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Pinson v. JPMorgan Chase Bank, National Association, Case No. 16-17107 (11th Cir. 2019).
A consumer must establish two things in order to allege a creditor used a false name in violation of the Fair Debt Collection Practices Act: the creditor used a name other than its own in a way that would indicate a third person is attempting to collect its debt, and that the creditor used the false name in the process of collecting its own debt.

Classy Cycles, Inc. v. Panama City Beach, Case No. 1D18-3095 (Fla. 1st DCA 2019).
The Municipal Home Rule Powers Act, Florida Statute section 166.021, inserted the rational basis test (an ordinance must be reasonable and not arbitrary) in place of the "per se nuisance" test (activity can only be banned if it is a per se nuisance) for determining whether activity can be banned. Whether an ordinance is a zoning ordinance or a traffic control ordinance is irrelevant.

Florida Department of Agriculture and Consumer Services v. Dolliver, Case No. 2D18-1393 (Fla. 2d DCA 2019).
The Florida Legislature may not pass laws which restrict the obligation of Florida government to pay for takings without just compensation under Article X, section 6(a) of the Florida Constitution.

Stacknik v. U.S. Bank National Association, Case No. 2D18-2156 (Fla. 2d DCA 2019).
A mailing log is sufficient additional evidence to establish the mailing of a condition precedent letter.

Villa Bellini Ristorante & Lounge, Inc. v. Mancini, Case No. 2D18-2249 (Fla. 2d DCA 2019).
Florida law permits mandamus proceedings to allow shareholders in private corporations to inspect their corporation's books and records.

Pillay v. Public Storage, Inc., Case No. 4D19-84 (Fla. 4th DCA 2019).
Exculpatory clauses are effective in leases, and the following clause bars negligence claims against a self-storage landlord:

> (1) ALL PERSONAL PROPERTY IS STORED BY OCCUPANT AT OCCUPANT'S SOLE RISK.
> (2) Owner and Owner's agents . . . will not be responsible for, and Tenant releases Owner and Owner's agents from any responsibility for, any loss, liability, claim, expense, damage to property . . . including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner or Owner's agents.
> (3) Tenant has inspected the Premises and the Property and hereby acknowledges and agrees that Owner does not represent or guarantee the safety or security of the Premises or the Property or any of the personal

property stored therein, and this Rental Agreement does not create any contractual obligation for Owner to increase or maintain such safety or security.

Bayview Loan Servicing, LLC, v. Cross, Case No. 5D18-2797 (Fla. 5DCA 2019).
The standard FNMA mortgage does not permit an award of fees for litigating the amount of fees.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17107

D.C. Docket No. 9:16-cv-80688-WJZ

JOHN PINSON,

Plaintiff - Appellant,

versus

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
a financial institution,

Defendant - Appellee.

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

(November 12, 2019)

Before MARTIN, JILL PRYOR, and JULIE CARNES, Circuit Judges.

MARTIN, Circuit Judge:

After years spent trying to correct what he views as a false entry on his credit report, John Pinson sued the entity he believed provided the false

information: JPMorgan Chase Bank, N.A ("JPMorgan Chase"). His pro se complaint asserted claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. On JPMorgan Chase's motion, the District Court dismissed his complaint for failure to state a claim. Having reviewed Mr. Pinson's complaint, and with the benefit of oral argument, we conclude he has stated three plausible claims for relief under the FCRA. We therefore reverse in part and remand to the District Court to give Mr. Pinson the chance to prove his FCRA claims. However, we cannot say Mr. Pinson plausibly stated a claim under the FDCPA. We therefore affirm the District Court's dismissal of his FDCPA claim.

I.

John Pinson got a copy of his credit report from TransUnion, a consumer credit reporting agency, in May 2012.[1] His report showed a past due account with an entity called Chase Home Finance LLC. But Mr. Pinson says he does not have an account with Chase Home Finance LLC. Mr. Pinson's explanation is that

[1] We take the facts from Mr. Pinson's complaint and accept all well-pleaded allegations as true. See Hunt v. Aimco Props., L.P., 814 F.3d 1213, 1221 (11th Cir. 2016).

JPMorgan Chase, with whom Pinson has a past-due mortgage,[2] used the false name Chase Home Finance when it reported the debt to TransUnion.

In July 2012, Mr. Pinson disputed the entry with both JPMorgan Chase and TransUnion. TransUnion responded a couple of weeks later with a letter saying Chase Home Finance would continue to appear on his credit report. There is no allegation JPMorgan Chase responded.

Mr. Pinson sent another letter to JPMorgan Chase in September 2012, again disputing the Chase Home Finance entry on his report. JPMorgan Chase did not respond. Undaunted, Mr. Pinson sent at least four more such letters to JPMorgan Chase in 2013. So far as the complaint shows, JPMorgan Chase never responded to any of those letters, either.

In April 2014, Mr. Pinson disputed the entry with TransUnion once again. TransUnion responded with another letter saying Chase Home Finance would continue to appear on the report. Mr. Pinson repeated his dispute in yet another letter to TransUnion in June 2014. TransUnion once again replied that the Chase Home Finance entry would continue to appear.

[2] Mr. Pinson nowhere alleges JPMorgan Chase held his mortgage, although we are aware of prior litigation regarding a past-due home mortgage Mr. Pinson had with JPMorgan Chase. Pinson v. JP Morgan Chase Bank, N.A., 646 F. App'x 812, 813 (11th Cir. 2016) (per curiam) (unpublished).

All told, Mr. Pinson wrote TransUnion three times and JPMorgan Chase at least six. Yet the Chase Home Finance entry still appeared on Mr. Pinson's credit report as of May 2015.

Throughout this back-and-forth, Mr. Pinson says JPMorgan Chase failed to investigate the accuracy of the information on his credit report. He also says JPMorgan Chase requested his credit report from Experian, another credit reporting agency, some twenty times without a proper purpose.

Mr. Pinson sued JPMorgan Chase in April 2016, asserting violations of the FDCPA and the FCRA.[3] He asserts JPMorgan Chase violated the FDCPA's prohibition on using a name other than a business's true name in connection with the collection of a debt when JPMorgan Chase gave TransUnion the name Chase Home Finance. See 15 U.S.C. § 1692e(14). He also claims JPMorgan Chase violated the FCRA by failing to investigate the accuracy of information it provided to TransUnion and by requesting his credit report without a permissible purpose. See id. §§ 1681b(f), 1681s-2(b), 1681o.

On JPMorgan Chase's motion, the District Court dismissed Mr. Pinson's complaint for failure to state a claim on which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Mr. Pinson timely appealed. The Court appointed Ashwin

[3] Mr. Pinson also asserted various state law claims. He does not press those claims on appeal.

Phatak to represent Mr. Pinson on appeal, and he ably discharged his responsibilities.

II.

We review de novo our subject matter jurisdiction, and we have an independent obligation to ensure jurisdiction exists. Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 408, 410 (11th Cir. 1999). We also review de novo the grant of a motion to dismiss for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. Hunt v. Aimco Props., L.P., 814 F.3d 1213, 1221 (11th Cir. 2016). To state a claim, a complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). A complaint is facially plausible where there is enough factual content to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). We liberally construe pro se pleadings. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

III.

We initially consider whether Mr. Pinson has standing to bring his claims. We conclude he does.

Standing, a limitation on federal subject matter jurisdiction derived from Article III, requires plaintiffs to show they suffered an injury in fact traceable to the defendant's conduct and redressable by a favorable decision. Spokeo, Inc. v. Robins, 578 U.S. ___, 136 S. Ct. 1540, 1546–47 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992)).

Mr. Pinson alleged actual, concrete, and particularized injuries: that he lost time communicating with JPMorgan Chase and TransUnion; that he incurred out-of-pocket expenses trying to correct misinformation on his credit report; and that he was denied access to credit and paid higher car insurance premiums as a result of JPMorgan Chase's conduct. We have held that the time spent by a person attempting to correct a false credit report constitutes a concrete injury for purposes of an FCRA claim. See Pedro v. Equifax, Inc., 868 F.3d 1275, 1280 (11th Cir. 2017) ("Pedro also alleged a concrete injury because she alleged that she 'lost time . . . attempting to resolve the credit inaccuracies.'").

In addition, economic harm is a quintessential injury in fact. See Sierra Club v. Morton, 405 U.S. 727, 733, 92 S. Ct. 1361, 1365 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing . . . .").

Beyond the out-of-pocket expenses, such as postal expenses, incurred by Mr. Pinson in his repeated communications concerning the information in his credit report, he also alleges economic harm in the form of lost credit opportunities and higher car insurance premiums. Mr. Pinson says JPMorgan Chase's alleged violations of the FDCPA and FCRA caused this economic harm. At this stage in Mr. Pinson's case, we accept his allegations as true, and we find them specific enough for us to conclude Mr. Pinson plausibly suffered an injury traceable to JPMorgan Chase's conduct. See id. at 1336 ("Each element of standing . . . must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." (quotation marks omitted)). This is particularly true given our liberal construction of Mr. Pinson's pro se complaint.

On top of lost time and money, the harm Mr. Pinson alleges—"the reporting of inaccurate information about [his] credit"—has "a close relationship to the harm caused by the publication of defamatory information, which has long provided the basis for a lawsuit in English and American courts." Pedro, 868 F.3d at 1279–80. That in itself constitutes a concrete injury. See id. at 1279; see also Spokeo, 136 S. Ct. at 1549 (noting that, in assessing whether an injury is concrete, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm

that has traditionally been regarded as providing a basis for a lawsuit in English or American courts").

These injuries flowed directly from JPMorgan Chase purportedly providing false information concerning Mr. Pinson's debt to TransUnion and from its repeated requests for Mr. Pinson's credit report. A court could redress Mr. Pinson's harms by giving him relief on his statutory claims. This suffices for standing.

IV.

JPMorgan Chase urges us to dismiss Mr. Pinson's complaint as a shotgun pleading. We decline to do so. A shotgun pleading is "a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1321 (11th Cir. 2015). The worst examples of shotgun pleadings contain "innumerable pages of rambling irrelevancies," Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam), "waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts," Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1295 (11th Cir. 2018) (quotation marks omitted and alterations adopted). JPMorgan Chase summons these specters and asks us to

dismiss Mr. Pinson's complaint. But our review of the complaint reveals this argument is more hyperbole than substance.

It is true that each count of Mr. Pinson's pro se complaint adopts the allegations of all preceding counts. It is also true that the complaint is perhaps longer than it needs to be. But it does not contain endless irrelevancies. And it does what complaints must do: it "give[s] the defendant[] adequate notice of the claims against [it] and the grounds upon which each claim rests." Weiland, 792 F.3d at 1323. We have no trouble understanding Mr. Pinson's allegations that JPMorgan Chase violated federal law by providing a false name to TransUnion, failing to investigate the accuracy of the information it provided, and obtaining Mr. Pinson's credit report for an improper purpose. We've seen no indication that JPMorgan Chase had trouble understanding them either. This would "explain why [JPMorgan Chase] did not move for a more definite statement" in the District Court. Id. at 1324. What's more, both JPMorgan Chase and the District Court understood the claims well enough to address their merits—JPMorgan Chase in a motion to dismiss, and the District Court in an order granting that motion. And while this circuit's shotgun-pleading rule applies to everyone, we ordinarily give pro se litigants more leeway when it comes to drafting. See, e.g., Dean v. Barber, 951 F.2d 1210, 1213 (11th Cir. 1992) (explaining this Court would look at the pro se plaintiff's pleadings "with special care" because "[t]his circuit and the Supreme

Court have stated that pro se complaints are given more leeway than complaints submitted by litigants represented by lawyers"). We will therefore consider Mr. Pinson's complaint on its merits.

V.

Assured of our jurisdiction and the sufficiency of Mr. Pinson's complaint, we now examine Mr. Pinson's FDCPA and FCRA claims. We conclude he has stated a plausible claim for relief only as to his FCRA claims. [4]

A.

The FDCPA makes it unlawful for a "debt collector" to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. A debt collector violates this provision when it uses "any business, company, or organization name other than the true name of the debt collector's business, company, or organization" in connection with the collection of a debt. Id. § 1692e(14).

Mr. Pinson alleges that JPMorgan Chase's use of the name Chase Home Finance on Mr. Pinson's credit report violated the FDCPA. We hold that Mr.

[4] Mr. Pinson asserts FDCPA claims in counts 1 and 2 of his complaint. He asserts FCRA claims in counts 3, 8, and 9 of his complaint. Although counts 3, 8, and 9 each allege a violation of different FCRA provision, addressed below, counts 1 and 2 both allege violations of the FDCPA's prohibition on using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Thus, for the purposes of this appeal, we treat counts 1 and 2 as reciting only one set of claims under the FDCPA.

Pinson did not plausibly allege that JPMorgan Chase qualifies as a "debt collector" under § 1692e.[5]

1.

The FDCPA regulates "debt collector[s]," defined as persons who "regularly collect[] or attempt[] to collect" someone else's debts. 15 U.S.C. § 1692a(6). The FDCPA ordinarily does not apply to creditors trying to collect their own debt. Davidson v. Capital One Bank (USA), N.A., 797 F.3d 1309, 1313 (11th Cir. 2015). However, there are instances in which creditors collecting their own debt are deemed debt collectors under the statute. The FDCPA applies to "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6). We will refer to this as the false-name exception.

The false-name exception has three components: a creditor must (1) use a name other than its own (2) in a way that would indicate a third person is attempting to collect its debt (3) in the process of collecting its own debt. JPMorgan Chase quite plainly used a name other than its own on Mr. Pinson's

[5] In a single footnote, Mr. Pinson also claims he stated violations of 15 U.S.C. § 1692e(8), which prohibits "[c]ommunicating or threatening to communicate to any person credit information which is known . . . to be false," and § 1692e(10), which prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." He has abandoned these claims. We do not ordinarily consider arguments raised in passing in one footnote rather than the body of the brief. See Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987).

credit report. However, we conclude Mr. Pinson's FDCPA claim flounders at the second component of the false-name exception, because JPMorgan Chase's use of the name Chase Home Finance did not indicate that a third person was collecting Mr. Pinson's mortgage.

This circuit has not set a standard for assessing when a name would indicate that a third party was involved in collecting the debt—or, put differently, from whose perspective we should assess whether a name would indicate a third party's involvement. We now join the Second and Seventh Circuits and hold that the false-name exception applies when the "least sophisticated consumer" would believe a third party was involved in collecting a debt.[6] See Catencamp v. Cendant Timeshare Resort Grp.-Consumer Fin., Inc., 471 F.3d 780, 782 (7th Cir. 2006); Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 236 (2d Cir. 1998). This standard has a long legacy in consumer protection law. Cf. FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116, 58 S. Ct. 113, 115 (1937) ("The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."). We already use the least sophisticated consumer standard to interpret other substantive provisions of the FDCPA. See Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1173–75 (11th Cir. 1985) (addressing allegations of

[6] Both parties agree this is the appropriate standard.

harassment and abuse under 15 U.S.C. § 1692d and false or misleading representations under §§ 1692e(5) and (10)). We see no need to adopt a different standard for analyzing the threshold issue of whether the FDCPA applies. This standard also promotes the FDCPA's purpose of protecting all consumers, "the gullible as well as the shrewd," Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993), from "abusive debt collection practices," 15 U.S.C. § 1692(e).

The objective, least sophisticated consumer standard protects "naive consumers" with a minimal understanding of personal finance and debt collection. LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1194 (11th Cir. 2010) (per curiam) (quotation marks omitted). At the same time, it "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." Id. (quotation marks omitted). We presume the least sophisticated consumer "possess[es] a rudimentary amount of information about the world and a willingness to read a collection notice with some care." Id. (quotation marks omitted). We should not hold the least sophisticated consumer to the same standard as a reasonably prudent consumer. See Jeter, 760 F.2d at 1172–75 (reversing a district court's use of a "reasonable consumer" standard in an FDCPA case). The least sophisticated consumer, though not unreasonable, is "ignorant" and "unthinking," id. at 1172–73, "gullible," and of "below-average sophistication or intelligence," Clomon, 988 F.2d at 1318–19. Whether the least

sophisticated consumer would think a name indicates a third party's involvement in collecting a debt will ordinarily present a jury question, though of course whether a plaintiff pleads enough facts to state a claim is a question of law for the court. Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1307 n.11 (11th Cir. 2015).

While the least sophisticated consumer standard is a low bar, Mr. Pinson cannot meet it. The least sophisticated consumer would not believe that Chase Home Finance was an unrelated third party attempting to collect on Mr. Pinson's mortgage with JPMorgan Chase. Applying the least sophisticated consumer standard to Mr. Pinson's circumstances is an objective inquiry. See Jeter, 760 F.2d at 1174–75 & n.6. Standing in Mr. Pinson's shoes, even the least sophisticated consumer would understand that JPMorgan Chase and Chase Home Finance were related entities collecting his mortgage with JPMorgan Chase Bank.

