DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MARCUS BODIE,

Appellant,

v.

CRICKET WIRELESS, LLC,

Appellee.

No. 2D22-64

November 16, 2022

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Christopher C. Nash, Judge.

Allison J. Davis of Silber & Davis, West Palm Beach, for Appellant.

John A. Schifino of Gunster, Tampa, for Appellee.

PER CURIAM.

Affirmed.

KELLY and BLACK, JJ., Concur.
LaROSE, J., Concurs with opinion.

LaROSE, Judge, Concurring.

I concur in the per curiam affirmance of the trial court's nonfinal order compelling arbitration. I write separately to address what is, in my view, a consequential issue.

Marcus Bodie sued his cellular phone company, Cricket Wireless, LLC, under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201-.213, Fla. Stat. (2020). In a nutshell, Mr. Bodie alleged that Cricket engaged in a bait-and-switch scheme; Cricket misleadingly advertised BridgePay, its late-payment billing option, resulting in overcharges to Mr. Bodie's account. The trial court granted Cricket's motion to compel arbitration, concluding that the parties were bound by the arbitration agreement contained in the "Terms and Conditions of Service" signed by Mr. Bodie.

The arbitration agreement contains a class-action waiver, as well as prohibition on representative actions.[1] On appeal, Mr. Bodie

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[1] The arbitration provision at issue provides as follows:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND CRICKET AGREE THAT EACH MAY BRING CLAIMS**

claims that the prohibition on representative actions on behalf of the consuming public violates public policy and, therefore, is unenforceable. The relevant portion of the provision provides as follows:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. YOU AND CRICKET AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further unless both you and Cricket agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

Mr. Bodie contends that limiting injunctive and declaratory relief solely to the aggrieved individual suing under FDUTPA prevents him from pursuing and securing relief on behalf of the

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> **AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING**. Further, unless both you and Cricket agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

larger consuming public. Consequently, he maintains, the arbitration agreement stymies FDUTPA's remedial purpose. *See* § 501.202(2) ("The provisions of this part shall be construed liberally to . . . protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.").

"Generally, [w]e review an order granting or denying a motion to compel arbitration de novo." *UATP Mgmt., LLC v. Barnes*, 320 So. 3d 851, 855 (Fla. 2d DCA 2021) (alteration in original) (quoting *Chaikin v. Parker Waichman LLP*, 253 So. 3d 640, 643 (Fla. 2d DCA 2017)). Similarly, "[o]ur review of the validity of an arbitration agreement on the challenge that it violates public policy is a question of law subject to de novo review. If an arbitration agreement violates public policy, then no valid agreement exists." *Anderson v. Taylor Morrison of Fla., Inc.*, 223 So. 3d 1088, 1091 (Fla. 2d DCA 2017) (citations omitted). There seems to be no dispute that an arbitration agreement is unenforceable "when it defeats the remedial purpose of a statute or prohibits the plaintiff from obtaining meaningful relief under the statutory scheme." *Id.*

(citing *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 606 (Fla. 1st DCA 2007)).

"A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. It is also defined as [a] statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before." *Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven, LLC*, 201 So. 3d 218, 222 (Fla. 2d DCA 2016) (alteration in original) (quoting *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005)). FDUTPA is such a statute. *Fonte*, 903 So. 2d at 1024 ("FDUTPA is a remedial statute designed to protect consumers.").

Mr. Bodie identifies no provision of FDUTPA giving him the right to seek "public" injunctive relief.[2] Nor does he cite any authority showing that the arbitration agreement's prohibition on representative actions violates FDUTPA's remedial purpose. *Cf. id.*

[2] For that matter, I observe that "an incidental public benefit from what is otherwise class-wide private injunctive relief is not sufficient to establish that the requested injunction is actually public relief." *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 546 (9th Cir. 2021) (citing *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)).

at 1024-25 (concluding that the arbitration clause's preclusion of class relief did not defeat FDUTPA's remedial purposes, because the public enforcement authority FDUTPA provides "presents an added deterrent effect to violators if private enforcement actions should fail to fulfill that role" and "gives another possible avenue of recovery for consumers"); *Cruz v. Cingular Wireless, LLC*, No. 2:07-cv-714-FtM-29DNF, 2008 WL 4279690, at *3 (M.D. Fla. Sept. 15, 2008) ("Although FDUTPA's claims are susceptible to class action litigation, the statute does not give a 'blanket right' to litigate on a class wide basis. . . . Florida courts have held that "neither the text nor the legislative history of FDUTPA suggests that the legislature intended to confer a non-waivable right to class representation." (first citing *Fonte*, 903 So. 2d at 1024-25; and then quoting *Fonte*, 903 So. 2d at 1025)).

