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# Real Property and Business Litigation Report

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Manuel Farach

**Arizona Chemical Co. v. Mohawk Industries, Inc.**, --- So. 3d ----, 2016 WL 2941121 (Fla. 1st DCA 2016).
An expert testifying on lost profits must do more than make a mere assumption that defendant's actions caused the lost profits; the expert must consider factors relevant to a particular case such as competition in the marketplace, an overall shift away from the product allegedly damaged, and issues regarding general damage to reputation.

**Ochoa v. Koppel**, --- So. 3d ----, 2016 WL 2941099 (Fla. 2d DCA 2016).
A motion to enlarge time does not automatically toll the time to accept a proposal for settlement; conflict certified with the Fifth District's opinion in *Goldy v. Corbett Cranes Services, Inc.*, 692 So. 2d 225 (Fla. 5th DCA 1997).

**Frieri v. Capital Investment Services, Inc.**, --- So. 3d ----, 2016 WL 2941081 (Fla. 3d DCA 2016).
The entire contract must be considered when determining whether a corporate representative intended to be personally liable under a contract, and a person may be personally bound even if the signature block signifies a representative capacity if "the contract contains language indicating personal liability or the assumption of personal obligations."

**Wells Fargo Bank, N.A. v. Bilecki**, --- So. 3d ----, 2016 WL 2894115 (Fla. 4th DCA 2016).
Movants for summary judgment must timely serve affidavits in support of their motion, an affidavits in opposition to an opposing party's motion for summary judgment does not suffice.

**SunTrust v. Arrow Energy, Inc.**, --- So. 3d ----, 2016 WL 2897611 (Fla. 4th DCA 2016).
A garnishment that assesses interest against the garnishee is void.

**United Food and Commercial v. Wal-Mart Stores, Inc.**, --- So. 3d ----, 2016 WL 2943255 (Fla. 5th DCA 2016).
Under certain circumstances, unions may be prohibited from trespassing on private property.

**Billington v. Ginn-La Pine Island, Ltd., LLLP**, --- So. 3d ----. 2016 WL 2942185 (Fla. 5th DCA 2016).

Merger, integration and "non-reliance" clauses are different, and a "non-reliance" clause will negate a cause of action for fraud in the inducement; conflict certified and the following questions certified as questions of great importance:

- Did the court's decision in *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), *sub silentio* overrule its decision in *Cassara v. Bowman*, 186 So. 514 (Fla. 1939)?
- If *Oceanic Villas* did not overrule *Cassara*, does a merger clause such as that discussed in *Cassara*, negate a claim for fraud?
- Do clear and unambiguous disclaimer clauses, such as those in this case, negate or "ma[ke] incontestable" a claim for fraud as discussed in *Oceanic Villas*?
- Does a clear and unambiguous non-reliance clause negate a claim for fraud, where one party alleges justifiable reliance on an extrinsic representation?
- Did *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), overrule *Fote v. Reitano*, 46 So. 2d 891 (Fla. 1950), and *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977), and reject Restatement (Second) of Torts § 537, by holding that reliance need not be justified to maintain a fraudulent misrepresentation claim?
- If *Butler* did not overrule *Fote* or *Avila*, which standard applies in Florida, "justifiable" reliance or "reasonable" reliance?

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ARIZONA CHEMICAL COMPANY, LLC,

Appellant,

v.

MOHAWK INDUSTRIES, INC. and ALADDIN MANUFACTURING CORP.,

Appellees.
_____/

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

CASE NO. 1D14-4079

Opinion filed May 20, 2016.

An appeal from the Circuit Court for Duval County.
L. P. Haddock, Judge.

Sylvia H. Walbolt and Christine Davis Graves of Carlton Fields Jorden Burt, P.A., Tallahassee; Michael A. Abel, Jeremy J. Ches, and Andrew J. Steif of Holland and Knight, LLP, Jacksonville, for Appellant.

Thomas E. Bishop, Michael G. Tanner, and Casey W. Arnold of Tanner Bishop, Jacksonville; Doug Scribner, Daniel Norris, and Jason Rottner of Alston & Bird LLP, Atlanta, Georgia, for Appellees.

RAY, J.

This appeal and cross-appeal arise from a $70.1 million jury verdict and resulting judgment for the plaintiffs, Mohawk Industries, Inc., and Aladdin Manufacturing Corporation (collectively "Mohawk"), in a lawsuit about defective

Unibond-brand carpet. Mohawk, the manufacturer, became aware of the Unibond defects in 2008, when consumers' claims against Unibond's lifetime warranty began to rise sharply. After studying the issue, Mohawk developed a hypothesis that the cause of the claims spike was the use of a particular resin in the Unibond backing system. This resin had been formulated and manufactured by the defendant, Arizona Chemical Company, LLC, for this purpose.

As Mohawk later told the jury, Mohawk stopped using Arizona's resin after developing its hypothesis that the resin was causing failures in Unibond's backing system. The claims rate for newly manufactured Unibond carpet then returned to a rate consistent with the low rate Unibond had historically enjoyed. Nevertheless, Unibond sales plummeted, and Mohawk discontinued the carpet line in 2011. Mohawk sued Arizona on theories of breach of contract, breach of express warranty, and breach of implied warranty of fitness for a particular purpose, seeking recovery for the cost of the relevant claims and the loss of profits from unrealized sales.

The jury trial resulted in a judgment for Mohawk on the contract and express warranty claims and for Arizona on the implied warranty claim. Arizona, the appellant and cross-appellee before this Court, raises three issues. We affirm the appeal on the merits of each issue and write to address two of them. In light of this disposition, and at Mohawk's invitation, we affirm the cross-appeal as moot.

In the first issue, Arizona contends that the trial court erred in excluding evidence of claims spikes experienced by other Mohawk carpet lines contemporaneously with the Unibond spike, where those carpets were manufactured at the same facility as Unibond. Arizona offered this evidence to show possible alternative causes of the backing defects and resulting claims spike and to rebut Mohawk's expert testimony on causation. We find no abuse of discretion in the trial court's ruling that the other products' claims rates were not legally relevant to causation.[1]

In the second issue, Arizona argues that Mohawk's evidence of the amount of lost profits was legally insufficient because Mohawk's damages expert did not consider important variables affecting the amount of revenue Mohawk would have gained from Unibond sales in the absence of the backing failures. Those variables include, among others, reputational damage to Mohawk from the failure of Mohawk's Encycle carpet line, which contemporaneously generated a claims rate far exceeding the peak Unibond claims rate. In the alternative, Arizona argues that it should have been permitted to cross-examine Mohawk's lost-profits expert with Mohawk's business records acknowledging these variables as they affected the company's market share for commercial carpet, which included Unibond. We

[1] Arizona also argues that, even if this evidence were irrelevant, it should have been admitted under the opening-the-door doctrine after certain testimony by one of Mohawk's primary witnesses. We find no abuse of discretion in the trial court's ruling to the contrary.

conclude that the expert's failure to address the variables at issue did not render his testimony legally insufficient to support the lost-profits verdict and that Arizona has not shown an abuse of discretion in the limitation of cross-examination.

## I. FACTS AND PROCEDURAL HISTORY

### A. Motion in Limine

Before trial, Mohawk moved in limine to exclude evidence and argument concerning the claims spikes for Mohawk products that were not manufactured using Arizona's resin. Arizona opposed the motion, arguing that this evidence was relevant to rebut Mohawk's theories of causation and lost profits.

Arizona anticipated that, to show causation, Mohawk would rely on proof that the Unibond claims spike coincided with the use of Arizona's resin. Arizona intended to introduce evidence of contemporaneous claims spikes related to three other carpet brands manufactured at the same facility as Unibond, in Glasgow, Virginia. Those brands were known as PVC, U2, and Encycle.[2] Arizona argued that the similar claims spikes experienced by the other carpet lines indicate a likelihood that the rise and fall in the Unibond claims was caused by a factor shared among the four carpet lines, not a factor exclusive to Unibond, such as the

[2] Arizona also argued that a spike in claims for a line branded "Ecoflex" was relevant. However, Mohawk explains on appeal that Arizona was mistaken in its belief that Ecoflex was manufactured in Glasgow, and Arizona does not refute that point. Because Arizona's theory of admissibility depends on manufacture of the other carpet products at Glasgow, we affirm the ruling as to Ecoflex without further discussion.

use of Arizona resin. In conjunction with this rebuttal, Arizona intended to introduce evidence that the Glasgow manufacturing facility had experienced organizational issues, poor performance habits, and a lack of discipline among employees. Further, Arizona had evidence that Glasgow's director of quality assurance had been fired in 2008 for poor job performance. Arizona contended that this evidence would show that all the claims spikes were attributable to poor quality control or failure to adhere to manufacturing protocol at the Glasgow facility. For its part, Mohawk argued that the other products' claims rates were irrelevant because they were distinct products with different manufacturing processes and unrelated defects.

Unibond, a carpet sold for commercial use, had three defining characteristics: its longevity in the market, from 1971 until 2011; its broadloom classification, meaning that it was produced in long twelve-foot-wide rolls; and its manufacturing process. Unibond's manufacturing process was relevant not only to the arguments on the motion in limine but also to an understanding of the causation evidence at trial. This carpet was manufactured using a two-step "hot melt" process. In the first step, a pre-coat made of pure resin was applied to the carpet fibers in a hot liquid form. In the second step, a main coat, also called a secondary backing and an adhesive, was applied. The main coat consisted of three ingredients: resin, ethyl-vinyl acetate ("EVA"), and a filler. The resin provided a

"sticky" quality to the main coat; the EVA provided strength; and the "filler" was just that. Like the pre-coat, the main coat was applied hot. The two coats would cool to form a solid, fusing the entire carpet system together. The failure of this system, in the form of delamination, edge ravel, and poor tuft bind, caused the warranty claims that led to this lawsuit.

In contrast to Unibond, Encycle and PVC were carpet-tile products. U2 was a broadloom product, but U2's backing was not applied through a two-step hot-melt process. In fact, none of the other products had this backing system or experienced the backing failures at issue in this case. Also, unlike Unibond, both U2 and Encycle were short-lived experimental products. Perhaps most importantly, Arizona proffered no evidence specifically linking the defects of Encycle, PVC, and U2 to quality control or any particular cause.

To support the claim that the other products' failures were relevant to a determination of how much profit Mohawk lost as a result of the backing failures, Arizona provided the deposition testimony of Robert Devlin, Mohawk's director of commercial quality, expressing his belief that the claims against Encycle in particular, which at one time accounted for 88.2% of Mohawk's paid commercial carpet claims, hurt Mohawk's reputation and affected sales of Mohawk products. In addition, Arizona presented documents prepared by Mohawk attributing a general loss of commercial market share in 2009 and 2010 to the Encycle issues, at

least in part. Arizona contended that this evidence would show that Mohawk's lost profits were a result of non-Unibond product failures. In support of its motion in limine, Mohawk asserted that the other products' claims were irrelevant because Mohawk was not seeking damages for the loss of any market share other than in the broadloom carpet space.

The trial court granted Mohawk's motion in limine. Concerning damages, the ruling was without prejudice to Arizona's raising the issue again if the evidence presented at trial warranted the admission of other-product evidence.

B. Causation Evidence

At the beginning of trial, Mohawk informed the jury that the timing of the Unibond claims spike—and specifically the fact that the claims rate returned to its historical level when Mohawk discontinued the use of Arizona's resin—led the company to file the lawsuit. Devlin's testimony provided the basis for this point. According to Devlin, the vast majority of the defective carpet was produced during a time when Arizona's resin was the only resin used in Unibond's pre-coat and the only resin used in the main coat of at least seventy percent of the Unibond carpet being produced. Mohawk decided to discontinue the use of Arizona's resin based on the possibility that it was the cause of the backing failures. Devlin testified that Mohawk filed suit a couple of years later after seeing the claims rate on Unibond carpet return to normal.

Nevertheless, Devlin, a thirty-year veteran of the carpet industry, described a multi-faceted investigation into the cause of the backing failures. In addition to analyzing the claims rate and Mohawk's manufacturing process, Devlin reviewed the claim files, personally inspected some of the claim sites, and examined samples of defective carpet. He considered strength and aging tests conducted on relevant carpet samples. These observations and tests led him to conclude that the condition of the defective carpet indicated degradation of the resin used in the backing system. Devlin ruled out installation errors and breakdowns in quality control. Devlin also discovered that Arizona had made changes to its resin formula and determined that those changes coincided with the increase in backing failures. Further, he concluded that no changes Mohawk had made to its main-coat formula would have caused the backing failures, and he reviewed Arizona's own testing of its resin. Ultimately, Devlin opined as an expert that Arizona's resin was the "sole cause of the backing failures." Although not the only basis for Devlin's conclusion, the claims-rate analysis was an important factor that he considered in reaching this conclusion.

The same conclusion concerning the cause of the backing failures was presented to the jury through the testimony of a chemist, Michael Cronin. He examined the results of scientific tests designed to assess how Arizona's resin performed as it aged, inspected samples of defective Unibond carpet, studied

Mohawk's Unibond manufacturing process, analyzed documentation of the development of Arizona's resin, and considered the claims spike. Cronin opined that Arizona's resin was highly prone to oxidation and degradation. He explained that oxidation caused degradation of the resin, causing it to lose its adhesive quality. Mohawk buttressed this testimony with a document from a chemist employed by Arizona, which acknowledged that the resin Arizona had produced for Unibond penetrated the carpet fibers less, provided lower adhesion, and degraded faster than two other resins that had been used at various times in Unibond carpet. One such resin was the one Mohawk used just before contracting with Arizona. Mohawk had provided this resin to Arizona and received assurances that Arizona's resin would perform just as well.

