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Lucoff v. Navient Solutions, LLC, Case No. 19-13482 (11th Cir. 2020).
A person who consents online to be contacted regarding past due debts (even though he earlier advised the company he did not wish to be contacted) has, as a legal matter, changed his preference and cannot claim a violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227.

In Re: Amendments to Florida Rules of Civil Procedure 9.120 And 9.210, Case No. SC20-597 (Fla. 2020).
Changes to the Florida Rules of Appellate Procedure, including certification and required fonts.

Galleon Bay Corporation v. Board of County Commissioners of Monroe County, Florida, Case No. 3D19-1783 (Fla. 3d DCA 2020).
Florida Statute sec. 73.111 (the money to satisfy a condemnation judgment award must be deposited in the court registry within 20 days of the judgment) does not apply to inverse condemnation awards.

Kachkar v. U.S. Bank National Association, Case No. 3D19-1961 (Fla. 3d DCA 2020).
A signatory to a mortgage, even if not a party to the foreclosure case, is permitted to intervene in proceedings to set a foreclosure sale.

Wahnon v. Coral & Stones Unlimited Corp., Case No. 3D19-2387 (Fla. 3d DCA 2020).
A trial court faced with invocation of a witness's invocation of the Fifth Amendment privilege against self-incrimination which impacts a party's right to discovery and access to the courts may fashion an appropriate balancing remedy, including but not limited to: staying the case, preventing a witness from testifying or a party from presenting evidence, and recognizing an adverse inference.

Torruella v. Nationstar Mortgage, LLC, Case No. 5D19-3298 (Fla. 5th DCA 2020).
A party that has not been served in a lawsuit is not a "prevailing party" entitled to attorney's fees when the suit is dismissed.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13482

D.C. Docket No. 0:18-cv-60743-RAR

JOEL D. LUCOFF,

Plaintiff-Appellant,

versus

NAVIENT SOLUTIONS, LLC,
STUDENT ASSISTANCE CORPORATION,

Defendants-Appellees.

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

(December 4, 2020)

Before JORDAN, JILL PRYOR, and BRANCH, Circuit Judges.

BRANCH, Circuit Judge:

After Navient Solutions, LLC and its affiliate, Student Assistance Corporation ("SAC"), called Joel Lucoff's cell phone almost 2,000 times concerning his unpaid student loan, Lucoff sued Navient and SAC alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. The TCPA prohibits callers from making non-emergency calls using an "automatic telephone dialing system" ("ATDS")[1] or an "artificial or prerecorded voice" to a person's cell phone unless the call is made with the prior express consent of the called party. *Id.* Because we agree with the district court that Lucoff expressly consented to receive Navient and SAC's calls, we affirm the district court's grant of summary judgment to Navient and SAC.

I. Background

A. Lucoff's Student Loans

[1] The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In *Glasser v. Hilton Grand Vacations Co.*, we held that the clause "using a random or sequential number generator" modifies "both verbs ('to store' and '[to] produce')." 948 F.3d 1301, 1306 (11th Cir. 2020) (alteration in original). So to be an ATDS under the TCPA "the equipment must (1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them." *Id.* Under *Glasser*, equipment that calls a targeted list of individuals is not an ATDS because the call-list was not randomly or sequentially generated and dialed. *Id.*

Lucoff, now an attorney, obtained various federal loans to pay for law school, which he began in 1994. In 2006, Lucoff consolidated his student loans under the Federal Family Education Loan Program ("FFELP"). Navient[2] serviced Lucoff's FFELP consolidated loan, and SAC performed default aversion services on it.[3]

B. The *Arthur* Class Settlement

In 2010, a class of borrowers sued Navient, alleging that the company and its affiliates, including SAC, committed TCPA violations by calling class members' cell phones without consent between October 27, 2005, and September 14, 2010. In exchange for settling those claims, Navient agreed to implement "prospective practice changes" and "contribute . . . monetary relief" to a fund accessible by class members who submitted valid claim forms.[4] Lucoff does not dispute that he was a class member and that he was sent an e-mail notice of the class action settlement agreement. Although Lucoff does not dispute receiving the class action settlement notice, he testified he does not remember receiving or reading it. By the terms of

[2] Many of the relevant interactions between Lucoff and Navient occurred when Navient operated under its former name, Sallie Mae, Inc. Because the distinction between these names is irrelevant to the merits of this appeal, we will refer to Navient/Sallie Mae as "Navient."

[3] Default aversion services include counseling borrowers on repayment options to prevent their loans from reaching default. Navient and SAC share technology services, including a platform that stores borrowers' consent to receive automated and prerecorded calls.

[4] On September 17, 2012, the United States District Court for the Western District of Washington approved the class action settlement agreement ("*Arthur* settlement") at issue in this case. *See Arthur, et al. v. Sallie Mae, Inc.*, No. C10-0198-JRL.

the settlement, class members who failed to submit revocation request forms were "deemed to have provided prior express consent" to receiving Navient and its affiliates' calls. Lucoff does not dispute that he did not submit a revocation request form.

C. Debit Form

Two months before the *Arthur* settlement was approved, on July 2, 2012, Lucoff faxed SAC an Automatic (Electronic) Debit Authorization form that included his cell phone number. By submitting the debit form, Lucoff expressly consented to allow Navient and its affiliates to call him concerning his student loan. The relevant provision in the debit form provides:

> I, the Bank Account Holder, authorize Sallie Mae, and its agents or assigns, to communicate with me in connection with this Automatic Debit Authorization or any of the Customer's current or future loans being serviced by Sallie Mae using any telephone number that I provide to Sallie Mae in this Authorization or in the future, even if such telephone number is associated with a cellular telephone. I authorize Sallie Mae to communicate with me using automated telephone dialing equipment and/or artificial or pre-recorded voice messages.

D. Phone Call and Demographic Form

On June 24, 2014, almost two years later, Lucoff called Navient to discuss a proposed settlement offer for his consolidated loan. During this call, Lucoff and a Navient representative had the following exchange:

> Q: Is this your cell phone number, []-0907?
> A: That is correct.

> Q: Well, to help contact you more efficiently, may Sallie Mae Bank and Navient and their respective subsidiaries, affiliates, and agents contact you at this number?
> A: Sure.
> Q: Using an auto-dialer or pre-recorded messages regarding your current or future accounts[?]
> A: No.
> Q: Yes or no?
> A: No.

After this conversation, while still on the phone with the Navient representative, Lucoff visited Navient's website to fill out an automatic debit agreement to make payments on his delinquent student loan. When Lucoff logged on to Navient's website, a form titled "Edit Your Contact Information" (the "demographic form") popped up. The demographic form already contained some of Lucoff's information, like his cell phone number, because Navient auto-filled portions of the form from information in its records. Lucoff's cell phone number was not marked as a "required field" on the demographic form, and the auto-filled information could be deleted. The demographic form contained the following language, in the same sized font as the rest of the form, above the "submit" button on the bottom of the form:

> By providing my telephone number, I authorize SLM Corporation, Sallie Mae Bank, Navient Corporation and Navient Solutions, Inc., and their respective subsidiaries, affiliates and agents, to contact me at such number using any means of communication, including, but not limited to, calls placed to my cellular phone using an automated dialing device, calls using prerecorded messages and/or SMS text messages, regarding any current or future loans owned or serviced by SLM Corporation, Sallie Mae Bank, Navient Corporation or Navient

> Solutions, Inc., or their respective subsidiaries, affiliates and agents, even if I will be charged by my service provider(s) for receiving such communications.

Lucoff does not dispute that this language was on the demographic form, and he remembered completing the demographic form while still speaking to the Navient representative. After the June 24, 2014 phone call, Lucoff did not attempt to revoke his consent again for Navient or its affiliates to call him on his cell phone.

When Lucoff fell behind on his loan payments, Navient and SAC began calling his cell phone.[5] Lucoff sued, alleging that Navient and SAC called his cell phone using an ATDS and prerecorded messages, both of which require prior express consent to comply with the TCPA.[6]

After discovery, both parties filed motions for summary judgment. Lucoff argued that Navient and SAC called his cell phone without his consent because he revoked any prior consent during the phone call with the Navient representative. Navient argued that Lucoff provided prior express consent to the calls (which he

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[5] Navient called to discuss Lucoff's loan during periods of delinquency. SAC called (beginning on May 17, 2016) to discuss Lucoff's options to avoid default on the loan. The calls occurred between April 18, 2014 (shortly before the Navient/Lucoff phone call) and the filing of Lucoff's complaint.

[6] The parties do not dispute that SAC made 1,549 calls and Navient made 418 calls to Lucoff's cell phone using a non-manual "automated device." The parties also do not dispute that Navient and SAC made some calls to Lucoff's cell phone using a prerecorded message, but the parties do not agree on how many.

could not unilaterally revoke) because he was bound by the consent provision in the *Arthur* settlement. Navient also argued that even if Lucoff could (and did) revoke his consent during the phone call with the Navient representative, he reconsented when he submitted the online demographic form.

The district court, following the magistrate judge's recommendation, determined that (1) Lucoff could not unilaterally revoke his consent to be called by Navient and SAC because his consent was given as consideration in a valid bargained-for contract (the *Arthur* settlement), and, alternatively (2) even if Lucoff could (and did) revoke his consent to be called, he nonetheless reconsented when he submitted the demographic form. Lucoff appealed.