FDUTPA, however, permits an "enforcing authority"[3] to obtain declaratory and injunctive relief, as well as actual damages

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[3] Section 501.203(2) defines an "enforcing authority" as

> the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's jurisdiction. "Enforcing authority" means the Department of Legal Affairs if the violation occurs in or

sustained by consumers. *See* § 501.207; *Sanders v. Drivetime Car Sales Co.*, 221 So. 3d 718, 719 (Fla. 1st DCA 2017) ("FDUTPA states that a cause of action can be brought by a person who has suffered a loss or has been aggrieved by a violation of FDUTPA, an interested party, or an enforcing authority."). And, FDUTPA allows an individual to seek redress under the statute, so long as that individual has suffered a loss or been aggrieved by a FDUTPA violation. *See* §§ 501.207(1), .211.

In the context of declaratory and injunctive relief, section 501.207 provides that "[t]he enforcing authority may bring . . . [a]n action to obtain a declaratory judgment that an act or practice violates this part," as well as "[a]n action to enjoin any person who has violated, is violating, or is otherwise likely to violate, this part." § 501.207(1)(a)-(b). Thus, the enforcing authority is not limited solely to seeking such relief for its own benefit or because it is the aggrieved party. Instead, the enforcing authority may obtain relief that would necessarily benefit a consumer or entity that is or could

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affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

be impacted by a FDUTPA violation. Mr. Bodie concedes as much, telling us that "under consumer protection statutes, such as § 501.207 and § 501.211, it is inherent in granting declaratory or injunctive relief to benefit the consuming public."

Section 501.211(1), addressing "individual remedies," provides in relevant part that

> [w]ithout regard to any other remedy or relief to which a person is entitled, *anyone aggrieved by a violation of this part may bring an action* to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

(Emphasis added.) Thus, the statute's plain language does not authorize an individual to bring a FDUTPA action on behalf of another. To sustain a cause of action, the claimant must have suffered harm.

Mr. Bodie may not maintain a FDUTPA claim on behalf of the consuming public at large; the prohibition on representative actions precludes it. Moreover, Mr. Bodie certainly is not an "enforcing authority." *See, e.g.*, *Sanders*, 221 So. 3d at 719 ("Based on the definition, an individual does not qualify as an enforcing authority. Thus, an individual's private claims for violations of FDUTPA

cannot be deemed a private attorney general action since a person has no statutory right to represent the enforcing agency or another person under FDUTPA."). Had the legislature intended to provide an individual with the right to seek and obtain an injunction on behalf of others, it could have easily done so. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."). The absence of any language to this effect clearly evinces the legislature's intent to exclude an individual from seeking and obtaining an injunction on behalf of others. *See Moonlit Water Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (stating statutory construction principle of "expressio unius est exclusio alterius," i.e., "the mention of one thing implies the exclusion of another"). Under the circumstances before us, Mr. Bodie may assert his own individual claims for relief under FDUTPA. Such action, if successful, will advance FDUTPA's public policy.

As important, the parties' arbitration agreement does not prohibit an action by an enforcing authority to benefit the

consuming public. *Cf. Fonte*, 903 So. 2d at 1024-25 (quoting *Randolph v. Green Tree Fin. Corp.–Ala.*, 244 F.3d 814, 817 (11th Cir. 2001)). Indeed, no enforcing authority is a party to, or bound by, the agreement.

Additionally, because FDUTPA permits an enforcing authority to bring an action on behalf of consumers, the statutory purpose in "protect[ing] the consuming public" is served. § 501.202(2). In other words, should an enforcing authority seeking declaratory or injunctive relief because of an act or practice violating FDUTPA, then any relief obtained would necessarily benefit the consuming public writ large. And, "[t]his additional enforcement mechanism presents an added deterrent effect to violators if private enforcement actions should fail to fulfill that role" as it "gives another possible avenue of recovery for consumers." *Fonte*, 903 So. 2d at 1025.

