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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12536

D.C. Docket No. 1:18-cv-00357-RWS,
Bkcy No. 15-bkc-58440-WLH

In Re: BAY CIRCLE PROPERTIES, LLC,

Debtor.

CHITTRANJAN THAKKAR,

Plaintiff-Appellant,

DCT SYSTEMS GROUP, LLC,

Plaintiff,

versus

BAY POINT CAPITAL PARTNERS, LP,
BAY POINT ADVISORS, LLC,
CHARLES ANDROS,
JOHN DOE, 1,
JOHN DOE, 2,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 8, 2020)

Before WILSON, BRANCH, and JULIE CARNES, Circuit Judges.

WILSON, Circuit Judge:

Initially, when co-plaintiffs Chittranjan Thakkar and DCT Systems Group, LLC (DCT) jointly appealed to this court, we had no reason to doubt our jurisdiction. But then, after briefing, DCT settled and dismissed its appeal, leaving Thakkar as the sole appellant. DCT's exit created a jurisdictional problem—Thakkar, an individual without injury, lacks standing. We thus dismiss Thakkar's appeal.

I.

Thakkar claims to be "affiliated with" DCT. Thakkar and DCT each had loans with Wells Fargo. When DCT declared bankruptcy, Thakkar, DCT, and Wells Fargo entered into a Settlement Agreement for debt owed on the loans, securing them with two properties DCT owned and to which Thakkar asserted a "beneficial interest."[1] Thakkar alleges the properties were worth at least $8 million together. The Agreement included a deeds-in-lieu-of-foreclosure remedy for Wells

[1] For simplicity's sake, we omit reference to other entities involved in the bankruptcy case and attendant agreements.

Fargo: upon default, “Lender may at any time and in its discretion, without further notice to any Obligor or any other Person, record one or more of the Deeds in Lieu to effectuate a transfer of title to one or more Parcels of the Encumbered Property.”

Wells Fargo sold its interest in the Agreement to Bay Point, and DCT ultimately defaulted on the loans. Thakkar alleges that, upon default, DCT owed $2.7 million on the debt, and Bay Point chose to record the properties’ deeds. Thakkar alleges that recording one deed would have satisfied the debt. The bankruptcy court overseeing DCT’s bankruptcy authorized Bay Point “to exercise (in Bay Point’s sole discretion) any and all rights and remedies,” including foreclosure, and Bay Point pursued foreclosure on both properties.

Two days before the foreclosure sale, counsel for DCT purported to tender payment of the remaining debt to Bay Point, stating over email, “I can confirm to you that the sum of [$2.8 million] is in escrow to be tendered on behalf of DCT and such sum [can] be remitted to Bay Point upon receipt of written acknowledgment that it will accept this tender.” Bay Point did not respond. At the sale, Thakkar appeared and read the email letter aloud, but he did not produce payment. Bay Point sold the properties for $2.85 million.

Thakkar sued Bay Point in state court and added DCT as a plaintiff in an amended complaint. In the amended complaint, Thakkar alleges that Bay Point’s foreclosure of two properties caused him to lose the collateral's value exceeding the debt balance, and to suffer mental anguish.

Bay Point removed to bankruptcy court and moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which the court granted and entered for Bay Point. The district court affirmed the bankruptcy court in all respects. Thakkar and DCT appealed. On July 24, 2019, we granted DCT's motion to dismiss its appeal, following a settlement with Bay Point where DCT relinquished all claims regarding the two properties it owned. Now Thakkar alone challenges Bay Point's decision to record both properties' deeds instead of one and Bay Point's failure to accept the purportedly proper "tender."

II.

Article III standing "represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). We analyze three elements for Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The first of these is injury in fact—"an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted) (citations omitted). A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1.

At the pleading stage, "plaintiff[s] must clearly allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547 (2016) (alteration adopted) (internal quotation marks omitted). "[L]abels," "conclusions," or "naked assertions devoid of further factual enhancement" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration adopted) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Important too is that "standing is not dispensed in gross." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. ___, 137 S. Ct. 1645, 1650 (2017). An appellate court must examine its jurisdiction if the sole party with standing in the lower court is absent as an appellant. *See Diamond v. Charles*, 476 U.S. 54, 61 (1986). The ability of a party without its own standing to "piggyback" on another party's standing "exists only if the [party with standing] is in fact an appellant . . . ; in the absence of the [party with standing] in that capacity, there is no case." *Id.* at 64.

To start, DCT undoubtedly had standing, but now its "absence as an appellant requires that we examine our jurisdiction to entertain this appeal." *See id.* at 61. Thakkar can no longer piggyback on DCT's standing because DCT relinquished all claims to the properties in its settlement with Bay Point. He must have sufficiently alleged facts in the operative complaint to establish his own standing independent of any interest in DCT.

He did not. Thakkar failed to allege an actual injury personal to him. In the operative complaint, Thakkar alleges that Bay Point's foreclosure on DCT's two properties caused *him* to lose the collateral's value exceeding the debt balance, and to suffer mental anguish. But he also alleges that *DCT*—not he—was the properties' owner, and he otherwise fails to elaborate on the nature of his "beneficial interest" in DCT and its properties. Without more, we cannot say that any alleged loss Thakkar suffered as an individual is more than speculative. His "naked assertions devoid of further factual enhancement" will not suffice. *See Iqbal*, 556 U.S. at 678 (alteration adopted) (internal quotation marks omitted).

As for mental anguish, Thakkar asserted that, "[i]n a wrongful foreclosure action, an injured party may seek damages for mental anguish in addition to cancellation of the foreclosure," quoting *Blanton v. Duru*, 543 S.E.2d 448, 452 (Ga. Ct. App. 2000). But, unlike the injured party in *Blanton*, Thakkar has not demonstrated that he owned the foreclosed properties here. *See id.* at 449–50. On the contrary, he alleges DCT owned them. *Blanton* did not hold that a nonowner may seek damages for mental anguish, so *Blanton* does not benefit Thakkar.

To the extent Thakkar asserts other injuries, none amount to an injury in fact. He asserts on appeal that (1) he personally guaranteed the loans at issue; and

(2) the property could satisfy or decrease his personal liability stemming from judgments that two creditors have against him individually. First, the foreclosures satisfied the Settlement Agreement debt, so even assuming that he truly did personally guarantee the loans, it is unclear why any personal guaranty matters. And more importantly, we see no reference in his complaint to such a personal guaranty. Second, it is unclear how DCT's recovery of any lost property value would pay off Thakkar's alleged personal liability on creditors' judgments against him individually; he is neither a debtor nor creditor in the original bankruptcy proceedings. Indeed, in his supplemental brief, he says that he *or* the bankruptcy estate could get the property, and he offers no basis for concluding that the property would likely become his. And, anyway, the complaint contained no allegations about Thakkar's personal liability to these two creditors. All in all, because Thakkar failed to allege a particularized, actual injury for Article III standing, we have no jurisdiction over this appeal.

III.

Beyond Article III standing, "we have adopted the person aggrieved doctrine as our standard for determining whether a party can appeal a bankruptcy court's order." *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, 1325 (11th Cir. 2014). That "standard does not speak to a court's subject-matter jurisdiction. Rather, it tells us which parties may appeal from a bankruptcy court order." *Id.* at 1325 n.3. The "doctrine restricts standing more than Article III standing." *Heatherwood Holdings, LLC v. HGC, Inc. (In re Heatherwood Holdings, LLC)*, 746 F.3d 1206, 1216 (11th Cir. 2014). It "limits the right to appeal a bankruptcy court order to those parties having a direct and substantial interest in the question being appealed," i.e., those whom a bankruptcy court's order "directly, adversely, and pecuniarily" affects by "diminish[ing] their property, increas[ing] their burdens, or impair[ing] their rights." *Ernie Haire Ford*, 764 F.3d at 1325 (internal quotation mark omitted).

Based on that doctrine, we also dismiss this appeal because Thakkar certainly cannot clear the higher hurdle of showing that he is a person aggrieved. Assuming the bankruptcy-court order injured Thakkar at all, it did so indirectly because the order affected DCT's pecuniary interest, not Thakkar's. *See LorCon LLC # 1 v. Heyl (In re Heyl)*, 770 F.3d 729, 729–31 (8th Cir. 2014) (per curiam) (holding an individual did not have person-aggrieved standing because he had no more than a derivative interest in his company's claim). He fails to allege a direct and substantial interest in the question being appealed or explain how the order diminishes his—rather than DCT's—property, increases his burdens, or impairs his rights. *See Fortune Nat. Res. Corp. v. U.S. Dep't of Interior*, 806 F.3d 363, 366–67 (5th Cir. 2015) (holding entity had no person-aggrieved standing because it "did not show that it would have accessed any funds from the bankruptcy estate had the court not approved" a sale, and the contested order "left [the entity] in the same position").

Thakkar argues that he has person-aggrieved standing to appeal the bankruptcy-court order because the order will ultimately cause him financial loss akin to the loss suffered by homeowners in *Westwood Community Two Association, Inc. v. Barbee (In re Westwood Community Two Association, Inc.)*, 293 F.3d 1332 (11th Cir. 2002). However, *Westwood* is distinguishable. There, the trustee for a debtor homeowners' association imposed a special assessment on the homeowners to cover the cost of claims against the association in its bankruptcy proceeding. *Id.* at 1333–34. The homeowners appealed two bankruptcy-court orders: (1) an order denying their request to reconsider allowance of the claims against the debtor homeowners' association; and (2) an order allowing the special assessment. *Id.* at 1334. We held that, under the proper person-aggrieved standard, the homeowners had standing to challenge both orders because, in short, the orders directly permitted the special assessment that cost each homeowner thousands of dollars. *Id.* at 1336–37. Thakkar alleged no equivalent to the *Westwood* special assessment—no "direct financial stake" in the bankruptcy order at issue in this case. *See id.* at 1337. Therefore, Thakkar has not shown person-aggrieved standing under *Westwood*.

Finally, to the extent Thakkar argues that he is a person aggrieved simply by virtue of attacking the inherent fairness of a bankruptcy proceeding, citing *Ernie Haire Ford* and *Kabro Associates of West Islip, LLC v. Colony Hill Associates (In re Colony Hill Associates)*, 111 F.3d 269 (2d Cir. 1997), he is wrong. Thakkar misconstrues *Ernie Haire Ford* and its reference to *Kabro*. In *Ernie Haire Ford*, we merely referenced *Kabro* to support the proposition that three other circuits "have recognized that a person is not 'aggrieved' when the interests harmed by a court order are not interests the Bankruptcy Code seeks to protect or regulate." *Ernie Haire Ford*, 764 F.3d at 1326 (citing *Kabro Assocs. of West Islip*, 111 F.3d at 273–74). In the next sentence, we held that "for a person to be aggrieved, the interest they seek to vindicate on appeal must be one that is protected or regulated by the Bankruptcy Code." *Id.* But that was not to say that, if someone fails to assert a direct harm, he may still appeal if he attacks the inherent fairness of a proceeding. In fact, we later said, "Allowing appeals from parties who have suffered only an indirect harm *or* who hold interests outside the scope of the Bankruptcy Code would defeat the very purpose underlying our person aggrieved standard." *Id.* (emphasis added). In other words, a party must both show a direct harm *and* hold an interest within the scope of the Bankruptcy Code. *See id.* at 1327 ("Assuming arguendo that Atkinson has suffered a direct harm . . . , he is still not a person aggrieved because his interest is not protected or regulated by the

Bankruptcy Code.”). Thakkar’s harm is not cognizable, *see supra* section II, much less direct. Therefore, Thakkar is not a person aggrieved, and he may not pursue this appeal.

IV.

In conclusion, Thakkar lacks standing, whether Article III or person-aggrieved. So we dismiss this appeal.

DISMISSED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14490

D.C. Docket No. 1:17-cv-00253-MW-GRJ

AMANDA LAWSON-ROSS,
TRISTIAN BYRNE,

Plaintiffs - Appellants,

versus

GREAT LAKES HIGHER EDUCATION CORPORATION,

Defendant - Appellee.