We agree with the district court that Lucoff reconsented to Navient and SAC's calls when he submitted the demographic form. Accordingly, we do not address whether the *Arthur* settlement made Lucoff's initial consent unilaterally irrevocable.[7]

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[7] The district court found that Lucoff did not have the *ability* to revoke unilaterally his consent to be called by Navient concerning his student loans. Navient's position is that because Lucoff was a member of the *Arthur* class, failed to opt out of the class settlement, and failed to fill out a revocation request form, he is bound by the *Arthur* settlement's prior express consent provision. Under Navient's view, because the consent term is part of a bargained-for contract (the class action settlement agreement), Lucoff's consent cannot be revoked unilaterally, under *Medley v. Dish Network, LLC*, 958 F.3d 1063 (11th Cir. 2020).

In *Medley*, we held that a party to a valid contract who agrees to receive automated calls on her cell phone may not later revoke her consent unilaterally. *See id.* at 1071 (holding that "the TCPA does not authorize unilateral revocation of consent to receive automated calls when such consent is given in a bargained-for contractual provision"). This Court followed the Second Circuit's approach to TCPA consent and held that "[p]ermitting Medley to unilaterally revoke a mutually-agreed-upon term in a contract would run counter to black-letter contract law in effect

II. Standard of Review

"We review *de novo* a grant of summary judgment, and we view the evidence and all factual inferences in the light most favorable to the nonmoving party." *Bearden v. E.I. du Pont de Nemours & Co.*, 945 F.3d 1333, 1337 (11th Cir. 2019). Summary judgment is appropriate only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. Discussion

The TCPA prohibits callers from using an ATDS[8] or an artificial or prerecorded voice to make non-emergency calls to a person's cell phone unless the call is made with the person's prior express consent.[9] We use common law

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at the time Congress enacted the TCPA." *Id.* (citing *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 59 (2d Cir. 2017)).

Navient asks us to expand *Medley* to the class action settlement agreement context and hold that Lucoff, an absent *Arthur* class member, is bound by a consent provision "agreed" to based on his inaction in response to the receipt of a class action settlement agreement notice, which he does not remember receiving. Because we agree with the district court that regardless of whether Lucoff *could* unilaterally revoke his consent, he nonetheless reconsented to Navient's calls, we need not address this issue.

[8] Navient argues that most of the calls at issue in this case are TCPA compliant regardless of consent because they were not made using an ATDS under this Court's recent decision in *Glasser*, 948 F.3d 1301. Because we find Lucoff consented to Navient and SAC's calls, we do not address this argument.

[9] In full, the relevant portion of the TCPA provides that:

> (b)(1) It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> > (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

principles to interpret whether a party gave—or revoked—their "prior express consent" to receive calls under the TCPA. *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) ("We . . . presume from the TCPA's silence regarding the means of providing or revoking consent that Congress sought to incorporate the 'common law concept of consent.'" (quoting *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013)). At common law, "consent is a willingness for certain conduct to occur." *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1276 (11th Cir. 2017) (citing RESTATEMENT (SECOND) OF TORTS § 892(1) (AM. LAW INST. 1979)). Even if a person does not intend to consent, their "words or conduct [that] are reasonably understood by another to be intended as consent . . . constitute apparent consent and are as effective as consent in fact." *See* RESTATEMENT (SECOND) OF TORTS § 892(2). And consent is revoked "when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct." *Schweitzer*, 866 F.3d at 1278 (quoting RESTATEMENT (SECOND) OF TORTS § 892A cmt. i).

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* * *

> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]

47 U.S.C. § 227(b)(1)(A)(iii).

Lucoff contends that he did not reconsent to receive Navient and SAC's calls by submitting the online demographic form which said "[b]y providing my telephone number, I authorize [Navient] to contact me at such number using any means of communication, including . . . calls placed to my cellular phone using an [ATDS] [or] calls using prerecorded messages . . . regarding any current . . . loans . . . serviced by [Navient]." Lucoff argues that submitting this language did not constitute consent because he submitted the form right after his oral revocation to the Navient representative, and the form was misleading and deceptive. Lucoff also argues that a jury should resolve this issue, rather than the district court on summary judgment. We disagree. Even if Lucoff effectively revoked his prior consent by answering "no" to the Navient representative's questions during the phone call, he later reconsented by submitting the online demographic form.[10]

This case revolves around timing. Lucoff took two opposite actions (revoking consent and reconsenting) close in time to one another. After orally revoking his consent to receive certain calls from Navient, Lucoff reconsented to receive those same calls just moments later. But because the record is undisputed that Lucoff's reconsent came *after* his revocation, we agree with the district court

[10] We will assume, without deciding, that Lucoff could and did effectively revoke his prior express consent to be called by answering "no" to the Navient representative's questions.

that Navient and SAC's calls were made with Lucoff's TCPA-required prior express consent.

Lucoff first argues that Navient should have known that he did not intend to "change his mind" and reconsent so soon after revoking his consent on the phone with the Navient representative. But under common law, consent is effective regardless of whether a party "intended" to consent if his words or conduct are "reasonably understood by another to be intended as consent." *See* RESTATEMENT (SECOND) OF TORTS § 892(2). It was reasonable for Navient to understand Lucoff's submission of the consent language in the demographic form (clearly stating Lucoff authorized the calls) as Lucoff's consent to the calls. So even if Lucoff did not want to receive ATDS or prerecorded calls, he nonetheless provided apparent consent to Navient and SAC by submitting the online demographic form that contained his cell phone number and a clear, unambiguous consent provision. *See Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1308 (11th Cir. 2015) (providing a phone number on a form, even without an express consent provision, constitutes consent under the TCPA).

Lucoff next argues that because he submitted the demographic form right after he answered "no" to the Navient representative's question, Navient still knew or should have known that Lucoff did not want to receive the calls, under the "knew or should have known" standard this Court uses to determine whether

consent was revoked. *See Schweitzer*, 866 F.3d at 1278. While it is true that Lucoff filled out the demographic form just moments after he orally revoked his prior consent, Lucoff cites no authority that this temporal proximity should require this Court to consider the separate interactions (of revoking consent and later reconsenting) as one lumped-together interaction. Accordingly, we disagree with Lucoff's argument that the revocation of consent standard should stretch to apply to Lucoff's later reconsent to Navient.

Lucoff also argues that any reconsent gleaned from his submission of the demographic form was ineffective because the form, and the way he was directed to fill it out, were deceptive and misleading. Lucoff cites a Seventh Circuit case concerning consent to trespass for support that consent is ineffective if "procured by a misrepresentation or a misleading omission." *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351 (7th Cir. 1995). He points to five facts to prove that he was misled into providing his consent: (1) the form explained its purpose was to make sure Navient had "up to date records" rather than to obtain consent to call consumers; (2) the Navient representative directed Lucoff to the website (to fill out an auto debit agreement) and was still on the phone with him as he quickly submitted this form; (3) the form could not be submitted without at least one phone number being submitted because the home phone number was a required field (marked with an asterisk); (4) the consent provision was at the bottom of the form

and in "fine print"; and (5) Navient auto-populated the form with information from its records.

After reviewing the form, we disagree with Lucoff's allegation that the form was misleading. The consent provision was located above the submit button and was in the same sized text as the rest of the online demographic form. Lucoff's cell phone number was not marked as a "required field" (signified by asterisks) on the demographic form, and the information auto-filled into the form could be edited or deleted. The only reason Navient had Lucoff's information in its records (to autofill portions of the form) is because Lucoff had previously provided it to Navient. Thus, the form was not misleading and Lucoff cannot now escape the consequences of submitting it.

Finally, Lucoff argues that this case "at the very least" presents genuine issues of material fact that preclude summary judgment. We disagree. All the facts material to determining whether Lucoff reconsented are undisputed.[11]

Lucoff argues that the jury is the proper body to apply the "knew or should have known" standard for revocation of consent. But binding precedent shows that TCPA consent issues are appropriate for summary judgment (and that a judge can

[11] It is undisputed that: (1) Lucoff submitted the demographic form *after* revoking his consent on the phone with the Navient representative, (2) Lucoff filled out the demographic form, saw his cell phone number on the form, and submitted the form containing the consent provision, and (3) Lucoff's cell phone number was auto filled into the form, could have been removed, and was not a required field.

apply the "knew or should have known" standard) when the underlying facts are not disputed. *Compare Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1126 (11th Cir. 2014) (holding that summary judgment was appropriate because there was no factual dispute over whether the plaintiff's wife provided his phone number on a hospital admission form), *with Osorio*, 746 F.3d at 1256 (holding that summary judgment was inappropriate because the plaintiff said he told the caller to "stop calling," and the caller said the plaintiff never said such a thing).

Lucoff relies on our TCPA consent decision in *Schweitzer* to support his position that a jury should resolve the reconsent issue. In *Schweitzer*, we found that a jury should determine whether the plaintiff's vague oral statement partially revoked consent to receive calls. 866 F.3d at 1278–80. But the reasoning in *Schweitzer* does not apply here because the language of the consent provision Lucoff submitted in the demographic form was not vague. Rather, the consent provision made clear that Lucoff, by submitting the form, "authorized" Navient and its affiliates to "contact [him on his] cellular phone using an automated dialing device, [and] prerecorded messages . . . ." Because this provision was unambiguous, a jury was not needed to determine whether Lucoff provided Navient with consent to contact him using an ATDS and prerecorded messages.

IV. Conclusion

Because Lucoff reconsented to receive ATDS and prerecorded calls by submitting the online demographic form, we affirm the district court's grant of summary judgment to Navient and SAC.

