayworth for defamation.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed September 18, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1669
Lower Tribunal No. 15-30066

Eluime H. Baker, a/k/a Eluine H. Baker,
Appellant,

vs.

The Courts at Bayshore I Condominium Association, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Robert Flavell (Orlando), for appellant.

Association Law Group, P.L., and Douglas H. Stein, for appellee.

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

EMAS, C.J.

INTRODUCTION

Eluime H. Baker ("Baker"), appeals from an order correcting a scrivener's error in the final judgment of foreclosure entered against Baker and in favor of The Courts at Bayshore I Condominium Association, Inc. ("the Association"). Because the scrivener's error did not exist prior to entry of the final judgment, but instead first occurred upon entry of the final judgment itself, we affirm the trial court's order correcting the final judgment pursuant to Florida Rule of Civil Procedure 1.540(a).

FACTS AND PROCEDURAL BACKGROUND

Baker was the owner of a condominium unit and a member of the Association. In December 2015, the Association filed a complaint seeking to foreclose on a statutory claim of lien arising from Baker's failure to pay her share of condominium assessments. The Association attached, as exhibits to the complaint, the declaration of condominium, a duly recorded claim of lien, and a notice of lis pendens. The complaint, the declaration of condominium, the claim of lien, and the notice of lis pendens each contained the correct legal description of the property at issue. When Baker failed to respond to the complaint, the Association moved for default, and later for summary judgment, both of which the trial court granted.

The final summary judgment, however, while containing the correct street address for the property, recited an incorrect legal description.[1] This erroneous legal

[1] The correct legal description of the property:

description was carried forward to the certificates of sale and title, as well as to the subsequent order granting the third-party purchaser's motion for writ of possession.

Following the sale and issuance of the certificate of title, the Association moved for attorney's fees. Baker moved for disbursement of the remaining proceeds of the sale (including disbursement of the surplus to Baker). The trial court granted both motions and disbursed the remaining surplus of the sales proceeds ($92,084.98) to Baker.

Thereafter, the third-party purchaser moved to amend the certificate of title to correct what it described as a scrivener's error in the legal description. The trial court granted the motion and amended the certificate of title accordingly. Baker timely moved for rehearing, contending that the error in the legal description was not

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> CONDOMINIUM UNIT NO. 2, BUILDING NO. 23, OF THE COURTS AT BAYSHORE **I**, ACCORDING TO THE DECLARATIONS OF CONDOMINIUM THEREOF, AS RECORDED IN OFFICAL RECORDS BOOK 25621, AT PAGE **2372**, AND ALL AMENDMENTS THERETO, RECORDED IN THE PUBLIC RECORDS OF MIAMI- DADE COUNTY, FLORIDA. (Emphasis added.)

The incorrect legal description of the property:

> CONDOMINIUM UNIT NO. 2, BUILDING NO. 23, OF THE COURTS AT BAYSHORE **II,** ACCORDING TO THE DECLARATIONS OF CONDOMINIUM THEREOF, AS RECORDED IN OFFICAL RECORDS BOOK 25621, AT PAGE **2486,** AND ALL AMENDMENTS THERETO, RECORDED IN THE PUBLIC RECORDS OF MIAMI- DADE COUNTY, FLORIDA. (Emphasis added.)

merely a scrivener's error, but a material error. The trial court did not rule on Baker's motion for rehearing.

After the amended certificate of title was issued, the Association moved to correct the same scrivener's error contained in the final judgment. The trial court granted the motion and issued an order correcting the legal description recited in the final judgment. Baker filed a motion for rehearing, which the trial court denied, and this appeal followed.

DISCUSSION

Baker contends that the error in the legal description was not a mere scrivener's error, but a material error that required the trial court to vacate the final judgment, as well as the certificate of title and certificate of sale. We hold that the trial court did not abuse its discretion in amending the final judgment (as well as the certificate of title) to correct a scrivener's error. See Bazzichelli v. Deutsche Bank Trust Co. Ams., 274 So. 3d 414 (Fla. 3d DCA 2019) (holding trial court properly amended final judgment and certificate of title to correct scrivener's error); Keller v. Belcher, 256 So. 2d 561, 563 (Fla. 3d DCA 1971) (observing that "clerical mistakes include only errors or mistakes arising from accidental slip or omission and not errors or mistakes in the substance of what is decided by the judgment or order").

We recognize those decisions holding that errors in the legal description of property, contained in a deed or mortgage existing prior to entry of the final

judgment, cannot be remedied by simply amending or correcting the final judgment.[2] However, those decisions are distinguishable because in the present case, the error in the legal description occurred **upon** entry of the final judgment itself, and did not exist in a deed or mortgage (or other document conveying or encumbering the property) **prior** to entry of the final judgment.

In reaching our conclusion that the trial court properly amended the final judgment, we adopt the reasoning of our sister court in Rodgers v. Deutsch Bank Nat'l Trust Co., 256 So. 3d 885 (Fla. 4th DCA 2018). Rodgers involved a mortgage foreclosure on real property. The mortgage and the complaint contained an accurate legal description of the property. However, the final judgment contained errors in the legal description of the property, and this error was carried forward into the notice of foreclosure sale as well as the certificate of title issued following the sale.

