Florida Real Property and Business Litigation Report

Volume XIV, Issue 2
January 13, 2021
Manuel Farach

Black Knight Servicing Technologies, LLC PennyMac Loan Services, LLC, Case No. 1D20-1492 (Fla. 1st DCA 2021).
The filing of a separate lawsuit raising separate claims against a separate entity does not establish an evidentiary basis of a party's intent to relinquish the right to arbitration.

Money v. Home Performance Alliance, Inc., Case No. 2D19-1642 (Fla. 2d DCA 2021).
The Florida Deceptive and Unfair Trade Practices Act, Florida Statute sections 501.201-.213, require a judgment in favor of the party complaining of the violation notwithstanding that the complaining party reached a favorable settlement under Florida Statute Section 768.79 and Florida Rule of Civil Procedure 1.442; *Mady v. DaimlerChrysler Corp.*, 59 So. 3d 1129, 1133 (Fla. 2011), is distinguished.

Gleman v. MWH Americas, Inc., Case Nos. 4D19-2280 and 4D19-2923 (Fla. 4th DCA 2021).
A Motion to Dismiss for Fraud on the Court due to inconsistent statements in an earlier suit bears a higher burden than a Motion to Strike Sham Pleading, and the fraud must be demonstrated through a "clear showing of fraud, pretense, collusion, or similar wrongdoing."

Nunes v. Herschman, Case No. 4D19-2798 (Fla. 4th DCA 2021).
A deposition is not a "judicial proceeding" under Florida Statute section 92.57, ("[a] person who testifies in a judicial proceeding in response to a subpoena may not be dismissed from employment because of the nature of the person's testimony . . . .") and thus an employee may be dismissed for testimony arising out of the deposition.

Oakmont Custom Homes, LLC v. Billings, Case No. 4D20-1263 (Fla. 4th DCA 2021).
The transfer of home warranties as part of a sales transaction by a seller to a purchaser does not equal agreement by the purchaser to the arbitration provision contained in the home warranty.

Jacocks v. Capital Commercial Real Estate Group, Case No. 4D20-1512 (Fla. 4th DCA 2021).
A third-party beneficiary who does not sign a contract which contains an arbitration agreement may be bound to the arbitration agreement, but only if he is suing to enforce the contract which contains the arbitration agreement.

contact

Manuel Farach
member > fort lauderdale

T (954) 356-2528
mfarach@mcglinchey.com

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1492

BLACK KNIGHT SERVICING TECHNOLOGIES, LLC,

Appellant,

v.

PENNYMAC LOAN SERVICES, LLC,

Appellee.

On appeal from the Circuit Court for Duval County.
Virginia Norton, Judge.

January 6, 2021

LONG, J.

Black Knight appeals the trial court's order compelling arbitration. Black Knight argues PennyMac waived its right to arbitration when, after Black Knight sued PennyMac in Florida state court for breach of contract, PennyMac responded by suing Black Knight's parent company in a California federal court. The lawsuit was carefully worded and does not mention PennyMac's contractual relationship with Black Knight. While the only action taken by PennyMac in the state court proceedings was to compel arbitration, Black Knight argues the federal lawsuit constitutes a waiver of PennyMac's contractual right to arbitrate. We disagree and affirm. Both arbitration and contract law compel this result.

"The general definition of waiver, namely 'the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right,' applies to the right to arbitrate." *Pearson v. Peoples Nat'l Bank*, 116 So. 3d 1283, 1284 (Fla. 1st DCA 2013) (quoting *Raymond James Fin. Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)). "[The] party arguing waiver of arbitration bears a heavy burden of proof." *Eden Owners Ass'n, Inc. v. Eden III, Inc.*, 840 So. 2d 419, 420 (Fla. 1st DCA 2003) (citing *Miami Dolphins, Ltd. v. Cowan*, 601 So. 2d 301 (Fla. 3d DCA 1992)).

"All doubts regarding waiver should be construed in favor of arbitration rather than against it." *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003); *see also Qubty v. Nagda*, 817 So. 2d 952, 956 (Fla. 5th DCA 2002) (same); *Zager Plumbing, Inc. v. JPI Nat. Const., Inc.*, 785 So. 2d 660, 662 (Fla. 3d DCA 2001) (same); *K.P. Meiring Const., Inc. v. Northbay I & E, Inc.*, 761 So. 2d 1221, 1225 (Fla. 2d DCA 2000) (same). PennyMac's filing of a separate lawsuit raising separate claims against a separate entity does not establish an evidentiary basis of its intent to relinquish the right to arbitration with Black Knight. In fact, it may show the opposite; PennyMac's carefully worded federal lawsuit suggests an intent to safeguard its arbitration right.

Black Knight's burden is high, and it presented only the lawsuit itself to show PennyMac's intent to relinquish its contractual right to arbitration. There is doubt as to PennyMac's intent, and we must resolve all doubts against waiver and in favor of arbitration. We therefore find the trial court was correct to compel arbitration.*

AFFIRMED.

OSTERHAUS and NORDBY, JJ., concur.

---

* We leave the issue of appellate attorney's fees to the arbitrator. Both parties' fee motions are denied.

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

Cristine M. Russell, A. Graham Allen, Edward McCarthy, III, E. Carson Lange, and Samuel J. Horovitz of Roger Towers, P.A., Jacksonville, for Appellant.

Nancy M. Wallace of Akerman LLP, Tallahassee, Celia C. Falzone of Akerman LLP, Jacksonville, and William P. Heller and Lawrence D. Silverman of Akerman LLP, Fort Lauderdale, for Appellee.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES MONEY, Appellant, v. HOME PERFORMANCE ALLIANCE, INC., Appellee.	)	Case No. 2D19-1642

Opinion filed January 6, 2021.

Appeal from the Circuit Court for Sarasota County; Maria Ruhl, Judge.

Albert A. Sanchez, Jr. of Sanchez Law, PLLC, Sarasota; and David A. Wallace of Bentley and Bruning, P.A., Sarasota, for Appellant.

Richard N. Asfar and Mason A. Pokorny of Cotney Construction Law, LLP, Tampa, for Appellee.

LaROSE, Judge.