AFFIRMED.

Supreme Court of Florida

No. SC20-597

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE 9.120 AND 9.210.

December 3, 2020

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to the Florida Rules of Appellate Procedure. We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

BACKGROUND

The Florida Bar's Appellate Court Rules Committee (Committee) has filed a report proposing amendments to rules 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) and 9.210 (Briefs). In addition, the Court severed the following proposals from *In re Amendments to the Florida Rules of Appellate Procedure—2020 Regular-Cycle Report*, 45 Fla. L. Weekly S282 (Fla. Oct. 29, 2020), for consideration in this case: 9.100 (Original Proceedings), 9.125 (Review of Trial Court Orders and Judgments Certified by the District Courts of

Appeal as Requiring Immediate Resolution by the Supreme Court of Florida), 9.141 (Review Proceedings in Collateral or Postconviction Criminal Cases), 9.142 (Procedures for Review in Death Penalty Cases), 9.225 (Notice of Supplemental Authority), 9.370 (Amicus Curiae), 9.900(j) (Forms; Notice of Supplemental Authority), and proposed new rule 9.045 (Form of Documents).

The Committee published its proposals for comment prior to filing them with the Court and received two comments. Upon consideration of the comments, the Committee did not alter its proposals. After the Committee filed its report, the Court republished the proposals for comment; no comments were received.

Having considered the Committee's report, we adopt the amendments to the Florida Rules of Appellate Procedure as proposed by the Committee, except for the proposed amendments to rules 9.225 (Notice of Supplemental Authority) and 9.900(j) (Forms; Notice of Supplemental Authority), which we decline to adopt. We explain our reasons below, as well as discuss some of the significant rule amendments.

AMENDMENTS

New rule 9.045 (Form of Documents) sets out the formatting requirements for all documents filed with an appellate court. Subdivision (a) (Generally) of the new rule makes clear that the formatting requirements in rule 9.045 are in addition to those set out in Florida Rule of Judicial Administration 2.520 (Documents). The

type of fonts permitted in documents filed with a court is changed in subdivision (b) (Line Spacing, Type Size, and Typeface) of the new rule to either Arial or Bookman Old Style. Because the new fonts take up more space on a page, page limits for computer-generated documents throughout the Florida Rules of Appellate Procedure are replaced with word counts. Page limits for handwritten and typewritten documents are unchanged. All computer-generated documents subject to a word count limit are required under subdivision (e) (Certificate of Compliance) of rule 9.045 to contain a certificate of compliance certifying that the document is in conformity with all font and word count requirements.

The formatting requirements contained in rules 9.100(*l*) (Original Proceedings; General Requirements; Fonts) and 9.210(a)(1)-(3) (Briefs; Generally) are deleted as duplicative of the requirements contained in new rule 9.045.

Next, subdivision (e) (Accepting or Postponing Decision on Jurisdiction; Record) of rule 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) is amended to shorten the period of time for transmission of the record from sixty days to twenty-five days. Subdivision (g) (Briefs on Merits) of the same rule is also amended to extend the period of time for service of the initial brief from twenty days to thirty-five days after the Court accepts or postpones a decision on jurisdiction.

Lastly, we decline to adopt the Committee's proposed amendments to rules 9.225 (Notice of Supplemental Authority) and 9.900(j) (Forms; Notice of Supplemental Authority). The Committee proposes amending rule 9.225 and the corresponding form in rule 9.900(j) to permit the inclusion of argument in a notice of supplemental authority, as well as the filing of a response by an opposing party. The Committee did not provide a reasoned explanation for its proposed amendments, and we are concerned that permitting additional argument outside of the briefs will have an adverse impact on court resources and appellate proceedings.

CONCLUSION

Accordingly, we amend the Florida Rules of Appellate Procedure as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The comments are offered for explanation and guidance only and are not adopted as an official part of the rules. The amendments shall become effective on January 1, 2021, at 12:03 a.m.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Appellate Procedure

Hon. Stephanie Williams Ray, Chair, and Thomas D. Hall, Past Chair, Appellate Court Rules Committee, Tallahassee, Florida; and Joshua E. Doyle, Executive Director, and Krys Godwin, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Appendix

RULE 9.045. FORM OF DOCUMENTS

(a) Generally. All documents, as defined in Florida Rule of Judicial Administration 2.520(a), filed with the court shall comply with Florida Rule of Judicial Administration 2.520 and with this rule. If filed in electronic format, parties shall file only the electronic version.

(b) Line Spacing, Type Size, and Typeface. The text in documents shall be black and in distinct type, double-spaced. Text in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single-spaced and shall be in the same size type, with the same spacing between characters, as the text in the body of the document. Headings and subheadings shall be at least as large as the document's text and may be single-spaced. Computer-generated documents shall be filed in either Arial 14-point font or Bookman Old Style 14-point font.

(c) Binding. Documents filed in paper format shall not be stapled or bound.

(d) Signature. All documents filed with the court must be signed as required by Florida Rule of Judicial Administration 2.515.

(e) Certificate of Compliance. Computer-generated documents subject to word count limits shall contain a certificate of compliance signed by counsel, or the party if unrepresented, certifying that the document complies with the applicable font and word count limit requirements. The certificate shall be contained in the document immediately following the certificate of service. The word count shall exclude words in a caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block. The word count shall include all other words, including words used in headings, footnotes, and quotations. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document.

RULE 9.100. ORIGINAL PROCEEDINGS

(a)-(f) [NO CHANGE]

(g) Petition. The caption shall contain the name of the court and the name and designation of all parties on each side. The petition shall not exceed 13,000 words if computer-generated or 50 pages ~~in length~~if handwritten or typewritten and shall contain:

(1)-(4) [NO CHANGE]

[NO CHANGE]

(h)-(i) [NO CHANGE]

(j) Response. Within the time set by the court, the respondent may serve a response, which shall not exceed 13,000 words if computer-generated or 50 pages ~~in length~~if handwritten or typewritten and which shall include argument in support of the response, appropriate citations of authority, and references to the appropriate pages of the supporting appendices.

(k) Reply. Within 30 days thereafter or such other time set by the court, the petitioner may serve a reply, which shall not exceed 4,000 words if computer-generated or 15 pages ~~in length~~if handwritten or typewritten, and supplemental appendix.

~~**(*l*) General Requirements; Fonts.** The lettering in all petitions, responses, and replies filed under this rule shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single spaced and shall be in the same size type, with the same spacing between characters, as the text. Computer-generated petitions, responses, and replies shall be submitted in either Times New Roman 14-point font or Courier New 12-point font. All computer-generated petitions, responses, and replies shall contain a certificate of compliance signed by counsel, or the party if unrepresented, certifying that the petition, response, or reply complies with the font requirements of this rule. The certificate of compliance shall be contained in the petition, response, or reply immediately following the certificate of service.~~

Committee Notes

1977-2010 Amendment. [NO CHANGE]

2010 Note. [NO CHANGE]

2020 Amendment. Page limits for computer-generated petitions, responses, and replies were converted to word counts.

Court Commentary

[NO CHANGE]

RULE 9.120. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF DISTRICT COURTS OF APPEAL

(a)-(b) [NO CHANGE]

(c) Notice. The notice shall be substantially in the form prescribed by rule 9.900. The caption shall contain the name of the lower tribunal, the name and designation of at least 1 party on each side, and the case number in the lower tribunal. The notice shall contain the date of rendition of the order to be reviewed and the basis for invoking the jurisdiction of the supreme court.

(d) [NO CHANGE]

(e) Accepting or Postponing Decision on Jurisdiction; Record. If the supreme court accepts or postpones decision on jurisdiction, the court shall so order and advise the parties and the clerk of the district court of appeal. Within ~~60~~25 days thereafter or such other time set by the court, the clerk shall electronically transmit the record. The clerk shall transmit separate Portable Document Format ("PDF") files of:

(1)-(3) [NO CHANGE]

(f) [NO CHANGE]

(g) Briefs on Merits. Within ~~20~~35 days of rendition of the order accepting or postponing decision on jurisdiction, the petitioner shall serve the initial brief on the merits. Additional briefs, including any briefs on cross-review, shall be served as prescribed by rule 9.210.

Committee Notes

[NO CHANGE]

RULE 9.125. REVIEW OF TRIAL COURT ORDERS AND JUDGMENTS CERTIFIED BY THE DISTRICT COURTS OF APPEAL AS REQUIRING IMMEDIATE RESOLUTION BY THE SUPREME COURT OF FLORIDA

(a)-(d) [NO CHANGE]

(e) Form. The suggestion shall ~~be limited to 5 pages~~not exceed 1,300 words if computer-generated or 5 pages if handwritten or typewritten and shall contain all of the following elements:

(1)-(4) [NO CHANGE]

(f)-(g) [NO CHANGE]

Committee Notes

1980 Amendment. [NO CHANGE]

2020 Amendment. The page limit for a computer-generated suggestion was converted to a word count.

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POSTCONVICTION CRIMINAL CASES

(a) [NO CHANGE]

(b) Appeals from Postconviction Proceedings Under Florida Rules of Criminal Procedure 3.800(a), 3.801, 3.802, 3.850, or 3.853.

(1) [NO CHANGE]

(2) Summary Grant or Denial of All Claims Raised in a Motion Without Evidentiary Hearing.

(A)-(B) [NO CHANGE]

(C) Briefs or Responses.