Arizona offered a multitude of reasons the Unibond backing system may have failed, many of which related to poor quality control and lack of adherence to manufacturing protocol. One of Arizona's experts on causation testified, for example, that Mohawk had failed to systematically record the viscosity of the main-coat adhesive being applied to Unibond carpet before 2009. He found this lack of record-keeping "appalling" and testified that overly thick adhesive can cause backing failures. This expert noted that once Mohawk began tracking the viscosity, there was tremendous variance from batch to batch. He also observed that Mohawk had used recycled material as filler and had changed the ratios of

ingredients in the main-coat formula without providing direction to employees concerning the necessary ratios. Further, Arizona presented evidence that, of the defective carpet samples Mohawk had produced for Arizona to test, thirty percent contained resin produced by another manufacturer. Finally, Arizona presented evidence that its resin was of consistent quality, such that if the problem were with the resin, a higher percentage of backing failures would have occurred.

Arizona's expert opined that it was not possible to say with certainty what caused the backing failures at issue. He suggested, however, that Arizona's resin could be ruled out as the cause due to the randomness of the claims, which he opined indicated a failure in the manufacturing process.

Ultimately, the jury weighed the conflicting evidence concerning the cause of the backing failures in favor of Mohawk.

C. Lost Profits Evidence

In support of the damages Mohawk claimed for lost profits, Robert Devlin testified that Mohawk discontinued the Unibond carpet line because Unibond sales plummeted by seventy-five percent after the backing failures. Devlin testified that, by 2011, Unibond was no longer the flagship in the commercial-carpet industry given the toll on Unibond's reputation caused by the backing-failure claims. Devlin traced the drop in sales back to 2008, when he observed a "big dip." He testified that sales continued to drop each year, resulting in a significant decline in

revenue from 2008 through 2012. He noted specific customer accounts that had dropped off after the claims increased substantially. Mohawk sought recovery for lost profits beginning with the date Unibond sales began to decline and for ten years forward. Daniel Edelman, a forensic accountant, testified that Mohawk's lost profits were $95 million.

To calculate Mohawk's lost profits, Edelman began by determining Mohawk's average annual profits from the sale of Unibond before 2008. Edelman used that information along with market data for broadloom commercial carpet to project the revenue that Mohawk would have gained from Unibond from 2008 through 2017 but for the backing-failure claims. This procedure resulted in projected revenue below the pre-2008 average. Edelman testified that he accounted for market trends and the effect of the general economic recession on customer demand for the very narrow category of broadloom commercial carpet. Edelman also took into account mitigating factors, including the costs that Mohawk avoided by not manufacturing Unibond, the increased profits received on its other commercial broadloom products, and the profit Mohawk actually earned on Unibond during the relevant years. Edelman ended his calculation with the year 2017 because he projected that Mohawk would be able to convert its customers to an alternative product by 2018. When questioned on cross-examination concerning his consideration of economic conditions and consumer confidence in the floor-

covering industry as a whole, Edelman testified that he took those matters into consideration but that his focus was on "the broadloom commercial product line, not the whole Mohawk company."

Arizona argued that it should be permitted to cross-examine Edelman based on Mohawk's business records attributing a loss of commercial market share to factors other than Unibond. These documents showed a steady decrease in Mohawk's commercial market share from 2007 to 2010, followed by a slight rebound. The documents noted that the market was shifting towards carpet tile. They attributed the decline between 2007 and 2010 primarily to the "Encycle Quality issues" and Mohawk's "[s]maller foot-print in Carpet Tile relative to the industry," while noting attractive pricing from competitors as another factor. Arizona's counsel explained that his intent was simply to ask Edelman if he had considered "other causes for loss of market share to the plaintiffs . . . other than Unibond" and then to offer the proffered evidence.

The court declined to admit these business records or permit cross-examination concerning their content. The court explained that Mohawk was not seeking damages for a general loss of market share, but for loss of Unibond sales in particular. At the close of Mohawk's case, Arizona moved for a directed verdict on the lost-profits claim, asserting that Mohawk's experts did not consider all factors that could have caused a decrease in Unibond sales. Arizona pointed out

that Mohawk had specifically excluded external variables from the calculation by choosing to focus on only on Unibond carpet. The motion was denied, and the jury awarded Mohawk $32.2 million for lost profits.

## II. ANALYSIS

Having established this procedural and factual background, we now address the two most substantial issues in this appeal in turn. First, we analyze the relevance of the other-product evidence to Mohawk's theory of causation under the abuse-of-discretion standard. See McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007); Mitsubishi Motors Corp. v. Laliberte, 52 So. 3d 31, 37 (Fla. 4th DCA 2010). Second, we consider de novo Arizona's argument that the lost-profits evidence was legally insufficient, see New Jerusalem Church of God, Inc. v. Sneads Cmty. Church, Inc., 147 So. 3d 25, 28 (Fla. 1st DCA 2013), but review the related question about the limitation on cross-examination for abuse of discretion, see Gosciminski v. State, 132 So. 3d 678, 706 (Fla. 2013).

### A. Evidence of Other Claims Spikes on Matters Related to Causation

Part of Arizona's argument on appeal is that the trial court erred in applying the so-called "substantial similarity" test to its decision over whether to admit or exclude the evidence of other products' claims spikes. See Ford Motor Co. v. Hall-Edwards, 971 So. 2d 854, 858 (Fla. 2007). We agree with Arizona that substantial similarity, or lack thereof, was not the dispositive question, and we recognize that

the trial court considered the fact that the other products were dissimilar carpets with different manufacturing processes and distinct defects. However, that consideration alone does not indicate that the trial court improperly confined its analysis to whether the products were substantially similar. Cf. Laliberte, 52 So. 3d at 38 (noting that, although plaintiffs relied heavily on similarity analysis, trial court's "ultimate evidentiary rulings" were based on relevance and prejudice, among other grounds). The court also noted the general relevance test and took into account Arizona's argument that it should have been permitted to present evidence of alternative causation under this Court's precedent in R.J. Reynolds Tobacco Co. v. Mack, 92 So. 3d 244 (Fla. 1st DCA 2012). The court further found that, even if the evidence were relevant, its probative value would be substantially outweighed by the danger of unfair prejudice or misleading the jury. We find no reversible error in the trial court's consideration of the other products' similarity, or lack thereof, to Unibond.

The admissibility issue in this case, reflected in the trial court's ultimate ruling, is whether the evidence was relevant and, if so, whether it was properly excluded for some other reason. Joyner v. State, 4 So. 3d 76, 78 (Fla. 1st DCA 2009) ("In general, all relevant evidence is admissible, unless excluded by a specific rule."). Under section 90.401, Florida Statutes (2013), "[r]elevant evidence is evidence tending to prove or disprove a material fact." Even though relevant,

evidence is inadmissible under section 90.403, Florida Statutes (2013), "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

Generally, evidence of "possible explanations" for the plaintiff's harm other than the defendant's negligence is relevant and must be admitted. See Mack, 92 So. 3d at 248-49; Haas v. Zaccaria, 659 So. 2d 1130, 1133 (Fla. 4th DCA 1995); Aycock v. R.J. Reynolds Tobacco Co., 769 F.3d 1063, 1069-70 (11th Cir. 2014). To establish the relevance of particular alternative-causation evidence, however, the defendant must provide a competent evidentiary link between the plaintiff's harm and the defendant's theory. See Sidran v. E.I. Dupont De Nemours & Co., Inc., 925 So. 2d 1040, 1043, 1045-46 (Fla. 3d DCA 2006) (finding abuse of discretion in admission of an expert opinion that contaminated water, rather than the defendant's fungicide, could have damaged the plaintiffs' orchids, where there was no competent scientific evidence to support a finding that the level of contaminants present in the plaintiffs' water was harmful). This threshold requirement exists as a function of the relevance rule, even though the defendant does not carry a quantifiable burden of proof as to the alternative explanation. See Mack, 92 So. 3d at 248 (citing Williams v. Eighth Judicial Dist. Court of Nevada, 262 P.3d 360, 369 (Nev. 2011)).

Here, Arizona's basic argument is that the excluded evidence was relevant to rebut Mohawk's point that the timing of Unibond's claims spike indicates that Arizona's resin was the cause of the Unibond defects. The excluded evidence established that other products manufactured in the same Mohawk facility without Arizona's resin experienced claims spikes at approximately the same time as Unibond. When these two points are considered outside the context of the remaining evidence, they make a compelling case for an abuse of the trial court's discretion. Of course, context is key. When the trial court's decision is viewed in the context in which Mohawk used the evidence of Unibond's claims spike and the limitations of the evidence concerning other products' claims spikes, the basis for the manner in which the trial court exercised its discretion in this case is understandable.

Mohawk did not argue that the claims rate alone established causation. Mohawk pointed to evidence of actual resin degradation, provided expert testimony that the resin formula caused the degradation, and analyzed the claims spike in the context of Unibond's specific history with warranty claims and changes Arizona made to its resin. Mohawk did not argue simply that the coincidence of a claims spike with the use of Arizona's resin established causation; Mohawk argued that other factors, such as the history of Unibond claims and the lack of any significant change to the product other than the manufacturer of the

resin during the relevant time period, combined with the claims spike to suggest that the resin was to blame. Thus, the claims-spike analysis was specific to this product and was argued only in conjunction with other points.

Arizona argues that the evidence of other products' claims spikes rebuts Mohawk's causation theory because this evidence bears on the likelihood that other factors caused the Unibond claims spike. The specific factors Arizona suggests are poor quality control and lack of adherence to manufacturing protocol. However, there is no evidentiary basis in the record for supplying the connection between contemporaneous claims spikes of the four product lines and these factors. The record supports a theory that there may have been some general quality-control failings at the facility, but Arizona has not identified any evidence to substantiate its conclusion that problems with quality control explained the defects in the non-Unibond products. In fact, evidence Arizona submitted in opposition to Mohawk's motion indicates that Mohawk traced the causes of the defects in the other products to design flaws and choices of raw materials, not quality-control or procedural failures.

Without a more direct connection between the other products' failures and Unibond's failures, the evidence of the other products' failures showed causation, or rebutted Mohawk's causation theory, only to the extent that it showed Mohawk has a propensity to produce bad carpet. Introducing evidence for this purpose is

improper. § 90.404(2)(a), Fla. Stat. (2013). In light of these considerations, we find no abuse of discretion in the trial court's decision to exclude the other-product evidence as legally irrelevant to the issue of liability.

### B. Sufficiency of the Lost-Profits Evidence and Limitation on Cross-Examination

Arizona next argues that Mohawk's evidence of lost profits was insufficient as a matter of law because, when calculating the amount of lost profits, Mohawk's damages expert did not take into account relevant factors such as competition in the marketplace, an overall shift in the market away from broadloom carpet and toward carpet tile, and damage to Mohawk's reputation from the failure of Encycle. In conjunction with this argument, Arizona claims that, at a minimum, the court erred in precluding it from cross-examining Mohawk's expert with these business records. We find no reversible error.

A plaintiff can recover lost profits as damages if "the defendant's actions caused the damage" and "there is some standard by which the amount of damages may be determined." Cedar Hills Props. Corp. v. Eastern Fed. Corp., 575 So. 2d 673, 677 (Fla. 1st DCA 1991) (citing W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348, 1351 (Fla. 1989)). The plaintiff need not show that the defendant's action was the sole cause of the damages sought; instead, the plaintiff's burden is to show that the defendant's action was a "substantial factor" in causing the lost profits and establish the amount with reasonable

certainty. Id. at 678; Whitby v. Infinity Radio, Inc., 951 So. 2d 890, 898 (Fla. 4th DCA 2007) (quoting Forest's Mens Shop v. Schmidt, 536 So. 2d 334, 336 (Fla. 4th DCA 1988)). However, where the plaintiff's evidence reflects a mere assumption that the defendant's action caused its lost profits without consideration of other factors shown by the record to be significant, the evidence is legally insufficient to support a claim for lost profits. See A.R. Holland, Inc. v. Wendco Corp., 884 So. 2d 1006, 1008 n.2 (Fla. 1st DCA 2004) (affirming judgment for defendant where plaintiff sought lost profits due to defendant's sale of neighboring property to competing business in breach of parties' contract but failed to present evidence taking into consideration any contributing factors such as road construction, national marketing problems, and internal operating issues); Whitby, 951 So. 2d at 898 (finding lost-profits evidence speculative where expert assumed radio station's advertising revenue for the morning would increase if revenue increased for the afternoon, without regard to numerous variables that must have had an effect "by their very nature"); Rooney v. Skeet'r Beat'r of Sw. Fla., Inc., 898 So. 2d 968, 969 (Fla. 2d DCA 2005) (reversing award of lost profits as speculative where it assumed lost profits were entirely attributable to defendant even though there was evidence that legitimate competition or a reduction in sales force may have contributed).

Edelman's testimony in this case shows that he considered a variety of factors and rendered a reasonably certain expert opinion on the amount of lost profits attributable to the loss of Unibond sales. Although Edelman did not expressly state that the market had shifted towards carpet tile and away from broadloom carpet, his testimony concerning customer demand and the general state of the broadloom carpet market necessarily encompassed this shift. We realize that Edelman's trial testimony did not overtly address the damage to Mohawk's reputation from the Encycle problems or the competition issue. However, we still cannot say the evidence of lost profits was legally insufficient to present the issue to the jury, because the record does not establish that the factors that Edelman did not discuss had a substantial effect on the sales of Unibond.