[2] See Fed. Nat. Mortg. Ass'n v. Sanchez, 187 So. 3d 341, 343 (Fla. 4th DCA 2016) (holding in such case that the trial court must first vacate the judgment, the sale and any certificates of title or sale); Caddy v. Wells Fargo Bank, N.A., 198 So. 3d 1149, 1150 (Fla. 4th DCA 2016); Wells Fargo Bank, N.A. v. Giesel, 155 So. 3d 411, 414 (Fla. 1st DCA 2014); Lucas v. Barnett Bank of Lee Cty., 705 So. 2d 115, 116 (Fla. 2d DCA 1998). "[W]hen a mortgage misdescribes the property intended to be mortgaged the mistake may be corrected by a proper proceeding before judicial foreclosure; but, if the mistake has been carried into a bill, filed for the purpose of foreclosing such mortgage, into the decree ordering foreclosure, into the advertisement, and into the deed, the purchaser at such foreclosure sale cannot maintain a bill in equity to correct the description of the land as contained in the mortgage, in the decree, and in the deed." Fisher v. Villamil, 56 So. 559, 561-62 (Fla. 1911).

The bank moved to amend the final judgment, but that motion was never heard. Rodgers moved to vacate the final judgment, contending that the erroneous legal description in the final judgment required the final judgment be vacated and the foreclosure process begun anew. The trial court denied Rodgers' motion to vacate, and the Fourth District affirmed, distinguishing its earlier decision in Caddy v. Wells Fargo Bank, N.A., 198 So. 3d 1149, (Fla. 4th DCA 2016):

> In Caddy[], we determined that the trial court erred in denying the mortgagor's motion to vacate the final judgment which contained a single numerical error ***in the deed description*** that was carried into the amended complaint and consent judgment, even though the correct legal description was used in the advertisement for the sale. Id. at 1150. We concluded that, "[b]ecause the erroneous legal description was discovered after the final judgment and foreclosure sale, the court could not simply correct the legal description in the judgment and certificate of title. 'Rather, reformation required vacating the final judgment, judicial sale, and issuance of title.'" Id. (quoting Fed. Nat'l Mortg. Ass'n v. Sanchez, 187 So. 3d 341, 343 (Fla. 4th DCA 2016)).
>
> Unlike the situation in Caddy, here, the error ***did not occur prior to the entry of the final judgment; instead the error first occurred upon the entry of the judgment itself*.** This factual distinction makes principles of law discussed in Caddy and the cases cited therein inapplicable. The situation in this case is arguably more in line with the case law discussing errors covered by Florida Rule of Civil Procedure 1.540(a), rather than rule 1.540(b).

Rodgers, 256 So. 3d at 888 (emphasis added).

CONCLUSION

Here—as in Rodgers— because the error in the legal description did not exist in a deed or mortgage (or other document conveying or encumbering the property)

prior to entry of the final judgment, but instead first occurred upon entry of the final judgment itself, the trial court properly corrected the scrivener's error in the final judgment pursuant to Florida Rule of Civil Procedure 1.540(a).

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EVERGLADES LAW CENTER, INC., MAGGY HURCHALLA, and **DONNA MELZER,**
Appellants,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, a public corporation of the State of Florida, **MARTIN COUNTY,** a political subdivision of the State of Florida, **LAKE POINT PHASE I, LLC,** a Florida limited liability company, and **LAKE POINT PHASE II, LLC,** a Florida limited liability company,
Appellees.

Nos. 4D18-1220, 4D18-1519 & 4D18-2124

[September 18, 2019]

Consolidated appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; William L. Roby, Judge; L.T. Case Nos. 43-2017-CA-001098 and 43-2018-CA-000108.

Marcy I. LaHart of Marcy I. LaHart, P.A., Micanopy, for appellant Everglades Law Center, Inc.

Virginia P. Sherlock of Littman, Sherlock & Heims, P.A., Stuart, for appellant Maggy Hurchalla.

Donna Sutter Melzer, Palm City, pro se.

Thomas E. Warner and Dean A. Morande of Carlton Fields Jorden Burt, P.A., West Palm Beach, for Amicus Curiae First Amendment Foundation, Inc.

Brian J. Accardo, James W. Sherman, Judith W. Levine and Laura E. Scala-Olympio of South Florida Water Management District, West Palm Beach, for appellee South Florida Water Management District.

Meagan L. Logan of Marks Gray, P.A., Jacksonville, and Kansas R. Gooden of Boyd & Jenerette, P.A., Jacksonville, for Amicus Curiae Florida Defense Lawyers Association.

Richard Grosso of Richard Grosso, P.A., Davie, for appellants Everglades Law Center, Inc., and Maggy Hurchalla.

Daniel S. Melzer, Palm City, for appellee Donna Melzer.

CONNER, J.

We address a matter of first impression involving shade meetings[1] and the public's interest in protecting government in the sunshine and mediation communications. Reading applicable provisions of the Florida Constitution and statutes in pari materia, we conclude that mediation communications disclosed by a governmental attorney during a shade meeting are to be redacted from the transcript of the shade meeting when it becomes a public record.

Everglades Law Center, Inc. ("ELC"), Maggy Hurchalla ("Hurchalla"), and Donna Sutter Melzer ("Melzer") (collectively, "Appellants"), appeal several orders entered by the trial court involving the trial court's determination that mediation communications are exempt from disclosure with reference to the transcript of a shade meeting conducted by the South Florida Water Management District ("the District"). Appellants also appeal the trial court's order denying their motions to dismiss for improper venue. We affirm without discussion the trial court's venue ruling. We also affirm the trial court's determination that mediation communications are subject to redaction from the shade meeting transcript and explain our analysis.[2] However, the trial court erred in denying Appellants' petition for mandamus to compel the disclosure of the full shade meeting transcript without conducting an in camera review of the transcript to determine if

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[1] Meetings held between a governmental board and its attorney pursuant to section 286.011(8) to discuss settlement and litigation strategy, which are not open to the public, are commonly referred to as "shade meetings." *Anderson v. City of St. Pete Beach*, 161 So. 3d 548, 551 n.2 (Fla. 2d DCA 2014).