(i) Briefs are not required, but the appellant may serve an initial brief within 30 days of filing the notice of appeal. The appellee need not file an answer brief unless directed by the court. The initial brief shall comply with the word count (if computer-generated) or page limits (if handwritten or typewritten) set forth in rule 9.210 for initial briefs. The appellant may serve a reply brief as prescribed by rule 9.210.

(ii) The court may request a response from the appellee before ruling, regardless of whether the appellant filed an initial brief. The appellant may serve a reply within 30 days after service of the response. The response and reply shall ~~not exceed~~comply with the word count (if computer-generated) or page limits (if handwritten or typewritten) set forth in rule 9.210 for answer briefs and reply briefs.

(D) [NO CHANGE]

(3) [NO CHANGE]

(c)-(d) [NO CHANGE]

Committee Notes

[NO CHANGE]

RULE 9.142. PROCEDURES FOR REVIEW IN DEATH PENALTY CASES

(a) Procedure in Death Penalty Appeals.

(1) Record.

(A) [NO CHANGE]

(B) The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record ~~that is electronically transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already electronically transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and~~ shall exclude any materials already transmitted to the supreme court as the

record in any prior appeal. The clerk of the lower tribunal shall retain a copy of the complete record when it transmits the record to the supreme court.

(C) [NO CHANGE]

(2)-(5) [NO CHANGE]

(b) [NO CHANGE]

(c) Petitions Seeking Review of Nonfinal Orders in Death Penalty Postconviction Proceedings.

(1)-(7) [NO CHANGE]

(8) Reply. Within 30 days after service of the response or such other time set by the court, the petitioner may serve a reply~~, which shall not exceed 15 pages in length,~~ and supplemental appendix.

(9)-(11) [NO CHANGE]

(d) [NO CHANGE]

Committee Notes

[NO CHANGE]

Criminal Court Steering Committee Note

[NO CHANGE]

RULE 9.210. BRIEFS

(a) Generally. Unless otherwise ordered by the court, the only briefs permitted to be filed by the parties in any 1 proceeding are the initial brief, the answer brief, and a reply brief. A cross-reply brief is permitted if a cross-appeal has been filed or if the respondent identifies issues on cross-review in its brief on jurisdiction in the supreme court. All briefs required by these rules shall be prepared as follows:

(1) ~~When not filed in electronic format, briefs shall be printed, typewritten, or duplicated on opaque, white, unglossed paper. The dimensions of~~

~~each page of a brief, regardless of format, shall be 8 1/2 by 11 inches. When filed in electronic format, parties shall file only the electronic version.~~

~~(2) The lettering in briefs shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single spaced and shall be in the same size type, with the same spacing between characters, as the text in the body of the brief. Headings and subheadings shall be at least as large as the brief's text and may be single-spaced. Computer-generated briefs shall be filed in either Times New Roman 14-point font or Courier New 12-point font. All computer-generated briefs shall contain a certificate of compliance signed by counsel, or the party if unrepresented, certifying that the brief complies with the font requirements of this rule. The certificate of compliance shall be contained in the brief immediately following the certificate of service.~~

~~(3) Briefs filed in paper format shall not be stapled or bound.~~

~~(4)~~ The cover sheet of each brief shall state the name of the court, the style of the cause, including the case number if assigned, the lower tribunal, the party on whose behalf the brief is filed, the type of brief, and the name, address, and e-mail address of the attorney filing the brief.

(~~5~~2) Computer-generated briefs shall not exceed the word count limits of this subdivision. Handwritten or typewritten briefs shall not exceed the page limits of this subdivision. The page limits for briefs shall be as follows:

(A) Briefs on jurisdiction shall not exceed 2,500 words or 10 pages.

(B) Except as provided in subdivisions (a)(~~5~~2)(C) and (a)(~~5~~2)(D) of this rule, the initial and answer briefs shall not exceed 13,000 words or 50 pages and the reply brief shall not exceed 4,000 words or 15 pages. If a cross-appeal is filed or the respondent identifies issues on cross-review in its brief on jurisdiction in the supreme court, the appellee or respondent's answer/cross-initial brief shall not exceed 22,000 words or 85 pages, and the appellant or petitioner's reply/cross-answer brief shall not exceed 13,000 words or 50 pages, not more than 4,000 words or 15 pages of which shall be devoted to argument replying to the answer portion of the appellee or respondent's answer/cross-initial brief. Cross-reply briefs shall not exceed 4,000 words or 15 pages.

(C) In an appeal from a judgment of conviction imposing a sentence of death or from an order ruling after an evidentiary hearing on an initial postconviction motion filed under Florida Rule of Criminal Procedure 3.851, the initial and answer briefs shall not exceed 25,000 words or 100 pages and the reply brief shall not exceed 10,000 words or 35 pages. If a cross-appeal is filed, the appellee's answer/cross-initial brief shall not exceed 40,000 words or 150 pages and the appellant's reply/cross-answer brief shall not exceed 25,000 words or 100 pages, not more than 10,000 words or 35 pages of which shall be devoted to argument replying to the answer portion of the appellee's answer/cross-initial brief. Cross-reply briefs shall not exceed 10,000 words or 35 pages.

(D) [NO CHANGE]

(E) The cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block for the brief's author shall be excluded from the word count and page limits in subdivisions (a)(~~5~~2)(A)–(a)(~~5~~2)(D). For briefs on jurisdiction, the statement of the issues also shall be excluded from the page limit in subdivision (a)(5)(A). All pages not excluded from the computation shall be consecutively numbered. The court may permit longer briefs.

(~~6~~3) Unless otherwise ordered by the court, an attorney representing more than 1 party in an appeal may file only 1 initial or answer brief and 1 reply brief, if authorized, which will include argument as to all of the parties represented by the attorney in that appeal. A single party responding to more than 1 brief, or represented by more than 1 attorney, is similarly bound.

(b) Contents of Initial Brief. The initial brief shall contain the following, in order:

(1)-(3) [NO CHANGE]

(4) a summary of argument, suitably paragraphed, condensing succinctly, accurately, and clearly the argument actually made in the body of the brief, which should not be a mere repetition of the headings under which the argument is arranged~~, and should seldom exceed 2 and never 5 pages~~;

(5) [NO CHANGE]

(6) a short conclusion~~, of not more than 1 page,~~ setting forth the precise relief sought;

(7)-(8) [NO CHANGE]

(c)-(h) [NO CHANGE]

Committee Notes

1977-1996 Amendment. [NO CHANGE]

2020 Amendment. Page limits for computer-generated briefs were converted to word counts. Page limits are retained only for briefs that are handwritten or typewritten.

Court Commentary

[NO CHANGE]

RULE 9.370. AMICUS CURIAE

(a) [NO CHANGE]

(b) Contents and Form. An amicus brief must comply with rule 9.210(b) but shall omit a statement of the case and facts and may not exceed 5,000 words if computer-generated or 20 pages if handwritten or typewritten. The cover must identify the party or parties supported. An amicus brief must include a concise statement of the identity of the amicus curiae and its interest in the case.

(c) [NO CHANGE]

(d) Notice of Intent to File Amicus Brief in the Supreme Court of Florida. When a party has invoked the discretionary jurisdiction of the supreme court, an amicus curiae may file a notice with the court indicating its intent to seek leave to file an amicus brief on the merits should the court accept jurisdiction. The notice shall state briefly why the case is of interest to the amicus curiae, but shall not contain argument. The body of the notice shall not exceed 250 words if computer-generated or 1 page if handwritten or typewritten.

Committee Notes

[NO CHANGE]

Supreme Court of Florida

No. SC19-884

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE 9.120 AND 9.210.

December 3, 2020

PER CURIAM.

The Court has for consideration the supplemental report of The Florida Bar's Appellate Court Rules Committee (Committee) proposing amendments to Florida Rules of Appellate Procedure 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) and 9.210 (Briefs). We have jurisdiction. *See* art. V, § 2(a), Fla. Const.

Previously, in *In re Amendments to Florida Rules of Appellate Procedure 9.120 & 9.210*, 284 So. 3d 967 (Fla. 2019), the Court adopted, with modifications, amendments to rules 9.120 and 9.210 that establish a procedure for respondents to identify cross-review issues in discretionary review cases through the service of a "notice of cross-review." The Court made the following modifications to the amendments:

> A new subdivision (f) titled "Notices of Cross-Review" is added to rule 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal). The new subdivision as proposed by the Committee would have required a respondent who intends to raise cross-review issues in a discretionary review case to serve a notice of cross-review within fifteen days of the rendition of this Court's order accepting jurisdiction. However, we have modified new subdivision (f) of the rule to require a notice of cross-review to be served within five days of the service of a timely filed notice to invoke the Court's discretionary jurisdiction. We also have added a requirement that the notice identify the issue(s) the respondent intends to raise on cross-review. We modified the new subdivision because we agree with the Committee's observation in the report that a notice of cross-review filed at the jurisdiction determination stage of a discretionary review case would be beneficial to the Court in deciding whether it should accept jurisdiction in a case in which a basis exists for the Court to exercise its discretionary jurisdiction.

Id. at 967.