The evidence presented at trial indicated that Unibond was a product in a league of its own. Unibond was an established brand with a thirty-year history, while Encycle was an experimental product. Both were manufactured by Mohawk, but they were sold under different brand names and were much different products. No evidence proffered at trial established a link between the Encycle claims or any change in the competition Mohawk was facing and the decline in Unibond sales.

Compared to the evidence of Unibond's strength as a stand-alone product with a loyal customer base, Mohawk's business record attributing loss of commercial market share in general to other factors was not specific enough to

Unibond to render Edelman's opinion unreliable as a matter of law. That record suggested only that the Encycle claims had an effect on Mohawk's overall profits from commercial carpet, not that those claims affected the sales of Unibond carpet in particular. The reference in that record to competition is similarly insubstantial. The record did not provide details concerning what product sales were suffering due to the effects of competition. In sum, the record does not show that consideration of these two factors by Edelman should have influenced his conclusion.

Arizona's alternative argument, that the trial court should have allowed cross-examination with the business records identifying these three factors, presents a closer question, the answer to which rests on the deferential standard of review applicable to the trial court's control of the admission of evidence and cross-examination. Because the business records Arizona wanted to introduce and use to cross-examine Edelman did not purport to analyze the reason for a decline in Unibond sales in particular, reasonable minds could differ as to their relevance and probative value. If these general documents had a bearing on the lost-profits issue, that point was not made sufficiently clear through the proffer. Consequently, we defer to the trial court's judgment on this matter. Moreover, we do not find a sufficient basis to disturb the trial court's ruling that these records were

substantially more unfairly prejudicial or misleading than probative due to their reference to the Encycle claims.

AFFIRMED.

OSTERHAUS and WINOKUR, 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

LAURA OCHOA,

Appellant,

v.

DONNA KOPPEL and PROGRESSIVE SELECT INSURANCE COMPANY, a Foreign Profit Corporation,

Appellees.

Case No. 2D14-1866

Opinion filed May 20, 2016.

Appeal from the Circuit Court for Pinellas County; Jack Day, Judge.

George A. Vaka and Nancy A. Lauten of Vaka Law Group, P.L., Tampa, for Appellant.

Anthony J. Russo, Ezequiel Lugo and Jared M. Krukar of Butler Weihmuller Katz Craig LLP, Tampa; and Paul U. Chistolini and William G.K. Smoak of Smoak, Chistolini & Barnett, PLLC, Tampa, for Appellee Donna Koppel.

No appearance for remaining Appellee.

SALARIO, Judge.

Laura Ochoa appeals a final judgment entered after the trial court ruled that Donna Koppel timely accepted a proposal for settlement that Ms. Ochoa served pursuant to section 768.79, Florida Statutes (2013), and Florida Rule of Civil Procedure 1.442. She asserts that Ms. Koppel failed to accept the proposal during the thirty-day period provided for in rule 1.442(f)(1) and that Ms. Koppel's motion to enlarge the time to accept the proposal, which the trial court ultimately denied, did not toll that thirty-day period while it was pending. We agree, reverse, and certify conflict with the Fifth District's decision in Goldy v. Corbett Cranes Services, Inc., 692 So. 2d 225 (Fla. 5th DCA 1997).

I.

On December 9, 2011, Ms. Ochoa was injured in a crash with a car driven by Ms. Koppel. In April 2013, she sued Ms. Koppel, alleging negligence and seeking damages to compensate her for her injuries.

On September 3, 2013, Ms. Ochoa served Ms. Koppel with a proposal for settlement pursuant to section 768.79 and rule 1.442. The proposal offered to dismiss the action with prejudice in exchange for a lump-sum payment by Ms. Koppel of $100,000. Rule 1.442(f)(1) provides that a proposal for settlement is "deemed rejected" if not accepted within thirty days after service of the proposal, and Ms. Ochoa's proposal stated that it would be withdrawn if not accepted within that time. On the same day she served the proposal, Ms. Ochoa filed a notice that the case was ready for trial.

On October 2, 2013—one day before the thirty-day period to accept the settlement proposal expired—Ms. Koppel filed a motion seeking to enlarge the time in which to respond to the proposal. The motion cited Florida Rule of Civil Procedure

1.090, which governs enlargements of time, and alleged that Ms. Koppel had not had sufficient time to evaluate the proposal because (1) she had recently received through discovery a new MRI report bearing on Ms. Ochoa's alleged injuries and (2) the case remained "in its infancy" and Ms. Ochoa's deposition had not been taken. Ms. Ochoa later filed a notice setting a hearing on the motion for December 2, 2013.

Although we do not have a transcript of the hearing, the parties agree that the court did not render a decision on December 2 and that it instead requested that the parties submit additional authorities on or before December 5. The day after the hearing, on December 3, 2013, Ms. Koppel served a notice purporting to accept the proposal for settlement. Two days later, on December 5, 2013, she provided the court with the authorities it had requested. Later that day, the court entered an order denying Ms. Koppel's request to enlarge the time in which to accept the proposal for settlement.

Ms. Ochoa next filed a motion to strike Ms. Koppel's notice accepting the proposal for settlement on grounds that it was untimely. Ms. Koppel opposed the motion and argued that under the Fifth District's decision in Goldy, her filing of a motion to enlarge time under rule 1.090 tolled the thirty-day period in which she was authorized to accept the proposal. According to Ms. Koppel, the period remained tolled until the trial court denied her motion for enlargement of time on December 5, 2013. Ms. Koppel coupled her response to the motion to strike with a motion to enforce the settlement that she asserted was created by her acceptance of Ms. Ochoa's proposal for settlement.

After a hearing, the trial court agreed that Ms. Koppel's filing of a motion to enlarge time tolled the time she had to accept the settlement proposal, denied the motion to strike the notice of acceptance, and granted the motion to enforce settlement.

The trial court then entered a final judgment dismissing Ms. Ochoa's case with prejudice based upon the proposal and acceptance. Ms. Ochoa timely appealed.

II.

This case presents the question of whether the filing of a motion under rule 1.090 to enlarge the time to accept a proposal for settlement automatically tolls the thirty-day period for accepting that proposal until the motion to enlarge is decided.[1] The issue is thus one that requires construction of a rule of civil procedure. Our review is de novo. Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006).

A.

Rule 1.442 governs the procedures by which proposals for settlement are made and accepted or rejected. See also Audiffred v. Arnold, 161 So. 3d 1274, 1277 (Fla. 2015). As relevant here, rule 1.442(f)(1) provides that "[a] proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal." In addition, it provides that the provisions of Florida Rule of Judicial Administration 2.514(b), which grant five additional days to act if service

[1]Two other issues are potentially implicated here. The first is whether, in light of the fact that the thirty-day period after which a settlement proposal is deemed rejected is also statutory under section 768.79, that deadline is extendable under rule 1.090 at all. Compare BNP Paribas v. Wynne, 944 So. 2d 1004, 1006 (Fla. 4th DCA 2005) (holding that rule 1.090 "is inapplicable to procedural deadlines under a special statutory proceeding"), with Schmidt v. Fortner, 629 So. 2d 1036, 1038 n.3 (Fla. 4th DCA 1993) ("Because the time for responding to an offer of judgment under section 768.79 is now governed by rule 1.442, there is no reason why rule 1.090(b) would not authorize the enlargement . . . ."). The second is whether, because the proposal itself provided that it would be "withdrawn" within thirty days and Ms. Ochoa did not agree to enlarge that time, the offer was by its terms insusceptible of acceptance notwithstanding any enlargement of the thirty-day period under rule 1.442. The case can be fully resolved on the question of tolling addressed in the text, and neither additional issue is thoroughly presented by the briefs. Therefore, we express no opinion on either question.

of the document requiring the act is made by mail or email, "do not apply to this subdivision." The rule thus sets a hard thirty-day deadline after which, unless accepted, a proposal for settlement is deemed by the rule to have been rejected.

Rule 1.090(b) governs the enlargement of time periods established by the civil rules. It provides, in relevant part:

> When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion (1) with or without notice, may order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect . . . .

The rule does not contain any provision which tolls the running of the applicable time periods while a motion made pursuant to its provisions is pending.

The rules of civil procedure are to be interpreted in accord with ordinary principles of statutory construction. Barco v. Sch. Bd. of Pinellas Cty., 975 So. 2d 1116, 1121 (Fla. 2008); Saia, 930 So. 2d at 599. The cardinal principle of statutory construction is that a statute must be given its plain and ordinary meaning and, where that meaning is unambiguous, the effect that meaning dictates. See Kephart v. Hadi, 932 So. 2d 1086, 1091 (Fla. 2006) (citing Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993)). That principle resolves this case.

The texts of rules 1.090 and 1.442 are unambiguous in that neither contains language that could in any way be construed as providing that the time to accept a proposal for settlement is tolled when a motion to enlarge the time to do so is filed. Apart from providing that the thirty-day period is not extended when service is by

mail or email, rule 1.442 says nothing about the computation or enlargement of time. Rule 1.090 provides that a party may seek to have the time in which an act must be performed enlarged, but such an extension requires an order of the court, the exercise of the trial judge's discretion, and a showing by the movant that grounds for an enlargement exist—i.e., cause shown and, in the case of motions made after the expiration of the time period, excusable neglect. It too contains no provision tolling time while a motion for enlargement is pending.

The practical effect of interpreting the rule to provide automatic tolling upon the filing of a motion for enlargement is to give the party filing the motion additional time under circumstances other than those the rule contemplates. The filing of the motion grants a party a de facto enlargement of time—without the judicial supervision, exercise of discretion, and substantive showings rule 1.090 requires—until the motion is decided.[2] Neither rule contains any textual indication that this result was intended.

Accordingly, we hold that the filing of a rule 1.090 motion to enlarge time to accept a proposal for settlement under rule 1.442 does not toll the thirty-day acceptance period between the date of the proposal and when it is deemed rejected. Rule 1.442(f)(1) sets a hard thirty-day deadline for acceptances, and rule 1.090 authorizes enlargements but does not provide for tolling. To hold that a motion to enlarge the thirty-day period automatically tolls it until the motion is decided would require us to insert the necessary text into one or the other of the rules where that text

[2]We acknowledge that tolling and enlargement are different in that tolling suspends the running of a time period while enlargement adds time to it. See Hankey v. Yarian, 755 So. 2d 93, 98 (Fla. 2000). The important point for our interpretation of these rules, however, is that the effect in a case like this is the same; however named, the result is that a party gets more time than it would otherwise have to do an act.

does not in fact exist. That exercise is foreclosed to us. Cf. Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."); FINR II, Inc. v. Hardee Cty., 164 So. 3d 1260, 1264 (Fla. 2d DCA), rev. granted, 182 So. 3d 632 (Fla. 2015) (holding that a court may not "rewrite the statute to insert an additional requirement not placed there by the legislature").

Our holding finds additional support in the fact that when the supreme court has intended that the filing of a motion should toll time, it has not had difficulty expressing that intention. Under Florida Rule of Appellate Procedure 9.300(b), the filing of a motion to enlarge time automatically "toll[s] the time schedule of any proceeding in the court until disposition of the motion." Because the supreme court knows how to provide for tolling when that is desired, it seems unlikely that the omission of a tolling provision in rules 1.090 and 1.442 was unintentional. Cf. Cason v. Fla. Dep't of Mgmt. Servs., 944 So. 2d 306, 315 (Fla. 2006) ("[W]e have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question." (quoting Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000))).

B.

In Goldy, the Fifth District held that a motion to enlarge the time to accept a proposal for settlement tolls the thirty-day period until the motion is decided. 692 So. 2d at 228. It reasoned that where time limitations are strictly construed, the filing of a motion to enlarge time should toll the applicable time period. Id. Doing so with regard to proposals for settlement made sense to the Fifth District because it avoids punishing a party with a "sincere desire to settle" pursuant to a proposal for settlement and a legitimate need for an enlargement of time. Id.

Our court has twice discussed Goldy. In Pinnacle Corp. of Central Florida, Inc. v. R.L. Jernigan Sandblasting & Painting, Inc., 718 So. 2d 1265, 1266 (Fla. 2d DCA 1998), which was an appeal from a final default judgment, we cited it without analysis for the proposition that a defendant's motion to extend time to answer a complaint "effectively extend[ed]" the time it had to do so. That statement is dictum; we resolved the case on the basis that the default was improper under rule 1.500 because the defendant's answer was on file before an order of default was entered. Id. In Donohoe v. Starmed Staffing, Inc., 743 So. 2d 623 (Fla. 2d DCA 1999), we reversed an order denying an award of fees and costs based on a proposal for settlement because the proposal was not timely accepted. We rejected the defendant's argument under Goldy that its motion to enlarge the time to accept or reject the proposal tolled the thirty-day period finding that Goldy was distinguishable on the facts. Id. at 625. Neither Pinnacle nor Donahoe held that Goldy represented the law of this district. Nor did either case analyze the validity of its reasoning. We now do so for the first time, and we respectfully disagree with our sister court.