Following a settlement payment and the voluntary dismissal of his lawsuit, James Money appeals the trial court's order denying his motion for attorney's fees. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). Because the statute under which Mr. Money sought fees does not authorize such relief absent a judgment, we affirm.

Background

Mr. Money sued Home Performance Alliance, Inc., and Time Investment Company, Inc.,[1] alleging, among other causes of action, violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). §§ 501.201-.213, Fla. Stat. (2017). The suit arose from Home Performance's alleged defective installation of doors and windows in Mr. Money's home and the purported bait-and-switch credit agreement he signed to finance the work. Mr. Money sought attorney's fees under FDUTPA.

Mr. Money extended a proposal for settlement to Home Performance, pursuant to section 768.79, Florida Statutes (2018). The proposal did not "include attorney's fees or court costs." See Fla. R. Civ. P. 1.442(c)(2)(F) (requiring that a proposal for settlement "state whether the proposal includes attorneys' fees and whether attorneys' fee[s] are part of the legal claim").

The parties exchanged a flurry of counterproposals, all of which focused on the amount of the settlement and whether attorney's fees were included. Eventually, the parties settled. The settlement agreement covered "all claims for damages and monetary relief which could be awarded to [Mr.] Money against [Home Performance] in a final judgment in the above-styled action." Upon acceptance of the proposal and receipt of a $9000 settlement amount, the agreement obligated Mr. Money to dismiss the lawsuit with prejudice. The agreement provided that it "does not include attorney's fees or court costs which [Mr. Money] claims against [Home Performance] in this action."

---

[1]Time Investment Company, Inc., was dismissed below before Mr. Money filed his notice of appeal.

Home Performance filed a written notice of acceptance and remitted $9000 to Mr. Money's counsel. Mr. Money filed a "Notice of Dismissal with Prejudice." The notice dismissed "all claims affected by [Mr. Money]'s Proposal for Settlement"; however, it "expressly exclude[d Mr. Money]'s claim for attorney's fees against . . . Home Performance."

Several weeks later, Mr. Money moved for attorney's fees, arguing that he "[wa]s the prevailing party in this action as a result of [Home Performance]'s acceptance of the proposal for settlement." Mr. Money sought fees pursuant to section 501.2105(1), FDUTPA's attorney's fees provision.

The trial court denied the motion, reasoning that section 501.2105(1) "strictly requires the entry of a judgment by the trial court." Absent such judgment, Mr. Money was not entitled to attorney's fees. Further, the trial court reasoned that it lacked jurisdiction to enter a judgment because Mr. Money had dismissed the case.

Mr. Money asserts that the trial court's rationale flies in the face of Mady v. DaimlerChrysler Corp., 59 So. 3d 1129, 1133 (Fla. 2011), in which the court held that the acceptance of a proposal for settlement and the corresponding payment is tantamount to a final judgment when considering the assessment of prevailing party attorney's fees. Thus, he argues, the trial court erred by holding that Home Performance's acceptance of his proposal for settlement is not the equivalent of a judgment under section 501.2105. Further, he complains that the reasoning in Mady, which involved a federal cause of action under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (2000) (MMWA), should apply to his FDUTPA claim. Lastly, he contends that the trial court retained jurisdiction to award fees.

Analysis

We first address whether the trial court had jurisdiction to entertain Mr. Money's motion for fees. It did. Our opinion in Ekonomides v. Sharaka, 133 So. 3d 1174, 1175 (Fla. 2d DCA 2014), illustrates the point:

> Pursuant to the offer of judgment statute, "[u]pon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement." § 768.79(4), Fla. Stat. (2011); see also Mady v. DaimlerChrysler Corp., 59 So. 3d 1129, 1133 (Fla. 2011) (stating that "a settlement produced pursuant to Florida's offer of judgment statute is subject to that court's full continuing jurisdiction thereafter"). Thus, if the Tenant had accepted the proposal and Ekonomides had failed to pay the $100, the trial court would have had jurisdiction to enforce the settlement agreement.

(Alteration in original.) We are unpersuaded that the dismissal of the lawsuit left the trial court powerless to enforce the settlement's terms. Indeed, the settlement explicitly reserved the issue of attorney's fees for the trial court's consideration. Unfortunately for Mr. Money, we can side no further with him.

FDUTPA's "attorney's fees provision applies to claims asserted under FDUTPA." Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 368 (Fla. 2013). FDUTPA's attorney's fees provision applies so long as the legal action is filed pursuant to FDUTPA, irrespective of its success, see, e.g., Brown v. Gardens by the Sea S. Condo. Ass'n, 424 So. 2d 181, 184 (Fla. 4th DCA 1983) (holding that despite the trial court's finding that FDUTPA was inapplicable, because the plaintiff invoked FDUTPA's protections and filed an action under FDUTPA, the nonprevailing plaintiff was responsible to the defendant for attorney's fees under the act), or even if the trial court ultimately finds FDUTPA inapplicable, see, e.g., Rustic Vill., Inc. v. Friedman, 417 So. 2d 305, 305-06 (Fla. 3d DCA 1982) (stating that upon a trial court's finding that a plaintiff

filed a claim under FDUTPA, an award of attorney's fees to a prevailing defendant is permissible despite the trial court's conclusion that FDUTPA did not apply).

Our task is to review the trial court's construction and application of section 501.2105(1). "Generally, a trial court's order on attorney's fees is reviewed for an abuse of discretion. When entitlement to attorney's fees is based on the interpretation of a statute, however, this Court's review is de novo." Saltzman v. Hadlock, 112 So. 3d 772, 774 (Fla. 5th DCA 2013) (citation omitted). It is a "fundamental premise that legislative intent is the polestar that guides us in our [statutory construction] inquiry." Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1150 (Fla. 2000). "[T]he primary source for determining legislative intent is the language chosen by the Legislature to express its intent." Id. Furthermore, "[i]t is . . . well-established in Florida that a statute that awards attorney's fees is in derogation of the common law rule that each party pay its own attorney's fees and must be strictly construed." Diamond Aircraft Indus., Inc., 107 So. 3d at 367.

No one can dispute that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)). With these principles in mind, we turn to the statute's language. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992, 997 (Fla. 2010) ("As a general rule, statutory interpretation begins with the plain meaning of the statute.").