Following the issuance of *In re Amendments to Florida Rules of Appellate Procedure 9.120 & 9.210*, the Committee moved for rehearing, contending that the Court's modifications place respondents "in a quagmire . . . by having to decide whether to raise cross-review issues before they know the particular jurisdictional basis and issues petitioners intend to raise and having to do so within just five days of the notice to invoke." The Committee also claimed that the five-day period in which to file a notice of cross-review placed respondents at a significant disadvantage when a notice to invoke is filed quickly after issuance of a district court decision, and placed petitioners at a disadvantage in preparing a jurisdictional brief, as they will be unaware of whether any cross-review issues exist until nearly

half of the ten-day period in rule 9.120(d) to file a jurisdictional brief has expired. The Court granted the Committee's motion, postponed the effective date of the amendments, and directed the Committee to file a supplemental report addressing the modified rule amendments.

The Committee has now filed a supplemental report proposing amendments to rules 9.120 and 9.210 that dispense altogether with the requirement that a respondent serve a notice of cross-review. The proposed amendments require the parties to identify in a separate "statement of the issues" section of their jurisdictional briefs the issues they intend to raise that are independent of those upon which jurisdiction is sought. The Committee did not publish its proposals for comment prior to filing them with the Court. After the Committee filed its report, the Court published the proposals for comment; no comments were received.

Having considered the Committee's supplemental report, we hereby adopt the amendments to rules 9.120 and 9.210 as proposed by the Committee. The amendments to rule 9.120 delete references to the service of a notice of cross-review from subdivision (d) (Briefs on Jurisdiction), as well as language excluding certified questions of great public importance from the jurisdictional brief requirements. Rule 9.120(f) (Notices of Cross-Review) is replaced with a new subdivision titled "Additional Issues on Review or Cross-Review," under which a party who intends to raise issues in this Court independent of those upon which

jurisdiction is based is required to identify the issues in the statement of the issues section of his or her jurisdictional brief.

Rule 9.210(a) (Generally) is amended to permit the filing of a cross-reply brief in cases where a cross-appeal has been filed or a respondent identifies cross-review issues in his or her brief on jurisdiction. New subdivision (f), titled "Contents of Briefs on Jurisdiction," is added to rule 9.210. The new subdivision identifies the required contents of a jurisdictional brief. It also requires that the parties identify in the statement of issues section of their jurisdictional briefs the issues they intend to raise if review is granted that are independent of those upon which the Court's jurisdiction is invoked.

Accordingly, Florida Rules of Appellate Procedure 9.120 and 9.210 are amended as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective on January 1, 2021, at 12:01 a.m.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Appellate Procedure

Hon. Stephanie Williams Ray, Chair, and Thomas D. Hall, Past Chair, Appellate Court Rules Committee, Tallahassee, Florida; and Joshua E. Doyle, Executive Director, and Krys Godwin, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Appendix

RULE 9.120. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF DISTRICT COURTS OF APPEAL

(a)-(c) [NO CHANGE]

(d) Briefs on Jurisdiction. The petitioner's brief, with the argument section limited solely to the issue of the supreme court's jurisdiction, and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of the filing of the notice to invoke the court's discretionary jurisdiction~~ or the service of a notice of cross-review under subdivision (f) of this rule, if one is filed~~. The respondent's brief on jurisdiction shall be served within 30 days after service of petitioner's brief. Formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted.~~ If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal to the supreme court), no briefs on jurisdiction shall be filed.~~

(e) [NO CHANGE]

(f) ~~**Notices of Cross-Review.** Within 5 days of the service of a timely filed notice to invoke the court's discretionary jurisdiction, a respondent shall serve a notice of cross-review if the respondent intends to file a cross-initial brief raising any issues independent of those upon which the petitioner sought review. The notice shall identify the issue(s) the respondent intends to raise on cross-review.~~**Additional Issues on Review or Cross-Review.** As specified in rule 9.210, if the petitioner or respondent intends to raise issues for review in the supreme court independent of those on which jurisdiction is based, the petitioner or respondent must identify those issues in the statement of the issues included in their brief on jurisdiction.

(g) [NO CHANGE]

Committee Notes

[NO CHANGE]

RULE 9.210. BRIEFS

(a) Generally. ~~In addition to briefs on jurisdiction under rule 9.120(d)~~Unless otherwise ordered by the court, the only briefs permitted to be filed by the parties in any 1 proceeding are the initial brief, the answer brief, and a reply brief~~, and a cross-reply brief~~. A cross-reply brief is permitted if a cross-appeal has been filed or if the respondent identifies issues on cross-review in its brief on jurisdiction in the supreme court. All briefs required by these rules shall be prepared as follows:

(1)-(4) [NO CHANGE]

(5) The page limits for briefs shall be as follows:

(A) [NO CHANGE]

(B) Except as provided in subdivisions (a)(5)(C) and (a)(5)(D) of this rule, the initial and answer briefs shall not exceed 50 pages and the reply brief shall not exceed 15 pages. If a cross-appeal is filed or ~~a notice of cross-review is filed~~the respondent identifies issues on cross-review in its brief on jurisdiction in the supreme court, the appellee or respondent's answer/cross-initial brief shall not exceed 85 pages, and the appellant or petitioner's reply/cross-answer brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee or respondent's answer/cross-initial brief. Cross-reply briefs shall not exceed 15 pages.

(C)-(D) [NO CHANGE]

(E) The cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block for the brief's author shall be excluded from the page limits in subdivisions (a)(5)(A)–(a)(5)(D). For briefs on jurisdiction, the statement of the issues also shall be excluded from the page limit in subdivision (a)(5)(A). All pages not excluded from the computation shall be consecutively numbered. The court may permit longer briefs.

(6) [NO CHANGE]

(b) [NO CHANGE]

(c) Contents of Answer Brief. The answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts may be omitted, if the corresponding section of the initial brief is deemed satisfactory. If a cross-appeal has been filed or ~~a notice of cross-review has been filed~~the respondent identifies issues on cross-review in its brief on jurisdiction in the supreme court, the answer brief shall include the issues presented in the cross-appeal or cross-review, and argument in support of those issues.

(d)-(e) [NO CHANGE]

(f) Contents of Briefs on Jurisdiction. Briefs on jurisdiction, filed pursuant to rule 9.120, shall contain a statement of the issues, a statement of the case and facts, the argument, the conclusion, a table of contents, a table of citations, a certificate of service, and, for computer-generated briefs, shall also include a certificate of compliance in the same manner as provided in subdivisions (a) and (b) of this rule. In the statement of the issues, petitioner shall identify any issues independent of those on which jurisdiction is invoked that petitioner intends to raise if the court grants review. Respondent, in its statement of the issues, shall clearly identify any affirmative issues, independent of those on which jurisdiction is invoked and independent of those raised by petitioner in its statement of the issues, that respondent intends to raise on cross-review if the court grants review.

(g) Times for Service of Briefs. The times for serving jurisdiction and initial briefs are prescribed by rules 9.110, 9.120, 9.130, and 9.140. Unless otherwise required, the answer brief shall be served within 30 days after service of the initial brief; the reply brief, if any, shall be served within 30 days after service of the answer brief; and the cross-reply brief, if any, shall be served within 30 days thereafter. In any appeal or cross-appeal, if more than 1 initial or answer brief is authorized, the responsive brief shall be served within 30 days after the last initial or answer brief was served. If the last authorized initial or answer brief is not served, the responsive brief shall be served within 30 days after the last authorized initial or answer brief could have been timely served.

(gh) Citations. Counsel are requested to use the uniform citation system prescribed by rule 9.800.

Committee Notes

[NO CHANGE]

Court Commentary

[NO CHANGE]

Third District Court of Appeal

State of Florida

Opinion filed December 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1783
Lower Tribunal No. 02-595-K

Galleon Bay Corporation,
Appellant,

vs.

Board of County Commissioners of Monroe County, Florida, et al.,
Appellees.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Andrew M. Tobin, P.A., and Andrew M. Tobin, for appellant.

Derek V. Howard, Assistant County Attorney; Ashley Moody, Attorney General, and Timothy L. Newhall (Tallahassee), Senior Assistant Attorney General, for appellees.

Before LOGUE, SCALES and LINDSEY, JJ.

SCALES, J.

Appellant, plaintiff below, Galleon Bay Corporation appeals the trial court's August 15, 2019 order that denied Galleon Bay's March 19, 2019 post-judgment Motion to Declare Final Order Null and Void (the "Motion"). The Motion sought to void a May 26, 2016 final judgment that the trial court entered after a jury awarded Galleon Bay approximately $480,000 in damages for its inverse condemnation claim against appellees, defendants below, Monroe County and the State of Florida.[1]

Galleon Bay appealed (and Monroe County and the State of Florida cross-appealed) that May 2016 judgment, and this Court affirmed the judgment in an unelaborated opinion. See Galleon Bay Corp. v. Bd. of Cty. Comm'rs. of Monroe Cty., 272 So. 3d 396 (Fla. 3d DCA 2018). Galleon Bay unsuccessfully moved this Court for rehearing, rehearing en banc, and for a written opinion. Several months later, in March 2019, Galleon Bay filed its Motion, asserting for the first time that the inverse condemnation proceedings resulting in the May 2016 final judgment, as well as the final judgment itself, were null and void because the defendants did not, within twenty days after rendition of the May 2016 final judgment, deposit into the registry of the court the amounts set forth in that judgment, as required by section 73.111 of the Florida Statutes.

[1] This appears to be the ninth time this case has been before this Court. The history of the parties' dispute is described in Galleon Bay Corporation v. Board of County Commissioners of Monroe County, 105 So. 3d 555 (Fla. 3d DCA 2012).