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

(April 10, 2020)

Before WILLIAM PRYOR and JILL PRYOR, Circuit Judges, and ROBRENO,* District Judge.

JILL PRYOR, Circuit Judge:

Plaintiffs Dr. Amanda Lawson-Ross and Tristian Byrne (the "Borrowers") each took out federal student loans to finance higher education. The Borrowers' federal student loans were serviced by defendant Great Lakes Higher Education Corporation. The Borrowers alleged that Great Lakes made affirmative misrepresentations to them and other borrowers that they were on track to have their student loans forgiven based on their public-service employment when, in fact, their loans were ineligible for the forgiveness program. The Borrowers sued Great Lakes, bringing a variety of claims under Florida law, including the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55 *et seq*.

The district court ruled that the Borrowers' claims were preempted by a provision of the Higher Education Act of 1965, 20 U.S.C. §§ 1001 *et seq*. ("HEA"), which prohibits the application of state law disclosure requirements to loans made under federal student loan programs. 20 U.S.C. § 1098g. In this appeal, we must decide whether the HEA preempts state law claims alleging that student loan servicers made affirmative misrepresentations to borrowers regarding their eligibility for a federal program that forgives student loan balances. We hold

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* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

that the HEA—which expressly preempts state law disclosure requirements—does not preempt the Borrowers' claims here. We therefore vacate the district court's dismissal of the claims and remand for further proceedings.

I. STUDENT LOAN REGULATION

Congress enacted the HEA, the primary statute governing federal student loans, "to keep the college door open to all students of ability, regardless of socioeconomic background." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009) (internal quotation marks omitted); *see also* 20 U.S.C. § 1070(a). To fulfill this goal of improving access to higher education, the HEA established the Federal Family Education Loan Program ("FFELP"). *See* 20 U.S.C. § 1071.

Under the FFELP, lenders used their own funds to make loans, known as FFEL loans, to students attending postsecondary institutions. These loans were guaranteed by private guarantors and reinsured by the federal government. *See id.* § 1078(a)-(c). Although the federal government did not directly fund these loans, it served as the ultimate guarantor of the loans through the reinsurance program.[1] Lenders for FFEL loans contracted with loan servicing companies to manage borrowers' repayment of the loans.

[1] In 2010, the government stopped reinsuring new FFEL loans. 20 U.S.C. § 1071(d).

In time, Congress shifted away from the FFELP to the William D. Ford Federal Direct Loan Program. *See id.* §§ 1087a-1087j. Under this program, the federal government itself served as the lender, directly providing the funds for student loans. Because the federal government directly provided the funds for these loans, they aptly became known as "direct loans." *Id.* § 1087a(b)(2). The government contracted with non-government entities to service direct loans.

To encourage student loan recipients to enter and remain employed in public service jobs, Congress created the Public Service Loan Forgiveness Program ("PSLF" or the "PSLF Program"), to forgive direct loan balances for borrowers employed in government or not-for-profit organizations. *See* College Cost Reduction and Access Act, Pub. L. No. 110-84 § 401, 121 Stat. 784, 800 (2007). Under the PSLF Program, the federal government forgives outstanding student loan balances for borrowers who: (1) made 120 payments on their loan after October 1, 2007; (2) made these payments on an eligible direct loan; (3) were on a qualifying repayment plan; and (4) were employed in public service at the time of the loan forgiveness and had been employed in public service during the period in which the 120 payments were made. 20 U.S.C. § 1087e(m)(1).

A key requirement of the PSLF Program is that the 120 payments must be made on an "eligible Federal Direct Loan." *Id.* § 1087e(m). Congress defined an "eligible Federal Direct Loan" to include "a Federal Direct Stafford Loan, Federal

Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan." *Id.* § 1087e(m)(3)(A). Borrowers with other types of federal student loan debt—including FFEL loans—are ineligible for the PSLF Program. Borrowers with FFEL loans are not entirely out of luck, however. They may consolidate their loans into a Federal Direct Consolidation Loan to become eligible. *See id.* §§ 1078-3(b)(5); 1087e(m)(3)(A). But any payments they made before consolidation do not count toward the 120 payments required for the program.

The HEA also imposes obligations on student loan lenders and loan servicers.[2] Most relevant to the Borrowers' claims here are the requirements that lenders and servicers make various disclosures to borrowers. *See id.* § 1083. Although the HEA does not define the term "disclosure," it specifies the information that must be disclosed and when the disclosures must occur. *Id.* § 1083(a)-(b), (e). The HEA mandates disclosures at or during particular points in time, including: (1) at or before the disbursement of loan proceeds (19 required disclosures); (2) at or before the start of repayment (13 required disclosures); and (3) periodically during repayment. *See id.* § 1083(a)-(b), (e). Certain information must be provided with each bill or statement sent to the borrower, including the

[2] Direct loans are subject to the "same terms, conditions, and benefits" as loans issued under the FFELP. 20 U.S.C. § 1087e(a)(1).

original principal amount of the loan, the borrower's current outstanding loan balance, the loan's interest rate, and the total amount the borrower has paid in interest and in the aggregate. *Id.* § 1083(e)(1). Additional information must be disclosed when the borrower either has provided notice that she is having difficulty making payments or is 60 days delinquent in making payments. *See id.* § 1083(e)(2)-(3).

Along with imposing these disclosure requirements, the HEA expressly preempts the imposition of state law disclosure requirements. Section 1098g, entitled "Exemption from State disclosure requirements," provides:

> Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the [HEA] . . . shall not be subject to any disclosure requirements of any State law.

Id. § 1098g.

II. BACKGROUND

A. Factual Background

Defendant-appellee Great Lakes services the Borrowers' federal student loans. The Borrowers allege that Great Lakes representatives told them they were eligible for forgiveness of their loans through the PSLF Program, and only later did they discover they were not eligible—after they had already made payments that could not then be counted toward the PSLF Program.[3]

Plaintiff-appellant Lawson-Ross has a master's degree and a doctoral degree in counseling psychology. She borrowed to finance both degrees. The majority of her loans were not Federal Direct Loans.[4] Since completing her doctorate, Lawson-Ross has been employed at the University of Florida working in its Counseling and Wellness Center and also at Florida Gulf Coast University's Counseling and Psychological Services Office. Given this work in public service, Lawson-Ross expected that after 10 years of working her student loans would be forgiven through the PSLF Program.

Once she began repaying her student loans in 2007, Lawson-Ross regularly contacted Great Lakes to "ensur[e] that she was on track to receive the benefits of the PSLF." Doc. 24 at ¶ 41.[5] During her communications with Great Lakes representatives, she inquired about her eligibility for the PSLF Program, and the representatives "repeatedly and explicitly" told her that she was "on track to

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[3] We describe the facts as alleged in the Borrowers' complaint. In reviewing the grant of a motion to dismiss, we accept the well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

[4] The complaint did not identify what the type of loans Lawson-Ross had; it alleged only that they were not Federal Direct Loans.

[5] Citations in the form "Doc. #" refer to the numbered entries on the district court's docket.

benefit [from] PSLF, *that her loans qualified under that program*, and that she would not need to complete any additional forms until her 10 years of public service was completed." *Id.* at ¶ 42 (emphasis added).

In July 2017, however—almost 10 years later—a Great Lakes representative told Lawson-Ross that she was ineligible for the PSLF Program. She was ineligible because most of her loans were not Federal Direct Loans—the only loans eligible for the PSLF Program. As a result, none of the payments she had made during those 10 years counted toward the PSLF Program. Had Lawson-Ross known that her loans were ineligible for the PSLF Program, she either could have made sure she was eligible for forgiveness under the PSLF Program (presumably by consolidating her loans) or undertaken a different career path.

Plaintiff-appellant Byrne graduated with an associate degree in criminal justice. She took out FFEL loans to help finance her education. Byrne learned about the PSLF Program while working for the Pinellas County Sheriff's Office. When she learned about the program, she reached out to Great Lakes to ask whether her job with the sheriff's office would qualify her for the program. A Great Lakes representative informed her that to qualify for the PSLF Program, she needed only to work full time in her current job, complete an application, have human resources fill out a form certifying her employment, and apply for incomebased payments. Great Lakes represented that once Byrne had made 120 payments on her student loans, the remainder of her loan balance would be forgiven.

Byrne followed Great Lakes's instructions. She submitted an application for loan forgiveness. After hearing nothing from Great Lakes, she submitted a second application. Several months later, Great Lakes told Byrne that she was ineligible for the PSLF Program because her loans were not Federal Direct Loans. If Great Lakes had not misinformed Byrne, she would have taken the steps necessary to ensure that she was eligible for the PSLF Program.

As a federal student loan servicer, Great Lakes was responsible for collecting payments from borrowers, providing borrowers with repayment options, managing borrowers' student loan accounts, and communicating with borrowers about their loans. Great Lakes held itself out as an authority for advice about the best path to student loan repayment. It did so, the Borrowers alleged, by stating on its website, "You should never have to pay for student loan advice or services. Call us, instead. Our representatives have access to your latest student loan information and are trained to understand all of your options." *Id.* at ¶ 29.

The United States Department of Education ("DOE") also encouraged borrowers to consult their federal loan servicers regarding repayment and options for borrowers having trouble making their loan payments. The DOE made statements such as: "Work with your loan servicer to choose a federal student repayment plan that's best for you;" "Your loan servicer will help you decide whether one of these plans is right for you;" "Always contact your loan servicer immediately if you are having trouble making your student loan payment;" and "Why pay for help with your federal student loans when your loan servicer will help you for FREE? Contact your servicer to apply for income-driven repayment plans, student loan forgiveness, and more." *Id.* at ¶ 27. Therefore, the Borrowers reasonably looked to Great Lakes for advice about the PSLF Program and relied on Great Lakes's representations.

B. Procedural History

The Borrowers filed a complaint against Great Lakes alleging that it misrepresented that they were on track to benefit from the PSLF Program when they were not and that they were harmed by these misrepresentations. They further alleged that Great Lakes had incentives to put its own interests ahead of the Borrowers whose loans it serviced so that it could continue to service the loans and benefit from the extra principal, fees, and interest that it would not otherwise have collected had the Borrowers been given correct information so that they could make their loans PSLF-eligible.

On behalf of a class of similarly situated borrowers, the Borrowers brought claims under Florida law for breach of fiduciary duty, negligence, unjust enrichment, breach of implied-in-law contract, and violation of the FCCPA. *See*

Fla. Stat. § 559.72.[6] The Borrowers Lawson-Ross and Byrne alleged that they and the other class members spent years making payments that they believed, based on Great Lakes's representations, qualified for the PSLF Program, only to find out years later that none of their loan payments counted toward loan forgiveness.

Great Lakes moved to dismiss the case for failure to state a claim. Among other arguments, Great Lakes maintained that the Borrowers' claims were expressly preempted under § 1098g of the HEA. Invoking § 1098g's explicit preemption of "any disclosure requirements of any State law," 20 U.S.C. § 1098g, Great Lakes argued that the Borrowers' claims were based on alleged failures to disclose information. Allowing these state law claims to proceed, they contended, would effectively impose additional disclosure requirements, in violation of § 1098g.

After Great Lakes filed its motion to dismiss, the Secretary of the DOE issued a notice outlining the agency's position regarding federal preemption of state law by the HEA. *See* Federal Preemption and State Regulation of the Department of Education's Federal Student Loans Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (Mar. 12, 2018) (the "Notice"). In the Notice, the Secretary announced that "Congress intended section 1098g to preempt any

[6] The FCCPA prohibits false representations regarding the character or status of a debt and forbids use of deceptive debt collection methods. Fla. Stat. § 559.72.

State law requiring lenders to reveal facts or information not required by Federal law." *Id.* at 10621 (alteration adopted) (internal quotation marks omitted).[7] According to the Notice, state laws imposing "new prohibitions on misrepresentation or the omission of material information" ran afoul of § 1098g's express preemption provision. *Id.*

Great Lakes notified the district court that the Notice "squarely addresse[d] the preemption issue" in Great Lakes's favor. Doc. 30 at 3. The district court then directed the parties to file supplemental briefs regarding the Notice and whether the court should defer to it.