We are unable to reconcile the Fifth District's holding with the requirement that the civil rules be interpreted in accord with ordinary principles of statutory construction. As we have described, although rule 1.090 authorizes enlargements of time, the applicable rules do not provide for tolling pending a decision on a motion for enlargement—whether of a strictly construed time period or otherwise. By limiting its tolling rule to time periods that are strictly construed, the Goldy court appears to have assumed (correctly, in our view) that tolling would not ordinarily be authorized or permitted when a party files a motion to enlarge a deadline. Its decision that time is

nonetheless automatically tolled whenever the time limit is one that is strictly construed thus seems more like a revision of the rules to meet the perceived equities of a case—here, the protection of a party with a sincere desire to settle—than it does an exercise in determining what the rules actually authorize and what they do not.[3]

Even if this approach to interpreting the civil rules might be appropriate in some circumstances—we do not mean to imply that it is—it is particularly unjustified here because rule 1.090, as drafted, provides a trial court with ample discretion to address the perceived equities with which Goldy was concerned. See Morales v. Sperry Rand Corp., 601 So. 2d 538, 540 (Fla. 1992) (rejecting the notion that former Florida Rule of Civil Procedure 1.070(j) was "unduly harsh" because rule 1.090(b) provides trial courts with broad discretion to extend deadlines if reasonable grounds exist), superseded by rule on other grounds as stated in Thomas v. Silvers, 748 So. 2d 263 (Fla. 1999). If a party that is sincerely interested in settlement has a bona fide need for more time to accept or reject it, the court has the discretion to rectify that problem by granting an enlargement of time. If the party is unable to get a motion seeking an enlargement heard before the time expires, but the trial court determines that an

[3]Goldy cited two decisions for the proposition that the filing of a motion to enlarge time tolls deadlines that are strictly construed—Morales v. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992), and Nationwide Mutual Fire Insurance Co. v. Holmes, 352 So. 2d 1233 (Fla. 4th DCA 1977). Morales said that the 120-day deadline to effect service under rule 1.070(j) is to be strictly construed and that rule 1.090 is available to enlarge that deadline in appropriate cases. 601 So. 2d at 539-40. Holmes held that it was error for a trial court to allow the substitution of a personal representative for a deceased party where no motion for substitution was made within ninety days as required by rule 1.260(a)(1) and, in so holding, noted that "[t]here is no indication that Plaintiff moved for an enlargement" of the deadline. 352 So. 2d at 1234. Neither case said, let alone held, that the filing of a motion to enlarge a strictly construed deadline automatically tolls time.

enlargement is warranted, its decision to grant the enlargement rectifies the problem.[4] If, on the other hand, the trial court determines that the extension was unwarranted, there is no equitable problem for a tolling rule to solve because an extension was not merited in the first place. In sum, the court has sufficient room to address the problem of the party who is sincerely interested in settlement within the confines of existing rules.

On the other hand, however, Goldy's holding that a motion to enlarge time automatically tolls time where the subject deadline is strictly construed seems to us inconsistent with the concept of a strictly construed deadline. Allowing a party to suspend the occurrence of a deadline through the simple act of putting a piece of paper in the court file tends to liberalize rather than strictly enforce that deadline. Moreover, Goldy's tolling rule has obvious practical detriments. Dissenting from the Goldy majority's holding on tolling, Judge Griffin summarized them as follows:

> Any time, including the day before the offer is due to expire, the motion to extend the deadline is simply filed. The deadline thus does not ever arrive and the offeror does not get the benefit of [rule 1.442], nor can he withdraw the offer without losing the benefit of the rule. If the filing of the

[4]The problem in Goldy was that after the proposal was automatically withdrawn upon the expiration of the deadline, the motion to enlarge time filed by the other party "was never heard by the court in view of [the] absolute withdrawal of the offer." 692 So. 2d at 226. The Goldy opinion does not state whether the party seeking the enlargement failed to seek a hearing. Because rule 1.090 by its terms requires that the court actually grant a party an extension of time in its discretion—and does not indicate that tolling is accomplished by the mere filing of the motion itself—we believe that the approach most consistent with the rules is to require the party seeking the enlargement of time to set a hearing or insist on a ruling, whichever may be required, and not to create an automatic tolling rule that springs into effect upon the filing of a motion for enlargement. See, e.g., Three Lions Constr., Inc. v. The Namm Grp., Inc., 183 So. 3d 1119, 1119-20 (Fla. 3d DCA 2015) (rejecting the argument that a motion to enlarge time under rule 1.090(b) tolled the time to respond to a proposal for settlement where the party seeking the enlargement "did not obtain a hearing on the motion prior to the expiration of the time for acceptance of the Proposal" and the motion was not otherwise agreed to by the parties).

> motion to extend prevents expiration, the offeree will likely always file one since there is no downside to doing so. If the motion is ever called up for hearing, the worst that can happen is the motion is denied and all that extra time will have been bought during which the offer (which cannot be "withdrawn" without losing the right to fees) can be accepted at leisure.

692 So. 2d at 228-29 (Griffin, J., concurring in part and dissenting in part). The existence of these problems is all the more reason to apply the rules as they are written, leave enlargements of time to the discretion of the trial judge in accord with those rules, and leave any broader policy issues with the rules to the body to which the law commits them—the supreme court.

III.

We hold that the filing of a motion to enlarge time to respond to a proposal for settlement does not automatically toll that time pending a decision on the motion. Accordingly, we reverse the final judgment, remand for further proceedings consistent with this opinion, and certify conflict with Goldy.

Reversed; remanded; conflict certified.

SILBERMAN and BADALAMENTI, JJ., Concur.

# Third District Court of Appeal

**State of Florida**

Opinion filed May 18, 2016.
Not final until disposition of timely filed motion for rehearing.

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Nos. 3D14-293 & 3D14-1442
Lower Tribunal No. 08-7586

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**Salvatore Frieri, etc.,**
Appellant,

vs.

**Capital Investment Services, Inc., etc.,**
Appellee.

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**Robert J. Escobio, etc., and Southern Trust Securities Holding Corporation,**
Appellants,

vs.

**Salvatore Frieri, etc.,**
Appellee.

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

Carlton Fields Jorden Burt, P.A., and Sonia Escobio O'Donnell and Namrata S. Joshi; Berger Singerman LLP, and Lara E. O'Donnell, for appellant Robert J. Escobio and appellee Capital Investment Services, Inc., etc.

Beasley, Demos & Brown, LLC, and Joseph W. Beasley and Jennifer Perez Alonso, for appellant Southern Trust Securities Holding Corporation and appellee Capital Investment Services, Inc., etc.

Berrio & Berrio, P.A., and Juan D. Berrio, Giorgio L. Ramirez and Raul E. Espinoza, for appellant/appellee Salvatore Frieri.

Before ROTHENBERG, SALTER, and SCALES, JJ.

ROTHENBERG, J.

This case, which essentially arose out of a breach of contract dispute, involves two related appeals. First, the plaintiff below, Salvatore Frieri ("Frieri"), appeals the trial court's entry of final judgment following its *ore tenus* entry of a directed verdict in favor of Capital Investment Services, Inc., n/k/a Southern Trust Securities, Inc. ("CIS"), one of three defendants in the litigation below. Second, the other two defendants, Robert J. Escobio ("Escobio") and Southern Trust Securities Holding Corporation ("STS"), appeal the final judgment entered against them in the amount of $7,369,222 and the trial court's denial of their post-trial motions: (1) for judgment notwithstanding the verdict; (2) for a new trial; (3) to alter, amend, or vacate the verdict; and (4) for remittitur ("the post-trial motions"). For the reasons that follow, we affirm each of the trial court's determinations.

## BACKGROUND

On December 22, 2004, Escobio, who was the president and CEO of STS and the CEO and director of CIS at all relevant times, entered into a contract with Frieri for the purpose of growing STS's business. As relevant to our decision, the contract contained the following terms and obligations: (1) Frieri was required to invest $6 million to be placed into a trust that would be 50% owned by Frieri and 50% owned by Escobio ("the Escobio/Frieri Trust"), with $1.5 million of Frieri's investment being used to purchase STS shares and $4.5 million of Frieri's investment operating as a loan to the Escobio/Frieri Trust; (2) Escobio was required to place 3,910,110 STS shares into the Escobio/Frieri Trust; and (3) the Escobio/Frieri Trust would own 78% of all STS shares, both issued and outstanding. Thus, the contract was intended to give the Escobio/Frieri Trust control over STS in exchange for Frieri's $6 million investment in STS.

On December 23, 2004, pursuant to the contract, Frieri transferred his $6 million investment to an escrow account with CIS, which was subsequently transferred to STS on February 4, 2005. However, Escobio never placed the 3,910,110 STS shares into the Escobio/Frieri Trust. Thus, the Escobio/Frieri Trust never obtained 78% of all STS shares, and as a result, the Escobio/Frieri Trust never received a controlling stake in STS.

After a series of failed attempts to resolve their differences, Frieri sued Escobio, STS, and CIS, alleging that: (1) Escobio breached his fiduciary duty as trustee of the Escobio/Frieri Trust; (2) Escobio and STS breached the contract; (3) all three defendants were liable for negligent misrepresentation, fraudulent inducement, and fraud ("the misrepresentation claims"); and (4) the trial court should impose a constructive trust against all three defendants.

At the close of the case, Escobio, STS, and CIS moved, *ore tenus*, for a directed verdict, which the trial court denied as to Escobio and STS, but granted as to CIS. The trial court later entered a final judgment in favor of CIS on all counts in the operative complaint, from which Frieri now appeals.

The jury entered a verdict in Frieri's favor and against Escobio and STS for breach of contract and on the misrepresentation claims, and against Escobio for breach of fiduciary duty.[1] Thereafter, Escobio and STS filed their post-trial motions, which the trial court denied. Ultimately, the trial court entered a final judgment allowing Frieri to recover $7,369,222 from Escobio and STS, stemming from their liability for breach of contract. Escobio and STS now appeal the final judgment in favor of Frieri and the order denying their post-trial motions.

[1] Because Frieri elected to base the final judgment only on the breach of contract claim, and because we affirm the final judgment in favor of Frieri on that basis, we need not discuss the other claims in the jury's verdict here.

## ANALYSIS

### (I) The Final Judgment in Frieri's Favor

Escobio and STS contend that there was no competent substantial evidence of Escobio's personal liability for breach of contract. For the following reasons, we disagree.

An appellate court must review a trial court's determination on a motion for judgment notwithstanding the verdict de novo and "evaluate the evidence in the light most favorable to the non-moving party, drawing every reasonable inference flowing from the evidence in the non-moving party's favor." Miami-Dade Cnty. v. Eghbal, 54 So. 3d 525, 526 (Fla. 3d DCA 2011). Additionally, we must sustain a jury verdict if it is supported by competent substantial evidence. Hancock v. Schorr, 941 So. 2d 409, 412 (Fla. 4th DCA 2006).

The entire document must be considered when determining "whether the parties intended to bind their principal businesses alone, or also the signing agents in their individual capacities." MacKendree & Co., P.A. v. Pedro Gallinar & Assocs., P.A., 979 So. 2d 973, 976 (Fla. 3d DCA 2008). Even if a signatory to a contract adds to his signature block an official designation, such as "president" or "agent," he may still be personally liable if "the contract contains language indicating personal liability or **the assumption of personal obligations**." Fairway Mortg. Solutions, Inc. v. Locust Gardens, 988 So. 2d 678, 681 (Fla. 4th DCA

2008) (citation and quotation omitted) (emphasis added); Manufacturers' Leasing, Ltd. v. Fla. Dev. & Attractions, Inc., 330 So. 2d 171, 172 (Fla. 4th DCA 1976) (stating that the addition of an official designation to a signature line "in the absence of words in the body of the instrument showing a different intent, is to be treated as matter of description, and the agent or official is **personally** the contracting party") (quoting Williston on Contracts, Third Edition, Vol. II, § 299) (emphasis added).

We find that competent substantial evidence was presented to the jury in support of the claim that Escobio was personally liable for breach of contract because the contract's clear language indicated Escobio's assumption of a personal obligation. The contract required Escobio to place 3,910,110 shares into the Escobio/Frieri Trust. This personal obligation was breached because Escobio never placed any of the required 3,910,110 STS shares into the Escobio/Frieri Trust. While the text underneath Escobio's signature in the contract identified him as the president of STS, as stated above, the mere addition of Escobio's official designation does not shield him from personal liability because the contract's language shows that he assumed personal obligations.

Thus, considering the contract as a whole, and given that our standard of review requires us to resolve all inferences in Frieri's favor, we find that the jury's verdict holding Escobio personally liable for breach of contract was supported by

competent substantial evidence. In addition to Escobio's personal liability, both STS and Escobio agree that STS was bound by the contract, and we therefore also find that there was competent substantial evidence of STS's liability for breach of contract.[2]

**(II) The Final Judgment in CIS's Favor**

Frieri argues that the trial court should not have entered a directed verdict in favor of CIS because sufficient evidence was presented to support a jury finding against CIS on Frieri's constructive trust claim and misrepresentation claims. For the following reasons, we disagree.

While the standard of review for the trial court's entry of a directed verdict is de novo, an appellate court "can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V., 979 So. 2d 1030, 1032 (Fla. 3d DCA 2008) (quoting Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329 (Fla. 2001)).

The essence of the equitable remedy of constructive trust is whether specific property or funds can be identified as the res upon which a constructive trust should be imposed. Collinson v. Miller, 903 So. 2d 221, 229 (Fla. 2d DCA 2005).

[2] After full and fair consideration, we find that Escobio's and STS's remaining arguments, including their arguments for remittitur or a new trial, are without merit, and we decline to discuss them here.

Thus, "a constructive trust may be imposed only where the trust res is 'specific and identifiable property,' or can be 'clearly traced in assets of the defendant.'" Bank of Am. v. Bank of Salem, 48 So. 3d 155, 158 (Fla. 1st DCA 2010) (quoting Gersh v. Cofman, 769 So. 2d 407, 409 (Fla. 4th DCA 2000)).