In relevant part, section 73.111 reads as follows: "Within 20 days after the rendition of the judgment, the *petitioner* shall deposit the amount set forth into the registry of the court for the use of the defendants, or the proceeding shall be null and void . . . ." § 73.111, Fla. Stat. (2016) (emphasis supplied).

After conducting a hearing on Galleon Bay's Motion, the trial court entered the challenged order denying the Motion, concluding that, "Section 73.111, Fla. Stat., does not apply to this inverse condemnation proceeding or the Final Judgment."

We affirm because the trial court correctly concluded that section 73.111 is inapplicable to Galleon Bay's inverse condemnation proceeding.[2] Chapter 73 plainly governs eminent domain proceedings where the condemning authority, rather than the landowner, initiates the takings lawsuit. Indeed, as is evidenced throughout chapter 73,[3] the statutory scheme demonstrates that a "petitioner" initiates an eminent domain lawsuit by filing a petition meeting with the requirements of section 73.021 of the Florida Statutes. Section 73.111 becomes

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[2] We apply the *de novo* standard of review to an interpretation of statutory law. See Gomez v. Village of Pinecrest, 17 So. 3d 322, 325 (Fla. 3d DCA 2009).

[3] For example, section 73.021 defines who may file an eminent domain "petition" as "[t]hose having the right to exercise the power of eminent domain;" section 73.041 refers to the process a "petitioner" uses to perfect defective title acquired under chapter 73; and section 73.091 requires the "petitioner" to pay a condemnee's costs and attorney's fees.

applicable toward the end of the petition process – it allows the condemning authority to walk away from a valuation it deems too costly or unaffordable, which only makes sense in an eminent domain context. It is axiomatic that statutes must be read in conjunction with related statutory provisions. Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.").

Galleon Bay initiated inverse condemnation proceedings in 2002; Galleon Bay never was a "petitioner" of an eminent domain proceeding as contemplated by section 73.111. Galleon Bay provides this Court with no relevant authority supporting its position that chapter 73, and particularly section 73.111, apply to inverse condemnation proceedings initiated by a landowner.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed December 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1961
Lower Tribunal No. 17-7669

Jack Kachkar,
Appellant,

vs.

U.S. Bank National Association, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Jack Kachkar, in proper person.

No appearance, for appellee.

Before FERNANDEZ, HENDON and GORDO, JJ.

PER CURIAM.

Jack Kachkar appeals the trial court's order granting U.S. Bank National Association's Motion to Reschedule Foreclosure Sale, arguing that the trial court

violated his due process rights by failing to hold a hearing on his motion to intervene, as requested, prior to re-setting the sale date. We agree, reverse and remand.

Viktoria Benkovitch, Mr. Kachkar's spouse, executed a promissory note in 2005. Both Ms. Benkovitch and Mr. Kachkar executed the corresponding mortgage. After they defaulted on the loan, the Bank filed a foreclosure action against several parties, including Mr. Kachkar. While the foreclosure case was pending, Mr. Kachkar was convicted of crimes in federal court (unrelated to the underlying case) and began serving his sentence.

Eventually, the trial court entered a consent final judgment of foreclosure against all defendants. The Bank later sought to vacate the consent judgment as to Mr. Kachkar because he had not consented to the judgment, and, thus, its entry was in error as to him. Once the judgment was vacated as to Mr. Kachkar, the Bank voluntarily dismissed him as a party and filed its motion to reschedule the sale.

The Bank's motion was set for hearing on September 26, 2019. On September 25, 2019, Mr. Kachkar filed an emergency motion to intervene, pursuant to Florida Rule of Civil Procedure 1.230. Contemporaneously, he mailed a letter to the trial judge, advising her of the motion's filing and requesting that an evidentiary hearing on the motion be held prior to the rescheduling of the foreclosure sale. He also requested permission to appear telephonically at the hearing, rather than in person,

because he was incarcerated. He filed the letter with the trial court clerk and served a copy on the Bank.

Mr. Kachkar's motion to intervene argued he had rights to the subject property as a signatory to the mortgage. The trial court never addressed his motion to intervene or the request for a telephonic hearing and re-set the sale.[1]

Due process requires that a person be afforded the opportunity to be heard. See, e.g., Reed v. Reed, 816 So. 2d 1246, 1247 (Fla. 5th DCA 2002) ("Due process requires that [the movant] be given [an] opportunity to be heard on his request and that his motion should not be summarily disposed of . . . ."). "This Court also has ruled that the failure to give due process notice and the failure to grant a necessary party's motion to intervene are defects that can render a judgment void." Goodman v. Goodman, 126 So. 3d 310, 314 (Fla. 3d DCA 2013) (citing Bernard v. Rose, 68 So. 3d 946, 948 n.3 (Fla. 3d DCA 2011)). Despite his request to the trial court for a hearing, Mr. Kachkar was not afforded an opportunity to be heard on his motion to intervene, and, as such, his right to procedural due process was violated. See, e.g., Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001).

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[1] The sale of the property proceeded on the re-set date, November 6, 2019, and the Bank was the highest bidder. A certificate of title has not yet issued because Ms. Benkovitch filed an objection to the sale, which has not been heard as of filing date of this opinion.

Reversed and remanded.

Third District Court of Appeal
State of Florida

Opinion filed December 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2387
Lower Tribunal No. 18-32567

Moises Wahnon,
Petitioner,

vs.

Coral & Stones Unlimited Corp.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Manos • Schenk, PL, and Tom J. Manos, for petitioner.

Daniel K. Bandklayder, P.A., and Daniel K. Bandklayder, and Douglas R. Feuer, for respondent.

Before FERNANDEZ, LOGUE, and MILLER, JJ.

LOGUE, J.

Moises Wahnon petitions for a writ of certiorari to quash orders imposing sanctions for civil contempt. The sanctions stem from Wahnon's refusal to answer

deposition questions based on his claim of the Fifth Amendment privilege against self-incrimination. The trial court found that Wahnon waived the privilege and that his invocation was in bad faith. The sanctions under review include (1) striking Wahnon's pleadings; (2) entering a default against Wahnon; (3) continuing to impose a $500 per day fine, totaling $157,000 as of October 31, 2019; and (4) issuing a writ of bodily attachment.

For the reasons stated below, we quash the orders under review. This case illustrates the problems that arise when a trial court attempts to use civil contempt to remedy the admittedly very real prejudice that arises when a party asserts the Fifth Amendment in a civil case.

BACKGROUND

Coral & Stones Unlimited Corp. and Wahnon are diamond merchants. Coral & Stones provided certain diamonds to Wahnon. The parties dispute the nature of their agreement in this regard, but Coral & Stones alleged the diamonds were provided under written agreements signed by Wahnon. This type of agreement, known as a memorandum, which is apparently standard in the industry, allows one merchant to provide diamonds to another for a short period of time so the diamonds can be shown to interested clients and then returned within a few days. If the client wishes to buy the diamonds, the parties negotiate a price and the merchants their respective commissions. Wahnon, however, asserts that he purchased the diamonds

outright, contingent on a payment on re-sale. When Wahnon failed to return the diamonds upon demand, Coral & Stones reported the diamonds as stolen to the police and sued Wahnon for replevin and civil theft.

Early in the case, Wahnon filed an affidavit in which he declared that he transferred the diamonds in a "bona fide sale to a third-party." But he refused to disclose additional details out of concern for his own and his client's right to privacy and his right to protect trade secrets. He did not assert the privilege against self-incrimination. On October 23, 2018, the trial court ordered Wahnon to submit to a deposition by the close of business on October 25, 2018.

On October 25, 2018, Wahnon was deposed for the first time. He testified that he sold the diamonds and obtained invoices documenting the transaction which he indicated he would disclose "when I need to." He otherwise declined to provide details regarding the sale, including the identity and location of the buyer. In so refusing, he again asserted his own and his client's right to privacy and the right to protect trade secrets. He did not mention the right against self-incrimination.

Coral & Stones moved for an order to show cause why Wahnon should not be held in contempt, and Wahnon moved for a protective order. At a December 11, 2018 hearing on the motions, the trial court overruled Wahnon's trade secrets and privacy objections and ordered Wahnon to answer questions regarding his sale of the diamonds to a third party.

On December 20, 2018, Wahnon was deposed for the second time. At this point, he asserted the Fifth Amendment privilege. In fact, he asserted the Fifth to nearly every question asked, whether or not pertinent to the disposition of the diamonds.[1] Coral & Stones subsequently moved for sanctions and Wahnon responded by again asserting the Fifth Amendment.

On March 25, 2019, the trial court entered the second sanction order. In it, the trial court ruled that Wahnon had waived the Fifth Amendment privilege: Wahnon, the trial court explained, "cannot use the [F]ifth [A]mendment as both a sword and shield, asserting the legitimacy of the transaction for this benefit and then refusing to disclose the details of the transaction on grounds that they may be incriminatory." The second sanction order found Wahnon in contempt. It further provided Wahnon would be taken into custody, his pleadings stricken, and a default entered unless, within 20 days, Wahnon answered questions regarding his transfer of the diamonds, including disclosing the buyer and the current whereabouts of the diamonds.