In its supplemental briefing, Great Lakes again argued that the Borrowers' claims were simply restyled nondisclosure claims that were expressly preempted. It further argued that even if the court were to accept that the Borrowers' claims were based on affirmative misrepresentations rather than failures to disclose, the claims nevertheless should be dismissed for failure to satisfy the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. Claims based on affirmative misrepresentation, Great Lakes contended, "sound in fraud"

[7] The Notice further explained that it "interprets disclosure requirements under section 1098g of the HEA to encompass informal or non-written communications to borrowers as well as reporting to third parties such as credit reporting bureaus." Notice, 83 Fed. Reg. at 10621 (internal quotation marks omitted).

and therefore must satisfy the requirements of Rule 9(b). Doc. 34 at 19–21 (internal quotation marks omitted).

The district court granted Great Lakes's motion to dismiss, concluding that the Borrowers' claims were expressly preempted by § 1098g. The court addressed only the preemption arguments. It construed Great Lakes's alleged misrepresentations as a "failure to provide accurate information," or "in other words . . . [a] disclosure." Doc. 44 at 8. Then, looking to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the district court determined that the DOE's guidance in the Notice was entitled to deference and concluded that the HEA expressly preempted the Borrowers' Florida state law claims and granted the motion to dismiss.[8] The Borrowers appealed that decision, which we now review.

III. STANDARD OF REVIEW

We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim. *See Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1317 (11th Cir. 2006). We likewise review *de novo* whether federal law preempts a state law claim. *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc).

IV. DISCUSSION

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[8] Because the district court concluded that the Borrowers' claims were preempted, it did not reach the issue of whether the complaints' allegations otherwise sufficed to state a claim for relief.

The Constitution's Supremacy Clause makes federal law "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. When applying the Supremacy Clause, we begin "with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (alterations adopted) (internal quotation marks omitted). "The purpose of Congress is the ultimate touchstone" of preemption analysis. *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). In determining Congress's purpose, we look to the "text and structure of the statute at issue." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Where Congress legislates in a field traditionally occupied by the states, the presumption against preemption "applies with particular force." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

Congress's intent to preempt state law may be stated expressly in a statute or implied by the statute's structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Absent express preemption language, congressional intent to preempt state law will be implied where there is a "conflict with a congressional enactment," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001), or where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation" in a particular area of law, *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (internal quotation marks omitted). These forms of implied preemption are known as conflict preemption and field preemption, respectively.

In this appeal we confront the question of whether the Borrowers' state law claims are preempted, expressly or otherwise, by the HEA. Our answer to the question is no. We divide our analysis into two parts. In Part A, we address why the Borrowers' claims are not expressly preempted by § 1098g of the HEA. In Part B, we explain why the Borrowers' claims are not preempted implicitly, either by conflict or field preemption.

A. The Borrowers' Claims Are Not Expressly Preempted.

We first consider whether the Borrowers' claims are preempted by express language in the HEA. The HEA includes various provisions that explicitly preempt certain areas of state law. *See, e.g.*, 20 U.S.C. §§ 1078(d) (state usury laws); 1091a(a)(2) (state statutes of limitations); 1091a(b)(2) (state law infancy defense). Section 1098g, entitled, "Exemption from State disclosure requirements," is one such express preemption provision. It provides:

> Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the [HEA] . . . shall not be subject to any disclosure requirements of any State law.

Id. § 1098g.

It is clear, and the parties do not contest, that § 1098g expressly preempts state laws requiring federal student loan servicers to make additional disclosures beyond what the HEA requires. The Borrowers' complaint attempts to impose state disclosure requirements on servicers, Great Lakes argues, because their affirmative misrepresentation claims, at their core, are based on a failure to disclose correct information. We reject Great Lakes's characterization of the Borrowers' claims and its argument that § 1098g so broadly preempts state law. We conclude that the precise language Congress used in § 1098g preempts only state law that imposes disclosure requirements; state law causes of action arising out of affirmative misrepresentations a servicer voluntarily made that did not concern the subject matter of required disclosures impose no "disclosure requirements."

Before we address Great Lakes's characterization of the Borrowers' claims, as an initial matter we must "identify the domain expressly pre-empted" by § 1098g. *Cipollone*, 505 U.S. at 517 To identify the domain expressly preempted by Congress, we read "the words of a statute . . . in their context and with a view to their place in the overall statutory scheme." *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (internal quotation marks omitted). Section 1098g concerns "disclosure requirements," but the HEA does not define "disclosure requirements" or "disclosure." The HEA does, however, identify the disclosures it requires. *See* 20 U.S.C. § 1083(a), (b), (e). Viewed in its statutory context, then, the term "disclosure requirements" refers to the HEA's requirements that certain information be communicated to borrowers during the various stages of a loan, as laid out in § 1083 of the statute. Thus, the domain § 1098g preempts is the type of disclosures to borrowers that § 1083 requires.

We now turn to the nature of the Borrowers' state law claims. We examine whether these claims are based on failures to disclose, as Great Lakes contends, such that allowing the claims to proceed would violate § 1098g. The Borrowers allege that Great Lakes made affirmative misrepresentations to them while they were in the repayment stage of their federal student loans. The most relevant part of the HEA is § 1083(e), which details the "[r]equired disclosures during repayment." *See id*. § 1083(e). Section 1083(e) principally requires the servicer to disclose information about the loan itself, including: the original principal amount of the loan, the borrower's current outstanding balance, the loan's interest rate, the fees the borrower has been charged, the total amount paid in interest on the loan, and the aggregate total amount the borrower has paid on the loan. *See id.* § 1083(e)(1). In addition, when a borrower is having difficulty making payments, the servicer must provide a description of available repayment plans, the requirements for forbearance on the loan, and the options to help the borrower avoid defaulting on the loan. *See id*. § 1083(e)(2).

Comparing these types of disclosures to the communications between Great Lakes and the Borrowers here, we find little to no similarity. Although at first blush the subject of the communications at issue might appear to resemble a description of payment plans or options to prevent default, the Borrowers were not behind on payments or facing default. Instead, they requested information about a loan forgiveness program for borrowers employed in public service jobs, specifically, whether they were in a position to meet that program's requirements. Great Lakes's voluntary, personalized, affirmative misrepresentations in the form of advice about whether an individual borrower was on track to qualify for the PSLF Program was different in kind from any disclosure required by this subsection or any other provision of the HEA. The Borrowers' claims therefore did not correspond with a failure to make a disclosure under the HEA.

In concluding that the Borrowers' affirmative misrepresentation claims are simply restyled failure-to-disclose claims and so allowing the claims to proceed would impose state law disclosure requirements on servicers in violation of § 1098g, the district court never considered what constitutes a disclosure under § 1083 or any other provision of the HEA. Without reference to the HEA's identification of information required to be disclosed, the district court stated that "[c]laims that a servicer provided inaccurate information [are] no different than a claim that Great Lakes failed to make proper disclosures." Doc. 44 at 9. Great

Lakes contends that this position is supported by *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010). We first explain why Great Lakes's characterization of the Borrowers' claims as failure-to-disclose claims is untenable and then explain why *Chae* fails to persuade us otherwise.

Taking a close look at the Borrowers' complaint, we see no allegation that Great Lakes failed to provide them with any information that it had a legal obligation to disclose. Rather, the Borrowers alleged that when Great Lakes chose to provide them with information it was not required to disclose—about their eligibility for the PSLF Program—it gave false information.[9] If instead the Borrowers had alleged that Great Lakes had a duty to inform them whether they qualified for the PSLF Program, such a claim might well be preempted. But here, Great Lakes was not required to say anything about loan forgiveness. It could have remained silent instead of giving the Borrowers advice. Holding Great Lakes liable for offering false information would therefore neither impose nor equate to imposing on servicers a duty to disclose information. It would simply require

[9] The Borrowers additionally argue that § 1083, read together with DOE regulations, suggests that Congress intended to draw a distinction between written "disclosures" and "other communications" between a borrower, on the one hand, and a lender or servicer, on the other, *see* 34 C.F.R. § 682.205(a)(4)(ii). The Borrowers contend that this distinction leads to the conclusion that the HEA provides no "guidance regarding what loan servicers may or may not communicate in informal telephonic communications." Appellants' Br. at 23. Therefore, they argue, federal law does not preempt state law with respect to such communications. Because we conclude that the affirmative misrepresentations Great Lakes allegedly made were not subject to disclosure requirements under the HEA, we need not address this argument.

Great Lakes and other servicers to speak truthfully when they choose to speak about a borrower's qualification for the PSLF Program or any other topic on which servicers have no duty to disclose.

We find support for this distinction between an affirmative misrepresentation and a failure to disclose in the law of torts. To succeed on a failure-to-disclose claim, the plaintiff must establish that there was a duty to speak and the duty was breached. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) ("[O]ne who fails to disclose material information . . . commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them" (alteration adopted) (internal quotations omitted)). In contrast, a claim alleging an affirmative misrepresentation does not rely on a duty to disclose. *See Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 649 (7th Cir. 2019) ("The common law tort of fraud ordinarily requires a deliberately false statement of material fact. An omission or failure to disclose, on the other hand, will not support a common law fraud claim . . . ." (citations omitted)). Here, the Borrowers alleged no duty to disclose information about the Borrowers' eligibility for PSLF, only a duty to speak truthfully; we thus reject Great Lakes's characterization of the Borrowers' claims as failure-to-disclose claims.

We now address Great Lakes's argument that the Ninth Circuit's decision in *Chae* supports its characterization of the Borrowers' claims as restyled failure-to-disclose claims.[10] Great Lakes argues that *Chae* is persuasive as a "nearly identical" case. Appellee's Br. at 41. At issue in *Chae* were state law claims challenging how a federal student loan servicer communicated its methods of calculating interest, assessing late fees, and setting the first repayment date. *Chae*, 593 F.3d at 940–41. The borrowers in *Chae* claimed, in part, that the servicer violated California's unfair competition law and Consumer Legal Remedies Act by failing to disclose key information about these methods in its billing statements and coupon books.[11] *Id.* at 942. The Ninth Circuit concluded that these

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[10] Great Lakes also argues that the Borrowers' claims are similar to a fraudulent misrepresentation theory the Supreme Court held to be expressly preempted by § 5 of the federal Public Health Cigarette Smoking Act of 1969 ("PHCSA"). *Cipollone*, 505 U.S. at 510. We disagree that the Borrowers' claims are analogous to the preempted fraudulent misrepresentation theory in *Cipollone*. First, the preemption statute at issue in *Cipollone* contained broader, different language than § 1098g of the HEA. Second, the Borrowers' affirmative misrepresentation claims are more like the second theory of fraudulent misrepresentation addressed in *Cipollone*. The Court held in *Cipollone* that the plaintiffs' second theory of fraudulent misrepresentation was not preempted because it was based not on a duty related to smoking and health, the subject of the PHCSA, but "rather on a more general obligation[,] the duty not to deceive." *Id.* at 528–29 (plurality opinion). Similarly, the Borrowers' claims are based not on a duty to disclose but the duty not to deceive. Thus, we are not persuaded by Great Lakes's argument that *Cipollone* leads to a contrary conclusion.

[11] The plaintiffs in *Chae* also brought claims against the servicer for breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and the use of fraudulent and deceptive practices apart from the billing statements. *See Chae*, 593 F.3d at 943. Because the Ninth Circuit held that these claims were not expressly preempted, we do not discuss them here.

misrepresentation claims were simply restyled nondisclosure claims that were expressly preempted by § 1098g. *Id.* at 943.

Importantly, these claims challenged how the servicer communicated information that the HEA required it to disclose. *Id.* at 942–43; *see Nelson*, 928 F.3d 649–50 ("The plaintiffs in *Chae* complained about the supposed failures to disclose key information in specific ways, such as loan terms and repayment requirements. Since the defendant was required to disclose that information by federal law and had disclosed it in ways permitted by federal law, the Ninth Circuit found that the plaintiffs were implicitly seeking to impose additional disclosure requirements under state law.") Here, however, the Borrowers made no claim that Great Lakes disclosed in a misleading manner information it was required to disclose; rather, they alleged that Great Lakes voluntarily provided information on a matter on which it was not required to disclose, and while doing so made affirmative misrepresentations. *Chae* does not persuade us that the Borrowers' claims are expressly preempted.