Mr. Bodie relies on California law, specifically *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017). I am not persuaded. In *McGill*, the California Supreme Court held that an arbitration agreement waiving an individual's right to seek "public injunctive relief," that is, "injunctive relief that has the primary purpose and

effect of prohibiting unlawful acts that threaten future injury to the general public," in any forum violated California's consumer protection laws. 393 P.3d at 951-52, 956 (first citing *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003); and then citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999)). However, I see no analog to California's "public injunctive relief" in Florida law. *Cf. DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1158 (9th Cir. 2021) ("*McGill*'s reasoning—an individual requesting relief for the entire public is suing *only* on her own behalf—is peculiar."). Moreover, California law simply bears no relevance to FDUTPA. *See Barnes v. StubHub, Inc.*, No. 19-80475, slip op. at 4 (S.D. Fla. Oct. 3, 2019) ("*McGill* is inapplicable to Barnes' FDUTPA claim because under Florida law 'a choice-of-law provision that provides for the application of non-Florida law precludes a claim under the FDUTPA.' " (first quoting *Herssein Law Grp. v. Reed Elsevier, Inc.*, No. 13-23010-CIV, 2014 WL 11370411, at *9 (S.D. Fla. Mar. 5, 2014); then citing *Martin v. Creative Mgmt. Grp., Inc.*, No. 10-CV-23159, 2013 WL 12061809, at *9 (S.D. Fla. July 25, 2013))).

In sum, the arbitration provision prohibiting representative actions for declaratory and injunctive relief on behalf of nonparties is enforceable. The waiver does not undermine FDUTPA's remedial purpose. Mr. Bodie may not seek "public injunctive relief" under FDUTPA.

Opinion subject to revision prior to official publication.

Third District Court of Appeal

State of Florida

Opinion filed November 16, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-1801
Lower Tribunal No. 20-27319

EcoVirux, LLC,
Appellant,

vs.

BioPledge, LLC, et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

Goodkind & Florio, P.A., Vanessa A. Rousso, and Brian K. Goodkind, for appellant.

Akerman LLP, Alexandra M. Mora, Alejandro J. Paz, Davis Law Firm, and Bryan T. Davis (Whitefish, MT), for appellees.

Before LOGUE, LINDSEY, and MILLER, JJ.

MILLER, J.

Appellant, EcoVirux, LLC, challenges a final order dismissing its lawsuit against appellees, Alex Baranga, Christina Baranga, and BioPledge, LLC, with prejudice. The primary issue on appeal presents a purely legal issue of contract construction, namely, whether the forum selection clause contained within the parties' distribution agreement is mandatory such that any action arising under the contract may be maintained only in the state or federal courts of Denton County, Texas. Finding that the clause is unambiguously exclusive and there is a clear nexus between the claims alleged and the agreement, we affirm in all respects, save the "with prejudice" nature of the dismissal.

BACKGROUND

The genesis of this dispute lies in the unprecedented demand for disinfecting products that arose in the infancy of the COVID-19 pandemic. The Barangas owned BioPledge, a Texas limited liability company. BioPledge marketed and distributed a commercial disinfectant spray known as BioPledge AntiMicrobial Protection+. EcoVirux sought distribution rights, and the Barangas and BioPledge drafted a proposed distribution agreement containing a forum selection clause. Before executing the agreement, EcoVirux modified two words in the forum selection clause. The clause, in its final form, reflected the following:

> This Agreement shall be governed by and interpreted in accordance with the laws of Texas. The exclusive venues for any dispute(s) arising under this Agreement (including but not limited to breach, validity, and enforceability of the Agreement) ~~shall~~ may be brought in the state and federal courts for Denton County, Texas. The parties' consent to the personal jurisdiction of and venue in such courts for all of such cases and controversies, which include any action at law or in equity.

Within months of signing the distribution agreement, EcoVirux filed suit against BioPledge and the Barangas in the circuit court of Miami-Dade County. In the operative complaint, EcoVirux alleged counts for fraud, conspiracy to commit fraud, negligent misrepresentation, breach of contract, and violation of section 501.201 et seq., Florida Statutes (2020), known as the "Florida Deceptive and Unfair Trade Practices Act." The claims all centered around common allegations that BioPledge and the Barangas misrepresented their ownership of the distribution rights and effectiveness of the product. The distribution agreement was appended to the complaint.