Section 501.2105(1) states that "[i]n any civil litigation resulting from an act or practice involving a violation of this part . . . the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party." Under the statute's plain and obvious meaning, it is only after entry of a judgment[2] in the trial court that the prevailing party[3] may be entitled to attorney's fees.

Mr. Money did not obtain a judgment. Pursuant to the parties' agreement, he voluntarily dismissed his lawsuit. Therefore, Mr. Money is not entitled to attorney's fees under FDUTPA. See, e.g., Diamond Aircraft Indus., Inc., 107 So. 3d at 368 ("In accordance with the plain language of [section 501.2105(1), Florida Statutes (2011)], to recover attorney's fees in a FDUTPA action, a party must prevail in the litigation; meaning that the party must receive a favorable judgment from a trial court with regard to the legal action, including the exhaustion of all appeals." (emphasis added)); Black Diamond Props., Inc. v. Haines, 36 So. 3d 819, 821 (Fla. 5th DCA 2010) ("[S]ection 501.2105(1) . . . requires that there be an entry of judgment before attorney's fees can be awarded. In this case, attorney's fees cannot be granted to Black Diamond under section 501.2105(1) because judgment is not entered . . . ."); Sanborn v. Jagen Pty. Ltd., No. 8:10-cv-142-T-30MAP, 2010 WL 3781641, at *1 (M.D. Fla. Sept. 23, 2010)

---

[2]The term "judgment" is not defined in FDUTPA; however, "final judgment" is defined. See § 501.203(1) (" 'Final judgment' means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired."). This is the only instance throughout FDUTPA in which the term "final judgment" is utilized.

[3]The parties also dispute whether Mr. Money was a "prevailing party" under section 501.2105. Because our conclusion on the threshold issue of whether the absence of a judgment precludes an award of attorney's fees under 501.2105 is dispositive, we do not address this argument.

("Florida case law makes it clear that . . . an [attorney's fee] award is inappropriate in a FDUTPA case under these circumstances because section 501.2105(1) specifically requires a 'judgment.' "). Mr. Money alerts us to no case specifically holding otherwise.

Mr. Money relies on Mady to salvage his claim. He insists "the trial court erred by ruling that . . . Mady . . . is not applicable to the fee shifting provision contained in [section] 501.2105(1)." He concedes that there must be a "judgment in the trial court." However, he argues that "Mady holds that a settlement produced pursuant to Florida's offer of judgment statutes [sic], section 768.79 . . . and 'the corresponding payment is tantamount to a final judgment when considering prevailing party type attorney fee assessments' " (quoting Mady, 59 So. 3d at 1131). We disagree.

Mady addressed whether a consumer who resolves an action against a warrantor pursuant to section 768.79 is a prevailing party under the MMWA and may recover attorney's fees. 59 So. 3d at 1131. The court held that under those circumstances, the consumer "may recover attorneys' fees as allowed by that statute." Id. at 1137.

Seemingly, the court focused a keen eye on the the purposes of the MMWA. See id. at 1131 ("The MMWA was designed to 'encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.' " (quoting 15 U.S.C. § 2310(a)(1) (2000))). Accordingly,

> [a] consumer who has exhausted all non-judicial remedies as a condition required by the MMWA and later secures a favorable formal settlement offer of judgment from a defendant which is accepted in a Florida legal action filed under the MMWA 'finally prevails' and may be entitled to recover costs, expenses, and attorneys' fees under the MMWA.

Id. (citation omitted). The MMWA offers a "carrot-and-stick" approach to resolving disputes:

> Subsection (d)(2)'s fee-shifting provision is consistent with the MMWA's overarching concern to provide consumer protection at the lowest cost possible. In enacting the MMWA, Congress designed a process intended to encourage warrantors to resolve claims quickly, efficiently, and informally without the necessity of forcing consumers to file legal actions. See 15 U.S.C. § 2310(a)(1). If a warrantor waits to resolve a meritorious claim until after the consumer is forced to involve the courts, the MMWA provides a remedy and method of shifting costs to the warrantor which at times may be associated with a more extensive resolution process in our courts when the outcome acknowledges the validity of the warranty claim. See 15 U.S.C. § 2310(d)(2).

Mady, 59 So. 3d at 1132 (emphasis added).

Although Congress designed the MMWA with the goal of expeditiously resolving disputes "without the necessity of forcing consumers to file legal actions," id., the plain language of FDUTPA's attorney's fees provision requires a party to file a legal action and obtain a "judgment in the trial court," § 501.2105(1). In other words, FDUTPA's attorney's fees provision requires a legal action be resolved in favor of the prevailing party and that such favorable resolution be memorialized in a judgment. On the other hand, the MMWA's objectives are advanced by the requirement that "warrantors . . . establish an 'informal dispute settlement procedure' that adheres to minimum requirements prescribed by the Federal Trade Commission." Mady, 59 So. 3d at 1131-32 (quoting 15 U.S.C. § 2310(a)(2)). In short, FDUTPA's attorney fees provision is distinguishable from the MMWA fee shifting provision, in that the former requires entry of a "judgment in the trial court," § 501.2105(1), while the latter merely

requires that the consumer "finally prevail[ ]," 15 U.S.C. § 2310(d)(2). Mr. Money's reliance on Mady is misplaced.

Conclusion

In the absence of a judgment entered in Mr. Money's favor, we conclude that the trial court properly denied his motion for attorney's fees under section 501.2105(1).

Affirmed.

KHOUZAM, C.J., and LUCAS, J., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MICHAEL GLEMAN,
Appellant,

v.

MWH AMERICAS, INC., a foreign Limited Liability Corporation, **JACK McDONALD, ADAM WARD, STANTEC CONSULTING INTERNATIONAL, LLC,** a foreign Limited Liability Company, **HINTERLAND GROUP,** a Florida for profit corporation, and **DAN DUKE,**
Appellees.

Nos. 4D19-2280 and 4D19-2923

[January 6, 2021]

Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lisa S. Small, Judge; L.T. Case No. 50-2018-CA-010810-XXXX-MB.

Jennifer S. Carroll of the Law Offices of Jennifer S. Carroll, P.A., Jupiter; and Isidro M. Garcia of the Garcia Law Firm, P.A., West Palm Beach, for appellant.