Without a doubt, § 1098g of the HEA expressly preempts a state law's imposition of disclosure requirements on federal student loan servicers, but the Borrowers do not allege that Great Lakes had a duty to disclose anything about the PSLF Program—and in fact it had no such duty. Section 1098g of the HEA does not expressly preempt the Borrowers' claims.

B. The Borrowers' Claims Are Not Otherwise Preempted.

Having concluded that the Borrowers' claims are not expressly preempted, we next turn to Great Lakes's argument that the Borrowers' claims are preempted implicitly, either by the doctrine of conflict or of field preemption.[12]

1. Conflict Preemption Does Not Apply to the Borrowers' Claims.

Even where state law is not expressly preempted, it may nevertheless be preempted where it "conflicts with federal law." *Cipollone*, 505 U.S. at 516. Conflict preemption can occur when (1) it is impossible for a party to comply with both state and federal law, or (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks omitted). We conclude that conflict preemption does not apply here due to the general implication that arises when Congress has expressly preempted specific areas of state law: that it did not intend to preempt state law more broadly. But even if the inference against preemption should not be drawn here, the Borrowers' claims present no conflict with federal law because we remain unconvinced that the purpose Great Lakes advances—uniformity for uniformity's sake—is in fact a goal of the HEA.

[12] The district court did not address conflict or field preemption; having concluded that the Borrowers' claims were expressly preempted, the court had no need to address implied preemption.

When Congress has explicitly addressed preemption in a statute, an implication arises that it did not intend to preempt other areas of state law. *Graham*, 857 F.3d at 1189; *see Nelson*, 928 F.3d at 648 (reasoning that the inclusion of other express preemption provisions in the HEA "weigh[s] against attributing to Congress a desire to preempt state law broadly"). In *Cipollone*, the Supreme Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone, 505 U.S. at 517 (internal quotation marks and citations omitted). Based on this implication, we conclude that conflict preemption does not apply. In the HEA, Congress included provisions expressly preempting specific areas of state law, including § 1098. *See, e.g.*, 20 U.S.C. §§ 1078(d) (state usury laws); 1091a(a)(2) (state statutes of limitations); 1091a(b)(2) (state law infancy defense). Section 1098g "offer[s] no cause to look beyond" it. *Cipollone*, 505 U.S. at 517. We therefore find "no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the HEA. *Id.* (internal quotation marks omitted).

But even assuming that conflict preemption could exist here despite the HEA's express preemption provisions, we would nonetheless conclude that the Borrowers' claims present no conflict with the HEA.[13] Great Lakes argues that the Borrowers' state law claims would interfere with, and therefore stand as an obstacle to, what Great Lakes contends was Congress's objective in the federal student loan program: uniformity of communications between loan servicers and borrowers.[14] Great Lakes's argument fails because it rests on the mistaken premise

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[13] Great Lakes argues that we must defer to the DOE's determination in the Notice that Congress intended for the HEA to preempt state laws regulating servicers of FFEL loans. *See* Notice, 83 Fed. Reg. at 10621. But we conclude that the Notice is entitled to no special deference. We find persuasive the district court's analysis of what deference the Notice is owed in *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26, 48–49 (D.D.C. 2018), and similarly conclude that *Skidmore*, 323 U.S. at 138, 140, provides the appropriate framework for determining whether the agency's determination is entitled to deference. Under *Skidmore*, we conclude that the Notice should be given little weight because "it is not particularly thorough and it 'represents a stark, unexplained change' in the Department's position." *Nelson*, 928 F.3d at 651 n.2 (quoting *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 50). We acknowledge that the Notice also addresses express preemption; however, we find the Notice unpersuasive as to express preemption for the same reason.

[14] Relying on *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508 (1988), Great Lakes also advances a broader theory of conflict preemption, one based on the "uniquely federal interest in uniformity." Appellee's Br. at 28. In *Boyle*, the Supreme Court held that state law is preempted where there is: (1) "an area of uniquely federal interest" and (2) a "significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation." *Boyle*, 487 U.S. at 507 (alteration adopted) (citations and internal quotation marks omitted). Great Lakes argues that there is a uniquely federal interest present in the HEA because loan servicers act under contracts with the federal government.

It is true that when liability is imposed on federal government contractors, the interest of the federal government is affected. The inquiry does not end there, however, because even though the conflict in an area of uniquely federal interest "need not be as sharp as that which must exist for ordinary pre-emption," a "conflict there must be." *Id.* at 507–08. Because we conclude that uniformity is not an overarching goal of the HEA, no such conflict exists, and *Boyle* is inapplicable.

that Congress's goal in enacting the federal student loan program was such uniformity. Congress expressly identified the purposes of the program to include: (A) "encourag[ing] States and nonprofit institutions and organizations to establish adequate loan insurance programs for students," (B) "provid[ing] a Federal program of student loan insurance for students or lenders who do not have reasonable access to a State or private nonprofit program of student loan insurance," (C) "pay[ing] a portion of the interest on loans to qualified students which are insured," and (D) "guarantee[ing] a portion of each loan insured under a [qualified] program of a State or of a nonprofit private institution or organization." *See* 20 U.S.C. § 1071(a)(1). Notably, Congress did not use the word "uniformity" or invoke the concept of uniformity in § 1071(a)(1).

Absent a statement or other indication from Congress that its purpose in enacting the FFELP was uniformity, multiple courts that have examined this issue have determined that uniformity was not a goal of the HEA. *See Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2005) ("We are unable to confirm that the creation of 'uniformity' . . . was actually an important goal of the HEA."); *Daniel v. Navient Sols., LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018) ("Uniformity, however, is not one of Congress's expressed goals in enacting the HEA . . . ."); *see also Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *9 (Conn. Super. Ct. Dec. 20, 2011) (unpublished) (concluding that "because uniformity is not mentioned as a goal of the HEA," compliance with the Connecticut Unfair Trade Practices Act "is not an obstacle to the achievement of the objectives of the HEA").

We acknowledge that the Ninth Circuit in *Chae* concluded otherwise when it determined that although some of the borrowers' claims were not expressly preempted by § 1098g, they nonetheless were implicitly preempted because they posed an obstacle to the uniform operation of FFELP and therefore the HEA. *Chae*, 593 F.3d at 946. In concluding that uniformity was an intended purpose of the HEA, the Ninth Circuit relied on the comprehensive framework of the FFELP, citing congressional direction to the DOE in the FFELP that referenced the standardizing of forms, procedures, terms, conditions, and benefits throughout the federal student loan programs. *Id.* at 944–45. The Ninth Circuit then determined that allowing state law causes of action to proceed would conflict with that purpose. *Id.* at 943, 945.

We are unconvinced by the Ninth Circuit's conclusion that uniformity was an intended purpose of the HEA. Accepting the Ninth Circuit's reasoning that the HEA, through regulations in the FFELP, provides a detailed comprehensive scheme or the standardization of certain procedures and other aspects of the federal student loan program does not lead us to its conclusion because we do not infer preemption from the comprehensive nature of a regulation alone. *N.Y. State Dep't* *of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973). Although the guidance provided by Congress in the FFELP is comprehensive, "subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Id.* *Chae* is also distinguishable because the Ninth Circuit identified the Congress's purpose as the "uniform administration" of the FFELP. 593 F.3d at 944–55, 948. The claims in *Chae* concerned assessment of late fees, establishing repayment start dates, and interest calculations—core administrative aspects of the FFELP that arguably require more nationwide consistency than the subject of the claims at issue here, personalized advice about loan forgiveness provided to individual student loan borrowers. *See id.*; *see also Nelson*, 928 F.3d at 651 (noting that the broad language regarding conflict preemption in *Chae* "focused on different sorts of claims, where the value of uniformity would be more compelling than it is here" and "assum[ing] the need for nationwide consistency on those sorts of administrative mechanics is substantial").

Even if we assume that uniformity is a purpose of the HEA, the Borrowers' claims would not conflict with that purpose. Congress's interest in ensuring uniform disclosures would not be harmed by a prohibition on voluntary affirmative misrepresentations *See Cipollone*, 505 U.S. at 529 ("State-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards.") (plurality opinion); *see also Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 553 (M.D. Pa. 2018) ("Whether or not 'uniformity' is actually a goal of the HEA . . . [t]he uniformity of the HEA in setting its requirements for the standard parameters of the federal student loan programs is not harmed by prohibiting unfair or deceptive conduct in the operation of those programs that is not explicitly permitted by the HEA . . . .").[15] We agree with the reasoning of these courts: prohibiting Great Lakes from making affirmative misrepresentations to borrowers—in contrast to imposing a duty to disclose—does no harm to standardization of disclosures for federal student loan programs.

2. The HEA Does Not Preempt the Field of Regulation of Student Loans.

Relying on its argument that the HEA requires uniform administration, Great Lakes argues that field preemption also applies. Field preemption exists where Congress has "legislated so comprehensively" in an area of law that there is no room for supplemental state legislation. *R.J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 140 (1986).

We find Great Lakes's field preemption argument to be the weakest of its preemption arguments. This Court previously has addressed the question of field

[15] An appeal of this decision is currently pending before the Third Circuit. *See Pennsylvania v. Navient Corp.*, No. 19-2116 (3rd Cir).

preemption by the HEA in the context of debt collection and consumer protection law. *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125–26 (11th Cir. 2004). Taking into account the HEA's express preemption provisions, we concluded in *Cliff* that "the enactment of the HEA does not 'occupy the field' of debt collection practices and thus does not impliedly preempt [state laws]." *Id.* at 1126. We similarly conclude here that federal regulation of lending to students for higher education is not so extensive as to indicate that Congress intended to occupy the entire field. The mere fact that Congress has legislated in this field does not imply that it seeks to occupy the entirety of it. *See Keams v. Tempe Tech. Inst., Inc.*, 39 F.3d 222, 226 (9th Cir. 1994) (observing that "a detailed regulatory scheme does not by itself imply preemption of state remedies" or an intent by Congress to occupy the entire field). Given the implication against implied preemption where Congress has expressly preempted specific areas of state law, *see Cipollone*, 505 U.S. at 517, we conclude, as we did in *Cliff*, that field preemption does not apply to the HEA.

Our conclusion is consistent with decisions from other courts addressing field preemption by the HEA. Indeed, no circuit court that has considered the issue has found field preemption. *See Nelson*, 928 F.3d at 652 ("Courts have consistently held that field preemption does not apply to the HEA, and we do as well."); *Chae*, 593 F.3d at 941–42 (noting that "field preemption does not apply to the HEA"); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (concluding that "federal education policy regarding [lending to students] is not so extensive as to occupy the field"). Field preemption does not apply to the Borrowers' claims.

V. CONCLUSION

The district court erred in concluding that the Borrowers' claims were preempted by the HEA. We note that Great Lakes raised in the district court additional arguments why the Borrowers' claims should be dismissed, including that the Borrowers failed to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. But "[b]ecause none of these issues were decided initially, we decline to address them for the first time on appeal." *Leal v. Ga. Dep't of Corrs.*, 254 F.3d 1276, 1280–81 (11th Cir. 2001). We thus vacate the district court's order granting the motion to dismiss and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

First District Court of Appeal
State of Florida

No. 1D18-4146

MTGLQ Investors, L. P.,

Appellant,

v.

Darrell Moore, Samantha Snow, etc.,

Appellees.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

April 9, 2020

Per Curiam.

MTGLQ appeals a final judgment in favor of Samantha Snow and Darrell Moore in this mortgage foreclosure case. MTGLQ contends the trial court erred in denying foreclosure and discharging the *lis pendens*, thereby eliminating its secured interest in the subject property. Because the trial court abused its discretion and erred as a matter of law, and because its factual findings are not supported by competent, substantial evidence, we reverse the denial of foreclosure and remand for further proceedings consistent with this opinion. We affirm, without further comment, the trial court's determination that the proceedings are not barred by res judicata.