[2] Appellants also raise an issue about technical compliance with section 286.011(8), Florida Statutes (2017), in that they had not been provided with a redacted transcript of the closed meeting (showing compliance as to who was present during the closed meeting and the time period of the meeting). However, because Appellants stipulated that the trial court could rule without reviewing the meeting transcript and because the transcript is neither in the trial court record nor the appellate record, we do not reach the issue. *See Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is 'invited,' . . . the appellate court will not consider the error a basis for reversal."); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.").

redactions were appropriate. Thus, we affirm in part, reverse in part, and remand the case for further proceedings consistent with this opinion.

Background

Lake Point Phase I, LLC and Lake Point Phase II, LLC (collectively, "Lake Point"), the District, and Martin County entered into a partnership for an environmental project. After contract disputes arose, Lake Point brought suit against the District, Martin County, and Hurchalla, claiming damages ("the Lake Point Litigation"). During the course of that litigation, the trial court ordered the parties to attend mediation.

The District filed a certification of authority, naming its attorney, Brian Accardo, as its representative at mediation, certifying that he "ha[d] full authority to negotiate on behalf of the District and to recommend settlement to the District's Governing Board [("the Board")]." Several mediation sessions were conducted by the mediator with all of the parties. Eventually, Lake Point and the District developed a settlement agreement at mediation ("the MSA").

The District held duly noticed meetings that included closed and confidential attorney-client sessions in accordance with section 286.011(8), Florida Statutes (2017). At issue in this case is one specific meeting that occurred on August 23, 2017 ("the Shade Meeting"). An open meeting immediately preceded the Shade Meeting. When the Board convened the Shade Meeting, a certified court reporter recorded the entire closed-door session, as required by statute.

According to the minutes of the public portion of the meeting, only the Board members and two attorneys representing the District in the Lake Point Litigation were present during the Shade Meeting. At the conclusion of the Shade Meeting, the Board immediately returned to an open meeting, whereupon the chair solicited a motion to "accept or reject the terms of the settlement," referring to the discussion during the Shade Meeting. The Board approved the MSA at that open meeting.

Subsequently, Lake Point and the District entered a joint stipulation for dismissal of their respective claims against one another with prejudice. Eventually, Martin County and Lake Point entered into a separate mediated settlement agreement, resulting in Martin County being dismissed from the litigation. The litigation between Lake Point and Hurchalla continued to a jury trial.

Notably, ELC, a nonprofit law firm dedicated to representing the public

interest in environmental and land use matters, became interested in the Lake Point Litigation. ELC strives to enhance governmental transparency regarding governmental decisions impacting the environment.

After it was dismissed from the litigation, the District filed an action for declaratory relief, naming ELC, Martin County, Hurchalla, and Lake Point as defendants. The District alleged that shortly after it approved the MSA, Appellants made a public records request for the Shade Meeting transcript. The District requested the trial court enter a declaratory judgment that it was not required to produce and disclose the Shade Meeting transcript.

ELC filed its answer and also filed a counterclaim in the form of "a petition for writ of mandamus to enforce the provisions of Chapter 119, Florida Statutes." ELC requested that the trial court enter a writ requiring the District to produce the full Shade Meeting transcript. Melzer filed a similar counterclaim seeking disclosure of the full transcript.

At the hearing on ELC's petition for writ of mandamus, the District argued that the Shade Meeting transcript was exempt from disclosure pursuant to section 44.102(3), Florida Statutes (2017), which states: "All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119." ELC argued that the statements made during the Shade Meeting and the transcript were not "written communications" and the statements were not made in a "mediation proceeding." At no time during the proceedings below did Appellants ask the trial court to conduct an in camera review of the Shade Meeting transcript. The transcript was not filed in the trial court and is not part of the appellate record.

The trial court entered an order denying ELC's petition for writ of mandamus and entering final judgment on ELC's counterclaim. In its written order, the trial court noted that "because the parties agreed that this Court was not required to take evidence, the Court relies on the representations of counsel," and found that "as a matter of law, mediation communications reflected in the transcripts are exempt from disclosure under Chapter 119."

Based on Appellants' stipulation that the trial court's ruling as to the petition for mandamus was determinative of the declaratory judgment actions, the trial court entered final judgment in favor of the District on all claims and counterclaims filed by Appellants. The Appellants gave notice of appeal.

Appellate Analysis

In support of their contention that they are entitled to the full transcript of the Shade Meeting, Appellants rely on section 286.011(8), Florida Statutes (2017). Section 286.011(8) provides for a limited exception to the public meeting requirements of Florida's Sunshine Law. Appellants contend that section 286.011(8) does not contain an explicit exception for mediation communications. Appellants further contend that there is no provision of chapter 119, Florida's Public Records Act, which permanently exempts the disclosure of the Shade Meeting transcript. Additionally, Appellants argue that the trial court erroneously interpreted statutes pertaining to mediation to conclude that there is a public records exemption from disclosure of the Shade Meeting transcript. In Appellants' view, the trial court impermissibly expanded the temporary delay for the public to have access to the full Shade Meeting transcript, as contemplated by section 286.011(8), into a permanent delay.