On November 7, 2019, the trial court entered its third sanction order, one of the orders under review. This order found that Wahnon was in continuing violation of the December 21, 2018 first sanction order and the March 25, 2019 second

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[1] For instance, Wahnon pleaded the Fifth Amendment when asked "What is your email address?"; "What is your wife's name?"; and "Are you still married?" Obviously, the Fifth Amendment privilege extends only to questions whose answers would be self-incriminating. See Eller Media Co. v. Serrano, 761 So. 2d 464, 466 (Fla. 3d DCA 2000).

sanction order. Based on Wahnon's nonfeasance in this regard, the trial court again found Wahnon in contempt, struck his pleadings, entered a default, and ordered that Wahnon would be taken into custody "without further hearing" unless he submitted a sworn affidavit with "a complete and detailed explanation" regarding the "disposition of the subject diamonds and their whereabouts" and paid the accrued fines, subject to a claim of financial inability to do so, by November 20, 2019. This third sanction order expressly referenced Wahnon's "failure to pay the Court imposed fine of $500 per day, accruing since December 21, 2018" which the order calculated as "amounting to $157,000 as of October 31, 2019." On December 2, 2019, the trial court issued a writ of bodily attachment.

This petition for certiorari followed.

ANALYSIS

"To grant certiorari relief, there must be: '(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law.'" Fla. Power & Light Co. v. Cook, 277 So. 3d 263, 264 (Fla. 3d DCA 2019) (quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012)). An order compelling potentially self-incriminating testimony qualifies as irreparable harm justifying the issuance of a writ of certiorari. See Aguila v. Frederic, 45 Fla. L. Weekly D2043 (Fla. 3d DCA Aug. 26, 2020). The question here thus turns to

whether the trial court departed from the essential requirements of law. See Boyle v. Buck, 858 So. 2d 391, 392 (Fla. 4th DCA 2003).

The Fifth Amendment provides no person "shall be compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const. The Fourteenth Amendment incorporates the Fifth Amendment so that the privilege against self-incrimination is protected from both federal and state action. See, e.g., Malloy v. Hogan, 378 U.S. 1, 8 (1964). The privilege applies in civil as well as criminal cases. Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

Of course, "[a] blanket assertion of the Fifth Amendment right is insufficient to invoke the privilege against self-incrimination." Uriquiza v. Kendall Healthcare Grp., Ltd., 994 So. 2d 476, 477 (Fla. 3d DCA 2008). Accordingly, "the 'central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.'" Florida Dep't of Revenue v. Herre, 634 So. 2d 618, 619 (Fla. 1994) (quoting Marchetti v. United States, 390 U.S. 39, 53 (1968)). Nevertheless, the United States Supreme Court "has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 419 U.S. 449, 461 (1975). "In view of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual

that undergirds the privilege," the standard for deciding whether the Fifth Amendment has been properly invoked in a civil proceeding is not demanding. Id. It concerns only whether "'the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him.'" Aguila, 45 Fla. L. Weekly D2043, at *2 (quoting Rainerman v. Eagle Nat'l Bank of Miami, 541 So. 2d 740, 741 (Fla. 3d DCA 1989)).

Here, it is apparent that Wahnon could have reasonable grounds to believe that forcing him to disclose what he did with the diamonds could aid in his criminal prosecution. Diamonds are a ready currency for illicit trafficking due to their high value, portability, and ease in anonymous transfer. Moreover, Coral & Stones itself reported to the police that Wahnon had stolen the diamonds; Coral & Stones sued for civil theft; and the statute of limitations for theft has not expired.

The trial court nevertheless determined that Wahnon had waived the privilege by initially testifying without raising the privilege. In reviewing this conclusion, we must be mindful that "waiver of the privilege will not be lightly inferred, and courts will generally indulge every reasonable presumption against finding a waiver." State v. Spiegel, 710 So. 2d 13, 16 (Fla. 3d DCA 1998) (citing Smith v. United States, 337 U.S. 137, 150 (1949)).

Coral & Stones cites two cases in support of the claim that Wahnon waived the privilege by his testimony. In Goethel v. Lawrence 599 So. 2d 232, 233 (Fla. 3d DCA 1992), this Court held that a party waived the privilege after he knowingly accepted a position as personal representative, which statutorily required him to produce an accounting of an estate, and "he made numerous prior representations and responses to the court concerning the subject of the accounting without then raising the privilege." Similarly, in Schlien v. Schlien, 763 So. 2d 350, 351 (Fla. 4th DCA 1998), the Fourth District held that a party who provided financial information to his expert accountant, which formed the basis of the financial information presented at trial, constituted a waiver of that party's Fifth Amendment privilege regarding that financial information. Here, however, Wahnon's testimony, while self-serving, was purely conclusory in nature and always accompanied by claims of privilege regarding the supporting details. Given these circumstances, Wahnon's testimony did not rise to the level found in Goethel and Schlien to constitute a waiver.

Although Wahnon first asserted other privileges before invoking the Fifth Amendment privilege, Wahnon never actually disclosed the privileged information before asserting the Fifth, and he consistently claimed the information was privileged. We are reluctant to find a voluntary waiver in these circumstances. Cf. Truly Nolen Exterminating, Inc. v. Thomasson, 554 So. 2d 5, 5–6 (Fla. 3d DCA

1989) ("A failure to assert a work-product privilege at the earliest opportunity, in response to a discovery motion, does not constitute a waiver of the privilege so long as the privilege is asserted by a pleading, to the trial court, before there has been an actual disclosure of the information alleged to be protected.").

While Wahnon did not waive the Fifth Amendment privilege, his assertion of that right in a civil case to bar relevant discovery nevertheless directly conflicts with Coral & Stones' constitutional right of access to the courts. See Art. I, § 21, Fla. Const. In these circumstances, civil courts face the considerable challenge of making "enough room for one party's right against self-incrimination without infringing upon the other litigant's right to use the court." Matthew C. Lucas, Balance of Silence: Weighing the Right to Remain Silent Against the Right of Access to Florida Civil Courts, 22 U. Fla. J.L. & Pub. Pol'y 1, 4 (2011). There is no easy fix to this dilemma. Any solution must be driven by the facts and circumstances of the individual case. Several guiding principles, however, emerge from the caselaw.

In these circumstances, the trial court must fashion a remedy that has the least intrusive impact on the assertion of the Fifth Amendment privilege while alleviating the prejudice to the other party and providing a "just, speedy, and inexpensive determination" of the underlying dispute. Fla. R. Civ. P. 1.010. The trial court's

toolkit in this regard includes, but is not limited to, staying the case,[2] preventing a witness from testifying or a party from presenting evidence,[3] and recognizing an adverse inference.[4] The more onerous remedies become appropriate "only where other, less burdensome, remedies would be an ineffective means of preventing unfairness" to the opposing party. Village Inn Rest. v. Aridi, 543 So. 2d 778, 781 (Fla. 1st DCA 1989) (quoting Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 (5th Cir. 1979)). Where the privilege has not been waived, the use of civil contempt to force a party asserting the Fifth Amendment to testify should be reserved for only the most extraordinary circumstances, if at all.

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[2] See Childs v. Solomon, 615 So. 2d 865, 866 (Fla. 3d DCA 1993) (noting a continuance, rather than dismissal or striking of the pleadings, may be an appropriate remedy when defendant in a civil proceeding asserts the Fifth Amendment). But see Urquiza, 994 So. 2d at 478 ("Although under certain circumstances, a trial court may grant a stay in a civil proceeding for a limited time during the pendency of a concurrent criminal proceeding, such a stay is not constitutionally required."); Klein v. Royale Grp., Ltd., 524 So. 2d 1061, 1062–63 (Fla. 3d DCA 1988) (finding too prolonged stay granted because parties were asserting the Fifth Amendment to be a departure from the essential requirements of law).

[3] See Sule v. State, 968 So. 2d 99, 105–06 (Fla. 4th DCA 2007) (holding that exclusion of a defense witness' testimony was not erroneous because invocation of the Fifth Amendment privilege prevented full and fair cross-examination as to material issues); Kelly v. State, 425 So. 2d 81, 84 (Fla. 2d DCA 1982) ("If a defendant's right to cross-examination on such matters [as a witness' credibility] is thwarted, the remedy is to strike the witness' testimony.").

[4] See Vasquez v. State, 777 So. 2d 1200, 1203 (Fla. 3d DCA 2001) (noting that a "trial court may draw an adverse inference against a party in a civil action who invokes his privilege against self-incrimination").

Petition granted.

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

TANIA M. TORRUELLA AND LUXURY LIVING
DEVELOPERS CORPORATION,

Appellants,

v. Case No. 5D19-3298

NATIONSTAR MORTGAGE, LLC AND
CITY OF ORLANDO,

Appellees.

____/

Opinion filed December 4, 2020

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

Adam H. Sudbury, of Apellie Legal,
Orlando, for Appellants.

Nancy M. Wallace, of Akerman LLP,
Tallahassee, and William P. Heller, of
Akerman LLP, Fort Lauderdale, and Eric
M. Levine, of Akerman LLP, West Palm
Beach, for Appellee, Nationstar Mortgage,
LLC.

No Appearance for Appellee, City of
Orlando.

WALLIS, J.

Tania Torruella appeals the trial court's final order denying her motion to tax attorney's fees and costs against Nationstar Mortgage, LLC. Because we conclude that the trial court properly denied Ms. Torruella's motion, we affirm.

In 2009, an action was brought to foreclose a mortgage executed by Ms. Torruella on real property now owned by Luxury Living Developers Corporation. Ms. Torruella is the president of Luxury Living. Following unsuccessful efforts to serve process on either Ms. Torruella or Luxury Living between 2009 and 2019, the trial court dismissed the foreclosure action for lack of personal jurisdiction. Ms. Torruella and Luxury Living then sought attorney's fees and costs pursuant to the note, mortgage, and section 57.105(7), Florida Statutes (2018). After a hearing, the trial court denied Ms. Torruella and Luxury Living's motion.