Facts

MTGLQ filed a foreclosure complaint against Snow and Moore seeking a judgment of foreclosure on the mortgaged property. Receiving no timely response to the complaint, the trial court ordered responses by a date certain. Again, no responses were filed by Snow or Moore, so MTGLQ requested a default judgment. Ultimately, Moore filed a response in the form of a motion, and on the same day, the trial court set the matter for trial. At trial, MTGLQ's corporate representative, Snow, Moore, and Moore's current wife all testified. The trial testimony revealed that in October 2004, Snow—who at the time was married to Moore—executed a promissory note (Note) in favor of Flagstar Bank in the amount of $243,750.00. Moore, however, did not sign the Note. Snow and Moore then jointly entered a mortgage agreement with Flagstar Bank, granting it a security interest in the subject property, which was owned by both parties.

The mortgage, in relevant part, provides as follows:

> 1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.
>
> Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.
>
> . . . .
>
> 13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.
>
> Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security instrument; (b) is not personally obligated to pay the sums secured by

> this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

The Note was transferred among various entities between 2004 and 2016, with MTGLQ being the owner and holder of the note when this foreclosure complaint was filed. MTGLQ's corporate representative testified that the loan had been in default since October of 2012.[1] He also testified to the contents of corporate records admitted into evidence, which showed the loan history and amounts owed under the Note and mortgage.

The testimony established that Snow and Moore divorced in 2007. Snow testified, without objection, that the divorce decree named Moore as solely responsible for the Note payments. Pursuant to the divorce decree, she quitclaimed the subject property to Moore. In turn, Moore was to take the necessary actions to remove her name from the Note, whether by refinance or otherwise. However, Moore did not do so. Neither Snow nor Moore entered any divorce order into evidence, and in fact, during the trial, Moore stated he did not want to introduce the divorce decree. In May 2008, Snow wrote a letter to Countrywide Home Loans, which at that time apparently owned the Note. In the letter, Snow specifically refused to give any authorization for Countrywide to supply information pertaining to the loan. She also wrote that "a court" had ordered Moore to make all payments and that the loan was not to remain in her name. No evidence was presented that Countrywide ever received a copy of any divorce order or received authorization from Snow to speak with Moore about the loan.

Moore testified, without objection, that he attempted to make a payment on the loan in September of 2007 to NetBank but was informed that it had been closed by the Office of Thrift

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[1] The testimony revealed that no payments had been made in eleven years. Countrywide Home Loans had filed a foreclosure in 2008, but ultimately dismissed the case.

Supervision.[2] He contacted the Federal Deposit Insurance Corporation and was told that the loan was held by either Countrywide or EverBank. He testified that he got through to Countrywide by using Snow's social security number, but never elaborated at trial as to his specific conversation with any bank representatives about receiving access to the loan. At some unknown date, he was able to speak to lender representatives about possible reinstatement of the loan. He further asserted that the amounts the lenders were demanding to be paid to reinstate the loan were amounts he could not afford. In his opinion, Countrywide imposed additional charges somewhere between "$15,000, $20,000, or $30,000" that appeared to him to be improper. He acknowledged that he understood MTGLQ's position in the case and that he did not want to be liable for any deficiency. He did not establish, when he spoke to lenders, which lenders he spoke to, or any specific conversations he may have had with the lenders.

During Moore's testimony, which occurred after MTGLQ's representative testified, the trial court raised, *sua sponte*, the issue of whether MTGLQ or any of its predecessors had unclean hands. Neither Snow nor Moore had raised this affirmative defense in any responsive pleadings or at trial. The trial court also announced during Moore's testimony that it believed that MTGLQ had the burden to show it had clean hands when it sought to foreclose on the property. No objection was raised by MTGLQ.

Ultimately, the trial court ruled that the foreclosure was precluded by the lack of clean hands on the part of a prior lender. In support, the trial court found that Countrywide, when it was the lender, should have complied with the divorce decree, taken

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[2] The Office of Thrift Supervision, a former federal bureau of the Department of the Treasury, "was abolished effective October 19, 2011, and its rulemaking authority and operative rules were transferred to other agencies pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act." *Removal of Office of Thrift Supervision Regulations*, 82 Fed. Reg. 47,083 (Oct. 11, 2017) (noticing removal of 12 C.F.R. Chapter V, effective October 11, 2018).

the loan out of Snow's name, given Moore access to the account information, and allowed Moore to accept responsibility for the loan and make monthly payments. The trial court further concluded that Moore attempted to keep the loan current, and that Countrywide improperly imposed charges as an attempt to extort Moore to agree to pay more than what was due. As a result, the trial court concluded that MTGLQ was not entitled to foreclose. As a remedy, the trial court ordered that the principal balance be frozen in time, with Moore having the option to reinstate the loan. If he chose to do so, MTGLQ would be required to file a new amortization schedule based solely upon the outstanding principal amount of the loan.

Subsequently, Moore filed a notice to reinstate the loan. MTGLQ, pursuant to the trial court's order, filed an amortization schedule. However, the trial court rejected MTGLQ's proposed amortization schedule because it did not provide an address where Moore should send his monthly payments. Also, the trial court believed that MTGLQ's proposals in responding to Moore's desire to reinstate the loan added conditions that modified the trial court's previous order. As a result, the trial court ordered MTGLQ take nothing as to Snow, denied the request for foreclosure, and eliminated any security interest that MTGLQ had in the subject property. In the same order, despite the fact Moore was not a signor on the Note, the trial court held that Moore owed MTGLQ the principal amount of the loan, but granted Moore thirty days from the date of the judgment to refinance the property with a lender of his choice. This is MTGLQ's appeal.

Legal Analysis

When a trial court's decision is based, in part, on factual findings, it presents a mixed question of law and fact. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003). The trial court's factual findings are reviewed under a competent, substantial evidence standard. *Id.* The trial court's application of the law to the facts is reviewed *de novo*. *Id.* "The trial court's interpretation of the contract is a matter of law subject to a de novo standard of review." *Imagine Ins. Co., Ltd. v. State ex rel. Dep't of Fin. Servs.*, 999 So. 2d 693, 696 (Fla. 1st DCA 2008) (quoting *Jenkins v. Eckerd Corp.,* 913 So. 2d 43, 49 (Fla. 1st DCA 2005)).

Unclean hands is an equitable defense akin to fraud; its purpose is to "discourage unlawful activity." *Bank of Am., N.A. v. Pate*, 159 So. 3d 383, 385 (Fla. 1st DCA 2015) (citing *Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.,* 105 So. 3d 602, 609 (Fla. 4th DCA 2013)). The words "sneaky" and "deceitful" have been equated with unclean hands. *Hensel v. Aurilio*, 417 So. 2d 1035, 1038 (Fla. 4th DCA 1982). *Hensel* also observed that "[e]quity will stay its hand where a party is guilty of conduct condemned by honest and reasonable men. Unscrupulous practices, overreaching, concealment, trickery or other unconscient[i]ous conduct are sufficient to bar relief." *Id.* (quoting 22 Fla. Jur. 2d Equity § 50). Relying on the partial dissent of Judge Walden in *Cain v. Cain*, 436 So. 2d 367, 369 (Fla. 4th DCA 1983), the court in *Hitt v. Hitt*, 535 So. 2d 631, 634 (Fla. 4th DCA 1988), observed that "[d]enying access to the [c]ourt based on the doctrine of unclean hands is an extreme sanction which ought to be invoked under only the most provocative or contumacious circumstances. It is tantamount to striking a party's pleadings.' *Id.*

The trial court's findings and its application of the doctrine of unclean hands is not supported by competent, substantial evidence or the law. In its decision, the trial court placed great emphasis on Countrywide's refusal to comply with Snow and Moore's divorce decree. However, no evidence was presented that Countrywide ever received it. In fact, Moore refused to introduce the divorce decree into evidence. The only evidence of a divorce and the terms thereof was Snow's May 14, 2008, letter to Countrywide, in which she specifically refused to give authorization to Countrywide to disclose information pertaining to the loan but demanded she be taken off the loan.

Even if the terms of the divorce were known by Countrywide, there is no legal authority that demands a lender be bound by the terms of a divorce decree in a case to which it was not a party, and then have its collateral stripped if it does not modify its note and mortgage to comport with a court's order in a divorce case. Here, the trial court determined that Countrywide acted wrongfully by refusing to remove Snow as the payor of the Note and have Moore installed as the new debtor. However, courts are not free to alter or extinguish a divorcing couple's financial obligations to their lenders. "It is well established in this state that an acceleration clause or promise in a mortgage confers a contract right upon the note or mortgage holder which he may elect to enforce upon default." *David v. Sun Fed. Sav. & Loan Ass'n*, 461 So. 2d 93, 95 (Fla. 1984). "Safeguarding the validity of such contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions." *Id.*

Thus, we agree with MTGLQ that under Florida law while a foreclosure may be a proceeding in equity, "[o]nly under certain clearly defined circumstances may a court of equity refuse to foreclose a mortgage." *Id.* "Mere notions or concepts of natural justice of a trial judge which are not in accord with established equitable rules and maxims may not be applied in rendering a judgment." *Id*; *accord Smiley v. Manufactured Hous. Assocs. III Ltd. P'ship*, 679 So. 2d 1229, 1232 (Fla. 2d DCA 1996) ("We recognize that mortgage foreclosure is an equitable remedy. However, in determining whether to grant equitable relief, the trial court cannot look solely to the result but must apply rules which confer some degree of predictability on the decision-making process." (internal citation omitted)).

Moore was not a party to the Note and could not force the holder to enter into a new contract with him to reinstate or modify the Loan. Under Florida law, "[c]ourts may not rewrite contracts . . . ." *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993) (citing *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)); *see also Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 739 (Fla. 2002) (noting that a court cannot create additional terms of a contract "out of whole cloth" (quoting *Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40, 41 (Fla. 3d DCA 1985))). Here, Snow was the only party to sign the Note, and while Moore signed the mortgage, its plain language detailed that he did so only in his capacity as the co-owner of the property and had no other substantive rights in the mortgage transaction.

MTGLQ argues, and we agree, that the trial court's disregard for the plain language of the mortgage and apparent determination that Moore had the right to be added as a borrower under the Note constitute a gross abuse of discretion. To the extent the trial court reasoned that the divorce decree (which was not introduced into evidence) required Countrywide to substitute Moore in the place of Snow as the borrower under the Note, such a finding is erroneous. Initially, the court that issued the divorce decree had no more power to unilaterally rewrite the terms of the Note and mortgage than did the trial court. Moreover, there is no evidence that Countrywide or any other lender or servicer was a party to Moore and Snow's divorce proceeding. "It is axiomatic that a trial court may not issue an injunction that interferes with the rights of those who are not parties to the action." *Trans Health Mgmt. Inc. v. Nunziata*, 159 So. 3d 850, 857 (Fla. 2d DCA 2014); *accord Oakland Props. Corp. v. Hogan*, 117 So. 846, 848 (Fla. 1928) ("The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants, so that a complete decree may be made binding upon all parties.").

The trial court's finding that Moore attempted to keep the loan current is also not supported by competent, substantial evidence. Moore testified that he attempted to make a payment back in 2007 and generally advised of several attempts to call lenders. The evidence showed he lived in the house for eleven years without making a payment. He did not pay any property taxes or tender payment for insurance. However, he did spend money for improvements to the house. For the doctrine of unclean hands to apply, a party must prove injury. *See McCollem v. Chidnese*, 832 So. 2d 194, 196 (Fla. 4th DCA 2002). In this case, neither Moore nor Snow were injured as a result of any mortgagee's conduct. Moore does not owe MTGLQ under the Note. He lived in the house for several years without making any payments; all the while interest accrued with the various mortgagees paying property taxes and insurance. Snow is not injured because she was always responsible for the amounts MTGLQ seeks. Her demand that she be taken off the loan without anything more does not absolve her from the responsibility of paying the debt she incurred. As with Moore, she has spent several years not paying amounts she obligated herself to pay.