Invoking the forum selection clause, the Barangas and BioPledge filed a joint motion to dismiss for improper venue pursuant to Florida Rule of Civil Procedure 1.140(b)(3). EcoVirux opposed the motion, contending the forum selection clause was permissive rather than mandatory, or, at a minimum, ambiguous, and, alternatively, dismissal should be without prejudice. After convening a hearing, the trial court dismissed the complaint with prejudice. Rehearing proved unsuccessful, and the instant appeal ensued.

STANDARD OF REVIEW

In construing a forum selection clause, we apply a de novo standard of review. Antoniazzi v. Wardak, 259 So. 3d 206, 209 (Fla. 3d DCA 2018). Similarly, "[t]he existence of ambiguity in a contract term is . . . a question of law reviewed de novo." Gold Crown Resort Mktg. Inc. v. Phillpotts, 272 So. 3d 789, 792 (Fla. 5th DCA 2019).

ANALYSIS

"[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964). Forum selection clauses serve the laudatory purpose "of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991). Placing a high premium on freedom of contract, the courts of this state enforce such clauses absent a showing that enforcement would be unjust or unreasonable. See Manrique v. Fabbri, 493 So. 2d 437, 440 (Fla. 1986); Am. Safety Cas. Ins. Co. v. Mijares Holding Co., 76 So. 3d 1089, 1092 (Fla. 3d DCA 2011).

There is a critical distinction between mandatory and permissive forum selection clauses. "Permissive clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum." Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So. 2d 273, 274–75 (Fla. 1987). In contrast, mandatory forum selection clauses provide "for a mandatory and exclusive place for future litigation." Id. at 274.

Absent a latent ambiguity—as distinct from a patent ambiguity—the determination as to whether a clause is mandatory or permissive is a matter of pure contractual interpretation.[1] See Gold Crown Resort, 272 So. 3d at 792–93. Clauses containing language of exclusivity are construed as mandatory. See Sonus-USA, Inc. v. Thomas W. Lyons, Inc., 966 So. 2d

[1] "Patent ambiguities are on the face of the document, while latent ambiguities do not become clear until extrinsic evidence is introduced and requires parties to interpret the language in two or more possible ways." Prime Homes, Inc. v. Pine Lake, LLC, 84 So. 3d 1147, 1151–52 (Fla. 4th DCA 2012); see also Francis Bacon, Maxims of Law Regula XXV, in 4 The Works of Francis Bacon 79 (J. Johnson 1803) ("There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."). "Parol evidence is admissible to resolve a contract's ambiguity only where that ambiguity is latent." Napoli v. Bureau of State Emp.'s W/C Claims/ The Div. of Risk Mgmt., 260 So. 3d 449, 450 (Fla. 1st DCA 2018).

992, 993 (Fla. 5th DCA 2007); Antoniazzi, 259 So. 3d at 209. No "magic words" are required, but the language employed must evince the parties' clear intent to limit venue. See Celistics, LLC v. Gonzalez, 22 So. 3d 824, 826 (Fla. 3d DCA 2009). In the absence of such language, a clause is deemed permissive. Sonus-USA, 966 So. 2d at 993.

Against these principles, we examine the case at hand. Here, the forum selection clause provides: "[t]he exclusive venues for any dispute(s) . . . may be brought in the state and federal courts for Denton County, Texas." Courts have consistently construed clauses containing the word "exclusive" and its variants as mandatory. See Weisser v. PNC Bank, N.A., 967 So. 2d 327, 331 (Fla. 3d DCA 2007); Gold Crown Resort, 272 So. 3d at 793; H. Gregory 1, Inc. v. Cook, 222 So. 3d 610, 611 (Fla. 4th DCA 2017); Antoniazzi, 259 So. 3d at 209–10. Notwithstanding this line of authority, EcoVirux seizes on the word "may" for the proposition the clause is permissive or, at a minimum, ambiguous.

Divorced from its contractual context, the phrase "may be brought" could indeed be interpreted as permissive. It is well-settled, however, that words and phrases in a contract cannot be considered in isolation. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) (footnote omitted) ("If possible, every word and every

provision is to be given effect (*verba cum effectu sunt accipienda*).”). None should be ignored, and any “apparent inconsistencies” must be “reconciled if possible.” Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979); see also Restatement (Second) of Contracts § 202(2) (1981) (“A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.”).

In the instant case, the contract clearly provides that the parties selected the state and federal courts of Denton County, Texas, to litigate any disputes. In designating these courts as the exclusive fora, the parties necessarily eschewed all other venues.