C. Ryan Jones, Scot E. Samis and Richard A. Jarolem of Traub Lieberman Straus & Shrewsberry LLP, St. Petersburg, for appellees MWH Americas, Inc., a foreign Limited Liability Corporation, Jack McDonald, Adam Ward, and Stantec Consulting International, LLC, a foreign Limited Liability Company.

Andrew A. Harris of Harris Appeals, P.A., Palm Beach Gardens; and Ryan J. Wynne of Slinkman, Slinkman & Wynne, P.A., Jupiter, for appellees Hinterland Group, a Florida for profit corporation, and Dan Duke.

CIKLIN, J.

The appellant, Michael Gleman (plaintiff below), brings these consolidated appeals that involve the dismissal of Gleman's complaint, which the trial judge found to be a sham and, effectively, a fraud on the court. The dismissals were based on purported conflicts between (1) Gleman's allegations contained in the complaint and (2) assertions made

by Gleman in an earlier suit (not involving the same defendants). We find the trial court erred and we reverse for further proceedings.

After Gleman was suspended from his employment with the Palm Beach County Board of County Commissioners ("the county"), purportedly for making false statements during a meeting, he sued the county, alleging the suspension was based on his whistleblowing activities. The county then terminated his employment, maintaining that it had received complaints from contractors regarding Gleman's unsatisfactory job performance. Gleman amended his complaint to include the termination, and he alleged the termination was based on further whistleblowing activities that occurred after his suspension.

Ultimately, the county agreed to pay Gleman a significant sum of money to settle the case, and the suit was dismissed. The release executed pursuant to the settlement agreement provided that the "release shall NOT operate to bar any potential claim against any third party who has or had a contractual relationship with the County, or the employees of said parties, including MWH Global, now part of [Stantec], and Hinterland Group, Inc."

Gleman then sued the appellees, MWH Americas, Inc., Jack McDonald, Adam Ward, Stantec Consulting International, LLC, Hinterland Group, and Dan Duke (collectively, "the defendants") for tortious interference with a business relationship. In his complaint, Gleman disclosed that he had brought a whistleblower complaint against the county, "claiming that he was first suspended, then terminated, for making protected disclosures or otherwise participating in activities protected by law" and that the suit was settled. He alleged that the county's purported reason for suspending and ultimately terminating his employment was his unsatisfactory job performance, as charged by the defendants in communications they had with the county. He further alleged that, consistent with his job duties, he had objected to some of the payments requested by the defendants because they were improper, and that some payments were delayed for reasons not related to Gleman's satisfactory job performance. Gleman alleged that the defendants' communications to the county were "without justification, for the express purpose of undermining his status and interfering in his employment" with the county and that "[a]s a result of said conduct, [Gleman] was terminated from his employment, and suffered damages."

Hinterland Group and Dan Duke moved to dismiss the suit for fraud, or in the alternative, to strike the pleading as a sham. The remaining defendants moved to dismiss or strike the complaint as a sham pleading.

All defendants asked the trial court to take judicial notice of the filings in the first suit, including the pleadings, Gleman's deposition, and a transcript of the pre-termination hearing, among other things. The crux of the motions was that Gleman's allegations of causation in the two suits were in direct conflict: If he was terminated based on his whistleblowing activities, he could not have been terminated based on the defendants' complaints of his unsatisfactory job performance.

The trial court agreed with the defendants, finding that they "demonstrated by clear and convincing evidence that this complaint is a sham, and that the actions of [Gleman] set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate the matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." The trial court dismissed the case with prejudice and entered final judgments in favor of the defendants.

We must find the trial court erred in dismissing the suit based on findings that it constituted a sham pleading and a fraud on the court. Pursuant to Florida Rule of Civil Procedure 1.150, a trial court may strike a pleading as a sham. But "[b]ecause striking a pleading is an extreme measure, it is disfavored in the law." *Upland Dev. of Cent. Fla., Inc. v. Bridg*e, 910 So. 2d 942, 944 (Fla. 5th DCA 2005).

> A pleading is considered a sham only "when it is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue." *Rhea v. Hackney*, 157 So. 190, 193 (Fla. 1934). Thus a sham pleading is one "good on its face but absolutely false in fact." *Id.* at 194.
>
> For a trial court "to justify the striking of a pleading for being sham or false it must be so undoubtedly false as not to be subject to a genuine issue of fact." *Meadows v. Edwards*, 82 So. 2d 733, 735 (Fla. 1955). The motion to strike a pleading as being a sham "should be tested by the same standards as a motion for a summary judgment . . . ." *Id.* For a trial court to strike a pleading as a sham the "falsity thereof [must] clearly and indisputably appear[]. . . . [I]t must evidently be a mere pretense set up in bad faith and without color of fact." *Rhea*, 157 So. at 193. Finally, "[i]n reviewing a motion to strike a pleading as sham all doubts are to be resolved in favor of the pleading." *Furst v. Blackman*, 819 So. 2d 222, 225 (Fla. 4th DCA 2002).

Bornstein v. Marcus, 169 So. 3d 1239, 1242 (Fla. 4th DCA 2015) (alterations in original).

As is the case in summary judgment proceedings, "[a] hearing on a motion to strike pleadings . . . is not to try the issues, but to determine whether there are any genuine issues to be tried." *Sunex Int'l. Inc. v. Colson*, 964 So. 2d 780, 782 (Fla. 4th DCA 2007) (quoting *Meadows*, 82 So. 2d at 735). "The fact that a court may perceive little prospect in the success of an alleged sham proceeding is not a sufficient ground to grant a motion to strike the pleading." *Id.* (quoting *Cromer v. Mullally*, 861 So. 2d 523, 525 (Fla. 3d DCA 2003)).

A dismissal for fraud "may be imposed only on a 'clear showing of fraud, pretense, collusion, or similar wrongdoing.'" *Cherubino v. Fenstersheib & Fox, P.A.*, 925 So. 2d 1066, 1068 (Fla. 4th DCA 2006) (quoting *Bob Montgomery Real Estate v. Djokic*, 858 So. 2d 371, 374 (Fla. 4th DCA 2003)). Due to the extreme remedy of dismissal, "the fraud must be demonstrated by clear and convincing evidence." *Id.* at 1068-69 (quoting *Arzuman v. Saud*, 843 So. 2d 950, 952 (Fla. 4th DCA 2003)). The movant must show that "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Id.* at 1069 (quoting *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998)).