The District contends that the statutory provisions protecting the confidentiality of mediation communications are not at odds with the provisions of section 286.011(8). The District relies primarily on section 44.102(3), Florida Statutes, in arguing that the trial court properly determined that mediation communications are not to be disclosed to the public in a Shade Meeting transcript. The trial court relied upon section 44.102(3), as well as section 44.405(1), Florida Statutes, in denying the relief sought by Appellants.

Also important to the analysis are the provisions of article I, section 24 of the Florida Constitution. We proceed with a discussion of the pertinent constitutional and statutory provisions.

Florida's Sunshine Law and Section 286.011(8)

"Originally codified by statute, the Sunshine Law . . . became part of the Florida Constitution." *Monroe Cty. v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994). In November 1992, the Florida Constitution was amended to add article I, section 24. The constitutional amendment "elevated the public's right to government in the sunshine to constitutional proportions." *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998). Article I, section 24(b), states:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business

> of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Art. I, § 24(b), Fla. Const.

Especially important to our analysis, article I, section 24(d) states that "[a]ll laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed." Art. I, § 24(d), Fla. Const.

Section 286.011, commonly referred to as the "Sunshine Law," is the primary statute that implements article I, section 24(b). Thus, section 286.011(1), requires:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

§ 286.011(1), Fla. Stat. (2017).

"Because section 286.011 'was enacted in the public interest to protect the public from "closed door" politics . . . the law must be broadly construed to effect its remedial and protective purpose.'" *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010) (alteration in original) (quoting *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983)). Our supreme court has also stated that "[t]he statute should be construed so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). Because the Sunshine Law must be liberally construed in favor of open government, "exemptions should be narrowly construed." *Brown v. Denton*, 152 So. 3d 8, 11 (Fla. 1st DCA 2014).

Section 286.011(8) provides an exemption to the open meeting requirement of the Sunshine Law under certain conditions. *See Zorc*, 722 So. 2d at 896. Section 286.011(8) states:

> (8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:
>
> (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
>
> (b) *The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures*.
>
> (c) The *entire session shall be recorded by a certified court reporter*. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes *shall be fully transcribed and filed* with the entity's clerk within a reasonable time after the meeting.
>
> (d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
>
> (e) *The transcript shall be made part of the public record upon conclusion of the litigation*.

§ 286.011(8), Fla. Stat. (emphases added). As the statute provides, the discussions during the closed meeting are confined to settlement negotiations or strategy sessions related to litigation expenditures. *Id.*

The subsection (8)(e) requirement that transcripts of shade meetings "shall be made part of the *public record*" is a focal point of our analysis. We deem it important to note that section 286.011(8)(e) provides for a significant delay between a shade meeting and when the transcript of the meeting becomes a public record. The language of section 286.011(8)(e) leads to our discussion of the Public Records Act.

Florida Public Records Act – Chapter 119, Florida Statutes

Similar to the Sunshine Law, the Public Records Act was added to the Florida Constitution, and is also contained in article I, section 24 as subsection (a), which states:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, *except with respect to records exempted pursuant to this section* or specifically made confidential by this Constitution.

Art. I, § 24(a), Fla. Const. (emphasis added). The constitutional provision regarding open government and public records has been primarily implemented by chapter 119, Florida Statutes.

As stated early on in chapter 119, "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." § 119.01(1), Fla. Stat. (2017). Consistent with this policy, "the purpose of the Public Records Act 'is to open public records to allow Florida's citizens to discover the actions of their government.'" *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010) (quoting *Christy v. Palm Beach Cty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997)).

Also similar to the Sunshine Law, "the public records law is to be construed 'liberally in favor of the state's policy of open government.'" *Morris Publ'g Grp., LLC v. Fla. Dep't of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013) (quoting *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009)). "If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure." *Id.* Important to our analysis is that the Public Records Act, similar to the Sunshine Law, is subject to the provisions of article I, section 24(d), which provides exemptions existing prior to July 1, 1993, that remain in place until repealed. Art. I, §§ 24(c), (d), Fla. Const.

Mediation Communication Confidentiality Exemption – Sections 44.102(3) and 44.405(1)

The trial court relied on sections 44.405(1) and 44.102(3) as the statutory bases for exempting the Shade Meeting transcript from disclosure. Section 44.405(1) states: "(1) Except as provided in this section, *all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel.*" § 44.405(1), Fla. Stat. (2017) (emphasis added). Section 44.102(3) states: "All *written communications* in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119." § 44.102(3), Fla. Stat. (2017) (emphasis added). Section 44.102(3) is a particularly key provision, since it *expressly* provides an exemption from chapter 119.

A transcript is a memorialization of oral communications; once memorialized, the exchange of ideas, information, and assertions become a written communication. Thus, to the extent the shade meeting transcript memorializes mediation communications, such portions of the transcript constitute a mediation communication within the meaning of sections 44.403(1), 44.102(3), and 44.405(1).

The Trial Court Properly Harmonized Statutory Provisions.