Mr. Pinson took out a mortgage on his home with JPMorgan Chase Bank in 2005. See Pinson v. JP Morgan Chase Bank, N.A., 646 F. App'x 812, 813–814 (11th Cir. 2016) (per curiam) (unpublished).[7] In this factual context, each part of the name "Chase Home Finance" suggests its association with Mr. Pinson's

[7] Although neither party has alleged the circumstances of Mr. Pinson's mortgage, we may take judicial notice of factual circumstances from a previous case. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 157, 89 S. Ct. 935, 942 (1969) (taking judicial notice of the record in prior, related litigation between the same parties for the purposes of identifying relevant circumstances).

creditor, JPMorgan Chase. The word "Chase" in Chase Home Finance echoes the name of JPMorgan Chase, the holder of Mr. Pinson's mortgage. The words "Home Finance" call up the fact that Mr. Pinson had financed his home with the mortgage from JPMorgan Chase. Thus, even the least sophisticated consumer would connect Chase Home Finance with these "rudimentary" facts of his own mortgage with JPMorgan Chase. Because he took out a home mortgage with JPMorgan Chase, Mr. Pinson's perception of Chase Home Finance as a third-party debt collector rises to the level of idiosyncratic.

Other courts have applied the false-name exception similarly. See Thomas v. Commercial Recovery Sys., Inc., No. 8:07-cv-1104-T-23MAP, 2008 WL 11336625, at *3 (M.D. Fla. Sept. 19, 2008) (holding that the relationship between JPMorgan Chase and Chase Auto Finance is apparent from the names of the entities); Berk v. J.P. Morgan Chase Bank, N.A., No. 11-2715, 2011 WL 4467746, at *4 (E.D. Pa. Sept. 26, 2011) ("No reasonable person would find that 'Chase Auto Loans' is a false identification of . . . JPMorgan Chase Bank[.]"); see also Drew v. Rivera, No. 1:12-CV-9-MP-GRJ, 2012 WL 4088943, at *5 (N.D. Fla. Aug. 6, 2012) (stating that Citibank, South Dakota, N.A.'s use of the name "Citibusiness" in communications about credit card debt did not trigger the false-name exception, because it "could [not] possibly cause the least sophisticated consumer to have the false impression that a third party was collecting the debt");

Simon v. Nat'l City Mortg. Co., No. 2:09-cv-376-FtM-29DNF, 2010 WL 1539970, at *5 (M.D. Fla. Apr. 19, 2010) (holding that even the least sophisticated consumer would know from the language on collection notices that National City Mortgage Company and National City Bank were affiliated corporations); Burns v. Bank of Am., 655 F. Supp. 2d 240, 254 (S.D.N.Y. 2008) ("Even the least sophisticated consumer would be able to determine from cursory review of the correspondence from Bank of America Mortgage to Plaintiffs that Bank of America Mortgage is related to Bank of America." (alterations adopted and quotation marks omitted)), aff'd, 360 F. App'x 255 (2d Cir. 2010); Young v. Lehigh Corp., No. 80 C 4376, 1989 WL 117960, at *22 (N.D. Ill. Sept. 28, 1989) (concluding that a debtor could not have been "duped into believing that Lehigh Corporation was not affiliated with Lehigh County Club, Inc.").

Mr. Pinson argues the least sophisticated consumer would be confused because the names "Chase Home Finance LLC" and "JPMorgan Chase Bank, N.A." indicate two different types of legal entities, a limited liability company and a bank. In Mr. Pinson's case, where the name "Chase Home Finance" on his credit report otherwise pointed to JPMorgan Chase Bank and his past-due home mortgage, the small discrepancy between "LLC" and "N.A." would not reasonably give Pinson the impression of a third-party debt collector.

Mr. Pinson presses us to establish a bright-line rule requiring creditors to use the same exact name throughout their relationships with debtors to avoid FDCPA liability. Likewise, JPMorgan Chase proposes a bright-line rule precluding liability under the false-name exception whenever a creditor uses another name that contains a part of the creditor's name. Both rules sweep too broadly. The perspective of the least sophisticated consumer arises from the totality of circumstances, and we cannot properly adopt a per se rule. For instance, there may well be cases in which a creditor's use of a name that contains part of its own name could cause confusion to the least sophisticated consumer. On this record, however, the unsophisticated consumer could not plausibly have been misled.

2.

Because we have concluded that Mr. Pinson cannot plausibly allege that the name Chase Home Finance would fool the unsophisticated consumer in his position, we need not address the third prong of the false-name exception. We therefore reserve for another day the question of whether reporting a debt to a consumer credit agency is part of "the process of collecting [one's] own debts." See 15 U.S.C. § 1692a(6).

Because the least sophisticated consumer would not believe Chase Home Finance was a third-party debt collector distinct from JPMorgan Chase, Mr. Pinson

has failed to state a claim that JPMorgan Chase violated the FDCPA. We affirm the District Court on this ground.

B.

Mr. Pinson's first FCRA claim is that JPMorgan Chase failed to investigate the accuracy of the information it provided to TransUnion. The FCRA requires consumer reporting agencies like TransUnion to notify a person who provided information—here, JPMorgan Chase—if a consumer disputes the information's accuracy. 15 U.S.C. § 1681i(a)(2)(A). On receiving notice, the person who provided the information is required to conduct an investigation into the information's accuracy. Id. § 1681s-2(b)(1)(A). A person who negligently fails to conduct the required investigation is liable for actual damages, id. § 1681*o*, and willful noncompliance gives rise to liability for actual damages, statutory damages of not less than $100, punitive damages, and attorney's fees, id. § 1681n. The Supreme Court has held that knowing or reckless disregard of the FCRA's requirements amounts to willful noncompliance. See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 56–60, 127 S. Ct. 2201, 2208–10 (2007). A person acts in reckless disregard of the FCRA if he runs "a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." Id. at 69, 127 S. Ct. at 2215.

Mr. Pinson alleges, and we think it plausible, that JPMorgan Chase willfully failed to comply with the FCRA's investigation requirement. Mr. Pinson says he disputed the allegedly false entry on his credit report with TransUnion at least three times, most recently in June 2014. Each time, TransUnion had a statutory duty to notify JPMorgan Chase of the dispute. 15 U.S.C. § 1681i(a)(2)(A). Yet Mr. Pinson alleges JPMorgan Chase "failed to conduct an investigation after receiving notice that [he] disputed the information [JPMorgan Chase] had provided to consumer reporting agencies" and "failed to review all relevant information provided by the consumer reporting agency pursuant to § 1681i." JPMorgan Chase's failure to investigate not once but three times plausibly indicates reckless disregard of the investigation requirement. These allegations cover the four necessary elements of the FCRA claim. Mr. Pinson alleges: (1) he disputed the accuracy of information on his credit report with a consumer credit agency; (2) JPMorgan Chase received notice of the dispute from TransUnion; (3) JPMorgan Chase failed to investigate; and (4) JPMorgan Chase recklessly disregarded its duty to investigate. Mr. Pinson has thus stated a claim that JPMorgan Chase willfully violated the FCRA by failing to investigate his dispute.

Not content with Mr. Pinson's allegations, JPMorgan Chase maintains Mr. Pinson did not allege JPMorgan Chase ever received notice of the dispute from TransUnion. That is not so. We have already recited the allegations that

JPMorgan Chase indeed received notice. Add to that TransUnion's statutory duty to notify JPMorgan Chase of the dispute—a duty we will not assume TransUnion shirked—and we are satisfied Mr. Pinson adequately alleged notice.

JPMorgan Chase also argues Mr. Pinson did not adequately allege damages. It misses the mark with that argument, too. Mr. Pinson plausibly alleged actual damages resulting from the failure to investigate. As we set out in Part III, supra at 5–8, he says he suffered from mental anguish, lost credit opportunities, paid higher auto insurance premiums, and spent time and money trying to correct the falsehood on his credit report. Mr. Pinson is entitled to compensation if he can prove his claims.

C.

Mr. Pinson's final claims allege that JPMorgan Chase violated the FCRA by unlawfully obtaining his credit report. He contends this violated two separate FCRA provisions: one that prohibits obtaining a credit report for an improper purpose, and one that prohibits obtaining a credit report under false pretenses. He has stated a plausible claim for each of these violations.

1.

The FCRA prohibits a person from using or obtaining a credit report for any purpose unless "the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section." 15 U.S.C.

§ 1681b(f)(1).[8] The FCRA narrowly circumscribes the purposes for which a person may obtain a credit report. See id. § 1681b(a)(3) (listing exhaustively all purposes for which a person may obtain a credit report). Among other purposes, a person may obtain a credit report to "use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer." Id. § 1681b(a)(3)(A).

Mr. Pinson alleges JPMorgan Chase obtained his credit report for use in litigation twenty times between May 10, 2013 and October 13, 2014. JPMorgan Chase was involved in litigation with Mr. Pinson beginning July 26, 2013. See Pinson v. JP Morgan Chase Bank, N.A., 646 F. App'x 812, 813 (11th Cir. 2016) (per curiam) (unpublished). It may violate the FCRA to obtain a consumer report for use in litigation. Litigation does not appear in the exhaustive list of purposes for which the FCRA authorizes a person to obtain a credit report. See 15 U.S.C. § 1681b; see also Bakker v. McKinnon, 152 F.3d 1007, 1012 (8th Cir. 1998)

[8] The statute also requires the "prospective user" of the report to certify the purpose for which the credit report is sought and to certify the report will be used for no other purpose. 15 U.S.C. § 1681b(f)(2) (requiring certification according to the procedure set out in 15 U.S.C. § 1681e(a)). JPMorgan Chase says Mr. Pinson's claim fails because he did not allege JPMorgan Chase violated the certification requirement. This argument is easily dispensed with. Most obviously, Mr. Pinson did allege that JPMorgan Chase "failed to certify as the user of the report the true purpose for which the information is sought." What's more, to comply with § 1681b(f), a person seeking a consumer report must both obtain it for a purpose authorized by the FCRA and certify the purpose according to § 1681e(a). Failing to do either will give rise to liability. A plaintiff need not allege both.

(rejecting the argument that the defendant, "an attorney representing clients in litigation, . . . had a business need to obtain credit reports on the opposing parties"); Duncan v. Handmaker, 149 F.3d 424, 427 (6th Cir. 1998) ("[T]rial preparation generally does not fall within the scope of § 1681b."). Given the timing, JPMorgan Chase might plausibly have obtained Mr. Pinson's credit report for use in litigation, at least for those credit reports obtained after July 26, 2013.

Mr. Pinson also adequately alleged a willful violation of the statute. Mr. Pinson alleges JPMorgan Chase obtained the report many times for use in litigation even though the statute, which sets out an exhaustive list of permissible purposes, nowhere authorizes the use of credit reports in litigation. These actions plausibly "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." Safeco, 551 U.S. at 69, 127 S. Ct. at 2215. The statute plainly says a consumer reporting agency may "furnish a [credit report] under the following circumstances and no other." 15 U.S.C. § 1681b(a) (emphasis added). Even a careless reader would understand that the statute's list of permissible purposes is exhaustive.

JPMorgan Chase says it had a permissible purpose to obtain Mr. Pinson's credit report—namely, that Mr. Pinson had a past due account with JPMorgan Chase. It is true that the FCRA permits a person to obtain a credit report to review or collect a consumer's account. 15 U.S.C. § 1681b(a)(3)(A). And if JPMorgan

Chase in fact requested the consumer report for that purpose, it will not face FCRA liability. But all we have at this stage in the litigation are the allegations of Mr. Pinson's complaint, which we must credit. On remand, JPMorgan Chase may submit evidence explaining why it requested Mr. Pinson's credit report so many times. It will prevail if the evidence it musters bears out its explanation. Where Mr. Pinson has plausibly alleged that the report was obtained for use in litigation, however, we do not resolve these issues on a motion to dismiss.

2.

Separately, the FCRA makes it a crime to "knowingly and willfully obtain[] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q. This crime, contained in the same subchapter as the rest of the FCRA, is enforceable by the FCRA's private right of action. Id. § 1681n ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . ."); id. § 1681*o* ("Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . ."); see Kennedy v. Border City Sav. & Loan Ass'n, 747 F.2d 367, 369 (6th Cir. 1984) (holding a civil cause of action exists under § 1681n to enforce § 1681q); Hansen v. Morgan, 582 F.2d 1214, 1221 (9th Cir. 1978) (same).

This circuit has never addressed the meaning of "false pretenses" in § 1681q of the FRCA. Consistent with every other court to address this issue, we now hold that intentionally obtaining a credit report under the guise of a permissible purpose while intending to use the report for an impermissible purpose can constitute false pretenses under § 1681q. Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction, 811 F.2d 1368, 1370 (6th Cir. 1987) (per curiam); Hansen, 582 F.2d at 1219–20; see also Veno v. AT&T Corp., 297 F. Supp. 2d 379, 385 (D. Mass. 2003). Negligent misrepresentation of the purpose will not suffice for liability under § 1681q; the offending party must intentionally misrepresent his purpose for obtaining the credit report.

Just as Mr. Pinson alleged enough to state a violation of § 1681b(f), he has alleged enough to state a violation of § 1681q. He alleges that JPMorgan Chase "knowingly and willfully made false representations to Experian to obtain information," "failed to disclose [its] true motivation in obtaining information . . . to Experian," and "knowingly and willfully obtained information . . . from Experian for use in litigation." Again, JPMorgan Chase may have obtained Mr. Pinson's credit reports for a perfectly proper purpose. Or it may have disclosed its true purpose to Experian, in which case it did not obtain the report under false pretenses. But this fact question cannot be resolved on a motion to dismiss.

VI.

All a plaintiff must do to survive a motion to dismiss is state a plausible claim on which relief can be granted. Not a surefire claim, not one likely to succeed. A plausible claim, supported by enough factual allegations for a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Under this standard, the District Court erred in dismissing Mr. Pinson's FRCA claims, but it properly dismissed his FDCPA claim. We **AFFIRM** dismissal of the FDCPA claim. We **REVERSE** dismissal of the FRCA claims and **REMAND** for further proceedings consistent with this opinion.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3095

CLASSY CYCLES, INC.,

Appellant,

v.

PANAMA CITY BEACH,

Appellee.

On appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

November 13, 2019

WOLF, J.

Classy Cycles, Inc. challenges a final summary judgment upholding Panama City Beach's (City) ordinances pertaining to the rental of motorized scooters. Two ordinances are at issue, one prohibiting the overnight rental of scooters and one completely prohibiting the rental of scooters in the city effective September 8, 2020. Appellant claims the ordinances are arbitrary as a matter of law because the City does not have the power to ban a business from the entire city unless the business constitutes a per se legal nuisance. They also argue that the ordinances are preempted by Florida Statutes.[1] We find no error in the trial court's

[1] Chapter 2019-109, Laws of Florida, was submitted as supplemental authority, but both sides agreed at oral argument

determination that a geographically small city has the right to restrict a business from operating within the city when the undisputed facts demonstrate that the restriction is for the safety of the city's citizens and visitors. We also find that chapter 316 does not preempt the ordinances because it provides the City the right to pass restrictions on types of vehicles which may be operated in congested areas.

UNDISPUTED FACTS

In 2015, the City passed ordinances requiring drivers of rented scooters to wear vests and requiring businesses renting scooters to the public to carry insurance on the scooters. This court reversed a trial court's order finding the ordinances valid, holding that these ordinances were preempted by state law. *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

On June 8, 2017, the City enacted two new ordinances: 1415, which prohibits the overnight rental of scooters; and 1416, which completely prohibits the rental of scooters in the City effective September 8, 2020. Both ordinances contain extensive whereas clauses, painting a portrait of the City's rationale for adopting them: The City is geographically small and crowded and is being besieged by inexperienced scooter drivers seeking amusement and driving in a dangerous manner; the City is a tourist destination frequented by tens of thousands, and its streets are congested by scooters that are being driven illegally and in areas where they are not permitted; the City's residents and visitors are put in dangerous situations as a result of the improper use of scooters, especially at night; City businesses have complained about numerous trespasses on their property by people driving scooters while being disruptive; City police have been unable to cope with the situation and essential police resources are being drained; the City has been unable to control the situation through less restrictive means.

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that the statute was inapplicable to the scooters being regulated in this case.

A portion of the whereas clauses describing this situation is setout in the footnote below.[2]

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[2] In ordinance 1415, pertaining to nighttime rental of scooters:

> Whereas, the City Police Chief has reported an increase in calls from private owners asking to trespass rented scooters from their property, and complaints from business owners regarding the movement of rented scooters through their properties; and
>
> Whereas, the City Council has observed the frequent and recurring recreational use of scooters operating on sidewalks, boardwalks, parking lots, parking garages, weaving in and out of traffic, and the numerous traffic stops undertaken by law enforcement to address and curb such use which is in violation of state and local laws; and
>
> Whereas, the Council finds that two material factors have combined to generate or increase the irresponsible behavior of the rented scooter operators which has become a public nuisance, namely (1) the fact that the scooters are rented in many, and probably most, cases as an amusement to ride-the-strip, to see and be seen, and not to "go to the grocery store," and (2) that the increase of traffic congestion on the City streets resulting from the growth of retail and accommodations has denied the rented scooter operators the use of the streets for amusement and so they weave in traffic and scoot along sidewalks, the right shoulder of the road, parking lots, all in conflict with pedestrians; and
>
> . . . .
>
> Whereas, the City Police Chief has stated scooter rentals at night present the biggest nuisance to the public and the greater impediment to his department's protection of the visitors and residents of this City; and
>
> . . . .

Whereas, during the period of March 1 through April 13, 2018, the City Police Department conducted 3,162 traffic stops while also attempting to protect the public and investigate other crimes committed in the City; and

Whereas, during the first 13 days of April 2017, the City Police Department received 19 citizen complaints, and rented scooters after 5:00 p.m. were involved in 81 traffic stops and 18 motor vehicle accidents which resulted in 104 traffic citations; and

Whereas, City Police Office receive numerous requests to remove rental scooters from private property or are forced to arrange for the towing of vehicles following traffic citations or motor vehicle accidents. . . .