Here, when the allegations of the tortious interference suit are read in their entirety, Gleman's allegations of causation are ambiguous and thus not necessarily incompatible with the assertions of causation he made in the first suit. Read one way, Gleman could be alleging that he was terminated based solely on the defendants' complaints regarding his job performance. Such an allegation would be at odds with Gleman's assertions throughout the first suit that he was fired solely for his whistleblowing activities. However, when all of the allegations of the tortious interference suit are read together, Gleman seemed to be alleging that the defendants acted vindictively because he stood in the way of their attempt to improperly bill the county, and that because of their ill will toward Gleman, they made unjustified complaints about Gleman's job performance, which the county used as cover for its actual reason for the termination of Gleman's employment—his whistleblowing activities. This is not clearly articulated in the pleading, but it is suggested. Additionally, Gleman's counsel explained the causation theory during one of the hearings and in his responses to the defendants' motions.

The defendants compare this case to *Bailey v. State Farm Mutual Automobile Insurance Co.*, 789 So. 2d 1181, 1182 (Fla. 4th DCA 2001), a case where two lawsuits arose out of a collision between an automobile and a motorcycle on which the complainant was a passenger. In the first suit, the complainant had taken the position that the accident was not caused by the driver of the motorcycle, her significant other, and that the driver of the automobile caused the collision. *Id.* at 1183. The case was settled. *Id.* at 1182. In the second suit, the complainant alleged that both the driver of the motorcycle and the driver of the automobile were at fault. *Id.* The appellate court affirmed the summary judgment entered in favor of the insurance company based on equitable estoppel. *Id.* at 1183.

This case is distinguishable in two respects. First, this is not a case where the allegations in the subsequent suit are unambiguous and directly at odds with the allegations of the first suit. Second, the issue raised in this case is whether Gleman's pleading constituted a sham or fraud on the court, not whether a summary judgment was justified based on estoppel principles.

At bottom, given the ambiguity in Gleman's pleading, the defendants did not establish that Gleman's tortious interference suit was "palpably or inherently false." Nor did they demonstrate that Gelman "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." To the extent the litigation below suggests the possibility of procedural bars to bringing suit and possible defenses, the trial court should be the court of first instance to adjudicate any such issues if they are properly raised. The only issue raised in this appeal—and thus the only one we entertain—is whether the trial court erred in finding the pleading amounted to a sham and a fraud on the court.

Based on the foregoing, we reverse and remand for further proceedings. Because we reverse, Gleman's other arguments on appeal are moot and need not be addressed.

Reversed and remanded for further proceedings.

GROSS and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALEX NUNES,
Appellant,

v.

VALERIE HERSCHMAN, individually and in her capacity as guardian for Shirley Fiterman, the Ward, and **BRIAN O'CONNELL**, in his capacity as guardian for Shirley Fiterman, the Ward,
Appellees.

No. 4D19-2798

[January 6, 2021]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jaimie R. Goodman, Judge; L.T. Case No. 50-2017-CA-008818-XXXX-MB.

Josh M. Bloom, Marshall A. Adams, and Amber L. Ruocco of Lubell & Rosen, LLC, Fort Lauderdale, for appellant.

Jack J. Aiello and Holly L. Griffin of Gunster, Yoakley & Stewart, P.A., West Palm Beach, for appellee Valerie Herschman, individually.

Christopher W. Kammerer of Kammerer Mariani PLLC, West Palm Beach, for appellee Valerie Herschman, in her capacity as guardian for Shirley Fiterman, the Ward.

LEVINE, C.J.

An employee was subpoenaed to appear for deposition. After giving unfavorable testimony about his employer at the deposition, the employer terminated that employee. The employee filed a complaint alleging, in part, a cause of action under section 92.57, Florida Statutes (2017), which states that "[a] person who testifies in a judicial proceeding in response to a subpoena may not be dismissed from employment because of the nature of the person's testimony . . . ." The trial court dismissed the employee's cause of action, finding that a deposition is not a judicial proceeding pursuant to the statute. We agree. The statute covers only those who testify in a judicial proceeding, and not those in other types of legal proceedings, like depositions. Thus, we affirm.

According to the allegations in the third amended complaint, Alex Nunes ("the employee") worked as a caregiver for a married couple. When the husband passed away, the employee continued to care for the wife. A guardianship was later established for the wife. Subsequently, a legal battle ensued between the adult children, Valerie Herschman ("the employer") and Brian O'Connell, over the guardianship. As a result of the ongoing lawsuit, the employee appeared for a subpoenaed deposition. During the deposition, the employee gave unfavorable testimony regarding the employer, who was the current guardian. Ten days after his subpoenaed deposition testimony, the employer terminated the employee.

The employee filed an action against the employer as guardian for retaliation in violation of Florida's whistleblower statute (count 1) and against the employer, both in her individual capacity and as guardian, for violation of section 92.57, Florida Statutes (2017) (count 2). The employer moved to dismiss the complaint. As to count 2, the employer argued that dismissal was warranted for failure to state a cause of action because a deposition is not a judicial proceeding under section 92.57. The employee filed a response in opposition, arguing that a deposition is a judicial proceeding in the context of litigation privilege, under the Florida Rules of Judicial Administration, and for purposes of perjury in an official proceeding under section 837.011, Florida Statutes (2017).

The trial court dismissed only count 2, agreeing with the reasoning of *Speights v. Palmer Hall Floors, Inc.*, 1993 WL 632265 (Fla. 4th Cir. Ct. Dec. 17, 1993), which relied on the Florida Supreme Court's decision in *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 384 (Fla. 1987), to determine what constitutes a "judicial proceeding."[1]

We review the trial court's order dismissing a cause of action under the de novo standard of review. *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Issues of statutory construction are also reviewed de novo. *Kelly v. Green Tree Servicing, LLC*, 300 So. 3d 244, 245 (Fla. 4th DCA 2020).