Regarding the trial court's determination that Countrywide erroneously charged Snow and Moore between $15,000 to $30,000, this finding too is not supported by the evidence presented at trial. The only testimony presented by Moore was that it appeared to him that he was overcharged by Countrywide. The business records introduced at trial reveal that the total amount owed consists of the principal amount of $213,193.85, $66,252.20 in interest, $64,753.51 for property taxes and hazard insurance, and $12,997.77 for additional charges that appear to be for items such as property preservation, inspections, pool maintenance, filing fees, and court costs, all of which were amounts that could properly be awarded pursuant to the Note and mortgage. It should also not be overlooked that the business records reflect that some late fees, including those imposed by Countrywide, were apparently waived and not sought by MTGLQ in the total amount claimed.

Lastly, the trial court erred by awarding relief that was never requested by Snow or Moore. "'A trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent.'" *Bayview Loan Servicing, LLC v. Newell*, 231 So. 3d 588, 590 (Fla. 1st DCA 2017) (quoting *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945 (Fla. 4th DCA 2015)). In fact, "granting relief, which was neither requested by appropriate pleadings, nor tried by consent, is a violation of due process." *Id.* (quoting *Bank of Am., N.A. v. Nash*, 200 So. 3d 131, 135 (Fla. 5th DCA 2016)). It is only under clearly defined circumstances that a court using its equitable powers should refuse to foreclose a mortgage. *David*, 461 So. 2d at 95.

Conclusion

Even if the trial court's factual findings were supported by competent, substantial evidence—we find they were not— such facts do not support the trial court's legal conclusion that MTGLQ was estopped from foreclosing because it had unclean hands through a predecessor lender. The trial court's order that MTGLQ be stripped of its collateral as a result of unclean hands is also not supported by the law. The application of unclean hands is reserved for those who act unlawfully and attempt to trick and deceive others. In this case, the evidence does not establish that MTGLQ or the former lenders acted in an unlawful or deceitful manner that merits the denial of a foreclosure and an extinguishment of the mortgage on the subject property. Not relieving Snow of her obligation to pay a debt she incurred and substituting Moore as the payor of the Note is not unlawful or deceitful conduct. Additionally, even if insurance overcharges were charged several years before, the trial court's decision to deny the foreclosure and strip MTGLQ's collateral is too extreme of a sanction where the trial court had the alternative remedy of reducing the total amount due.

Accordingly, we REVERSE the final judgment entered in favor of Snow and Moore. Additionally, because the evidence adduced at trial otherwise established MTGLQ's right to foreclose, we REMAND with directions that the trial court enter an *in rem* final judgment of foreclosure. Because Moore is not legally obligated by the Note to pay any amounts due, the final judgment of foreclosure should reflect that no deficiency judgment be entered against Moore. The trial court's determination that res judicata does not bar the proceedings is AFFIRMED.

WOLF and M.K. THOMAS, JJ., and DUNCAN, J. SCOTT, ASSOCIATE JUDGE, concur.

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

Brian A. Wahl of Bradley Arant Boult Cummings LLP, Birmingham, for Appellant.

No appearance for Appellees.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2802

CHARLES TIMMONS,

Appellant,

v.

LAKE CITY GOLF, LLC d/b/a The Country Club At Lake City, a Florida limited liability company; CARL STE MARIE, an individual; and NICOLE STE. MARIE, as successor member to Claude Ste. Marie, deceased,

Appellees.

On appeal from the Circuit Court for Columbia County.
Mark E. Feagle, Judge.

April 7, 2020

ROWE, J.

Charles Timmons appeals a final judgment confirming an arbitration award. Timmons argues that the judgment is not final because it merely confirms the arbitration award and lacks traditional words of finality. He also asserts that the trial court erred by not entering judgment in his favor or including language in the judgment giving him the right of execution and final process. We affirm.

Facts

Timmons, his wife, Regina, along with Claude Ste. Marie, Nicole Ste. Marie, and Carl Ste. Marie, formed Lake City Golf Club, LLC in 2009. Years later, after Regina Timmons and Claude Ste. Marie passed away, a dispute arose among the remaining parties about Carl Ste. Marie's handling of the LLC's finances. The parties resolved the dispute through mediation. The settlement agreement reached at mediation granted Timmons a mortgage against the LLC for $1,750,000 to be secured by real estate and other LLC assets. Under the agreement, the LLC was to make mortgage payments to Timmons. But because of material changes in the financial condition of the LLC, no payments were ever made.

To recover the payments and enforce the settlement agreement, Timmons sued the LLC and Carl Ste. Marie. Ste. Marie moved to compel arbitration pursuant to the LLC's operating agreement. The parties went to arbitration. The arbitrator found that the settlement agreement reached at mediation was enforceable and that the LLC breached the agreement. The arbitrator found that the LLC owed Timmons about $1,850,000. Timmons sought authority to execute on the mortgage. But the arbitrator denied Timmons' request after finding that the LLC could not afford to pay the mortgage. Instead, the arbitrator recommended that a receiver be appointed to begin judicial dissolution of the LLC. The arbitrator later amended the arbitration award to clarify that the trial court would determine the priorities of the distribution of the net proceeds derived from the judicial dissolution of the LLC.

Timmons then moved in the circuit court to confirm the amended arbitration award and to enter judgment in his favor. The LLC and the Ste. Maries also moved to confirm the arbitration award, but opposed the entry of final judgment for Timmons. Instead, they argued that the trial court should appoint a receiver and order the receiver to seek judicial dissolution of the LLC.

After a hearing, the trial court entered a final judgment confirming the arbitration award. The court found that the LLC owed Timmons around $1,850,000. The court appointed a receiver and authorized the receiver to begin judicial dissolution of the

LLC. The court retained jurisdiction to enter any necessary orders to enforce the judgment. This appeal follows.

Analysis

We review a final judgment confirming an arbitration award for an abuse of discretion. *Nucci v. Storm Football Partners*, 82 So. 3d 180, 181 (Fla. 2d DCA 2012).

Timmons claims the trial court erred in three respects when it entered the final judgment confirming the arbitration award. First, he argues that the judgment is not final because it merely confirms the arbitration award and lacks traditional words of finality. Second, Timmons contends that the trial court should have entered judgment in his favor. Third, he asserts that the trial court should have included language in the judgment giving him the right of execution and final process. Each argument lacks merit.

First, Timmons argues that the trial court's judgment was not final because it merely confirmed the arbitration award. After entry of an arbitration award, a party to the arbitration may move in circuit court for an order confirming the award. § 682.15, Fla. Stat. (2018). The court must then "issue a confirming order unless the award is modified or corrected pursuant to s. 682.10 or s. 682.14 or is vacated pursuant to s. 682.13." § 682.12, Fla. Stat. Once the court confirms the arbitration award, unless there is a pending motion to correct or modify the award, the trial court must then enter a final judgment. § 682.15(1), Fla. Stat. (2018).

The question presented here is whether the trial court merely confirmed the arbitration award or entered a final judgment. If the trial court merely confirmed the arbitration award, the judgment is not final and not appealable. *Ross v. Prospectsplus!, Inc.*, 182 So. 3d 802, 803 (Fla. 2d DCA 2016). We find that the judgment was final because the trial court did more than just confirm the arbitration award. Though the judgment incorporates the arbitration award and clarification order, the trial court also cited section 682.15 and titled its ruling as a final judgment. And the trial court appointed a receiver to begin judicial dissolution of the LLC so that the receiver could distribute the dissolution proceeds.

Finally, while the final judgment includes a retention of jurisdiction, the trial court retained jurisdiction only to enforce the judgment. This retention of jurisdiction does not disturb the finality of the judgment. *See Prime Orlando Props., Inc. v. Dep't of Bus. Regulation*, 502 So. 2d 456, 459 (Fla. 1st DCA 1986) (holding that a clause reserving jurisdiction to enforce an order does not destroy the finality of the order).

Even so, Timmons argues that the judgment is not final because it does not include traditional words of finality like "go hence without day" or "let execution lie." This argument fails because finality does not depend on whether the trial court uses particular words or phrases. *Hoffman v. Hall*, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002); *see also Ball v. Genesis Outsourcing Sols., LLC*, 174 So. 3d 498, 500 (Fla. 3d DCA 2015) (explaining the origins of the phrase "go hence without day"). Rather, a judgment is final when it puts an end to judicial labor, with only execution and enforcement of the judgment remaining. *City of Tallahassee v. Big Bend PBA*, 703 So. 2d 1066, 1069 (Fla. 1st DCA 1997). The judgment here does just that. The judgment confirms the arbitration award, providing that the terms of the award are "incorporated into this Final Judgment by reference as the Final Judgment of this Court." The judgment also includes the amount owed to Timmons, directs the process for the receiver to begin judicial dissolution of the LLC, and directs the receiver to determine the priorities in the distribution of the dissolution proceeds. The judicial labor in this case came to an end, leaving the receiver to execute the judgment through new judicial proceedings to dissolve the LLC. There is nothing more for the trial court to do. The judgment is final.

Next, Timmons asserts the trial court erred by entering a final judgment that did not conform to the arbitration award. When a trial court confirms an arbitration award, it must enter judgment in conformity with the arbitration award. § 682.15, Fla. Stat.; *see also Polley v. Garner*, 98 So. 3d 648, 649 (Fla. 1st DCA 2012). Timmons argues that the judgment is inconsistent with the arbitration award because it does not grant judgment in his favor. But Timmons can point to no provision of the arbitration award or clarification order that requires entry of a judgment in his favor. Though the arbitrator determined the amount the LLC owed to

Timmons, the arbitrator recommended the appointment of a receiver to begin judicial dissolution of the LLC and to determine the priorities of distribution (including any distribution to Timmons) of the net proceeds of the sale of the LLC's assets. The final judgment confirmed the arbitration award and provided the relief necessary to carry out the terms of the arbitration award. And thus, the relief provided in the final judgment properly conformed to the relief awarded in arbitration.

Finally, Timmons argues that the judgment is flawed because it does not include language giving him the right of execution and final process. We disagree. The final judgment does not provide that relief because the arbitration award did not contemplate that type of relief. The arbitrator determined the amount of money owed to Timmons under the mortgage. And even though Timmons sought damages, attorneys' fees, and costs against the LLC, the arbitrator did not award that requested relief. Instead, the arbitrator recommended that the trial court appoint a receiver with customary powers to dissolve the LLC and to present to the receivership court the priorities of distribution of company assets. The final judgment provides that the amount owed to Timmons "shall be paid by the Receiver under the judicial dissolution and receivership proceedings," and that "thereafter" the receivership court shall determine the priorities of distribution of net proceeds from judicial dissolution and sale of company assets. The final judgment thus establishes the sole process for Timmons to recover the debt owed to him from the assets of the LLC. For these reasons, the trial court did not err by not granting Timmons the right of execution and final process in the final judgment. We, therefore, AFFIRM the final judgment confirming the arbitration award.

KELSEY, J., concurs; MAKAR, J., concurs with opinion.

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

MAKAR, J., concurring.

I fully concur and point out that the trial court was required to confirm the arbitration award in this case as it found it. As the trial court noted in its final judgment of confirmation, the arbitration award and a clarification were "filed with this Court in this action *without* a request to modify, correct, or vacate either of them." (Emphasis added.) By not attempting to modify, correct or vacate the arbitration award, the plaintiff acquiesced in its enforcement method, making it incumbent on the trial judge to enter a final judgment specifying that plaintiff is owed approximately $1,850,000 plus pre-award interest and that the amount owed to plaintiff "shall be paid . . . under the judicial dissolution and receivership proceedings" in accordance with the arbitration award and clarification. Affirmance of the trial court's order is thereby appropriate.

Meagan L. Logan and Sara Jane Carter of Douglas & Carter, Lake City, for Appellant.

Jeffrey R. Dollinger of Scruggs, Carmichael & Wershow, P.A., Gainesville, for Appellee Lake City Golf, LLC; Guy W. Norris of Norris & Norris, P.A., Lake City, for Appellees Ste. Marie.

Third District Court of Appeal
State of Florida

Opinion filed April 8, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-503
Lower Tribunal No. 15-23794

City of Miami Beach, etc.,
Appellant,

vs.

Florida Gas Transmission Company, LLC, etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Holland & Knight LLP, and Rodolfo Sorondo, Jr. and Christopher N. Bellows, for appellant.

Smolker, Bartlett, Loeb, Hinds & Thompson, P.A., and Ethan J. Loeb, Jon P. Tasso and Latasha L.C. Scott (Tampa); Banker Lopez Gassler PA, and Chris W. Altenbernd (Tampa), for appellee.

Before LOGUE, LINDSEY and GORDO, JJ.

PER CURIAM.

The City of Miami Beach appeals an order granting Florida Gas Transmission Company, LLC's motion for partial summary judgment, declaring that Florida Gas had rights in a disputed easement. Because the order is a non-final, non-appealable order, we dismiss the City's appeal for lack of jurisdiction.

"At the outset, we note that the order does not constitute an appealable final order." Mid–Continent Cas. Co. v. Flora–Tech Plantscapes, Inc., 225 So. 3d 336, 337–38 (Fla. 3d DCA 2017) (citing Ball v. Genesis Outsourcing Sols., LLC, 174 So. 3d 498, 499 (Fla. 3d DCA 2015); Lidsky Vaccaro & Montes, P.A., v. Morejon, 813 So. 2d 146, 149 (Fla. 3d DCA 2002)). The City agrees but argues that the order is appealable either as one granting immediate possession of property or because it is, in effect, an injunction. See Fla. R. App. P. 9.130(a)(3)(B), (a)(3)(C)(ii).

We find the order under review does not grant immediate possession of property. It confirms the existence of an easement, allowing Florida Gas to maintain its pipeline—a pipeline that has been in place since 1959. In fact, no one disputes Appellee's right to have its gas pipes in the right of way, but only whether that right is pursuant to easement, permit, franchise, or some combination thereof. Moreover, the trial court's order does not function as an injunction because it does not specifically mandate or prohibit any City action. Cf. Mid–Continent Cas., 225 So. 3d at 339–40 (holding that an order declaring that the insurer had a contractual duty to defend did not operate as an injunction conferring jurisdiction under Rule

9.130(a)(3)(B) because the court did not compel the insurer to defend). The order does not define the parameters of the easement that it purports to recognize, and, indeed reserves that determination for a later proceeding. Accordingly, we find the order does not rise to the level either of a grant of immediate possession of property or of an injunction prohibiting the City from undertaking construction in its rights-of-way. For this reason, we decline to exercise jurisdiction under Florida Rule of Appellate Procedure 9.130.

Dismissed.

Third District Court of Appeal

State of Florida

Opinion filed April 8, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1404
Lower Tribunal No. 18-2976

Law Offices of Granoff & Kessler, P.A.,
Appellant,

vs.

Richard Randal Glass, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Law Offices of Granoff & Kessler, P.A., and Roy E. Granoff, for appellant.

Mark Goldstein, for appellees.

Before SALTER, SCALES and LOBREE, JJ.

SALTER, J.

The Law Offices of Granoff & Kessler, P.A. ("Law Offices"), appeal a final judgment denying Law Offices' claim for allegedly-unpaid legal fees against its former client, Richard Randal Glass ("Mr. Glass"). The legal basis for the denial of attorney's fees was Law Offices' failure to present independent expert testimony regarding the value of the legal services allegedly rendered.

We reverse, joining two of our sibling District Courts in recognizing that an attorney's claim for breach of contract against his or her own client does not require such expert testimony. We distinguish this and similar cases from clear and well-established precedent pertaining to motions for attorney's fees claimed against an opposing party.

Background and Procedural History

Mr. Glass retained Law Offices in a detailed, three-page written fee agreement captioned "Law Offices of Granoff & Kessler, P.A. Fee Agreement and Office Policy in Dissolution of Marriage Proceeding" (the "Fee Agreement"). Mr. Glass thereby obtained representation in a dissolution of marriage proceeding commenced against him in 2011 by his now-former wife.

The Fee Agreement specified the initial retainer amount, and the hourly rates for out-of-court services ($325.00 per hour) and in-court time ($375.00 per hour). The dissolution case included Mr. Glass' counter-petition and protracted issues regarding the shared parental responsibility for the spouses' three minor children. The final hearings in the dissolution case took place over six days, and the final judgment was issued in February of 2014.

The record evidences payment by Mr. Glass in accordance with the Fee Agreement and monthly invoices for the majority of Law Offices' billings. After the dissolution case had concluded, however, Mr. Glass refused to pay a remaining balance of $34,345.20. Law Offices ultimately sued him for this amount (and prejudgment interest) in 2018.

Law Offices' amended complaint included counts for breach of contract, open account, and quantum meruit. Only the breach of contract claim remained at the time of the non-jury trial. Mr. Glass counterclaimed for breach of contract and legal malpractice.[1]

At trial in 2019, Law Offices presented the testimony of Roy Granoff, the attorney who represented Mr. Glass in the dissolution proceedings. The Fee Agreement and invoices were admitted into evidence. Law Offices did not present expert testimony by an unaffiliated attorney regarding the reasonableness of the fees or value of the legal services rendered.

The trial court's final judgment denied Law Offices' claim for fees, concluding that "without expert testimony to establish the reasonableness of the fees, this court cannot award same." The trial court rejected Mr. Glass' counterclaim alleging legal malpractice by Law Offices. This appeal by Law Offices followed.

[1] The counterclaim was tried as a legal malpractice claim and found to be "without merit" by the trial court. Mr. Glass did not cross-appeal the trial court's findings on that issue.

Analysis

Our review is de novo, as the issue on appeal is purely a matter of law. Musi v. Credo, LLC, 273 So. 3d 93, 95-96 (Fla. 3d DCA 2019). The final judgment cites four Florida appellate cases in support of its determination that an award of attorney's fees must include not only testimony by the attorney performing services, but also by an expert as to the value of those services. The trial court did not accept Law Offices' argument that corroboration via expert testimony is not required when legal fees are sought by an attorney as breach of contract damages payable by the attorney's client (or former client), rather than as a motion seeking fees payable by an adverse party.

The difference between these two categories of attorney's fee awards is recognized, however, in Florida. We first address the four cases cited by the trial court in the final judgment. We then consider the decisions by two other District Courts—opinions we consider persuasive and a basis for reversal here. We further note the absence of a definitive prior decision by our own Court regarding this category of attorney's fee claims.

The Cases Cited in the Final Judgment

The final judgment relied first upon Snow v. Harlan Bakeries, Inc., 932 So. 2d 411 (Fla. 2d DCA 2006). In that case, Ms. Snow appealed a trial court order awarding Harlan Bakeries over $98,000.00 in trial and appellate fees and costs after

Harlan Bakeries prevailed regarding Ms. Snow's personal injury claims. The trial court made the award despite the fact that Harlan Bakeries failed to provide expert testimony regarding the reasonableness of the attorney's fees sought. The Second District reversed and remanded, "[b]ecause the trial court determined the amount of attorney's fees without expert testimony . . . ." Id. at 413.

Importantly, the case involves an award of attorney's fees sought by a prevailing party against an opposing party—not fees sought as contract damages by an attorney suing his own client for non-payment. In a footnote, the opinion in Snow discussed criticism of the expert witness requirement, though "currently mandated by case law," by the Fourth District in Island Hoppers, Ltd. v. Keith, 820 So. 2d 967, 972 (Fla. 4th DCA 2002), and a Florida Bar Journal article questioning the requirement. Snow, 932 So. 2d at 412 n.2.

The final judgment in the present case next cited Ghannam v. Shelnutt, P.A., 199 So. 3d 295 (Fla. 5th DCA 2016). Ghannam was pro se in the appeal, but a former client of Shelnutt, P.A., a law firm. The law firm sought to recover payment of fees unpaid by both Ghannam and a corporation allegedly controlled by Ghannam. The corporation had not been named a party to the law firm's fee collection claim, and the record indicates that the damages sought were a "reasonable fee" rather than a fee based on agreed hourly amounts and regular invoices for time expended. Ghannam was decided by three judges of the Second

District, sitting by designation as the Fifth District, and the panel observed that the Second District "does not make a distinction between whether the attorney fees are sought in the underlying action or from a third party in a breach of contract action." Id. at 300 n.2. The panel cited, quoted, and followed the previously discussed Second District opinion in Snow.

The third case cited by the trial court in the final judgment under review is another Second District opinion, Yakubik v. Board of County Commissioners of Lee County, 656 So. 2d 591 (Fla. 2d DCA 1995). In that short opinion, it is apparent the Board of County Commissioners had moved for an award of attorney's fees against Yakubik, an adverse party. The attorney for the Board presented an affidavit regarding his claimed fees, and Yakubik successfully appealed the resulting trial court award based on the Board's failure to provide independent expert testimony.

The fourth and final case cited on this issue in the final judgment before us is Robin Roshkind, P.A. v. Machiela, 45 So. 3d 480 (Fla. 4th DCA 2010). Although that case included a broad statement that the testimony of an independent expert is required to establish the reasonableness of attorney's fees payable by a former client, the Fourth District has repeatedly followed a different rule when a client is sued for unpaid fees as damages for breach of a fee agreement between the attorney and the client. In Roshkind, the Fourth District mentioned that different rule, but determined that it did not apply to the record before it.

In the present case, the trial court did not cite or apply any opinion of this Court. As discussed further below, that is because this Court has not previously addressed this specific category of claim and the types of competent, substantial evidence required to prove such a claim.

No Expert Testimony Required: The *Sea World* Case

In 2010, the Fifth District articulated a distinction for breach of contract damages by an attorney against a former client. In Sea World of Florida, Inc. v. Ace American Insurance Companies, 28 So. 3d 158, 160 (Fla. 5th DCA 2010), the Fifth District explained the basis for such a distinction:

> [I]f a claimant is seeking to recover, as damages, fees paid to a physician, engineer, architect, or other professional, there is no requirement to present "corroborating" testimony from an independent expert. Indeed, our supreme court has held that there is no requirement for expert testimony (independent or otherwise) to support an award of physician's fees where the doctor's bill and the plaintiff's testimony made it a question for the jury to determine whether the bills represented reasonable and necessary medical expenses. Garrett v. Morris, Kirschman & Co., Inc., 336 So. 2d 566, 571 (Fla. 1976); see also East West Karate Ass'n. Inc. v. Riquelme, 638 So. 2d 604 (Fla. 4th DCA 1994) (although plaintiff had burden at trial to prove reasonableness and necessity of medical expenses, expert testimony not required). We see no reason to impose a higher standard of proof simply because the professional fees sought to be recovered are those of an attorney.

The Fourth District discussed, but ultimately distinguished, Sea World in the Roshkind case discussed above (and relied upon by the trial court in the case at hand). The Fourth District's opinions after Roshkind have cited and relied upon the rationale in Sea World when a former attorney seeks to recover unpaid fees in a breach of contract action. Schwartz v. Bloch, 88 So. 3d 1068, 1072 (Fla. 4th DCA 2012) ("Roshkind does not require independent expert testimony to establish the reasonableness of professional fees, including attorney's fees, when those fees are an element of compensatory damages."); Valentin Rodriguez, P.A. v. Altomare, 261 So. 3d 590, 592 (Fla. 4th DCA 2018) (same).

Third District Cases

Our own decisions are distinguishable and were not cited by the trial court. The narrow issue and record before us present an issue of first impression in this Court.

In Brake v. Murphy, 736 So. 2d 745 (Fla. 3d DCA 1999), two residuary beneficiaries (parties in a probate proceeding) sought to recover attorney's fees paid to their attorney in an adversary action against a former personal representative removed for conflict of interest. The probate court awarded the beneficiaries over $388,000.00 against the removed personal representative. This Court reversed for two reasons—no independent expert testimony was provided to corroborate the claimed fees, and the hours and rates were based on "reconstructed," rather than contemporaneous, billing records. Id. at 747. ("[W]hile proof by way of contemporaneous records is not imperative, something more than wild guesses are necessary to support an award of fees based on reconstructed records.").