Whereas, the Council finds that the operation of rented motor scooters is particularly dangerous at night because the congestion and proclivities of the visitors and the extraordinary demands placed upon law enforcement prevent adequate policing of scooter operation at night, in addition to the fact that typically visitors who rent scooters are unfamiliar with the area, and often are not skilled scooter drivers so that they become more easily confused and distracted in nighttime traffic with reduced visibility and the flare of artificial lights;

. . . .

In ordinance 1416, pertaining to the complete prohibition of the rental of scooters:

Whereas, the City of Panama City Beach is a tourist destination frequented by tens of thousands at a time; and

. . . .

Whereas, as the popularity of rental scooters increased the behavior of scooter operators became noticeably dangerous as traffic violations were more

common among rental scooter than other vehicles. This problem was amplified by the lack of training, supervision, and oversight practiced by the rental scooter businesses; and

. . . .

Whereas, irresponsible driving behavior by scooter renters has become so common that it frequently affects visitors and residents who are all-to-often forced to modify their own behavior or routes of travel to compensate for this irresponsible behavior, or else fall victim to a motor vehicle accident involving a renter scooter; and

. . . .

Whereas, the City's efforts to regulate rental scooter businesses to improve the behavior of the industry and its customers have been long and varied, and reflect the longstanding tension between the associated and varied problems observed by the City arising from the rental of scooter and the popularity of rented scooters with tourists, ...

Whereas, since January 1, 2017 through May 23, 2017, the Panama City Beach Police department wrote 305 rented scooter traffic citations, made 319 rented motor scooter stops and worked 56 rented scooter motor scooter crashes; and

Whereas, the number of scooter rentals per day and the typical reckless and often illegal driving behavior of rental operators create an impracticable strain upon City resources and siphons those valuable resources from other important police work; and

Whereas, the City is fortunate to enjoy a robust and growing tourism and more recently local and regional retail economy which has resulted in the expansion of major roads and connectors and even more significant

increases in the number of vehicles on those roads because the City is linear, being 8 miles long but only one-mile-wide with only three, parallel thoroughfares, all of which combined has resulted in increased congestion on City streets; and

Whereas, the materially increased congestion and side of City roads and intersections of roads have made it increasingly dangerous for inexperienced operators of rented scooters to operate and, frequently play, in the streets; and

Whereas, additionally the increased congestion has created greater and greater incentives for the operators of rented scooters to take short cuts through parking lots, on pedestrian sidewalks, on the pier board-walk, and generally through private or quasi-public property where through traffic of any kind is appropriate, and frequently when those areas are occupied by pedestrians; and

. . . .

Whereas, the limits of the City's infrastructure capacity, resources to police dangerous, disrespectful, and frequently simply mindless, behavior of the rented scooter drivers, combined with the sheer volume of rented motor scooters on the street have materially and adversely impacted the tourists' experiences and the residents' quality of life; and

. . . .

Whereas, the City has attempted everything within its home rule authority to improve or remove the danger and nuisance posed by the behavior of the customers of the scooter rental businesses but its unsuccessful attempts to dampen the unacceptable behavior of the customers of those businesses, and the refusal or inability of the industry itself to do so, have left no effective legislative alternative within its authority other than to

On June 12, 2017, Classy Cycles commenced the underlying action seeking to have ordinances 1415 and 1416 declared invalid, arguing the ordinances are preempted by state law, they impermissibly burden the statutory right of drivers to operate a motor vehicle on public streets, they treat drivers of scooters differently than other drivers, and the ordinances cannot as a matter of law prohibit renting a scooter. The factual findings contained within the whereas clauses were not challenged in the trial court nor have they been challenged on appeal.

Both parties filed motions for summary judgment, and the trial court, after several hearings, entered final summary judgment in favor of the City.

ISSUES ON APPEAL

The specific arguments raised in appellant's brief are: (1) the City's ordinances are arbitrary and unreasonable because they ban an activity that is not a per se nuisance; and (2) the City's ordinances are preempted and thus invalid because they are an attempt by the City to indirectly regulate what this court ruled the City could not directly regulate in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

Much of the argument between the parties concerns whether the ordinances are traffic control ordinances or zoning ordinances. Ultimately this question does not control our analysis. No matter how they are categorized they restrict the rental of scooters with the goal of limiting their use within the city. This is the action which we must review.

RATIONAL BASIS REVIEW

Appellant argues the City's ordinances are arbitrary because they restrict and ultimately eliminate the business of renting scooters within the city. They contend that the rental of scooters to

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> make the rented-scooter resource unavailable to the visitors to the beach by prohibiting the rental of them;
>
> . . . .

the public is not a per se nuisance, so the City may not enact ordinances completely prohibiting this business because such ordinances would be arbitrary and unreasonable as a matter of law. They rely on the cases of *Carter v. Town of Palm Beach,* 237 So. 2d 130 (Fla. 1970); and *Inglis v. Rymer,* 152 So. 4 (Fla. 1934).

The City contends that it is permitted to prohibit activity which threatens the health, safety, and welfare of its citizens and visitors, even when the activity is not a per se nuisance because of a constitutional amendment granting municipalities broad powers and the Municipal Home Rule Powers Act (MHRPA). We first look to the history of a city's ability to adopt ordinances for the health, safety, and welfare of their communities.

Under the constitution of 1885, the Legislature was required to pass a general or special act to grant municipalities the power to perform any given function. *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992), modified sub nom. *Collier County v. State*, 733 So. 2d 1012 (Fla. 1999), holding modified by *Sarasota County v. Sarasota Church of Christ, Inc*., 667 So. 2d 180 (Fla. 1995). Municipalities thus derived all of their power from the Legislature, and unless the Legislature explicitly granted them the power to perform a given function, the municipalities were without authority to act. *Id.*

In 1968, the State amended the Florida Constitution and provided for broad inherent municipal powers, "except as otherwise provided by law." *Id.* (quoting Art. VIII §2(b), Fla. Const.). The legislature further adopted this view when it passed the Municipal Home Rule Powers Act (MHRPA), which codified the constitution's recognition of the broad powers inherent in municipalities and authorized them to wield any power not expressly prohibited by law. *See* § 166.021, Fla. Stat.

Specifically, under section 166.021, the MHRPA provides that municipalities have inherent governmental powers that do not require legislative authorization:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform

> municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
>
> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act.

§ 166.021, Fla. Stat.

Under this framework, the parties dispute to what extent a municipality can prohibit a certain activity. Appellant argues a municipality cannot totally prohibit any business activity that is not a per se nuisance. The City contends it can prohibit any activity, provided the reasoning supporting the prohibition is not arbitrary or unreasonable. We agree with the City.

Prior to the enactment of the MHRPA, courts routinely struck down ordinances prohibiting certain business or leisure activities because the respective municipalities were not banning activity that was considered a per se nuisance and the municipalities were acting outside of valid authority conferred by the legislature. *See Inglis v. Rymer*, 152 So. 4 (Fla. 1934) (holding that an ordinance prohibiting skating rinks that charged a fee was invalid because the municipality had no express authority to enact such an ordinance unless the activity was considered a per se nuisance); *Carter v. Town of Palm Beach*, 237 So. 2d 130 (Fla. 1970) (holding that an ordinance prohibiting surfing was invalid because even though the municipality had authority to regulate surfing, the ordinance was arbitrary and unreasonable because it sought to prohibit an activity that was not a per se nuisance). We find appellant's argument unpersuasive for several reasons.

First, the case law cited by appellant is at least partially based on the outdated analysis from *Inglis* that one had to look to the city charter to determine whether the city had the right to ban the

particular activity. 152 So. at 5. Second, while the court in *Inglis* held that banning a business activity throughout the city was arbitrary and unreasonable under those particular circumstances, the facts in this case indicate that the limitation on the rental of motor scooters constitutes reasonable exercise of police powers by the City.

As the City points out, the law has changed since *Inglis* and *Carter* were decided. The Legislature passed the MHRPA and provided municipalities with inherent authority to pass ordinances pertaining to a legitimate exercise of municipal power. Municipal ordinances no longer require an express statutory provision authorizing their enactment, but the ordinances must pass the rational basis test to be upheld. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632 (Fla. 3d DCA 2010) (citing *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995)).

The "per se nuisance" requirement is no longer in effect because it was attached to the now defunct rule requiring municipalities to only exercise authority expressly granted to them by the legislature. The modern test is an application of the rational basis test, which requires that the ordinance in question be reasonable and not arbitrary. *Id.*

The trial court addressed the applicability of *Carter* and the per se nuisance rule cogently by pointing out that the holding in *Carter* did not survive the expansion of municipal home rule power as evidenced by modern case law upholding prohibitions of activities that are not per se nuisances. *See Kuvin v. City of Coral Gables*, 62 So. 3d 625, 628 (Fla. 3d DCA 2010) (upholding prohibition of parking trucks in residential areas); *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010) (upholding prohibition of sex offenders from residing within 2500 feet of a school); *Lamar-Orlando Outdoor Advert. v. City of Ormond Beach*, 415 So. 2d 1312, 1315 (Fla. 5th DCA 1982) (upholding prohibition of off-site advertising); *Lambros, Inc. v. Town of Ocean Ridge, Fla.*, 392 So. 2d 993, 993 (Fla. 4th DCA 1981) (upholding prohibition of all commercial uses of property); *Blank v. Town of Lake Clarke Shores*, 161 So. 2d 683 (Fla. 2nd DCA 1964) (upholding prohibition of all commercial activity).

Thus, under modern home rule power, municipalities have broad authority to regulate activities impacting public health, safety, and welfare so long as such regulations are not arbitrary or unreasonable. *See, e.g., City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1174 (Fla. 1st DCA 1993). Accordingly, to the extent that appellant argues on appeal that the City was without authority to prohibit the leasing or rental of motor scooters because motor scooters are not a "per se nuisance," appellant's argument is without merit as it relies on an out dated legal test that is no longer applicable.

Our job under the rational basis test is not to determine whether the City used the best method or least intrusive means, but whether the actions were reasonably related to accomplishing its goal.[3] *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39-40 (Fla. 1st DCA 1996). Under this analysis, the "statute need only bear a reasonable relationship to a legitimate state interest. Some inequality or imprecision will not render a statute invalid." *Id.* at 39; *Acton v. City of Fort Lauderdale*, 440 So. 2d 1282, 1284 (Fla. 1983). Under the rationale basis standard, courts uphold governmental regulations as long as there appears to be a plausible reason for the governmental action. *Strohm*, 685 So. 2d at 40.

In *Kuvin v. City of Coral Gables*, 62 So. 2d 625, 632 (Fla. 3d DCA 2010), the court described the review of city land use regulations under a rational basis standard as follows:

> Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court and this Court have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. *See Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995) ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no

[3] Appellant has never argued that the strict scrutiny test applies in this case.

> substantial relationship to legitimate societal policies."); *Harrell's Candy Kitchen, Inc. v. Sarasota–Manatee Airport Auth.*, 111 So. 2d 439, 443 (Fla. 1959) (holding that zoning regulations are presumptively valid, "and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to public health, safety, morals or general welfare"); *City of Coral Gables v. Wood*, 305 So. 2d 261, 263 (Fla. 3d DCA 1974) ("A zoning ordinance will be upheld unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare.").

(Emphasis supplied.)

In *Carter v. Town of Palm Beach*, 237 So. 2d 130 (Fla. 1970), the court recognized the ability of cities to prohibit surfing within portions of the city for the safety of its citizens. However, the court held that the complete prohibition of this activity from all the beach area is arbitrary and unreasonable. *Id.* at 131-132. We do not disagree that generally an ordinance prohibiting a legal business from operating within an entire city is arbitrary and unreasonable.

In *Carter*, there is no indication that the Town argued there were dangerous conditions present throughout the entire city. Here, however, the situation laid out within the whereas clauses unequivocally states that the dangerous conditions existed throughout the entire city. Under these limited circumstances, we do not find the ordinances to be arbitrary or unreasonable.

It has been suggested that the ordinances were arbitrary because rather than prohibiting the operation of scooters, the ordinances instead prohibit the rental of scooters. It is not our job to second guess the City on its method of accomplishing its legitimate goals. There are a number of reasons to limit scooter rentals other than to impose a total ban on their operation. Owners may be more experienced riders than one-time renters or may rely on scooters for their primary mode of transportation as opposed to renting them for amusement and then operating them in a dangerous manner. It may be that the City chose this method

in an attempt to avoid the preemption argument. Whatever the rationale, the City's reasoning in choosing this particular method of limiting rental scooter use is not within the scope of rational basis scrutiny.

PREEMPTION

Appellant also argues that the City's ordinances are preempted by chapters 316, 320, and 322, Florida Statutes, as well as the holding of this court in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

The City argues that there is no express preemption because the ordinances are not traffic laws that regulate the manner of use of vehicles which is preempted by chapter 316, Florida Statutes. The City also argues that the holding in *Classy Cycles* is limited to the matters specifically addressed in that case: the ordinances requiring scooter renters to wear vests and requiring scooter rental businesses to carry a specific insurance for scooter rentals.

The Florida Supreme Court most recently addressed the issue of preemption of local ordinances in *D'Agostino v. City of Miami*, 220 So. 3d 410 (Fla. 2017). In *D'Agostine*, the court laid out the legal framework for preemption stating:

> Florida law recognizes both express preemption and implied preemption. [*Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010)] On one hand, express preemption requires a specific legislative statement—it cannot be implied or inferred—and the preemption of a field is accomplished by clear language. *Id.* On the other hand, implied preemption occurs when the state legislative scheme is pervasive, and the local legislation would present a danger of conflict with that pervasive scheme. *Id.* In other words, preemption is implied when the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature. *Id.* . . . *The test for implied preemption requires that we look "to the provisions of the whole law, and to its object and*

> *policy." Browning*, 29 So. 3d at 886 (citing *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006)). Further, "[t]he nature of the power exerted by the Legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital to this determination." *Id.* (citing *Harden*, 938 So. 2d at 486).

D'Agastino, 220 So. 3d 410 at 421 (emphasis added).

The key question becomes whether the Legislature intended to preempt an area of local regulation. But, in applying this test, "we must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers." *Id.* at 421 (citing to *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996)).

The main preemption question in this case is to what extent chapter 316, Florida Statutes, the Florida Uniform Traffic Code, precludes the passage of the City's ordinances. Chapter 316 contains two broad preemption provisions: The first is section 316.002, Florida Statutes, which prohibits municipalities and localities from enacting ordinances that conflict with state traffic laws; the second is section 316.007, Florida Statutes, which prohibits municipalities and localities from enacting ordinances on any matters covered by chapter 316 without authorization. *Masone v. City of Aventura*, 147 So. 3d at 495-96 (Fla. 2014). Local authority to regulate in this area is specifically addressed in section 316.008, Florida Statutes[4], which states in pertinent part:

> (1) The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:

[4] Appellant did not argue below, or on appeal, that section 318.008(1)(n), Florida Statutes, cannot be used to ban motor scooters throughout an entire city.

. . . .

> (n) Prohibiting or regulating the use of heavily traveled streets by *any class or kind of traffic* found to be incompatible with the normal and safe movement of traffic.

(Emphasis added.)

In *Masone*, the supreme court was confronted with the question of whether municipal ordinances imposing penalties for red light violations detected by devices using cameras were invalid because there were preempted by state law. 147 So. 3d at 494. The court found that the municipal ordinances were preempted because they regulated the movement of traffic and provided for penalties covered under the Uniform Traffic Code. *Id.*

Similarly, this court in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016), was confronted with ordinances that attempted to regulate matters specifically addressed and regulated within the Uniform Traffic Code. This court determined the ordinance requirement that operators of rented scooters wear green vests was preempted by the express provisions in sections 316.002 and 316.007, Florida Statutes. *Id.* at 786. This court also determined that the ordinance requiring additional insurance for renters of scooters was expressly preempted by chapter 316 and impliedly preempted in chapter 324, Florida Statutes. *Id.* at 788.

The trial court in this case found that the holding in *Classy Cycles* was inapplicable because the ordinances at issue here do not address the actual operation of motor vehicles or disturb the uniformity of Florida's traffic laws. We agree with the trial court. Unlike *Masone*, the ordinances at issue here do not regulate the method of driving or attempt to apply penalties for improper driving behavior in conflict with state regulations on the same subject. Unlike the ordinances in *Classy Cycles*, these ordinances do not attempt to regulate conduct or behavior while driving or impose additional requirements in order to drive on the streets. The ordinances in this case also do not impose additional requirements over and above what is required by state law.

The ordinances simply regulate a business that is causing traffic congestion and unsafe conditions within the city. It has always been within the purview of a local government to regulate uses that will cause traffic congestion through its land use code. *See Watson v. Mayflower Prop. Inc.*, 223 So. 2d 368 (Fla. 4th DCA 1980).

As previously stated, the Uniform Traffic Code itself recognizes an exemption for local government to reasonably exercise their police powers by "*prohibiting or regulating* the use of heavily traveled streets by any *class or kind* of traffic found to be incompatible with the normal and safe movement of traffic." § 316.008(1)(n), Fla. Stat. (emphasis added). Thus, whether these are designated land use or traffic ordinances they are not preempted, and the only question is whether they are a reasonable exercise of police powers.[5] We agree with the trial court's determination that they are and AFFIRM.