Frieri's claim that a constructive trust should be imposed against CIS for his $6 million investment is meritless because Frieri has failed to introduce evidence of specific and identifiable property in any of CIS's assets which might constitute the res of his proposed constructive trust. The record on appeal reflects that, at most, CIS only maintained some level of control over Frieri's $6 million from December 23, 2004, when the investment was transferred to CIS's escrow account, through February 4, 2005, when the investment was transferred to STS. Thereafter, when Frieri filed suit against Escobio, STS, and CIS, Frieri's $6 million investment could neither be identified in nor traced to CIS's assets. Without an identifiable res traceable to CIS's assets upon which a trust might be imposed, Frieri's claim for a constructive trust against CIS must fail.

Next, Frieri argues that the trial court erred in granting a directed verdict as to Frieri's misrepresentation claims against CIS. We disagree. Each of Frieri's misrepresentation claims requires a showing that CIS made a misrepresentation to Frieri. See Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033, 1039-40 (Fla. 3d DCA 2010) (stating that a claim for fraudulent inducement requires proving a

misrepresentation of a material fact); Romo v. Amedex Ins. Co., 930 So. 2d 643, 653 (Fla. 3d DCA 2006) (stating that a claim for negligent misrepresentation requires proving that "the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false"); Lopez-Infante v. Union Cent. Life Ins. Co., 809 So. 2d 13, 15 (Fla. 3d DCA 2002) (stating that a claim for fraud requires proving "a false statement concerning a specific material fact"). However, Frieri failed to introduce any evidence to substantiate his claim that CIS made a misrepresentation to Frieri. Without any evidence that CIS made a misrepresentation of any kind to Frieri, Frieri's misrepresentation claims must also fail.[3]

## CONCLUSION

In conclusion, we affirm the trial court's denial of Escobio's and STS's post-trial motion and affirm the resulting final judgment in Frieri's favor because the jury was presented with competent substantial evidence of Escobio's and STS's liability for breach of contract. We also affirm the trial court's entry of a directed verdict in favor of CIS because no evidence was presented on Frieri's constructive trust claim that showed how Frieri's investment was either identified in, or traced to, any of CIS's assets at the time Frieri filed suit, and further, no evidence was

[3] We find that Frieri's remaining arguments are without merit, and we decline to discuss them here.

presented to suggest that CIS misrepresented any facts to Frieri that might support Frieri's misrepresentation claims against CIS.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**WELLS FARGO BANK, N.A.,**
Appellant,

v.

**SHAUNA BILECKI** and **SCOTT BILECKI,**
Appellees.

Nos. 4D14-1015 & 15-67

[May 18, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Cynthia G. Imperato, Judge; L.T. Case No. CACE 09-011290.

Michael K. Winston and Dean A. Morande of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellant.

John P. Seiler of Seiler Sautter Zaden Rimes & Wahlbrink, Fort Lauderdale, and Darin J. Lentner and Mark C. Hillis of Foreclosure Fighters Law Center, Fort Lauderdale, for appellees.

LEVINE, J.

The issue presented in this foreclosure case is whether the bank was required to prove, in opposition to a motion for summary judgment, that it complied with conditions precedent where the homeowners did not produce timely, competent evidence in support of their motion for summary judgment. In other words, the issue is who has the burden to prove the absence of any genuine issue of fact when moving for summary judgment. We find that the trial court improperly placed the burden of proof on the bank to produce evidence in opposition to the motion for summary judgment when it properly rested with the homeowners, as movants. As such, we reverse the final judgment in favor of the homeowners as well as the order awarding attorney's fees.[1]

In February 2009, Wells Fargo Bank, N.A., filed a foreclosure complaint against Shauna and Scott Bilecki. The Bileckis filed an answer and

[1] We sua sponte consolidate these appeals for all purposes.

affirmative defenses, denying that all conditions precedent had been performed. Specifically, the Bileckis alleged that Wells Fargo failed to provide notice as required by paragraph 22 of the mortgage because they never received the default letter. With respect to notice, the mortgage provided:

> Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers.

The Bileckis moved for summary judgment. In their motion, the Bileckis argued that because they raised failure to perform conditions precedent as an affirmative defense, Wells Fargo had the burden of proving it performed the conditions precedent prior to acceleration. The Bileckis attached a copy of the default letter to their motion. The letter, dated December 14, 2008, was addressed to Shauna Bilecki.

On March 20, 2013, Wells Fargo served an affidavit in support of its own motion for summary judgment. In the affidavit, a vice president of loan documentation for Wells Fargo stated that Wells Fargo's business records contained a notice of default and intent to accelerate which was sent to the address provided by the Bileckis. The affidavit was filed on March 21, 2013.

On March 20, 2013, the Bileckis served an affidavit in opposition to Wells Fargo's motion for summary judgment. In the affidavit, Scott Bilecki stated that he never received any pre-acceleration or pre-foreclosure notice letter from Wells Fargo.

The court held an initial summary judgment hearing on the Bileckis' motion on March 22, 2013. Thereafter, the trial court continued the hearing four times. At issue during the continued hearings was the date Wells Fargo served and filed its affidavit. The Bileckis argued that the affidavit did not comply with Florida Rule of Civil Procedure 1.510(c) because it was served less than five days prior to the hearing. The trial court ultimately granted summary judgment in favor of the Bileckis. Wells Fargo moved for rehearing, arguing that the trial court improperly shifted the burden to Wells Fargo to produce an affidavit. The trial court confirmed its ruling and entered final summary judgment. Following entry of summary judgment, the trial court entered an order awarding the Bileckis attorney's fees and costs. From these orders, Wells Fargo appeals.

"The standard of review of the entry of summary judgment is *de novo*." *Craven v. TRG-Boynton Beach, Ltd.*, 925 So. 2d 476, 479 (Fla. 4th DCA 2006). "The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Id.* at 479-80. Significant to the instant case, "[o]nly where the movant tenders competent evidence in support of his motion does the burden shift to the other party to come forward with opposing evidence." *Id.* at 480.

As the party moving for summary judgment, the Bileckis had the burden of demonstrating that no genuine issue of material fact existed. *Id.* They did not meet their burden. The Bileckis did not submit any timely, competent evidence in support of their motion. Although they served Scott Bilecki's affidavit, it was served in opposition to Wells Fargo's motion for summary judgment, not in support of their own motion. Additionally, the affidavit was not served until March 20, 2013—two days before the summary judgment hearing. Moreover, the affidavit was insufficient to meet the Bileckis' burden. The affidavit stated only that Scott did not receive the demand letter. It did not address whether Shauna received the demand letter. This is significant because the default letter was addressed only to Shauna, as permitted by the mortgage. Further, the mortgage required only that the default letter be sent by first class mail; it did not require that the default letter be received unless "if sent by other means" than first-class mail.

*Le v. Lighthouse Associates, Inc.*, 57 So. 3d 283 (Fla. 4th DCA 2011), is instructive. In that case, the plaintiffs alleged that the defendant's negligence in failing to maintain a community swimming pool resulted in injuries to their son, who contracted a virus. The defendant's motion for summary judgment alleged that the plaintiffs did not produce any credible evidence which would entitle them to relief. The plaintiffs produced an affidavit of an infectious disease physician, who opined that the son contracted a virus after ingesting pool water. The trial court granted summary judgment in favor of the defendant, finding that the plaintiffs' affidavit was based on the stacking of inferences, and that the plaintiffs had not produced enough evidence to prove their cause of action. This court reversed, finding that the trial court misplaced the burden of proof to the non-movant in granting the motion for summary judgment.

Like in *Le*, in the instant case the trial court misplaced the burden of proof on Wells Fargo. As the moving party, the Bileckis had the burden to conclusively show the absence of any genuine issue of material fact. The trial court entered summary judgment in favor of the Bileckis after the

Bileckis argued that Wells Fargo did not serve its affidavit in opposition to summary judgment more than five days prior to the hearing. By agreeing with the Bileckis, the trial court inappropriately placed the burden on Wells Fargo to produce evidence in opposition to the motion. Because the Bileckis did not produce timely, competent evidence in support of their motion, the burden should have never shifted to Wells Fargo. *Craven*, 925 So. 2d at 480.

Finally, we note that although Wells Fargo was not required to serve an affidavit in opposition to the motion for summary judgment until the Bileckis met their initial burden, the trial court also erred in finding that Wells Fargo's affidavit was not timely served. Although the affidavit may have been untimely as to the initial summary judgment hearing, it was timely as to the subsequent continued hearings. *See Rodriguez v. Tri-Square Constr., Inc.*, 635 So. 2d 125 (Fla. 3d DCA 1994).

In sum, the trial court erred in placing the burden on Wells Fargo to produce evidence in opposition to the Bileckis' motion for summary judgment, where the Bileckis failed to meet their initial burden and thereby shift the burden of proof to Wells Fargo. As such, we reverse the final summary judgment in favor of the Bileckis. Because the trial court erred in granting summary judgment in favor of the Bileckis, we also reverse the order awarding the Bileckis attorney's fees.

*Reversed and remanded.*

DAMOORGIAN, J., and HANZMAN, MICHAEL A., Associate Judge, concur.

* * *

***Not final until disposition of timely filed motion for rehearing.***

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**SUNTRUST BANK,**
Appellant,

v.

**ARROW ENERGY, INC., AVIATION FUEL INTERNATIONAL, INC.** and **SEAN WAGNER,**
Appellees.

No. 4D15-1477

[May 18, 2016]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol-Lisa Phillips, Judge; L.T. Case No. CACE 2010-48678 (25).

William C. Davell, Carolyn B. Brombacher and Christopher D. Barber of May, Meacham & Davell, P.A., Fort Lauderdale, for appellant.

Roger M. Dunetz of Roger M. Dunetz, P.A., Coral Gables, for appellee Arrow Energy, Inc.

WARNER, J.

Appellant Suntrust Bank appeals an order denying its motion for relief from a final judgment of garnishment. Suntrust contends that the final judgment was void to the extent that it included postjudgment interest on the amount of funds held by Suntrust. We agree with Suntrust that the judgment is void because there is no authority to assess interest to be paid by the garnishee. We reverse.

Appellee Arrow Energy, Inc., sued Aviation Fuel International, Inc., and other defendants in federal district court in Michigan in 2010. Arrow obtained a final judgment against Aviation and defendant Sean Wagner for $313,036.08, plus statutory interest, in October 2010. This foreign judgment was certified and filed in Florida. Arrow commenced execution of the judgment.

In May 2011, Arrow served a writ of garnishment on Suntrust. Suntrust answered, alleging that it was holding a total of $122,519.75

owed to the defendants. In 2013, the trial court entered a final judgment against Suntrust for that amount, plus post-judgment interest at 4.75% per annum. Suntrust sent Arrow a check for $122,519.75, but then stopped payment on the check because another creditor of Aviation had also filed a garnishment. Various proceedings ensued, including an appeal and a bankruptcy.

In March 2014, Suntrust moved for relief from the final judgment, contending that the inclusion of the requirement that it pay interest on the sum garnished required it to pay an amount in excess of the garnished amount, and the judgment was void to that extent. After much litigation, the court denied the motion, prompting this appeal.

Garnishment is a quasi in rem proceeding. *Burkhart v. Cir. Ct. of Eleventh Jud. Cir.*, 1 So. 2d 872, 875 (Fla. 1941). "To have subject matter jurisdiction in an in rem proceeding, a court must have both the jurisdictional authority to adjudicate the class of cases to which the case belongs and *jurisdictional authority over the property which is the subject matter of the controversy*." *Ruth v. Dep't of Legal Affairs*, 684 So. 2d 181, 185 (Fla. 1996) (emphasis added). The court acquires jurisdiction over the garnishee to the extent of the property garnished, as the extent of the garnishee's liability is the amount that it owes to the judgment debtor. *See Sec. Bank, N.A. v. BellSouth Advert. & Publ'g Corp.*, 679 So. 2d 795, 800 (Fla. 3d DCA 1996), *approved by BellSouth Advert. & Publ'g. Corp. v. Sec. Bank, N.A.*, 698 So. 2d 254 (Fla. 1997).

This is reflected in section 77.083, Florida Statutes (2013), which provides that "[*n*]*o judgment* in excess of the amount remaining unpaid on the final judgment against the defendant or *in excess of the amount of the liability of the garnishee to the defendant*, whichever is less, *shall be entered against the garnishee."* (Emphases added). Thus, by entering a judgment which includes liability for post-judgment interest, the court exceeded its jurisdictional authority over the property which was the subject matter of the controversy, namely the funds owed by Suntrust to the judgment debtor. To that extent, the court did not have jurisdiction, and the judgment is void.

Arrow contends that it is entitled to interest on the judgment pursuant to section 55.03(2), Florida Statutes (2010), which provides for interest on judgments for money damages, orders for judicial sale, and process or writs directed to a sheriff for execution. A garnishment judgment, however, is technically not a judgment for money but a judgment to permit the garnishor to obtain monies owed by the judgment debtor but held by the garnishee.

Because garnishment is a proceeding in derogation of common law, the relevant statutes must be strictly construed. *See Paz v. Hernandez*, 654 So. 2d 1243, 1244 (Fla. 3d DCA 1995). In *Paz*, the court overturned an award of attorney's fees to the judgment creditor in a garnishment proceeding, which were awarded under section 57.115, Florida Statutes (1993), authorizing an award in connection with execution on a judgment. *Paz*, 654 So. 2d at 1244. The court held that, without express statutory or case law authority to the contrary, garnishment was not simply another type of execution for which attorney's fees could be awarded under section 57.115. *Id.*

Moreover, section 77.28, Florida Statutes (2013), provides that the court must determine the garnishee's attorney's fees and costs, and that those can be offset against the amount owed.