On appeal, Ms. Torruella[1] contends that the trial court's denial was improper because while the trial court may not have had personal jurisdiction in the foreclosure action, a post-judgment attorney's fee claim is a separate collateral claim that is independent of the main claims and defenses considered in the underlying action. Hence, she argues that the trial court erred in determining that she was estopped or that it lacked jurisdiction to adjudicate the post-judgment claim to recover attorney's fees and costs after the underlying action was dismissed for failure to effectuate service of process. We disagree.

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[1] While Luxury Living filed a notice of appeal, it properly concedes that it is not entitled to a fee award because it was not a party to the note and mortgage. See PNC Bank, N.A. v. MDTR, LLC, 243 So. 3d 456, 458 (Fla. 5th DCA 2018) (reiterating that stranger to contract cannot recover attorney's fees based on contract).

Florida follows the American Rule, which provides that litigants generally are not entitled to an award of attorney's fees for prevailing in litigation unless provided by statute or contact. See, e.g., In re Martinez, 416 F.3d 1286, 1288 (11th Cir. 2005); Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1214-15 (Fla. 2016); Price v. Tyler, 890 So. 2d 246, 250 (Fla. 2004); State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993). Below, Ms. Torruella moved for attorney's fees pursuant to the note,[2] the mortgage,[3] and section 57.105(7), Florida Statutes (2018), which provides for a reciprocal right to attorney's fees if the borrowers are the "prevailing party" in any lawsuit to enforce the note and mortgage. "A trial court's determination of whether a party prevails on the 'significant issues' in litigation so as to designate that party the prevailing party for the purpose of awarding attorney's fees is reviewed for an abuse of discretion." MacKenzie v. Centex Homes, 281 So. 3d 621, 624 (Fla. 5th DCA 2019). "'However, to the extent a trial court's order on attorney's fees is based on its interpretation of the law,' an appellate court employs the de novo standard of review." Moore v. Estate of Albee by Benzenhafer, 239 So. 3d 192, 194 (Fla. 5th DCA 2018) (quoting Infiniti Emp't Sols., Inc. v. MS Liquidators of Ariz., LLC, 204 So. 3d 550, 553 (Fla. 5th DCA 2016)).

In Florida, the prevailing party is the party who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Moritz

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[2] Paragraph 7(E) of the note states in relevant part: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees."

[3] Paragraph 22 states, in pertinent part: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence."

v. Hoyt Enters., Inc., 604 So. 2d 807, 810 (Fla. 1992) ("[T]he fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court.") (embracing federal standard for prevailing party status set forth in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)); see Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, 919 (Fla. 1990) (explaining that absent specific statutory provisions to contrary, party is deemed to be "prevailing" only at point where "[t]here must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed"). This standard, utilized by federal and Florida courts, requires a determination of whether a court-ordered material alteration of the legal relationship between the parties has occurred. Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach, 353 F.3d 901, 904-06 (11th Cir. 2003) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001)). "In other words, there must be: (1) a situation where a party has been awarded by the court 'at least some relief on the merits of his claim' or (2) a 'judicial imprimatur on the change' in the legal relationship between the parties." Id. at 905 (quoting Buckhannon, 532 U.S. at 603, 605).

A dismissal for lack of personal jurisdiction does not confer "prevailing party" status on the party over whom the trial court lacks jurisdiction because the trial court does not rule on any issue central to the merits of the dispute, and the legal relationship between the parties following such a disposition has not been materially changed. See, e.g., Am. Home Ass. Co. v. Weaver Agg. Transp. Inc., No. 10-cv-329, 2015 WL 12830413, at *7 (M.D. Fla. Jan. 14, 2015) (reiterating that dismissal for lack of personal jurisdiction does not confer "prevailing party" status on any party because party had mere procedural

victory but had not succeeded on significant issue in litigation that would achieve some of benefit sought in bringing suit); Equitrac Corp. v. Delany, No. 09-60629-CIV, 2009 WL 10667047, at *1 (S.D. Fla. Dec. 28, 2009) (stating that diversity case was dismissed for lack of personal jurisdiction, and defendant had not explained how this disposition—which was not on merits—made him 'prevailing party'); Flick Mortg. Investors, Inc. v. Metropolis Promotion Invest. & Props. (1993), Ltd., No. 04-cv-21900, 2008 WL 11417665, at *3 (S.D. Fla. Mar. 25, 2008) ("[A] dismissal for lack of personal jurisdiction does not make a defendant 'a prevailing party' for purposes of a fee provision."); see also Religious Tech. Ctr. v. Liebreich, 98 F. App'x 979, 986 (5th Cir. 2004) (applying Florida law and rejecting argument that finding that personal jurisdiction was wanting rendered defendant "the prevailing party" for purposes of fee provision in contract).

Here, the trial court only decided whether service of process was sufficient, not whether the foreclosure action had merit. Nationstar is still free to refile its action. Thus, at this stage of the proceedings, the legal relationship between the parties has not changed. While Ms. Torruella succeeded in dismissing the foreclosure action for lack of personal jurisdiction, she did not prevail on any "significant issue" in the overall litigation between the parties. Consequently, because "[t]he dismissal was based on procedural grounds and not a determination of any significant issue in the case[,] . . . . it [would have been] error to award Ms. [Torruella] prevailing party attorney's fees." See Shaw v. Schlusemeyer, 683 So. 2d 1187, 1188 (Fla. 5th DCA 1996).

Ms. Torruella's reliance on Finkelstein v. North Broward Hospital District, 484 So. 2d 1241 (Fla. 1986), and Martinez v. Giacobbe, 951 So. 2d 902 (Fla. 3d DCA 2007), is misplaced as neither of those cases concerned a dismissal for lack of personal

jurisdiction. As Ms. Torruella points out, in Finkelstein, the Florida Supreme Court recognized that "a post-judgment motion for attorney's fees raises a 'collateral and independent claim' [over] which the trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claim may have been concluded with finality." 484 So. 2d at 1243; see Martinez, 951 So. 2d at 904 (quoting Finkelstein, and further clarifying that "specific reservation of jurisdiction mentioning attorney's fees is not required"). Finkelstein also recognized that a post-judgment motion for prevailing party attorney's fees raises a "collateral and independent" claim because "the prevailing party simply cannot be determined until the main claims have been tried and resolved." 484 So. 2d at 1243.

While Nationstar concedes that the court did not need to reserve jurisdiction in the dismissal order to have jurisdiction to award fees, that is not relevant here. Instead, for determining "prevailing party," the focus is on the litigation of the main claims. Here, the dismissal was based on inadequate service of process, i.e., lack of personal jurisdiction, and thus, the main claim—the foreclosure–has not been litigated, i.e., tried and resolved, with any finality. See Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991) ("[T]he reference in [Finkelstein] to the 'collateral,' 'independent,' and 'ancillary' nature of claims for attorney's fees recognizes only that the proof required in such claims is not integral to the main cause of action."). Because the trial court did not have personal jurisdiction over Ms. Torruella to litigate the merits of the foreclosure action, it certainly would not have *continuing* jurisdiction to entertain a motion for attorney's fees.[4]

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[4] Ms. Torruella's reliance on Prime Insurance Syndicate, Inc. v. Soil Tech Distributors, Inc., 270 F. App'x 962 (11th Cir. 2008), is equally unavailing because that case concerned an award of statutory attorney's fees under the insurance code, section

We conclude, as did the trial court, that Ms. Torruella was not a "prevailing party" for purposes of reciprocal attorney's fees under section 57.105(7). The dismissal of the foreclosure action for lack of personal jurisdiction did not render her a "prevailing party" to be entitled to an award of attorney's fees under the note, mortgage, and section 57.105(7). The court did not err in denying an award of attorney's fees and costs.

AFFIRMED.

SASSO, J., and ORFINGER, M.S., Associate Judge, concur.

627.428, Florida Statutes. The Eleventh Circuit held a dismissal for lack of subject matter jurisdiction did not prevent an award of fees because section 627.428 permits an "award[] [of] attorney's fees even in cases where the insured party did not prevail 'on the merits.'" Prime, 270 F. App'x at 964 (collecting cases). However, section 627.428 runs counter to common law, which ordinarily requires "[t]he prevailing party is the party that won on the significant issues in litigation." Wells Fargo Bank Nat'l Ass'n, as Tr. & Cust. for Morgan Stanley ABS Capital, MSAC 2007-HE3 v. Bird, 234 So. 3d 833, 834 (Fla. 5th DCA 2018); see also Hallmark Ins. Co. v. Maxum Cas. Ins. Co., No. 6:16-cv-2063-Orl-37GJK, 2017 WL 3723706, at *2 (M.D. Fla. May 25, 2017) (holding that section 627.428 "must be strictly construed because an award of attorneys' fees is in derogation of common law"). This case does not involve an insurance dispute or section 627.428, and thus, the common law rule applies. Moreover, the reasoning in Prime seems to conflict with Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc., 739 F.2d 534 (11th Cir. 1984), an earlier case which Prime did not discuss, and which stated that an award of fees under section 627.428 is integral to the merits of the claim. See S.-Owners Ins. Co. v. Maronda Homes, Inc. of Fla., No. 3:18-CV-1305-J-32MCR, 2020 WL 1451684, at *4 (M.D. Fla. Mar. 25, 2020).