RAY, C.J., concurs; MAKAR, J., concurs in part and dissents in part with opinion.

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

MAKAR, J., concurring in part, dissenting in part.

Motorized scooters, or more specifically, the irresponsible driving behavior of inexperienced youthful operators primarily

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[5] While the parties stipulated that chapter 2019-109, Laws of Florida, is inapplicable, we would note that the new legislation continues to recognize the right under section 316.008(1)(n) for local governments to adopt "an ordinance governing the operation of micromobility devices and motorized scooters on streets, highways, sidewalks, and sidewalk areas under the local government jurisdiction."

during Spring Break's evening hours, has resulted in a total prohibition of any rentals in Panama City Beach beginning on September 9, 2020. On that day, no scooter may be rented from within the City, the purpose of which is to control traffic movement by reducing the community's seasonal reckless-scooter problem. Rentals are not just prohibited during the peak Spring Break period, however, but on a 365/24/7 basis. Scooters rented elsewhere (for example in neighboring Panama City) and owner-operated scooters remain permissible.

Over the years, the City has taken different approaches to motorized scooters, initially embracing them as complementing the community's tourist and visitor industry but later deeming them a scourge as usage increased markedly. As traffic infractions and accidents increased, and efforts at industry self-regulation failed,[*] the City says it successfully altered scooter operators' behavior by requiring that renters wear brightly colored safety vests and carry signed safety brochures (so they couldn't claim ignorance of public safety laws). The resulting "dramatic reduction in dangerous driving" was "short lived," however, due to this Court's decision in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016) (*Classy Cycles I*), which curtailed regulations deemed pre-empted by state law. Soon thereafter, the City enacted Ordinances 1415 and 1416, the latter implementing a total ban in September 2020 following a grace period that ostensibly allows rental companies to recoup their investments.

Judge Wolf's opinion, which addresses the legality of Ordinances 1415 and 1416, provides a thorough and thoughtful discussion of the current status of municipal law and concludes

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[*] Emblematic of the City/rental company standoff is a Whereas clause in Ordinance 1416, which recounts that employees of one rental company showed up at a City meeting "all wearing a red t-shirt emblazoned with its business name and slogan, which is 'Ride It Like You Stole It.'" The City, citing Urban Dictionary, pointed out the irony that the slogan means to "Drive fast; drive as if you stole the car and the police are after you – to drive a vehicle faster and more recklessly than it should be driven, acting as if you aren't the one paying for the repairs."

that both ordinances are lawful. I fully concur in Judge Wolf's opinion except the conclusion that the total ban on intra-city scooter rentals in Ordinance 1416 is permissible.

Whether the ban is an allowable exercise of municipal regulatory powers or is pre-empted by state law requires review of the applicable traffic control laws. A municipal regulation—even a reasonable one—may be impermissible if the legislature has carved out an area of regulation for uniform state application and not included the regulation as an enumerated local government power.

Such is the case with Florida's Uniform Traffic Control Law, codified in chapter 316, Florida Statues, which has clear statements as to its purpose and strict limitations on local government powers.

> It is the legislative intent in the adoption of [chapter 316] to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities. The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. *Section 316.008 enumerates the area within which municipalities may control certain* ***traffic movement*** *or parking in their respective jurisdictions.* This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith. *It is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.*

§ 316.002, Fla. Stat. (2019) (emphases added); *see also id.* § 316.007 ("The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and *no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized*.") (emphasis added). As the highlighted portions indicate, the legislature has made clear that the state's traffic

control laws in chapter 316 trump municipal ordinances excepting only those specific areas set out in section 316.008. And our supreme court has echoed this point, stating that "[c]hapter 316 could not be clearer in providing that local ordinances on 'a matter covered by' the chapter are preempted unless an ordinance is 'expressly authorized' by the statute." *Masone v. City of Aventura*, 147 So. 3d 492, 496–97 (Fla. 2014).

The legislature has set forth limited and specifically defined powers that local governments statutorily possess as to traffic movement and control, set forth in section 316.008, entitled "Powers of local authorities," which states in relevant part:

> (1) The provisions of this chapter [State Uniform Traffic Control] shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:
>
> . . .
>
> (g) Restricting *the use* of streets.
>
> (h) Regulating *the operation* of bicycles.
>
> . . .
>
> (n) Prohibiting or regulating *the use* of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic.
>
> . . .
>
> (t) Adopting and enforcing such temporary or experimental regulations as may be necessary to cover emergencies or special conditions.

§ 316.008, Fla. Stat. (2019) (emphasis added). *See City of Aventura*, 147 So. 3d at 496 ("As indicated in section 316.002, section 316.008 contains an enumeration of specific powers that local authorities

may exercise *to control traffic movement* or parking in their respective jurisdictions 'within the reasonable exercise of the police power.'") (emphasis added).

In this case, the motor scooters at issue were within the statutory definition of a motorcycle for purposes of chapter 316, such that the City was limited to the powers in section 316.008 in dealing with traffic movement and control. On this point, the legislature recently made clear that the operation of motorized scooters is permissible and on par with bicycles in most respects such as operating on sidewalks and bicycle paths. Ch. 2019-109, § 3, Laws of Florida, ("Motor Vehicles-Micromobility Devices"); § 316.2128(1), Fla. Stat. (2019) ("The operator of a motorized scooter or micromobility device has all of the rights and duties applicable to the rider of a bicycle under s. 316.2065, except the duties imposed by s. 316.2065(2), (3)(b), and (3)(c), which by their nature do not apply."). The recent legislation further provides that "this section [316.2128] may not be construed to prevent a local government, through the *exercise of its powers under s. 316.008*, from adopting an ordinance *governing the operation of* micromobility devices and *motorized scooters* on streets, highways, sidewalks, and sidewalk areas under the local government's jurisdiction." § 316.2128, Fla. Stat. (emphasis added).

The statutorily defined "powers of local authorities" that govern the operation of motorized scooters (deemed motorcycles previously) was, and remains, limited to twenty-three topics, none of which suggest that a total ban on scooter rentals within a municipality is permissible as a means of traffic control. Each method of regulation in section 316.008(1) deals with the manner of *use* of motorized scooters or their *operation*, and not the manner in which they are sold, rented, or otherwise made available commercially for use or operation. The City and trial judge both characterize the total rental ban in Ordinance 1416 as a permissible regulation because it does not ban all scooters, does not affect operating standards for scooters generally, and falls outside the pre-emptive canopy of chapter 316, which does not directly address the regulation of rental vehicles commercially within a municipality.

Nonetheless, it is beyond debate that the *sole reason* for the total intra-city rental ban is to regulate and control traffic movement on the City's streets that spills into adjoining areas. The conclusion that Ordinance 1416 regulates "only the business of renting motor scooters" overlooks the City's specific regulatory intent, which is to "deny access" to rented scooters to prohibit their "use" and thereby the traffic stops, citations, and accident investigations that would occur. The ban is *specifically intended* to have a direct and immediate impact on traffic movement, not merely an incidental or inconsequential side effect; controlling the use and operation of motorized scooters in the City's traffic flow is its raison d'être.

For this reason, the City must directly employ one of the twenty-three listed powers in subsection 316.008(1) that address traffic movement and control versus totally banning intra-city scooter rentals as an indirect means to regulate their use and operation. A ban, such as the one in this case, amounts to an indirect prohibition of a permissible activity that is unlawful. That's the focus of *Alachua County v. Lewis Oil Co., Inc.*, 554 So. 2d 1210 (Fla. 1st DCA 1989), where a moratorium on underground petroleum storage tanks was held to be an indirect and unlawful means of prohibiting what the county could not ban. *Id*. at 1211 ("The intended and actual effect of the moratorium is therefore to indirectly do what [the county] is prohibited from doing directly, i.e., enforce standards stricter than DER standards, without first obtaining DER approval."); *see also City of Gainesville v. GNV Invs., Inc.*, 413 So. 2d 770, 771 (Fla. 1st DCA 1982) (upholding "trial judge's finding that the Plan Board unlawfully and arbitrarily denied" a proposed skate center). No case, including *Lewis Oil*, is a perfect match factually and legally to this one, but its legal principle fits nicely. *See also State ex rel. Powell v. Leon Cty.*, 182 So. 639, 642 (Fla. 1938) ("It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action.").

The ban on rental scooters is akin to St. Petersburg's proposed ban on horse-drawn carriages that the attorney general deemed impermissible based on the limited authority in section 316.008. In opining that such a ban is impermissible, the attorney general concluded:

> In light of the authority granted under s. 316.008, F.S., this office has stated that under certain conditions and in the reasonable and nondiscriminatory exercise of its police power, a municipality may regulate or prohibit the use of certain streets within the municipality by any class or kind of traffic. *Such limited authority, however, does not empower a municipality to absolutely bar or prohibit the riding or driving of horses or horse-drawn vehicles on all streets of the municipality or to unreasonably discriminate against such use of the public streets within the municipality.* Thus, there may be certain heavily traveled streets within a municipality where the use of horse-drawn carriages may be incompatible with the normal and safe movement of traffic; however, a municipality would appear to be precluded from prohibiting such carriages on all streets under its jurisdiction.

Op. Att'y Gen. Fla. 93-22 (1993) (footnote omitted) (emphasis added); *see also* Op. Att'y Gen. Fla. 80-80 (1980) (use of public streets by horses, ridden or driven, is preempted by chapter 316). As the trial judge noted, a total ban on all scooters—rentals and non-rentals—would violate chapter 316, but so would a ban that does not comply with section 316.008.

The City's frustration factor, understandably, is high. If chapter 316 and its pre-emptive force did not exist, the City could do as it sees fit under its broad home rule powers to regulate and control traffic movement and associated problems. Cities have means of addressing seasonal scooter inundation, such as restricting or prohibiting scooter operations where they are deemed incompatible with traffic safety standards. Although the legislature has pre-empted the field, it has given local governments a defined set of tools to address traffic movement and control, including section 316.008(1)(n), which allows "[p]rohibiting or regulating the use of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic." § 316.008(1)(n), Fla. Stat.; *see also* Op. Att'y Gen. Fla. 2002-11 (2002) ("Accordingly, while the City of Cedar Key may restrict the operation of golf carts on city

streets where such operation is determined to be incompatible with the normal and safe movement of traffic, the city may not impose a more restrictive age requirement for the operation of a golf cart than that which is allowed by section 316.212, Florida Statutes, nor may the operator be required to have a valid Florida driver's license."). In addition, although *Classy Cycles I* rejected the application of subsection 316.008(1)(t) to the City's year-round safety vest and insurance requirements, it did not foreclose its application to temporary situations, such as the peak Spring Break season, where especially heavy inundations of visitors may justify local regulations on use and operation of motorized scooters to combat the types of problems the City perpetually faces.

This case, however, does not involve subsections (1)(n) or (1)(t), which were not cited in the trial court's order or by the parties in their submissions. The City—although referencing subsection (1)(n) at the end of the last preamble in Ordinance 1416—has not relied on that subsection as the basis for its regulatory authority, and Classy Cycles does not contend the City failed to act within the powers set out in subsection (1) generally. Instead, the focus has been on whether pre-emption applies to the challenged ordinances, the trial court ruling it does not.

The exclusive purpose of the City's ban on intra-city rentals of motorized scooters is to regulate traffic movement, which is within the pre-emptive core of Florida's Uniform Traffic Control Law, chapter 316. It was error to conclude otherwise. That said, the legislature has granted local governments specific powers, such as those in sections 316.008(n) and (t), to address raucous and disruptive traffic situations such as those occurring with regularity in Panama City Beach. This litigation did not address whether the City's ban was within these specific statutory powers—which is for another day.

George T. Reeves of Davis, Schnitker, Reeves & Browning, P.A., Madison, and Mark V. Murray, Tallahassee, for Appellant.

J. Cole Davis and Julia K. Maddalena of Hand Arendall Harrison Sale LLC, Panama City, for Appellee.

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES and FLORIDA COMMISSIONER OF AGRICULTURE, Appellants, v. JOSEPH DOLLIVER; NANCY DOLLIVER; JOHN KLOCKOW and DEANNA KLOCKOW, Trustees of the Klockow Living Trust; CHARLES STROH; LOIS STROH; THE CERTIFIED CLASS OF LEE COUNTY HOMEOWNERS; RAYMOND DELLASELVA; MARY E. DELLASELVA; and MARIANNE J. SANSON, Trustee of the Marianne J. Sanson Revocable Trust, Appellees.	)	Case No. 2D18-1393

Opinion filed November 13, 2019.

Appeal from the Circuit Court for Lee County; Keith R. Kyle, Judge.

Wesley R. Parsons and Karen H. Curtis of Clarke Silverglate, P.A., Miami, for Appellants.

Robert C. Gilbert of Grossman Roth Yaffa Cohen, P.A., Coral Gables; and Bruce S. Rogow and Tara Campion of Bruce S. Rogow, P.A., Fort Lauderdale, for Appellees.

SILBERMAN, Judge.

The Florida Constitution provides in what is commonly referred to as the "Takings Clause" that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. Appellants, a class of homeowners in Lee County (the Lee Homeowners), have spent sixteen years fighting for their constitutional rights to payment of compensation for the taking of their property by the Florida Department of Agriculture and Consumer Services and the Florida Commissioner of Agriculture (the Department).

In this stage of these unnecessarily protracted proceedings, the Lee Homeowners are pursuing enforcement of a 2014 final judgment for $13,625,249.09 that was entered following a jury trial, together with final judgments for attorney's fees and costs entered in their favor in 2015 and 2016. In 2016, this court affirmed the 2014 final judgment, Fla. Dep't of Agriculture & Consumer Servs. v. Dolliver, 209 So. 3d 578 (Fla. 2d DCA 2016) (table decision), and the Department did not seek further review in the Florida Supreme Court. The Department also did not seek appellate review of the judgments for fees and costs.

As a result of the Department's ongoing failure to pay the outstanding final judgments, the Lee Homeowners returned to court to enforce the judgments. Although the judgments have long been final and the Department claimed that it would be "happy to pay the three judgments," the Department asserted that it is unable to make payment until the legislature appropriates the funds as required by sections 11.066(3) and (4), Florida Statutes (2015). The Lee Homeowners responded that the Department has

refused to take affirmative action to obtain an appropriation and has taken a position that has resulted in the governor vetoing a legislative appropriation that the Lee Homeowners had requested. Further, the Lee Homeowners argued that sections 11.066(3) and (4) are unconstitutional as applied.

After an evidentiary hearing, the trial court entered a thorough order[1] that addressed at length the Takings Clause, the pertinent statutes, and the applicable case law, together with the evidence that the parties presented. The court determined that sections 11.066(3) and (4) are unconstitutional as applied and issued a writ of mandamus directing the Department to pay the judgments. As the court explained, "To essentially argue that the [Lee Homeowners] should just hope that someday, some year, the Legislature eventually will pass an appropriation to cover the judgments, and further that the governor finally will assent, while at the same time doing absolutely nothing to secure such an appropriation, is a specious argument." (Order p. 7) We agree with the trial court's well-reasoned decision and affirm.

I. Introduction

The question before this court is whether the trial court erred in declaring sections 11.066(3) and (4) unconstitutional as applied to the Lee Homeowners' takings judgments and in issuing a writ of mandamus compelling payment. Sections 11.066(3) and (4) provide as follows:

> (3) Neither the state nor any of its agencies shall pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law. To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment

[1]The entire order can be found at the following link on our website: https://www.2dca.org/content/download/540183/6097146/2D18-1393.pdf

> creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.
>
> (4) Notwithstanding s. 74.091, a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies. Moreover, it is a defense to an alternative writ of mandamus issued to enforce a judgment for monetary damages against the state or a state agency that there is no appropriation made by law to pay the judgment.

Under section 11.066(3), a court may not require a state agency to pay a judgment for monetary damages absent an appropriation made by the legislature. In the event of nonpayment of a monetary judgment due to a lack of appropriation, the judgment creditor must petition the legislature for an appropriation. Id. Section 11.066(4) expressly prohibits the courts from issuing a writ of execution or using any common-law remedy against the state agency to enforce the monetary judgment. And, in the event a court issues an alternative writ of mandamus to compel payment, section 11.066(4) provides that the lack of an appropriation is a valid defense.

The difficulty with these provisions is that despite the constitutional imperative in the Takings Clause, they give the legislature the sole discretion to decide whether and when to make an appropriation. And if an appropriation is made, it is subject to the governor's sole discretion to veto it. By doing so, application of these statutory provisions could subject payment of a takings judgment to the whim of the legislature and governor. And this could result in sections 11.066(3) and (4) effectively abrogating judgment creditors' constitutional rights to full compensation under the Takings Clause.

II. Facts

This action began in 2003 when the Lee Homeowners sued the Department for inverse condemnation for taking 33,957 healthy citrus trees located on 11,811 residential properties. The Department had taken the trees in the course of its efforts to eradicate citrus canker. In 2014, following a jury trial, the trial court entered a judgment awarding the Lee Homeowners $13,625,249.09 plus interest and a judgment awarding them $821,993.12 in attorney's fees. The takings judgment was affirmed by this court. See Dolliver, 209 So. 3d 578. This court also awarded the Lee Homeowners appellate attorney's fees, and the trial court entered a third judgment in the amount of $70,892.50.[2]

In the 2017 session of the Florida Legislature, the Lee Homeowners requested an appropriation to pay the judgments. The legislature passed a bill in the session that included such an appropriation. However, Commissioner Adam Putnam had made public statements suggesting that the Department was still challenging the judgments, and Governor Scott line-item vetoed the appropriation in apparent reliance on those statements on June 2, 2017.