Thus, the statutes contemplate that the garnishee will have no liability or out-of-pocket expense due to the garnishment. In this context, interest on the amounts held by the garnishee is akin to such fees and costs. To require the garnishee to pay such interest, without offsetting it against the amount owed, is therefore contrary to these statutes.

In accordance with the foregoing, we cannot accept Arrow's proposition that garnishment is merely a form of money judgment on which interest is awardable. Further, there is no express provision in the garnishment statute for the award of interest, and there is a specific direction in section 77.083, Florida Statutes, that no judgment can be entered against a garnishee in excess of the amount of its liability to the judgment debtor. Awarding interest in excess of that amount would be contrary to that statute and an unconstitutional deprivation of the *garnishee's* property without due process of law. *See Carpenter v. Benson*, 478 So. 2d 353, 354 (Fla. 5th DCA 1985).

We acknowledge Arrow's concern that a garnishee could benefit by intentionally withholding funds due to the garnishor, but we recognize that the court has many tools to obtain compliance with its orders. And when the court finds a party in contempt for refusal to obey a court order,[1] the court may award compensation to the injured party for its loss. *See Johnson v. Bednar*, 573 So. 2d 822 (Fla. 1991), *receded from on other grounds*, *Parisi v. Broward Cty.*, 769 So. 2d 359 (Fla. 2000).

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[1] We do not suggest that is the case here.

We therefore reverse the order denying Suntrust's motion for relief from final judgment and remand for vacation of the judgment and entry of a judgment consistent with this opinion, eliminating any award of post-judgment interest.

GROSS and FORST, 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

UNITED FOOD AND COMMERCIAL, ETC., ET AL.,

Appellants,

v. Case No. 5D15-1434

WAL-MART STORES, INC.,

Appellee.
_____/

Opinion filed May 20, 2016

Appeal from the Circuit Court
for Orange County,
Alice Blackwell, Judge.

Richard P. Siwica, Egan, Lev & Siwica, P.A., Orlando, and George Wiszynski and Joey James Hipolito, United Food and Commercial, International Union, Washington, D.C., for Appellants.

Elliot H. Scherker, Brigid F. Cech Samole, Jay A. Yagoda, of Greenberg Traurig, P.A., Miami, Ronald M. Schirtzer, of Greenberg Traurig, P.A., Orlando, and Steven D. Wheeles and Douglas D. Janicik of Steptoe & Johnston, LLP, Phoenix, Arizona, for Appellee.

COHEN, J.

Walmart and the United Food and Commercial Workers International Union, OURWalmart, et al., (collectively, "UFCW"), are engaged in strategic jurisdictional

battles throughout the nation. Walmart brought this action against UFCW seeking an injunction against future trespasses and nuisances. The issue on appeal is whether Walmart's trespass claim, based on Florida law, is preempted by the National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 151-169 (2016).[1] The trial court found that Walmart's claim was not preempted because it fell under the exception to NLRA preemption recognized in Sears, Roebuck, & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 199-208 (1978), and entered an injunction on summary judgment against further trespasses by UFCW. We agree and affirm.

UFCW is a national labor organization that represents grocery, retail, meat-packing, and food-processing workers. OURWalmart is UFCW's subsidiary labor organization, which includes current and former employees of Walmart. UFCW staged a number of demonstrations and mass actions, both inside and outside of Walmart stores, affecting Walmart employees, managers, and shoppers alike. UFCW has stipulated that it would continue such actions absent an injunction. Although UFCW's demonstrations were loud and disruptive, they were not violent.[2] During various demonstrations,

[1] In addition to the preemption issue, UFCW argues that Walmart cannot seek an injunction over parking lots and sidewalks it shares with other businesses, and that Walmart lacked standing to pursue a public nuisance claim. We find these issues lack merit and affirm without further comment.

Additionally, Walmart's public nuisance claim was based on the fact that UFCW blocked access into and out of its parking lot at an Orlando store. UFCW concedes that if Walmart had standing to bring the nuisance claim, that claim would not be preempted by the NLRA under a long-standing exemption for "interests . . . deeply rooted in local feeling and responsibility." San Diego Bldg. Trades Council, Millmen's Union 2020 v. Garmon, 359 U.S. 236, 244 (1959). Accordingly, we address UFCW's preemption argument only as to Walmart's trespass claim.

[2] The protests included a variety of practices, such as entering Walmart stores, filling shopping carts full of merchandise and using them to block other customers' access to the cash registers, confronting Walmart managers, chanting slogans, playing

Walmart was forced to call the police to remove UFCW from its stores; Walmart later sent UFCW written, formal notice that it was not allowed to enter Walmart property for purposes other than shopping.

The strategic maneuvering began when Walmart filed unfair labor practice charges on behalf of its employees against UFCW with the National Labor Relations Board ("NLRB"), alleging that UFCW violated its employees' rights under section 8(b)(1)(A) of the NLRA.[3] Walmart later withdrew these charges before the NLRB took action on the matter, opting instead to pursue trespass actions in state court. This same strategy has been repeated throughout the country. Walmart is currently seeking similar injunctions in Arkansas, California, Colorado, Maryland, and Texas. One appellate court, in the state of Washington, has ruled that Walmart's claims are preempted. Wal-Mart Stores, Inc. v. UFCW, 354 P.3d 31, 33 (Wash. Ct. App. 2015), review denied, 367 P.3d 1084 (Wash. 2016).

Preemption raises a pure question of law and is reviewed de novo. W. Fla. Regional Med. Ctr. v. See, 79 So. 3d 1, 8 (Fla. 2012).[4] The NLRA contains no preemption clause yet is considered to have one of the broadest preemptive scopes of any federal litigation. See Benjamin I. Sachs, Despite Preemption: Making Labor Law in

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loud music, speaking though bullhorns, and projecting videos onto the walls of Walmart's stores.

[3] Section 8(b)(1)(A) of the NLRA is codified at 29 U.S.C. § 158 (2016) and makes it "an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title." Section 157, in turn, gives employees the right to refrain from participating in union activities such as collective bargaining and concerted action. 29 U.S.C. § 157 (2016).

[4] Federal law preempts state law based on the U.S. Constitution's Supremacy Clause. Art. VI, U.S. Const. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

Cities and States, 124 Harv. L. Rev. 1153, 1154, 1164-69 (2011) (discussing the impact of labor-law preemption on state and local lawmaking). The U.S. Supreme Court has held that the NLRA prohibits state regulation of conduct only arguably protected or prohibited by the NLRA. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 245 (1959).[5] The broad doctrinal rule of Garmon rests on a belief that Congress, in enacting the NLRA, intended to occupy the entire field of labor relations, leaving little room for state law to regulate, and to give the NLRB primary jurisdiction to adjudicate labor disputes and develop a national labor policy. See id. at 241–43; see also Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Reg. 355, 358-59 (1990) (suggesting alternative interpretations of the NLRA's broad field preemption).

The leading exception to the "arguably protected" standard from Garmon, in the context of state-law trespass actions, comes from Sears, 436 U.S. at 207-08. In Sears, the union picketed on Sears' property to publicize the company's decision to use non-union carpenters. Id. at 182. While the union could have brought an unfair labor-practice charge against Sears seeking the protection of section 7 of the NLRA for its picketing, Sears could not have brought an action with the NLRB against the union seeking specifically to enjoin the union's trespass. Id. at 201-02. The proceeding with the NLRB would have instead focused on the protected or prohibited character of the picketing itself without addressing the union's alleged violations of state law. Id. at 198, 198 n.28. The Court conceded that there was still a potential risk that the picketing could be

[5] "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Garmon, 359 U.S. at 245.

protected under the NLRA—that the picketing was arguably protected—yet it held that state jurisdiction is appropriate when: (1) the party alleging that its conduct is protected elects not to bring a claim before the NLRB; (2) the party alleging that the conduct is not protected cannot present its claim to the NRLB; and (3) the claim to protection for the conduct is weak, as is often the case for trespasses. Id. at 203-08; see also Gottesman, supra, at 378 n.94.

UFCW seeks to distinguish Sears by arguing that here, unlike in Sears, Walmart had access to the NLRB, as evidenced by Walmart having initially brought a complaint with NLRB only to withdraw that claim and seek its remedy in state court. UFCW also points out that in Sears, the union's conduct in picketing was entirely peaceful and the state-law controversy focused exclusively on the location of the picketing, not the union's conduct itself.[6] UFCW argues, then, that the Sears exception is not applicable when the employer had actual access to the NLRB to litigate its claim and where the state-law trespass claim goes beyond merely regulating the location of a protest and intrudes into regulating the actual conduct of the picketing.

The critical question is whether the action Walmart brought in state court is the same as the one it could have brought with the NLRB. See Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983) ("[A] critical inquiry in applying the Garmon rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and

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[6] The Court in Sears explained:

> Sears asserted no claim that the picketing itself violated any state or federal law. It sought simply to remove the pickets from its property to the public walkways, and the injunction issued by the state court was strictly confined to the relief sought. Thus, as a matter of state law, the location of the picketing was illegal but the picketing itself was unobjectionable.

436 U.S. at 185.

hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board."). If the state-law controversy is not identical to the controversy the party seeking state-court jurisdiction could have brought before the NLRB, then the party invoking state-court jurisdiction cannot be said to have access to the NLRB to bring its claim. In making that determination, we focus not on the formal elements of the claims or the state law's general applicability, but rather on whether the claims are identical in some "fundamental respect," and examine the inquiries dispositive of each controversy.[7] See Local 926, Int'l Union of Operating Eng'rs, AFL-CIO v. Jones, 460 U.S. 669, 682 (1983) (finding preemption based on the fundamental similarity of plaintiff's state-law and NLRA claims).

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[7] The Court in Sears explained:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in [Garner v. Teamsters, 346 U.S. 485, 490-91 (1953)]) or different from (as in [Farmer v. Carpenters, 430 U.S. 290, 297-301 (1977)]) that which could have been, but was not, presented to the Labor Board. . . .
>
> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices.

436 U.S. at 197-98.

Walmart's NLRA claim alleged UFCW violated its employees' section 7 right to refrain from participating in collective action. The focus of that claim, had Walmart pursued it, would have been on the objective of UFCW's protests—whether its goal was protected or prohibited under the NLRA—and their effect on Walmart's employees. Cf. Sears, 136 U.S. at 201 n.31 ("[I]n deciding the unfair labor practice question, the Board's sole concern would have been the objective, not the location, of the challenged picketing."); see also Millwrights & Machinery Erectors Union Local 102, 317 N.L.R.B. 1099, 1102 (1995) (stating that a section 8(b)(1)(A) claim requires a showing that conduct "affected 'employees'"). It would not have addressed Walmart's allegation that UFCW exceeded the scope of Walmart's general easement to the public to enter its property for the purposes of shopping.

The resolution of Walmart's NLRA claim would have also involved complex factual issues and nuanced determinations not just of the effect of UFCW's conduct on Walmart's employees and UFCW's objectives in protesting, but also of the status of the various participants as non-employees, employees from other stores, and employees at the store in question. See, e.g., ITT Indus., Inc. v. N.L.R.B., 413 F.3d 64, 74-77 (D.C. Cir. 2005) (reviewing and endorsing the NRLB's application of its so-called Hillhaven[8] test to establish a derivative right for employees from off-site facilities to enter an employer's parking lot to distribute handbills). The NLRB's final determination may have turned on any one of these factors unrelated to the question of trespass. Yet the central inquiry would have always been on balancing whatever protections the NRLA would have afforded UFCW against only the rights of Walmart's employees.

[8] First Healthcare Corp., 336 N.L.R.B. 646 (2001).

In contrast, Walmart's trespass claim focused on the relatively straightforward question of whether UFCW's actions exceeded the scope of the general easement provided to the public to come on to Walmart's property to shop. See Am. Quick Sign, Inc. v. Reinhardt, 899 So. 2d 461, 464 (Fla. 5th DCA 2005) ("[An easement] is an interest that gives to one other than the owner a right to use the land for some specific purpose."). The trespass claim did not require the trial court to address whether UFCW's actions restrained or coerced Walmart employees; thus, it did not pose a risk of intruding on issues of federal labor law. UFCW's impact on Walmart's employees was in no way dispositive, nor necessarily relevant, to Walmart's trespass action. Although UFCW is correct that some of the allegations in Walmart's trespass complaint went beyond the mere location of the protest, the trespass claim required only a finding that UFCW's conduct exceeded the scope of Walmart's easement to the public to enter its property for the purposes of shopping. See Restatement (Second) of Torts § 168 (Am. Law Inst. 1965) ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.").

The remedy in this case was likewise circumscribed to prohibiting future trespasses and does not affect UFCW's right to peacefully protest outside of Walmart's property or to contact Walmart's employees through other means than direct access to Walmart's property. Cf. Sears, 436 U.S. at 183 n.5. Although the NLRB has the power to obtain injunctions to halt unfair labor practices, that power is still predicated on the finding of an unfair labor practice, not a mere trespass.[9] Walmart's NLRA claim would

[9] The NLRB has the power to seek injunctions under 29 U.S.C. § 160(j) (2016), which reads, in pertinent part:

not have focused on Walmart's right to control who enters and exits its property, and its protections from nuisances and private torts under Florida law. Cf. Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 305-07 (1977) (holding that a state cause of action for intentional infliction of emotional distress was not preempted).