Mr. Glass contends that another decision of this Court, Seitlin & Co. v. Phoenix Insurance Co., 650 So. 2d 624 (Fla. 3d DCA 1994), stands for the proposition that expert testimony is necessary to support a claim for reasonable attorney's fees. We disagree. In that case, (1) an insured student sued his insurer for attorney's fees paid and incurred after the insurer wrongfully denied coverage (such that the insured and insurer were adverse regarding the claim to recover attorney's fees, and the student was not the client of the insurer), and (2) the student claimed reasonable fees, not an amount of damages computed in accordance with a written fee agreement and invoices (many of which, in the case before us, were paid pursuant to the Fee Agreement).

In both Brake and Seitlin, attorney's fees were sought against adverse parties rather than a former client. Neither case involved an attorney's claim for breach of contract against a former client under an express agreement to pay fees for legal services provided by the attorney/claimant.

The Rule of Decision in This Case

As noted, the trial court found no binding decision from this Court and instead followed the decision of the Second District in Snow and the later Second District cases discussed above. On the record before us, we find that the better-reasoned rule of decision is found in the more recent Fourth District cases, Schwartz and Valentin Rodriguez, P.A., and in the Fifth District's opinion in Sea World. Those three opinions, as discussed above, focus on an attorney's breach of contract claim against a former client under the attorney-client fee agreement. In such an instance, the fees are not sought to be recovered from an adverse party who never agreed to pay them, but rather from the client who promised to do so but did not.

Corroboration by an independent expert on the stipulated rates and hours incurred is unnecessary if the attorney claiming the fees from his or her former client has testified regarding those matters and the fee contract and invoices are admitted in evidence. In the case before us, for example, Mr. Glass' successor counsel stated at the hearing that "we do not dispute that [Law Offices'] hourly rate of $325 and $375 is reasonable." Moreover, the invoices from Law Offices were paid by Mr. Glass for most of the contentious, three-year litigation (with the final billings unpaid after Mr. Glass apparently determined that the final judgment after the non-jury trial of the dissolution action was unsatisfactory).

Conclusion and Certification of Conflict

Based on the foregoing analysis, we reverse the final judgment below and remand the case for the entry of a damages award to Law Offices consistent with the evidence presented. We certify conflict with the decision of the Second District in Snow v. Harlan Bakeries, Inc., 932 So. 2d 411 (Fla. 2d DCA 2006).

Reversed and remanded; conflict certified.

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

FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

v.

Case No. 5D19-3102

GARY M. MAHON D/B/A POKEY'S LAKE
GEM CITRUS NURSERY,

Respondent.

________________________________/

Opinion filed April 9, 2020

Petition for Certiorari Review of Order
from the Circuit Court for Orange County,
Kevin B. Weiss, Judge.

Shannon P. McKenna, Wesley R. Parsons,
and Francisco Ramos, Jr., of Clarke
Silverglate P.A., Miami, for Petitioner.

Hala Sandridge, of Buchanan Ingersoll &
Rooney P.C., Tampa, for Respondent.

LAMBERT, J.

The Florida Department of Agriculture and Consumer Services ("the Department") petitions for a writ of certiorari seeking relief from a nonfinal order entered by the trial court in an inverse condemnation action brought against it by the respondent, Gary M. Mahon, d/b/a Pokey's Lake Gem Citrus Nursery ("Mahon"). The order in question decided: (1) the parties' burden of proof, and (2) that the Department would have to present its evidence and argument first at the jury trial where the amount of damages or compensation to be awarded to Mahon is to be determined. For the following reasons, we conclude that the Department has failed to show that this order has caused it to suffer irreparable harm. Therefore, we dismiss the petition.

Mahon sued the Department, alleging that following an inspection of his citrus nursery, the Department placed a "stop sale notice" on his citrus trees, thus preventing him from selling the trees or their fruit. Mahon asserted that the Department, in an effort to protect public health and safety, forced him to destroy the majority of his trees because the trees were not being grown on a site within a protective structure that had been approved by the Department, in violation of section 581.1843, Florida Statutes (2007).[1]

Mahon disputed the Department's conclusion that his trees needed to be destroyed. Instead, he averred that his citrus trees were healthy and that they were not infected with citrus canker or citrus greening. Mahon claimed in his inverse condemnation lawsuit that the destroyed trees had a value in excess of $3.4 million and the Department had not compensated him for their destruction. *See* Art. X, § 6(a), Fla. Const. (providing that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner").

An inverse condemnation action may be brought by a nursery owner when the State, in its exercise of police power to prevent the spread of citrus canker, instead destroys otherwise healthy citrus trees. *See Dep't of Agric. & Consumer Servs. v. Mid-*

[1] Section 581.1843, Florida Statutes, was enacted to prevent a disease called "citrus greening," which is transmitted by an insect called a psyllid.

Fla. Growers, Inc., 521 So. 2d 101, 105 (Fla. 1988) (holding that in an inverse condemnation case, nursery owners must receive "full and just compensation" when the State, pursuant to its police power, destroys healthy trees); *State Plant Bd. v. Smith*, 110 So. 2d 401, 406–07 (Fla. 1959) (same). It essentially is a proceeding "to compel the governmental body to exercise its power of eminent domain and award just compensation to the owner." *Fla. Dep't. of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So. 2d 928, 931 (Fla. 4th DCA 2002) (quoting *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 489 (Fla. 1st DCA 1975)). The trial judge is the trier of all issues, legal and factual, in the inverse condemnation suit, except for the question of what amount constitutes just compensation. *Mid-Fla. Growers*, 521 So. 2d at 104 (citing *United States v. Certain Parcels of Land in Monroe Cty.*, 509 F.2d 801, 803 (5th Cir. 1975)).

Here, the trial court held a nonjury trial to determine whether the Department was liable to Mahon for the destruction or "taking" of his citrus trees and fruit. The court entered an order finding in favor of Mahon and thereafter scheduled a jury trial to determine the amount of compensation to be awarded to Mahon.

The dispute that is the subject of this certiorari proceeding arose when the Department filed a motion requesting that one of its experts be permitted in the courtroom during the upcoming jury trial when Mahon was presenting evidence regarding the value of the loss of his trees. *See City of Pompano Beach*, 829 So. 2d at 931 (holding that proper measure of damages in an inverse condemnation action brought by citrus growers seeking compensation for trees that were destroyed in an effort to eradicate citrus canker was replacement cost, not diminution in value of the land). Mahon responded that, much like in an eminent domain proceeding brought by a condemning governmental authority under either Chapter 73 or Chapter 74[2] of the Florida Statutes, once the trial court finds, as it did here, that a taking has occurred, the Department bears the initial burden of proof at trial regarding the value of the citrus trees destroyed. *See Foster v. City of Gainesville*, 579 So. 2d 774, 776 n.2 (Fla. 1st DCA 1991) (recognizing that in an inverse condemnation proceeding, if the trial court has found a taking by the state, "a jury trial is held wherein the jury determines the amount of compensation to which the property owner is entitled" and that "[t]he valuation proceeding is to be held in accordance with chapters 73 and 74, Florida Statutes, and the process is the same as if the cause were a statutory eminent domain action"); *City of Ft. Lauderdale v. Casino Realty, Inc.*, 313 So. 2d 649, 652 (Fla. 1975) (Overton, J., concurring) (recognizing, in a concurring opinion joined by a majority of the Florida Supreme Court, that in a statutory eminent domain case, the condemning authority bears the initial responsibility to go forward with evidence necessary to establish what land was taken, how it is being taken, and the value of the land actually taken); *accord Wilkerson v. Div. of Admin., State Dep't of Transp.*, 319 So. 2d 585, 585 (Fla. 2d DCA 1975) (holding that the condemning authority has the burden of proof to establish the value of land in a condemnation proceeding (citing *Casino Realty*, 313 So. 2d at 652)). Thus, Mahon reasoned that the Department's motion to allow its expert to observe Mahon's evidence at the jury trial was a non-issue because, similar to an eminent domain trial, the Department would be presenting its evidence first.

The Department responded that an inverse condemnation action should be treated no differently than any other civil case and that, as the plaintiff, Mahon was required to

[2] A Chapter 73 eminent domain proceeding is sometimes referred to as a "slow take" case, while a Chapter 74 eminent domain proceeding is referred to as a "quick take" case.

proceed first at trial because he had the burden to prove his damages. The trial court disagreed. It ordered that the Department would proceed first at the jury trial with voir dire, opening statement, presentation of evidence as to the value of the trees that it had inversely condemned, and closing argument.

From this order, the Department seeks certiorari review. It argues in its petition that this order must be quashed because it violates its "fundamental due process rights" regarding the conduct of a trial, departs from the essential requirements of law, and, if left uncured, will cause a "miscarriage of justice and irreparable harm."

In analyzing whether the Department is entitled to this requested relief, we first recognize that certiorari review of nonfinal orders is "an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule[3] which authorizes appeal from only a few types of non-final orders." *See Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 214–15 (Fla. 1998). To obtain a writ of certiorari, a petitioner, such as the Department, must show that the nonfinal order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011).

These second and third prongs or elements are sometimes referred to as "irreparable harm," and they are jurisdictional. *Deutsche Bank Nat'l Tr. Co. v. Prevratil*, 120 So. 3d 573, 575 (Fla. 2d DCA 2013). Therefore, prior to our court addressing the merits of the Department's certiorari petition, the threshold question to be decided is whether the injury resulting from the order is material and cannot be remedied on appeal.

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[3] Fla. R. App. P. 9.130.

Stated somewhat differently, because irreparable harm is a jurisdictional question, we cannot grant the writ unless the two elements that comprise "irreparable harm" have been established, even if the trial court was clearly wrong in its order. *See Laycock v. TMS Logistics, Inc.*, 209 So. 3d 627, 628–29 (Fla. 1st DCA 2017) (explaining that before an appellate court considers the merits of a certiorari petition, it must first determine the threshold jurisdictional question of whether the petitioner has shown irreparable harm and that an appellate court "cannot grant the writ without such a showing—no matter how wrong the trial court might have been"). Absent such a showing, the petition for writ of certiorari must be dismissed. *See Bared & Co. v. McGuire*, 670 So. 2d 153, 157 (Fla. 4th DCA 1996) (explaining that dismissal, rather than denial, is the proper disposition of petition for writ of certiorari when appellate court determines that there has been an insufficient showing of irreparable harm).

Reduced to its core, the Department's argument is that the trial court committed an extraordinary error by ordering it to proceed as if Mahon's inverse condemnation action was an eminent domain proceeding brought by the Department, as plaintiff, under Chapter 73 or Chapter 74, Florida Statutes. As previously mentioned, in an eminent domain case, even though the landowner sustained the damage as a result of the governmental taking, the condemning authority has the initial burden at the jury trial to present evidence concerning the value of the owner's land taken, subject to the landowner presenting its own valuation evidence, and the condemning authority has the right to give the initial and rebuttal closing argument. *Casino Realty,* 313 So. 2d at 652–53.

Our first task is to determine whether the trial court's requirement that the Department first proceed with the presentation of evidence and argument at the inverse condemnation jury trial, much like it would proceed in an eminent domain trial, will cause it to sustain irreparable harm. Only if we are convinced that such harm has been established would we proceed to the next step of deciding whether the court's order departs from the essential requirements of the law.

As previously alluded to, an inverse condemnation proceeding has been described as an action to essentially compel the governmental entity to bring an eminent domain action to award compensation to the property owner. *City of Pompano Beach*, 829 So. 2d at 931. Applying this observation here, Mahon has sued the Department to compel it to do what it could or should have done initially—bring an eminent domain action to take his citrus trees and fruit and to compensate him for doing so. Had the Department done so, then it would have had the burden of going forward at trial regarding the valuation to be placed on Mahon's destroyed trees. If dissatisfied with the jury's verdict and the subsequent final judgment entered, then, much like in an eminent domain case, the Department would have the right to plenary appeal to seek relief from any reversible error committed.

Viewing the petition before us with this prism, and in light of certiorari review being an extraordinary remedy, we conclude that the Department has not met its jurisdictional threshold of showing irreparable harm[4] by the trial court order. Accordingly, the Department's petition for writ of certiorari is dismissed.

[4] To be clear, by our decision, we have taken no present position on the merits of the trial court's order under review.

PETITION DISMISSED.

ORFINGER and HARRIS, JJ., concur.