On June 8, 2017, the Lee Homeowners filed a petition for writ of mandamus or to declare sections 11.066(3) and (4) unconstitutional in the trial court. The court issued an alternative writ and held a hearing on the petition. In March 2018, the court entered an order that detailed at great length the evidence presented and

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[2]Prior to the Lee Homeowners' trial, other homeowners around the state who were affected by citrus canker filed four class-action inverse condemnation actions against the Department. In the Miami-Dade County case, the Department obtained a defense verdict. The homeowners obtained judgments in Broward, Palm Beach, and Orange Counties.

contained extensive findings. It is not necessary to repeat the trial court's findings for the purposes of this opinion. We simply note that the court's factual findings are supported by the evidence.

The court determined that the Lee Homeowners established the elements necessary for a writ of mandamus: (1) they have a clear legal right to payment of the judgments, (2) the Department has a legal duty to pay, and (3) they are without an adequate remedy at law because the legislature has not been able to successfully pass an appropriation resulting in payment. But the court also determined that, despite the Lee Homeowners' satisfaction of these elements, sections 11.066(3) and (4) precluded the court from issuing a writ of mandamus directing the Department to pay the judgments.

The trial court then examined sections 11.066(3) and (4) and held that the statutes were unconstitutional as applied. Based on that conclusion, the court stated it would enter a writ of mandamus ordering the Department to immediately pay or arrange for payment of the three judgments. If the Department did not comply, the court would consider entering an order to show cause why the Department should not be held in contempt. Alternatively, the court would consider issuing a writ of execution. The court authorized the Lee Homeowners to conduct a deposition in aid of execution and submit to the court a list of the Department's properties that would satisfy the judgments. The court would review the list, conduct a duly noticed hearing, and decide which, if any, of the properties may be subject to a writ of execution.

The writ of mandamus issued in April 2018. The Department filed this timely appeal of the March 2018 order and the April 2018 writ of mandamus. While the

appeal has been pending, two more legislative sessions have passed without the appropriation of any funds for the takings judgments.

III. Issues/Analysis

A. The Department's Ability to Pay

The Department asserts that the trial court erred in issuing a writ absent evidence that it had the present ability to pay the judgments. We recognize that the total inability to pay the judgments may preclude issuance of a writ of mandamus. See State v. Amos, 131 So. 122, 123 (Fla. 1930); State v. Tavares & G.R. Co., 82 So. 833, 835 (Fla. 1919); Conner v. Mid-Fla. Growers, Inc., 541 So. 2d 1252, 1256 n.7 (Fla. 2d DCA 1989). However, the Department has not established that it lacks the ability to satisfy the judgments in full or in part. Instead, the Department's position is that it is not legally authorized (or required) to pay the judgments until the legislature appropriates the funds for that purpose as required by sections 11.066(3) and (4).

Based on the evidence presented the trial court found that the Department failed to demonstrate an actual inability to pay. Indeed, the Department has made no efforts to pay or secure payment of the judgments, and it has failed to request an appropriation in order to make payment.[3] In fact, when the legislature included an appropriation in the 2017 budget, the Department's position that the judgments were not final resulted in the governor vetoing that appropriation. As to the 2018-19 budget, the

[3]In its reply brief, the Department asserted that it requested an appropriation to pay the three judgments in its Legislative Budget Request (LBR) for 2020-21, which was filed while this appeal was pending. The Department informed this court that we could take judicial notice of the LBR but did not file a motion requesting same. Regardless, this court has taken judicial notice of Senate Bill 2500, the fiscal year 2019-20 budget, which does not contain an appropriation for the judgments.

Department sought millions of dollars for increased salaries and vehicles, while admittedly doing nothing to assist and support proposed appropriations to pay the judgments. In summary, as found by the trial court, "The overwhelming and conclusive evidence demonstrated that the" Department failed to pay the "judgments or make even the most basic of efforts to secure an appropriation of funds to pay" the judgments. (Order p. 15)

B. The Alleged Failure to Exhaust Legal Remedies

The Department next argues that the constitutionality challenge to sections 11.066(3) and (4) was not ripe because the Lee Homeowners did not file a claim bill under section 11.066(3). However, section 11.066(3) does not mention a claim bill but merely states: "To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment." (Emphasis added.) The Fourth District has already rejected this exhaustion of remedies argument on the same basis in the Broward County litigation. See Bogorff v. Fla. Dep't of Agric. & Consumer Servs., 191 So. 3d 512, 514 (Fla. 4th DCA 2016).

As noted previously, an appropriation had been made during the 2017 legislative term, but it was vetoed by the Governor apparently based on the Department's incorrect position that the judgments were not final. Moreover, the evidence before the trial court established that the Department had not previously raised section 11.066 as an impediment to paying other judgments. Based on the

analysis in Bogorff and the circumstances here, we conclude that the constitutionality challenge to sections 11.066(3) and (4) was ripe.

C. The Constitutionality of Sections 11.066(3) and (4)

The trial court found sections 11.066(3) and (4) unconstitutional as applied because the provisions (1) unconstitutionally restrict the Lee Homeowners' rights to payment of full compensation for a governmental taking of their property under article X, section 6(a), of the Florida Constitution; (2) violate the separation of powers doctrine under article II, section 3; and the power of the judiciary under article V, section 1; (3) violate the Lee Homeowners' rights of access to the courts under article I, section 21; and (4) unconstitutionally conflict with section 74.091, Florida Statutes (2015), which provides property owners the right to obtain a writ of execution to enforce a judgment in an eminent domain proceeding. The Department challenges all of these findings, and we adopt the trial court's well-reasoned analysis in its entirety. For purposes of this opinion, we address the first two findings because they are the most compelling.

1. Right to full compensation for a governmental taking of property under art. X, § 6(a)

In finding sections 11.066(3) and (4) unconstitutional on this basis, the trial court reasoned, in part, as follows:

> As stated in Notami Hospital of Florida, Inc. v. Bowen, 927 So. 2d 139, 142 (Fla. 1st DCA 2006), "[s]tate constitutions are limitations upon the power of [] state legislature[s] . . . ." As a result, a statute enacted by the Legislature may not restrict a fundamental right granted under the Florida Constitution. "To the extent [] a statute conflicts with express or clearly implied mandate[s] of the Constitution, the statute must fa[l]l." Id. at 142. Not surprisingly, courts rely on this principle—legislative authority necessarily yields to constitutional pronouncements—in the very context at issue

here: where legislation conflicts with the express or implied mandate of Article X, § 6(a).

In Storer Cable T.V. of Fla., Inc. v. Summerwinds Apts. Assocs. Ltd., 493 So. 2d 417 (Fla. 1986), the Florida Supreme Court held that a statute purporting to authorize a television service provider to enter private property without providing full compensation to the owner was unconstitutional under Article X, § 6, Fla. Const., as well as the Fifth Amendment to the United States Constitution. Id. at 418. Similarly, in the inverse condemnation case of Drake v. Walton County, 6 So. 3d 717 (Fla. 1st DCA 2009), the First District Court of Appeal held that regardless of the county's statutory authority to excavate drainage paths to preserve property under § 252.43(6), Fla. Stat., the county's statutory authority "must yield to Article 10, section 6 of the Florida Constitution," requiring payment of full compensation to the aggrieved party. Id. at 722.

No legislative pronouncement may thwart the implementation of a constitutional mandate—particularly where, as is typically the case and here, the constitutional provision is self-executing. In such cases, the Legislature may enact legislation addressing the constitutional right conferred, but only to further protect the right or make the right more readily available, not to undermine it. See, e.g., Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 485 (Fla. 2008) (recognizing that [a] constitutionally granted right "may be supplemented by legislation, further protecting the right or making it available," and that such does not prevent the provision from being self-executing). In Florida Hospital, the Florida Supreme Court explained:

> The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such [a] presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.

Id. at 486 (quoting Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960)).

Application of §§ 11.066(3) and (4) to prevent or limit payment of the three judgments awarded to [the Lee

> Homeowners] in this constitutional takings proceeding similarly "run[s] afoul" of the self-executing, constitutional mandate that requires it. See Florida Hospital. As reflected in the cases discussed above, the payment of full compensation for a taking is compulsory. . . .
>
> While the Legislature may permissibly implement the constitutional mandate in order to further protect the constitutional right to full compensation for a taking, or to make the right more readily available, §§ 11.066(3) and (4) do precisely the opposite. Application of §§ 11.066(3) and (4) to preclude issuance of a writ of execution will preclude the efforts of the Lee Homeowners to secure their constitutional right to payment of full compensation, and subject the payment of lawfully entered constitutional takings judgments to the vagaries of the legislative appropriations process. Absent judicial action, application of these sections will render payment of constitutional compensation entirely subject to the arbitrary exercise of the Legislature's discretion to appropriate funds, leaving little doubt that the constitutional guaranty of payment of full compensation will be denied to [the Lee Homeowners]. Put another way, [the Lee Homeowners'] right to full compensation is subject to the will of the Legislature to pass an appropriation, and the Governor to approve it, thereby essentially making the subject guarantee of full compensation under our State Constitution an illusory promise with no guarantee of compliance. Accordingly, the interpretation and suggested application of §§ 11.066 (3) and (4) must yield to Article X, § 6(a), Fla. Const.

(Order pp. 46-47) (footnotes omitted).

The Department raises three challenges to this analysis. First, it argues that the Takings Clause does not trump sections 11.066(3) and (4) because those sections are premised on the doctrine of sovereign immunity, which predates the constitution. The Department asserts that the supreme court has found constitutional a statutory cap that contained a similar restriction on payment for governmental negligence. See Cauley v. City of Jacksonville, 403 So. 2d 379, 379 n.1, 384 (Fla. 1981) (upholding a statute providing a cap on tort judgments against a municipality and

providing that judgments in excess of the cap "may be paid in part or in whole only by further act of the Legislature").

However, as noted by the Lee Homeowners, the underlying principle behind the Takings Clause is that the government is not immune from the obligation to pay full compensation when it takes and destroys private property. See State Road Dep't of Fla. v. Tharp, 1 So. 2d 868, 869-70 (Fla. 1941); Hillsborough County v. Kensett, 144 So. 393, 395 (Fla. 1932). Additionally, Cauley did not involve a statute that, as applied, completely deprived homeowners of their rights to compensation for a taking. Instead, Cauley involved the application of a statute that provided a cap on tort judgments, subject to further legislative action. Cauley, 403 So. 2d at 379 n.1. Here, as discussed previously, the Department takes the position that it will make no payment of the final judgments absent specific legislative appropriation; that it has no obligation to take any action to secure such an appropriation; and that it is up to the legislature to decide whether to make an appropriation. We agree with the trial court that these statutes, as applied here, are contrary to the Takings Clause.

Second, the Department argues that sections 11.066(3) and (4) are reasonable restrictions on the means by which a takings judgment may be paid. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (recognizing reasonable restrictions on the constitutional right to bear arms); Buss v. Reichman, 53 So. 3d 339, 344 (Fla. 4th DCA 2011) ("The Florida Supreme Court has repeatedly recognized that like other constitutional rights, the right to habeas relief is subject to reasonable restrictions."). However, based on the evidence presented sections 11.066(3) and (4)'s restrictions, as applied, completely deprive the Lee Homeowners of their rights to full

compensation for the government's taking. In short, the restrictions have not regulated payment; they have allowed the Department to completely avoid payment contrary to the Takings Clause.

And third, the Department argues that there are no Florida cases declaring unconstitutional a statute that provides a process for payment of a governmental obligation. The Department asserts that the cases cited by the trial court involve instances of no compensation for a taking while sections 11.066(3) and (4) merely regulate the process for obtaining compensation. However, the Department mischaracterizes the result of sections 11.066(3) and (4) under the circumstances here. As applied, the statues are being used as a shield against required compensation established by the final judgments and in accordance with the Takings Clause.

2. Separation of powers under article II, section 3; and the power of the judiciary under article V, section 1

In finding sections 11.066(3) and (4) unconstitutional on this basis, the trial court reasoned, in part, as follows:

> Application of §§ 11.066(3) and (4) also sets them at odds with another long-settled and well-enshrined principle; the determination of full compensation is a judicial function that cannot constitutionally be performed by the Legislature. As the Florida Supreme Court long ago held in Daniels v. State Road Dep't, 170 So. 2d 846, 851 (Fla. 1964):
>
> > It is well settled that the determination of [what is] just compensation for the taking of private property for public use 'is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection.'
>
> Id. at 851 (emphasis added, quoting Spafford v. Brevard, 110 So. 451, 455 (Fla. 1926)).
>
> Indeed, this oft-repeated principle is a hallmark of citrus canker jurisprudence. See, e.g., Patchen v. Dep't of

Agriculture, 906 So. 2d 1005, 1008 (Fla. 2005) (holding that "the determination of what is just compensation . . . is a judicial function that cannot be performed by the Legislature") (quoting [Haire v. Fla. Dep't of Agriculture], 870 So. 2d at 785); Dep't of Agriculture v. Bonnanno [sic], 568 So. 2d 24, 31 (Fla. 1990) ("It is true that the legislature may not set conclusive values for property taken for a public purpose because the determination of just compensation is a judicial function."); State Plant Bd. v. Smith, 110 So. 2d 401, 407 (Fla. 1959) ("But where, as here, a provision for 'just compensation' is a clear requisite to the act of destruction, then we find no authority for the Legislature's specification of the maximum compensation to be paid."); [Fla.] Dep't of Agriculture v. Haire, 836 So. 2d 1040, 1048 (Fla. 4th DCA 2003), aff'd, 870 So. 2d 774 (Fla. 2004) ("Although the [l]egislature had set the amount of compensation in the act, . . . the determination of what constitutes 'just compensation' [is] a []judicial function[] which [cannot] be pre[-]empted by the Legislature.") (citing State Plant Board v. Smith, 110 So. 2d 401, 407 (Fla. 1959)[])].

The rationale for vesting the judiciary with the power to determine full compensation, instead of vesting such authority in the Legislature, is sound and controls here. As stated in Daniels:

> [']The just compensation clause may not be evaded or impaired in any form of legislation. Against the opposition of the owner of private property taken for [] public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him [by that] clause. . . . [W]hen he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount.['] . . . And in Monongahela Navigation Co. v. U.S., supra, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 [1893], in which the Supreme Court struck down an Act of Congress purporting to exclude an element of value . . . , the court said that just compensation means that "a full and perfect equivalent for the property taken" must be returned to the owner, and that "By this l[e]gislation[] congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a

> judicial, and not a legislative[,] question. * * * It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

170 So. 2d at 852 (quoting Baltimore & [O.R.] Co. v. U.S., 298 U.S. 349, 368 (193[6])) (emphasis in original).

To the extent that §§ 11.066(3) and (4) are interpreted to permit the Legislature (by the appropriations process) to control the amount of compensation, if any, that [the Lee Homeowners] will actually receive under their lawfully-entered constitutional takings judgments, the Legislature, in effect, will both impose the taking and then determine whether or not, and in what amount, it will pay—in essence supplanting the jury's verdict with their own. Such a result resoundingly and repeatedly has been rejected by the Florida Supreme Court as noted in some of the aforementioned cases. A statute that allows the Legislature to exercise its discretion to determine whether or not, and in what amount, it will pay lawfully entered constitutional takings judgments is no different than legislation that purports to fix full compensation. Indeed, as succinctly stated by the Fourth District [in the Broward County litigation]:

> While the government has the ability to establish procedures for payment of its constitutional obligation, it does not have the luxury of avoiding it. Should the Class fail in obtaining a writ of mandamus, pursuant to section 11.066(4), the constitutional issue will ripen, and [t]he courts will be left with no choice but to enforce Article X, section 6(a) of the Florida Constitution.

Bogorff II, 191 So. 3d at 51[6].[4]

(Order pp. 54-56)

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[4]Bogorff v. Fla. Dep't of Agric. & Consumer Servs., 191 So. 3d 512 (Fla. 4th DCA 2016).

The Department argues that sections 11.066(3) and (4) do not implicate the judicial function of determining just compensation for a taking. The Department asserts that the judiciary has already determined just compensation by entering a judgment for damages pursuant to a jury verdict. The Department claims that sections 11.066(3) and (4) "relate solely to the payment and the appropriation of state funds for the amounts previously judicially determined, a matter within the exclusive purview of the legislative, not the judicial, branch."

However, these provisions allow the legislature to exercise its discretion to determine whether, when, and in what amount to pay constitutional takings judgments. In this way, sections 11.066(3) and (4) expand the legislature's power beyond the payment and appropriation of state funds for amounts previously determined. See State Plant Bd. v. Smith, 110 So. 2d 401, 407 (Fla. 1959) (holding that a statutory cap on payment for the taking of healthy trees constituted a legislative encroachment on the judiciary's power to determine just compensation for the taking of private property). As applied, the provisions have thwarted payment of full compensation, determined through court proceedings, under the Takings Clause for years.