In addition, UFCW's preemption argument could leave Walmart without any remedy for violations of state law. It would have been possible here, as in Sears, for the NLRB to resolve Walmart's claim and find that UFCW was not prohibited from engaging in these demonstrations without determining whether the demonstrations were actually protected under section 7. Walmart then would have been without a remedy as its NLRA claim would have been unavailing and its state-law trespass claim would have been preempted under Garmon's arguably-protected test.[10] We find, then, that while UFCW had access to the NLRB to determine whether its conduct was protected and

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> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order.

Id.

[10] The Court recognized a similar potential problem in Sears:

> [T]he Board could conclude that the picketing was not prohibited by either § 8(b)(4)(D) or § 8(b)(7)(C) without reaching the question whether it was protected by § 7. If the Board had concluded that the picketing was not prohibited, Sears would still have been confronted with picketing which violated state law and was arguably protected by federal law. Thus, the filing of an unfair labor practice charge could initiate complex litigation which would not necessarily lead to a resolution of the problem which led to this litigation.

436 U.S. at 198 n.28.

chose not to exercise it, Walmart did not have access to the NLRB to present its trespass claim.

The final element we consider is whether UFCW's claim to protection under the NLRA is weak. The Court in Sears pointed out that lack of access to the NLRB does not "foreclose the possibility that pre-emption may be appropriate." Sears, 436 U.S. at 203; see also Fed. Sec., Inc., 359 N.L.R.B. No. 1 at 11, 2012 WL 5473770 at *15 (2012). The Court explained that preemption may be required, even when one party lacks access to the NLRB, when there is a significant possibility that the conduct at issue is protected under the NLRA. In such instances, the risk of state-court misinterpretation of federal labor law may be too great to allow a state-court action to proceed. The Court concluded that "the acceptability of 'arguable protection' as a justification for pre-emption in a given class of cases is, at least in part, a function of the strength of the argument that § 7 does in fact protect the disputed conduct." Sears, 436 U.S. at 203.

Although, similar to the situation in Sears, there is some possibility that UFCW's violation of Florida law would have been protected under the NLRA, we believe that claim to protection is weak. As the Court held in Sears, "while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected." Sears, 436 U.S. at 205. UFCW's claim here is even weaker than the claim for protection in Sears as UFCW's conduct involved mainly the trespass of non-employees, who rarely have the right to access an employer's property. See Lechmere, Inc. v. NLRB, 502 U.S. 527, 540-41 (1992) (holding that nonemployees rarely have the right to enter employer's property for organizational efforts absent extraordinary circumstances that make contacting the

employees in other means nearly impossible). UFCW has disavowed any attempt to organize Walmart's employees and was not seeking to publicize an election or other pending union action.

We emphasize, in conclusion, that UFCW had, at all times prior to and even during this litigation, access to the NLRB to pursue the protection of the NLRA. We are cognizant of the expertise of the NLRB in making determinations about national labor policy. We likewise recognize that property law exists in some tension with federal labor law and that the former must yield to the latter in some circumstances as the NLRA protects some conduct that would otherwise violate state property law. We stress that in this case, though, UFCW has refrained from invoking the protection of the NLRA, leaving Walmart without a remedy for all of its claims, and that UFCW's claim to such protection is weak. We find that the exception to preemption under the NLRA announced in Sears applies here and affirm the trial court's injunction.

AFFIRMED.

SAWAYA and LAMBERT, JJ., concur.

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

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

IAN T. BILLINGTON,

Appellant,

v. Case No. 5D14-2177

GINN-LA PINE ISLAND, LTD, LLLP, ET AL.,

Appellees.

_____/

Opinion filed May 20, 2016

Appeal from the Circuit Court
for Lake County,
Michael G. Takac, Judge.

Philip K. Calandrino, and Thomas S. Dolney, of Calandrino Law Firm, P.A., d/b/a Small Business Counsel, Winter Park, for Appellant.

Darryl M. Bloodworth, of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, Lubert-Adler Partners, L.P., Dean Adler, and Ira Lubert, for Appellees.

Lawrence H. Kunin and Robert P. Alpert, of Morris, Manning Martin, LLP, Atlanta, GA, for Appellees, Ginn-La Pine Island LTD., LLLP, Ginn-Pine Island, GP, LLC and Ginn Development Company, LLC.

TORPY, J.

This dispute arises from the sale and purchase of two high-end residential lots. The lower court dismissed Appellant's fifth amended complaint for failure to state a cause of action. Appellees correctly advance several arguments supporting the dismissal, but we confine our discussion to the effect of the contractual "disclaimer" clauses on the fraud claims. Concluding that the "non-reliance" and "waiver" components of the disclaimer clauses negate Appellant's fraud claims, we affirm. We certify several questions of great public importance to the Florida Supreme Court because it has not addressed the effect of disclaimer clauses in this context in nearly 75 years, and its last pronouncement has resulted in conflicting interpretations. *See Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941).[1]

Appellant, Ian T. Billington, and Appellee, Ginn-LA Pine Island, Ltd., LLLP ("Pine Island"), executed a $1.35 million contract for the sale and purchase of lot 137 in the Bella Collina development in Lake County, Florida. The contract contained several disclaimer clauses relevant to this appeal, including:

> 14. BROKER AGENCY DISCLOSURE; COMMISSIONS; DISCLAIMER OF REPRESENTATIONS.
>
> . . . .
>
> NOTE: BEFORE BUYER SIGNS THE CONTRACT, BUYER SHOULD READ IT CAREFULLY AND IS FREE TO CONSULT AN ATTORNEY OF BUYER'S CHOICE.
>
> . . . .

[1] See *infra* for a discussion of some of the conflicting interpretations of *Oceanic Villas.*

> c. Buyer understands and acknowledges that the salespersons representing Seller in connection with this transaction do not have authority to make any statements, promises or representations in conflict with or in addition to the information contained in this Contract and the Community Documents, and Seller and Broker hereby specifically disclaim any responsibility for any such statements, promises or representations. By execution of this Contract, Buyer acknowledges that Buyer has not relied upon such statements, promises or representations, if any, and waives any rights or claims arising from any such statements, promises or representations.
>
> . . . .
>
> ANY CURRENT OR PRIOR UNDERSTANDINGS, STATEMENTS, REPRESENTATIONS, AND AGREEMENTS, ORAL OR WRITTEN, INCLUDING, BUT NOT LIMITED TO, RENDERINGS OR REPRESENTATIONS CONTAINED IN BROCHURES, ADVERTISING OR SALES MATERIALS AND ORAL STATEMENTS OF SALES REPRESENTATIVES, IF NOT SPECIFICALLY EXPRESSED IN THIS CONTRACT OR IN THE COMMUNITY DOCUMENTS, ARE VOID AND HAVE NO EFFECT. BUYER ACKNOWLEDGES AND AGREES THAT BUYER HAS NOT RELIED ON ANY SUCH ITEMS.

(Emphasis added). Appellant and Pine Island later executed a $1.64 million contract for the sale and purchase of lot 439 in the same development. That contract contained clauses substantially identical to those in the lot 137 contract.

After both transactions closed, Appellant brought suit against Pine Island and several associated entities and individuals claiming, among other things, that he had been induced to execute the contracts by fraudulent misrepresentations. Appellant alleged misrepresentations concerning the ability to construct private boat docks on the lots as well as the purchase price of other lots sold to different buyers. After numerous amendments, the trial court dismissed the relevant counts in the fifth amended complaint

with prejudice.[2] Appellant initially challenges the propriety of the dismissal, arguing that the court improperly went beyond the allegations in the complaint. Appellant correctly argues that he alleged reliance, which is itself a sufficient allegation to survive a motion to dismiss; however, because Appellant attached the contracts to the complaint, it was appropriate to dismiss the complaint if the terms of the contracts contradicted the allegation as pled. *See Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1055-56 (Fla. 4th DCA 1999); *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So. 2d 736, 736-37 (Fla. 3d DCA 1971). Because the disclaimer clauses in the contracts here contradicted Appellant's assertion of actual reliance and effectively waived this claim, we conclude that dismissal was proper.

There appear to be three categories of disclaimer clauses identified in court decisions and treatises. First, there are "merger" or "integration" clauses, which are clauses that purport to make extrinsic agreements unenforceable unless they are contained within the written contract. *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001). These clauses might also contain statements that negate the authority of an agent to vary the terms of the agreement. *See* Restatement (Second) of Contracts § 216 cmt. e (Am. Law Inst. 1981) (observing that merger clause "may negate the apparent authority of an agent to vary orally the written terms"). Second, there are "non-reliance," "no-reliance" or "anti-reliance" clauses, which state that the parties to the contract did not rely

[2] Although other claims remain pending, we have jurisdiction here because several parties were completely removed from the action upon dismissal of the pertinent claims. We also concluded previously, by separate order in this case, that the remaining counts are separate and distinct for purposes of appellate jurisdiction. *See* Fla. R. App. P. 9.110(k).

upon statements or representations not contained within the document itself. *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002). Finally, there are clauses that purport to waive or release claims for fraud. *See, e.g.*, *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 768 (Tex. App. 2012) (describing waiver or release as broadest form of disclaimer for fraud). While the contracts at issue here contain all three of these categories of disclaimers, our decision turns on the non-reliance and waiver clauses.

In *La Pesca Grande Charters, Inc. v. Moran*, 704 So. 2d 710, 714 n.1 (Fla. 5th DCA 1998), this court addressed the subject of non-reliance clauses, stating in dictum that a contractual agreement to "forego reliance on any prior false representation and limit . . . reliance to the representations . . . expressly contained in the contract" has the binding effect of negating an action based on fraud in the inducement. Although some courts have adopted a contrary approach,[3] this appears to be the rule in the majority of jurisdictions. *See, e.g.*, *Insitu, Inc. v. Kent*, 388 F. App'x 745 (9th Cir. 2010) (applying Washington law, "no-reliance" clause barred claims for fraud and promissory estoppel as matter of law); *Rissman v. Rissman*, 213 F.3d 381, 383-84 (7th Cir. 2000) ("non-reliance" clause precluded claim for securities fraud); *Bank of the West v. Valley Nat'l Bank of Ariz.*,

[3] Some of the contrary authorities decline to enforce non-reliance clauses against a non-sophisticated party. We cannot discern a logical basis for a distinction based on the sophistication of the party against whom the clause is sought to be enforced, because all parties, big and small, are bound by the terms of a contract. In any event, the size of the transactions here clearly supports the inference that the parties were on equal footing. Some courts also decline enforcement of clauses lacking in clarity or specificity. Here, the disclaimers are both clear and specific. The non-reliance language in particular, without use of legalese, clearly expresses a notion that most contracting parties should understand. Indeed, the use of a written contract itself should give caution that material components of the agreement must be expressed in the instrument.

41 F.3d 471, 477-78 (9th Cir. 1994) (applying California law, "plain and strong words" of no-reliance clause precluded fraud claim as matter of law); *First Fin. Fed. Sav. & Loan Ass'n v. E.F. Hutton Mortg. Corp.*, 834 F.2d 685, 687 (8th Cir. 1987) (disclaimer of reliance on representation negated claim for fraud); *Landale Enters., Inc. v. Berry*, 676 F.2d 506, 507-08 (11th Cir. 1982) (applying Alabama law, non-reliance clause negated fraud claim); *LeTourneau Techs. Drilling Sys., Inc. v. Nomac Drilling, LLC*, 676 F. Supp. 2d 534, 543 (S.D. Tex. 2009) (applying Texas law, disclaimer of reliance on prior representations negated claim for fraud); *Abry Partners V, L.P. v. F & W Acquisition, LLC*, 891 A.2d 1032, 1057-58 (Del. Ch. 2006) (party could not promise not to rely on prior representations and then "shirk its own bargain" by asserting in lawsuit that it in fact relied); *Weinstock v. Novare Grp., Inc.*, 710 S.E.2d 150, 155-56 (Ga. Ct. App. 2011) (comprehensive merger clause with no-reliance provisions negated fraud in inducement claim); *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 598-99 (N.Y. 1959) (no-reliance clause in lease precluded claim for fraud); *Blumenstock v. Gibson*, 811 A.2d 1029, 1036 (Pa. Super. Ct. 2002) (party could not sign contract denying reliance on prior representations then later claim reliance on such representations).[4]

[4] Some of these decisions couch their holdings in terms of whether there was a lack of "justifiable" or "reasonable" reliance. That potentially distinguishing feature has no bearing on our analysis because the disclaimer clauses here establish a lack of actual reliance. Though not essential to our conclusion, the parties here all agreed in their briefing that "justifiable" reliance must be established by Appellant. Indeed, Appellant pled "justifiable reliance" in several paragraphs of the fifth amended complaint. None of the parties, however, addressed the Florida Supreme Court's decision in *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), wherein the court stated that "justifiable" reliance is not an element of a claim for fraud. *Id.* at 105. We are mindful that our high court does not overrule itself *sub silentio*. *See Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002). As a result, we must view *Butler's* discussion in context and against the backdrop of earlier cases from our high court expressing contrary holdings. *See, e.g.*, *Avila S. Condo. Ass'n v. Kappa Corp.*,

347 So. 2d 599, 604 (Fla. 1977) (fraud "complaint [must] alleg[e] **reasonable reliance** on material misrepresentations of existing fact") (emphasis added); *Fote v. Reitano*, 46 So. 2d 891, 893 (Fla. 1950) (judgment for fraud reversed because plaintiff did not prove "justified" reliance).