The phrase “may be brought” does not detract from this expressed intention. Instead, the clause simply states the obvious. No aggrieved party is compelled to file suit to resolve a given dispute. If the party elects to do so, however, suit is proper only in either the state or federal courts of Denton County, Texas. See Copacabana Recs., Inc. v. WEA Latina, Inc., 791 So. 2d 1179, 1180 (Fla. 3d DCA 2001) (holding forum selection clause mandatory despite “seemingly contradictory language” where clause contained words of exclusivity and permissive language); Agile Assurance Grp., Ltd. v. Palmer, 147 So. 3d 1017, 1017–18 (Fla. 2d DCA 2014) (finding forum selection clause mandatory where it provided any action “may be

instituted exclusively" in the Philippines); Coffee Bean Trading-Roasting, LLC v. Coffee Holding, Inc., 510 F. Supp. 2d 1075, 1077 (S.D. Fla. 2007) (holding forum selection clause mandatory when it stated in pertinent part: "the parties hereto hereby . . . agree that exclusive venue of any such action or proceeding may be laid in the State of Delaware"); Golf Scoring Sys. Unlimited, Inc. v. Remedio, 877 So. 2d 827, 828–29 (Fla. 4th DCA 2004) (concluding forum selection clause mandatory where it stated "[t]he parties hereto consent to Broward County, Florida, as the proper venue for all actions that may be brought pursuant hereto").

Drawing on the parties' pre-contract negotiations, EcoVirux alternatively contends that parol evidence would establish the clause was intended to be permissive. It is axiomatic that "extrinsic evidence . . . should not be used to introduce [a contractual] ambiguity where none exists." Interwest Const. v. Brown, 29 F.3d 611, 615 (Fed. Cir. 1994). In this vein, the parol evidence rule excludes evidence of prior negotiations to change or modify the terms of a binding integrated contract, and differing interpretations of the same words in a contract will not give rise to an ambiguity. See Restatement (Second) of Contracts § 213 cmt. a–b (1981); see also Garcia Granados Quinones, 509 So. 2d at 275; McLane Foodservice, Inc. v. Table Rock Rests., L.L.C., 736 F.3d 375, 378 (5th Cir. 2013); Parisi v. Parisi, 107

A.3d 920, 929 (Conn. 2015); Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800, 806 (Tex. App. 1999). To allow otherwise would be to "cast[] a long shadow of uncertainty over all transactions." Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988).[2] Thus, because the clause is clear and unambiguous, the trial court properly rejected parol evidence to defeat the parties' expressed intent.

Finally, the claims alleged in the complaint all trace their origins to the distribution agreement. Without the contract, there would be no basis for the lawsuit. Hence, there is a clear nexus between the agreement and the allegations, and resolution of the dispute requires reference to the agreement itself. See Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013); Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1070 (11th Cir. 1987); World Vacation Travel, S.A., de C.V. v. Brooker, 799 So. 2d 410, 412–13 (Fla. 3d DCA 2001); SAI Ins. Agency, Inc. v. Applied Sys., Inc., 858 So. 2d 401, 404 (Fla. 1st DCA 2003). Because the claims stem directly from the contract and the commercial relationship of the parties relates to the agreement itself, the non-signatories to the agreement, the Barangas, are

[2] This argument further fails to account for the adage "ambiguities and inconsistencies in a contract are to be interpreted against the draftsman." Pomona Park Bar, 369 So. 2d at 942. Here, EcoVirux implemented the contractual modifications.

equally entitled to enforce the forum selection provision. See Antoniazzi, 259 So. 3d at 210 n.4; W. Bay Plaza Condo. Ass'n, Inc. v. Sika Corp., 338 So. 3d 32, 34–35 (Fla. 3d DCA 2022).

Accordingly, we affirm in all respects except insofar as the trial court dismissed the case "prejudice." See Carr v. Stetson, 741 So. 2d 567, 569 (Fla. 4th DCA 1999) ("[D]ismissal for improper venue is not a decision on the merits."); Chase v. Jowdy Indus., Inc., 913 So. 2d 1173, 1175 (Fla. 4th DCA 2005) (same). Upon remand, EcoVirux is entitled to raise any further claims that are not encompassed within the ambit of the forum selection clause and prosecute its current causes of action in Denton County, Texas.

Affirmed in part, reversed in part, and remanded for further proceedings.