D. The Doctrine of Separation of Powers

The Department argues that the order and writ violate the doctrine of separation of powers by encroaching on the legislative prerogative to appropriate funds and the Department's prerogative to control its own budget. We acknowledge that generally "[t]he judicial branch may not either interfere with the legislative branch by requiring funds to be spent by an executive agency in a manner not authorized by statute, nor interfere with an executive agency's discretion in the spending of

appropriated funds." Dep't of Children & Families v. K.R., 946 So. 2d 106, 107-08 (Fla. 5th DCA 2007). However, by specifying a defense to issuance of a writ of mandamus, section 11.066(4) itself recognizes the authority of the judicial branch to issue a writ of mandamus compelling a state agency to pay a valid judgment against it. And the supreme court has recognized that "issuance of the writ of mandamus is an appropriate enforcement mechanism" for a judgment against a governmental entity. Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1271 (Fla. 2008).

E. Writ of Execution

The Department challenges the portion of the order providing that if it fails to comply with the writ of mandamus the court would consider issuing a writ of execution against the Department's property. It also challenges the portion of the order allowing the Lee Homeowners to conduct a deposition in aid of execution and to submit a list of executable property to the trial court. The Department argues that these rulings violate section 11.066(4) and the Department's protection as a sovereign.

However, we have considered both of these arguments and conclude that both authorities cited by the Department yield to the Lee Homeowners' constitutional rights to be compensated for the governmental taking. Furthermore, as noted by the Lee Homeowners, any challenge to these provisions is premature because the court indicated that it would not issue a writ of execution without conducting a duly noticed hearing to decide which, if any, of the Department's property may be subject to a writ of execution.

IV. Conclusion

After considering all arguments made by the Department, we conclude that the trial court did not err in declaring sections 11.066(3) and (4) unconstitutional as applied to the Lee Homeowners' takings judgments and in issuing a writ of mandamus compelling payment. Applying sections 11.066(3) and (4) to prevent the trial court from issuing a writ of mandamus would preclude the Lee Homeowners from securing their constitutional rights to payment of full compensation under article X, section 6(a), of the Florida Constitution. It would also allow the legislature to control the amount of compensation, if any, that the Lee Homeowners will actually receive in contravention of the separation of powers doctrine under article II, section 3; and the power of the judiciary under article V, section 1. We echo the following sentiment of the trial court: "This Court cannot and will not countenance further delays in securing payment to [the Lee Homeowners] of the constitutionally-guaranteed full compensation that was adjudicated to finality in this case." We affirm the orders on appeal.

Affirmed.

NORTHCUTT, JJ., Concurs.

BADALAMENTI, Judge, Concurring specially.

I fully concur in the opinion of the court. I write separately to suggest that the legislature consider certain amendments to section 11.066, Florida Statutes (2015).

As an initial matter, our holding subsections 11.066(3) and (4) unconstitutional as applied comes after careful determination that no other grounds were available to enforce the final judgment rendered in favor of the plaintiffs here. See In re Holder, 945 So. 2d 1130, 1133 (Fla. 2006) ("Of course, we have long subscribed to

a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds."). And we act today to protect the Lee Homeowners' self-executing constitutional right to receive "full compensation" for the Department's taking of their 33,957 citrus trees. See art. X, § 6(a), Fla. Const. Indeed, neither the Constitution of the United States nor the Constitution of the State of Florida's respective takings provisions means anything unless those who have been deprived of their private property are paid for what the state took from them. See Bogorff v. Fla. Dep't. of Agric. & Consumer Servs., 191 So. 3d 512, 516 (Fla. 4th DCA 2016) (citing Tampa–Hillsborough Cty. Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54, 58 (Fla. 1994)) (explaining that the Florida Supreme Court has interpreted the takings clauses of the United States and Florida Constitutions coextensively).

The text of the takings provisions of both the Fifth Amendment and Florida's constitution yields the obvious conclusion that they are self-executing. See amend V, U.S. Const. ("[N]or shall private property be taken for public use, without just compensation."); art. X, § 6(a), Fla. Const. ("No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."). In other words, these takings provisions do not require enabling legislation to be effective. If a person's private property is physically taken by the government without "full compensation" at the time that the government took it, as we have here, we are able to discern a constitutional violation has occurred simply by the operation of the constitutional provisions. See Knick v. Twp. of Scott, 139 S. Ct. 2162, 2171 (2019) ("Because of 'the self-executing character' of the Takings Clause [of the Fifth

Amendment to the United States Constitution] 'with respect to compensation,' a property owner has a constitutional claim for just compensation at the time of the taking." (quoting First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal., 481 U.S. 304, 318 (1987))); Flatt v. City of Brooksville, 368 So. 2d 631, 632 (Fla. 2d DCA 1979) (noting that article X, section 6(a) of the Florida Constitution "does not require enabling legislation to be effective"). Even still, this case illustrates that the operation of even a self-executing constitutional provision has its challenges.

With the challenges presented in this case in mind, the legislature may wish to consider amending section 11.066 to take steps to accelerate the finality of constitutionally-based final judgments entered against the state and its agencies in our state's courts of law. As to finality, the answer cannot be, as the Department suggests, that takings plaintiffs must wait an indeterminate, if not infinite, number of legislative sessions for the state to fully satisfy constitutionally-based monetary judgments. And the position of a state agency should not be, as here, that it owes no duty to assist takings plaintiffs with the process of receiving payment of constitutionally-based monetary judgments.

Specifically, the legislature may first consider amending section 11.066 to include that the state and its agencies provide immediate, accurate, and ongoing information to the legislature until constitutionally-based monetary judgments are paid in full. Second, the legislature may consider mandating that the state and its agencies arrange for full payment, such that the legislature can appropriate new funds or authorize its agencies to reappropriate funds from its existing till, of such constitutionally-based judgments. Third, the legislature may consider adding that full

payment must be disbursed in a period not to exceed two legislative sessions from the issuance of the mandate in the state's supreme court or, if not appealed to the supreme court, the district courts of appeal. It is my view that much of this extended postjudgment litigation would have been unnecessary had the Department fully and accurately communicated the status of the litigation to the legislature and the governor and had the Department continuously assisted the Lee Homeowners in collecting the final monetary judgment entered against it.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CLAUDINE M. STACKNIK, Appellant, v. U.S. BANK NATIONAL ASSOCIATION, as Trustee, MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3; WESLEY R. STACKNIK; and SUNTRUST BANK, Appellees.	)	Case No. 2D18-2156

Opinion filed November 15, 2019.

Appeal from the Circuit Court for Pinellas County; Keith Meyer, Judge.

Jared M. Krukar and Dineen Pashoukos Wasylik of DPW Legal, Tampa (substituted as counsel of record), for Appellant.

Kimberly S. Mello and Vitaliy Kats of Greenberg Traurig, P.A., Tampa, for Appellee U.S. Bank National Association.

No appearance for remaining Appellees.

BLACK, Judge.

Claudine M. Stacknik challenges the final judgment of foreclosure entered in favor of U.S. Bank National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3. We affirm the final judgment in all respects and write only to express agreement with Hanna v. PennyMac Holdings, LLC, 270 So. 3d 403 (Fla. 4th DCA 2019), and to reiterate that a mailing log is sufficient additional evidence to establish the mailing of a paragraph 22 notice.

Ms. Stacknik asks this court to determine that a note containing negative amortization provisions is not a negotiable instrument subject to Article 3 of the Uniform Commercial Code, chapter 673, Florida Statutes (2013). Ms. Stacknik's adjustable rate note provides that the principal amount borrowed was $880,000 and that the principal amount might increase as provided under the terms of the note but would never exceed 110% of the amount originally borrowed. The terms allowing for an increase in principal are those setting forth the possibility of negative amortization; a possibility which would only occur through Ms. Stacknik's choices regarding payment. That is, where Ms. Stacknik's monthly payments were insufficient to satisfy the accruing interest, the balance of unpaid accrued interest was added to the principal balance. Ms. Stacknik argues that the negative amortization provisions of her note remove it from the definition of a negotiable instrument because the amount promised to be paid is not "fixed." See § 673.1041(1) (defining "negotiable instrument" in part as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order"). Ms. Stacknik's note is a promise to pay $880,000 in

principal plus applicable "interest or other charges described," including amounts added to the principal in accordance with the negative amortization provisions of the note. Like the Fourth District in Hanna, we reject the contention that the negative amortization possibility, as expressed by the statement that the principal repaid might exceed the amount originally borrowed, renders the note nonnegotiable.[1] See Hanna, 270 So. 3d at 405-06.

Ms. Stacknik also asks this court to determine that the evidence presented by U.S. Bank was insufficient to establish its compliance with paragraph 22 of the mortgage. Ms. Stacknik argues that U.S. Bank's witness did not demonstrate sufficient knowledge of the third-party vendor's mailing practices to establish that the paragraph 22 notice was mailed. However, Ms. Stacknik fails to recognize that testimony regarding a company's routine business practices is but one way to prove mailing. In addition to the default notice, to prove mailing a party must produce "evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a

[1]Concomitant with her negative amortization argument, Ms. Stacknik contends that U.S. Bank is not entitled to enforce the note as a holder, as that term is defined in section 671.201(21)(a), Florida Statutes (2013). While our determination that the note at issue is a negotiable instrument necessarily resolves this argument, it is important to remember that contractual obligations to pay money are enforceable independent of whether they are negotiable instruments under the Uniform Commercial Code. And in that respect, obligations which permit the assignment of the debt are enforceable by the assignee. See Chuchian v. Situs Invs., LLC, 219 So. 3d 992, 993 (Fla. 5th DCA 2017). Moreover, while "an action at law on a note may be pursued simultaneously with the equitable remedy of foreclosure," there is nothing requiring them to be simultaneously pursued; the legal remedy of enforcement of the note and the equitable remedy of foreclosure may each be sought independently from the other. Royal Palm Corp. Ctr. Ass'n, Ltd. v. PNC Bank, NA, 89 So. 3d 923, 932 (Fla. 4th DCA 2012); cf. Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768, 775 (Fla. 2d DCA 2016). And Ms. Stacknik has not argued that U.S. Bank was not entitled to the equitable remedy of foreclosure. Cf. § 702.09, Fla. Stat. (2013).

return receipt." Allen v. Wilmington Tr., N.A., 216 So. 3d 685, 688 (Fla. 2d DCA 2017) (emphasis added) (citing Burt v. Hudson & Keyse, LLC, 138 So. 3d 195, 1195 (Fla. 5th DCA 2014)); cf. Rivera v. Bank of N.Y. Mellon, 276 So. 3d 979, 982 (Fla. 2d DCA 2019) ("To use routine business practice to prove mailing, 'the witness must have personal knowledge of the company's general practice in mailing letters.' " (quoting Allen, 216 So. 3d at 688)). A mailing log has been expressly recognized by this court as adequate proof of mailing. See Allen, 216 So. 3d at 688; see also Kamin v. Fed. Nat'l Mortg. Ass'n, 230 So. 3d 546, 549 (Fla. 2d DCA 2017); Edmonds v. U.S. Bank Nat'l Ass'n, 215 So. 3d 628, 630 (Fla. 2d DCA 2017). Here, in addition to the default notice, the mailing log and customer service notes indicating that the default notice had been mailed were introduced into evidence through U.S. Bank's witness, and their admissibility has not been challenged.

The final judgment of foreclosure is affirmed.

ROTHSTEIN-YOUAKIM and ATKINSON, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

VILLA BELLINI RISTORANTE & LOUNGE, INC., Appellant, v. CIRO MANCINI, and QAMM PROPERTIES, INC., a Florida corporation, Appellees.	)	Case No. 2D18-2249

Opinion filed November 15, 2019.

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

Stacy D. Blank of Holland & Knight LLP, Tampa, for Appellant.

Brandon S. Vesely and Shannon T. Sinai (withdrew after briefing) of Albertelli Law, Tampa; Brandon S. Vesely of The Florida Appellate Firm, P.A., St. Petersburg (substituted as counsel of record), for Appellee Ciro Mancini.

No appearance for Appellee QAMM Properties, Inc.

LUCAS, Judge.

On the surface, this is a business dispute over the right of a shareholder to inspect his corporation's records; but the real controversy here is whether Ciro Mancini, an executive chef, is in fact a shareholder of Villa Bellini Ristorante & Lounge, Inc. (Villa Bellini). Following an evidentiary hearing, the circuit court issued its "Final Order Granting Petitioner's Writ of Mandamus and Motion for Summary Relief" in favor of Mr. Mancini and determined that Mr. Mancini was indeed a Villa Bellini shareholder and that, as such, he was entitled to access and review of Villa Bellini's corporate records. Villa Bellini appeals from that order.

I.

In the interest of brevity, we will relate several of the circuit court's factual findings to provide some of the factual background of this appeal:

> On or about January 27, 2014, Ciro Mancini ("Mancini"), an Italian chef working at a restaurant in Dunedin . . . spoke with a man by the name of Marco Marzocca ("Marzocca") about opening an Italian restaurant called Villa Bellini Ristorante, LLC. . . .
>
> . . . .
>
> On or about July 24, 2014, Villa Bellini [Ristorante] and Lounge, Inc. ("VBRL") was established and incorporated and Villa Bellini Ristorante, LLC ceased operations.
>
> Amongst other things, Mancini, as general manager and executive chef of VBRL, was responsible for overseeing the buildout, the hiring of employees, and the menu to the new restaurant, VBRL.
>
> In his position as Executive Chef of VBRL, Mancini was paid a salary.
>
> On or about September 20, 2016, Mancini was terminated as the Executive Chef of VBRL. . . .

> After September 20, 2016, Mancini, through counsel, made requests for inspection of books and records of VBRL pursuant to a statutory demand for inspection Chapter § 607.1602, Florida Statutes (2016 as amended) but said requests were denied because VBRL, Inc. did not recognize Mancini as a shareholder.

What followed Mr. Mancini's termination and unsuccessful demand to review Villa Bellini's records was Mr. Mancini's filing of a verified petition for writ of mandamus against Villa Bellini. Mr. Mancini also filed a "Motion for Summary Relief and Expedited Relief Pursuant to Fla. Stat. § 607.1604(1) and Expedited Relief Pursuant to Fla. Stat. § 607.1604(2)" in which Mr. Mancini, quite candidly, alleged that the underlying purpose for the requested documents was to "determine the existence and merits" of potential legal and equitable claims Mr. Mancini would pursue against Villa Bellini and its shareholders. However, as Mr. Mancini conceded (in a subsequent motion to consolidate and stay), the determination of Mr. Mancini's status as a shareholder of Villa Bellini—that is, whether he was one—was an important preliminary issue that "must be made in the first instance" by the circuit court.

Perhaps not surprisingly, that issue was both somewhat convoluted and hotly contested. We need not detail all the bank records, tax returns, amended tax returns, and corporate records that were brought to the circuit court's attention. Suffice it to say, there were discrepancies—early corporate filings reflected Mr. Mancini owning 60,000 of Villa Bellini's 240,000 authorized shares; amended records later deleted that ownership interest.[1]

[1]The record does not reflect that Villa Bellini issued physical certificates of shares to any of its shareholders.

On April 6 and 12, 2018, the circuit court convened an evidentiary hearing on Mr. Mancini's motion for summary relief and considered the merits of his mandamus petition. At the outset of the proceeding, the court announced that the hearing was "a show-cause hearing whether this Court should not immediately issue a writ of mandamus," which raised another preliminary issue: who had the burden of persuasion? Villa Bellini's counsel maintained that the burden remained on the petitioner, while Mr. Mancini argued that the burden would be on the respondent to show good cause why Mr. Mancini was not entitled to the corporate records he sought. The court agreed with Mr. Mancini and indicated that Villa Bellini bore the burden of showing "why this Court should not issue a writ of mandamus," and the parties then proceeded to present their respective cases.

From our review of the evidentiary hearing, the underlying issue of Mr. Mancini's status as a shareholder was anything but clear. The current president (and partial owner) of Villa Bellini, Vincent Addonisio, testified that Mr. Mancini never became a shareholder of Villa Bellini because Mr. Mancini never contributed the $60,000 that Mr. Addonisio believed was required under a purported "operating agreement" of the corporation.[2] Mr. Mancini could not recall the total amount he had paid for his shares in Villa Bellini, but he testified that he provided a $15,000 check, an unknown number of "deposits," remodeling construction work for the restaurant, and that he then worked for the restaurant as a chef and manager. All of this, Mr. Mancini stated, covered the

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[2]The operating agreement Mr. Addonisio was referring to was a record of Villa Bellini Ristorante, LLC's, which stopped operating in 2014 when Villa Bellini was established.

entirety of his required initial investment. Mr. Mancini was of the view that this was verbally agreed to among Villa Bellini's shareholders. Although early corporate records and tax returns reflected that Mr. Mancini was the president and a one-fourth owner of Villa Bellini, the gentleman who prepared those early records[3] testified that Mr. Mancini had been his only source of financial information for the corporation at the time they were made. He further recalled:

> Well, in the beginning I was trying to come up with the balance sheet to show the shareholders' contribution and I could see all the deposits being made from all the different shareholders, and I asked Mr. Mancini where his was and where they were, where they were coming from, and he mentioned that he gave – he paid with credit cards some expenses for – during the construction [of the restaurant], and then he gave liquor, wine – more wine to the company for his share.
>
> And I also asked for proof of all that meaning statements from the credit card accounts, and inventory, and never got it. Actually, to this day I never saw any evidence.

As Mr. Mancini's counsel expressed in his concluding remarks to the trial court, "this company was run very loosely. It wasn't run with the oversight it probably should have [had]."