When interpreting a statute, one first considers the text of the statute. *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018). We look to the intent of legislature only when the statute is not clear and unambiguous. *Id.*

---

[1] The trial court denied the motion to dismiss as to count 1. Count 1, which remains pending below, is not at issue in this appeal.

> Florida's appellate courts have for decades routinely framed the statutory construction task in general (for all cases) as starting with the "legislative intent as polestar" maxim. We next explain that "legislative intent" is discerned "primarily from the text of the statute." This construct improperly and confusingly elevates a secondary rule of construction to a primary position, but is harmless in most cases because we regularly explain that intent is determined primarily from the text of the statute—and that the inquiry should end with the text when it is clear and unambiguous. However, there is a potential harm.

Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294, 313-14 (Fla. 2017) (Lawson, J., concurring) (citations omitted). Thus, the text of the statute is our primary concern.

The statute at issue, section 92.57, Florida Statutes (2017), states as follows:

> **92.57. Termination of employment of witness prohibited**
>
> A person who testifies in a *judicial proceeding* in response to a subpoena may not be dismissed from employment because of the nature of the person's testimony or because of absences from employment resulting from compliance with the subpoena. In any civil action arising out of a violation of this section, the court may award attorney's fees and punitive damages to the person unlawfully dismissed, in addition to actual damages suffered by such person.

(emphasis added).

The question for our review is whether a deposition is a judicial proceeding. Initially, the statute applies only to a "person who testifies in a judicial proceeding in response to a subpoena . . . ." *Id.* Where a person does not testify pursuant to a subpoena, section 92.57 would not apply. *Wiggins v. S. Mgmt. Corp.*, 629 So. 2d 1022, 1024 (Fla. 4th DCA 1993). Neither party disputes that the employee's testimony was pursuant to a subpoena.

The statute itself does not define judicial proceeding. Where the legislature has not defined words in a statute, the language should be given its plain and ordinary meaning. *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1233, 1233 (Fla. 2009). The plain

and ordinary meaning of a word or phrase can be ascertained by referring to the dictionary definition. *Id.* Black's Law Dictionary (11th ed. 2019) defines a "judicial proceeding" as "[a]ny court proceeding; any proceeding initiated to procure an order or decree, whether in law or in equity." In contrast, Black's defines a "deposition" as "[a] witness's out-of-court testimony that is reduced to writing (usu. by a court reporter) for later use in court or for discovery purposes" or as "[t]he session at which such testimony is recorded." The word "judicial" itself has been defined as "of, relating to, or by the court <judicial officers> . . . ." Garner's Dictionary of Legal Usage 499 (3d ed. 2011). Additionally, the term "proceeding" is defined as meaning "[i]n reference to business done by a tribunal of any kind . . . ." *Id.* at 714.

When the meaning of a term is not defined in the statute itself, it is also appropriate to look to case law to ascertain its meaning. *State v. Brake*, 796 So. 2d 522, 528 (Fla. 2001). The Florida Supreme Court has stated that depositions are not judicial proceedings "for the simple reason that there is no judge present, and no rulings nor adjudications of any sort are made by any judicial authority." *Burk*, 504 So. 2d at 384 (citation omitted). Our court has stated that "'[j]udicial proceedings' are hearings before a judge that culminate in a ruling by the court." *Barnett v. Antonacci*, 122 So. 3d 400, 406 (Fla. 4th DCA 2013). Discovery depositions have been described as "not true judicial proceedings." *State v. Dolan*, 390 So. 2d 407, 409 (Fla. 5th DCA 1980). Other jurisdictions have defined "judicial proceedings" as "proceedings before a court or a judge." *Lybrand v. State Co.*, 184 S.E. 580, 583 (S.C. 1936); *see also Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958) (stating that "judicial proceeding" "includes any proceeding determinable by a court").

In dismissing count 2, the trial court relied on *Speights*, which is the only case that has interpreted the term judicial proceeding in the context of section 92.57. In *Speights*, an employee sued an employer after he was discharged from his employment because he missed work to testify at a deposition pursuant to a subpoena. 1993 WL 632265, at *1. The *Speights* court dismissed the cause of action under section 92.57, finding that a deposition was not a judicial proceeding. *Id.* After noting that the statute did not define the term judicial proceeding, the *Speights* court recognized that the "term has been defined in other contexts in other cases as including only those proceedings over which a judge presides, and has been specifically held not to include depositions." *Id.* Further, the court in *Speights* noted:

> The legislature is presumed to be aware of these prior judicial definitions and limitations of the term "judicial proceedings."

> Had the legislature intended to extend this witness protection to depositions, it should have done so by statutorily defining "judicial proceeding" to include depositions for the purpose of this statute or by specifically extending the protection to depositions as well as to "judicial proceedings."

Id.

We find *Speights* to be persuasive. In the present case, like *Speights*, the employee was subpoenaed for deposition only. No judge or judicial officer was present. Thus, under the plain language of the statute, the deposition was not a judicial proceeding.

Although the statute is clear and unambiguous, the canons of construction offer further support and confirm our understanding that depositions are not included within the meaning of judicial proceedings. For example, under the ordinary meaning canon of construction, "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). *See also Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 204-05 (Fla. 2003) ("One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature.") (citations omitted); *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973) ("In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words."). Depositions are generally understood to mean a legal proceeding outside the courtroom, without the presence of a judge. Judicial proceedings, however, are commonly understood to be proceedings in the presence of a judge or a judicial officer.

Further, since section 92.57 does not define judicial proceedings, under the imputed common law canon of construction, when a statute "uses a common-law term, without defining it," the statute then "adopts its common-law meaning." Scalia & Garner, *Reading Law* at 320. *See also Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977) ("Statutes in derogation of the common law . . . will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common

law is intended unless the statute is explicit in this regard.") (citation omitted). The common law definition of judicial proceedings contemplates the presence of a judge, with rulings or adjudications made by a judicial authority. *Burk*, 504 So. 2d at 384.

We can also look to the omitted case canon of construction. Under this canon, "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered." Scalia & Garner, *Reading Law* at 93. *See also State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018) (stating that courts are guided by the principle set forth in the omitted case canon). Thus, if the legislature wanted to add depositions to the text of the statute, it would have.