Third District Court of Appeal

State of Florida

Opinion filed November 10, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-913
Lower Tribunal No. 20-15859

Grove Isle Association, Inc.,
Appellant,

vs.

Jerry M. Lindzon,
Appellee.

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

Law Offices of Geoffrey B. Marks, and Geoffrey B. Marks, for appellant.

Halpern Rodriguez, LLP, and Priscilla S. Zaldivar and Marc A. Halpern, for appellee.

Before EMAS, LINDSEY and GORDO, JJ.

EMAS, J.

INTRODUCTION

Grove Isle Association, Inc. (the Association), appeals a nonfinal order granting Jerry M. Lindzon's motion for leave to amend his complaint to assert a claim for punitive damages.[1] Because Lindzon failed to satisfy the requirements for establishing entitlement to assert a claim for punitive damages against a corporation pursuant to section 768.72, Florida Statutes (2022), the trial court erred in granting Lindzon's motion to amend, and we therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Lindzon owns a unit at Grove Isle Condominium. He alleges his unit suffered severe water damage due to a failing roof assembly. After the Association allegedly ignored his complaints about the failing roof, Lindzon sued the Association for violation of the Declaration of Condominium and under section 718.113(1) for failing to maintain the common elements at Grove Isle.

[1] Florida Rule of Appellate Procedure 9.130 authorizes interlocutory appeals of certain enumerated nonfinal orders. In 2022, the Florida Supreme Court amended that rule to add nonfinal orders that "grant or deny a motion for leave to amend to assert a claim for punitive damages." Fla. R. App. P. 9.130(a)(3)G. See In re Amendment to Florida Rule of Appellate Procedure 9.130, 345 So. 3d 725, 726 (Fla. 2022).

The roof was repaired during the pending litigation. However, when Lindzon began to repair the damage to his own unit, his contractor discovered exposed rebar. This discovery, and the parties' attempt to address the newly discovered damage, led to the underlying motion to amend the complaint to assert a claim for punitive damages. In his amended complaint, Lindzon added counts for negligence and fraudulent misrepresentation, and sought punitive damages. He also described the following sequence of events:

- The reroofing project began in March 2021, after the underlying lawsuit was filed.
- In October 2021, the re-roofing project was completed, and Lindzon hired a contractor to restore his unit.
- In November 2021, Lindzon's contractor "discovered multiple areas on the common element slab surrounding the Unit with exposed, rusted rebar, spalling and cracked concrete." Lindzon twice notified the Association about specific areas of damage to the concrete slab, and each time "the Association inspected the Unit."
- "On January 31, 2022, the Association's own contractor confirmed that the work to be performed by the Association include[d] repairs to

rebar which require[d] input from a structural engineer and proper permitting."

- Rodriguez eventually advised Lindzon that work on the slab was set to commence on February 7.
- Days before the work was set to commence, Lindzon requested a copy of the scope of work and permit information. Upon receiving the request, Rodriguez stated: "[i]t's such a small job that I don't think it's [permits] really necessary."
- When Lindzon insisted on a copy of the scope of work and permit information, Rodriguez canceled the work, stating that "he instructed his contractor to proceed without a permit, and now that Lindzon requested it, the repairs would be significantly delayed."[2]

In sum—and relevant to the asserted punitive damages claim—Lindzon alleged: "In an effort to save money, the Association was not intending to retain a structural engineer or pull the necessary permits to

[2] The email from Rodriguez to Lindzon's attorney (attached to the motion to amend) specifically stated: "The contractor did not say that a permit is not required. I am the one that told the contractor that in order to expedite this I would not be requiring a permit. [] If you feel that a permit is necessary then we will go ahead and start the process. This process wit[h] the current backlog with the City of Miami due to Covid will delay this repair for a couple of months while a permit is obtained . . . ."

perform the repairs to the slab contrary to the advice of the Association's own contractor."

Attached to the motion to amend were the letters to the Association, and the correspondence between the Association contractor and Rodriguez.

Following a hearing, the trial court granted Lindzon's motion to amend, concluding that "the proffered misrepresentation regarding the lack of need for a building permit, the willful neglect to get a building permit in the face of expert advice to do [so] evidences a willful and wanton disregard of the Plaintiff[']s rights and safety." This appeal followed.