The circuit court adjudicated the dispute over Mr. Mancini's ownership from the evidence presented at the show cause hearing.[4] In its order, the court found

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[3]The individual was not a certified public accountant but rather an enrolled agent credentialed by the Internal Revenue Service.

[4]We recognize that the court attempted, in its remarks at the conclusion of the show cause hearing, to leave open the possibility that Mr. Mancini might owe more money for the purchase of his shares or, conversely, that he might be owed money from Villa Bellini for providing labor and wine to the restaurant. However, the court's oral pronouncement and subsequent written order leave no room to doubt that the court made a factual determination that Mr. Mancini was and is a shareholder of Villa Bellini.

that Villa Bellini had failed to show good cause why a writ of mandamus should not issue. The court's order further elaborated, "based upon the evidence and law presented, [Mr. Mancini] need not rebut that Mancini is not a shareholder, since it has been demonstrated to the satisfaction of the conscience of this Court that he is and always has been a shareholder of Respondent, [Villa Bellini]." Thus, by obtaining a writ to allow an inspection of Villa Bellini's corporate books and records, Mr. Mancini also obtained an adjudication that he was, in fact, a shareholder of Villa Bellini.

II.

The standard of our review of a circuit court's order on a mandamus petition is somewhat multifaceted and depends, in part, upon how the lower court disposed of the petition. If the circuit court dismissed the mandamus petition as facially insufficient, we review the ruling de novo. See Anthony v. State, 277 So. 3d 223, 225 (Fla. 2d DCA 2019) (citing Asay v. State, 210 So. 3d 1, 22 (Fla. 2016)); Chandler v. City of Greenacres, 140 So. 3d 1080, 1083 (Fla. 4th DCA 2014) (citing Barnett v. Antonacci, 122 So. 3d 400, 404 (Fla. 4th DCA 2013)). If the circuit court determined the petition was facially sufficient and adjudicated it on the merits, as it did here, then we would ordinarily review the ruling for an abuse of discretion. See Brown v. Jones, 229 So. 3d 397, 397 (Fla. 1st DCA 2017) (citing Rosado v. State, 1 So. 3d 1147, 1148 (Fla. 4th DCA 2009)); Bd. of Cty. Comm'rs Broward Cty. Fla. v. Parrish, 154 So. 3d 412, 417 (Fla. 4th DCA 2014). We afford that deferential review because the decision to grant mandamus relief is discretionary, not absolute. See Topps v. State, 865 So. 2d 1253, 1257 (Fla. 2004). To the extent that the circuit court's adjudication of a mandamus petition turns on an issue of law, however, we would review that decision de novo. See

Parrish, 154 So. 3d at 417 (quoting Harvard ex rel. J.H. v. Village of Palm Springs, 98 So. 3d 645, 647 (Fla. 4th DCA 2012)).

"In order to be entitled to a writ of mandamus the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available."[5] Huffman v. State, 813 So. 2d 10, 11 (Fla. 2000); see also Radford v. Brock, 914 So. 2d 1066, 1067 (Fla. 2d DCA 2005) (quoting Smith v. State, 696 So. 2d 814, 815 (Fla. 2d DCA 1997)). Our court summarized the parameters of mandamus proceedings in Radford:

> "When a trial court receives a petition for a writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. If it is not facially sufficient, the court may dismiss the petition." Davis v. State, 861 So. 2d 1214, 1215 (Fla. 2d DCA 2003) (citations omitted). If the petition is facially sufficient, the court must issue an alternative writ of mandamus requiring the respondent to show cause why the writ should not be issued. Moore v. Ake, 693 So. 2d 697, 698 (Fla. 2d DCA 1997); Conner v. Mid–Florida Growers, Inc., 541 So. 2d 1252, 1256 (Fla. 2d DCA 1989). If the petition and answer to the alternative writ raise disputed factual issues, the trial court must resolve these issues upon evidence submitted by the parties.

914 So. 2d at 1067-68.

[5]There is no question that if Mr. Mancini is a shareholder of Villa Bellini, Villa Bellini has a clear and indisputable statutory duty to allow him to inspect its corporate records in accordance with section 607.1602.

Now those who may be familiar with the arcana of mandamus jurisprudence[6] might think the use of a mandamus petition in a private business dispute between private individuals is a bit—odd. And indeed it is. Cf. State ex rel. Glynn v. McNayr, 133 So. 2d 312, 315-16 (Fla. 1961) (noting the "narrow confines of the established restrictions on mandamus as a remedy to compel official action"); Conner v. Moran, 44 Fla. L. Weekly D2052 (Fla. 1st DCA Aug. 9, 2019) ("The writ of mandamus is available only to compel a non-discretionary ministerial duty by a public official where the petitioner has no legal remedy to obtain the relief sought." (first citing Hatten v. State, 561 So. 2d 562, 563 (Fla. 1990); and then citing Rhea v. Dist. Bd. of Trs. of Santa Fe College, 109 So. 3d 851, 855 (Fla. 1st DCA 2013))); Kuehl v. Bradshaw, 954 So. 2d 653, 655 (Fla. 4th DCA 2007) ("Mandamus is proper to compel a public official to perform a ministerial duty."); Sancho v. Joanos, 715 So. 2d 382, 385 (Fla. 1st DCA 1998) ("Mandamus issues to require the performance of a ministerial duty imposed by law on a public official." (citing City of Coral Gables v. State ex rel. Worley, 44 So. 2d 298, 300 (Fla. 1950))). Our court once held that mandamus could not lie against a former assistant public defender who later became a private practitioner for the very reason that he "is a private citizen and not a government official." See Hall v. Liebling, 890 So. 2d 475, 476 (Fla. 2d DCA 2004); see also Donahue v. Vaughn, 721 So. 2d 356, 357 (Fla. 5th DCA 1998) ("[M]andamus does not lie to require a private citizen, appellee, to perform a ministerial duty required by law." (internal quotations omitted)). Nevertheless, there is a long running vein in Florida law that recognizes mandamus

[6]Cf. Doe v. State, 210 So. 3d 154, 170 (Fla. 2d DCA 2016) (Lucas, J., dissenting) (citing law review commentary and remarking that the origin and purpose of the writ of mandamus remains "somewhat unobvious and unexamined").

relief for shareholders in private corporations who wish to inspect their corporation's books and records. See Fla. Military Acad., Inc. v. State ex rel. Moyer, 174 So. 3, 4-5 (Fla. 1937) (affirming issuance of a writ of mandamus to authorize a shareholder to inspect the books and records of a corporation); Soreno Hotel Co. v. State ex rel. Otis Elevator Co., 144 So. 339, 342 (Fla. 1932) (holding that a shareholder may seek a writ of mandamus to compel a corporation to allow him access to its records). We are compelled to follow this vein, though it seems difficult to reconcile within the larger body of mandamus law.[7]

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[7]Courts throughout the country have been divided on this issue for some time. Compare Fla. Military Acad., 174 So. 3 (recognizing mandamus relief for a ten percent shareholder to inspect his corporation's books and records); Feuer v. Merck & Co., Inc., 187 A.3d 873, 881 (N.J. Super. Ct. App. Div. 2018) (observing that the "right" of shareholders to inspect corporate records under New Jersey's common law "was historically secured by a writ of mandamus" but the issuance of the writ was "still subject to the exercise of the court's discretion"); Treat v. Inhabitants of Middletown, 8 Conn. 243, 246 (Conn. 1830) ("A *mandamus* lies to compel any person, corporation, or inferior court to do a particular act, which they neglect."), with Hall, 890 So. 2d at 476 (holding that mandamus could not lie against a private citizen); Am. Asylum v. Phoenix Bank, 4 Conn. 172, 178 (Conn. 1822) (expressing doubt that mandamus would be available for plaintiffs to subscribe to a charitable corporation's shares; "The writ of *mandamus* lies to enforce the execution of an act . . . and, regularly, issues only in cases, relating to the public and the government . . . . It never lies to restore to a private office, or to execute a private right . . . ."); Shipley v. Mechanics' Bank, 10 Johns. 484, 485 (N.Y. 1813) ("The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock, if the bank have [sic] unduly refused to transfer it. There is no need of the extraordinary remedy by *mandamus*, in so ordinary a case. . . . It is not a matter of public concern, as in the case of public records and documents . . . .").

It may be that a writ of mandamus is still appropriate to enforce certain corporate ministerial duties because, as the Florida Supreme Court once explained, "[a] corporation being the recipient of a franchise from the state, it and its officials are subject to judicial control by means of the writ of mandamus." Soreno Hotel, 144 So. at 340. One could argue, though, that the proliferation of corporate organizations over the past century, the relative ease with which a corporate entity can now be created, and the panoply of legal remedies available to shareholders in modern civil practice—declaratory relief, injunctive relief, a direct action to apply for an expedited court order under section 607.1604—render this extraordinary writ an ill-suited procedural relic for this kind of private controversy.

That alone, however, does not resolve this appeal. While we are bound to recognize the potential availability of mandamus relief for a corporate shareholder who has been deprived of his or her statutory right to inspect a corporation's books and records, we cannot ignore the legal boundaries that have been set for this extraordinary writ's reach. Mandamus is available "only to enforce a right that is both clear and certain." Fla. League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992). "Mandamus may not be used to establish the existence of such a right, but only to enforce a right already clearly and certainly established in the law." Id. at 401; see also McNayr, 133 So. 2d at 316 ("The purpose of the remedy [of mandamus] is not to establish a legal right. Its function is to enforce a right which has already been clearly established."). The clarity and certainty required for mandamus relief ordinarily prevents the issuance of a writ of mandamus in cases where there is an underlying substantive fact in dispute, as Florida case law illustrates.

For example, in Morse Diesel International, Inc. v. 2000 Island Boulevard, Inc., 698 So. 2d 309 (Fla. 3d DCA 1997), a condominium association (Williams Island) that was in protracted litigation with a general contractor filed a separate petition for a writ of mandamus to direct the clerk of the circuit court to disburse a cash bond that the association had previously posted in connection with the litigation. The association argued that the contractor's claim of lien on the underlying property had expired so that the association was entitled to the return of its funds. Id. at 311. The circuit court issued the writ, but the appellate court reversed, holding that the association failed to establish a clear legal right to mandamus "where the clerk's answer and affirmative defenses created a genuine issue of fact about whether Morse Diesel's claim of lien had

expired and/or been satisfied." Id. at 312. "In granting the writ, we think that the court improperly adjudicated rather than enforced an established right to these funds by Williams Island." Id.

Similarly, in Immer v. City of Miami, 898 So. 2d 258 (Fla. 3d DCA 2005), the Third District affirmed a circuit court's denial of a petition for writ of mandamus where the petitioner sought to direct the City of Miami to cancel a building permit that had been issued to a homeowners' association.

> The petition and attachments reveal that there is a disputed factual issue in the case. In applying for the building permit, the Association swore that it was the owner of the land on which the proposed gatehouse was to be constructed. Immer asserts that he is a lot owner in the Moorings and an attorney specializing in real estate. He states that in his opinion the operative real estate documents make the lot owners (not the Association) the owners of the land on which the gatehouse is to be constructed.
>
> *Since there is a factual dispute regarding ownership of the property, mandamus is not an available remedy.* "[R]elief cannot be afforded by mandamus where the right to which relator claims he clearly is entitled depends on the determination of controverted question of fact[]." State ex rel. Blatt v. Panelfab Int'l Corp., 314 So. 2d 196, 198 (Fla. 3d DCA 1975).

Id. at 259 (alterations in original) (emphasis added).

As Mr. Mancini acknowledged in the proceedings below, his status as a shareholder was not only controverted, it was a preliminary factual issue the circuit court had to decide in order to adjudicate the merits of his mandamus petition. But a mandamus proceeding is not the appropriate mechanism to resolve that kind of factual dispute. See L.B. Price Mercantile Co. v. Gay, 44 So. 2d 87, 89 (Fla. 1950) ("It is seldom proper to resort to mandamus when determination of controverted questions of

fact is necessary in an ascertainment of the rights of the parties."); Immer, 898 So. 2d at 259; Morse Diesel, 698 So. 2d at 312; State ex rel. Blatt, 314 So. 2d at 198 ("[R]elief cannot be afforded by mandamus where the right to which relator claims he clearly is entitled depends on the determination of controverted questions of facts." (first citing State ex rel. H.W. Metcalf Co. v. Martin, 46 So. 424, 426 (Fla. 1908); and then citing Sanitarians' Registration Bd. v. Solomon, 148 So. 2d 744, 749 (Fla. 1st DCA 1963), quashed, 155 So. 2d 353 (Fla. 1963))).

The circuit court's convening a show cause hearing did nothing to rectify this error. Contrary to Mr. Mancini's argument here and below, the mandamus show cause hearing that we recognized in Radford was never meant to be a surrogate for a trial on the merits over disputed, substantive factual issues concerning the ownership interests in a private corporation.[8] Rather, the show cause hearing must necessarily be limited to the confines of what can be appropriately adjudicated in a mandamus proceeding: that is, whether the petitioner has a clear legal right to the requested relief, whether the respondent has an indisputable legal duty to perform the requested action, and whether the petitioner has any other legal remedy. See Huffman, 813 So. 2d at 11;

[8]The only Florida case we have found where a court arguably recognized that a mandamus proceeding could be utilized to determine a shareholder's ownership interest was Farro v. Simplex Medical Systems, Inc., 748 So. 2d 342 (Fla. 3d DCA 2000). The Third District's one-paragraph opinion in Farro reversed a circuit court's denial of a mandamus petition because "contrary to the finding below, the evidence as to the only disputed fact unequivocally establishes that Simplex, Inc. received the required consideration for the issuance of the shares of stock which are now in question." Id. at 342. The Farro opinion neither mentioned nor addressed the legal elements necessary to establish a right to mandamus relief, and so we do not find Farro particularly persuasive on this issue. Instead, we think the better reasoned approach would be to follow the law's general aversion to deciding disputed factual issues in mandamus proceedings.

Radford, 914 So. 2d at 1067. To hold otherwise, to extend the ambit of a show cause hearing in a mandamus proceeding to the extent Mr. Mancini suggests, would expand the reach of the writ beyond its historic demarcations.

It would also radically alter the burden of persuasion in a disputed civil controversy. As Villa Bellini points out, Mr. Mancini was the petitioner in the proceeding below; and yet, it was Villa Bellini, the respondent, that bore the burden of persuasion at the show cause hearing. Cf. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005) ("We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." (citation omitted)); Arthur v. Unkart, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue." (citing Johnson v. Plowman, 49 Barb. 472 (N.Y. 1867))); Meneses v. City Furniture, 34 So. 3d 71, 73-74 (Fla. 1st DCA 2010) ("As a rule, the burden of persuasion is with the party who initiates the proceeding, and remains with that party to establish the material elements of recovery." (citing Smith's Bakery, Inc. v. Jernigan, 134 So. 2d 519, 521 (Fla. 1st DCA 1961))); see also 2 J. Strong, McCormick on Evidence § 337 (5th ed. 1999) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."). More than that, Villa Bellini's burden before the circuit court required it to prove the proverbial negative that Mr. Mancini was *not* a shareholder. That is a startlingly inverted way to resolve a factual controversy in a proceeding that is "seldom proper" for resolving factual controversies. See Gay, 44 So. 2d at 89.

We are also of the opinion that the limited factual inquiry a court undertakes in a mandamus show cause hearing must align with another important limitation of mandamus relief. A writ of mandamus is not available when the petitioner has an adequate legal remedy. Huffman, 813 So. 2d at 11; see also Anthony, 277 So. 3d at 225 ("To be facially sufficient, a petition for writ of mandamus must also show the petitioner has no adequate remedy at law." (citing Davis, 861 So. 2d at 1216)). If, as it seems, Mr. Mancini, Villa Bellini, and Villa Bellini's shareholders were in doubt about Mr. Mancini's status as a shareholder, chapter 86 of the Florida Statutes afforded them the right to obtain a declaratory judgment to have that issue definitively resolved. See, e.g., Hyman v. Daoud, 194 So. 3d 392, 395 (Fla. 3d DCA 2016) (affirming circuit court's declaratory judgment of the extent and nature of a corporation's ownership); Price v. Rome, 222 So. 2d 252, 253 (Fla. 3d DCA 1969) (affirming declaratory judgment that determined that plaintiff owned 40,000 shares of a corporation); cf. Telestrata, LLC v. NetTALK.com, Inc., 126 F.Supp.3d 1344, 1350 (S.D. Fla. 2015) ("The question of rightful ownership of securities is a proper case or controversy for resolution by a [federal] declaratory judgment claim." (citing Linker v. Custom-Bilt Mach. Inc., 594 F.Supp. 894, 901 (E.D. Pa. 1984))). By deciding Mr. Mancini's disputed status as a shareholder of Villa Bellini, the circuit court erroneously crafted the legal remedy of a declaratory judgment from a mandamus petition.

III.

We hold that the circuit court erred when it utilized a mandamus show cause hearing to resolve the disputed fact of Mr. Mancini's ownership interest in Villa Bellini. We further hold that that error was harmful. As we have already discussed,

adjudicating the preliminary disputed factual issue of Mr. Mancini's share ownership in a show cause hearing effectively switched the burden of persuasion that he, as a petitioner or plaintiff, would have ordinarily had in a civil case. And the error allowed Mr. Mancini to obtain a legal remedy—a judicial declaration that he is a shareholder—in a proceeding that is supposed to be reserved for cases where no adequate legal remedy is available.