Finally, we can look to the stabilizing canons of construction that encompass a presumption against change in the common law. Scalia & Garner, *Reading Law* at 318. "A statute will be construed to alter the common law only when that disposition is clear." *Id.*; *see also Carlile*, 354 So. 2d at 364. "Since this statute is in derogation of the common law right of an employer to terminate an employee at will, it must be strictly construed where there is any ambiguity, although the Court finds no ambiguity here in light of the legislature's specific use of this judicially defined term." *Speights*, 1993 WL 632265, at *1. Once again, if the legislature wanted to broaden the parameters of the statute by changing the common law status of employees at will, it would have done so.

The employee makes several arguments that do not persuade. The employee argues that depositions are judicial proceedings for purposes of litigation privilege and therefore must also be judicial proceedings under section 92.57. *Anderson v. Shands*, 570 So. 2d 1121 (Fla. 1st DCA 1990). *Anderson* is inapplicable because it merely stated that a deposition was a part of judicial "procedure." *Id.* at 1122.[2] Additionally, litigation privilege cases such as *Anderson* are based on policy as advanced by case law, not the interpretation of statutes passed by the legislature.

The employee next claims that Florida Rule of Judicial Administration 2.535(h)(4) defines a deposition as a judicial proceeding. This rule was promulgated by the supreme court, not the legislature, and involves the issue of court reporting services. Thus, it has no bearing on our

---

[2] In a footnote, the court reaffirmed that "the taking of a deposition is not a judicial proceeding," but that "it nevertheless is a part of a judicial proceeding in the sense that it is a procedure performed in the course of or in furtherance of a judicial proceeding." *Id.* at 1122 n.1.

interpretation of this statute. Additionally, the rule clarifies that judicial proceedings include depositions. If the rule were so clear that judicial proceedings include depositions, then it would be unnecessary to have this clarifying language.

The employee also argues that depositions are judicial proceedings pursuant to the perjury statute, section 837.011, Florida Statutes. That statute defines the term "official proceeding" to include a judicial proceeding or a deposition. It does not define a judicial proceeding to include a deposition. Nor, of course, is a judicial proceeding the same thing as an official proceeding.

The employee further argues that section 92.57 is a remedial statute that should be liberally construed. Nothing in the language of the statute suggests that it is remedial. Even if it were remedial, that does not give the court the power to alter the plain meaning of the statute. *See Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). A liberal construction would not overcome the fact that a deposition is not encompassed within the term judicial proceeding.

In conclusion, common sense and the plain language of the statute dictate that a deposition is not in any sense a judicial proceeding for purposes of section 92.57. If the legislature had wanted to include depositions within the ambit of the statute, it surely could have included them. The employee makes policy arguments that including depositions within the statute would further the reach of the statute. Although that would be invariably true, this court is without the legal authority to alter the language of the statute. Thus, we affirm.

Affirmed.

MAY and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

OAKMONT CUSTOM HOMES, LLC,
Appellant,

v.

JENNIFER A. BILLINGS, AS TRUSTEE OF THE JENNIFER A. BILLINGS REVOCABLE LIVING TRUST DATED 5/22/2007,
Appellee.

No. 4D20-1263

[January 6, 2021]

Appeal of a nonfinal order from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Jennifer Alcorta Waters, Judge; L.T. Case No. 432019CA001181.

Louis E. Lozeau, Jr. of Wright, Ponsoldt & Lozeau, Trial Attorneys, L.L.P., Stuart, for appellant.

Roger C. Brown of Morgan & Morgan, P.A., Business Trial Group, West Palm Beach, for appellee.

PER CURIAM.

Oakmont Custom Homes, LLC, a defendant home builder, appeals a nonfinal order denying a motion to dismiss or compel arbitration. We agree with the trial court that the plaintiff is not bound by an arbitration provision in a building agreement that she was not a party to and affirm.

A second owner of the home, Jennifer A. Billings, has sued the builder for negligence (based on construction defects) and building code violations that have resulted in water damage and mold. The builder seeks to enforce an arbitration provision in the building agreement it entered with the original owner.

Importantly, Billings was never provided a copy of and never agreed to be bound by the building agreement when she purchased the home. Her amended complaint does not seek relief pursuant to the limited warranty in the building agreement. The builder, however, contends that she is still bound by the arbitration provision because she accepted assignment of

the limited warranty and her claims are sufficiently related to the building agreement.

In an addendum to Billings' purchase contract, the original owner transferred all warranties to her. The addendum did not reference the builder's limited warranty or the building agreement. Billings' purchase contract did not state that it was subject to the building agreement, and she did not receive a copy of the building agreement before closing on the home. Her claims against the builder do not seek to enforce the building agreement or otherwise depend on the building agreement.

The trial court concluded that Billings could not be compelled to arbitrate under these facts. We agree.

The builder asks this Court to follow *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n,* 118 So. 3d 957 (Fla. 2d DCA 2013), which reversed an order denying a builder's motion to compel arbitration of an HOA's complaint that alleged a statutory violation. The Second District reversed pursuant to *Pulte Home Corp. v. Vermillion Homeowners Ass'n*, 109 So. 3d 233 (Fla. 2d DCA 2013).

In *Vermillion*, the Second District explained that the homeowners association was required to arbitrate even though it did not sign a purchase agreement or limited warranty because it was suing in its representative capacity. 109 So. 3d at 234. The association did not have rights superior to its members, and it was obliged to comply with arbitration agreements signed by each of the members. *Id.* at 235.

Here, unlike the homeowners in *Vermillion*, Billings did not sign the building agreement or any agreement to arbitrate with the builder.

In *Bay at Cypress Creek*, the Second District also rejected an argument that subsequent purchasers were not bound by the arbitration agreement. The court concluded that they could be compelled to arbitrate as third-party beneficiaries because they were permitted to assume the builder's limited warranty. 118 So. 3d at 958.