Appellants argue that the statutory provisions protecting the confidentiality of mediation communications do not create an exemption to the disclosure of the full Shade Meeting transcript because there is no exemption under section 286.011 regarding mediation. However, that argument ignores the language of the Florida Constitution in article I, section 24(d), which authorizes exemptions from open public meetings and access to public records by statutory exemptions existing before July 1, 1993.[3] More specifically, the argument ignores the status of the law, according to the chapter laws history under section 44.102. In 1990, the latest revision prior to 1993, the legislature renumbered section 44.302 as section 44.102, Florida Statutes. *See* Ch. 90-188, § 3, Laws of Fla. As amended by chapter law 90-188, section 44.102(3) provided:

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[3] We note that the hearing transcript on Appellants' petition reflects that the trial court referred to article I, section 24(c), which provides for exemptions to the Sunshine Law and the Public Records Act created after July 1, 1993. Nonetheless, the trial court correctly understood that constitutional provisions control the analysis.

> Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and *to prevent* any person present at the proceeding from disclosing, communications made during such proceeding. *Notwithstanding the provisions of s. 119.14*, all oral or *written communications* in a mediation proceeding, other than an executed settlement agreement, *shall be exempt from the requirements of chapter 119 and shall be confidential* and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

§ 44.102(3), Fla. Stat. (1990) (emphases added). What is critically significant is that, although section 44.102(3) has been substantially rewritten since 1990, *the core provision* ("[a]ll written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119") *has not been repealed*. Thus, we conclude, as a matter of interpreting the constitutional provision for government in the sunshine and the statutes implementing it, the voters and the legislature intended mediation communications in written form to be exempt from public disclosure.

Additionally, we interpret the provisions of the Mediation Confidentiality and Privilege Act, adopted in 2004, to implement the language in the 1990 version of section 44.102(3) that "[e]ach party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and *to prevent* any person present at the proceeding from disclosing, communications made during such proceeding." § 44.102(3), Fla. Stat. (1990) (emphasis added).

Based on the language of article I, section 24(d), we conclude the trial court properly determined that sections 44.102(3) and 44.405(1) are not inconsistent with the provisions of section 286.011(8). As we said in *Barnett v. Antonacci*, 122 So. 3d 400, 404 (2013),

> When reviewing constitutional provisions, a court "'follows principles parallel to those of statutory interpretation.'" *Lewis v. Leon Cnty.*, 73 So. 3d 151, 153 (Fla. 2011) (quoting *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004)). First, Florida courts "must examine the actual language used in the constitution." *Id.* (citing *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 140 (Fla. 2008); *Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)). "If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written,

> and courts do not turn to rules of constitutional construction." *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) (citing *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986)).
>
> "If the explicit language is ambiguous or does not address the exact issue before the court, the court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters." *Id.* (citing *Crist*, 978 So. 2d at 140). "*It is a fundamental rule of construction that, if possible, amendments to the Constitution should be construed so as to harmonize with other constitutional provisions. . . .*" *State v. Div. of Bond Fin. of Dep't of Gen. Servs.*, 278 So. 2d 614, 617 (Fla. 1973).

Id. (emphasis added). Moreover, as noted by our supreme court in *In re Advisory Opinion of the Governor, Appointment of County Commissioners, Dade County*, 313 So. 2d 697 (Fla. 1975):

> This Court has consistently held that the Constitution shall be construed in such a manner as to give effect to every clause and every part thereof. Every provision is inserted for a definite purpose and all sections and provisions of the Constitution must be construed in par[i] materia.

Additionally, our supreme court has held that

> [t]he fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d 134, 140 (Fla. 2008) (quoting *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So. 2d 492, 501 (Fla. 2003)) (emphasis omitted). The court has also said that a constitutional provision should be "construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996).

Because section 286.011(8) was passed after the voters approved article I, section 24(d), and several years after statutes were enacted protecting the confidentiality of mediation communications,

> [i]t is axiomatic, [] that the courts must presume that statutes are passed with knowledge of prior existing statutes and where possible, it is the duty of the courts to favor a construction that gives a field of operation to all rather than construe one statute as being meaningless or repealed by implication. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978); *Woodgate Dev. Corp. v. Hamilton Invest. Trust*, 351 So. 2d 14, 16 (Fla. 1977). Therefore, whenever possible, courts must attempt to harmonize and reconcile two different statutes to preserve the force and effect of each. *See Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (stating that "[t]his follows the general rule that the legislature does not intend 'to enact purposeless and therefore useless legislation.'") (citation omitted). There must be hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes. *See Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064, 1068 (Fla. 1995).

Agency for Health Care Admin. v. In re Estate of Johnson, 743 So. 2d 83, 86-87 (Fla. 3d DCA 1999).

Noting the principle that constitutional and statutory provisions must be read in pari materia in a way to harmonize the provisions of each, we point out that sections 286.011(8)(c) and (e), relating to the creation of a shade meeting transcript, must be considered together with section 286.0105, Florida Statutes (2017), which provides:

> Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, *if a person decides to appeal any decision made by the board*, agency, or commission with respect to any matter considered at such meeting or hearing, *he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made*, which record includes the testimony and evidence upon which the appeal is to be based.

§ 286.0105, Fla. Stat. (emphasis added). Section 286.0105 has been in effect since 1988, indicating that the legislature understood the importance of a verbatim record for appellate review of governmental board decisions when it adopted the transcript requirement for shade meetings.

We also note that section 286.011(8) was not passed until after the voters approved article I, section 24. It is significant that the statutory provisions protecting the confidentiality of mediation communications were in effect for several years before the voters approved article I, section 24. In contrast, section 286.011(8) became law on May 15, 1993, but was not effective until June 30, 1993, *one day* before the grandfathered exemptions under article I, section 24(d) closed. *See* Ch. 93-232, § 4, Laws of Fla.