We note that *Butler* does not mention *M/I Schottenstein Homes v. Azam*, 813 So. 2d 91 (Fla. 2002), wherein the court framed the question in terms of whether reliance was "justified" and acknowledged its previous adoption of Restatement (Second) of Torts § 540 (1977). Section 540 contains a corollary to section 537's requirement of justified reliance as an element of fraud. The two sections go hand-in-hand. If reliance need not be "justifiable," section 540 is unnecessary. *See* Restatement (Second) of Torts § 540 (1977) ("recipient of fraudulent misrepresentation is **justified** in relying upon truth, although he might have ascertained the falsity . . . had he made an investigation") (emphasis added); *Id.* § 537 ("justifiable" reliance must be established to prove fraud).

We interpret *Butler* to hold that, consistent with the Restatement (Second) of Torts, a lack of due diligence or investigation into the truth of a representation does not negate the claim of justifiable reliance. That was the holding in *Besett v. Basnett,* 389 So. 2d 995, 998 (Fla. 1980), upon which *Butler* relied. The other case upon which *Butler* relied, *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), citing *Besett,* concluded that "[plaintiffs'] reliance on the truth of the [defendants'] representation was **justified** . . ." *Id.* at 628 (emphasis added). *See* Peter A. Alces, *Law of Fraudulent Transactions* § 2:18 & n.57.70 and accompanying text (categorizing *Butler* at "far end of spectrum" regarding "justifiable" reliance as modifier of element of fraud). Nevertheless, even if our interpretation of *Butler* is incorrect, our conclusion in this case turns on a lack of actual reliance, not necessarily on whether the reliance was justified or reasonable.

Florida courts, like other jurisdictions, at times use the phrases "justifiable reliance" and "reasonable reliance" interchangeably when addressing fraud claims. Nearly every district court has used both such phrases at one time or another. It appears, however, that the two phrases establish different standards, the latter of which is said to impose a higher burden on the claimant. *See Field v. Mans*, 516 U.S. 59, 81 (1995) ("justifiable" reliance, rather than the heavier burden of "reasonable reliance" must be established to prove fraud (quoting William L. Prosser, *Law of Torts* 718 (4th ed.1971) (footnotes omitted))); *accord* W. Page Keeton, et al., *Prosser and Keeton on Torts* 752 (5th ed. 1984); *see also In re Vann,* 67 F.3d 277, 282-85 (11th Cir. 1995) (adopting "justifiable reliance" standard in lieu of "actual reliance" or "reasonable reliance").

We think the "justifiable" standard is a minimally essential filter to preclude fraud claims where purported reliance strains logic and reason, such as when the representation is obviously false. As one leading commentary states, the "justifiable reliance" standard provides "some objective corroboration to plaintiff's claim that he did rely." W. Page Keeton, et al., *supra*, at 750.

Curiously, Appellant cites *La Pesca Grande Charters* in support of his argument that his fraud claim is not negated here. In doing so, he contorts a partial quote from the case, fails to state the holding of the case and ignores the dictum that is directly contrary to his position. *See* 704 So. 2d at 714 n.1. Nevertheless, Appellant also relies upon *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), for the proposition that the contractual disclaimer clauses in the instant case do not negate a claim for fraud. *Oceanic Villas* involved a claim for misrepresentation of past earnings, which purportedly induced execution of a long-term lease. 4 So. 2d at 690. The lease contained what Appellant labels a "merger" clause, but which we discern is more akin to a "non-reliance" clause.[5] *See id.* The trial court dismissed the complaint, apparently based upon the language of the clause. *Id.* The Florida Supreme Court quashed the order in part, concluding on "policy grounds" that the clause did not bar an action for fraud. *Id.* at 690-91. Although the court concluded that the clause there did not negate the fraud claim, it recognized that parties to a contract, "for consideration or expediency," may include provisions that render the contract "incontestable on account of fraud." *Id.* at 690.

*Oceanic Villas* has generated considerable confusion in the lower courts, given its attempt to distinguish *Cassara v. Bowman*, 186 So. 514 (Fla. 1939), a case decided just two years earlier. *Cassara* also involved purported fraud in the inducement of a lease where the alleged fraud involved misrepresentations concerning the amount of profits, prior rental receipts and other facts. 186 So. at 514. The supreme court affirmed the dismissal of a complaint based on an integration clause. *Id.* Rather than overrule

[5] The lease stated that "Lessee . . . in executing this lease . . . has not been . . . influenced by any representations of the Lessors as to . . . earning capacity thereof . . . ."

*Cassara*, in *Oceanic Villas*, the supreme court distinguished its earlier precedent but not based on the language used in the disclaimer clauses. *Oceanic Villas*, 4 So. 2d at 691. Instead, it stated that the allegations in the complaints in the two cases were "entirely different." *Id.*

Courts have struggled to reconcile and apply *Oceanic Villas* and *Cassara*, yielding conflicting results. For example, a panel of our court previously held that *Cassara* and *Oceanic Villas* are irreconcilable, and that the latter case overruled the earlier one *sub silentio. Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299, 301 (Fla. 5th DCA 1999). That decision involved a merger clause but did not concern non-reliance or waiver of misrepresentation clauses. The Third District Court of Appeal has followed both cases with conflicting results. *Compare Cas-Kay Enters., Inc. v. Snapper Creek Trading Ctr., Inc.*, 453 So. 2d 1147, 1148 (Fla. 3d DCA 1984) (citing *Oceanic Villas* for proposition that "integration clause" does not negate fraud claim), *with Weiss v. Cherry*, 477 So. 2d 12, 13 (Fla. 3d DCA 1985) (citing *Cassara* for proposition that fraud claim does not "survive" integration clause), *and Wasser v. Sasoni*, 652 So. 2d 411, 413 (Fla. 3d DCA 1995) (citing *Cassara* and *Weiss* for proposition that integration clause negates fraud claim). The *Cas-Kay Enterprises* court said that *Cassara* did not involve a fraud claim. 453 So. 2d at 1148. One year later in *Weiss*, involving two of the same panel members, the court relied upon *Cassara* and correctly labelled it as a fraud case. 477 So. 2d at 13; *see also Beeper Vibes, Inc. v. Simon Prop. Grp. Inc.*, 600 F. App'x 314, 318 (6th Cir. 2014) (applying Florida law, attempting to reconcile *Oceanic Villas* and *Cassara*, concluding that former does not prohibit action for fraud in face of non-reliance clause, but under *Cassara*, such claim cannot be proven).

Mindful that the Florida Supreme Court does not overrule itself *sub silentio*, we are compelled to reconcile *Oceanic Villas and Cassara*. *See, e.g.*, *Puryear*, 810 So. 2d at 905 (Florida Supreme Court does not intentionally overrule itself *sub silentio*). Because the factual allegations of fraud in the two cases appear identical, the only distinguishing feature is the language in the disclaimer clauses. In *Cassara*, the lease contained a classic "merger" or "integration" clause. 186 So. at 514. The contract in *Oceanic Villas* contained a "non-reliance" clause. 4 So. 2d at 690. Accordingly, a superficial resolution of the apparent conflict between the cases is that a "merger" clause negates a fraud claim but a "non-reliance" clause does not. Because the contracts at issue here contain both such clauses, it would follow from *Cassara* that the "merger" language negates Appellant's fraud claim.

The difficulty we have in attempting to reconcile the cases on this basis is that it defies logic and goes against the grain of virtually all of the cases that have addressed the distinction between the two types of clauses. These cases have concluded that non-reliance clauses negate claims for fraud, but integration or merger clauses do not. This distinction is explained by Judge Posner in *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641, 644 (7th Cir. 2002). There, he explains that merger or integration clauses are intended to prevent a party from introducing parol evidence to vary the terms of a written contract. *Vigortone*, 316 F.3d at 644. Because fraud is a tort, such a clause does not negate the tort claim. *Id.* A "non-reliance" clause, on the other hand, is intended to "head off the possibility of a fraud suit" by binding the parties to a promise that they have not relied upon extrinsic representations. *Id.* The latter negates a claim for fraud because it constitutes a contractual agreement on one element of a fraud claim—

reliance. *Id.*; *see also* Restatement (Second) of Contracts § 196 (Am. Law Inst. 1981) (noting distinction between merger clause and no-reliance clause, the latter negating a claim for fraud). Indeed, to permit a party to contradict such a promise made in a non-reliance clause is to sanction a breach of the very contract that is the subject of the dispute. As New York's highest court explained:

> Were we dealing solely with a general and vague merger clause, our task would be simple. A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue. . . . To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud—either in the inducement or in the execution—despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made. . . . Here, however, plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance on these contrary oral representations . . . .

*Danann Realty Corp.*, 157 N.E.2d at 599.

Alternatively, even if we assume that *Oceanic Villas* silently overruled *Cassara*, we would reach the same conclusion on the facts of this case. While the Florida Supreme Court held that the disclaimer clause in *Oceanic Villas* did not negate the fraud claim in that case, it nevertheless validated some disclaimer clauses where the parties manifest the intent to render the contract "incontestable . . . on account of fraud." *Oceanic Villas*, 4 So. 2d at 690. The decision draws a distinction between a contractual affirmation that "no fraud has been committed," which does not negate a fraud claim, and a contract that stipulates that, even if a fraud "may have been committed," such a claim may not be

asserted. *Id.* at 691. We interpret this to mean that an express waiver of the right to maintain a fraud claim is all that is required to avoid liability for fraud. *See id.* at 690-91. If our interpretation is correct, the contracts at issue here do that and much more. Among other components of the disclaimers is a "waive[r of] any rights or claims arising from any such statements, promises or representations."

Accordingly, we hold that the "non-reliance" clauses in this case negate a claim for fraud in the inducement because Appellant cannot recant his contractual promises that he did not rely upon extrinsic representations. *See, e.g.*, *Wasser,* 652 So. 2d at 411. We also conclude, pursuant to *Oceanic Villas*, that an express waiver of the right to base a claim on pre-contract representations renders the contract "incontestable . . . on account of fraud." *Oceanic Villas*, 4 So. 2d at 690. We emphasize that the disclaimer clauses here are as clear and conspicuous as they are comprehensive. If these clauses are insufficient to render a claim for fraud "incontestable" within the contemplation of the *Oceanic Villas* court, then no disclaimer can possibly accomplish that objective—an objective that is both reasonable and essential in our complex and litigious society. Written contracts are intended to head-off disputes. Public policy strongly favors the enforcement of contracts. Although our decision might benefit those who would use a disclaimer clause to cleverly avoid the consequences of a deliberate fraud, contracting parties can protect themselves against such fraudulent practices by respecting the gravity inherent in the contracting process and carefully reviewing a contract to ensure that material representations are expressed in the instrument. The law necessarily presumes that parties to a contract have read and understood its contents. Were we to reach a contrary holding, contracting parties would have no ability to protect themselves against those who would fabricate

claims of fraud to avoid the consequences of a contractual obligation. On balance, the sanctity of a contract and predictability of an outcome in a dispute should take precedence where, as here, the parties clearly manifest the intent to avoid such claims.[6]

We distinguish *Lower Fees, Inc. v. Bankrate, Inc.*, 74 So. 3d 517 (Fla. 4th DCA 2011), to the extent that the disclaimer language there did not contain a waiver. We disagree with and express conflict with our sister court's conclusion that a "non-reliance" clause does not negate a claim for fraud. We note that an earlier case from the same court relied in part on an "integration" clause to affirm the dismissal of a complaint for fraud in the inducement. *Yamamura*, 727 So. 2d at 1055-56.

We certify the following questions to the Florida Supreme Court as involving great public importance:

> Did the court's decision in *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), *sub silentio* overrule its decision in *Cassara v. Bowman,* 186 So. 514 (Fla. 1939)?
>
> If *Oceanic Villas* did not overrule *Cassara*, does a merger clause such as that discussed in *Cassara*, negate a claim for fraud?
>
> Do clear and unambiguous disclaimer clauses, such as those in this case, negate or "ma[ke] incontestable" a claim for fraud as discussed in *Oceanic Villas*?

[6] Appellant argues in the alternative that the misrepresentation regarding the private boat dock is not negated by the disclaimer because the disclaimer contains an exception for representations that are contained in the "community documents." He asserts in his brief, without citation to the record, that the "community documents . . . discuss the right of a lakefront owner to build a dock on his property . . . ." The "community documents" are not in the record and the fifth amended complaint does not contain this allegation. At oral argument, Appellant acknowledged that this argument is not supported by the record. Accordingly, we disregard the argument and caution counsel that unsupported statements of fact in briefs may result in sanctions.

> Does a clear and unambiguous non-reliance clause negate a claim for fraud, where one party alleges justifiable reliance on an extrinsic representation?
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> Did *Butler v. Yusem*, 44 So. 3d 102 (Fla. 2010), overrule *Fote v. Reitano*, 46 So. 2d 891 (Fla. 1950), and *Avila South Condominium Ass'n v. Kappa Corp*., 347 So. 2d 599 (Fla. 1977), and reject Restatement (Second) of Torts § 537, by holding that reliance need not be justified to maintain a fraudulent misrepresentation claim?
>
> If *Butler* did not overrule *Fote* or *Avila*, which standard applies in Florida, "justifiable" reliance or "reasonable" reliance?

AFFIRMED; CONFLICT ACKNOWLEDGED; QUESTIONS CERTIFIED.

PALMER J., and HARRIS, J.M., Associate Judge, concur.