We do not know whether the subsequent purchasers in that case are similarly situated to Billings. In any event, we agree with the trial court that the builder cannot compel arbitration under the circumstances in this case. Here, nothing in Billings' contract indicated that by accepting transfer of all warranties she agreed to be bound by the building agreement and to arbitrate any non-warranty claim against the builder, and she is not seeking to enforce the third-party contract. *See Hymowitz v. Delcrest*

Bldg. Corp., 770 So. 2d 1271 (Fla. 4th DCA 2000); *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.*, 705 So. 2d 983 (Fla. 4th DCA 1998) (reversing orders compelling arbitration where the agreement between the parties referenced but did not specifically incorporate a separate agreement containing an arbitration provision). No evidence exists that she was even aware of the building agreement and the builder's limited warranty when she purchased the home. Under these facts, the builder failed to prove an enforceable agreement to arbitrate the claims in the amended complaint. The trial court did not err in denying the motion to compel arbitration.

Accordingly, we affirm.

LEVINE, C.J., WARNER and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MATTHEW JACOCKS,
Appellant,

v.

CAPITAL COMMERICAL REAL ESTATE GROUP, INC., a Florida corporation; **RANDY NORTH,** an individual; **REAL ESTATE FLORIDA COMMERCIAL INTERNATIONAL, INC.,** a Florida corporation; **GREEN TREE COMMERCIAL, INC.,** a Florida corporation; **FRIEDLANDER & KAMELHAIR, P.L.,** a Florida Limited Liability Company, and **BRUCE FRIEDLANDER,** an individual,
Appellees.

No. 4D20-1512

[January 6, 2021]

Appeal of a nonfinal order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. 19-012740 CACE (14).

Geoffrey D. Ittleman of The Law Offices of Geoffrey D. Ittleman, P.A., Fort Lauderdale, and John M. Mullin and Stephanie C. Mazzola of Tripp Scott, P.A., Fort Lauderdale, for appellant.

Bruce D. Friedlander of Friedlander & Kamelhair, PL, Pembroke Pines, for appellees Friedlander & Kamelhair, P.L. and Bruce Friedlander.

PER CURIAM.

Matthew Jacocks appeals an order compelling arbitration of his legal malpractice claim, which he brought as an intended third-party beneficiary of a retainer agreement. Jacocks argues that he is not bound by the arbitration clause in the retainer agreement because he did not sign the agreement and is not suing to enforce it. We agree and reverse.

Jacocks is a real estate agent who worked for a real estate broker as a sales manager. Jacocks claims that, while he was working for the broker, he entered into an off-market listing agreement with the seller of a large multi-family property. He and the broker secured a prospective buyer for the property, but the buyer later told them the purchase would not be

closing. Jacocks eventually learned that the purchase did close, and he claims the buyer and seller improperly circumvented him and the broker to avoid paying their commission.

The broker retained the defendant law firm to sue the seller to recover the commission. Jacocks did not sign the retainer agreement, but he claims he paid half of the retainer fee as required by his agreement with the broker. He claims he worked closely with the attorney on the case, and the attorney never asked him to waive any conflict of interest or advised him that he represented only the broker. While the case was pending, the broker terminated its relationship with Jacocks, and the attorney stopped communicating with him. The case eventually settled, but Jacocks was not advised of the terms of the settlement and did not receive any of the proceeds.

Jacocks later sued the broker, the law firm, and the attorney. At issue in this appeal is count four of Jacocks' amended complaint, which alleges a cause of action for legal malpractice against the law firm and the attorney. Jacocks alleges that he was an intended third-party beneficiary of the retainer agreement between the broker and the law firm because he was entitled to 100% of any recovered commission under his agreement with the broker. Jacocks alleges that the defendants breached their duty to either act in his best interest or advise him to retain separate counsel.

The defendants moved to compel arbitration of Jacocks' legal malpractice claim pursuant to an arbitration clause in the retainer agreement. The court rejected Jacocks' argument that he was not bound by the arbitration clause and granted the defendants' motion. Jacocks timely appealed.

Because the trial court ruled as a matter of law, our review is de novo. *See Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Ass'n, Inc.*, 102 So. 3d 722, 727 (Fla. 4th DCA 2012) (stating that an order granting or denying a motion to compel arbitration is reviewed do novo, although any factual findings are reviewed for competent substantial evidence).

As a general rule, a plaintiff cannot be bound by an arbitration clause in a contract he did not sign even if he is a third-party beneficiary of the contract. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (holding that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate"); *Mendez v. Hampton Court Nursing Ctr.*, 203 So. 3d 146, 149 (Fla. 2016) (explaining that the third-party beneficiary doctrine "does not permit two parties to bind a

third—without the third party's agreement—merely by conferring a benefit on the third party").

As an exception to that rule, our supreme court has held that when a third-party beneficiary sues to enforce a contract between other parties, he will usually be bound by an arbitration clause contained in that contract. *See Mendez*, 203 So. 3d at 149 (citing *Nat'l Gypsum Co. v. Travelers Indem. Co.*, 417 So. 2d 254, 256 (Fla. 1982)). This exception does not apply when a third-party beneficiary brings a claim other than to enforce the contract. *See id.* at 149-50 (holding that a nursing home resident who alleged negligence and statutory violations against the nursing home was not bound by an arbitration clause in the admission contract, which he did not sign, because he was not suing to enforce the contract). *See generally Ray v. NPRTO Fla., LLC*, 322 F. Supp. 3d 1261, 1263 (M.D. Fla. 2017) (recognizing that "a third-party beneficiary cannot sue to enforce a contract and also argue it is not bound by its terms," but at the same time, "a third-party beneficiary who does not sue to enforce the contract is not bound by the terms to which she did not agree").

Here, the exception does not apply because Jacocks is suing the defendants for negligence, not to enforce the retainer agreement. The fact that Jacocks relies on his status as an intended third-party beneficiary of the retainer agreement to establish that the defendants owed him a duty of care does not transform the basic nature of his claim from negligence to breach of contract. *See Dingle v. Dellinger*, 134 So. 3d 484, 488 n.1 (Fla. 5th DCA 2014) (explaining that a third-party beneficiary can bring a legal malpractice action in theories of either negligence or contract, but the contract theory is "conceptually superfluous" because "the crux of the action must lie in tort as there can be no recovery without negligence").

In sum, because Jacocks did not sign the retainer agreement and is not suing to enforce it, he is not bound by the arbitration clause. *See Mendez*, 203 So. 3d at 149-50. We therefore reverse the order granting the defendants' motion to compel arbitration.

Reversed.

LEVINE, C.J., MAY and CIKLIN, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.