Appellants contend that Attorney General Opinion 96-75 ("AGO 96-75") is persuasive authority for resolution of this appeal. AGO 96-75 deals with the issue of protecting the confidentiality and privacy of an *individual*'s medical record in the context of a workman's compensation claim. Op. Att'y Gen. Fla. 96-75 (1996). Appellants point to the language in AGO 96-75 that

> [t]he participants in such discussions [during a shade meeting] under these circumstances, therefore, should take precautions to protect the confidentiality of an employee's medical reports and condition such that when the transcript of the closed-door meeting is made a part of the public record, the privacy of the employee will not be breached.

Id. Recognizing that it is problematic for a governing board to make a decision as to whether to accept, offer, or reject a settlement proposal without having information contained in mediation communications, Appellants argued at oral argument that the appropriate solution would be for the government's attorney to speak privately and individually with each board member about mediation communications prior to the shade meeting.

However, Appellant's attempted application of AGO 96-75 as offering a solution is simply untenable. Aside from the practical problem of how to assure each board member hears the same information, such an approach deprives the board of the collective benefit of exchanging ideas and asking questions about mediation communications that build upon questions asked by other board members, in order to reach a collaborative decision. Additionally, such an approach inappropriately sidesteps the requirement

to record important communications that would be essential to the collaborative process when a governing board decides whether to settle a case. More importantly, AGO 96-75 addresses the protection of confidentiality and privacy of an *individual's* medical record in the context of a workman's compensation claim. Op. Att'y Gen. Fla. 96-75 (1996). It does not address the confidentiality of mediation communications involving information regarding *multiple* persons. *Id.*

Error by Failing to Conduct an In Camera Review

Even though the trial court correctly harmonized the statutory provisions protecting the confidentiality of mediation communications with the requirements of section 286.011(8), the trial court was led astray by the parties' agreement that an in camera review of the transcript was not needed.

> When, as in the instant case, certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an *in camera* inspection.

Walton v. Dugger, 634 So. 2d 1059, 1061-62 (Fla. 1993). As stated by the Second District in *Gonzalez v. State*, 240 So. 3d 99 (Fla. 2d DCA 2018),

> In camera review affords the trial judge an opportunity to "properly determine if the document is, in fact, subject to a public records disclosure." [] That is, without conducting an in camera inspection of the requested [compact discs], the circuit court could not conclude that their contents are exempt from disclosure under section 119.071(3)(a)(2) or section 281.301; nor could it determine whether redaction was possible.

Id. at 101.

In the context of attorney-client privilege, we have held that when the privilege is asserted, the party claiming the privilege is entitled to an in camera review of the documents by the trial court prior to disclosure. *American Airlines, Inc. v. Cimino*, 44 Fla. L. Weekly D1495 (Fla. 4th DCA June 12, 2019); *Alliant Ins. Services, Inc. v. Riemer Ins. Group*, 22 So. 3d 779, 781 (Fla. 4th DCA 2009). Confidentiality is the core value protected by both the attorney-client privilege and the statutes protecting mediation

communications. Given the importance of protecting the Sunshine Law, the Public Records Act, and mediation confidentiality, we hold that it is fundamental error for a trial court to rule on an exemption to public access to the full shade meeting transcript by redacting mediation communications without conducting an in camera review of the transcript to determine if the claimed exemption applies.

Conclusion

We conclude that the trial court properly applied constitutional and statutory provisions and correctly ruled that the statutory mediation communication exemption under sections 44.102(3) and 44.405(1) precluded the disclosure of the full Shade Meeting transcript under review. We further affirm the trial court's ruling that the exemption is permanent and not temporary. However, the trial court erred in denying the petition for writ of mandamus without conducting an in camera review of the transcript to determine if redactions of claimed mediation communications are appropriate. Thus, we reverse the final judgment and remand for the trial court to conduct the required in camera review of the full Shade Meeting transcript to assess whether redactions of mediation communications proposed by the District have been appropriately applied.

Affirmed in part, reversed in part, and remanded with instructions.

DAMOORGIAN and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ANAMARIE M. SCHROEDER a/k/a **ANAMARIA M. SCHROEDER** a/k/a **ANAMARIE SCHROEDER** a/k/a **ANAMARIA SCHROEDER** a/k/a **ANA SCHROEDER,**
Appellant,

v.

MTGLQ INVESTORS, L.P.,
Appellee.

No. 4D18-3177

[September 18, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barry J. Stone, Senior Judge; L.T. Case No. 06-2016-CA-003170.

Bruce K. Herman of The Herman Law Group, P.A., Fort Lauderdale, for appellant.

Christophal C.K. Hellewell, Chase A. Berger and Tara L. Rosenfeld of Ghidotti | Berger LLP, Miami, for appellee.

CONNER, J.

Anamarie M. Schroeder ("Appellant") appeals the trial court's final judgment of foreclosure entered in favor of MTGLQ Investors, L.P. ("the lender"). Because the required documentary stamp and intangible taxes were not paid on a portion of the loan enforced by the judgment, we reverse the final judgment entered by the trial court and remand with instructions.