Mr. Mancini may very well have an ownership interest in Villa Bellini. In a proper proceeding, he may end up proving what the circuit court determined in his mandamus petition. All we hold today is that this kind of factual dispute is not one that can be resolved in a mandamus show cause hearing. Accordingly, we reverse the order below and remand this case for proceedings consistent with this opinion.

Reversed and remanded.

SMITH, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VIGNARAJ MUNSAMI PILLAY,
Appellant,

v.

PUBLIC STORAGE, INC.,
Appellee.

No. 4D19-84

[November 13, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David A. Haimes, Judge; L.T. Case No. 18-4261(08).

Vignaraj Munsami Pillay, N. Fort Myers, pro se.

Cindy J. Mishcon and Kevin M. Vannatta of Lewis Brisbois Bisgaard & Smith LLP, Fort Lauderdale, for appellee.

FORST, J.

In this *caveat emptor* case, Appellant Vignaraj Pillay appeals from the final order of dismissal with prejudice. Pillay's third amended complaint alleged two counts of gross negligence and three counts of breach of contract. We affirm the dismissal, addressing Pillay's "gross negligence" claims in this opinion.

Background

In 2000, Pillay entered into a written storage unit rental agreement with Appellee Public Storage. The rental agreement required monthly payments. Soon after entering into the rental agreement, Pillay moved to Maryland and remained there until November 2015. During this time, Pillay alleges that he used two rented units to store personal property valued in excess of $100,000. Pillay further alleges that he received three separate phone calls from Public Storage between 2005 and 2012 informing him that his storage units had been burglarized, with several items left outside of the unit.

Pillay returned to his units on December 7, 2015. He claims they were in a state of disrepair, with pieces of the ceiling having dropped onto his furniture and paintings. He also noticed several "high value" items were either missing or damaged. Pillay met with a new facility manager to gather information on what caused the damage to his property. The manager purportedly refused to cooperate with Pillay. Nonetheless, Pillay entered into a new lease with Public Storage and moved his items into a smaller unit just a few feet away.

On February 23, 2018, Pillay filed suit against Public Storage. The trial court dismissed the original complaint without prejudice for failure to state a claim. The first and second amended complaints met similar fates. Pillay then filed a third amended complaint, which alleged two claims of gross negligence, three claims of breach of contract, and one claim of breach of the implied covenant of good faith.[1] Public Storage responded with a motion to dismiss, which the trial court granted with prejudice. This appeal followed.

Analysis

Orders granting motions to dismiss for failure to state a claim are reviewed de novo. *Regis Ins. Co. v. Miami Mgmt., Inc.*, 902 So. 2d 966, 968 (Fla. 4th DCA 2005).

Pillay's claims for gross negligence boil down to an alleged failure by Public Storage to safeguard his storage unit, as well as an alleged failure to monitor the condition of the unit and to make repairs when the unit became damaged.

A. Public Storage's Failure to Safeguard Pillay's Property

Pillay's gross negligence claim based on the alleged failure of Public Storage to safeguard his property fails as a matter of law. First and foremost, the claim is time-barred. An action founded on negligence must be brought within four years from the time when the last element constituting the cause of action occurs. § 95.11, Fla. Stat. (2018). Here, the three alleged break-ins occurred between 2005 and 2012. The instant suit was not filed until February 23, 2018—well outside the four-year statutory period for bringing a negligence suit. *See id.*

Pillay's claim also fails due to the express terms of the rental agreement, which contained the following exculpatory provisions:

[1] As noted above, we address only the "gross negligence" claims in this opinion.

> (1) ALL PERSONAL PROPERTY IS STORED BY OCCUPANT AT OCCUPANT'S SOLE RISK.
>
> (2) Owner and Owner's agents . . . will not be responsible for, and Tenant releases Owner and Owner's agents from any responsibility for, any loss, liability, claim, expense, damage to property . . . including without limitation any Loss arising from the active or passive acts, omission or negligence of Owner or Owner's agents.
>
> (3) Tenant has inspected the Premises and the Property and hereby acknowledges and agrees that Owner does not represent or guarantee the safety or security of the Premises or the Property or any of the personal property stored therein, and this Rental Agreement does not create any contractual obligation for Owner to increase or maintain such safety or security.

Florida courts have upheld the enforceability of exculpatory provisions in contracts when the language of the provisions clearly and unambiguously communicates the scope and nature of the waiver. *See Sainslo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260-61 (Fla. 2015); *Brooks v. Paul*, 219 So. 3d 886, 888 (Fla. 4th DCA 2017); *Fresnedo v. Porky's Gym III, Inc.*, 271 So. 3d 1185, 1186 (Fla. 3d DCA 2019). Such provisions are deemed to be unambiguous and enforceable when the language unequivocally demonstrates a clear and understandable intention for the defendant to be relieved from liability such that an ordinary and knowledgeable person will know what he or she is contracting away. *Sainslo*, 157 So. 3d at 260-61.

By the express terms of the rental agreement, Public Storage had no duty to safeguard Pillay's storage units.[2] Pillay has not alleged unconscionability, and while the agreement's terms may favor Public Storage, Pillay freely entered into the agreement and is bound by its terms. *See Barakat v. Broward Cty. Hous. Auth.*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000) ("It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what

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[2] The rental agreement also contained a provision recommending that Pillay obtain insurance for the items stored in the unit. Public Storage offered insurance for purchase and it also informed Pillay that insurance could be obtained from third parties.

turns out to be a bad bargain."); *see also Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.").

B. Public Storage's Failure to Repair Pillay's Unit

Pillay also argues that Public Storage was grossly negligent for allowing his units to fall into a state of disrepair. To maintain a cause of action based on negligence "[t]he claimant must first demonstrate that the defendant owed a duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007) (internal citation omitted).

Commercial landlords do not have a duty to repair the premises absent a specific provision in the contract imposing such a duty. *See Veterans Gas Co. v. Gibbs*, 538 So. 2d 1325, 1328 (Fla. 1st DCA 1989) (explaining that Florida statutes clearly distinguish between residential tenancies and commercial tenancies with Florida law imposing a duty on residential landlords to repair the premises and not on imposing the same duty on commercial landlords); *Rizzo v. Naranja Lakes Condo. Ass'n. Nos. One, Two, Three, Four and Five*, 498 So. 2d 451, 452 (Fla. 3d DCA 1986) ("It is established Florida law that the lessee, not the lessor, has the duty to make repairs of any kind to the demised premises in the absence of a specific undertaking to the contrary."). Here, the rental agreement did not impose a duty on Public Storage to repair Pillay's units. *See Fischer v. Collier*, 143 So. 2d 710, 712 (Fla. 2d DCA 1962) ("[I]t is generally held that in the absence of a special agreement to repair, the landlord is not under such a duty.").

Conclusion

The trial court's order dismissing Pillay's third amended complaint with prejudice is affirmed.

Affirmed.

TAYLOR and MAY, 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

BAYVIEW LOAN SERVICING, LLC,

Appellant/Cross-Appellee,

v.

Case No. 5D18-2797

JASON CROSS AND SHERWOOD FOREST HOMEOWNER'S ASSOCIATION OF ORLANDO, INC.,

Appellees/Cross-Appellants.

_____/

Opinion filed November 15, 2019

Appeal from the Circuit Court
for Orange County,
Kevin B. Weiss, Judge.

Jonathan Blackmore, of Phelan Hallinan Diamond & Jones, PLLC, Ft. Lauderdale, for Appellant/Cross-Appellee.

Ryan N. Ghantous, of Ghantous & Branch, PLLC, Orlando, for Appellee/Cross-Appellant, Jason Cross.

No Appearance for Other Appellee/Cross-Appellant, Sherwood Forest Homeowner's Association of Orlando, Inc.

TATTI, A.M., Associate Judge.

Bayview Loan Servicing, LLC, ("Bayview") appeals the final judgment awarding contractual attorney's fees to Jason Cross, which was entered after this court affirmed

the involuntary dismissal of Bayview's mortgage foreclosure action against Cross. Bayview raises several issues on appeal, and Cross filed a notice of cross-appeal seeking reversal on two issues. After carefully considering each issue raised by the parties, we affirm on all but two of the issues without further discussion. However, for the reasons explained below, we reverse the trial court's award of attorney's fees incurred in litigating the amount of the award and the trial court's denial of Cross's request for prejudgment interest.

"FEES FOR FEES"

Bayview argues that the trial court erred in awarding to Cross attorney's fees for litigating the amount of attorney's fees. "Typically, the appellate court applies an abuse of discretion standard in reviewing a trial court's award of attorney's fees, usually with regard to the amount of an award rather than the actual entitlement to an award." *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A*., 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (citing *DiStefano Constr., Inc. v. Fid. & Deposit Co*., 597 So. 2d 248, 250 (Fla. 1992)). However, when entitlement to attorney's fees is based on the interpretation of contractual provisions or a statute, as a pure matter of law, the appellate court undertakes a de novo review*. Id.* Because the question of whether a trial court may award attorney's fees for litigating the amount of those fees is one of law, our standard of review is de novo. *See Ailles v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (citing *Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)).

As a general rule, attorney's fees incurred in litigating the amount of attorney's fees to be awarded are not recoverable. *See N. Dade Church of God, Inc. v. JM Statewide,*

Inc., 851 So. 2d 194, 196 (Fla. 3d DCA 2003) (addressing a contractual attorney's fees award in a mortgage foreclosure action and holding that "[i]t is settled that in litigating over attorney'[s] fees, a litigant may claim fees where entitlement is the issue, but may not claim attorney's fees incurred in litigating the amount of attorney's fees" (citing *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832–33 (Fla. 1993))). However, in finding that Cross was entitled to an award of attorney's fees incurred in litigating the amount of his attorney's fees, the trial court relied upon an exception to that general rule that applies where an attorney's fees provision in a contract is "broad enough to encompass fees incurred in litigating the amount of fees." *See Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 228 So. 3d 1184, 1189 (Fla. 2d DCA 2017), *quashed on other grounds*, 260 So. 3d 167 (Fla. 2018); *Waverly at Las Olas Condo. Ass'n v. Waverly Las Olas, LLC*, 88 So. 3d 386, 389 (Fla. 4th DCA 2012).

In *Waverly*, the Fourth District Court interpreted a contractual attorney's fees provision that authorized the award of prevailing party fees "[i]n the event of any litigation between the parties under [the agreement]." 88 So. 3d at 387. The court found that the phrase "any litigation" rendered the provision to be "broad enough to encompass fees incurred in litigating the amount of fees." *Id.* at 389.

In *Trial Practices*, the Second District Court interpreted a contractual attorney's fees provision containing the following pertinent language: "prevailing party in any action arising from or relating to this agreement will be entitled to recover all expenses of any nature incurred in any way in connection with the matter . . . including, but not limited to, attorneys' and experts' fees." 228 So. 3d at 1187. The court found that the language permitting recovery of "all expenses of any nature incurred in any way" rendered the

provision to be "broad enough to encompass fees incurred in litigating the amount of fees." *Id.* at 1189 (quoting *Waverly*, 88 So. 3d at 389).

We find that *Waverly* and *Trial Practices* do not support the application of the exception to the general rule against "fees for fees" in the instant case and hold that the trial court erred in awarding to Cross his attorney's fees incurred in litigating the amount of his fees award. There are three applicable contractual attorney's fees provisions in the note and mortgage in the instant case, none of which includes such broad and undefined language analogous to the "*any* litigation" and "*all* expenses of *any* nature incurred in *any* way" language present in *Waverly* and *Trial Practices*. Rather, the first fee provision in the instant case provides for the recovery of attorney's fees incurred "in enforcing th[e] Note" and "to the extent not prohibited by applicable law." The second fee provision authorizes recovery of attorney's fees incurred in pursuing the remedies provided in Section 22 of the mortgage, which Section 22 defines as "acceleration" and "foreclosure." Finally, the third fee provision provides for the recovery of attorney's fees incurred on appeal and in a bankruptcy proceeding. These three fee provisions are not broad enough to encompass attorney's fees incurred in litigating the amount of attorney's fees to be awarded, and we find that the general rule prohibiting such awards applies in the instant case.

Furthermore, because the attorney's fees provisions in the instant case would not authorize Bayview to recover attorney's fees for litigating the amount of attorney's fees, the reciprocity provision of section 57.105(7), Florida Statutes (2005), cannot function to authorize Cross to recover such fees that are not authorized for Bayview in the contract. *See Escambia Cty. v. U.I.L. Family Ltd. P'ship*, 977 So. 2d 716, 717 (Fla. 1st DCA 2008)

(holding that the reciprocity provision of section 57.105 "is limited to the specific terms of the attorney's fees provision in a contract" (citing *Subway Rests., Inc. v. Thomas*, 860 So. 2d 462, 463 (Fla. 4th DCA 2003); *Anderson Columbia Co. v. Fla. Dep't of Transp.*, 744 So. 2d 1206, 1207 (Fla. 1st DCA 1999))). Therefore, we reverse that portion of the trial court's attorney's fees award to Cross that awarded fees incurred in litigating the amount of the award.[1]

PREJUDGMENT INTEREST

Cross argues that the trial court erred in denying his request for prejudgment interest accruing from December 27, 2016, the date that the trial court fixed his entitlement to attorney's fees.[2] "A trial court's decision concerning a [party's] entitlement to prejudgment interest is reviewed de novo." *Sterling Vills. of Palm Beach Lakes Condo. Ass'n v. Lacroze*, 255 So. 3d 870, 872 (Fla. 4th DCA 2018) (alteration in original) (quoting *Berloni S.p.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1011 (Fla. 4th DCA 2008)).

[1] We reject Cross's argument that reversal is improper because the record on appeal does not reveal how much, if any, of the 147.1 billable hours allowed as reasonable by the trial court consisted of time spent litigating the amount of attorney's fees. Bayview has demonstrated legal error on the face of the final judgment, where the trial court wrote to defend its award of attorney's fees for litigating the amount of attorney's fees, which would not have occurred if the trial court did not, in fact, award such fees for litigating the amount of the fees. Cross has failed to carry his burden of demonstrating that the error was harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256–57 (Fla. 2014) (providing that under the harmless error test in civil appeals, the beneficiary of an error has the burden to prove that there is no reasonable possibility that the error contributed to the verdict or judgment resulting from the underlying proceedings).

[2] We reject Bayview's argument that Cross failed to preserve this issue for appellate review. Cross requested prejudgment interest before the trial court; argued that he was entitled to prejudgment interest accruing from December 27, 2016, because that is when the trial court fixed his entitlement to attorney's fees; and cited to appropriate authority in support of that argument.

At the December 27, 2016 hearing on Cross's motion for attorney's fees, the trial court orally pronounced that it was granting Cross's motion as to entitlement. Shortly thereafter, on January 4, 2017, the trial court entered a written order that was consistent with its oral pronouncement at the hearing, granting Cross's motion as to entitlement and reserving on the issue of the amount of the attorney's fees award. Bayview filed a motion for reconsideration on July 12, 2017. The trial court conducted a hearing on the motion for reconsideration on October 2, 2017, and it entered a written order denying the motion that same day.

In the final judgment under review, the trial court expressed that prejudgment interest was "not applicable" in the instant case because "[Bayview] continued to dispute [Cross's] fee entitlement." The trial court therefore concluded that the final judgment was "the operative legal document that establishe[d] entitlement *and* amount of the attorney's fees due to [Cross]." These findings were erroneous.

"[I]nterest accrues [on an award of attorney's fees] from the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination, even though the amount of the award has not yet been determined." *Quality Engineered Installation, Inc. v. Higley S., Inc.*, 670 So. 2d 929, 930–31 (Fla. 1996). In the instant case, the trial court's determination at the December 27, 2016 hearing that Cross was entitled to attorney's fees fixed such entitlement, irrespective of Bayview's position that it should not have to pay those fees; and the trial court's denial of Bayview's motion for reconsideration left that December 27, 2016 determination of entitlement in place, unchanged. Therefore, Cross's entitlement to attorney's fees was fixed on December 27, 2016, and Cross is entitled to an award of prejudgment interest from that date through

the rendition of the new final judgment entered upon remand after further proceedings that are consistent with this opinion.

We find untenable the suggestion that a party against whom attorney's fees are assessed may avoid the opposing party's entitlement to the award from being fixed by merely continuing to dispute entitlement. Furthermore, such reasoning is contrary to the basis of the Florida Supreme Court's opinion in *Quality Engineered*, where the supreme court held:

> We reach this conclusion on the basis that the burden of nonpayment is fairly placed on the party whose obligation to pay attorney fees has been fixed. Using the date of the entitlement as the date of accrual serves as a deterrent to delay by the party who owes the attorney fees and is appropriate in conjunction with our decision that attorney fees are not to be assessed for litigating the amount of an attorney-fee award.

Id. at 931.

We reverse the award of fees incurred in litigating the amount of the attorney's fees award, and we reverse the denial of Cross's request for prejudgment interest. We affirm the final judgment in all other respects, and we remand with directions to: (1) reduce Cross's attorney's fees award by reducing the 147.1 billable hours that the trial court found to be reasonable by the number of those hours that the trial court finds to have been devoted solely to litigating the amount of the attorney's fees award; and (2) calculate and award prejudgment interest from December 27, 2016, through the date of rendition of the new final judgment.

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

ORFINGER and SASSO, JJ., concur.