STANDARD OF REVIEW

The parties agree that our standard of review is de novo. Tallahassee Mem'l Healthcare, Inc. v. Dukes, 272 So. 3d 824 (Fla. 1st DCA 2019) (reviewing de novo the trial court's decision of whether a party should be allowed to plead punitive damages); Est. of Williams ex rel. Williams v. Tandem Health Care of Fla., Inc., 899 So. 2d 369, 376 (Fla. 1st DCA 2005). See also E.R. Truck & Equip. Corp. v. Gomont, 300 So. 3d 1230 (Fla. 3d DCA 2020) (Scales, J. concurring).

DISCUSSION AND ANALYSIS

The Association contends that (1) Lindzon "failed to meet the requirements of alleging and proving entitlement to pleading a claim for

punitive damages against a corporation"; and (2) because the amended complaint does not allege acts independent of its contractual and statutory claims, amendment to the complaint was barred by the independent tort doctrine. We agree with the Association's first contention and reverse the order granting leave to amend to assert a claim for punitive damages.[3]

"Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens–Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). See also BDO Seidman, LLP v. Banco Espirito Santo Intern., 38 So. 3d 874, 876 (Fla. 3d DCA 2010) ("Punitive damages are a form of extraordinary relief for acts and omissions so egregious as to jeopardize not only the particular plaintiff in the lawsuit, but the public as a whole, such that a punishment—

[3] As a result, we do not reach the merits of the second issue raised on appeal by the Association. See Peebles v. Puig, 223 So. 3d 1065, 1069 (Fla. 3d DCA 2017) ("When, as here, a contract has been breached, a tort action lies only for acts independent of those acts establishing the contract's breach") (citing Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d DCA 1994) ("It is well established that breach of contractual terms may not form the basis for a claim in tort. Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort")); TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516, 519 n.3 (Fla. 3d DCA 2016) ("Florida's independent tort rule precludes the recovery of punitive damages for a breach of contract claim unless the claimant has asserted a tort independent of the alleged breach of contract.")

not merely compensation—must be imposed to prevent similar conduct in the future.")

Florida courts have repeatedly described the substantial impact of granting a motion for leave to amend to assert a claim for punitive damages. See, e.g., TRG Desert Inn Venture, Ltd. v. Berezovsky, 194 So. 3d 516, 520 n.5 (Fla. 3d DCA 2016) ("From a practical perspective, the granting of a motion for leave to amend a complaint to add a punitive damages claim can be a 'game changer' in litigation.") For instance, once a plaintiff is allowed to proceed with his punitive damages claim, the defendant becomes subject to financial discovery and, potentially, to uninsured losses. Id.; see also Est. of Despain v. Avante Grp., Inc., 900 So. 2d 637, 641 (Fla. 5th DCA 2005) ("[A]lthough section 768.72(1) is procedural in nature, it also provides a substantive right to parties not to be subjected to a punitive damage claim and attendant discovery of financial worth until the requisite showing under the statute has been made to the trial court".) For these reasons, "punitive damages are reserved for truly culpable behavior and are intended to express society's collective outrage." KIS Grp., LLC v. Moquin, 263 So. 3d 63, 65-66 (Fla. 4th DCA 2019) (quotation omitted).

Section 768.72, Florida Statutes (2022), governs a plaintiff's ability to bring a punitive damages claim. It provides that "no claim for punitive

damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." § 768.72(1), Fla. Stat. See also Dukes, 272 So. 3d at 825 ("A defendant has a substantive legal right not to be subject to punitive damages claims if there is no reasonable basis for recovery.") A trial court's determination as to whether a plaintiff has made a "reasonable showing" under section 768.72 for a recovery of punitive damages, "is similar to determining whether a complaint states a cause of action, or the record supports a summary judgment, both of which are reviewed de novo." Holmes v. Bridgestone/Firestone, Inc., 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005). The statute further provides that a defendant can be held liable for punitive damages only if the trier of fact finds, by clear and convincing evidence, "that the defendant was personally guilty of intentional misconduct or gross negligence." § 768.72(2), Fla. Stat. The statute defines those two terms:

> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

§ 768.72(2)(a)-(b), Fla. Stat.