Background

The lender was substituted as the party plaintiff in this underlying mortgage foreclosure suit against Appellant. In the operable amended complaint, the lender alleged that the parties had modified the loan documents. Attached to the amended complaint was a copy of the loan modification agreement, in addition to the note and mortgage. The loan modification agreement stated that it amended and supplemented the mortgage and note. It provided that the original principal balance was

increased, stating a "New Principal Balance" that was $20,535.94 more than the original balance and describing the new principal balance as "consisting of the amount(s) loaned to the Borrower by Lender, which may include, but are not limited to, any past due principal payments, interest, fees and/or costs capitalized to date." The loan modification agreement provided for a "Deferred Principal Balance," which was a specific amount of the "New Principal Balance" which did not accrue interest and for which monthly payments were not required, leaving an "Interest Bearing Principal Balance." The "Interest Bearing Principal Balance" accrued interest at a fixed percentage and was payable in a minimum monthly amount. Finally, the loan modification agreement provided that if the full balance due under the note was not fully paid before the stated "Maturity Date," Appellant would pay the full balance due on the note on the "Maturity Date."

It does not appear the documentary stamp taxes or the intangible tax on the increased principal balance under the loan modification had been paid prior to or while the case was pending in the trial court.[1] Appellant filed her answer to the amended complaint below but did not raise any defense regarding the payment of those taxes. Following a non-jury trial, the trial court entered final judgment of foreclosure in favor of the lender.

Appellant gave notice of appeal.

Appellate Analysis

"Questions of law, such as the interpretation of statutes, are reviewed de novo." *Toler v. Bank of Am. Nat'l Ass'n*, 78 So. 3d 699, 701-02 (Fla. 4th DCA 2012) (citing *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 373 (Fla. 2008)).

On appeal, the parties agree that the lender paid the documentary stamp tax and intangible tax due on the original amount of the loan, but failed to pay those taxes on the increased amount of the principal balance under the loan modification agreement prior to entry of the final judgment. Appellant contends that the final judgment should be reversed because

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[1] The answer brief asserts that the lender subsequently recorded the loan modification agreement and paid the documentary stamp taxes and intangible taxes due. An appendix supporting the assertion was filed, containing a copy of the recorded loan modification which affixed the documentary stamp tax and intangible taxes thereto. However, because the assertion and appendix reference activity occurring while this appeal was pending and after the entry of the final judgment, we ignore both the assertion and the appendix.

the lender's failure to pay the requisite taxes rendered the note and mortgage unenforceable, making the instruments unenforceable when the final judgment was entered. In support of this argument, Appellant relies on sections 201.08(1)(b) and 199.282(4), Florida Statutes (respectively imposing a documentary stamp tax and an intangible tax). § 201.08(1)(b), Fla. Stat. (2018); § 199.282(4), Fla. Stat. (2018). Appellant further contends the Third, Fourth, and Fifth Districts have "uniformly" recognized that these sections do not constitute affirmative defenses and that a defendant is not required to plead such or even raise the issue in the trial court for the matter to be reviewable on appeal.

Because the final judgment was for an amount that included the increased principal balance of the loan, for which the documentary stamp and intangible taxes were not paid at the time the judgment was entered, we agree the final judgment must be reversed, despite the fact that the problem was not brought to the trial court's attention. § 201.08(1)(b), Fla. Stat. ("The mortgage, trust deed, or other instrument shall not be enforceable in any court of this state *as to any such advance* unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.") (emphasis added); § 199.282(4), Fla. Stat. ("No mortgage, deed of trust, or other lien upon real property situated in this state shall be enforceable in any Florida court . . . until the nonrecurring tax imposed by this chapter, *including any taxes due on future advances*, has been paid and the clerk of circuit court collecting the tax has noted its payment on the instrument or given other receipt for it.") (emphasis added).

We determine that an appellate disposition similar to the one used by the Third District in *Solis v. Lacayo*, 86 So. 3d 1147, 1148 (Fla. 3d DCA 2012) is appropriate in this case. Thus, we reverse the final judgment and direct that on remand the trial court shall vacate the judgment, but also direct that another final judgment may be entered without further hearing upon the submission of proof that the required documentary stamp and intangible taxes have been paid. The trial court may set a further hearing, if it deems it appropriate.

Reversed and remanded with instructions.

WARNER and CIKLIN, 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

MARY JEAN ANN WILLIAMS,

Appellant,

v. Case No. 5D18-912

RIVER BEND OF COCOA BEACH, INC., A FLORIDA CORPORATION, RIVER BEND CONDOMINIUM ASSOCIATION OF BREVARD, INC., AND ALL THE OWNERS OF RIVER BEND, A CONDOMINIUM, THROUGH THEIR AGENT, ETC.,

Appellees.

_____/

Opinion filed September 20, 2019

Appeal from the Circuit Court
for Brevard County,
Charles J. Roberts, Judge.

Richard W. Taylor, of Taylor & Nordman, P.A., DeLand, for Appellant.

James E. Olsen, of Wean & Malchow, P.A., Orlando, for Appellee, River Bend Condominium Association of Brevard, Inc., Etc.

Joe Caruso, of Law Offices of Caruso, Swerbilow & Wald, P.A., Merritt Island, for Appellee, River Bend of Cocoa Beach, Inc.

EDWARDS, J.

This appeal involves both a boundary dispute and a claim that water was being diverted from a condominium onto the adjacent homeowner's property. Appellant, Mary Jean Ann Williams, is the homeowner and Appellees, River Bend of Cocoa, Inc., and River Bend Condominium Association of Brevard, Inc. (collectively "River Bend"), are the developer and homeowner's association, respectively, of the condominium in question. For the reasons we set forth below, we affirm the final judgment regarding the boundary dispute in most respects; however, we hold that the trial court erred in rewriting the legal description of the parties' common boundary, and in failing to include all of the rulings that it orally pronounced in the final judgment. With regard to the water diversion issue, we affirm the final judgment, but remand for the trial court to enter an amended judgment that conforms to its oral pronouncements.

Appellant bought and moved into her single family home before the River Bend Condominiums were constructed on the adjacent lot. She claimed that a boundary wall constructed by the developer during construction encroached onto her property. She also alleged that the developer altered the elevation of its land, causing excessive waterflow onto her property. Finally, she claimed that River Bend occasionally drained water from its swimming pool and diverted that water onto her property, causing damage. River Bend denied any encroachment or water diversion.

First, we will discuss the boundary dispute. The parties agreed that the legal descriptions of the respective parcels of land were correct and agreed to the legal description of their shared boundary line. The shared boundary line had been established by reference to the original 1859 federal survey and was described by those section, township, and range lines. What they disagreed about was where the boundary line was

physically located on the ground. A bench trial was held, during which each side presented its surveyor's testimony as to where the shared boundary between Ms. Williams' and River Bend's land was physically located.

The trial court found that River Bend's surveyor had done a more accurate job of determining where the boundary was physically located. After the trial court orally announced its ruling, River Bend's surveyor placed permanent surveyor's monuments along the boundary to delineate where the shared boundary line was physically located. Following that, the trial court in its written judgment ordered that the legal description of the shared boundary line between the properties be rewritten to include a description of River Bend's surveyor's metes and bounds description and the surveyor's monuments.

We find that the trial court erred in rewriting the legal description of the properties, as there was never any dispute about the legal descriptions. Furthermore, boundary lines that were "established by the federal government surveyors are unchangeable and control all references in deeds and other documents describing parcels of land by reference to the federal government of sections, townships and ranges." *Rivers v. Lozeau*, 539 So. 2d 1147, 1152 (Fla. 5th DCA 1989). An original boundary line "cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it." *Trs. of Int. Imp. Fund of State of Fla. v. Toffel*, 145 So. 2d 737, 742 (Fla. 2d DCA 1962); *see also Routh v. Williams*, 193 So. 71, 73 (Fla. 1940) ("[W]here a deed refers to another deed or to a map, plat, or survey for a description, the deed, map, plat or survey becomes as much a part of the instrument as if copied therein."). We remand for the trial court to enter an amended judgment that deletes the changes to the legal descriptions of the shared boundary line, but which can state, as the trial court found, that River Bend's

surveyor's monuments placed along the boundary line accurately show the physical location of the shared boundary.

After concluding that River Bend's surveyor had correctly determined the physical property line, the trial court determined that the subterranean footer of River Bend's boundary wall did encroach very slightly on Ms. Williams' land. However, because the trial court found the encroachment to be de minimis, it ruled that Ms. Williams was not entitled to damages or to have the footer or wall moved. We affirm the trial court on this issue, as competent, substantial evidence established that the six-inch subterranean encroachment of the footer did not seriously interfere with the use and enjoyment of the land, nor did it render Ms. Williams' title unmarketable. *See Loeffler v. Roe*, 69 So. 2d 331, 337 (Fla. 1953). Nevertheless, the trial court also orally ruled that, if the wall between the properties fell into such a state of general disrepair in the future that it must be removed, then at that time, River Bend would be obligated to remove the encroaching footer and ensure that any newly constructed footer and wall would not encroach on Ms. Williams' property. This oral ruling, however, was not included in the written final judgment. A written judgment must conform to the trial court's oral rulings. *Goosby v. Lawrence*, 711 So. 2d 577, 578 (Fla. 3d DCA 1998). The failure of the written judgment to conform to the oral rulings requires reversal and remand so that an amended judgment can be entered. *Saucier v. Nowak*, 200 So. 3d 1298, 1299 (Fla. 5th DCA 2016). We therefore remand for the trial court to enter an amended judgment that includes this oral ruling.

Relying on River Bend's surveyor, the trial court also found that the return of Ms. Williams' seawall, where it was located at the shoreline, encroached on River Bend's land.

The trial court orally ruled that River Bend was not to tear down or change Ms. Williams' seawall; however, that ruling is also not reflected in the written final judgment. We therefore remand for entry of an amended final judgment on this ruling as well, to ensure that the written final judgment contains this oral pronouncement.

With regard to the water diversion issue, the trial court heard conflicting testimony from both sides and ruled primarily in River Bend's favor, finding that Ms. Williams had not proved that River Bend had altered or configured its property and improvements in such a fashion as to improperly divert water onto her property. We will not disturb the trial judge's findings of fact in this nonjury trial because they were supported by competent, substantial evidence, even though contrary evidence was presented. *See Roberts Roofing Co. v. Smith*, 605 So. 2d 167, 167 (Fla. 3d DCA 1992). Notwithstanding its other findings, the trial court ruled that River Bend was required to regrade specifically described ground near the boundary wall to redirect storm water away from the boundary wall and that River Bend shall permanently stop pumping out its swimming pool water in such a fashion that it would flow onto Ms. Williams' land. The trial court also ruled that River Bend should caulk and seal the boundary wall as necessary to prevent water flow from River Bend's property onto Ms. Williams'. These rulings were properly incorporated in the written final judgment, and are affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

WALLIS and LAMBERT, JJ., concur.