Here, Lindzon sues only the Association; Rodriguez is not a defendant in the action. Coronado Condo. Ass'n, Inc. v. La Corte, 103 So. 3d 239, 240 n.1 (Fla. 3d DCA 2012) ("La Corte did not sue the individual property managers or the contractor repairing the balconies; the Association is the sole defendant.") Therefore, in seeking punitive damages, Lindzon necessarily intends to impute the property manager's alleged intentional misconduct or gross negligence to the Association. To impute an employee's negligence or misconduct to the employer under the punitive damages statute, a plaintiff must establish the employee's conduct meets the criteria specified in subsection (2) above (i.e., that the employee was "guilty of intentional misconduct or gross negligence") **and** establish one of the following:

> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
>
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or
>
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

§ 768.72(3)(a)-(c), Fla. Stat.

Lindzon's amended complaint fails to satisfy any of the three alternative requirements of subsection (3)(a)-(c). "A corporate employer, like an individual employer, may be held liable for punitive damages based on the legal theories of either direct or vicarious liability." Est. of Despain, 900 So. 2d at 640. Here, the amended complaint does not specify whether Lindzon's claim for punitive damages was based on direct or vicarious liability. And a review of the negligence and fraudulent misrepresentation claims (for which punitive damages is sought) reveals no allegation of wrongdoing by the Association. Instead, the amended complaint alleges misconduct only by Rodriguez (while using the broad term "Association" to characterize the "perpetrator" of such conduct). Additionally, the correspondence Lindzon attached to the amended complaint shows that all communications pertaining to the permit were between Lindzon's counsel and Rodriguez. There are no separate, independent allegations in the complaint setting forth any actions taken by an Association officer, director or managing member.[4] See, e.g., Fetlar, LLC v. Suarez, 230 So. 3d 97, 100

[4] Ironically, the trial court indicated that its ruling (permitting the amendment to assert punitive damages) was based in part on the fact that no building permit was obtained even "in the face of expert advice to do so." That "expert advice" came from the Association's contractor who, as described earlier, took the position (contrary to Rodriguez) that a building permit was needed before undertaking the repairs.

(Fla. 3d DCA 2017) ("The plaintiffs assume that the alleged misconduct of the individual construction managers, superintendents, construction workers—*who were not, on the record before us, officers or managing members of the limited liability companies*—is, without more, misconduct of the four corporate petitioner/defendants for purposes of section 768.72. But that is contrary to the plain language of the statute") (emphasis added); La Corte, 103 So. 3d at 240-41 (holding that the third amended complaint failed to comply with the procedural requirements of section 768.72: "There are references in the third amended complaint to a single, unnamed 'Association board member,' but *those references do not allege the Association's active, knowing participation in, or consent to, misconduct by the property management or contractor's employees*") (emphasis added).

For these reasons, a vicarious liability theory suffers a similar fate. "In order to hold a corporate employer vicariously liable for punitive damages for the acts of its employees, the plaintiff must establish: (1) fault on the part of the employee that rises to the level of willful and wanton misconduct and (2) *some fault on the part of the corporate employer that rises to the level of at least ordinary negligence*." Est. of Despain, 900 So. 2d at 640-41 (emphasis added). As explained above, the absence of any allegations or record evidence showing even simple negligence on the part of the

Association compels the conclusion that Lindzon has failed to meet the heightened evidentiary standard for imposition of punitive damages on an employer. Compare id. at 645 (finding a reasonable basis to assert a claim for punitive damages based on vicarious liability: "As to the vicarious liability of the corporate entities, the record evidence and proffer shows that the facility was not adequately staffed, which contributed to the inability to provide the decedent with proper care, and that numerous records regarding the decedent's care were incomplete, missing, or had been fabricated, which made assessment, treatment, and referrals of the decedent much more difficult.")[5]

[5] In light of our analysis (together with the fact that Rodriguez is not a named defendant), we do not reach the question of whether the misconduct alleged might provide a reasonable basis for asserting a punitive damages claim against Rodriguez individually. See Valladares v. Bank of Am. Corp., 197 So. 3d 1 (Fla. 2016) (citing U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla.1983) ("Punitive damages cannot be assessed for mere negligent conduct, but must be based on behavior which indicates a wanton disregard for the rights of others")); Owens–Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla.1999) ("The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them") (quotation omitted). See also Carraway v. Revell, 116 So. 2d 16, 18-19 (Fla. 1959) ("[T]he character of negligence necessary to sustain

CONCLUSION

Because Lindzon failed to satisfy the requirements for establishing entitlement to assert a claim for punitive damages against a corporation pursuant to section 768.72, Florida Statutes (2022), the trial court erred in granting Lindzon's motion to amend. We therefore reverse and remand for further proceedings consistent with this opinion.

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a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages . . . .")