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Reports of Decisions of:

THE SUPREME COURT OF THE UNITED STATES
THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
THE UNITED STATES DISTRICT COURTS FOR FLORIDA
THE UNITED STATES BANKRUPTCY COURTS FOR FLORIDA

Reports include the full text of all opinions received from the courts.

SUMMARIES

Summary of selected opinions reported in this issue.

- **CRIMINAL LAW—CONTEMPT—VIOLATION OF INJUNCTION—SCOPE OF INJUNCTION. Under the theories presented to and considered by the district court, a former employee of a private corporation that was enjoined from infringing on certain intellectual property could not be held in contempt for violating that injunction where the former employee was not a party to the injunction, was no longer employed by the enjoined corporation at the time of the conduct underlying the contempt charge, and did not fall within a class of non-parties who might be bound by the injunction. The Court's opinion included an extensive discussion of Rule 65(d) and the binding effect of injunctions on former employees and non-parties to the injunction.** *UNITED STATES v. ROBINSON. U.S. Court of Appeals, Eleventh Circuit. Filed September 28, 2023. Full Opinion at U.S. Court of Appeals Section, page 245a.*

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PAGE PREFIXES

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Volume 30, Number 5
October 13, 2023

UNITED STATES SUPREME COURT

Torts—Defamation—Libel—Public officials—Actual malice—Denial of certiorari

DON BLANKENSHIP v. NBCUNIVERSAL, LLC, et al. U.S. Supreme Court. Case No. 22-1125. Decided October 10, 2023. On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit.

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, concurring in the denial of certiorari.

"The common law of libel at the time the First and Fourteenth Amendments were ratified did not require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages." *McKee* v. *Cosby*, 586 U.S. ___, ___ (2019) [27 Fla. L. Weekly Fed. S721a] (THOMAS, J., concurring in denial of certiorari) (slip op., at 6). To be sure, the law was not static; "[i]n the first decades after the adoption of the Constitution," the rule that "truth or good motives was no defense" to libel "was changed by judicial decision, statute or constitution in most States." *Beauharnais* v. *Illinois*, 343 U.S. 250, 254 (1952). But from the founding until 1964, the law of defamation was "almost exclusively the business of state courts and legislatures." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 369-370 (1974) (White, J., dissenting).

The Court usurped control over libel law and imposed its own elevated standard in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). It decreed that the Constitution required "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-280. The Court did not base this "actual malice" rule in the original meaning of the First Amendment. It limited its analysis of the historical record to a loose inference from opposition surrounding the Sedition Act of 1798, see *McKee*, 586 U.S., at ___-___ (opinion of THOMAS, J.) (slip op., at 12-13), and primarily justified its constitutional rule by noting that 20th century state-court decisions and "the consensus of scholarly opinion apparently favor[ed] the rule," *New York Times*, 376 U.S., at 280, and n. 20.

I continue to adhere to my view that we should reconsider the actual-malice standard. See *Counterman* v. *Colorado*, 600 U.S. 66, 105 (2023) [29 Fla. L. Weekly Fed. S1074a] (dissenting opinion); *Coral Ridge Ministries Media, Inc.* v. *Southern Poverty Law Center,* 597 U.S. ___, ___ (2022) [29 Fla. L. Weekly Fed. S542a] (same) (slip op., at 3); *Berisha* v. *Lawson*, 594 U.S. ___, ___ (2021) [29 Fla. L. Weekly Fed. S9a] (same) (slip op., at 3); *McKee*, 586 U.S., at ___ (opinion of THOMAS, J.) (slip op., at 14). "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *Id.*, at ___ (same) (slip op., at 2). The decisions have "*no relation* to the text, history, or structure of the Constitution." *Tah* v. *Global Witness Publishing, Inc.*, 991 F. 3d 231, 251 (CADC 2021) (Silberman, J., dissenting in part). And the actual-malice standard comes at a heavy cost, allowing media organizations and interest groups "to cast false aspersions on public figures with near impunity." *Id.,* at 254. The Court cannot justify continuing to impose a rule of its own creation when it has not "even inquired whether the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard." *Coral Ridge Ministries*, 597 U.S., at ___ (opinion of THOMAS, J.) (internal quotation marks omitted) (slip op., at 3).

Petitioner Don Blankenship asks us to revisit *New York Times*. I agree with the Court's decision not to take up that question in this case because it appears that Blankenship's claims are independently subject to an actual-malice standard as a matter of state law. See *State ex rel. Suriano* v. *Gaughan*, 198 W. Va. 339, 356, 480 S. E. 2d 548, 565 (1996). In an appropriate case, however, we should reconsider *New York Times* and our other decisions displacing state defamation law.

* * *

NOTE: Where it is feasible, a syllabus (headnote) will be released . . . at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Volume 30, Number 5
October 13, 2023

Bankruptcy—Professionals—Employment—Attorneys—Disqualification—Creditors of bankruptcy estate moved the bankruptcy court nunc pro tunc to disqualify law firm as special litigation counsel to Chapter 7 trustee and to require firm to disgorge compensation that firm had received as costs and fees—Disinterested person—District court did not err in affirming bankruptcy court's denial of the motion for disqualification where firm's representation of trust did not lessen the value of bankruptcy estate, create a dispute between bankruptcy estate and trust, or create a circumstance that could be considered a bias against the bankruptcy estate—Law firm was not disqualified from representing trustee of debtor's estate by virtue of its prepetition and postpetition representation as outside counsel of real estate investment trust that had owned real property on which one of debtors' nursing homes was located, but had no involvement in the operation of the nursing home either directly or by virtue of trust's connections with nursing home operators or other entities debtor identified—Judicial estoppel did not bar law firm from contending that its former client, the real estate investment trust, was only the landlord of, and did not own and operate, the subject nursing home, even though law firm never objected to or denied district court's statement in prior order that "[law firm] does not dispute that it represented [client], or that [client] was the landlord and owner of [the operator of the nursing homes] at one time," which was a statement directly contrary to position law firm had taken successfully at earlier hearing—Addressing a mixed question of fact and law, bankruptcy court did not err in determining that law firm's omissions in its Rule 2014 disclosures of its prepetition connections with its client, a real estate investment trust, and nursing home operators was inadvertent and not negligent, and so did not warrant imposition of sanctions—District court did not err in finding that bankruptcy court fully considered the circumstances under which the alleged failure to disclose occurred and concluded that the failure was not the result of negligence

In re: Fundamental Long Term Care, Inc., Debtor. ESTATE OF ARLENE TOWNSEND, ESTATE OF ELVIRA NUNZIATA, ESTATE OF JAMES HENRY JONES, ESTATE OF JOSEPH WEBB, ESTATE OF OPAL LEE SASSER, ESTATE OF JUANITA JACKSON, Petitioning Creditor, Plaintiffs-Appellants, v. STEVEN M. BERMAN, Esq., SHUMAKER, LOOP & KENDRICK, LLP, Defendants-Appellees. 11th Circuit. Case No. 21-10587. September 18, 2023. Appeal from the U.S. District Court for the Middle District of Florida (No. 8:20-cv-00956-VMC, Bkcy No. 8:11-bk-22258-MGW).

(Before LAGOA, BRASHER, and TJOFLAT, Circuit Judges.)

(TJOFLAT, Circuit Judge.) Section 327(a) of the United States Bankruptcy Code, titled "Employment of professional persons," states that "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties." 11 U.S.C. § 327(a). Rule 2014 of the Federal Rules of Bankruptcy Procedure implements the disinterestedness provision of this section by requiring the trustee, in seeking court approval of the employment of a professional, to disclose "the person's connections with the debtor, creditors, [or] any other party in interest."[1] Fed. R. Bankr. P. 2014(a).

The bankruptcy proceeding underlying this case, *In re Fundamental Long Term Care, Inc.*, was initiated by Wilkes & McHugh, P.A. ("Wilkes"), on December 5, 2011, when it filed an involuntary petition in the Bankruptcy Court for the Middle District of Florida under Chapter 7 of the Bankruptcy Code for relief against Fundamental Long Term Care, Inc. ("FLTCI") on behalf of the Estate of Juanita Jackson, deceased. The Jackson Estate, in a wrongful death tort action, had obtained judgments of $55 million against Trans Health, Inc. ("THI") and Trans Health Management, Inc. ("THMI") each, on July 22, 2010. In a post-judgment motion, the Jackson Estate obtained a default amended judgment on September 13, 2011, making FLTCI liable for the total $110 million award, along with THI and THMI—which were each liable for their respective $55 million judgment. But the Jackson Estate was unable to collect on the judgments due to a massive "bust-out" scheme[2] designed and executed in March 2006 to avoid paying the judgments.[3]

The Chapter 7 case became operative on January 12, 2012, when the Bankruptcy Court issued an "Order of Relief" after FLTCI—now the Debtor—failed to respond to the Jackson Estate's Chapter 7 petition. In June 2012, the trustee of the Debtor's estate (the "Trustee") employed Steven M. Berman and Shumaker, Loop & Kendrick, LLP ("Shumaker")[4] as special litigation counsel. They served in that capacity until December 2015, following the distribution of the proceeds of a compromise presented to the Bankruptcy Court for approval in March 2015.

On June 4, 2018, Wilkes, representing the creditors of the Debtor's estate—namely the Jackson Estate and five other Probate Estates (collectively, the "Probate Estates")—moved the Bankruptcy Court *nunc pro tunc* to disqualify Shumaker as special litigation counsel and require it to disgorge the compensation it had received for its services. According to Wilkes, when the Trustee employed Shumaker in June 2012, it was not disinterested as required by § 327(a). Moreover, Shumaker failed to timely disclose its "connections with the debtor, creditors, [or] any other party in interest"—connections that revealed its disinterestedness—as required by Rule 2014. The Bankruptcy Court denied Wilkes's motion. It did so without an evidentiary hearing and based on the record of the bankruptcy case.[5]

The Probate Estates appealed the Bankruptcy Court's decision. On February 27, 2020, the District Court affirmed the Bankruptcy Court's order except on the issue of whether Berman had committed a disclosure violation pursuant to Rule 2014. The District Court then remanded the case to the Bankruptcy Court so it could decide whether Berman violated Rule 2014's disclosure requirements. On remand, the Bankruptcy Court held that Berman's omissions did not warrant sanctions under Rule 2014. *In re Fundamental Long Term Care, Inc.*, 614 B.R. 753 (Bankr. M.D. Fla. 2020). On the Probate Estates' appeal, the District Court affirmed. *In re Fundamental Long Term Care, Inc.*, No. 8:20-cv-956, 2021 WL 222779 (M.D. Fla. Jan. 22, 2021).

The Probate Estates now appeal the District Court's decision, contending that the Bankruptcy Court abused its discretion in denying their motion. With the benefit of oral argument and having examined the record before the Bankruptcy Court, we affirm.

We divide our discussion as follows. In part I, we consider the relevant events that took place prior to the Chapter 7 Trustee's appointment and the administration of the bankruptcy estate prior to Berman and Shumaker's employment as special litigation counsel.[6] Part II begins with the Trustee's application to employ Berman and Shumaker; it then describes what they learned about the bust-out scheme, Wilkes's litigation in response to the scheme, and the conflict between the Trustee and counsel for the fraudulent transferees over control of the defense strategy in state court. Part III deals with the principal adversary proceedings held in the case, including the Bankruptcy Court's decision to treat THMI as if it had been included as a debtor in the Jackson Estate's petition for Chapter 7 relief against FLTCI and the compromises that resolved those proceedings. Part IV takes up Wilkes's motion to disqualify Shumaker and for disgorgement of the attorney's fees Shumaker received, the Bankruptcy Court's rulings on the motion, and the District Court's review of those rulings. Part V concerns the present appeal.

I.

On January 23, 2012, the Bankruptcy Court appointed Beth Ann Scharrer Trustee of the Debtor's (FLTCI's) estate. Two days later, the Bankruptcy Court approved her application to employ Allan C. Watkins as her general counsel.

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On February 22, the Trustee, through Watkins, moved the Bankruptcy Court to enter an order "authorizing the Trustee, on behalf of the [C]hapter 7 estate . . . to borrow up to Ten Thousand Dollars . . . from Wilkes & McHugh, P.A. . . . under 11 U.S.C. § 503(b)(1) as an administrative expense." The motion stated in relevant part:

> No schedules have been filed by the Debtor, and no appearance has been made by counsel for the Debtor. No response was made by or on behalf of the Debtor, and no schedules or statement of financial affairs have been filed. As such, there is little information in the record upon which the Trustee can rely to determine the assets and liabilities of the Debtor.
>
> . . .
>
> Wilkes & McHugh represents a number of creditors asserting claims against the Debtor, including the Estate of Juanita Jackson, the petitioning creditor. The Lender [Wilkes] has agreed to loan to the [Debtor's] Estate up to $10,000.00, allowable as an administrative expense under § 503(c)(1) of the Bankruptcy Code.
>
> . . .
>
> The Debtor has not prepared any schedules, list of creditors, or statement of financial affairs. The Trustee needs to conduct discovery, including by deposition testimony as necessary, to produce the information necessary or available. The likely witnesses with knowledge of the Debtor's business affairs are located out of the State of Florida, so expenses would include travel costs, lodging, and meals as well.

Trustee's Motion for Final Approval of Postpetition Financing at 2-3, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Feb. 22, 2012). The Bankruptcy Court held a hearing on the motion on March 28, 2012, and approved it in an order dated April 6, 2012.

At the same time, Wilkes was involved in the prosecution of, or in post-judgment proceedings in, five of the six wrongful death cases it had brought on behalf of the Probate Estates in state courts—five in Florida and one in Pennsylvania.[7] The six Probate Estate plaintiffs were the Probate Estate of Juanita Jackson,[8] whose case had been prosecuted to final judgment pre-petition, and the Probate Estates of Elvira Nunziata,[9] Joseph Webb,[10] James Henry Jones,[11] Opal Lee Sasser,[12] and Arlene Townsend,[13] whose cases were pending trial in state court.[14] THMI was a defendant in all six cases, while THI was a defendant in all the cases except *Nunziata*.

Within a matter of weeks of her appointment, the Trustee became aware of the circumstances that led to Wilkes filing the Chapter 7 petition against FLTCI on December 5, 2011, and some of the untoward legal consequences that resulted from filing the petition against FLTCI instead of THMI. Importantly, the Trustee learned:

> (1) On July 22, 2010, an "empty-chair" jury trial[15] was held in *Jackson*,[16] and the plaintiff obtained verdicts—and then judgments—of $55 million against each of THI and THMI.[17] Three weeks later, on August 13, Wilkes, in an effort to discover THI and THMI's assets to satisfy the $55 million judgments, moved the trial court pursuant to Florida Rule of Civil Procedure 1.560(b)[18] for an order requiring THI and THMI to complete Form 1.977 as required by that rule. The state trial court granted the motion four days later. Over the next three months, Wilkes noticed several depositions in aid of execution but was unable to discover enough assets to satisfy the judgments.
>
> (2) By December 2010, Wilkes discovered why it was unable to obtain satisfaction of the Jackson Estate's $55 million judgment against THMI. Those in control of THMI had THMI transfer its assets to Fundamental Long Term Care Holdings, LLC ("FLTCH") in March 2006, in the execution of a fraudulent "bust-out" scheme that rendered THMI judgment-proof.[19] To obtain satisfaction of the $55 million judgment against THMI, the Jackson Estate would have to sue FLTCH and any other entities that received THMI's assets as part of the bust-out scheme (collectively, the "Targets") as fraudulent transferees under Florida's version of the Uniform Fraudulent Transfer Act (the "UFTA").[20]
>
> (3) The prescriptive period for bringing an action under Florida's UFTA is four years. *See* Fla. Stat. § 726.110.[21] Florida's UFTA has a statute of repose, not a statute of limitations.[22] The four-year period in which the Jackson Estate could sue FLTCH and the Targets expired in March 2010. Nonetheless, under Florida's UFTA, the prescriptive period would extend for one year following the Jackson Estate's discovery of the fraudulent transfer. Wilkes discovered the bust-out scheme on or before December 10, 2010, so the Jackson Estate had—at the latest—until December 10, 2011, to sue FLTCH and the Targets to obtain satisfaction of the Estate's $55 million judgment against THMI.[23]
>
> (4) Once Wilkes discovered that it had been unable to obtain satisfaction of the Jackson Estate's judgment against THMI because of the bust-out scheme, it had two options. Either the Jackson Estate, as a THMI judgment creditor, could sue FLTCH and the Targets pursuant to the applicable state fraudulent transfer law, or it could put THMI into Chapter 7 bankruptcy. A trustee of THMI's estate, then, as a hypothetical THMI judgment creditor, could utilize the "strong arm" power provided by the Bankruptcy Code[24] and sue the transferees of THMI's assets pursuant to the same state fraudulent transfer law.

Wilkes pursued neither option. Instead, on December 10, 2010, Wilkes moved the *Jackson* state court for leave to implead two of the Targets—Rubin Schron and General Electric Capital Corporation ("GECC")[25]—pursuant to Fla. Stat. § 56.29,[26] for the purpose of pursuing THMI's assets. The state court granted the motion and entered an order on December 21, 2010, requiring Schron and GECC to show cause why they should not be held liable for the payment of the $55 million judgment entered against THMI. Schron and GECC removed the § 56.29 proceeding to the United States District Court for the Middle District of Florida on December 30, 2010, on the ground that the proceeding was a separate cause of action, not a proceeding ancillary to *Jackson*.[27]

Wilkes moved to remand the case under the theory that, under Florida law, a § 56.29 proceeding was "a supplementary proceeding . . . and thus was not removable." *Jackson-Platts v. Gen. Elec. Cap. Corp.*, 727 F.3d 1127, 1132 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C587a]. On September 16, 2011, the District Court, on Wilkes's motion, remanded the proceeding to the state trial court. Schron and GECC timely appealed. *Id.* at 1133. We reversed the District Court. *Id.* at 1140.[28]

On May 16, 2011, Wilkes moved the *Jackson* state court for leave to implead FLTCH and 14 other Targets under § 56.29 for the purpose of asserting fraudulent transfer claims against them.[29] The motion also sought to join FLTCI as a defendant in the case. The state court granted the motion on May 18 and promptly issued an order requiring FLTCH and the Targets to show cause, thus placing the liability burden on the defendants. FLTCI did not appear in response to the show cause order, so on September 13, 2011, the state court—treating FLTCI as an original defendant in the case—entered an amended judgment making FLTCI jointly and severally liable with THI and THMI for their respective $55 million judgments—$110 million total.

The Targets named in Wilkes's May 16 motion objected on several grounds, including that they were beyond the reach of the Florida long-arm statute and that the state court lacked personal jurisdiction over them. The state court overruled their objections and granted Wilkes's motion. The Targets appealed the jurisdictional ruling to the Florida Second District Court of Appeal, and on November 28, 2012, that court affirmed the trial court's ruling and remanded the case for further proceedings. *Fundamental Long Term Care Holdings, LLC v. Estate of Jackson ex rel. Jackson-Platts*, 110 So. 3d 6, 11 (Fla. 2d Dist. Ct. App. 2012) [37 Fla. L. Weekly D2718a].[30]

On December 5, 2011, Wilkes looked to the Bankruptcy Court for the Middle District of Florida for assistance. Wilkes had the Jackson Estate file an involuntary petition for Chapter 7 relief against FLTCI, not THMI.[31] Wilkes attached the Jackson Estate's $110 million judgment against FLTCI to the petition. As of the date of filing, the Jackson Estate was the only estate with a final state court judgment.

* * *

Commentary

The record does not reveal the reason Wilkes selected December 5, 2011, as the date for filing the Chapter 7 petition against FLTCI. It could have been that the one-year extension provided by Fla. Stat. § 726.110 for filing a fraudulent transfer action against FLTCH and the Targets was about to expire. As previously discussed, that one-year period began at some point prior to December 10, 2010, when Wilkes, having learned about the transfer of THMI's assets to FLTCH, moved the *Jackson* court for leave to implead Schron and GECC as fraudulent transferees pursuant to

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§ 56.29. Wilkes may have thought that a potential trustee of FLTCI's Chapter 7 estate, exercising a trustee's strong-arm power as a hypothetical FLTCI judgment creditor, could pursue FLTCH and the Targets with an UFTA cause of action—the same cause of action the Jackson Estate could bring against the transferees in state court.[32] For that potential trustee to pursue the transferees as a hypothetical FLTCI creditor, the Bankruptcy Court would have to treat FLTCI and THMI as one entity. Treating them as one could not have been part of Wilkes's litigation strategy at that time. Its steadfast position was that FLTCI and THMI were entirely separate entities. Wilkes had to assume that position to avoid violating the automatic stay that issues as a result of filing a Chapter 7 petition pursuant to 11 U.S.C. § 362(a).

So why did Wilkes put FLTCI into bankruptcy instead of THMI? The record yields several possibilities. One was that Wilkes wanted to continue prosecuting the Probate Estates' wrongful death actions in state court where Wilkes could seek multimillion-dollar jury verdicts. If THMI were in bankruptcy, the automatic stay would bring an end to the state court litigation, and the prosecution of the Probate Estates' wrongful death actions would have to move to the Bankruptcy Court in the form of wrongful death claims against THMI's estate, the value of which would be decided by the Bankruptcy Court. *See* 11 U.S.C. § 502(a).[33] Doing so would diminish the value of the claims, and they would likely be worth significantly less than they would be before a jury.

A second possible reason for putting FLTCI, rather than THMI, into bankruptcy could have been the assistance the trustee of the bankruptcy estate could provide Wilkes in its prosecution of the Probate Estates' actions in state court. The scope of the evidence the trustee would be able to discover in marshalling FLTCI's assets would likely exceed what Wilkes could obtain under state discovery rules. Access to what the trustee uncovered would aid Wilkes in prosecuting the Probate Estates' claims—and would be helpful to use later in post-judgment proceedings supplementary, such as impleading targets to collect judgments.

In exchange for the freedom to have their wrongful death actions prosecuted to the hilt, the Probate Estates paid a price. They gave up their fraudulent transfer claims against FLTCH and the Targets under Florida's UFTA since those claims became "extinguished" on or before December 10, 2011. As things turned out, though, the Trustee and her special litigation counsel uncovered evidence sufficient to enable the FLTCI estate to make out causes of action against FLTCH and aligned Targets under theories of law other than those the UFTA codifies.

* * *

The Jackson, Nunziata, and Webb Estates filed claims against the Debtor's—FLTCI's—estate on February 22, 2012, in the sums of $110 million, $200 million, and $900 million respectively.[34] The Jones, Townsend, and Sasser Estates filed claims against the Debtor's estate on March 27, 2012, in the sums of $200 million each.[35] With the exception of the Jackson Estate, none of the Probate Estates had a claim against the Debtor. All of their claims were based on THMI's (and THI's) negligence. Nonetheless, Wilkes, as an officer of the court, in filing claims against the Debtor's estate that appeared to be against THMI rather than the Debtor, effectively represented that the claims against the Debtor were *derivative* of THMI's liability. At least, according to the Bankruptcy Court, that is how the Trustee interpreted Wilkes's representations. *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147, 149-50 (Bankr. M.D. Fla. 2013). If FLTCI's liability was in fact derivative of THMI's liability, Wilkes's continued litigation of the Probate Estates' cases filed in state court pre-petition would appear to violate the automatic stay because the litigation had the effect of increasing the Debtor's liability post-petition.

But Wilkes's litigation strategy throughout had been, and continued to be, that the Debtor—FLTCI—and THMI were separate entities: a parent corporation and an independent subsidiary. Accordingly, the Probate Estates' claims against the Debtor's estate, if legitimate, must have been based on a theory other than THMI's conduct, because if the claims were based on a theory that rendered the Debtor legally responsible for THMI's conduct prior to December 5, 2011, Wilkes's continued litigation of the Probate Estates' wrongful death actions against THMI or its post-judgment proceedings supplementary as a creditor of THMI would be barred by the automatic stay in FLTCI's bankruptcy.

In sum, each Probate Estate had a legitimate claim against two entities. First, each Estate had a claim against the Debtor's estate that existed pre-petition against FLTCI. If allowed, the Bankruptcy Court would "determine the amount" of such a claim. 11 U.S.C. § 502(b). Each Estate also had a claim against THMI. The two claims could not both be based on the theory pursued in the state court wrongful death actions without violating the automatic stay.

* * *

Commentary

As it turned out, the Bankruptcy Court eventually treated THMI as part of the Debtor's estate and the Probate Estates as having filed claims against THMI's (nonexistent) estate. The Bankruptcy Court also impliedly afforded the Probate Estates standing, as THMI creditors, to join the Trustee (now in effect acting as trustee of *two* bankruptcy estates—FLTCI's and THMI's) in prosecuting the surviving claims of the Second Amended Complaint in the adversary proceeding initiated by Wilkes on October 1, 2013. *See infra* part III. The claims were in two groups. One group consisted of the Trustee's strong-arm claims against FLTCH and several Targets as fraudulent transferees of THMI's assets under the Florida UFTA. The other group consisted of the Trustee's claims against the same defendants as the perpetrators of a variety of torts and breaches of duty committed against THMI and as the successors in interest of THMI.

* * *

On April 2, 2012, after the Probate Estates' claims against the Debtor's estate had been filed, Berger Singerman LLP ("Singer-man") appeared in the case as the Debtor's counsel and moved the Bankruptcy Court to convert the Debtor's Chapter 7 case to a case under Chapter 11 of the Bankruptcy Code. The motion, which stated that FLTCI and THMI had ceased operations six years ago, represented—among other things—that the $110 million judgment the Jackson Estate obtained against FLTCI in *Jackson* was invalid because FLTCI never appeared in the case and thus was not within the state trial court's jurisdiction. Consequently, the Jackson Estate was not a valid judgment creditor of FLTCI, and its filing of the Chapter 7 petition was effectively a nullity. Assuming the petition's validity, the motion stated that the "Trustee's strategy and actions [we]re being orchestrated by Wilkes, for the sole benefit of its clients and the firm itself through the ultimate recovery of astronomical contingency fees" and that Wilkes was "using the Bankruptcy Case and . . . the powers of the Chapter 7 Trustee to deny THMI representation" in the cases Wilkes had brought against it.[36]

On April 3 and 4, after receiving Singerman's motion to convert, the Trustee, armed to a great extent with the information Wilkes provided her, filed motions for leave to conduct Rule 2004 examinations of some of the individuals Wilkes had impleaded in *Jackson* pursuant to Fla. Stat. § 56.29—including attorneys at Troutman Sanders, LLP ("Troutman"), the law firm that created the legal structure for the bust-out scheme, and other individuals presumably having knowledge of the disposition of THMI's assets.[37]

Singerman immediately objected to the Trustee's motions. Picking up where it left off in its motion to convert, Singerman had this to say about Wilkes's involvement in the Trustee's decision-making:

> 14. Based on the nature and scope of the 2004 Motions, it is abundantly clear that the Trustee continues to advance a litigation strategy hoisted on her by [Wilkes] on behalf of the Petitioning Creditor and Claimants in this case *to deprive the Debtor [FLTCI] and [THMI] of legal representation and available defenses*. At the same time, the Trustee is improperly using . . . the 2004 Motions to engage in broad, "fishing expedition" discovery that the Wilkes plaintiffs have been unable to obtain in any other forum.
>
> 15. Tellingly, the 2004 Motions each request that the [Bankruptcy] Court order that "interested creditors" be permitted to attend the examinations and "make inquiry." There is no doubt that the intent of that request is to give Wilkes a broad discovery platform to pursue non-debtor targets in non-bankruptcy forums. The request certainly has nothing to do with the preparation of the Debtor's Schedules or Statements of Financial Affairs.
>
> . . .
>
> 18. Based on the foregoing, the Debtor respectfully submits that the [Bankruptcy] Court should deny the 2004 Motions, without prejudice, or, alternatively, not adjudicate the 2004 Motions pending a ruling on the Motion to Convert.

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Debtor's Objections to Motions of Chapter 7 Trustee for Rule 2004 Examinations at 4-5, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Apr. 5, 2012) (emphasis added) (footnote omitted).

The Bankruptcy Court heard the Trustee's Rule 2004 motions on April 12, granted the motions with respect to the production of certain documents, and stated that it would consider the Debtor's objections to the motions on June 6. On April 24, the Bankruptcy Court denied the Debtor's motion to convert the case to a Chapter 11 proceeding.

* * *

Commentary

In sum, the Trustee, soon after her appointment, knew that Wilkes: (1) was unable to execute the *Jackson* judgment against the defendants in state trial court; (2) realized that THMI's assets had been fraudulently transferred to FLTCH and the Targets; and (3) should have been aware of Florida's UFTA and its four-year prescriptive period. That period began to run at the time of the bust-out scheme in March 2006. It therefore ran out by the time the Jackson Estate received a state court judgment on July 22, 2012. But under the Florida UFTA discovery extension, Fla. Stat. § 726.110, the Jackson Estate had one year from Wilkes's discovery of the fraud, which occurred on or before December 10, 2012, to bring a fraudulent transfer action under Florida's UFTA.

Still attempting to collect on the *Jackson* judgment, Wilkes tried to come to a solution. It first tried to bring a Florida UFTA action via a § 56.29 motion to implead but was unable to obtain relief. Wilkes then tried a second option: petitioning for Chapter 7 relief against FLTCI. Wilkes waited to file for this relief until December 5, 2011—five days before the absolute latest the § 726.110 discovery extension would have run for the Probate Estates' UFTA claims against FLTCH and the Targets. But Wilkes did not place THMI in Chapter 7 bankruptcy—it petitioned the Bankruptcy Court to put ***FLTCI*** into Chapter 7 bankruptcy. Wilkes therefore allowed the one-year discovery extension to expire, thus extinguishing the Probate Estates' claims for fraudulent transfer against THMI. As it turned out, the Trustee later discovered evidence that enabled the Probate Estates to sue FLTCH and the Targets as successors to THMI, holding them responsible for THMI's debts, including the Probate Estates' judgments.

Beyond the statute of repose issue, there was a further issue with Wilkes's plan. FLTCI had no assets except THMI shares. FLTCI's Trustee therefore could not pursue FLTCH and the Trustees under the UFTA because FLTCI was not itself guilty as a fraudulent transferor. So Wilkes's strategy was two-fold: (1) have the Chapter 7 Trustee in possession of the THMI shares seek evidence of THMI causes of action against FLTCH and the Targets even though such causes of action are not actually property of the estate, thus using the Trustee as a discovery platform; and (2) allow the Trustee to obtain evidence Wilkes could use in § 56.29 proceedings to implead the Targets and other potential fraudulent transferees in state court.

II.

A.

On June 1, 2012, the Trustee moved the Bankruptcy Court to approve the employment of Steven M. Berman, a partner at Shumaker, as special litigation counsel. The Bankruptcy Court granted the motion on June 5. The same day, Singerman (the Debtor's counsel) moved the Bankruptcy Court to dismiss the Chapter 7 case on several grounds, including that Wilkes was abusing the Chapter 7 process in seeking relief against a debtor it knew "ha[d] no business activity, no going concern value, and no employees." According to Singerman, Wilkes filed the petition "to further its financial interests in maximizing claims, and facilitating execution of default judgments, against the Debtor, THMI and other third parties regardless of the resulting prejudice to the estate."

Along with the motion to dismiss, Singerman filed two other pleadings that complained that the Trustee, in assisting Wilkes's prosecution of claims against THMI, was breaching her duty to maximize the Debtor's estate by enhancing the value of THMI's shares—which were assets of the Debtor's estate. The first pleading supplemented the Debtor's objections to the Trustee's motions for Rule 2004 examinations discussed above. The second pleading responded to the Trustee's motion for a protective order regarding the notice of deposition the Debtor served on the Trustee on May 23.

The gist of the two filings was essentially two-fold. First, the $110 million judgment the *Jackson* court entered against FLTCI in the proceeding supplementary was invalid because that court lacked personal jurisdiction over FLTCI; therefore, the Jackson Estate lacked a valid judgment on which to base its Chapter 7 petition against FLTCI. Second, and as argued in Singerman's motion to dismiss, the Trustee was breaching her duty to the Debtor's estate in "acquiesce[ing] to Wilkes in connection with its unrelenting efforts to (mis)use this Chapter 7 case to further its financial interests in maximizing claims, and facilitating execution of default judgments, against the Debtor, THMI and other third parties regardless of the resulting prejudice to the estate."

* * *

Commentary

Singerman's argument proceeds from two points. The first is that THMI was part of the Debtor's estate because THMI's shares were FLTCI's sole asset. The Trustee was attempting to maximize the value of THMI's shares, and thus the value of the Debtor's estate, so that the Jackson Estate's claim (based on its $110 million judgment against FLTCI) could be paid. The second point is contradictory. Instead of maximizing the value of THMI's shares to the Debtor's estate, the Trustee, in acquiescing to Wilkes's pursuit of judgments against THMI, was *minimizing* the value of the shares to the Debtor's estate.[38]

* * *

Berman, on behalf of the Trustee, opposed the motion to dismiss in a response filed on June 18.[39] The Trustee lamented that in her investigation into the assets of the Debtor's estate, "the Debtor and related parties have uniformly and defiantly refused to produce [requested] documentation without broad confidentiality agreements, all in derogation of th[e] [Bankruptcy] Court's directives and unquestionably clear statutory law." Further, the Trustee noted that she "received no substantive responses to her information requests"—nothing but "rigorous opposition to avoid any flow of even the most basic information" required.

In addition to the Trustee, the Probate Estates also opposed the Debtor's motion to dismiss on several grounds. Among the reasons was that the Debtor had no standing to file the motion, "particularly over the opposition of the Creditors"[40]—namely, the Probate Estates. Wilkes stated that "[t]wo of the Creditors, the Estate of Elvira Nunziata and the Estate of Joseph Webb, have unstayed judgments against THMI. The remaining creditors, with the exception of the Estate of Jones,[ ] have default judgments as to liability against THMI."[41]

Responding to the Probate Estates' opposition to dismissal, the Debtor stated:

> [T]his case gives [the Probate Estates] no substantive right they do not already have. Their only aim in filing this case was to shop for a better forum for broader discovery that they cannot get in their chosen non-bankruptcy courts, which courts will, in any event, be the ultimate arbiters of the parties' rights and defenses. This Court and its jurisdiction are being used as a pawn to gain information and for other strategic litigation purposes, not for *any* legitimate bankruptcy purpose.

Debtor's Omnibus Reply to State Court Litigants' and Trustee's Oppositions to Debtor's Motion to Dismiss Chapter 7 Case at 9-10, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. June 21, 2012) (emphasis in original). Following an evidentiary hearing, the Bankruptcy Court denied the motion without prejudice on July 6, 2012.

At a hearing on June 29, 2012, the Bankruptcy Court instructed Berman to confer with interested counsel and prepare a draft of an omnibus order establishing discovery procedures and protocol for the production of documents and the examination of witnesses. The Bankruptcy Court considered Berman's draft, and on July 12, 2012, it incorporated parts of Berman's draft into the Omnibus Order it entered. The Omnibus Order established the scope of the Trustee's Rule 2004 examinations and stated that the Trustee should coordinate the date, time, and location of the examinations to allow them to be completed by September 14, 2012. It provided that the examinations and consequent discovery could potentially include other business entities or assets in the Debtor's estate.

On July 19, 2012, the Trustee filed a multi-count complaint for damages in the Circuit Court of Polk County, Florida—where the lawsuits brought by the Jackson, Sasser, and Townsend Estates had been filed.[42] The complaint charged

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the defendants with: (1) legal malpractice in abandoning the defense of THI and THMI in *Jackson*; (2) legal malpractice in failing to respond on behalf of FLTCI to the *Jackson* court's May 23, 2011, order to show cause, which allowed the state trial court to enter a $110 million default judgment against FLTCI; and (3) breach of fiduciary duties owed to THMI and FLTCI.[43] On July 20, 2012, the Trustee filed another complaint in the Circuit Court of Polk County, charging the defendants with unauthorized practice of law in unlawfully controlling or directing THMI's defense in *Jackson* and in representing themselves as counsel for FLTCI.[44] The defendants in both cases timely removed the cases to the United States District Court for the Middle District of Florida.[45]

Three weeks later, on August 10, 2012, the Debtor—FLTCI—moved the Bankruptcy Court for leave to challenge the *Jackson* court's $110 million judgment against it pursuant to Florida Rule of Civil Procedure 1.540(b)(4).[46] The Bankruptcy Court heard the motion on September 7 and denied it without prejudice in a September 25 order.[47] The Debtor renewed the motion on March 6, 2013.

The Omnibus Order temporarily resolved the disputes resulting from the Trustee's efforts to conduct Rule 2004 examinations of several Targets. The Omnibus Order gave the Trustee the right to conduct discovery regarding: (i) the Debtor's assets and liabilities; (ii) control of the Debtor's assets and operations; (iii) potential avoidance actions; and (iv) the possibility of including other business entities or assets in the Debtor's bankruptcy estate. The Trustee's mission, as she saw it, was to identify, secure, and recover hundreds of millions of dollars (if not more than one billion dollars) as the owner of THMI assets in the form of tort claims—including claims for legal malpractice,[48] breach of fiduciary duties, and fraud. According to the Bankruptcy Court, the Trustee's mission was "really no secret to anyone involved in this case. . . . [T]he Trustee . . . openly stated what her goal [wa]s." *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147, 151 (Bankr. M.D. Fla. 2013).

* * *

Commentary

The property of the Debtor's bankruptcy estate included "all legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), such as causes of action belonging to the debtor. 5 Collier on Bankruptcy ¶ 541.07 (16th ed. 2022). The Debtor's estate did not extend, however, to THMI's assets, including THMI's causes of action. *See Kreisler v Goldberg*, 478 F.3d 209, 214 (4th Cir. 2007) ("The fact that a parent corporation has an ownership interest in a subsidiary, however, does not give the parent any direct interest in the *assets* of the subsidiary.") (emphasis in original); *In re Com. Mortg. & Fin. Co.*, 414 B.R. 389, 395 (Bankr. N.D. Ill. 2009) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary, but not the assets of the subsidiary."). As the owner of 100% of THMI's stock, though, the Trustee had full control of THMI. In seizing THMI's tort claims, which were the only assets THMI possessed, the Trustee treated THMI as if it were dissolved and its tort claims had become part of the Debtor's estate. After the Bankruptcy Court consolidated FLTCI and THMI at the trial of the principal adversary proceeding in this case, THMI's assets were part of the bankruptcy estate.

B.

The Rule 2004 examinations, coupled with information provided by Wilkes and what Berman learned about the bust-out scheme, led the Trustee to file claims she believed aided her mission. Before turning to the claims themselves, we explain the bust-out scheme.[49]

1.

THI was incorporated under Delaware law in 1998. Through subsidiaries, it operated nursing homes, assisted living facilities, and long-term acute care hospitals across the United States. THMI provided a wide variety of administrative services to THI's operating subsidiaries.

A private equity group referred to as the "GTCR Group" provided THI's initial funding.[50] Between 1998 and 2005, the GTCR Group invested $37 million of its own capital in THI. Ventas, Inc. ("Ventas") loaned THI $55 million followed by another $22 million, with the stock of THI and THMI serving as collateral. GECC eventually assumed the $55 million loan. The GTCR Group controlled THI's Board of Directors and was instrumental in the company's day-to-day management and administration.

Early in 2003, the GTCR Group decided to increase THI's nursing home operations. Integrated Health Services ("Integrated"), one of the nation's largest nursing home operators, was in bankruptcy in Delaware, and the GTCR Group planned on acquiring its assets out of bankruptcy. To do that, the GTCR Group restructured THI. First, it created THI Holdings, LLC ("THI Holdings"), exchanging the GTCR Group's 83% stock interest in THI for an equal percentage of THI Holdings's shares. Second, THI Holdings created two new subsidiaries: THI of Baltimore, Inc. ("THI-Baltimore") and THI of Baltimore Management, LLC ("THMI-Baltimore"). With the restructuring in place: (1) THI Holdings became the parent of two wholly owned subsidiaries, THI and THI-Baltimore; (2) THI became the parent of the wholly owned subsidiary THMI; and (3) THI-Baltimore became the parent of the wholly owned subsidiary THMI-Baltimore.

With this restructuring, the GTCR Group intended to replicate the old THI structure for holding the Integrated assets it planned on acquiring. THI-Baltimore, operating as THI had, would operate the acquired nursing homes, and THMI-Baltimore, functioning as THMI had, would provide the management services for the homes.

But the GTCR Group failed to acquire the Integrated nursing homes. It was outbid by ABE Briarwood ("Briarwood"). THI-Baltimore was not out of the picture for long, however. It was soon able to strike a deal with Briarwood because Briarwood was not a licensed nursing home operator. Briarwood leased or subleased the former Integrated homes to THI-Baltimore to operate. THI-Baltimore then contracted with THMI-Baltimore to provide the management services for the homes. THI-Baltimore would be profitable, the GTCR Group thought, because the income generated by its nursing home operations would more than offset the rent it paid Briarwood and the management fees paid to THMI-Baltimore.[51]

The arrangement with Briarwood coupled with THI's operations seemed successful. By mid-2003, THI was reporting gross annual revenues of $1 billion and a net annual income of $6 million. In reality, however, THI had sustained a $29 million loss and was on the verge of defaulting on the Ventas and GECC loans. GECC and Ventas therefore took steps to protect their positions.

First, GECC and Ventas forced THI to enter into a series of forbearance agreements at a substantial cost in fees to THI. Second, GECC took control of THI's bank accounts. Pursuant to the terms of the loan agreement between GECC and THI, THI's cash flowed through a series of lockboxes and sweep accounts. After GECC learned of misrepresentations in THI's financial reporting, GECC began "trapping cash" in the sweep accounts. It instructed the Bank of New York, which kept THI's deposits, to capture all of the money held in THI's accounts. THI gave GECC control of a large portion of its assets. At the same time, it deprived itself of the ability to pay its bills and jeopardized patient care in its nursing homes. A lawsuit brought against the GTCR Group, Edgar Jannotta (associated with the GTCR Group), and THI alleged that they were conspiring to divert money loaned to certain nursing home facilities to pay the obligations of other facilities.

By early 2006, THI and THMI were defendants in over 150 lawsuits—among them, the wrongful death actions Wilkes had brought on behalf of the Jackson Estate in 2004 and the Nunziata Estate in 2005.

As the *Jackson* litigation was progressing and other cases like it were about to be filed, THI and THMI's boards of directors considered whether seeking protection in bankruptcy would be in the best interests of the companies, their employees, and their creditors. In January 2005, they authorized the companies to file for bankruptcy. The GTCR Group overruled their decision. After consulting counsel at Troutman,[52] the GTCR Group decided to take a different approach and execute a bust-out scheme to preserve the THI conglomerate and keep its assets intact.

2.

The bust-out scheme was carried out in three phases. The initial phase involved closing two transactions simultaneously in March 2006. In the first transaction, THI Holdings sold THMI's assets, as well as its shares of THI-Baltimore, to FLTCH for $9.9 million—far less than their fair market value. As of January 2006, those assets had been valued at more than $183 million.

In the second transaction, THI sold its shares of the nowassetless THMI[53] to FLTCI for $100,000. FLTCI therefore acquired all of THMI's liabilities but none of its assets. Troutman—where Leonard Grunstein, who held

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an interest in FLTCH,[54] was a partner—had incorporated FLTCI just months before. FLTCI's sole shareholder was Barry Saacks, an elderly graphic artist who was not aware that he owned FLTCI or that it acquired stock in THMI.

After acquiring the THMI assets, FLTCH rebranded them and continued generating millions in profits without the burden of THMI's liabilities. Within six months, THMI-Baltimore changed its name to Fundamental Clinical Consulting, LLC ("FCC") and took over the operations of the former Integrated nursing homes, and Fundamental Administrative Services, LLC ("FAS")[55] was created to take over the administrative services under the management contracts previously held by THMI-Baltimore. All of THMI's employees became employees of either FCC or FAS, depending on whether the employee provided operational aid, clinical support, or administrative services.

THMI and FLTCI became defunct following the March 2006 closings, but THI remained an active corporation until the GTCR Group launched the second phase of the bust-out scheme, winding down THI.

The GTCR Group launched the second phase in November 2007 when it sold a THI entity for $4.7 million. Three months later, the GTCR Group sold the remaining THI properties (except for one facility in Maryland) to Omega Healthcare Investors, Inc. and CommuniCare Health Services. As part of the latter transaction, CommuniCare acquired THI's right to operate those properties. The GTCR Group received nearly $48 million from the sale. The proceeds of the sales were used to pay off THI's creditors.

In January 2009, the GTCR Group had THI petition a Maryland state court on behalf of itself and 143 subsidiaries—but not THMI—for appointment of a receiver. The Maryland court granted THI's petition and the same day appointed a receiver, who was subsequently replaced by Alan Grochal, an attorney in the law firm that filed the petition. The purpose of the receivership was to obtain a stay in the litigation of Wilkes's cases while the receivership was ongoing.

With the receivership underway, the GTCR Group executed the third—and final—phase of the bust-out scheme: concealing the March 2006 transactions. The transactions had to be concealed long enough for the statute of limitations to run on a fraudulent transfer suit against FLTCH.[56] The prescriptive period for an action to void a fraudulent transfer was four years in Florida and Delaware and six years in New York. Prior to the trial of the adversary proceeding in this case in October 2014, the parties—with the Bankruptcy Court's consent—agreed to apply the Florida UFTA, Fla. Stat. § 726.101 *et seq*.

In an effort to ensure that the prescriptive period would run before Wilkes established that its clients' negligence claims were meritorious and thus could support a free standing UFTA cause of action, the GTCR Group had to take control of THI and THMI's defense in those cases in order to delay their completion. The receivership order had given the receiver the right to defend THMI in Wilkes's cases even though THMI was not one of the THI subsidiaries included in the THI receivership. In June 2009, as a delay tactic, Grochal (the THI Receiver) filed an action, *Trans Health Care, Inc. v. Creekmore*, in the Circuit Court of Miami-Dade County for the domestication of the receivership in Florida.[57] No. 2009CA-11513, 2013 WL 11015914 (Fla. Cir. Ct. June 19, 2013). Grochal immediately sought a stay of the actions Wilkes was prosecuting against THI and THMI. The circuit court granted the domestication of the receivership but denied Grochal's application for a stay, leaving the decision whether to grant a stay to the state courts in which Wilkes's cases were pending.

To reiterate, the four-year prescriptive period for filing an action to void the March 2006 sale of THMI's assets to FLTCH and any other recipients of the assets would expire in March 2010. Grochal, aware of that fact and the status of Wilkes's cases, directed the lawyers that the receivership had retained to defend THI and THMI in Wilkes's cases to withdraw their representation in April 2010—just over four years after the March 2006 transactions had closed and 16 months after the receivership's creation.

The lawyers defending THI and THMI in *Jackson* withdrew their representation of the defendants with leave of court on May 18, 2010. The case went to trial before a jury on July 22, 2010, without the lawyers' presence. It was thus an empty-chair trial and resulted in verdicts of $55 million each against THI and THMI. Judgments were entered accordingly.

* * *

Commentary

In a nutshell, the bust-out scheme involved THMI's assets and liabilities being split into two separate entities. FLTCH got the assets. FLTCI got the liabilities. If they could get away with it, THI's owners could enjoy THMI's money without being subject to THMI's legal liabilities. It goes without saying that this is wrong. That is why fraudulent transfer statutes exist. The bust-out scheme continued by attempting to avoid liability under those statutes. Namely, the powers that be in the THI corporate family orchestrated a defense strategy that allowed the UFTA prescriptive period to run without alerting potential creditors like Wilkes's clients that something untoward was going on behind the scenes.

3.

In a way, the bust-out scheme continued through the bankruptcy proceedings in the Trustee's conflict with the Debtor—FLTCI—FLTCH, and the Targets over the representation of THI and THMI in Wilkes's state court proceedings. After Wilkes put FLTCI into bankruptcy in December 2011, the Targets realized that the withdrawal of defense counsel in Wilkes's wrongful death actions was unwise. Although they appeared to have solid time bar defenses to Wilkes's fraudulent transfer actions in the form of post-judgment motions under Fla. Stat. § 56.29, Wilkes's litigation strategy was of considerable concern. After obtaining multimillion-dollar verdicts in empty-chair jury trials, Wilkes would use the evidence the bankruptcy trustee uncovered to reinforce its § 56.29 motions or support an adversary proceeding in the FLTCI bankruptcy. To bring the empty-chair trials to an end and reduce their § 56.29 exposure, the Targets concluded that they had to provide defense counsel for THI and THMI in Wilkes's cases. In a memorandum opinion issued on March 20, 2015, the Bankruptcy Court recalled the steps they took:

> [T]he targets decided to provide a defense for THI and THMI as an outer firewall to any liability to the Probate Estates. In an effort to ensure the remaining cases did not go undefended, the targets entered into a settlement agreement with the THI Receiver [Grochal] on January 5, 2012.
>
> Under the January 2012 agreement, FAS—one of the targets—agreed to defend THI, the THI Receiver, and the THI receivership estate from any claims arising out of the negligence or wrongful death cases filed by the Probate Estates. FAS agreed to deposit $800,000 in escrow to fund the costs of that defense. GECC—one of THI's lenders who was also a target—likewise agreed to contribute up to $200,000 toward the defense costs. FAS fairly immediately delegated the duty to defend THI back to the THI Receiver, and the THI Receiver immediately set out to retain counsel for THI and THMI.

In re Fundamental Long Term Care, Inc., 527 B.R. 497, 504 (Bankr. M.D. Fla. 2015).

As the Bankruptcy Court pointed out, however, the Receiver didn't act soon enough:

> Newly retained counsel for THMI attempted to appear on the company's behalf on the morning of trial in the case filed by the Nunziata Estate. But the court in that case would not let counsel appear. Likewise, the court in the case filed by the Webb Estate would not let newly retained counsel appear for either THI or THMI. Because the state courts would not let newly retained counsel appear on behalf of THI and THMI, both of those cases proceeded to empty-chair trials, and the juries ultimately returned more than $1 billion in verdicts combined.

Id. (footnote omitted).[58] By the time Berman and Shumaker joined the Trustee's team, lawyers retained by the THI Receiver—Grochal—were actively representing THI and THMI in Wilkes's wrongful death cases. At the same time, the Trustee was seeking access to their litigation files. The THI Receiver objected, so Berman moved the Bankruptcy Court for an order requiring the Receiver to show cause why the files should not be produced. The Receiver did not dispute that the Trustee should generally have access to THMI's books and records, but he claimed that the lawyers' litigation files were privileged. *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258, 2012 WL 4815321, at *2 (Bankr. M.D. Fla. Oct. 9, 2012) (internal quotation marks omitted). He also took the position that he had the exclusive right to control the defense of any claims against THMI. *Id.* This was so, he said, because he had assumed the obligation of defending THMI "to ensure that no THMI obligation might by default

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exhaust the limited assets of the THI estate to the detriment of THI's other creditors." *Id.* (internal quotation marks omitted).

The Bankruptcy Court held a hearing on the Receiver's objection on September 27, 2012, and on October 9, 2012, the Bankruptcy Court issued an order stating that

> the Trustee—as the sole shareholder of the Debtor's wholly owned subsidiary—should have (i) access to the books and records relating to the Debtor and its subsidiary (including any litigation files); and (ii) the right to control THMI activities (including the right to assert any attorney-client privilege, to the extent it exists, on THMI's behalf).

Id. at *11.

On October 29, 2012, the THI Receiver appealed that order and promptly moved the Bankruptcy Court to stay its order pending the appeal. Wilkes opposed the motion, alleging that FLTCI was merely "a shell and its purchase of THMI was a sham transaction designed to benefit a few wrongdoers by transferring the valuable assets of THMI, lodging the liabilities in a shell company, and concealing the whole scheme from the creditors." Wilkes went on to allege that the Receiver was an integral part of the scheme:

> In January 2012, sixteen parties including General Electric Capital Corporation, Inc., GTCR, Ventas, Rubin Schron, Leonard Grunstein, Murray Forman, and the state court receiver for THI, entered into a specific agreement, memorializing an extant conspiracy, to fund a massive effort to conceal discovery of the facts related to their fraud. The signatories attempted to gain legitimacy for these efforts by using the color of the state law receivership of THI.

Creditors' Opposition to Motion of Alan M. Grochal for Stay Pending Appeal at 3-4, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Nov. 5, 2012). Wilkes concluded by saying that "the Debtor and the other 'interested parties' have no standing in this case."

The Bankruptcy Court heard the motion on November 16, 2012, and took it under advisement. The day before, unbeknownst to the Trustee and the Bankruptcy Court, FLTCH and FAS sued THMI in the Southern District of New York for a declaration that the fraudulent transfer claims Wilkes was attempting to prosecute via its § 56.29 post-judgment motions in *Nunziata* and *Webb*—which had resulted in jury verdicts and judgments of $200 million and $900 million, respectively—were time-barred.[59] *Fundamental Long Term Care Holdings, LLC. v. Trans Health Mgmt., Inc.*, No. 1:12-cv-8339 (S.D.N.Y. filed Nov. 15, 2012). Six days later, the lawyer who brought that action also filed a complaint for Christine Zack (a FAS in-house counsel) against Shumaker in the Southern District of Ohio, seeking unrelated relief. *Zack v. Shumaker, Loop & Kendrick, LLP*, No. 2:12-cv-1075 (S.D. Ohio filed Nov. 21, 2012).

Before the defendants were served with process in those cases, the Trustee decided to take over THMI's defenses in the Wilkes cases. On December 10 and 21, 2012, Shumaker moved the appellate courts in *Webb* and *Nunziata*, where THMI's appeals were pending, to appear as appellants' counsel in place of the lawyers the THI Receiver had retained. Then, on December 27, 2012, the Trustee, having notice of the federal district court cases in New York and Ohio, sought to enjoin their prosecution by commencing an adversary proceeding against FLTCH, FAS, and Zack with a two-count complaint.[60]

On January 4, 2013, the Bankruptcy Court entered an order denying the THI Receiver's motion to stay the Bankruptcy Court's October 9, 2012, ruling pending the THI Receiver's appeal to the District Court for the Middle District of Florida.[61] Although it denied the motion, the Bankruptcy Court ordered counsel for the Trustee, the Receiver's counsel, and counsel hired by the Receiver to represent THMI in the Wilkes cases to confer so the Trustee could "evaluate the positions she will take on behalf of THMI in the Wilkes Litigation." Regarding the current representation of THMI, the Bankruptcy Court provided that:

> The law firms who have made appearances on behalf of THMI are authorized to continue to defend the Wilkes Litigation to prevent prejudice to THMI's rights and to ensure that defaults are not entered or permitted to remain in place uncontested (including prosecuting appeals with respect to previously entered judgments) against THMI until the Trustee either (i) authorizes existing THMI counsel to continue to represent THMI; or (ii) obtains substitute counsel (who enters his or her appearance in each Wilkes Litigation matter) and releases existing THMI counsel from any further obligations.
>
> . . .
>
> In any event, the Trustee shall take any and all actions necessary to ensure that disputed claims are defended, including prosecuting appeals with respect to previously entered judgments.

Order Denying Motion for Stay Pending Appeal at 2, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Jan. 4, 2013). The Bankruptcy Court also stated that "[a]ny substantive information regarding the personal injury claims and defenses shared with the Trustee during the . . . conferences will not be shared with the Petitioning Creditors or their counsel absent further order of this Court." *Id.* at 3.

The same day this order was entered, FLTCH and FAS moved the Bankruptcy Court to enter an order disqualifying Shumaker as Trustee's counsel on the ground that Shumaker had a conflict of interest in favor of Wilkes.[62] The motion alleged that Wilkes had brought the Chapter 7 case for two reasons:

> The first reason was to remove THMI's defense against the plaintiffs' outrageous claims from competent counsel that serves only THMI's interest, and place it under the control of counsel with loyalties to the plaintiffs and their counsel. The second reason was to obtain a trustee, with the mantle of independence and court appointment, to assist in collecting THMI's bogus liabilities from unrelated third parties. . . . This case and this Court are being used to perpetrate a gross violation of fundamental due process, and [Shumaker's] representation of THMI is critical to pulling it off.

Joint Motion of Fundamental Administrative Services, LLC and Fundamental Long Term Care Holdings, LLC for an Order (A) Disqualifying Shumaker, Loop & Kendrick LLP as Counsel to Trans Health Management, Inc. Due to Conflict of Interest, and (B) Granting Related Relief at 3, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Jan. 4, 2011).

On January 30, 2013, the Bankruptcy Court, "having heard argument of counsel for the Trustee, FAS, and FLTCH," entered an order denying FLTCH and FAS's motion to disqualify Shumaker. The order stated that the Bankruptcy Court would conduct a status conference on February 4, 2013, "at which time the Trustee shall report to the Court the status of pending state court litigation and appeals involving the Debtor or THMI," and the "current representation of the Debtor and THMI in such cases." The Bankruptcy Court required that prior to the status conference, the Trustee and the THI Receiver confer about "the prior and future representation of THMI." On February 5, 2013, FLTCH and FAS appealed that order to the District Court.

Meanwhile, on January 23, 2013, the Bankruptcy Court granted the Trustee's motion for a preliminary injunction barring FLTCH and FAS from prosecuting their declaratory judgment action in the Southern District of New York and barring Zack from proceeding with her case in the Southern District of Ohio.

On March 7, 2013, the Debtor—FLTCI—renewed the motion it had filed on August 10, 2012, pursuant to Florida Rule of Civil Procedure 1.540(b)(4), challenging the $110 million judgment entered against it as void.[63] One day earlier, on March 6, the Trustee moved the Bankruptcy Court to authorize and direct mediation of all claims. On March 19, 2013, FLTCH and FAS jointly responded to the Trustee's motion. They repeated their concern from the hearing on their motion seeking Shumaker's disqualification. Their concern was that Shumaker would enter into "collusive settlements of the six [wrongful death] actions with [Wilkes] 'to set THMI's liabilities at amounts that . . . are going to be astronomical windfalls to the plaintiffs . . . set in stone behind closed doors.' " "In the mediation envisioned by the Trustee, there will be no party arguing to the mediator that THMI or the Debtor has zero liability to these plaintiffs." The Bankruptcy Court heard the motion on March 26 and granted it over the objections of the Debtor, FLTCH, and FAS, appointing a retired bankruptcy judge as mediator.[64]

On June 6, 2013, following five days of mediation, the Trustee filed an expedited motion to compromise the claims that the Sasser, Jones, and Townsend Estates had brought against THMI in state court and filed as claims against the Debtor's estate in the bankruptcy proceeding.[65] In *Sasser* and *Jones*, THMI and the Debtor stipulated to a

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claim for compensatory damages of $5 million and punitive damages of $5 million—a total of $20 million between the two cases. In *Townsend*, THMI and the Debtor stipulated to a claim for compensatory damages of $10 million and punitive damages of $10 million. The Trustee filed an amendment to her expedited motion to compromise on July 10.

The Trustee's motion was met with vehement opposition by FLTCH, FAS, FCC, THI Holdings, the THI Receiver, GECC, and the Debtor on a variety of substantive and procedural grounds. The objections led to reciprocal exchange of documentary evidence. The Trustee produced documents on which she and Shumaker relied in determining that the settlement proposed was in the best interests of the bankruptcy estate. The objectors produced documents supporting their objections.

The Bankruptcy Court heard the Trustee's motion on July 10-12, 2013, and on July 12 the Bankruptcy Court entered an order approving the compromise. The order was perfunctory. The trial date in *Townsend* was looming and the Bankruptcy Court wanted its ruling to serve as notice well in advance of the trial. The Bankruptcy Court anticipated that the parties would agree on a superseding replacement order. As a precaution, the Debtor, joined by the Receiver, appealed that July 12 order to the District Court, as did FAS and FCC. On December 18, 2013, the District Court reversed the July 12 order and remanded the matter to the Bankruptcy Court with the instruction that it reconsider the settlements after it concluded the adversary proceeding and resolved the issue of the identity of interest between FLTCI and THMI, if any. The District Court observed that many of the issues plaguing the Bankruptcy Court were "created because the creditors placed [FLTCI] into bankruptcy as the debtor, rather than its subsidiary THMI against which the [Probate Estates] have causes of action." As indicated *infra* part III, the Bankruptcy Court resolved this issue by treating THMI and FLTCI as one entity for Chapter 7 purposes.

On July 30, 2013, FLTCH and FAS moved the Bankruptcy Court for authority either to transfer their New York declaratory action to the Middle District of Florida with referral to the Bankruptcy Court or, in the alternative, to dismiss the New York action without prejudice and refile it in the Bankruptcy Court. On August 2, FLTCH and FAS supplemented their motion to include a request for injunctive relief "based on the flagrant misconduct of the [Townsend] Estate and its counsel, Wilkes," that took place following the jury trial in *Townsend* and entry of judgment for the Townsend Estate on July 29, 2013.

What Wilkes had done in *Townsend* after the entry of judgment was described by the Florida District Court of Appeal in *General Electric Capital Corp. v. Shattuck*, 132 So. 3d 908 (Fla. 2d Dist. Ct. App. 2014) [39 Fla. L. Weekly D377a]. On July 29, 2013—after the state court had entered a default against THI and a jury returned a verdict against THI of $1.1 billion ($1 billion of which was for punitive damages)—the trial court entered judgment against THI.[66]

> Two days later, the [Townsend E]state filed a "motion to alter and amend the judgment to conform with evidence at trial." The motion asked the court to add the sixteen Appellants to the final judgment pursuant to Florida Rule of Civil Procedure 1.530(g). The motion was served only on the attorney for the THI [R]eceiver, not on any of the sixteen Appellants. Later that same day the trial court, without soliciting responses or holding a hearing, granted the motion and entered the amended final judgment at issue in these proceedings. The amended judgment added the sixteen Appellants as judgment debtors, jointly and severally liable for the damages award "based on the evidence adduced at trial" demonstrating that they were "the real parties in interest."

Id. at 910-11.[67]

The Bankruptcy Court heard the motion to transfer on August 20, 2013, and took it under advisement. As it turned out, a ruling was unnecessary since the purpose of the motion was accomplished when the Bankruptcy Court entertained FLTCH and FAS's statute of limitations defense at the trial of the principal adversary proceeding (initiated by the Probate Estates) in September and October 2014 as affirmative defenses to the Probate Estates' claims. *See In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 384 ("Denial of the motions to dismiss [as time-barred] is without prejudice. The Defendants are free to raise the statute of limitations as an affirmative defense.").

On September 3, 2013, the District Court decided FLTCH and FAS's appeal of the Bankruptcy Court's January 30, 2013, order denying their motion to disqualify Shumaker. The District Court did so with these observations:

> Appellants contend the [T]rustee has a direct conflict with making decisions for [THMI] even though the debtor [FLTCI] owns 100% of the stock in THMI. Because of this asserted conflict, Appellants contend [T]rustee's counsel, [Shumaker], also has a conflict.
>
> . . .
>
> This asserted conflict is occasioned because of the unusual posture of this case. This is an involuntary bankruptcy brought by a creditor of THMI's parent corporation. By putting THMI's parent corporation [FLTCI,] in bankruptcy rather than THMI, the creditors are allowed to continue to pursue litigation against THMI.
>
> Since THMI is not the debtor, it does not receive any of the benefits of bankruptcy, such as an automatic stay of civil litigation against it. Therefore, civil litigation has been proceeding against THMI outside the control of the Bankruptcy Court. The [T]rustee has been making decisions (such as allowing "claims") for THMI as if THMI were in bankruptcy.
>
> It is apparent that a decision needs to be made whether in fact THMI and the Debtor should be treated as the same entity under theories of alter ego, substantive consolidation, or other legal or equitable theory. If so, THMI should be brought into the bankruptcy as a debtor which would afford it the benefits of bankruptcy as well as the burdens. If THMI is not to be treated as the same entity as the debtor, then the litigation against THMI may be moot in this bankruptcy estate and the issues involved in this appeal may become moot.

Order of Remand at 1-2, *In re Fundamental Long Term Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. Sept. 5, 2013). The District Court therefore remanded the case with the instruction that the Bankruptcy Court determine at the earliest practical time whether "THMI should be brought into the bankruptcy case as a debtor."

* * *

Commentary

The District Court observed the obvious. Other than the Jackson Estate, none of the Probate Estates had a claim against the Debtor. Their claims were against THMI, an entirely separate entity. And they could not be allowed in the Debtor's estate. That is why it was necessary that the Bankruptcy Court consider THMI, qua separate entity, as a bankrupt entity together with FLTCI.

* * *

The Bankruptcy Court followed the District Court's lead on September 12, 2013. In a Memorandum Opinion, the Bankruptcy Court held that the Bankruptcy Court was the proper forum for Wilkes's fraudulent transfer claims. *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147 (Bankr. M.D. Fla. 2013). In doing so, the Bankruptcy Court addressed Wilkes's argument that the Probate Estates should be allowed to continue their state court litigation:

> In asking the Court not to enjoin their efforts in state court, the creditors argue the Court should be guided by the Trustee's judgment as to what is in the best interests of the estate. That is not quite right. The Court is first and foremost guided by the Bankruptcy Code. And the Bankruptcy Code grants this Court exclusive jurisdiction over property of the estate. There is no question in the Court's mind that continuation of the proceedings supplementary—given the Estate of Nunziata's acknowledgement that the assets that were allegedly transferred to the "targets" belong to THMI—is an attempt (even if unintentional) to obtain or take control of property of the estate, and that alone warrants requiring the creditors [the Probate Estates] to pursue any fraudulent transfer or alter ego claims in this Court.

Id. at 160. The Bankruptcy Court then set a hearing to set "the parameters of a single proceeding—involving the Trustee, the creditors, and the 'targets'—for resolving any fraudulent transfer and alter ego claims." *Id.* The Trustee, as a hypothetical creditor of THMI, could not mount fraudulent transfer causes of action against FLTCH and the Targets unless THMI was in bankruptcy.

* * *

Commentary

As evidenced by the various disputes over control of THMI's defense strategy, the Chapter

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7 proceeding pitted Wilkes, the Probate Estates, the Trustee, and Shumaker against FLTCI, FLTCH, and the Targets.

III.

A.

On October 1, 2013, the Probate Estates initiated an adversary proceeding in the Bankruptcy Court against 16 entities and individuals with a two-count complaint for declaratory relief.[68] Count I alleged that six of the defendant parties assumed the debts and liabilities of THI, THMI, and FLTCI as successors to those entities. Count II alleged that eleven of the defendant parties were the alter egos of THI, THMI, and FLTCI and therefore assumed their debts and liabilities.

On October 24, 2013, the Trustee moved the Bankruptcy Court pursuant to Federal Rule of Bankruptcy Procedure 7024[69] for leave to intervene as a party plaintiff to bring additional claims that constitute the property of the Debtor's estate.[70] The Bankruptcy Court granted the motion on October 31 and, on November 18, the Trustee filed a Complaint in Intervention which added a Count III to the Probate Estates' complaint "to substantively consolidate THMI into the Debtor's bankruptcy estate." Count III alleged that "[t]there is such a unity of interest and ownership between FLTCI and THMI that the independence of each corporation had, in effect, never begun, and therefore adherence to the fiction of separate identities serves only to defeat justice."

The next day, in a Memorandum Opinion on Motions for Temporary Injunction and Motion to Approve Compromise, the Bankruptcy Court concluded that "THMI's fraudulent transfer and alter ego claims (if any) potentially belong to the estate" and enjoined the Probate Estates "from pursuing any proceedings supplementary or other collection efforts that could conceivably affect property of the estate." *In re Fundamental Long Term Care, Inc.*, 501 B.R. 770, 774, 784 (Bankr. M.D. Fla. 2013). The Bankruptcy Court also denied a motion to compromise made by the Trustee (involving the claims of the Sasser, Jones, and Townsend Probate Estates) because one of its provisions would allow the Probate Estates to maintain their lawsuits against THMI, suggesting that the Bankruptcy Court viewed lawsuits against THMI as affecting property of FLTCI. *Id.* at 784.

The Probate Estates amended their adversary complaint on December 19, 2013. This pleading consisted of 228 pages with 1201 paragraphs and 22 counts. It was a typical shotgun complaint in that each count incorporated all preceding paragraphs of the complaint such that Count XXII was an amalgamation of all counts.

On March 14, 2014, the Bankruptcy Court, in a Memorandum Opinion on Motions to Dismiss, identified the counts and the claims they asserted. According to the Bankruptcy Court:

> The twenty-two counts in the complaint can be broken down into eight claims for relief: one count for substantive consolidation by the Trustee (Count I), two counts for breach of fiduciary duty (Counts II & III), four counts for aiding and abetting a breach of fiduciary duty (Counts IV-VII), one count for successor liability (Count VIII), two counts for piercing the corporate veil (Counts IX & X), three counts for alter-ego liability (Counts XI-XIII), eight counts for (actual or constructive) fraudulent transfer (Counts XIV-XXI), and one count for conspiracy to commit a fraudulent transfer (Count XXII).

In re Fundamental Long Term Care, Inc., 507 B.R. 359, 372 (Bankr. M.D. Fla. 2014).

* * *

Commentary

Before passing on the sufficiency of any of the counts, though, the Bankruptcy Court shared the frustration Judge Merryday expressed on November 8, 2013, in reviewing a complaint Wilkes filed in the Middle District of Florida on behalf of the Jackson Estate against McGraw-Hill Companies, Inc.; Standard & Poor's Financial Services, LLC; Credit Suisse Securities (USA), LLC; and Credit Suisse First Boston Mortgage Securities Corporation. *See Jackson-Platts v. McGraw-Hill Cos.*, No. 8:13-cv-850-T-23MAP, 2013 WL 6440203, at *1 (M.D. Fla. Nov. 8, 2013). This complaint alleged that "the [Jackson] Estate holds a $110 million judgment against [THI], and [THMI] . . . which is uncollected." *Id.* The complaint and charged the defendants with

> an expansive and enduring conspiracy among an array of conspirators, including S & P and Credit Suisse, who together allegedly undertook "a shell game" effected by a scheme the complaint denominates a "Propco-Opco-Oldco" (P-O-O) business structure, designed to "loot the assets" of the THI entities, among many other targets, and—as part of an "unlawful and improper professional liability and general liability claim reduction strategy"—designed to render the THI entities unable to satisfy the [Jackson] Estate's judgment. The conspiracy allegedly sought to further the malevolent purpose of capturing enormous profit for the conspirators at the expense of nursing home occupants.

Id. Judge Merryday described the complaint as "a confusing, ambiguous, generalized, conclusory, and uninformative (and intermittently melodramatic) paper" and dismissed it.[71] *Id.* at *4, *6. On December 6, 2013, Wilkes voluntarily dismissed the case.[72]

* * *

Nevertheless, despite the deficiencies in this amended complaint, the Bankruptcy Court, "(particularly given the two years it ha[d] spent dealing with all of these parties in the main bankruptcy case) [wa]s able to glean the meaning of the critical allegations—albeit not without considerable energy." *In re Fundamental Long Term Care, Inc.*, 507 B.R. at 386.

In ruling on the motions, the Bankruptcy Court indicated how it viewed the case. To the Bankruptcy Court, it was obvious that

> the main thrust of this case is the Plaintiffs' claims for fraudulent transfer. In all, the Plaintiffs allege a total of eight counts for fraudulent transfer against the Defendants (Counts XIV-XXI).
>
> . . .
>
> The complaint unquestionably states claims for fraudulent transfer against THI-Baltimore and FLTCH.
>
> . . .
>
> [T]he facts of the complaint plausibly allege that the transfer of THMI's assets to FLTCH was for the benefit of Forman and Grunstein since they owned FLTCH—a closely held company.

Id. at 380-81. In essence, the Bankruptcy Court viewed the Probate Estates' sprawling and tangled amended complaint as simply a fraudulent transfer action. That said, it was clear to the Bankruptcy Court that the plaintiffs "fail[ed] to state a claim for relief under any alter-ego or veil-piercing theories." *Id.* at 386. Plaintiffs did, however, state claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent transfer, conspiracy to commit fraudulent transfer, and successor liability against a variety of defendants. *Id.*

The Bankruptcy Court dismissed the remaining claims without prejudice and with leave to amend. *Id.* It granted leave with the expectation that the amendment would cure the many defects of the amended complaint. *Id.* In passing on the sufficiency of the claims asserted in the amended complaint, the Bankruptcy Court did not consider the defendants' argument that the claims were time-barred. It stated that the defendants' statute of limitations grounds for dismissing the adversary proceeding would be treated as affirmative defenses and addressed later *See id.* at 384.

On April 4, 2014, the Probate Estates filed a second amended complaint with 32 claims—more claims than were contained in the first amended complaint. Instead of rehabilitating the dismissed claims and curing the previous complaint's defects, the second amended complaint: (1) incorporated several hundred paragraphs of the first amended complaint by reference; (2) repleaded five claims the Bankruptcy Court had dismissed in their entirety; (3) offered a new, but largely repetitive, restatement of several claims; and (4) added four new claims against several defendants.

The defendants responded to the second amended complaint by filing motions to dismiss.[73] On June 26, 2014, the Bankruptcy Court dismissed the following claims: "alter ego liability (Count 23), aiding and abetting against Schron (Count 26), abuse of process (Count 27), conspiracy to commit abuse of process (Count 28), negligence (Count 29), fraudulent transfer against Schron (Count 30), civil conspiracy against GECC (Count 31), and avoidance of a post-petition transfer (Count 32)." The Bankruptcy Court then gave the plaintiffs seven days to file another amended complaint restating the claims that had not been dismissed.

In the end, the claims that survived were: (1) a claim for substantive consolidation of THMI and FLTCI; (2) two claims of breach of fiduciary duty; (3) six claims of aiding and abetting breach of fiduciary duty; (4) a request for declaratory relief against FLTCH, FAS, and THI-Baltimore on a successor liability theory; (5) one claim each of actual and constructive fraudulent transfer; and

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(6) one claim of civil conspiracy to commit fraudulent transfer. The Bankruptcy Court concluded that "any further attempts by the Plaintiffs to amend their complaint would be futile or unfairly prejudicial to the Defendants." *In re Fundamental Long Term Care, Inc.*, 512 B.R. 690, 707 (Bankr. M.D. Fla. 2014).

On August 26, 2014, as the Bankruptcy Court and the parties were preparing for a trial on the remaining claims of the second amended complaint, the Bankruptcy Court denied the defendants' motions for summary judgment without a hearing in a two-page order.[74]

The trial of the case began on September 22, 2014. It ended fifteen days later, on October 7. On December 16, the Bankruptcy Court tentatively announced the following findings of fact and conclusions of law:

> (1) FLTCI and THMI are consolidated and ought to be treated as if they are one.
>
> (2) The claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty fail for lack of proof. Indeed, "the evidentiary record shows that the challenge[d] transactions were entirely fair."
>
> (3) The claims of constructive fraud and actual fraud fail for lack of proof that THMI's assets were sold to defraud THI or THMI's creditors. The transferor of THMI was THI. THI sold 100% of THMI's shares to FLTCI, but THI did not do so to defraud its creditors or THMI's creditors.
>
> (4) The claim of successor liability is established. "FAS and possibly [THI-Baltimore] and FLTCH [we]re the mere continuation of THMI and . . . the 2006 transaction [the bust-out scheme] was a fraudulent effort to avoid the liability of a predecessor corporation." "The parties appear to agree that the Delaware law governs" whether the successor liability claim is time-barred. The statute of limitations' three-year prescriptive period began to run when the March 2006 transaction closed, and the plaintiffs didn't file their successor liability claim until October 1, 2013. The Bankruptcy Court tolled this time period because the injury sustained was "inherently unknowable," and the plaintiffs' claims were "concealed" by the defendants.

Following the conclusion of the adversary proceeding, on January 9, 2015, Wilkes, for the Townsend Estate, moved the Bankruptcy Court "for Relief to Comply with the Mandate of the Florida Second District Court of Appeal" in *General Electric Capital Corp. v. Shattuck*, 132 So. 3d 908 (Fla. 2d Dist. Ct. App. 2014) [39 Fla. L. Weekly D377a]. Wilkes asked that the Townsend Estate be allowed to "proceed with its motion to alter or amend the judgment" it procured in the state court wrongful death action to include the 16 parties it wished to be bound by the Townsend Estate's $1.1 billion judgment in that action. Following a hearing on May 27, 2015, the Bankruptcy Court denied that motion without prejudice.

Meanwhile, on February 2, 2015, the Bankruptcy Court issued an order requiring the Trustee, the "Fundamental Defendants,"[75] the Probate Estates, and other interested parties to submit to mediation on February 3-4, 2015. The parties attended mediation on February 3, 4, 5, 9, and 10. Also on February 10, the Bankruptcy Court granted the Trustee's motion to "consolidate" the bankruptcy to include THMI, pursuant to the Bankruptcy Court's finding that FLTCI and THMI could be treated as one.

On February 23, 2015, the Trustee moved the Bankruptcy Court to compromise two controversies involving the Trustee, the Probate Estates, and the Fundamental Defendants.

The Trustee presented two compromises. In one, the Fundamental Defendants would pay the Trustee $18.5 million[76] and would receive the Trustee's and Probate Estates' general releases and a bar order in exchange.[77] *In re Fundamental Long Term Care, Inc.*, 527 B.R. 497, 507-08 (Bankr. M.D. Fla. 2015). The second compromise was with the Quintairos law firm. It would pay the Trustee $1.25 million and receive general releases like the ones the Fundamental Defendants would receive, as well as the same bar order. *Id.* at 508.

In addressing the motions in its March 20 Memorandum Opinion on Motion to Compromise and Motions for Permanent Injunctive Relief, the Bankruptcy Court described what the Chapter 7 case had become: "at least 27 lawsuits and 15 appeals before 13 different courts and 17 judges in 5 states" involving 16 defendants.[78] *Id.* at 501. The Bankruptcy Court listed the defendants and their tentative dispositions. *Id.* at 501 n.6. In short, only five of the defendants were *potentially* liable on a successor liability theory.

The Bankruptcy Court then assessed the compromises under the *Justice Oaks* factors[79] and found that they met the factors. *Id.* at 509. But it stated it would only approve "the proposed compromises and bar orders conditioned on the entry of a final, non-appealable order enjoining the Probate Estates from pursuing any claims arising out of the nucleus of facts set forth in the adversary complaint in this proceeding." *Id.* at 517. The Probate Estates were free to appeal any of the Bankruptcy Court's orders, as well as litigate their negligence claims against the THI Receiver and in *Jones, Sasser*, and *Webb*. *Id.*

> But they [we]re enjoined from (i) pursuing any pending proceedings supplementary; (ii) litigating their civil rights claim against the GTCR Group, GECC, and Ventas; and (iii) pursuing any claims against the GTCR Group, GECC, Ventas, and Schron as "real parties in interest" in the *Townsend*, *Jones*, or *Sasser* cases.[80] In short, there will be no sequel.

Id.

On March 23, the Bankruptcy Court entered an order approving the Trustee's proposed compromises; the approval was conditioned on the entry of an injunction permanently enjoining the Probate Estates from pursuing claims against any of the non-settling defendants—in other words, the non-Fundamental Defendants. In addition to enjoining them in the manner it described on March 20, the Bankruptcy Court also enjoined the Probate Estates from "pursuing any claims against the non-settling Defendants arising out of the nucleus of facts set forth in the adversary complaint in this proceeding." The Bankruptcy Court added this proviso: "In the event any part of this Order is reversed on appeal, the Motion to Compromise shall not be approved, and none of the terms of the parties' compromise shall become effective."

On March 27, 2015, the THI Receiver appealed the Bankruptcy Court's decisions from March 20 and 23. On April 3, the Probate Estates appealed the Bankruptcy Court's March 20 Memorandum Opinion and the final judgment it entered on March 27.

* * *

Commentary

As the Bankruptcy Court recognized, "the main thrust of this case is the Plaintiffs' claims for fraudulent transfer." Wilkes let the Probate Estates' fraudulent transfer claims extinguish to preserve its ability to seek multimillion-dollar jury verdicts in state court, then filed a baseless Chapter 7 petition against an inoperative shell corporation with no assets—not even potential causes of action against FLTCH and the Targets. This, Wilkes thought, would essentially set the Trustee to work for Wilkes. In the bankruptcy proceeding, the Trustee could discover evidence that Wilkes could not discover in various state court wrongful death cases. Wilkes could use this evidence to potentially bring unrelated claims against the defendant entities.

B.

On September 9, 2015, the Trustee moved the Bankruptcy Court: (i) to approve another compromise, this time between the Trustee and the bankruptcy estate's professionals; (ii) to reconsider and vacate in part the March 20 Memorandum Opinion and the March 23 Order approving the two compromises described above; (iii) to enter a separate opinion or order unconditionally approving the $18.5 million settlement; and, if appropriate, (iv) to enter a separate opinion or order addressing the Targets' requests for permanent injunction, independent of the compromises discussed herein, subject to the ongoing rights of all parties. The Settlement Term Sheet attached to this motion provided that the proceeds of any claims against Troutman would be placed in a Litigation Trust for the benefit of deferred litigation expenses and the Probate Estates, that the Trustee (of the instant bankruptcy estate) would serve as trustee of the Litigation Trust, and that she would take "direction from a steering committee made up exclusively by the Probate Estates and their representative(s)."

Following a hearing on October 5, the Bankruptcy Court granted the compromise in an order entered on October 23, 2015. The order adhered to the Bankruptcy Court's position in its March 20 Memorandum Opinion that the $18.5 million settlement satisfied the *Justice Oaks* factors, but the order declined to condition approval of the settlement on a permanent non-appealable injunction. The Bankruptcy Court concluded that the compromise was "fair and equitable in light of the permanent injunction the [Bankruptcy] Court will enter enjoining the Probate Estates from pursuing any claims against the non-settling Defendants arising out of the same nucleus of facts" alleged in

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the complaint the Probate Estates filed in initiating the adversary proceeding back on October 1, 2013.

On October 28, 2015, the Bankruptcy Court entered an order granting the Trustee's amended motion for approval of the third compromise—the compromise between the Trustee, the bankruptcy estate professionals, and the Probate Estates—which included a payment to Shumaker: $5 million as an attorney's fee and costs of $620,148.48, for a total payment of $5,620,148.48. In addition, the order approved the continuing work of the Trustee found in the Settlement Term Sheet, providing that the proceeds of "[a]ny bankruptcy estate claims against [Troutman] and related parties [were to] be put into a Litigation Trust" administered pursuant to the Settlement Term Sheet and that the Trustee would serve as the trustee of the Litigation Trust after concluding her duties as Trustee of the bankruptcy estate. The Bankruptcy Court also approved the payment of certain administrative expenses and the distribution of the balance:

> [The] Initial Settlement Proceeds [go] to the trust account of Wilkes & McHugh, P.A. . . . for distribution to the Probate Estates in accordance with the existing fee agreements between them and their professionals, as well as applicable Florida and Pennsylvania law regarding settlements of personal injury and wrongful death claims, trust accounts, and contingency fee agreements.

Finally, the Court granted four motions to compromise: one with the Quintairos firm for $1.25 million; a second with GTCR-related parties for $1.5 million; a third with Ventas and GECC for $250,000 and $1.5 million, respectively; and a fourth with the THI Receiver for $700,000—for a total of $5.2 million. Added to the $18.5 million the Trustee received from the Fundamental Defendants, the Trustee received settlements totaling $23.7 million. Of the $23.7 million, the Probate Estates received about $16.2 million. But as provided in settlement agreements between the Estates and their attorneys, each estate received $1 million, less a $50,000 future cost reserve. The attorneys received the remainder as fees and costs.[81]

On December 22, 2015, the Bankruptcy Court entered an order granting Berman and Shumaker's motion to withdraw as special litigation counsel. The order provided that Shumaker would "continue to assist with preparation of the Litigation Trust Agreement" referred to in the October 28 order "at no additional cost to the Trustee."

C.

While the adversary proceeding Wilkes initiated on October 1, 2013, was coming to a close, the adversary proceeding the Trustee initiated against Troutman on June 2, 2014,[82] was still pending on a motion to dismiss the complaint for failure to state a claim for relief. Because the Troutman adversary proceeding affected the ongoing work of the Trustee, Berman, and Shumaker through the Litigation Trust as described above, the opinion now turns to that litigation.

On December 8, 2015, the Bankruptcy Court granted Troutman's motion, dismissing Count I with prejudice and Counts II-V with leave to amend. On May 6, 2016, the Trustee filed an amended complaint against Troutman alleging four counts: conspiring with FLTCH and others to defraud, and actually defrauding, THI's creditors; aiding and abetting the fraud; aiding and abetting FLTCH's conversion of THMI's assets; and aiding and abetting THI's officers' breach of their fiduciary duties to THMI.

Troutman answered the amended complaint, denying the allegations of wrongdoing and asserting 29 affirmative defenses. The Trustee and Troutman thereafter entered into a settlement agreement which required Troutman to pay FLTCI's bankruptcy estate the sum of $6.5 million—placed in the Litigation Trust—in exchange for a bar against future claims. On December 16, 2016, the Trustee moved the Bankruptcy Court to approve that settlement agreement. Wilkes objected to the Trustee's motion on January 27, 2017. After a hearing, on May 17, 2017, the Bankruptcy Court granted the Trustee's motion. The Bankruptcy Court ruled without considering Wilkes's objection to the compromise because the Probate Estates "lack[ed] a pecuniary interest" in the matter. On May 31, Wilkes appealed the Bankruptcy Court's decision to the District Court.

On February 2, 2018, the Trustee moved to dismiss the appeal on the ground that the Probate Estates did not have standing to challenge her settlement with Troutman because the Probate Estates were not "persons aggrieved." The Probate Estates had been "cashed-out" of the bankruptcy case, meaning that they would receive nothing from the $6.5 million Troutman settlement. Rather, the entire sum would go to Wilkes (in the form of attorney's fees and costs).[83]

On May 30, 2019, in the midst of Wilkes's attempts to disqualify Shumaker and the bankruptcy judge, explained *infra* part IV, the District Court issued an order holding that the Probate Estates had standing to challenge the Troutman compromise agreement, vacating the Bankruptcy Court's order approving the settlement, and remanding the matter so that the Bankruptcy Court could determine in the first instance whether the Trustee had violated the provisions of the Settlement Term Sheet—which was part of the compromise—by settling with Troutman without the Probate Estates' approval.

On August 2, 2019, the Bankruptcy Court, on remand, granted the Trustee's motion to approve the Troutman compromise. The Bankruptcy Court explained that because the Trustee had not been discharged from her duties as Trustee of the bankruptcy estate and the Bankruptcy Court had not approved the Litigation Trust, the Trustee had the authority to enter into the settlement with Troutman in her capacity as Chapter 7 Trustee.

Wilkes appealed the Bankruptcy Court's decision on August 16, 2019, and on September 30, 2020, the District Court affirmed. The District Court first held that the Bankruptcy Court did not abuse its discretion in concluding that the Trustee had the authority to enter into a settlement with Troutman because, according to the plain language of the Settlement Term Sheet, the Probate Estates could not gain control over any potential settlements until the bankruptcy closed and the Trustee transitioned from Chapter 7 trustee to the trustee of the Litigation Trust. The District Court also held that the Bankruptcy Court did not commit plain error by finding the Troutman settlement fair because the Bankruptcy Court's determination had "substantial evidentiary support."

Wilkes filed a motion for reconsideration on October 28, 2020. The District Court denied the motion on December 18, 2020. The settlement with Troutman became final on January 20, 2021, and on February 19, 2021, Troutman paid the Bankruptcy Estate $6.53 million.

IV.

A.

While the dispute over the Troutman compromise was playing out, several other disputes arose. These disputes stemmed from a potential conflict of interest on Shumaker's part. In short, Wilkes believed Shumaker to have a conflict of interest and moved to disqualify the firm from participating in the bankruptcy proceedings and disgorge the attorney's fees it had received. But Wilkes also believed that Chief Bankruptcy Judge Williamson had a conflict of interest and moved to have him recused so that another judge could decide the motion to disqualify Shumaker.

According to Berman, some time after the Bankruptcy Court approved the Trustee's compromise with Troutman, Wilkes approached the Trustee, her general counsel—Watkins—and the Office of the United States Trustee, and alleged that Shumaker had an undisclosed conflict of interest while representing the Trustee such that Shumaker could not be considered "disinterested" under 11 U.S.C. § 327(a). The alleged conflict was based on Shumaker's long-standing legal representation of Healthcare REIT, Inc. ("HCN"). Berman and Shumaker considered the allegation to be meritless, so on May 4, 2018, under the penalty of perjury, Berman filed a "Supplemental Disclosure" with the Bankruptcy Court, which focused on Shumaker's relationship with HCN.

The Supplemental Disclosure revealed the following: Shumaker had represented HCN, "a publicly traded real estate investment trust based in Toledo, Ohio," for thirty years as outside counsel "in corporate, real estate, and other transactional matters." HCN's only connection with any of the Probate Estates was its ownership of real estate leased to Lyric Health Care Holdings III, Inc., the owner and operator of the Auburndale Oaks nursing home in which Townsend and Jackson once resided. Under the lease, HCN surrendered possession and control of the premises to its lessee and therefore had no liability for injuries to anyone on the premises. In the complaint it filed in *Townsend* (in state court) in January 2009, Wilkes named HCN as a defendant. But once it appeared that HCN had no involvement in the operation of the nursing home, Wilkes dismissed HCN from the case.

On June 4, 2018—while the Trustee's motion to dismiss the Probate Estates' appeal of the Bankruptcy Court's May 17, 2017, order approv-

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ing the Troutman compromise was pending in the District Court—Wilkes moved the Bankruptcy Court to disqualify Berman and Shumaker as the Trustee's special litigation counsel *nunc pro tunc* and require them to disgorge the $5,620,148.48 they received as costs and an attorney's fee.[84] The motion asserted that the Bankruptcy Court should declare Berman and Shumaker disqualified from the moment the Trustee sought its approval of their employment as special litigation counsel because they were not disinterested as required by § 327(a). Moreover, the motion alleged Berman and Shumaker failed to timely disclose their "connections with the debtor, creditors, [or] any other party in interest"—connections that revealed their disinterestedness—pursuant to Rule 2014. While the Supplemental Disclosure revealed Shumaker's connections to HCN, as well as its relationship with the Auburndale Oaks property and the nursing home tenant, that disclosure was untimely, according to Wilkes.

Wilkes accompanied that motion with a second motion—this one seeking to "withdraw the reference" of the motion for disqualification and disgorgement. If granted, the motion to withdraw the reference would place the motion for disqualification and disgorgement before the District Court, rather than the Bankruptcy Court. For that reason, the motion to withdraw the reference was placed on the District Court's docket on July 3.

The motion to withdraw the reference reiterated the reasons Shumaker should be disqualified: because HCN, which Shumaker had been representing for thirty years, "was the owner of the nursing homes where four of the six [Probate] Estates resided [and] was also a previous state court litigation adversary of the Townsend Estate [in *Townsend*]." The motion to withdraw the reference then leveled another allegedly disqualifying accusation, this one aimed at the bankruptcy judge presiding over the case—Chief Judge Williamson.

According to that motion, Chief Judge Williamson should not hear the motion to disqualify Shumaker because his law clerk, Edward J. Comey, had been an associate at Shumaker and had worked on bankruptcy cases with Berman. Had Shumaker disclosed that information in the Supplemental Disclosure before its appointment as special litigation counsel, Chief Judge Williamson could have considered whether to recuse himself—especially if Comey's history had come to light.

The District Court issued an order denying Wilkes's motion to withdraw the reference on November 1, 2018. In doing so, it dealt straightforwardly with the points Wilkes made in the motion to withdraw the reference:

> The [Probate E]states contend in the motion that *Shumaker's representation of HCN*, an owner of nursing facilities, creates a disqualifying conflict of interest. Also, the estates contend that Shumaker failed to disclose that *a law clerk for the bankruptcy judge is a former Shumaker associate and is married to a Shumaker partner*. Armed with these conflict theories, the [Probate E]states demand that Shumaker disgorge all fees earned in representing the trustee. . . .
>
> The bankruptcy judge's determination of the disqualification motion promotes the efficient use of judicial resources and advances uniformity in bankruptcy procedure. The bankruptcy judge enjoys the advantage of presiding for six years over litigation involving the estates, the trustee, and their counsel. The bankruptcy judge "bring[s] a unique expertise to the question of when simultaneous representation . . . is a conflict that works to the detriment of the estate in bankruptcy [or] its creditors." And the bankruptcy judge "is on the front line, in the best position to gauge the ongoing interplay of factors and to make delicate judgment calls" about the retention and disqualification of counsel.
>
> The resolution of a motion to disqualify counsel in this circumstance is a core proceeding and the pertinent considerations decisively favor denying withdrawal.

Order Denying Motion to Withdraw the Reference at 1-3, *Estate of Juanita Jackson v. Scharrer*, No. 8:18-cv-01602 (M.D. Fla. Nov. 1, 2018) (third and fourth alterations in original) (emphasis added) (citations omitted).

After failing in the District Court, on January 17, 2019, Wilkes moved both Chief Judge Williamson and his law clerk to recuse pursuant to 28 U.S.C. § 455 and Federal Rule of Bankruptcy 5004.[85] The motion for recusal essentially tracked the points the District Court elaborated on in its November 1 order: Shumaker's longstanding client, HCN, owned nursing facilities involved in the bankruptcy case; Chief Judge Williamson's law clerk was a former Shumaker associate and is married to a Shumaker partner; and all of this created an unacceptable conflict.

On June 7, 2019, Chief Judge Williamson decided Wilkes's recusal motion. He observed that § 455(b) "provides for the recusal of a judge if the judge's spouse has an interest that could be affected by the outcome of the case, or if the judge has a personal bias or personal knowledge of disputed facts in the case." Chief Judge Williamson read Wilkes's motion as centering on these points: (1) "that Comey was previously associated with Shumaker"; (2) that Comey "may have personal knowledge of the relationship" between HCN and Shumaker; (3) that "Comey's spouse has a financial interest in Shumaker"; and (4) that "Comey's conflict should be imputed to the Court," thereby necessitating the Bankruptcy Court's recusal.

In responding to these points, Chief Judge Williamson stated that he screened Comey from the case following the filing of the motion to disqualify Shumaker and would not impute Comey's prior association with Shumaker or Comey's wife's status with the law firm to himself. The judge acknowledged that

> in evaluating a request for recusal of a judge, Courts should consider whether there is an actual and reasonable doubt concerning the judge's impartiality. Congress has required that a judge's impartiality must *reasonably* be questioned before the judge recuses himself, "because there is a need to prevent parties from manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."
>
> *In this case, the timing and circumstances of the Recusal Motion suggest that the request may stem from a search for a different judge to consider the Disqualification Motion and related issues, rather than a concern for the Court's impartiality.*
>
> The Probate Estates filed the Disqualification Motion and the Recusal Motion, but will retain no money from any settlements reached by the bankruptcy estate. Wilkes, as attorney for the Probate Estates, has admitted that the Probate Estates "[a]re not going to get any cash" from future settlements generated by the Trustee. Instead, the Probate Estates have contractually agreed to convey any distributions from the bankruptcy estate to their attorneys as payment of the attorneys' deferred fees and costs totaling more than $7 million.
>
> In the Disqualification Motion, the Probate Estates seek the disgorgement from Shumaker of "any and all past and future compensation approved by this Court." *It appears, therefore, that the Probate Estates may seek to collect any funds that Shumaker is required to disgorge, solely in an effort to recoup their attorneys' deferred fees and costs*. To the extent that the disgorged funds are property of the bankruptcy estate, the Court possesses jurisdiction over the ultimate award of the disgorged funds.
>
> The Probate Estates initially moved to withdraw the reference of the Disqualification Motion in order to have it decided by a District Court judge. The Recusal Motion was filed only after the District Court denied the Motion to Withdraw the Reference, in part because the bankruptcy judge "enjoys the advantage of presiding for six years over litigation involving the estates, the trustee, and their counsel."
>
> Under these circumstances, the Court has considered whether the Recusal Motion was filed because of reasonable doubts about its impartiality, or whether the Recusal Motion was filed for the strategic purpose of obtaining a different judge, and finds that recusal is not warranted.

Order and Memorandum Opinion on Probate Estates' Motion for Recusal at 17-19, *In re Fundamental Long Term Health Care, Inc.*, No. 8:11-bk-22258 (Bankr. M.D. Fla. June 7, 2019) (alteration in original) (emphasis added) (citations and footnotes omitted).

On June 21, 2019, Wilkes moved the District Court for leave to appeal the interlocutory order denying its motion to recuse. The heart of Wilkes's argument, in the District Court's view, was that the "late screening of Comey was insufficient to cure the alleged bias" of Chief Judge Williamson.

On July 30, 2019, the District Court denied Wilkes leave to appeal because it established none of the three elements required under 28 U.S.C. § 1292(b) for an interlocutory appeal: (1) the appeal did not present a controlling question of law; (2) the appeal failed to present a substantial ground

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for difference of opinion; and (3) resolution of the appeal would not advance the ultimate determination of litigation.[86]

B.

On August 21, 2019, while Wilkes's appeal of the Bankruptcy Court's approval of the Troutman settlement was pending, the Bankruptcy Court decided the Probate Estates' motion to disqualify Berman and Shumaker and for disgorgement of their payment in a Memorandum Opinion. *In re Fundamental Long Term Care, Inc.*, 605 B.R. 249 (Bankr. M.D. Fla. 2019). The Bankruptcy Court began by noting why Wilkes filed the motion two and a half years after Shumaker's withdrawal from the case as the Trustee's special litigation counsel: "The attorneys were dissatisfied with the Trustee's settlement of the proceeding against Troutman . . . because the projected $2.8 million distribution to the Probate Estates from the settlement was insufficient to pay their deferred attorney's fees in the amount of $7,352,104.38."[87] *Id.* at 256.

The Bankruptcy Court then turned to the argument Wilkes advanced in support of the Probate Estates' motion:

> In their Summary of Argument . . . the Probate Estates assert that they have uncovered connections between Shumaker and at least four entities that affected Shumaker's disinterestedness: (1) Healthcare REIT [HCN], which they assert is "an actual or potential adversary" of the Probate Estates and the bankruptcy estate; (2) two entities known as Lyric Health Care, LLC and Lyric Health Care Holdings III, Inc. (together, Lyric), which they assert are adversaries of the Probate Estates and THMI, the Debtor's subsidiary; and (3) Home Quality Management, Inc. (HQM), which they assert is an adversary of two of the Probate Estates.

Id. at 256.

As the Bankruptcy Court saw it, Wilkes was contending that Shumaker's connections to HCN, Lyric, and HQM rendered Berman and Shumaker "unable to fulfill [their] fiduciary duties to the only creditors in the bankruptcy case," the Probate Estates, and therefore incapable of being disinterested as required by 11 U.S.C. § 327(a). *Id.* at 256-57. In addressing this disinterestedness point, the Bankruptcy Court first recalled the service § 327(a) and Rule 2014 perform in the administration of a bankruptcy estate.

Section 327(a) authorizes a trustee, with the court's approval, to employ one or more attorneys or other professional persons "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties." *Id.* at 254 (quoting 11 U.S.C. § 327(a)). A "disinterested person" is a person who "does not have an interest *materially adverse* to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." *Id.* (emphasis added) (quoting 11 U.S.C. § 101(14)(C)). The Bankruptcy Code does not define the phrase "interest materially adverse to the estate." This Court has, however, and we define a "materially adverse interest" as

> an "economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant . . . or . . . a predisposition under the circumstances that render such a bias against the estate."

Electro-Wire Prods., Inc. v. Sirte & Permutt, P.C., 40 F.3d 356, 361 (11th Cir. 1994) (alteration in original) (quoting *Roger J. Au & Son, Inc. v. Aetna Ins. Co.*, 64 B.R. 600, 604 (N.D. Ohio 1986)).

Federal Rule of Bankruptcy Procedure 2014 implements the disinterestedness provision of § 327(a) by requiring professional persons to make certain disclosures at the time they seek approval of their employment. Specifically, a professional must set forth any "connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). Under the rule, a professional must disclose all "connections" to parties in interest "that are not so remote as to be *de minimis*." *In re Fullenkamp*, 477 B.R. 826, 834 (Bankr. M.D. Fla. 2011) (quoting *In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 536 (Bankr. S.D.N.Y. 1994)) (internal quotations omitted).

As the Bankruptcy Court observed:

> A professional who violates § 327(a) and Rule 2014 may be disqualified and may be required to disgorge any fees that they have received for the representation. Section 328(c) of the Bankruptcy Code, for example, provides that the Court may deny compensation to a professional person employed under § 327 if, at any time during the professional person's employment, he "is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." Similarly, a failure to disclose the connections required by Rule 2014 "can warrant disqualification, denial of compensation, and disgorgement of any compensation already received."

In re Fundamental Long Term Care, Inc., 605 B.R. at 255 (footnotes omitted).

With these principles in hand, the Bankruptcy Court considered the arguments Wilkes advanced in support of the Probate Estates' motion. Wilkes's primary contention, as characterized by the Bankruptcy Court, was that "Shumaker also represent[ed] [HCN], which leased the underlying real property to certain of the nursing homes involved in the wrongful death actions." *Id.* at 252. Consequently, HCN's interest was "adverse to" the Probate Estates and to the bankruptcy estate, and Shumaker's representation of HCN was not timely disclosed to creditors or the Bankruptcy Court. *Id.*

Characterizing HCN as the owner of the real property leased to the nursing homes was only half true. HCN, according to Wilkes, was "the owner of the nursing homes where the majority of the [Probate Estates' decedents] resided." *Id.* at 257. And Lyric and HQM were adversaries of the Probate Estates and THMI.

The Bankruptcy Court meticulously examined the way in which HCN, Lyric, and HQM may have affected Shumaker's disinterestedness under § 327(a). Here is what the Bankruptcy Court found, starting with HCN.

HCN

It was undisputed that Shumaker represented HCN, a real estate investment trust, and had done so for several years. The only tangible connection between HCN and any of the Probate Estates occurred in June 2005, when HCN purchased the real property on which the Auburndale Oaks nursing home was located and in which Townsend and Jackson resided. Contrary to Wilkes's representation, however, HCN did not own or operate the facility. HCN merely leased the property to a tenant—one of the Lyric entities—and *that entity* operated the home. As the Bankruptcy Court noted:

> Despite scores of hours of deposition testimony and thousands of exhibits developed through a joint discovery effort, [Wilkes] and the Trustee never considered [HCN] as potentially liable to the bankruptcy estate because of any prepetition transactions. In fact, [Wilkes] acknowledge[s] that [HCN]'s existence and contact with THI appeared in deposition exhibits, Bates-stamped documents, and other discovery materials in the case. But [HCN] never emerged from the materials as a potential target for recovery. The March 2006 transaction [the bust-out scheme], for example, was "front and center" of the [Adversary] Proceeding, but the joint investigation by the Trustee and [Wilkes] never revealed any potential claim against [HCN] arising out of a connection with THI.

Id. at 260 (footnote omitted).

The Bankruptcy Court cited a letter that Watkins, the Trustee's general counsel, wrote to Wilkes on January 18, 2018—four and a half months before Wilkes filed the motion to disqualify Shumaker as the Trustee's litigation counsel. The letter was in response to Wilkes's letter to Watkins of December 29, 2017, in which Wilkes attached 18 items purportedly showing that Shumaker's relationship to HCN disqualified Shumaker from serving as the Trustee's counsel. The Bankruptcy Court quoted the following from Watkins's letter to Wilkes:

> The Involuntary [Chapter 7] petition was filed on December 5, 2011. Despite your knowledge that [HCN] was a party to the Briar Hill suit for a short period of time, I have no records or recollection of [HCN] being a topic of discussion (as a potential target or otherwise) in the bankruptcy case. [HCN] was also not a creditor in the bankruptcy case, and did not appear to have any ongoing business or contact with the Debtor, [FLTCI]. In fact, the first time [HCN] was brought to our attention is when you raised Shumaker's alleged conflict of interest in or about September 2017, nearly 6 years after the involuntary petition had been

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filed.

Id.

The Bankruptcy Court then stated that "[b]ased on [its] review of the documents sent by [Wilkes], the Trustee's general counsel did not see how [HCN] had any relationship to the Debtor[ ] and did not find a conflict created by Shumaker's representation of [HCN]." *Id.* (internal quotation marks omitted). The Bankruptcy Court ended its analysis of the HCN issue by concluding that Shumaker's relationship with HCN was not disqualifying under § 327:

> In summary, [Wilkes] allege[s] that [HCN] had prepetition connections to THI that were not investigated in the bankruptcy case because of [HCN]'s attorney-client relationship with Shumaker. But the prepetition transactions were the subject of exhaustive joint discovery and litigation in multiple proceedings, and neither [Wilkes] nor the Trustee ever considered [HCN] as potentially liable to the bankruptcy estate. For these reasons, Shumaker's representation of [HCN] did not lessen the value of the bankruptcy estate, create a potential dispute between the bankruptcy estate and [HCN], or create a circumstance that would generate a bias against the bankruptcy estate.

Id. at 260-61.

Lyric

The Bankruptcy Court provided a brief explanation of Shumaker's relationship with Lyric:

> [HCN] leased the property underlying the Auburndale Oaks nursing facility to Lyric . . . after [HCN] purchased the property in 2005, and Lyric thereafter operated the nursing home facility. [HCN] sold the property in December 2012. Shumaker acknowledges that Lyric may have made payments to Shumaker in relatively small amounts during Lyric's lease of the property[,] . . . such payments represent[ing] compensation for work performed by Shumaker for . . . [HCN]. Shumaker's services were not provided to Lyric, and Lyric made the payments only pursuant to its obligations under the lease.

Id. at 261.

Summarizing, the Bankruptcy Court found that "Shumaker did not serve as Lyric's attorney, and [ ] its representation of Lyric's landlord did not create a disqualifying conflict of interest in the bankruptcy case." *Id.*

HQM

HQM operated nursing homes in Florida under leases with HCN; HCN served as landlord and owned the real estate on which the homes were situated. Shumaker never served as HQM's attorney—but, as with Lyric, Shumaker may have received payments from HQM pursuant to its contract with HCN. The payments would be for work Shumaker performed for HCN. *Id.* at 262.

The Probate Estates sued HQM in *Nunziata* and *Webb*, but HQM was dismissed from the lawsuits in 2009, two years prior to the Chapter 7 bankruptcy case here. Neither Wilkes nor the Trustee considered HQM a Target—that is, a transferee of THMI's assets—so HQM was not mentioned in the complaint Wilkes filed in the bankruptcy case to initiate the adversary proceeding. In sum, the Bankruptcy Court found that Shumaker's representation of HQM's landlord, HCN, did not create a conflict of interest in the bankruptcy case. *Id.*

Having concluded that Shumaker's legal representation of HCN and Shumaker's interactions with Lyric and HQM were, in effect, immaterial to its § 327(a) analysis, the Bankruptcy Court returned to Wilkes's contention that Shumaker failed to comply with Rule 2014 by omitting its representation of HCN from its initial disclosures. The Bankruptcy Court found no violation because

> Shumaker's representation of [HCN] was not adverse to the Probate Estates or to the bankruptcy estate [and] there [was] no evidence that Shumaker was aware of any alleged connection between [HCN] and the Probate Estates, or [HCN] and the bankruptcy estate, before [Wilkes] raised the issue in 2017. In other words, this [was] not a situation in which Shumaker knew of the alleged connections and deliberately chose not to disclose them, or in which Shumaker's conflict check system was wholly inadequate.

Id. at 263.

Based on the foregoing analysis, the Bankruptcy Court, on August 21, 2019, entered an order denying the motion for disqualification and disgorgement.

C.

The Probate Estates appealed that order to the District Court. The District Court found no error in the Bankruptcy Court's conclusion that Shumaker's pre-petition connections with HCN, Lyric, and HQM did not create a disqualifying conflict of interest in the bankruptcy case under § 327(a).[88] *In re Fundamental Long Term Care, Inc.*, No. 8:19-cv-2176-T-33, 2020 WL 954982, at *8-9 (M.D. Fla. Feb. 27, 2020). The District Court did find error, however, in the Bankruptcy Court's analysis of the issues presented by the Probate Estates' argument that Shumaker violated Rule 2014.

The District Court began its discussion of the Bankruptcy Court's order denying Wilkes's motion for disqualification and disgorgement by noting that the Bankruptcy Court found that Shumaker did not violate Rule 2014 by omitting its representation of HCN in its initial disclosures. *Id.* at *11. The Bankruptcy Court reached this conclusion based on its finding that there was no evidence that Shumaker was aware of any alleged connection between HCN and the Probate Estates or between HCN and the bankruptcy estate. *Id.* This, the Bankruptcy Court added, was not a situation in which Shumaker knew of the alleged connections and deliberately chose not to disclose them, or one in which the operation of the conflict system in the Shumaker law office was wholly inadequate and thus could not be relied on. *Id.* In short, there was "no knowing violation of Rule 2014 by Shumaker." *Id.*

Although the District Court saw no error in the Bankruptcy Court's finding that Shumaker did not knowingly violate Rule 2014, it was concerned about what the order *did not* say. It was "unclear . . . whether the Bankruptcy Court considered a negligent or inadvertent nondisclosure after the initial disclosure was made." *Id.* at *12. As the District Court explained, the order was

> ambiguous . . . [and] otherwise silent as to whether the Bankruptcy Court analyzed—under a negligence lens—Shumaker's failure to identify and disclose potential connections between its 30-year, long term client and the bankruptcy estate, its creditors, and other parties of interest after the initial disclosures were made. Additionally, the [order was] silent as to the nondisclosures of connections to Lyric and HQM.

Id.[89]

The District Court therefore vacated the Bankruptcy Court's Rule 2014 ruling and remanded the matter to the Bankruptcy Court so it could consider the record through the negligence lens and determine, in the first instance: (1) whether there was "an unintentional, negligent and/or inadvertent nondisclosure" of Shumaker's connections to HCN, Lyric, and HQM; (2) whether a Rule 2014 violation occurred; (3) if so, whether sanctions were warranted; and (4) if sanctions were warranted, what type of sanctions would be warranted. *Id.* In all other respects, the District Court affirmed the order denying the motion for disqualification and disgorgement. *Id.* at *13.

D.

On remand, the Bankruptcy Court complied with the District Court's mandate, answering the questions the District Court put to it:

> Th[is] Court has considered the record on remand and finds that Shumaker inadvertently and non-negligently failed to disclose all of its connections with the Debtor, creditors, or other interested parties in this case. The Court further finds that no sanctions are warranted because the connections did not create a disqualifying conflict of interest, the nondisclosures were inadvertent, the connections were not material, Shumaker corrected the inadvertent nondisclosures, and Shumaker's representation of the Trustee greatly benefited the bankruptcy estate.

In re Fundamental Long Term Care, Inc., 614 B.R. 753, 756 (Bankr. M.D. Fla. 2020).

After making these findings, the Bankruptcy Court explained how it reached them. It did so after citing the disclosures Wilkes says Shumaker should have made. Wilkes again alleged that Shumaker failed to disclose its connections with HCN, Lyric, and HQM pre-petition. *See id.* at 757.

According to Wilkes, Shumaker's connections with these entities should have been revealed on June 1, 2012, in Shumaker's declaration of disinterestedness filed with the Trustee's application for approval of Shumaker's employment. If not then, Wilkes argued, the disclosures should have been made at any of the following times: on March 22, 2013, in a supplemental disclosure in support of the application; on February 6, 2014, in an amended declaration of disinterestedness to

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accompany the Trustee's motion to modify the terms of Shumaker's retention as special counsel; or on July 27, 2016, in a notice related to continued disinterestedness.

Neither the first declaration nor any of the supplements Wilkes mentioned disclosed any connection between Shumaker and HCN, Lyric, or HQM. The Bankruptcy Court found that "the omission was inadvertent and not the result of negligence." *Id.* at 760-61. The case law did not explain what constitutes negligent nondisclosure under Rule 2014, so the Bankruptcy Court drew on Florida law in concluding that the omissions were not caused by negligence:

> Generally, . . . a misrepresentation is negligent under Florida law if the representor "should have known the representation was false." To state a claim for negligent misrepresentation, for example, a plaintiff must allege that the representation was made "without knowledge of its truth or falsity, or . . . under circumstances in which he ought to have known of its falsity."

Id. at 761 (footnote omitted).

In determining whether Shumaker was negligent, the Bankruptcy Court was mindful that:

> [U]nder Rule 2014, an attorney is not charged with the duty to disclose "every conceivable interpretation of its connections and possible consequence resulting from the connections; as well as a prediction of the outcome of any litigation that may result from, or be related to, the referenced connection." When an attorney seeks employment in a bankruptcy case, the disclosure required by Rule 2014 should not be "an impossible task subject to endless litigation over what would be enough."

Id. (footnotes omitted).

In the Bankruptcy Court's view, the record "d[id] not show that Shumaker knowingly omitted its connections with HCN, Lyric, and HQM from its Declarations," or that "Shumaker omitted the connections under circumstances in which it should have known of the requirement to disclose." *Id.*

The Bankruptcy Court considered whether Shumaker's supplemental disclosures—of May 4, 2018, after Wilkes raised the issue of Shumaker's potential conflict of interest, and on July 3, 2018, in a memorandum Shumaker filed in opposition to the motion for disqualification and disgorgement—cast light on Shumaker's declarations so that Shumaker should have known that it had been required to disclose its connections with HCN, Lyric, and HQM from the outset. The Bankruptcy Court found that the May 4 and July 3 supplemental disclosures contained nothing indicating that Shumaker, from the start, omitted disclosing its connections with those entities under circumstances in which it should have known that it had to disclose them.

Regarding HCN, the Bankruptcy Court reasoned:

> The [May 4] Supplemental Disclosure include[d] the following representations with respect to HCN: (1) Shumaker did not represent HCN in the action commenced on behalf of the Townsend Estate, and therefore did not find any client representation adverse to the Debtor's creditors when it ran its conflicts checks; (2) Shumaker was never litigation counsel for HCN as against any of the Probate Estates; (3) Shumaker took only limited action as outside counsel in the Townsend litigation by signing interrogatory responses, did not open a file for the Townsend litigation, and did not find any connection between the Townsend Estate and Shumaker in its conflicts checks; (4) none of the Probate Estates had any claim against HCN as of the date that the bankruptcy petition was filed; (5) neither Shumaker nor the Trustee knew of a connection between HCN and the Townsend Estate before the Probate Estates raised the issue in 2017; and (6) HCN was never a target of any potential litigation by the Trustee, and was never discussed by the Trustee or the Probate Estates' attorneys.

Id. at 761-62 (footnotes omitted).

Regarding Lyric, the May 4 disclosure revealed:

> (1) Lyric was never Shumaker's client; (2) Shumaker's conflict system reflects that Lyric was an adverse party to HCN in corporate or real estate transactions that Shumaker worked on for HCN; (3) any payments received by Shumaker from Lyric likely represented reimbursement to HCN for charges that HCN had incurred; and (4) Lyric was never a target of any litigation by the Trustee in the bankruptcy case.

Id. at 762 (footnotes omitted).

In the memorandum from July 3, 2018, Shumaker "addressed the [Probate Estates'] allegations regarding HQM by stating that HQM [was] not its client, that HQM had leased real property from HCN upon which it operated nursing homes in Florida, and that HQM was never a target of any litigation in the bankruptcy case." *Id.*

Taking the supplemental disclosures of May 4 and July 3 into account, the Bankruptcy Court found:

> Shumaker did not omit its connections with HCN, Lyric, and HQM under circumstances in which it should have known of the requirement to disclose. Shumaker did not represent HCN in any pre-bankruptcy litigation involving the Probate Estates, and none of HCN's pre-petition transactions ever surfaced as targets in the bankruptcy case despite exhaustive discovery and litigation. Lyric and HQM were not Shumaker's clients. Instead, they were adverse to Shumaker's client because of their landlord-tenant relationships.
>
> Shumaker performed its customary conflicts checks, and no conflict appeared in its files. There is nothing in the record to show that Shumaker disregarded flags that should have alerted it to the connections, that Shumaker's conflict check system is inherently flawed, or that Shumaker maintains the system in a manner that reflects poor intra-firm communication and data input.

Id.

After noting that circumstances involving a conflict check system may constitute grounds for finding an intentional violation of Rule 2014, the Bankruptcy Court then quoted *In re Fullenkamp*: "[G]iven the various relationships between the parties, the Court is comfortable that [the] failure to discover the relationship was not . . . the result of a woefully inadequate conflict check system." *Id.* (quoting *In re Fullenkamp*, 477 B.R. 826, 834 (Bankr. M.D. Fla. 2011) (internal quotation marks omitted)).

Next, the Bankruptcy Court noted that

> [i]n *Fullenkamp*, the Court concluded that the omission was inadvertent and did not rise to the level of a sanctionable nondisclosure. In this case, as in *Fullenkamp*, the record does not show that Shumaker initially omitted its connections to HCN, Lyric, and HQM under circumstances in which it should have known of the requirement to disclose. The omission was not the result of negligence.

Id. at 762-63 (footnote omitted).

Finally, the Bankruptcy Court addressed the question of sanctions. It concluded that "no sanctions [were] warranted for the omission because the connections did not create a disqualifying conflict, the omission was inadvertent, the connections were not material to the bankruptcy estate, Shumaker corrected the omissions, and Shumaker's representation provided a substantial benefit to the estate." *Id.* at 765-66.[90]

E.

The Probate Estates appealed the Bankruptcy Court's resolution of the Rule 2014 liability issues to the District Court. Wilkes argued that the Bankruptcy Court: (1) abused its discretion in denying the Probate Estates an opportunity to conduct discovery on whether Shumaker's omission to disclose its pre-petition connections with HCN, Lyric, and HQM was unintentional, negligent, and/or inadvertent; (2) abused its discretion in failing to hold a hearing on whether such omission was unintentional, negligent, and/or inadvertent; and (3) used an inapplicable standard in determining whether such omission was unintentional, negligent, and/or inadvertent. *See In re Fundamental Long Term Care, Inc.*, No. 8:20-cv-956, 2021 WL 222779, at *3 (M.D. Fla. Jan. 22, 2021).

Addressing the first argument, the District Court recalled that, in the prior appeal, it "held that the Bankruptcy Court had a sufficient record to conclude that there was no intentional violation of Rule 2014." *Id.* (citing *In re Fundamental Long Term Care, Inc.*, 2020 WL 954982, at *11). Wilkes contended that that record was insufficient, though, to permit the Bankruptcy Court to determine that Shumaker's nondisclosure of its connections with HCN, Lyric, and HQM was an unintentional, negligent, or inadvertent nondisclosure. Wilkes also contended that the Bankruptcy Court's denial of its request to reopen discovery for the purpose of establishing a record sufficient to resolve that issue constituted an abuse of its right to discovery.

The District Court disagreed and held that the Bankruptcy Court did not err in limiting discov-

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ery on remand. *Id.* The District Court noted that the Bankruptcy Court was intimately familiar with the factual and procedural history of the case, which had spanned several years. "Discovery was voluminous, as evidenced by [Wilkes's] thirty-seven-page Motion to Disqualify and thirty-four attached exhibits, consisting of hundreds of pages. Shumaker's response also exceeded thirty pages and contained nineteen attached exhibits." *Id.* Elaborating on the record before the Bankruptcy Court, the District Court said:

> A negligence inquiry may differ from an intentionality inquiry, but these filings indicate the parties extensively briefed all facets of disqualification. The record provided the Bankruptcy Court with a thorough history of Shumaker's relationship with HCN, including the nature of previous legal representations, the precise legal tasks Shumaker performed for HCN, and how HCN affected Shumaker's conflict checks. The record likewise contained detailed information on Shumaker's interactions with Lyric and HQM, and how those entities appeared in the conflict system. The Bankruptcy Court was well within its discretion to base its decision on this information and to limit discovery it deemed unnecessary.

Id. (citations omitted).

Like its first argument, Wilkes's second argument asserted an abuse of discretion. Wilkes argued that the Bankruptcy Court should have held an evidentiary hearing because material issues of fact existed regarding Shumaker's failure to disclose its connections with HCN, Lyric, and HQM. Again, the District Court disagreed, reasoning that the extensive filings presented to the Bankruptcy Court in support of and in opposition to the motion to disqualify provided the Bankruptcy Court with "ample evidence" from which to make the findings the District Court requested. *Id.* at *4. The District Court then explained that "a bankruptcy judge 'does not abuse her discretion in reaching a decision without holding an evidentiary hearing where the record provided ample evidence on which the court could make such a decision.' " *Id.* (quoting *In re Garcia*, 532 B.R. 173, 182 (B.A.P. 1st Cir. 2015)). The District Court noted that this was not a case where the record was inadequate to allow the Bankruptcy Court to resolve disputed issues of material fact and it was "unnecessary to conduct an evidentiary hearing on a contested matter unless there are disputed issues of material fact that a Bankruptcy Court cannot decide based on the record." *Id.* (internal quotation marks and citation omitted).

Wilkes's third argument was that the Bankruptcy Court abused its discretion in relying on the negligent misrepresentation standard of Florida law in determining whether Shumaker's failure to disclose its pre-petition interactions with HCN, Lyric, and HQM in its Rule 2014 disclosure was negligent.[91] Because "Shumaker had an affirmative duty to disclose any relevant connections," Wilkes argued, "the correct analysis should have been one of reasonableness." *Id.* "By erroneously appl[ying] the elements of the fraud-based tort of negligent misrepresentation, rather than conducting a reasonableness analysis, [Wilkes] claim[s] the Bankruptcy Court abused its discretion." *Id.* (first alteration in original) (internal quotation marks and citation omitted).

The District Court disagreed with Wilkes's characterization of the Bankruptcy Court's opinion. According to the District Court:

> The Estates argue that the Bankruptcy Court focused "almost entirely on [Shumaker's] asserted lack of knowledge," but Shumaker's "purported lack of its undisclosed connections is not determinative to a negligence analysis." Therefore, according to the Estates, the Bankruptcy Court used an incorrect legal standard because it "never analyzed the reasonableness of [Shumaker's] asserted lack of knowledge under the circumstances."
>
> But the Bankruptcy Court specifically examined the circumstances under which Shumaker failed to disclose its connections. In concluding that the omission was not the result of negligence, the Bankruptcy Court not only considered what Shumaker purportedly knew through its conflict check system, but also noted that (1) Shumaker never represented HCN in any pre-bankruptcy litigation involving the Estates, (2) HCN never surfaced as a target in the bankruptcy action despite exhaustive discovery on potential targets, and (3) Shumaker never represented Lyric or HQM, but only dealt with them in an adverse posture as counsel for their landlords.
>
> Based on Shumaker's purported knowledge at the time of the omissions, *and* these surrounding circumstances, the Bankruptcy Court held that the omissions were not made under circumstances in which Shumaker "should have known of the requirement to disclose." Therefore, the Court disagrees with the Estates' contention that the Bankruptcy Court entirely eschewed the issue of reasonableness. The Bankruptcy Court considered the circumstances in which the omission was made and concluded that under the circumstances, the omission was "not the result of negligence."
>
> The Court disagrees that the use of a negligent misrepresentation standard constituted an abuse of discretion. As noted by the Bankruptcy Court, no case law explains what constitutes a negligent nondisclosure under Rule 2014. Even the Estates' cited case law states that there is "no clear definition of [the term negligence] in the context of discovery misconduct." Therefore, the Court cannot say that the Bankruptcy Court used a clearly incorrect legal standard in evaluating Shumaker's omissions as negligent misrepresentations.

Id. at *5 (alterations and emphasis in original) (citations omitted).

Based on what Shumaker knew at the time of the omissions and these surrounding circumstances, the Bankruptcy Court held that Shumaker's omissions "were not made under circumstances in which Shumaker 'should have known of the requirement to disclose.' " *Id.* (quoting *In re Fundamental Long Term Care, Inc.*, 614 B.R. at 763). The District Court therefore disagreed with Wilkes's claim that the Bankruptcy Court "entirely eschewed the issue of reasonableness." *Id.* "The Bankruptcy Court considered the circumstances in which the omission was made and concluded that under the circumstances, the omission was 'not the result of negligence.' " *Id.* (quoting *In re Fundamental Long Term Care, Inc.*, 614 B.R. at 763).

The District Court noted that, contrary to Wilkes's position, the Bankruptcy Court acted consistent with the instructions it was given on remand when it used a negligent misrepresentation standard. The Bankruptcy Court was instructed "to examine whether there was an 'unintentional, negligent and/or inadvertent nondisclosure by Shumaker.' " *Id.* (quoting *In re Fundamental Long Term Care, Inc.*, 2020 WL 954982, at *13). "By definition, failing to disclose all relevant connections would be a negligent misrepresentation by omission." *Id.* Therefore, the District Court found itself unable to say that the Bankruptcy Court erred in evaluating Shumaker's omission under a negligent misrepresentation standard. *Id.*

In addition, the District Court agreed with Shumaker that

> the use of the negligent misrepresentation legal standard [was] consistent with the purpose of Rule 2014. The rule requires an applicant for appointment by the trustee to "state the specific facts showing . . . to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." . . . [T]his rule does not require attorneys to raise "every conceivable interpretation of its connections and possible consequence resulting from the connections, as well as a prediction of the outcome of any litigation that may result from, or be related to, the referenced connection."

Id. (citations omitted). The District Court concluded its consideration of Wilkes's third argument by holding: "Examining Shumaker's omission under a negligent misrepresentation standard (that is, whether Shumaker omitted the connections under circumstances in which it 'ought to have known of its falsity') [was] consistent with this purpose" and was not an abuse of discretion. *Id.* at *6.

Based on the filings the parties submitted regarding Shumaker's Rule 2014 disclosures, the Bankruptcy Court had found that "there was no evidence showing Shumaker disregarded any red flags that should have alerted it to the connections or that the conflict system was inherently flawed, or that Shumaker maintained the conflict system in a manner that reflects poor intrafirm communication and data input." *Id.* The District Court found no error in the Bankruptcy Court's conclusion that Shumaker's failure to disclose its connections with HCN, Lyric, and HQM was non-negligent and inadvertent. *Id.* The District Court therefore affirmed the Bankruptcy Court's denial of the motion for disqualification and disgorgement. *Id.* at *7.

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V.

The Probate Estates now appeal the District Court's decision affirming the Bankruptcy Court's April 16, 2020, order denying the motion for disqualification and disgorgement. They present five issues for our review; Shumaker presents three.[92] They are essentially the same set of issues: (1) whether the District Court erred in affirming the Bankruptcy Court's decision that Shumaker did not have a disqualifying interest under 11 U.S.C. § 327(a); (2) whether the District Court erred in affirming the Bankruptcy Court's decision that Shumaker's omission in its Rule 2014 disclosures of its pre-petition connections with HCN, Lyric, and HQM was inadvertent and not negligent; and (3) whether the Bankruptcy Court abused its discretion in finding that sanctions were not warranted for the omission.[93]

In entertaining these issues, we sit as a second court of review. We therefore examine independently the factual and legal determinations of the Bankruptcy Court and employ the same standards of review the District Court employed. *In re Issac Leaseco, Inc.*, 389 F.3d 1205, 1209 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C9a]. We review legal conclusions of the Bankruptcy Court or the District Court *de novo*, and we review the Bankruptcy Court's findings of fact for clear error. *In re Fin. Federated Title & Tr., Inc.*, 309 F.3d 1325, 1328-29 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C1126a].

We review denials of motions for sanctions, disqualification, and disgorgement for abuse of discretion. *See In re Hood*, 727 F.3d 1360, 1363 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C614a] (sanctions); *Giles v. Garwood*, 853 F.2d 876, 878 (11th Cir. 1988) (disqualification); *S.E.C. v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) [26 Fla. L. Weekly Fed. C1407a] (disgorgement). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination or bases an award upon findings of fact that are clearly erroneous." *ElectroWire Prods., Inc. v. Sirte & Permutt, P.C.*, 40 F.3d 356, 359 (11th Cir. 1994) (internal quotation marks and citations omitted).

A.

Section 327(a) of the Bankruptcy Code provides that "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties." 11 U.S.C. § 327(a). The concept of "adverse interests" appears twice in §327(a). First, counsel may "not hold or represent an interest adverse to the estate." Second, counsel must be a "disinterested person," which means that counsel may not, among other things, "have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders." *Id.* § 101(14)(C). The Bankruptcy Code does not define the phrase "hold or represent an interest materially adverse to the estate." Hence, as the Second Circuit observed, "[w]hether an adverse interest exists is best determined on a case-by-case basis." *In re Arochem Corp.*, 176 F.3d 610, 623 (2d Cir. 1999).

This appeal focuses on Shumaker's representation of HCN as outside counsel and whether Shumaker was "disinterested" given its relationship with HCN. As the Second Circuit observed:

> [S]ection 327(a) is phrased in the present tense, permitting representation by professionals "that do not *hold* or *represent* an interest adverse to the estate," and limiting the class of acceptable counsel to those "that *are* disinterested persons." 11 U.S.C. § 327(a) (emphasis added). . . . Thus, counsel will be disqualified under section 327(a) only if it presently "hold[s] or represent[s] an interest adverse to the estate," notwithstanding any interests it may have held or represented in the past. . . .
>
> This reasoning finds support in related portions of the Bankruptcy Code, which draw explicit distinctions between current and past relationships. For example, the Bankruptcy Code defines a "disinterested person" as a person that, among other things, "*is not and was not* an investment banker for any outstanding security of the debtor," *see* 11 U.S.C. § 101(14)(B) (emphasis added); "*has not been, within three years before the date of the filing of the petition*, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor," *id.* § 101(14)(C) (emphasis added); and "*is not and was not, within two years before the date of the filing of the petition*, a director, officer, or employee of the debtor," *id.* § 101(14)(D) (emphasis added). The Bankruptcy Code thus recognizes a distinction between past and present representation.

Id. at 623-24 (alterations in original). We will assume for purposes of this appeal that § 327(a) applies to Shumaker's pre-petition *and* post-petition representation of HCN.

Wilkes begins the Probate Estates' argument on the first issue with this statement:

> The Bankruptcy Court and District Court erred when they concluded that [Shumaker] was disinterested and did not possess a disqualifying interest under § 327. In the underlying Disqualification Order, the Bankruptcy Court found that although *HCN owned the Auburndale Oaks nursing home* where the loved-ones of three of the six decedents of the [Probate] Estates resided,[94] HCN was not adverse because HCN "had no involvement in the operation of the nursing home." However, the record before the District Court established that [Shumaker] "does not dispute that it represented HCN, or that HCN was the landlord ***and*** owner of Lyric [the operator of the nursing homes] at one time."

Appellants' Br. at 30 (fifth alteration in original) (first emphasis added) (citations omitted).

How could the District Court have held that Shumaker was disinterested and did not possess a disqualifying interest under § 327 in the face of Shumaker's admission that its client, HCN, owned the Lyric nursing home where six decedents resided? In Wilkes's telling, HCN was not just the landlord—it was the owner of the Auburndale Oaks facility. As such, the District Court—and the Bankruptcy Court earlier—inexplicably overlooked that HCN actually owned the nursing home.

Did Wilkes call this "oversight" to the District Court's attention and move it to reconsider its conclusion that Shumaker was disinterested? No. It made a strategic decision. Because Wilkes's motion would have been rejected out of hand, Wilkes did not move the District Court to reconsider its affirmance of the Bankruptcy Court's finding that Shumaker's representation of HCN did not disqualify Shumaker from serving as the Trustee's counsel. The notion that HCN owned the Auburndale Oaks nursing home was squarely refuted by the evidentiary record in the Bankruptcy Court and the Bankruptcy Court's findings of fact based on that record. Wilkes chose instead to forego moving the District Court for reconsideration and ask this Court, on appeal, to declare Shumaker bound by the "Shumaker does not dispute" statement under the doctrine of judicial estoppel.

The District Court would have rejected any such motion for reconsideration brought by the Probate Estates for the same reasons the District Court gave in its order affirming the Bankruptcy Court's finding on the ownership of the Auburndale Oaks nursing home issue. *See In re Fundamental Long Term Care, Inc.*, 2020 WL 954982. The District Court recalled those reasons in the order we review today. *In re Fundamental Long Term Care, Inc.*, 2021 WL 222779.

The District Court cited the Probate Estates' motion for disqualification and disgorgement, which was based on Shumaker's representation of HCN and HCN's connection to Lyric among others. "In the [motion], the [Probate] Estates argued that Shumaker had a long-standing relationship with [HCN], a real estate investment trust. At the time of the bankruptcy proceedings, Shumaker had acted as HCN's general counsel for over thirty years." *Id.* at *1 (citations omitted). The District Court then recited what the evidentiary record in the Bankruptcy Court revealed and why in deciding the Probate Estates' earlier appeal it agreed with the Bankruptcy Court that Shumaker, in representing HCN, had not possessed a disqualifying interest under § 327(a):

> HCN *owned and leased the real property* to some of the nursing homes involved in the wrongful death actions. Specifically, [HCN] had connections to THI, THMI, and the related company THI Holdings, all of which were litigation targets in the underlying bankruptcy proceedings. HCN also had connections with [*Lyric*] *and* [*HQM*], *which operated* the nursing homes where some of the deceased residents lived.
>
> The [Probate] Estates argued that (1) these connections constituted representations of adverse interests, disqualifying Shumaker under Section 327(a), and (2) Shumaker violated Rule 2014 by failing to disclose these connections in its initial declaration of disinterestedness.

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> The Bankruptcy Court denied the Motion to Disqualify (Disqualification Order) on August 21, 2019, finding that Shumaker did not possess a disqualifying interest under Section 327(a) and that Shumaker's omissions in the initial disclosures did not violate Rule 2014. The [Probate] Estates appealed the decision.
>
> On appeal, this Court adopted and affirmed the Disqualification Order "in all respects except to the extent the Bankruptcy Court found no violation of the disclosure requirements of Rule 2014."

Id. at *1-2 (emphasis added) (citations omitted).

The District Court could have gone further in elaborating on Shumaker's representation of HCN and HCN's connections with Lyric and others involved in the nursing home industry by quoting from the Bankruptcy Court's order denying the motion for disqualification and disgorgement. *See In re Fundamental Long Term Care, Inc.*, 605 B.R. 249 (Bankr. M.D. Fla. 2019). The order presented the Bankruptcy Court's holding at the outset and then explained it.

> The holding:
>
> [HCN] owned the real property on which certain nursing homes were located, but had no involvement in the operation of the facilities. Additionally, despite exhaustive investigation, neither the Probate Estates nor the Chapter 7 Trustee ever considered [HCN] as potentially liable to the bankruptcy estate because of any prepetition transactions. Accordingly, Shumaker's representation of [HCN] was not adverse to the Probate Estates or the bankruptcy estate.

Id. at 252.

> The explanation:
>
> [HCN] is a real estate investment trust with its principal place of business in Toledo, Ohio. In the sworn Supplemental Disclosure, Berman stated that the "only tangential connection between [HCN] and any of the Probate Estates, [is that] on or about June 30, 2005, . . . [HCN] purchased the real property located at 919 Old Winter Haven Road, Auburndale, Florida—the location of the Auburndale Oaks facility in which Ms. Townsend and Ms. Jackson resided for a period of time (the 'Auburndale Oaks Property')."
>
> But [HCN] *did not operate the Auburndale Oaks nursing home*. *It leased the Auburndale Oaks Property* to a tenant (one of the Lyric entities) that operated the nursing home. In an Affidavit filed in state court in 2010, a Vice President of [HCN] stated:
>
> > 6. [HCN] leased the Real Property to Lyric Health Care Holdings III, Inc. ("Tenant") on June 30, 2005.
> >
> > 7. [HCN] serves only as a Landlord to its Tenant for the Real Property.
> >
> > 8. [HCN] *does not control the services provided by its Tenants* or its Tenant's agents, employees or representatives. *It does not operate, nor has it ever operated, Auburndale Oaks Healthcare Center*, nor does it control, nor has it ever controlled, the services provided by Auburndale Oaks Healthcare Center, its agents, employees or representatives.
> >
> > 9. [HCN] has never had any control over the hiring, supervision, or management of employees at Auburndale Oaks Healthcare Center and it does not administer, direct, supervise, or provide health care or skilled nursing services at any facility, including Auburndale Oaks Healthcare Center.
>
> Even though [HCN] *had no involvement in the operation of the nursing home*, the Probate Estates contend that it was potentially liable to the residents of Auburndale Oaks because its lease required the tenant/operator to provide [HCN] with certain financial and licensing documents. But the Probate Estates provide no authority for the proposition that a property owner is liable for a tenant nursing home's negligence. Further, even if such potential liability did exist, Ms. Townsend's estate is the only party that asserted a claim against [HCN], and that claim was dismissed with prejudice.
>
> Specifically, [HCN] was named as a defendant in the wrongful death action filed by the Townsend Estate in state court in 2009. In the sworn Supplemental Disclosure, Berman states that Shumaker did not represent [HCN] in the action by the Townsend Estate, took only limited action in the case consistent with its role as outside general counsel, did not take any action related to the substantive claims in the case, and did not open a file for the litigation.
>
> In January 2011, Townsend's Estate filed a Notice of Voluntary Dismissal of [HCN] from the action without prejudice. In August 2011, more than three months before the bankruptcy case was filed, the state court entered an order dismissing the action against [HCN] with prejudice.
>
> In summary, [HCN] *owned the real property on which the Auburndale Oaks nursing facility was located, but had no involvement in the operation of the nursing home*. [HCN] was initially named as a defendant in a wrongful death action brought by one of the Probate Estates, but was dismissed from the action with prejudice before the bankruptcy case was filed. For these reasons, [HCN] is not adverse to the Probate Estates, and Shumaker's representation of [HCN] did not lessen the value of the bankruptcy estate, create a potential dispute between the bankruptcy estate and [HCN], or create a circumstance that would generate a bias against the bankruptcy estate.

Id. at 257-58 (third alteration in original) (emphasis added) (footnotes omitted).

The order denying Wilkes's motion states that HCN "owned *the real property* on which the Auburndale Oaks nursing facility was located." *Id.* at 258 (emphasis added). So what did Wilkes find to support its statement that: "In the underlying [order,] the Bankruptcy Court found that . . . HCN owned the Auburndale Oaks nursing home"? Appellants' Br. at 30. And its statement that: "[Shumaker] does not dispute that it represented HCN, or that HCN was the landlord ***and*** owner of Lyric [the operator of the nursing homes] at one time"? *Id.* (emphasis in original).

The first statement is squarely contradicted in both the Bankruptcy Court's order and the District Court's order affirming it. The Bankruptcy Court's order is replete with unassailable statements that HCN owned *the real estate* on which nursing homes, including the Auburndale Oaks nursing home, were located—not the nursing homes themselves.[95] The order also notes that the homes were operated by lessees like Lyric, not HCN, their landlord. The statement that HCN owned the Auburndale Oaks facility was not made by the Bankruptcy Court or the District Court in the decision on review here.

The second statement was in the record before the District Court, as the Probate Estates' brief represents, but the words, "[Shumaker] does not dispute that it represented HCN, or that HCN was the landlord ***and*** owner of Lyric [the operator of the nursing homes] at one time," *id.*, do not appear in the underlying order denying Wilkes's motion or the District Court order affirming it (as to the § 372(a) issues) or the District Court's order here on appeal. Rather, the second statement appears in an order the District Court entered on September 25, 2020, while the Probate Estates' appeal of the Bankruptcy Court's order was pending. *See Estate of Arlene Townsend v. Shumaker*, No. 8:20-cv-956-T-33, 2020 WL 10318565, at *1 (M.D. Fla. Sept. 25, 2020).

The September 25 order denied Wilkes's motion to supplement the Bankruptcy Court's record with a "Closing Checklist" that, according to Wilkes, would show "Shumaker's relationship with [HCN], the landlord and owner of two nursing homes involved in this action." *Id.* at *1. The September 25 order contained this statement: "Shumaker does not dispute that it represented HCN, or that HCN was the landlord and owner of Lyric at one time."[96] *Id.* at *2.

As indicated *supra*, Wilkes did not move the District Court to reconsider its affirmance of the Bankruptcy Court's finding that HCN neither owned Lyric nor operated the Auburndale Oaks facility. A finding that HCN did own and operate the facility was critical to the Probate Estates' position. It went to the heart of their motion for disqualification and disgorgement and is the *sine qua non* of their disqualification argument here. If the Probate Estates had moved the District Court to reconsider, we have no doubt the District Court would have gotten to the bottom of the apparent inconsistency—created by the "Shumaker does not dispute" statement and the Bankruptcy Court's contrary statements in *In re Fundamental Long Term Care, Inc.*, 605 B.R. 249—and held an evidentiary hearing.[97] Shumaker contends that the statement from the September 25 order was a pure scrivener's error that the District Court simply didn't catch. Appellees' Br. at 21. Shumaker could have brought the error to the District Court's attention but neglected to do so.

So we are faced with an argument Wilkes chose not to present to the District Court on behalf

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of the Probate Estates and Shumaker's neglect in failing to point the District Court to what it believed was a scrivener's error. Because Shumaker "never objected to or denied this statement by the District Court," Wilkes contends that Shumaker is judicially estopped from contending here that HCN did not own and operate the Auburndale Oaks nursing home. Appellants' Br. at 30. It matters not to Wilkes whether the "Shumaker does not dispute" statement was a scrivener's error. "The equitable doctrine of judicial estoppel is intended to protect courts against parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment." *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1176 (11th Cir. 2017) [27 Fla. L. Weekly Fed. C190a] (en banc). According to Wilkes, that is what Shumaker is doing here—manipulating the judicial process.

In considering whether the judicial estoppel doctrine should be invoked, Wilkes would have us start with Shumaker's "does not dispute" position, as reflected in the District Court's September 25 order: HCN owned and operated the Auburndale Oaks nursing home.[98] Wilkes says that the manipulation of the judicial process occurred when Shumaker took the position he advances here, on appeal: HCN did not own and operate the Auburndale Oaks facility. According to Wilkes, Shumaker changed its position as indicated in the September 25 order "to suit the exigencies of the moment."

What Wilkes ignores is that the position Shumaker took—as reported in the September 25 order—was directly contrary to the position Shumaker had taken successfully at the hearing on the motion for disqualification and disgorgement in the Bankruptcy Court and in the District Court on appeal. If the doctrine of judicial estoppel was in effect on September 25, 2020, Shumaker's position as announced that day abused the judicial process[99] and should be disregarded as manipulative of that process.

We are unaware of a situation like the one here, and Wilkes has not cited one. Wilkes describes the instant scenario as follows. A party's lawyer fails to call to a court's attention a statement in the court's order that, in the party's view, misstates the party's legal position and under the circumstances had to be a scrivener's error. Despite the misstatement, the party prevails. On appeal, when the party's adversary relies on the statement as written in the order, the party objects, explains why it believes the statement is a scrivener's error, and takes the legal position it had been taking prior to the entry of the order. The adversary responds. Judicial estoppel bars the party from changing the legal position attributed to it in the order.

Judicial estoppel is an equitable doctrine. It applies when a party advances a legal or factual position in one court, and the court relies on the position in deciding an issue. At the same time or later in another court, the party advances an entirely new legal or factual position—one that is contrary to the position advanced in the first court. That is not the case here. We would be hard pressed to say that equity requires that we accept Wilkes's argument.

We therefore hold that Shumaker was not disqualified from representing the Trustee of the Debtor's (FLTCI's) estate by virtue of its pre-petition representation of HCN or HCN's connections with Lyric, HQM, or any of the other entities Wilkes has identified as rendering Shumaker disqualified. And we find nothing relating to Shumaker's post-petition representation of HCN that disqualified Shumaker from representing the Trustee. Shumaker's representation of HCN did not lessen the value of the bankruptcy estate, create a dispute between the bankruptcy estate and HCN, or create a circumstance that could be considered a bias against the bankruptcy estate. We therefore affirm the District Court's order as it relates to Shumaker's alleged disqualification under § 327(a).

B.

We turn now to the second issue this appeal presents: whether the District Court erred in affirming the Bankruptcy Court's decision that Shumaker's omission in its Rule 2014 disclosures of its pre-petition connections with HCN, Lyric, and HQM was inadvertent and not negligent.

The District Court remanded the disqualification issue to the Bankruptcy Court with this instruction: "to determine, in the first instance, if there was an unintentional, negligent and/or inadvertent nondisclosure by Shumaker." *In re Fundamental Long Term Care, Inc.*, 2020 WL 954982, at *13. Whether the nondisclosure was negligent called for the determination of a mixed question of fact and law. Thus, an error would occur if the Bankruptcy Court applied the wrong legal standard for negligence or committed clear error in making its factual findings.

Wilkes argues that the Bankruptcy Court made an error of law. The Bankruptcy Court, according to Wilkes, "erroneously applied a negligent misrepresentation standard under Florida law to analyze [Shumaker's] conduct, rather than negligence standard." Appellants' Br. at 37. And, Wilkes contends, the District Court erred in not vacating the Bankruptcy Court's decision and remanding the case for further proceedings. *See id.* at 26.

This is essentially the same argument Wilkes made to the District Court. Berman and Shumaker had a "duty to thoroughly investigate and disclose any connections that might be relevant to their disinterestedness." *Id.* at 42. Whether their investigation was "reasonable" under the circumstances would determine whether they were negligent. *See id.* at 43. In Wilkes's view:

> It was and is manifestly unreasonable that, [Shumaker] failed to disclose the true nature of its HCN relationship which, at a minimum, included: (1) HCN and [Shumaker]'s status as litigation adversaries to the Townsend Estate just prior to Berman's employment; (2) *HCN's ownership* at the time of Berman's employment *of the nursing homes where four of the six Creditor Estates' decedents resided* and were injured; and (3) [Shumaker]'s role in drafting HCN's master lease agreement governing the subject-nursing homes at issue in this bankruptcy. That the HCN connections went undisclosed for so long implies an unreasonable lack of disclosure, or an unreasonable system for compliance with Rule 2014.

Id. at 43-44 (emphasis added). The first item is inaccurate and meaningless. HCN was an adversary purely on paper, added to the complaint by Wilkes in shotgun fashion, and was ultimately dismissed from the case. Shumaker did not enter the case as HCN's counsel. The second item, as previously discussed, was false.

The District Court disagreed with Wilkes's treatment of the Bankruptcy Court's order—thus addressing the third item:

> [T]he Bankruptcy Court specifically examined the circumstances under which Shumaker failed to disclose its connections. In concluding that the omission was not the result of negligence, the Bankruptcy Court not only considered what Shumaker purportedly knew through its conflict check system, but also noted that (1) Shumaker never represented HCN in any pre-bankruptcy litigation involving the Estates, (2) HCN never surfaced as a target in the bankruptcy action despite exhaustive discovery on potential targets, and (3) Shumaker never represented Lyric or HQM, but only dealt with them in an adverse posture as counsel for their landlords.

In re Fundamental Long Term Care, Inc., 2021 WL 222779, at *5 (citations omitted). The District Court found that the Bankruptcy Court fully considered the circumstances under which the alleged failure to disclose occurred and concluded that the failure was not the result of negligence. *Id.* We agree with the District Court's conclusion and accordingly affirm its judgment.

VI.

In conclusion, Chief Judge Williamson was right: this expansive and decade-plus dispute is, at its heart, a fraudulent transfer case. Wilkes, in representing the Probate Estates, sought huge sums in the form of damages in state court against the companies affiliated with the decedents' nursing homes. After having received one multimillion-dollar judgment in *Jackson*, Wilkes realized that the powers that be in the THI corporate structure had executed a bust-out scheme to separate THMI's liabilities from its assets and to hide those assets to avoid paying the *Jackson* judgment—as well as any potential future judgments awarded to the other estates.

Upon learning of this scheme, which THI and company went to great lengths to hide, Wilkes could still have obtained some recovery for its clients by placing THMI in Chapter 7 bankruptcy or by pursuing fraudulent transfer actions against FLTCH and the Targets. This likely would have resulted in a smaller total recovery for the Probate Estates—and smaller attorney's fees—because a bankruptcy court, rather than a jury, would evaluate the Estates' claims. Instead, Wilkes concocted a scheme of its own in which it placed FLTCI—THMI's assetless parent company—into Chapter 7 bankruptcy. Once the Bankruptcy Court appointed a trustee for FLTCI, Wilkes could then use the Trustee and the Trustee's strong-arm power to enhance its own discovery and pursue

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causes of action that it would not be able to pursue alone, attempting to get at THMI's assets through FLTCI.

Though this scheme was an abuse of the bankruptcy process, it appeared to work for Wilkes, until the final compromises were approved and Wilkes saw how much less in attorney's fees it stood to earn—receiving far less than it stood to receive as contingency fees for roughly $2 billion in state court judgments. Wilkes then turned on the Trustee, Shumaker, and the Bankruptcy Court, seeking Chief Judge Williamson's recusal, as well as Shumaker's disqualification as the Trustee's special counsel and disgorgement of the fees Shumaker received. The Bankruptcy Court held that Shumaker was disinterested, as required by 11 U.S.C. § 327(a), and that sanctions were not warranted because any violation of Rule 2014 was non-negligent. The District Court agreed.

Not only do we agree with the Bankruptcy and District Courts' reasoning, but when this saga is viewed as a whole, it is clear that the idea that Shumaker had a bias *against* Wilkes and the Probate Estates is baseless; if anything, Shumaker acted in a way that suggested a bias *toward* Wilkes and the Probate Estates.

The judgment of the District Court is therefore

AFFIRMED.

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[1]Fed. R. Bankr P. 2014(a) states that the trustee, in applying for court approval of the employment of a professional, must state:

> to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

A professional must disclose all connections to parties in interest "that are not so remote as to be *de minimis*." *In re Fullenkamp*, 477 B.R. 826, 834 (Bankr. M.D. Fla. 2011) (quoting *In re Leslie Fay Cos.*, 175 B.R. 525, 536 (Bankr. S.D.N.Y. 1994)).

[2]While this opinion later explains the bust-out scheme in detail, *see infra* part II.B, the gist of the scheme is that, in a series of transactions, THI separated THMI's assets and liabilities, and then hid those assets.

[3]Why Wilkes had the Jackson Estate file a petition for Chapter 7 bankruptcy relief against FLTCI and not THMI and THI will become apparent as this opinion unfolds.

[4]Berman was a Shumaker partner. Rule 2014(b) provides in relevant part:

> If, under the Code and this rule, a law partnership . . . is employed as an attorney . . . or if a named attorney . . . is employed, any partner, member, or regular associate of the partnership . . . or individual may act as attorney . . . without further order of the court.

[5]The Bankruptcy Court described the record of the case prior to March 20, 2014, in a Memorandum Opinion on Motion to Compromise and Motions for Permanent Injunctive Relief as "exceedingly complex." *In re Fundamental Long Term Care, Inc.*, 527 B.R. 497, 501 n.5 (Bankr. M.D. Fla. 2015). "The Court had nearly 80 days of hearings in this case." *Id.* The issues raised in those hearings resulted in 17 reported decisions: *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 492 B.R. 571 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 493 B.R. 613 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 493 B.R. 620 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 494 B.R. 548 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 500 B.R. 140 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 500 B.R. 147 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 501 B.R. 770 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 501 B.R. 784 (Bankr. M.D. Fla. 2013); *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 508 B.R. 224 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 509 B.R. 387 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 509 B.R. 956 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 512 B.R. 690 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 352 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 857 (Bankr. M.D. Fla. 2014); *In re Fundamental Long Term Care, Inc.*, 515 B.R. 874 (Bankr. M.D. Fla. 2014).

[6]In this opinion, we refer to Berman and Shumaker interchangeably.

[7]The lawsuits alleged negligence and frequently other tort law theories of recovery. We refer to the theories collectively under a wrongful death rubric.

[8]*Estate of Juanita Jackson v. Briar Hill, Inc.*, No. 53-2004CA-003229 (Fla. Cir. Ct. filed July 30, 2004), in the Circuit Court of Polk County, Florida.

[9]*Estate of Elvira Nunziata v. Pinellas Park Nursing Home, Inc.*, No. 05-8540CI (Fla. Cir. Ct. filed Dec. 23, 2005), in the Circuit Court of Pinellas County, Florida.

[10]*Estate of Joseph Webb v. Gainesville Health Center, Inc.*, No. 01-06-CA-2418 (Fla. Cir. Ct. filed June 16, 2006), in the Circuit Court of Alachua County, Florida.

[11]*Estate of James Henry Jones v. TFN Health Care Investors, Inc.*, No. 06-06672 (Pa. Ct. Com. Pl. filed July 17, 2006), in the Court of Common Pleas of Montgomery County, Pennsylvania.

[12]*Estate of Opal Lee Sasser v. Briar Hill, Inc.*, No. 06CA-3511 (Fla. Cir. Ct. filed Sept. 6, 2006), in the Circuit Court of Polk County, Florida.

[13]*Estate of Arlene Townsend v. Briar Hill, Inc.*, No. 53-2009CA-001025 (Fla. Cir. Ct. filed January 29, 2009), in the Circuit Court of Polk County, Florida.

[14]We refer to the cases in short-hand, e.g., *Jackson*, *Nunziata*, etc.

[15]An empty-chair trial occurs when the defendant does not participate in the trial. In *Jackson,* defense counsel for THI and THMI—Quintairos, Prieto, Wood & Boyer, P.A.—moved the court on April 29, 2010, for leave to withdraw as counsel for THI and THMI. The state trial court heard their motion at a pretrial conference on May 18 and granted the motion on June 4.

[16]The case was tried on the Jackson Estate's fifth amended complaint filed on July 31, 2009. The defendants were: Briar Hill, Inc. (the owner and operator of Integrated Health Services at Auburndale a/k/a Auburndale Oaks Healthcare Center, the nursing home in which Juanita Jackson once resided); Lyric Health Care Holdings III, Inc; Lyric Health Care LLC; TFN Healthcare Investors, LLC; IHS Acquisition No. 153, Inc.; Alliance Health Services, Inc.; Integrated Health Services, Inc.; THMI; THI; Daniel H. Beeler; Richard Kuhlmeyer; Rebecca Bachman; and Barbara Brown (the director of nursing at Auburndale Oaks Healthcare Center). Auburndale Oaks and Lyric played a role in the Probate Estates' motion to disqualify Shumaker as discussed *infra* part IV.

[17]The Florida Second District Court of Appeal subsequently referred to the judgments as "default judgment[s]" handed down "[a]fter [the plaintiff] settl[ed] with eleven defendants." *Fundamental Long Term Care Holdings, LLC v. Estate of Jackson ex rel. Jackson-Platts*, 110 So. 3d 6, 7 (Fla. 2d Dist. Ct. App. 2012) [37 Fla. L. Weekly D2718a].

[18]Rule 1.560 states in pertinent part:

> **(a) In General.** In aid of . . . execution the judgment creditor or the successor in interest, when the interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.
>
> **(b) Fact Information Sheet.** In addition to any other discovery available to a judgment creditor under this rule, the court, at the request of the judgment creditor, shall order the judgment debtor . . . to complete form 1.977, including all required attachments, within 45 days of the order or such other reasonable time as determined by the court. Failure to obey the order may be considered contempt of court.

Fla. R. Civ. P. 1.560.

[19]The bust-out scheme is discussed at length *infra* part II.B.

[20]Florida's UFTA, Fla. Stat. § 726.101 *et seq.*, states in relevant part:

> (1) A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made . . . if the debtor made the transfer . . . :
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor:
>
> . . .
>
> 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Fla. Stat. § 726.105. As indicated *infra*, the parties and the Bankruptcy Court agreed to apply the Florida UFTA rather than the comparable statutes of New York, Pennsylvania, Delaware, or Maryland.

[21]Section 726.110 states in relevant part:

> A cause of action with respect to a fraudulent transfer . . . under ss. 726.101-726.112 is extinguished unless action is brought:
>
> (1) Under s. 726.105(1)(a), within 4 years after the transfer was made . . . or, if later, within 1 year after the transfer . . . was or could reasonably have been discovered by the claimant.

[22]In *National Auto Service Centers, Inc. v. F/R 550, LLC*, the Florida Second District Court of Appeal characterized Fla. Stat. § 726.110 as a statute of repose. 192 So. 3d 498, 509 (Fla. 2d Dist. Ct. App. 2016) [41 Fla. L. Weekly D777a]. Because the text of Fla. Stat. § 726.110 refers to *extinguishing* a cause of action rather than barring the remedy, the court of appeal concluded that Fla. Stat. § 726.110 is a statute of repose based on its plain text. *Id.* at 510. In *CTS Corp. v. Waldburger*, the United States Supreme Court noted that statutes of limitations are subject to equitable tolling, but statutes of repose are not and "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." 573 U.S. 1, 9, 134 S. Ct. 2175, 2183 (2014) [24 Fla. L. Weekly Fed. S819a]. The Supreme Court explained that because statutes of repose dictate the time period after which a defendant will not face liability, equitable tolling is not applicable:

> Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to pursu[e] his rights diligently, and when an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by

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> the statute of limitations does not further the statute's purpose. . . . But a statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.

Id. at 10, 134 S. Ct. at 2183 (alteration in original) (internal quotation marks and citations omitted). This Court has cited *Waldburger* favorably for the proposition that statutes of repose are not subject to equitable tolling. *See Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883-84 (11th Cir. 2017) [27 Fla. L. Weekly Fed. C299a].

[23]The fraudulent transfer occurred in New York City on March 28, 2006. A New York statute provided a cause of action for voiding the transfer. N.Y. Debt. & Cred. Law § 273. The statute did not have a prescriptive period, so New York courts used the prescriptive period applicable to actions based on fraud, N.Y. C.P.L.R. § 213, as the time bar. Under § 213, suit had to be brought "six years from the date the cause of action accrued" or, if later, "two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8). Unlike Florida, where the UFTA prescriptive period was a statute of repose, New York courts considered the § 213 prescriptive period to be a statute of limitations. *See In re Borriello*, 329 B.R. 367, 372 (Bankr. E.D.N.Y. 2005). As it turned out, the Bankruptcy Court applied the Florida UFTA to THMI's fraudulent transfer of its assets.

The Bankruptcy Court did so on March 20, 2014, in ruling on the sufficiency of the fraudulent transfer claims asserted in the second amended complaint which the Probate Estates filed in the adversary proceeding they initiated against FLTCH and 15 defendants on October 1, 2013. *See infra* part III. One of the Bankruptcy Court's rulings denied the defendants' motions to dismiss the claims as time-barred. The Bankruptcy Court treated the time bar as an affirmative defense and thus upheld the sufficiency of the Probate Estates' fraudulent transfer claims. In deciding which state law governed the period for bringing fraudulent transfer claims, the Bankruptcy Court said:

> There appears to be a dispute about which law applies to the Plaintiffs' fraudulent transfer claims. According to the Plaintiffs, the law of Delaware, Florida, Maryland, and New York apply. But the Plaintiffs acknowledge the laws of those states contain substantially similar elements. So the Court will, as Ventas suggests, analyze the claims under Florida law.

In re Fundamental Long Term Care, Inc., 507 B.R. 359, 380 n.25 (Bankr. M.D. Fla. 2014). The Bankruptcy Court applied Florida law without objection. In the end, it did not matter whether Florida or New York law governed. The fraudulent transfer claims were either extinguished (under Florida law) or time-barred (under New York law).

[24]11 U.S.C. § 544 provides in relevant part:

> **(a)** The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
>
> **(1)** a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.

As the Bankruptcy Court for the Southern District of New York previously explained,

> Section 544(a) of the [Bankruptcy] Code clothes the trustee with the mantle of a hypothetical judicial lien creditor, unsatisfied execution creditor, and a bona fide purchase for value as of the date of the filing of the bankruptcy petition. While it is federal law which provides the trustee with his "strong arm" powers, his exercise of those powers is controlled by the *substantive law* of the jurisdiction governing the property in question; here, the law of New York.

In re Roman Crest Fruit, Inc., 35 B.R. 939, 946-47 (Bankr. S.D.N.Y. 1983) (emphasis added) (citing *In re Euro-Swiss Int'l Corp.*, 33 B.R. 872, (Bankr. S.D.N.Y. 1983).

[25]Wilkes believed that GECC, which was a secured creditor of THI and THMI, may have received loan payments from FLTCH and that Schron was one of FLTCH's owners.

[26]In 2010, § 56.29 provided in relevant part:

> (1) When any person or entity holds an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment holder or judgment lienholder may file an affidavit so stating, identifying, if applicable, the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment holder or judgment lienholder is entitled to these proceedings supplementary to execution.
>
> (2) On such plaintiff's motion the court shall require the defendant in execution to appear before it . . . at a time and place specified by the order in the county of the defendant's residence to be examined concerning his or her *property*.
>
> . . .
>
> (4) Testimony shall be under oath, shall be comprehensive and cover all matters and things pertaining to the business and financial interests of defendant which may tend to show what *property* he or she has and its location. Any testimony tending directly or indirectly to aid in satisfying the execution is admissible. A corporation must attend and answer by an officer who may be specified in the order. Examination of witnesses shall be as at trial and any party may call other witnesses.
>
> (5) The judge may order *any property* of the judgment debtor, not exempt from execution, in the hands of any person or due to the judgment debtor to be applied toward the satisfaction of the judgment debt.
>
> (6)
>
> . . .
>
> (b) When any . . . transfer . . . of *personal property* has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the . . . transfer . . . to be void and direct the sheriff to take the *property* to satisfy the execution.

Fla. Stat. § 56.29 (effective June 17, 2005-June 30, 2014) (emphasis added).

[27]The defendants removed the case under 28 U.S.C. § 1441, asserting diversity jurisdiction under 28 U.S.C. § 1332.

[28]The question presented to this Court in *Jackson-Platts* was whether a § 56.29 proceeding was ancillary to the underlying case, as Wilkes argued, or an independent cause of action like a case brought under Florida's UFTA. *Jackson-Platts v. Gen. Elec. Cap. Corp.*, 727 F.3d 1127, 1130 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C587a]. We concluded that the Florida courts treated a § 56.29 proceeding as a separate cause of action as if brought under Florida's UFTA:

> [T]he substance of the [Jackson] Estate's legal claims is governed by Florida's [UFTA], which is undoubtedly a substantive statute that imposes liability. . . .
>
> Indeed, had the Estate sued [GECC] and Schron in state court under the [UFTA], the lawsuit plainly would have been a "civil action" under [28 U.S.C.] § 1441.

Id. at 1137.

[29]In addition to FLTCH, Wilkes's motion sought leave to proceed against Fundamental Administrative Services, LLC ("FAS"); THI-Baltimore, Inc.; GTCR GolderRauner LLC; GTCR Partners VI, L.P.; Troutman Sanders LLP; Murray Forman; Leonard Grunstein; Edgar Jannotta; and Concepcion, Sexton & Martinez, P.A. Concepcion, Sexton & Martin was a Florida law firm, and its presence eliminated the possibility of diversity jurisdiction.

[30]The Trustee, and later Shumaker, were of course unaware of the Second District Court of Appeal's decision until late 2012. From Shumaker and the Trustee's point of view, a § 56.29 proceeding—like the one brought against Schron and GECC—would be useless as a means of collecting on the Jackson Estate's judgment against THMI.

[31]Wilkes filed a formal appearance for the Jackson Estate the same day along with Stichter, Riedel, Blain & Prosser, P.A.

[32]Or a federal district court exercising diversity jurisdiction under 28 U.S.C. § 1332.

[33]11 U.S.C. § 502(a) states in relevant part:

> **(a)** A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.
>
> **(b)** . . . [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount.

[34]At the time the Chapter 7 petition was filed, only the Jackson Estate had a final state court judgment. As of March 6, 2013, however, these three claims were all based on state court judgments.

[35]On March 6, 2013, the cases of these three Probate Estates were pending in state court. In *Townsend*, THI's counsel had been retained by the THI Receiver after defense counsel (for THI and THMI) had withdrawn per instructions in April 2010. On October 17, 2012, THI, having acquired new counsel, filed a "Motion to Disqualify" the trial judge on the ground of bias against THI. Defendant Trans Healthcare, Inc.'s Motion to Disqualify and Supporting Memorandum of Law, *Estate of Arlene Townsend v. Briar Hill, Inc.*, No. 53-2009CA-001025, 2012 WL 8139948 (Fla. Cir. Ct. Oct. 17, 2012)

[36]If the Bankruptcy Court granted Singerman's motion, FLTCI would function as a debtor-in-possession with the rights and powers of a Chapter 11 trustee. In that capacity, FLTCI itself would be required to perform all except the investigative functions and duties of a bankruptcy trustee. *See* 11 U.S.C. § 1107. These duties would include accounting for property, examining and objecting to claims, and filing informational reports as required by the court. *Id.* § 704. In that capacity, FLTCI would play a large part in determining who would be examined under Rule 2004—and to what extent.

[37]Rule 2004 states in subsection (b) in relevant part:

> The examination of an entity under this rule or of the debtor under § 343 of the [Bankruptcy] Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.'

Fed. R. Bankr. P. 2004(b). In subsection (c), Rule 2004 states in relevant part:

> The attendance of an entity for examination and for the production of documents or electronically stored

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> information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial.

Fed. R. Bankr. P. 2004(c).

[38]The automatic stay issued in the FLTCI bankruptcy barred Wilkes from prosecuting any pre-petition claims against FLTCI in state court, or from otherwise increasing the liability of its bankruptcy estate. At the same time, Wilkes was not barred from prosecuting claims against THMI, which, if they resulted in judgments against THMI, would minimize the value of its shares as assets of the Debtor's estate.

[39]Unless otherwise indicated, all of the Trustee's pleadings were filed Shumaker.

[40]Wilkes appended this footnote to that statement: "[T]he Order for Relief is conclusive as to the Debtor that the claim of the Petitioning Creditor, the Estate of Juanita Jackson, is an undisputed, non-contingent claim that is owed by the Debtor."

[41]The unstayed judgments that the Nunziata and Webb Estates obtained were the result of empty-chair trials in state court.

[42]The complaint was filed against: FAS; Kristi Anderson (FAS in-house counsel); Alan Grochal, the THI Receiver; two law firms, Tydings & Rosenberg LLP and Quintairos, Prieto, Wood & Boyer, P.A.; and six lawyers of the respective firms.

[43]The filing of this lawsuit was no doubt prompted by the statements Singerman made in the Debtor's April 2 motion to convert the case to a Chapter 11 proceeding and in the filings made on June 5, both referring to the entry of the $110 million default judgment against FLTCI.

[44]The defendants in this complaint were FAS, Anderson, and Christine Zack (FAS's in-house counsel).

[45]The cases were removed to the District Court under 28 U.S.C. § 1441 based on diversity of citizenship.

[46]Rule 1.540 states in pertinent part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:
>
> . . .
>
> (4) that the judgment, decree or order is void.

Fla. R. Civ. P. 1.540.

[47]The dispositive portion of the order reads:

> The Debtor's Motion is DENIED without prejudice conditioned on the Trustee (i) following through on obtaining an extension of the deadline for filing a motion under Florida Rule of Civil Procedure 1.540 in the action pending in Polk County Circuit Court, styled *Estate of Juanita Amelia Jackson v. Briar Hill, Inc., et al.*, Case No. 2004-CA-3229; and (ii) meeting and conferring in person with the [THI] Receiver, Alan Grochal.

Order Denying Debtor's Motion for Leave to Challenge Judgments and Claims at 1, *In re Fundamental Long Term Care, Inc.*, No. 8:11-BK22258 (Bankr. M.D. Fla. Sept. 7, 2012).

[48]The multi-count lawsuits the Trustee filed in the Circuit Court of Polk County in July 2012 were part of the Trustee's mission.

[49]The description of the bust-out scheme draws on Chief Judge Williamson's summary from the Bankruptcy Court's opinion in *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 365-71 (Bankr. M.D. Fla. 2014).

[50]The GTCR Group consisted of GTCR VI Executive Fund; GTCR Fund VI, LP; GTCR Associates VI; GTCR Partners VI, LP; and GTCR Golder Rauner, LLC.

[51]THMI-Baltimore lacked a staff, so it used THMI's employees and equipment (and other assets) to provide management services to the newly acquired Integrated nursing homes. THMI therefore shared in the revenue THMI-Baltimore received from THI-Baltimore for providing the services.

[52]On July 1, 2020, Troutman Sanders merged with Pepper Hamilton to become Troutman Pepper Hamilton Sanders LLP.

[53]THI owned 100% of THMI's issued and outstanding shares of stock.

[54]Murray Forman, an investment banker, also held an interest in FLTCH.

[55]FLTCH was FAS's sole member.

[56]The lawyers counseling the GTCR Group apparently assumed that Wilkes would not pursue FLTCH until Wilkes had obtained a judgment in the earliest of the Probate Estate cases it had brought, *Jackson*, and that with the judgment in hand, Wilkes would file an UFTA action against FLTCH and any of the recipients of THMI's assets. As it turned out, those lawyers were correct—Wilkes did not pursue FLTCH with an UFTA claim until after it filed an adversary complaint against FLTCH and others in the FLTCI bankruptcy case on October 1, 2013.

[57]Creekmore was a Wilkes client. None of Wilkes's cases were pending in Miami-Dade County.

[58]The verdict against THMI in *Nunziata*, which was tried on January 9, 2012, was $60 million in compensatory damages and $140 million in punitive damages. Almost immediately after the entry of judgment, Wilkes moved the court *ex parte* for an injunction against FLTCH, FAS, Forman, Grunstein (all Targets), the THI Receiver, and his attorney—none being parties in the case—that "purport[ed] to prohibit the [THI] Receiver and his 'agents and assignees' from challenging in any court anywhere in the country any aspect of the [Nunziata] Estate's entitlement to collect on its judgment." *Trans Health Mgmt., Inc. v. Nunziata*, 159 So. 3d 850, 856-57 (Fla. 2d Dist. Ct. App. 2014) [40 Fla. L. Weekly D43a]. The state court granted the injunction. THMI, represented by Shumaker, appealed the judgment, and the enjoined parties appealed the injunction. The Second District Court of Appeal dismissed THMI's appeal under Fla. Stat. § 607.1622(8) because THMI had been dissolved for failure to file an annual report. *Id.* at 855. The Second District Court of Appeal also vacated the injunction because it "was issued without notice to any of the nonparties, without the issuance of process on any of them, and without the presentation of admissible evidence." *Id.* at 858. In a consolidated appeal, FAS challenged a pretrial discovery order finding that it "had committed a fraud on the court." *Id.* at 854. The Second District Court of Appeal quashed the order because it "was not based on evidence admitted at a properly noticed evidentiary hearing." *Id.* at 859-60.

The judgment in *Webb* was reversed and the case was remanded for further proceedings. *Trans Health Mgmt., Inc. v. Webb ex rel. Webb*, 132 So. 3d 1152 (Fla. 1st Dist. Ct. App. 2013) [38 Fla. L. Weekly D2585a] (per curiam).

[59]The complaint alleged that the post-judgment motions were time-barred under the laws of Delaware, Florida, Maryland, New York, and Pennsylvania.

[60]Count I was lodged against Zack and Count II was against FLTCH and FAS. The complaint alleged that following the entry of the Omnibus Order on July 12, the Respondents

> in concert with the Debtor and other interested parties, ha[d] undertaken a concerted effort to undermine the Trustee's administration of this case with the sole purpose of reducing the potential exposure of third parties, including FLTCH and FAS, who were clearly involved in the fraudulent efforts to place the Debtor and THMI's [assets], exceeding more than $700 Million in value, beyond the reach of creditors.

Complaint for Temporary and Permanent Injunctive Relief at ¶ 24, *Scharrer v. Zack*, No. 8:12-ap-1198 (Bankr. M.D. Fla. Filed Dec. 27, 2012). The complaint also alleged that "according to an FAS representative's recent 2004 Examination testimony, FAS is paying various sets of lawyers more than $500,000 per month just in connection with the instant bankruptcy case, related litigation, oppositions, and discovery." Id. at ¶ 19. The complaint further alleged that in filing suit against THMI in the Southern District of New York, FLTCH and FAS sought to "avoid consideration and resolution by this Court of the very issues the Trustee is statutorily obligated to investigate [as] authorized by this Court." *Id.* at ¶ 31.

According to the Trustee, Zack's suit against Shumaker alleged that Shumaker's representation of the Trustee "constituted an abuse of process." *Id.* at ¶ 34. The Trustee contended that Zack filed the suit "shortly after th[e Bankruptcy] Court cautioned Zack's counsel against pursuing various requests for sanctions against lawyers and other parties," *id.* at ¶ 33, at a hearing in which the Bankruptcy Court "denied Zack's Motion for Sanctions and suggested that all parties would be well served focusing on the merits of the bankruptcy case and avoiding. . . personal attacks and reflexive assertions of rights to sanctions." *Id.* at ¶ 35.

[61]On December 21, 2012, the Trustee moved the District Court to dismiss the appeal. On September 12, 2013, the District Court entered an order staying the appeal "pending a resolution by the Bankruptcy Court of the interrelationship between THMI and FLTCI."

[62]Contrast this motion with the motion for disqualification and disgorgement Wilkes will later bring, which argues that Shumaker had a conflict of interest *against* Wilkes. *See infra* part IV.

[63]The same day, the Debtor objected to the Jackson Estate's $110 million claim on the ground that the judgment had been obtained via extrinsic fraud. The Bankruptcy Court overruled the objection on June 21, 2013, following an evidentiary hearing. *In re Fundamental Long Term Care, Inc.*, 500 B.R. 140 (Bankr. M.D. Fla. 2013).

[64]As a result of the Bankruptcy Court's September 12, 2013, decision, the mediation ended.

[65]Also on June 6, 2013, the Trustee and Kristi Anderson jointly moved to compromise the claims brought in the lawsuits filed against FAS and Anderson (and others) on July 19 and 20, 2012. FLTCH and FAS objected to the compromise. In a memorandum opinion issued on June 21, 2013, the Bankruptcy Court overruled the objection and approved the compromise. FLTCH and FAS appealed the ruling on June 27, 2013. FAS voluntarily dismissed the appeal on March 11, 2014.

[66]The *Townsend* case was tried after the trial judge denied THI's motion to recuse on the ground of bias. FLTCH and FAS's August 2 supplement to their July 30 motion stated that the "heavily one-sided damages trial was riddled with procedural and substantive errors, and the verdict will be appealed and is very unlikely to withstand appellate review."

[67]The 16 appellants included: FLTCH; FAS; THI-Holdings; THI-Baltimore; GECC; GTCR Golder Rauner, LLC; GTCR Fund VI, L.P.; GTCR Partners VI, L.P.; GTCR VI Executive Fund, L.P.; GTCR Associates VI; Edgar D. Jannotta, Jr.; Murray Forman; Leonard Grunstein; Ventas; Ventas Realty, L.P.; and Rubin Schron. The Second District Court of Appeal reversed the judgment and remanded the case for further proceedings. *Shattuck*, 132 So. 3d at 914.

[68]The defendant parties were: GECC; FAS; THI-Baltimore; GTCR Golder Rauner, LLC; FLTCH; Murray Forman; Leonard Grunstein; Rubin Schron;

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Ventas, Inc; Ventas Realty, LP; GTCR Fund VI, LP; GTCR Partners VI, LP; GTCR VI Executive Fund, L.P.; GTCR Associates VI; Edgar D. Jannotta, Jr; and THI-Holdings. Each count rested on 502 paragraphs of allegations.

[69]The Trustee stated in her motion that Rule 9024incorporates Federal. Rule Civil Procedure 24. But actually, Rule 7024 incorporates that rule, which allows intervention by a party that "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

[70]On November 13, 2013, in a Memorandum Opinion on the Trustee's Motion to Enlarge Time Period to Bring Avoidance and Other Actions, the Bankruptcy Court extended the two-year limitations periods in sections 108 and 546 of the Bankruptcy Code to April 13, 2014.

[71]The judge said a bit more:

> The complaint requires considerable energy to read with patience and to attempt to understand with confidence. Although alleging an encompassing, malevolent, and predatory scheme, the complaint provides to the disinterested reader little or nothing on which to conclude that the allegations arise from a sound factual basis or, more to the point, that the pleader has even the least notion that the allegations arise from a sound factual basis. The constant attribution of acts to "the Defendants" and "the Co-Conspirators" disguises much information necessary to glean the meaning, if any, of the allegations. The almost entire absence of allegations of time, place, and manner and the pertinent absence of the identity of the particular actors is wholly disabling to the disinterested reader. These omissions are so impairing and so obvious that the disinterested reader tends to doubt their inadvertence.

Jackson-Platts v. McGraw-Hill Cos., 2013 WL 6440203, at *4.

[72]Wilkes dismissed the case pursuant to Fed. R. Civ. P. 41(a)(1).

[73]While the motions were pending, on June 2, 2014, the Trustee commenced an adversary proceeding against Troutman in the Bankruptcy Court. The complaint alleged the following: Count I, a claim for negligence in abandoning FLTCI in *Jackson* resulting in a $110 million judgment; Count II, negligence in failing to inform FLTCI and its sole shareholder of their right to independent counsel in connection with the March 2006 transaction—the bust-out scheme—in which FLTCI acquired THMI; Count III, fraudulent concealment of the harm the March 2006 transaction could cause FLTCI; Count IV, fraud—participating in a scheme that defrauded FLTCI, THMI, and their creditors; and Count V, negligent supervision of a Troutman employee.

[74]There was one exception. On September 15, 2014, the Bankruptcy Court granted Ventas and Ventas Realty, LP summary judgment on one count of aiding and abetting breach of fiduciary duty.

[75]The "Fundamental Defendants" included FLTCH, FAS, FCC, THI-Baltimore, Murray Forman, and Leonard Grunstein.

[76]$4 million of that amount would be paid over time.

[77]Third parties, such as the non-settling defendants that prevailed, would be barred from asserting claims against the Fundamental Defendants arising out of or relating to the claims the Fundamental Defendants were released from.

[78]The Bankruptcy Court provided the citations for the 18 reported decisions the litigation had spawned. *In re Fundamental Long Term Care, Inc.*, 527 B.R. at 501 n.5.

[79]Those factors are: (i) the probability of success in the litigation between the settling parties; (ii) the difficulties, if any, to be encountered in collection; (iii) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and (iv) the paramount interests of the creditors and a proper deference to their reasonable views. *Wallis v. Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990).

[80]The Bankruptcy Court added this footnote:

> In *Townsend*, the Townsend Estate obtained a $1.1 billion verdict against THI. After the trial, the Townsend Estate attempted to add the non-settling Defendants to the judgment as the "real parties in interest." The Sasser and Jones Estates similarly attempted to add the non-settling Defendants as defendants in those state court actions—albeit before judgment—based on the same "real party in interest" theory. All three of those cases have been removed to this Court. In the Court's view, the "real party in interest" theory, which is based on the January 5 settlement agreement [between the THI Receiver and Targets], is completely without merit. In any case, it is essentially the same as several of the claims asserted here just recast under a different name, and even if it is somehow distinct, that claim could have been litigated here.

In re Fundamental Long Term Care, Inc., 527 B.R. at 517 n.113.

[81]The law firms receiving these fees were: Wilkes; Howell & Thornhill, P.A.; Stichter, Riedel, Blain & Postler, P.A.; and Kynes, Markman & Feldman, P.A.

[82]*See supra* note 73.

[83]We assume in this opinion that Wilkes would share the proceeds of the Troutman settlement with the other lawyers who represented the Probate Estates.

[84]We assume that the motion requesting disgorgement included the fee and costs because it refers to "all past and future compensation."

[85]28 U.S.C. § 455 provides in relevant part:

> (a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> 1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> 2.Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.

Rule 5004 provides: "[a] bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arise[ ] or, if appropriate, shall be disqualified from presiding over the case." Fed. R. Bankr. P. 5004(a).

[86]The District Court noted that Wilkes had petitioned the District Court for a writ of mandamus requiring Chief Judge Williamson "to recuse himself from the entire Chapter 7 proceeding." That petition was pending before another district judge at the time the District Court denied Wilkes's motion for leave.

[87]As the Bankruptcy Court noted:

> The [motion for disqualification and disgorgement] was also filed after the Probate Estates unsuccessfully objected to the Trustee's compromise of the proceeding against Troutman Sanders LLP. In the Objection, the Probate Estates complained that the Trustee's compromise improperly barred them from pursuing their own claims against Troutman, and that the compromise did not fairly disclose the amount of any distribution that the Probate Estates would receive from the settlement funds.
>
> The Probate Estates ha[d] already received approximately $16.2 million out of $23.7 million in settlements generated by the Trustee during the course of the bankruptcy case. Of the $16.2 million paid to the Probate Estates in the aggregate . . . each individual probate estate actually received $1 million less a $50,000.00 "future cost reserve." The balance of the distribution paid to the Probate Estates from the bankruptcy estate was disbursed to their attorneys for their fees and other charges. Consequently, the six Probate Estates received less than $6 million from their total distribution of $16.2 million, and the remaining $10 million was used to pay the Probate Estates' attorney's fees and costs.

In re Fundamental Long Term Care, Inc., 605 B.R. at 255-56 (footnote omitted).

[88]Whether Shumaker's connections with HCN, Lyric, and HQM created a disqualifying conflict of interest under 11 U.S.C. § 327(a) presented a mixed question of fact and law. The District Court found no clear error in the Bankruptcy Court's fact findings regarding Shumaker's involvement with HCN, Lyric, and HQM and the entities' relationship to the bankruptcy estate.

[89]The District Court appears to have overlooked the payments Lyric and HQM made to Shumaker pursuant to the lease agreements with HCN.

[90]Regarding sanctions—that is, the disgorgement the Probate Estates were seeking from Shumaker—the Bankruptcy Court noted that "any compensation recovered from Shumaker would be used to pay the balance of the attorney's fees or costs owed by the [Probate] Estates" to Wilkes and would not go to the Probate Estates themselves. *In re Fundamental Long Term Care, Inc.*, 614 B.R. at 755.

[91]Whether a court has misapplied the substantive law controlling its decision presents a question of law, not of discretion. The District Court's analysis of the third argument correctly treated the negligence issue as a question of law.

[92]The issues that the Probate Estates present are:

> I. Whether the District Court erred in affirming the Bankruptcy Court's determination on remand when the District Court found that [Shumaker] did not dispute that it represented [HCN], or that [HCN] was the landlord and owner of [Lyric] at one time.
>
> II. Whether the District Court erred in affirming the Bankruptcy Court's determination on remand that [Shumaker's] violations were nonnegligent.
>
> III. Whether the District Court erred in affirming the Bankruptcy Court's use of a negligent misrepresentation standard rather than conducting a reasonableness analysis of [Shumaker's] violations.
>
> IV. Whether the District Court erred in determining that the use of the negligent misrepresentation legal standard is consistent with the purpose of Federal Rule of Bankruptcy Procedure 2014.
>
> V. Whether the District Court erred in affirming the Bankruptcy Court's determination on remand that [Shumaker's] violations were inadvertent.

Appellants' Br. at 1. Shumaker's brief presents the issues this way:

> (1) whether the Bankruptcy Court abused its discretion when it found that Shumaker did not possess a disqualifying interest under 11 U.S.C. § 327(a), which finding was affirmed by the District Court; (2) whether the Bankruptcy Court abused its discretion when it found that Shumaker's omission of immaterial connections from its Rule 2014 disclosures was inadvertent and not negligent; and (3) whether the Bankruptcy Court abused its discretion when it found no sanctions were warranted for Shumaker's omissions.

Appellees' Br. at 2.

[93]Because we resolve the first two issues in Shumaker's favor, we need not consider the third issue.

[94]The Probate Estates' opening brief is apparently referring to the following statement in the Bankruptcy Court's memorandum opinion denying their motion to disqualify and require disgorgement:

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> [HCN] *owned the real property on which the Auburndale Oaks nursing facility was located*, but had no involvement in the operation of the nursing home. [HCN] was initially named as a defendant in a wrongful death action brought by one of the Probate Estates, but was dismissed from the action with prejudice before the bankruptcy case was filed.

In re Fundamental Long Term Care, Inc., 605 B.R. at 258 (emphasis added).

[95] The statements are unassailable because the District Court, in affirming the Bankruptcy Court's disposition of the §327(a) disqualification issue, found the statements supported by the evidence and thus not clearly erroneous. *See generally In re Fundamental Long Term Care, Inc.*, 2020 WL 954982.

[96] The District Court entered its order deciding the Probate Estates' appeal of the Bankruptcy Court's April 16, 2020, order on January 22, 2021. *In re Fundamental Long Term Care, Inc.*, 2021 WL 222779. After making the statement quoted above, the order went on to state:

> The only issues before the Court on appeal are whether the Bankruptcy Court abused its discretion in determining that the failure to mention this connection was inadvertent and non-negligent, and that the omission did not warrant sanctions. The Closing Checklist does nothing to further this inquiry, as it merely confirms the relationship all parties agree existed. In short, the Court "is not convinced that supplementing the record will assist it in deciding this appeal."

Estate of Townsend v. Shumaker, 2020 WL 10318565, at *2 (citation omitted).]

[97] We assume that at such a hearing, Shumaker would introduce the documents establishing HCN's ownership of the real estate, and its leases with those owning and operating the nursing homes, into evidence.

[98] The doctrine of judicial estoppel would not work for the Probate Estates if we started with the position Shumaker took throughout the litigation over the motion for disqualification and disgorgement: HCN owned the real estate on which the nursing home was located, while Lyric leased the land, created the nursing home, and thereafter operated it.

[99] If the statement that Wilkes points to was not a scrivener's error, Shumaker abused the judicial process because its statement was flatly contrary to the position it previously took in the Bankruptcy Court and in the District Court on appeal.

* * *

Civil rights—Law enforcement officers—Search and seizure—False arrest—Qualified immunity—Section 1983 action asserting federal and state law false arrest claims against law enforcement officers and others brought by plaintiff who was arrested for obstructing governmental operations during incident in which officers responded to church security guard's report that two Hispanic males were messing with an employee's car in the church parking lot at a time when plaintiff/mechanic was attempting to fix car at request of customer—District court erred in dismissing state law claim after concluding that officers were entitled to qualified immunity on state law false arrest claim because they had arguable probable cause to arrest plaintiff for violating Alabama statute prohibiting obstructing governmental operations after plaintiff initially refused to provide identification to officer—A person violates Alabama statute at issue if he obstructs governmental function "by means of intimidation, physical force or interference or by any other independently unlawful act"—Defendants' assertion that plaintiff obstructed officers' investigation by use of intimidation or physical force was refuted by video recordings of final interaction of plaintiff with law enforcement officers which showed that vehicle on which plaintiff was working slipped off the jack and slammed into the ground in front of plaintiff, after which plaintiff stood up, slapped his leg, and turned to answer officer's questions with his hands empty and without walking towards officer—Defendants' theory that probable cause existed to arrest plaintiff because he violated Alabama's Stop-and-Identify statute by refusing to produce a driver's license or ID is without merit—Broad background rule is that police may ask members of public questions and make consensual requests of them so long as they do not convey message that compliance is required; and that a person need not answer any question put to him—Although police may briefly detain person to investigate criminal activity, any obligation to answer police questions arises from state law, not federal Constitutional law—Plain text of Alabama statute clearly delineates that the only three things police can ask members of the public for are name, address, and an explanation of the individual's actions, and video is clear that officers did not ask for this information—Further, it was clear from video evidence that objections plaintiff voiced were related to unlawful demand that he produce physical identification—Defendants' assertion that plaintiff violated Alabama's driver's license statute, which requires those "driving" to show driver's license upon demand of a peace officer, is without merit—Under circumstances, there was no probable cause to believe that plaintiff was driving a car without displaying his license at time officer arrived

ROLAND EDGER, Plaintiff-Appellant, v. KRISTA MCCABE, THE CITY OF HUNTSVILLE, ALABAMA, CAMERON PERILLAT, Defendants-Appellees. 11th Circuit. Case No. 21-14396. September 26, 2023. Appeal from the U.S. District Court for the Northern District of Alabama (No. 5:19-cv-01977-LCB).

(Before WILSON, JILL PRYOR, Circuit Judges, and COVINGTON,* District Judge.)

(WILSON, Circuit Judge.) Roland Edger brought both a § 1983 false arrest claim and a state law false arrest claim against two Huntsville, Alabama police officers and the City itself. After the district court concluded that the officers were entitled to qualified immunity because they had arguable probable cause to arrest Mr. Edger, he appealed. After careful review of the record and with the benefit of oral argument, we **REVERSE** the district court's grant of qualified immunity.

I.

A.

The facts of this case are not in dispute, as the entirety of the encounter between Mr. Edger and the police was captured on the police officers' body-worn and dash cameras. Both Mr. Edger and the defendants agree that the video and audio evidence from these cameras is authentic. Before turning to that evidence, we must first detail the events leading up to the start of the recordings.

Mr. Edger is a mechanic in Huntsville, Alabama, where he manages the Auto Collision Doc store. One of Mr. Edger's longtime clients is Kajal Ghosh, who owns a red Toyota Camry.[1] The Camry is primarily driven by Mr. Ghosh's wife, who works as a teacher at Progressive Union Missionary Baptist Church. One or two days before June 10, 2019, Mr. Ghosh called Mr. Edger and reported that the Camry had broken down while his wife was working at the Church. He asked Mr. Edger to fix the car and told him the keys would be waiting for him at the Church's front office.

On June 10, around 2 p.m., Mr. Edger went to the Church to pick up the keys and to inspect the Camry. He determined something was wrong with either the car's steering or its tires, and he concluded he would need to come back later with tools to fix the car. That evening, he returned to the Church with his stepson, Justin Nuby, in tow, intending to either fix the Camry on-site or to take it back to the shop for further repairs. Mr. Edger and Mr. Nuby drove a black hatchback to the Church.

After Mr. Edger and his stepson entered the Church's lot, the Church's security guard observed them and grew concerned. From here on, the facts of this case were captured by audio and visual recording devices. At about 8:05 p.m., the security guard called 911 and told dispatch: "I have two Hispanic males, messing with an employee's car that was left on the lot." He also noted that he observed them remove a tire from the car. During the 911 call, the guard identified himself as a security guard for the Church, gave his phone number, noted his employer, and gave a description of Mr. Edger and Mr. Nuby. About 30 minutes later, at 8:36 p.m., Officer Krista McCabe arrived at the Church in her patrol car.

As Officer McCabe's body camera shows, she pulled into the Church parking lot and parked in front of where Mr. Edger and Mr. Nuby were working. McCabe Body Camera at 0:00:30.[2] As she stepped out of the squad car, Mr. Edger was laying on the ground next to the car, with the Camry's tire removed. *Id.* at 0:00:36. Mr. Nuby greeted Officer McCabe as she exited her vehicle and approached the Camry. *Id.* at 0:00:36-0:00:46. Mr. Edger continued to work, and the following conversation began:

> **Officer McCabe:** What are y'all doing?
>
> **Mr. Edger:** Getting the car fixed.
>
> **Officer McCabe:** Is this your car?
>
> **Mr. Edger:** Yeah, well, it is one of my customer's.
>
> **Officer McCabe:** One of your customer's?
>
> **Mr. Edger:** Ghosh Patel, yep. I was over here earlier.

Id. at 0:00:47. At this point Officer McCabe gestured towards the black hatchback.

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Officer McCabe: Whose car is that?
Mr. Edger: That's mine.
Officer McCabe: The black one?
Mr. Edger: Yeah.

Id. at 0:01:03. Officer McCabe then watched in silence as Mr. Edger attempted to jack the Camry up. Eventually the car slipped from the jack and slammed into the ground. *Id.* at 0:01:08-0:01:48. Immediately after the Camry slipped, Officer Perillat arrived at the scene in a squad car. He exited his car and approached on foot, positioning himself behind Mr. Edger, out of Mr. Edger's line of vision. From here, the interaction rapidly escalated:

Officer McCabe: Alright. Take a break for me real fast and do y'all have driver's license or IDs on you?

Mr. Edger: I ain't going to submit to no ID. Listen, you call the lady right now. Listen I don't have time for this. I don't mean to be rude, or ugly, but . . .

Officer McCabe: Okay. No, you need to—

Mr. Edger: I don't mean to be—

Officer McCabe:—give me your ID or driver's license.

Mr. Edger: No. I don't. Listen, I don't want you to run me in for nothing.

Officer McCabe: Are you refusing me—are you refusing to give me your ID or driver's license?

Mr. Edger: I'm telling you that if you will call this lady that owns this car—

In the middle of Mr. Edger's sentence, as he was attempting to explain the situation to Officer McCabe, Officer Perillat seized Mr. Edger from behind. He led Mr. Edger to the side of the Camry and started handcuffing him. As Mr. Edger protested, Officer Perillat told Mr. Edger: "We don't have time for this," and, "You don't understand the law." During this time, the video shows that Mr. Edger offered his driver's license at least three times before the officers could finish handcuffing him. Eventually, the officers managed to handcuff and search Mr. Edger, and then detain him in a squad car. Throughout this process, the officers never asked Mr. Edger or his stepson for their names or addresses. *Id.* at 0:00:44-0:02:16.

B.

Mr. Edger was charged with obstructing governmental operations in violation of Alabama Code § 13A-10-2(a)(1). The City of Huntsville dropped all charges relating to this incident.

After the dismissal of the charges, Mr. Edger filed a § 1983 civil rights lawsuit, alleging a false arrest in violation of his Fourth Amendment rights against unlawful searches and seizures, as well as a state law false arrest claim. On cross-motions for summary judgment, the district court found that the defendants were entitled to federal and state law immunities. It reasoned that even though Mr. Edger committed no acts giving rise to *actual* probable cause, a reasonable but mistaken officer could nonetheless have believed his refusal to produce physical identification was a crime, and the officers thus had *arguable* probable cause to make the arrest. This appeal followed.

II.

We review summary judgment rulings de novo, applying the same legal tests as the district court. *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017) [26 Fla. L. Weekly Fed. C1204a].

III.

We focus on the federal claims first. In general, when government officials are performing discretionary duties, as all parties concede they were in this case, they are entitled to qualified immunity. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C329a]. A plaintiff may rebut this entitlement by showing that the government officials (1) committed a constitutional violation; and (2) that this violation was "clearly established" in law at the time of the alleged misconduct. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) [21 Fla. L. Weekly Fed. S588a]. In theory, this judge-made doctrine is designed to protect government officials from the consequences of their reasonable mistakes made in the exercise of their official duties. *See id.* at 231. The test is conjunctive, and if a plaintiff fails either prong of the qualified immunity analysis, his claim is barred.

There are three recognized ways to show that a law is "clearly established." First, a plaintiff may show that a "materially similar case has already been decided," whose facts are similar enough to give the police notice. *See Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C565a]. Second, he may show that a "broader, clearly established principle should control the novel facts" of his case. *Id.* This "broader" principle may be derived from "general statements of the law contained within the Constitution, *statute*, or caselaw." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C473a] (alteration adopted) (emphasis added) (quoting *Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C340a]). Finally, a plaintiff may show that the officer's conduct "so obviously violates [the] constitution that prior case law is unnecessary." *Keating*, 598 F.3d at 766 (quoting *Mercado*, 407 F.3d at 1159). While we must be mindful of the "specific context of the case," we "do[ ] not require a case directly on point for a right to be clearly established." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8 (2021) [29 Fla. L. Weekly Fed. S25a] (per curiam).

Mr. Edger alleges that he was falsely arrested in violation of his Fourth Amendment rights against unreasonable searches and seizures. For Fourth Amendment purposes, arrests are seizures and are unreasonable unless supported by probable cause. *See Davis v. Williams*, 451 F.3d 759, 764 n.8 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C640a]; *Morris v. Town of Lexington*, 748 F.3d 1316, 1324 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1364a]. Probable cause exists where "facts and circumstances within the officer's knowledge . . . would cause a prudent person to believe" that a crime was being committed. *Morris*, 748 F.3d at 1324.

In the false arrest context, we have often said that an officer is entitled to qualified immunity if he had even "arguable probable cause," meaning that "reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff." *See, e.g.*, *Brown v. City of Huntsville*, 608 F.3d 724, 734 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C931a] (discussing the qualified immunity standard). We have recently clarified, that having "arguable probable cause" is just another way of saying that the law is not "clearly established." *See Garcia v. Casey*, 75 F.4th 1176, 1187 (11th Cir. 2023) [30 Fla. L. Weekly Fed. C22a] ("[T]he arguable probable cause inquiry in a false arrest case is no different from the clearly established law inquiry in any other qualified immunity case."). Thus, if we conclude that the officers had arguable probable cause then we conclude that their violation of the law was not clearly established and vice-versa.

Applying these principles to this case, Mr. Edger was charged with obstructing governmental operations in violation of Alabama Code § 13A-10-2(a)(1). A person violates this section if, "by means of intimidation, physical force or interference or by any other *independently unlawful act*, he" obstructs a governmental function. *Id.* (emphasis added). Our inquiry therefore asks whether the officers had probable cause to believe Mr. Edger obstructed governmental operations in violation of this statute. If not, our inquiry is whether no reasonable officer would believe that Mr. Edger obstructed governmental operations—or in other words, whether it was clearly established that there was no probable cause to arrest Mr. Edger for this crime.

The defendants argue that they had probable cause to arrest Mr. Edger for violating § 13A-10-2(a)(1) on two theories. First, they argue that Mr. Edger used "physical force or interference" to obstruct the officer's investigation. Second, in the alternative, they argue that Mr. Edger committed an "independently unlawful act" by refusing to identify himself as Officer McCabe ordered. They propose two different statutes, the Alabama Stop-and-Identify statute § 15-5-30, and the Alabama driver's license statute § 32-6-9, for why Mr. Edger was required to produce his identification. The officers are entitled to qualified immunity if they had arguable probable cause to arrest Mr. Edger based on any of these theories. We address whether the officers had arguable probable cause for each of these theories in turn.

A.

Turning first to the theory that Mr. Edger obstructed the officers by using "intimidation" of "physical force." First, the defendants argue that Mr. Edger's noncompliance and "aggressive demeanor" obstructed Officer McCabe's investigation and provided her probable cause to arrest Mr. Edger. But "words alone fail to provide culpability under" Alabama's obstruction statute. *D.A.D.O. v. State*, 57 So. 3d 798, 806 (Ala. Crim. App. 2009). So, Mr. Edger's statements and noncompliance without more do not begin to provide "facts or circumstances" to support probable cause.

Second, the defendants suggest that Mr. Edger physically threatened Officer McCabe in the

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moments following the Camry slipping off the jack and hitting the ground because he "jumped up" and "waved his hands," among other things. But the video evidence in this case speaks for itself. *See Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1290 n.3 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1630a] (noting we review video evidence de novo); *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) [20 Fla. L. Weekly Fed. S225a] (explaining that where one party's account is contradicted by the video evidence "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape"). The final interaction between Mr. Edger and Officers McCabe and Perillat is depicted from four separate angles on four separate cameras—two body-worn police cameras and two dash cameras. In each video, the Camry slips off the jack, slamming into the ground in front of Mr. Edger. In each, he stands up, slapping his leg, and turns to answer Officer McCabe's questions. Though he is clearly frustrated and gesturing as he speaks, his hands are empty. He stands in one spot without walking towards Officer McCabe. Looking to all the facts within the officer's knowledge at the time of the incident, no reasonable officer could have observed Mr. Edger and believed he was using "intimidation" or "physical force" to "intentionally obstruct[ ]" Officer McCabe's investigation. Accordingly, no reasonable police officer could believe that Mr. Edger violated this portion of the obstruction statute, and therefore there was not even arguable probable cause—much less actual probable cause—to support Mr. Edger's arrest. This theory does not support the grant of qualified immunity to the officers.

B.

Turning now to the defendant's theory that probable cause existed to support Mr. Edger's arrest because he violated Alabama's Stop-and-Identify statute, Alabama Code § 15-5-30. The Stop-and-Identify statute allows an Alabama police officer who "reasonably suspects" a crime is being, has been, or is about to be committed to stop a person in public and "demand of him his name, address and an explanation of his actions." *Id.*

Mr. Edger argues that he cannot possibly have violated § 15-5-30, because it clearly delineates three things the police may ask him for: his name, his address, and an explanation of his actions. He argues nothing in the statute requires him to produce physical identification, and that Officer McCabe's question, "Do y'all have driver's license or IDs on you?" and repeated references to "IDs" were clearly demands for him to produce physical identification of some kind. He notes that physical identification is not one of the three enumerated things that the police may ask for under Alabama law, and that he was never asked for his name or address.

We agree with the district court's assessment that Mr. Edger did not actually violate § 15-5-30 and thus did not actually commit an "independently unlawful act" justifying arrest under § 13A-10-2(a)(1). Section 15-5-30 does not require anyone to produce an "ID" or "driver's license" as Officer McCabe demanded. Indeed, it does not require anyone to produce anything. Instead, it grants Alabama police the authority to request three specific pieces of information. Here, the video evidence is clear that neither Officer McCabe nor Officer Perillat asked for Mr. Edger's name or address. Additionally, Mr. Edger's objection was clearly related to the unlawful demand that he produce physical identification. When asked, "What are y'all doing?" he responded to Officer McCabe and explained they were fixing the car and that it belonged to a customer. When he stood up to answer more of her questions, the video shows he continued explaining who the owner of the car was and began explaining how they could verify the information before he was abruptly arrested by Officer Perillat. Because the Alabama statute, by its plain text, does not permit the police to demand physical identification, the officers lacked probable cause and thus violated Mr. Edger's Fourth Amendment rights by arresting him. The first prong of the qualified immunity analysis is therefore satisfied.

Where we part ways with the district court is on the issue of arguable probable cause or the "clearly established law" prong of the qualified immunity analysis. We hold that the plain text of the Alabama statute is so clear that no reasonable officer could have believed they could arrest Mr. Edger for failing to produce his "ID" or "driver's license" under § 15-5-30.

Three related premises lead us to this conclusion. First, the broad background rule is that the police may ask members of the public questions and make consensual requests of them, *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (collecting cases and examples), "as long as the police do not convey a message that compliance . . . is required." *Id.* at 435. But the person "need not answer any question put to him; indeed, he may decline to listen to questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

Second, while the Fourth Amendment permits the police to briefly detain a person to investigate criminal activity, any obligation to answer police questions arises from state—not federal Constitutional—law. *See Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 187 (2004) [17 Fla. L. Weekly Fed. S406a] (analyzing Nevada's Stop-and-Identify statute and noting "the source of the legal obligation [to answer] arises from Nevada state law, not the Fourth Amendment").

Finally, as noted, the Alabama statute is clear. It lists only three things that the police may ask about. This is not an issue of "magic words" that must be uttered. There is a difference between asking for specific information: "What is your name? Where do you live?" and demanding a physical license or ID. The information contained in a driver's license goes beyond the information required to be revealed under § 15-5-30. *Compare* Ala. Code § 32-6-6 ("Each driver license . . . shall contain a distinguishing number assigned to the licensee and a color photograph of the licensee, the name, birthdate, address, and a description of the licensee . . . ."), *and* Ala. Code § 22-19-72 (requiring that there be "a space on each driver's license . . . to indicate in appropriate language that the [licensee] desires to be an organ donor"), *with* Ala. Code § 15-5-30 ("A [police officer] may stop any person abroad in a public place whom he reasonably suspects is committing . . . a [crime] and may demand of him his name, address and an explanation of his actions."). Further, neither the parties nor our own research can identify any Alabama law that generally requires the public to *carry* physical identification—much less an Alabama law requiring them to produce it upon demand of a police officer. There simply is no state law foundation for Officer McCabe's demand that Mr. Edger produce physical identification.

So to summarize, it has been clearly established for decades prior to Mr. Edger's arrest that the police are free to ask questions, and the public is free to ignore them. It has been clearly established prior to Mr. Edger's arrest that any legal obligation to speak to the police and answer their questions arises as a matter of state law. And the state statute itself in this case is clear and requires no additional construction: police are empowered to demand from an individual three things: "name, address and an explanation of his actions." Ala. Code § 15-5-30. It was thus clearly established at the time of Mr. Edger's arrest that she could not demand he produce physical identification. And because Officer McCabe's demands for an "ID" or a "driver's license" went beyond what the statute and state law required of Mr. Edger, she violated clearly established law. Under this set of facts and these precedents, no reasonable officer could have believed there was probable cause to arrest Mr. Edger for obstructing governmental operations by violating § 15-5-30. And this theory cannot support the grant of qualified immunity to the officers.

C.

Finally, the defendants also argue that Mr. Edger violated the Alabama driver's license statute, Ala. Code § 32-6-9(a), which requires those "driving" to "display the [license], upon demand of a . . . peace officer." *Id.* The defendants argue that because Mr. Edger admitted that the black hatchback was his, that he must have driven it there and he was therefore "driving" and subject to the requirement to display his license. They argue this constitutes an "independently unlawful act" under § 13A-10-2(a)(1) and a crime in and of itself justifying the arrest.

The defendants argue that "driving" is a broad term also encompassing those with "actual physical control" of the vehicle. Appellee Br. at 33 (citing Ala. Code § 32-1-1.1(14) (defining "driver")). The test for "actual physical control" means the "exclusive physical power, and present ability, to operate, move, park, or direct" the vehicle under the totality of the circumstances. *Davis v. State*, 505 So. 2d 1303, 1305 (Ala. Crim. App. 1987). Assuming without deciding that this is the appropriate test for determining if someone is "driving" under § 32-6-9,[3] under the totality of the circumstances, Mr. Edger was not driving. When Officer McCabe arrived on scene, she found Mr. Edger partially under the Camry at-

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tempting to jack it up. The Camry itself had a wheel removed and was thus disabled and incapable of being driven. The black hatchback was approximately two parking spaces away from where Mr. Edger was, and he was engaged in working on the Camry. No reasonable person could believe that Mr. Edger had the "present ability . . . to operate, move, park, or direct" the black hatchback from two parking spaces away and underneath another car. *See Davis*, 505 So. 2d at 1305. The only case analyzing § 32-6-9 cited by the defendants is from this court, *Cantu v. City of Dothan*, 974 F.3d 1217, 1230 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1779a], where we concluded the police *may* have had probable cause to arrest someone for failure to display their license. But that case's facts are materially different because, there, the arrest attempt occurred after the individual walked towards their vehicle and attempted to get in before being stopped by the officer. *Id.* at 1223.

In sum, there was not actual probable cause to believe that Mr. Edger was driving a car without displaying his license at the time Officer McCabe arrived. Nor could any reasonable officer believe so based on the facts in this case, and therefore there was no arguable probable cause either. Thus, this final theory cannot support the grant of qualified immunity to the officers.

* * *

In summary, Officers McCabe and Perillat violated Mr. Edger's clearly established Fourth Amendment rights when they arrested him with neither actual, nor arguable, probable cause. Accordingly, we **REVERSE** the district court's grant of qualified immunity to the officers and remand for further proceedings.

IV.

The district court dismissed Mr. Edger's state law claims against Officer McCabe, Officer Perillat, and the City because it determined that arguable probable cause was a defense to those claims as well. It did not conduct any independent analysis on these claims and instead linked its decision directly to the finding of arguable probable cause on the federal claims. Accordingly, because we hold that there was no arguable probable cause—i.e., the lack of probable cause was clearly established—we **VACATE** the district court's dismissal of the state law claims and remand for further proceedings.

REVERSED and VACATED.

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*Honorable Virginia M. Hernandez Covington, United States District Judge for the Middle District of Florida, sitting by designation.

[1]In the record, the owner of the car on which Mr. Edger was working is referred to by various combinations of the names "Ghosh," "Kajal," "Ghosh Patel," and "Mr. Patel." For consistency, we will refer to this individual as Kajal Ghosh, or Mr. Ghosh, as that is the name by which he identified himself in his deposition.

[2]Officer McCabe's body camera footage is available online. *See* Video—Investigating Officer Body Camera, Doc. 28-9 (https://www.ca11.uscourts.gov/media-sources).

[3]We note that the defined term "driver" does not appear in § 32-6-9, and the term "driving" is undefined in § 32-1-1.1. *Compare* Ala. Code § 32-6-9, *with id.* § 32-1-1.1(14).

* * *

Criminal law—Contempt—Copyrights—Infringement—Violation of injunction prohibiting private corporation or "its officers, agents, servants, employees, and attorneys; and any other persons...in active concert or participation with [the corporation] or its officers, agents, servants, employees, or attorneys" from distributing or causing to be distributed certain products that infringed on certain intellectual property—Scope of injunction—Former employee—Nonparties—Under Rule 65(d), district court's injunction, by its own terms, had binding effect on corporation that was party in the civil case; the corporation's officers, agents, servants, employees, and attorneys; and those who were not party to litigation or agents of corporate party, but who aid and abet those who are bound by the injunction—Defendant, a former employee of enjoined corporation, was entitled to judgment of acquittal on contempt charges where she was not party to injunction and, although she was employed at time of injunction, she was no longer employed at time of conduct giving rise to contempt charge—Discussion of binding effect of injunction on non-party former employees—Evidence did not show that defendant aided and abetted any party to injunction, and record does not support conclusion that defendant was in privity with a named party—Discussion of evidence relevant to establishing privity—Finally, government did not pursue theory that defendant aided and abetted party or entity in privity with a party bound by injunction, and district court did not consider this issue

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DIANA ROBINSON, Defendant-Appellant. 11th Circuit. Case No. 22-10949. September 28, 2023. Appeal from the U.S. District Court for the Middle District of Florida (No. 6:20-cr-00057-PGB-LHP-3).

(Before JORDAN, ROSENBAUM, and NEWSOM, Circuit Judges.)

(ROSENBAUM, Circuit Judge.) A court's injunction may require a person to do or refrain from doing a particular act. 1 Howard C. Joyce, *A Treatise on the Law Relating to Injunctions* § 1, at 2-3 (1909). But unlike a congressionally enacted statute, which can apply to everyone, an injunction generally applies to only those over whom the court has jurisdiction in the proceedings leading to the injunction, and only to the extent that the injunction gives notice to them. This case raises the question of just how far an injunction of a private corporation can reach.

In 2017, TASER International, Inc., obtained an injunction against "Phazzer [Electronics] and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer Electronics or its officers, agents, servants, employees, or attorneys" (the "2017 injunction"). The injunction prohibited Phazzer Electronics from distributing or causing to be distributed certain stun guns and accompanying cartridges that infringed on TASER's intellectual property. At the time of the TASER-Phazzer Electronics litigation, Steven Abboud controlled Phazzer Electronics (though not on paper). And Phazzer Electronics employed, among others, Defendant-Appellant Diana Robinson.

In 2018, after the district court found Abboud in contempt for violating the 2017 injunction, Phazzer Electronics became inactive, and Abboud persuaded Uriel Binyamin to start a new company called Phazzer-USA. In the meantime, Abboud and Robinson went to work for other entities with "Phazzer" in their names. Among others, these included Phazzer IP and Phazzer Global. Phazzer IP and Phazzer Global, in turn, assisted Phazzer-USA in 2019 in distributing stun guns that the 2017 injunction prohibited Phazzer Electronics from distributing.

Based on that activity the district court found Robinson (and others) in contempt of the 2017 injunction. On appeal, the question we must answer is whether the 2017 injunction extended broadly enough to bind Robinson and prohibit her conduct under the theories of liability that the government has pressed and the district court decided. After oral argument and careful review of the record, we conclude that the record cannot sustain Robinson's conviction under the any of these theories.

To be sure, the government did not seek a contempt conviction under and the district court did not consider one last theory of liability in a criminal-contempt case—whether Robinson aided and abetted a person or entity in privity with an enjoined party in violating the injunction—a theory that the government may believe possibly applies here. But now it's too late. So we vacate Robinson's conviction.

I. BACKGROUND

A. Factual Background

As we've mentioned, the district court in this case found Robinson in contempt of an injunction it issued July 17, 2017, against "Phazzer [Electronics] and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer [Electronics] or its officers, agents, servants, employees, or attorneys." Doc. No. 183, at 11-12. Before we get to that point in the story, though, we must explain how the 2017 injunction came about.

1. Phazzer Electronics, Inc.

Kirk French and Steven Abboud were cousins-in-law. Sometime around 2006 or 2007, Abboud approached French about forming a company to sell conducted electrical weapons, also known as stun guns. According to French, Abboud asked French to form the company, Phazzer Electronics, Inc. ("Phazzer Electronics"), because Abboud was going through a divorce and wanted to conceal the company from his wife. French thought he'd also benefit from the company because he hoped to become an active participant in the company's operations when he retired from the military.

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So in 2008 or 2009, French formed Phazzer Electronics. Relevant to this appeal, Phazzer Electronics sold a stun gun called the Enforcer.

Though French and his wife were the named owners of the company, Abboud ran the day-to-day operations of the business.[1] For example, Abboud had the business relationships with companies located in Taiwan that manufactured the products Phazzer Electronics sold. He also obtained Phazzer Electronics's inventory, and he made the bulk of the decisions for the company. In fact, Abboud's role was so tied up with Phazzer Electronics's business that he went by the nickname "The General" within the company. Abboud resigned from the company sometime in 2017 but provided consulting services to Phazzer Electronics until 2018.

Phazzer Electronics also employed Diana Robinson. Robinson answered the phones, shipped inventory, and responded to technical questions. She took her directions from Abboud, who always acted as the owner of Phazzer Electronics.

By the end of 2018, Phazzer Electronics ceased operating.

2. The TASER Civil Injunction

In March 2016, TASER International ("TASER"), a stun gun manufacturer, brought suit against Phazzer Electronics for trademark and patent infringement, false advertising, and unfair competition. On July 21, 2017, the district court entered judgment in favor of TASER and awarded several remedies, including a permanent injunction precluding Phazzer Electronics from producing and selling certain products such as the Enforcer stun gun. The injunction provided,

> Phazzer [Electronics] and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer Electronics or its officers, agents, servants, employees, or attorneys, are hereby enjoined from:
>
> a. Making or causing to be made,
>
> b. Using or causing to be used,
>
> c. Offering for sale, or causing to be offered for sale,
>
> d. Selling or causing to be sold,
>
> e. Donating or causing to be donated
>
> f. [D]istributing or causing to be distributed,
>
> g. Importing or causing to be imported,
>
> h. Exporting or causing to be exported
>
> the Phazzer Enforcer CEW, and any other conducted electrical weapon ("CEW") or device which infringed upon claim 13 of the '262 Patent, and any device not colorably different from the Enforcer CEW. The effect of this injunction shall continue through October 14, 2019.[2]

Doc. No. 183, at 11-12.

The Federal Circuit affirmed the district court's judgment and injunction.

3. 2018 Civil Contempt Finding Against Phazzer Electronics and Abboud

Before the Federal Circuit issued its opinion (and less than a year after the district court enjoined Phazzer Electronics, its officers, employees, and agents), the district court found Phazzer Electronics and Abboud to be in civil contempt of the 2017 injunction. In particular, TASER presented evidence that Phazzer Electronics sold and shipped the enjoined Enforcer stun gun to TASER's investigator and that Abboud continued to conduct demonstrations of the enjoined products. Although the district court declined to impose additional penalties, it notified Phazzer Electronics and Abboud that any continued violations of the court's injunction would result in the initiation of criminal-contempt proceedings. The Federal Circuit summarily affirmed. *TASER Int'l, Inc. v. Phazzer Elecs., Inc.*, 773 F. App'x 1092 (Fed. Cir. 2019).

4. Formation of Phazzer-USA

Four months after these events, Abboud approached Uri Binyamin about forming a company to sell Phazzer products.[3] According to Binyamin, in the process of forming the company, Abboud gave him a choice of four names for the company. Binyamin chose the name Phazzer-USA LLC, and the company was formed on September 21, 2018. The company was registered to Robinson, who used an email address of controller@phazzerglobal.com.

Four days after Phazzer-USA was formed, an entity called Phazzer IP LLC appeared on the scene. While it's unclear from the record generated during this litigation when Phazzer IP was formed, the context of the evidence in the record suggests that Phazzer IP formally held at least some of the intellectual property supporting the Phazzer Electronics devices and that Phazzer IP and Phazzer Electronics had entered into a Trademark License Agreement so that Phazzer Electronics could sell the devices. In any case, on September 25, 2018, Robinson, writing as a member of Phazzer IP, notified French that Phazzer IP was terminating its Trademark License Agreement with Phazzer Electronics. This spelled the end of Phazzer Electronics. It also cleared the way for Phazzer IP to work with Phazzer-USA. Binyamin testified that Robinson was his contact at Phazzer IP.

Yet another Phazzer entity—Phazzer Florida—also existed. Either Abboud or Robinson, acting on behalf of Phazzer Florida, gave Binyamin a username and password so that Phazzer-USA could order products from a manufacturer in Taiwan named Double Dragon. Robinson also facilitated payments between Phazzer-USA and Double Dragon.

Binyamin testified that Robinson sent him several emails about purchases Phazzer-USA made from Double Dragon. Essentially, it appears that Robinson acted as a facilitator for Phazzer-USA's purchases from Double Dragon. For instance, on February 25, 2019, Robinson, writing on behalf of Phazzer IP, listed the items in the order Binyamin placed with Double Dragon. That order included two products the injunction prohibited Phazzer Electronics from causing to be manufactured or sold. And nine days later, Robinson emailed Binyamin asking him to review the Double Dragon invoices attached to the email. The invoices listed several products the injunction prohibited Phazzer Electronics from causing to be manufactured or sold. On another occasion, Robinson, writing on behalf of an entity called Phazzer Global LLC (where Abboud was employed), asked Binyamin for an inventory of all products he had in stock. Binyamin responded with a list of products that the injunction covered.

When it came to paying Double Dragon, Double Dragon never collected payment from Binyamin for products he ordered on behalf of Phazzer-USA. Rather, Robinson or Abboud would call Binyamin to ensure that the invoices he received were correct, and they would deal with Double Dragon.

5. TASER learns that Phazzer-USA is selling enjoined products.

It wasn't that long before TASER learned of Phazzer-USA's sales to the public. In March 2019, Richard Beary received an unsolicited email from Phazzer-USA asking about his interest in purchasing a "law enforcement kit." Unbeknownst to Phazzer-USA, it targeted the wrong person.

As it turns out, Beary was a retired law-enforcement officer working as a consultant for a company contracting with Axon Enterprise, Inc.,[4] formerly known as TASER. When Beary received the solicitation, he visited Phazzer-USA's website. Although the website didn't contain specific details about the models of stun gun and cartridges included in the kit, Beary purchased the kit, anyway. The kit contained enjoined Phazzer products. Based on this incident, TASER moved for an order to show cause why Phazzer Electronics, Abboud, and Robinson should not be held in criminal contempt of the 2017 injunction.

B. Procedural Background

In response to TASER's motion, the district court issued a notice of criminal-contempt proceedings and a show-cause order for Phazzer Electronics, Abboud, and Robinson to respond to charges that they willfully violated the 2017 injunction when Phazzer-USA sold the enjoined products in 2019. The notice stated that the court would conduct a bench trial, so if Abboud or Robinson were found guilty, their maximum penalty would not exceed six months' imprisonment.

After trial, but before the district court made any factual findings, Robinson moved for a judgment of acquittal. She argued that she could not be guilty of contempt because she was a third party not bound by the injunction. As Robinson saw things, once Phazzer Electronics ceased operations following Phazzer IP's termination of the IP license, Robinson was no longer an employee of Phazzer Electronics. And because she did not work in concert with Phazzer Electronics, Robinson reasoned, she couldn't otherwise be bound by the injunction. Alternatively, Robinson argued that, even if bound by the injunction, she did not willfully violate it.

The court denied Robinson's motion and found Phazzer Electronics, Abboud, and Robinson guilty of criminal contempt. First, the district court determined that the injunction was lawful and reasonably specific. Second, the court found that Phazzer Electronics, Abboud, and Robinson violated the injunction because, at all times,

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Abboud was the de facto owner of Phazzer Electronics, and Robinson was an employee and agent of the company. And after the 2017 injunction was entered, Abboud recruited Binyamin to "form a new entity to pick up where Phazzer Electronics left off." Doc. No. 107, at 16. Indeed, the district court explained, Robinson, acting on behalf of Phazzer IP, terminated Phazzer Electronics's license agreement "on the exact same day that Phazzer-USA [ ] received an [employer identification number]." The district court also found that Abboud and Robinson supervised the distribution of Phazzer products by Phazzer-USA. Ultimately, the district court concluded that Phazzer Electronics, Abboud, and Robinson violated the injunction by causing Phazzer-USA to offer for sale, sell, and distribute enjoined products.

The district court also addressed Robinson's argument that she was not bound by the injunction. In the court's view, Robinson's argument "miss[ed] the point" because "Mr. Abboud and Ms. Robinson were without a doubt Phazzer Electronics' agent" when they "caused Phazzer-USA to offer for sale, sell, and distribute products covered by the injunction." *Id*. at 17. And, the court explained, "[i]t is not a defense . . . that Ms. Robinson and Mr. Abboud used other legal entities (Phazzer Global and Phazzer IP) to facilitate their actions.[ ]" *Id*. at 17-18. To accept Abboud's and Robinson's argument, the district court reasoned, "would . . . encourage entities and individuals subject to an injunction to sidestep it by enlisting a family member or unwitting party to form an LLC." *Id*. at 18 n.13.

Third, the district court found that Phazzer Electronics, Abboud and Robinson willfully engaged in "a pattern of activity that violated the injunction" by selling the enjoined products and consciously taking steps to circumvent the injunction. So the district court found Phazzer Electronics, Abboud, and Robinson guilty of criminal contempt and set a separate date for sentencing.

In preparation for sentencing, the probation office prepared Robinson's presentence investigation report ("PSI"), which noted that Robinson was subject to six months in prison or five years of probation and a maximum fine of $5,000. The PSI asserted that Robinson's contempt offense was a class B misdemeanor and that the Sentencing Guidelines did not apply. It also said that, under 18 U.S.C. § 3583(b)(3), the court could impose a one-year term of supervised release following imprisonment.

Robinson objected to the possibility of post-imprisonment supervision. She argued that her offense was a "petty offense," exempt from a term of supervised release. The district court overruled Robinson's objection, and it sentenced Robinson to three weeks in prison followed by one year of supervised release.

Robinson now appeals the district court's denial of her motion for judgment of acquittal and her sentence of supervised release.

II. DISCUSSION

A. Standards of Review

As always, we begin with the applicable standards of review. We review de novo the denial of a motion for acquittal. *United States v. Evans*, 473 F.3d 1115, 1118 (11th Cir. 2006) [20 Fla. L. Weekly Fed. C191a]. As for the district court's judgment that an injunction binds a party, we review that for clear error. *See ADT LLC v. NorthStar Alarm Servs., LLC*, 853 F.3d 1348, 1351 (11th Cir. 2017) [26 Fla. L. Weekly Fed. C1398a]; *see also United States v. Uscinski*, 369 F.3d 1243, 1246 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C535a] (reviewing factual findings in the criminal context for clear error).

We also review de novo the sufficiency of the evidence. *United States v. Taylor*, 480 F.3d 1025, 1026 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C725a]. In conducting that review, we consider whether the evidence, construed in the light most favorable to the government, would ultimately permit the trier of fact to find the defendant guilty beyond a reasonable doubt. *United States v. Maynard*, 933 F.2d 918, 920 (11th Cir. 1991). But we don't make factual findings in the first instance. *United States v. Noriega*, 676 F.3d 1252, 1263 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C900a]; *United States v. Fulford*, 662 F.3d 1174, 1181 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C552a]. Finally, we review, to the extent any such question is raised, the district court's credibility choices for clear error only. *See United States v. Brown*, 415 F.3d 1257, 1267 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C700a].

B. The district court's factual findings are insufficient to allow for the conclusion that Robinson was bound by the 2017 injunction.

As we've noted, the district court concluded that Robinson caused Phazzer-USA to offer for sale, sell, and distribute the enjoined products, and that when she did so, she always acted as an employee or agent of Phazzer Electronics.

A court can "punish by fine or imprisonment, or both, at its discretion, . . . contempt of its authority," including a defendant's "disobedience or resistance" to its lawful order. 18 U.S.C. § 401(3). A valid conviction for criminal contempt requires proof of all the following: (1) the court entered a lawful order of reasonable specificity; (2) the defendant violated that order; and (3) the defendant did so willfully. *Maynard*, 933 F.2d at 920.

The only element Robinson presses on appeal is the second one—whether Robinson violated the district court's 2017 injunction. But before we can decide that, we must first determine whether the 2017 injunction bound Robinson.

Federal Rule of Civil Procedure 65 reflects the courts' traditional understanding of whom a federal injunction binds. As a starting point, an injunction binds a person who "receive[s] actual notice of it" if that person falls into any of the three categories that Rule 65(d) delineates:

> (A) the parties;
>
> (B) the parties' officers, agents, servants, employees, and attorneys; and
>
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

FED. R. CIV. P. 65(d)(2).

But though we generally stick to the limitations of the text, our precedent is clear that Rule 65(d) "embodies, rather than limits the common law powers of the district court." *ADT*, 853 F.3d at 1351 (cleaned up). So besides those categories Rule 65(d) identifies, we have read the rule to continue to permit application of "the commonlaw doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1972) (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (quotation marks omitted)).[5] As our predecessor Court explained, Rule 65(d) "cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment." *Id.*

Still, due-process considerations limit the circumstances in which a court can find someone in contempt who is not a party to the injunction. *See ADT*, 853 F.3d at 1352. After all, a person must first know that she is bound by an injunction before she can be required to comply with it.

To determine the scope of the 2017 injunction, we begin with its text. The 2017 injunction applied to "Phazzer [Electronics] and its officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with Phazzer or its officers, agents, servants, employees, or attorneys." Doc. No. 183, at 11-14. This language largely tracks Rule 65(d). So by its own terms, the district court's injunction binds these categories of people and entities: (1) Phazzer Electronics, which was a party in the TASER civil case; (2) Phazzer Electronics's officers, agents, servants, employees and attorneys; and (3) those in active concert with Phazzer Electronics, its officers, agents, servants, employees or attorneys—that is, those who were neither party to the litigation nor the agents of a party, but who aid and abet those who are bound by the injunction.

Our caselaw also recognizes that the injunction binds (4) those under the "general rubric of privity," a category that includes "nonparty successors in interest" and "nonparties otherwise legally identifiable with the enjoined party." *ADT*, 853 F.3d at 1352. And some of our sister Circuits have concluded that (5) those who aid and abet those in privity with an enjoined party are also bound. As we explain later, we agree that those who aid and abet those in privity with an enjoined party are bound by an injunction.

One observation about the five categories: the first two bind parties, and the last three cover nonparties.

So Robinson can be bound by the injunction only if she falls into one of these five categories.

1. Robinson was not a party to the 2017 injunction.

For starters, Robinson is not Phazzer Electronics. And she was not named as a defendant in the litigation that resulted in the 2017 injunction. So much for subsection (A) of Rule 65(d).

2. Robinson was not an employee or officer of Phazzer Electronics when Phazzer-USA distributed items that the 2017 injunction enjoined.

So we move on to subsection (B). As a general matter, a court may not enjoin a non-party that has

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not appeared before it to have its rights legally adjudicated. *See Chase Nat'l Bank v. City of Norwalk,* 291 U.S. 431, 436-37 (1934).

But as the text of subsection (B) reflects, there's always an exception. And as relevant here, the Supreme Court has explained that (consistent with subsection (B) of Rule 65(d)) officers or employees of a company are bound by an injunction, even if they did not appear before the court, because "[a] command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs." *Wilson v. United States*, 221 U.S. 361, 376 (1911); *see also United States v. Fleischman*, 339 U.S. 349, 357-58 (1950) ("A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they . . . prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." (internal quotation marks omitted)). The 2017 injunction, following Rule 65(d), specifically covered employees of Phazzer Electronics.

So we consider whether Robinson was an officer, agent, or employee of Phazzer Electronics. The answer to that inquiry is yes, for some period. But when that period was is everything here.

To be sure, the record reflects that Robinson performed mostly administrative work when Phazzer Electronics employed her, before it ceased operating in September 2018. So as an employee of Phazzer Electronics at that time, she was bound by the 2017 injunction. The district court also concluded that Robinson was an agent of Phazzer Electronics.

That reasoning goes only so far, though. The problem is that Robinson was no longer a Phazzer Electronics employee or agent in 2019 when she caused Phazzer-USA to sell the enjoined products. And since she wasn't a Phazzer Electronics employee or agent at that time, she could no longer be bound by the injunction as an employee or agent under the second Rule 65(d) category. In fact, Phazzer Electronics was not even operating at that time. *See*, *e.g., Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010) ("Although the individual defendants might have qualified as 'officers' or 'agents' of the [organization] in June of 1966 when the injunction was entered, after the organization was dissolved in December of that year, they obviously no longer held that status."). So that eliminates the second Rule 65(d) category.

3. Under the district court's order, Robinson was not bound by the 2017 injunction as a nonparty.

Before considering the remaining categories in earnest, we pause to discuss Robinson's obligations under the district court's injunction as a *former* employee of Phazzer Electronics. We have not yet answered this question expressly. But Rule 65(d) contains no category pertaining specifically to "former employees." Rather, it speaks of "employees."

Because the rule does not define the term "employees," we consider "the common usage of [the] word[ ] for [its] meaning." *CBS Inc. v. PrimeTime 24 Joint Venture,* 245 F.3d 1217, 1222 (11th Cir. 2001) [14 Fla. L. Weekly Fed. C567a]. And more specifically, we consider the word's meaning at the time Rule 65(d) was adopted, in 1937. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) [27 Fla. L. Weekly Fed. S383a]. Around that time, dictionary definitions for the term "employee" included, for example, "[o]ne employed by another; one who works for wages or salary in the service of an employer," *Employee*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1938), and "[a] term of rather broad signification for one who is employed," *Employee*, BOUVIER'S LAW DICTIONARY (1934).

These definitions both employ the present, not past tense. *Webster's* speaks specifically of only one who "works." And *Bouvier's* refers to one who "is" employed. So the ordinary usage of the term "employee" generally denotes someone who is currently employed.

As for the common law, it does not allow for injunctions to capture former employees merely because they are former employees, either. In other words, under Rule 65(d) and the common law, a former employee can be bound exactly to the extent that a non-former employee, nonparty can be bound. And we are aware of no circuit that has found any special liability for an enjoined party's former employees that would transcend the outer bounds of the established categories.

Some of our sister circuits have effectively applied this rule. In sum, they have considered a former employee bound by an injunction if she falls into either the third or fourth categories of those whom an injunction may bind—that is, if she is a person or entity who aids or abets a named defendant or its agent, or a person or entity who is legally identified with the enjoined party. *See*, *e.g.*, *Alemite Man'g. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

Besides these four categories, at least two of our sister circuits have recognized a fifth category of nonparties (whether former employees or not) that an injunction may bind: a nonparty who aids or abets a nonparty in privity with an enjoined party can be bound by an injunction. *See People of State of New York by Vacco v. Operation Rescue National*, 80 F.3d 64, 70 (2d Cir. 1996); *see also Additive Controls & Measurement System, Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1350 (Fed. Cir. 1998). As Wright & Miller explains,

> [P]ersons who are not actual parties to the action or in privity with any parties may not be brought within the effect of a decree merely by naming them in the order. **The only significant exception to this rule involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or the defendant's privy in violating the injunction. They may be held in contempt.**
>
> 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2956 (3d ed. 2023 Update) (emphasis added). But no one has gone further than that.

That is so because, as the Second Circuit noted before the adoption of Rule 65(d), "no court can make a decree which will bind any one but a party," so a court of equity "cannot lawfully enjoin the world at large, no matter how broadly it words its decree." *Alemite*, 42 F.2d at 832. After all, courts are "not vested with sovereign power to declare conduct unlawful." *Id.* Rather, their "jurisdiction is limited to those over whom [they] get[ ] personal service, and who therefore can have their day in court." *Id.* at 832-33. So a nonparty may be punished in conjunction with contempt of an injunction only when the person "has helped to bring about . . . an act of a party," meaning the person "must either abet the defendant, or must be legally identified with him." *Id.* at 833; *see also Additive Controls*, 154 F.3d at 1350; *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 39-40 (1st Cir. 1980); *Nat'l Spiritual Assembly*, 628 F.3d at 849.

Though we don't appear to have previously addressed a contempt case involving a former employee, our precedent recognizes many of these same principles. Indeed, we've said that "both Rule 65 and the common-law doctrine contemplate two categories of nonparties potentially bound by an injunction[:] The first category is comprised of parties who aid and abet the party bound by the injunction in carrying out prohibited acts[,] [and] [t]he second category, captured under the general rubric of 'privity,' includes nonparty successors in interest and nonparties otherwise legally identified with the enjoined party." *ADT*, 853 F.3d at 1352 (cleaned up).

As for the fifth category (the third category of nonparties)—a nonparty who aids or abets a nonparty in privity with an enjoined party—for reasons we explain later in this opinion, we join our sister circuits in recognizing that an injunction can bind such nonparties.

But even as we acknowledge that the 2017 injunction can bind these categories of nonparties, we must still review the district court's factual findings to determine whether Robinson falls within any of the categories. And if she does not, she cannot be bound by the injunction. As we've explained, her status as a former employee of Phazzer Electronics alone does not mean that the injunction applies to her. *See* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed. 2023) ("[A] person who ceases to act [as a corporation's officer or agent] is no longer is bound by the decree, assuming the individual does not act in concert with the named enjoined party.").

With the understanding that injunctions apply to an enjoined party's former employees the same way they apply to all nonparties, we consider the three nonparty categories whom the 2017 injunction would bind.

i. Robinson did not aid and abet a named enjoined party.

We start with the category of those who aid and abet the enjoined party. As the Supreme Court has explained, "defendants may not nullify a decree by carrying out prohibited acts through

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aiders and abettors, although they were not parties to the original proceeding." *Regal*, 324 U.S. at 14. Rule 65(d)'s "active concert or participation" language recognizes that parties who aren't specifically named in an injunction's text may nonetheless thwart the objectives of that injunction. *Nat'l Spiritual Assembly*, 628 F.3d at 887.

But Robinson cannot fall into the aiding-and-abetting category because, as we've noted, Phazzer Electronics—the enjoined party—no longer existed at the times of Robinson's acts. As French testified, after the district court found Abboud in contempt in 2018, Phazzer Electronics stopped operating and became inactive. The company "shut everything down" and it no longer sold any products. Doc. No. 95, at 32. And when Robinson engaged in the distribution of enjoined Phazzer products, the year was 2019, well after Phazzer Electronics had stopped operating. So though Robinson was aware of the injunction when she acted with Phazzer-USA to distribute Phazzer enjoined products, that is not enough under an aiding-and-abetting theory here. In short, Phazzer Electronics wasn't around for Robinson to aid and abet. *See Additive Controls*, 154 F.3d at 1353 ("Non-parties are subject to contempt sanctions if they act with an enjoined party to bring about a result forbidden by the injunction, but only if they are aware of the injunction and know that their acts violate the injunction. (citations omitted)).

Nor does the record show that Robinson aided and abetted any other party to the injunction. The district court did find that Robinson and Abboud worked together in 2019 to supervise the distribution of Phazzer products through Phazzer-USA. But when they did this, Abboud was no longer an employee of Phazzer Electronics. Rather, Abboud resigned from Phazzer Electronics in August 2017 and then worked with the company as a consultant. And by September 2018, he was no longer paid by Phazzer Electronics. Because Abboud was no longer an employee, officer, or agent of Phazzer Electronics, we cannot consider him a named party to the injunction. *See Nat'l Spiritual Assembly*, 628 F.3d at 848. Ultimately, then, an aiding-and-abetting theory alone cannot support Robinson's contempt conviction.

ii. The record does not allow us to conclude that Robinson was in privity with a named party.

That brings us to whether the record shows that Robinson satisfied the fourth category—that is, whether, generally speaking, she herself was in privity with Phazzer Electronics or another bound party. *See ADT*, 853 F.3d at 1352. In the context of the scope of injunctions, "privity is seen as a descriptive term for designating those with a sufficiently close identity of interests" to justify enforcement of an injunction against a nonparty. *Nat'l Spiritual Assembly*, 628 F.3d at 849. Privity involves a close relationship between the party on record and the non-party. *ADT*, 853 F.3d at 1352. But the constitutional due-process requirement limits the privity exception. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996). So again, "courts [ ] my not grant an . . . injunction so broad as to make punishable the conduct of persons who acted independently and whose rights have not been adjudged according to law." *Regal*, 324 U.S. at 13. As we've noted, privity captures two subcategories: (1) "nonparty successors in interest" and (2) "nonparties otherwise legally identified with the enjoined party." *ADT*, 853 F.3d at 1352 (quotation marks and citation omitted).

We start with nonparty successors in interest. Successors in interest can be bound by an injunction, even though they weren't parties to it because "[a]n injunction would be of little value if its proscriptions could be evaded by the expedient of forming another entity to carry on the enjoined activity." *Additive Controls*, 154 F.3d at 1354; *see also Regal*, 324 U.S. at 14. But successor liability depends on the successor's knowledge of the injunction at the time of the purchase or transfer. *ADT*, 853 F.3d at 1353 (concluding that the record developed at the district court contains no evidence that the purchaser knew about the injunction before it acquired assets from or hired employees of the enjoined company).

In the context of a labor injunction, for instance, the Supreme Court has held that a *bona fide* purchaser who acquired an enjoined company with knowledge of a National Labor Relations Board ("NLRB") order and who was a "continuing business enterprise" was in privity with the enjoined company. *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 179-80 (1973). As a result, the purchaser, too, was bound by the injunction. Key to this holding was the fact that the purchasing company had notice of the NLRB's order and received a hearing with the assistance of counsel on whether the purchasing company was bound company's successor. *Id.* at 181.

Here, though, the record contains no evidence to suggest that Robinson was a *bona fide* purchaser of Phazzer Electronics.

Then again, *bona fide* purchasers aren't the only ones who can be successors in interest of an enjoined party. *See Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944) (injunction may be enforced "against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons"). As the Second Circuit has explained, "an organization and its agents may not circumvent a valid court order merely by making superficial changes in the organization's name or form, and in appropriate circumstances a court is authorized to enforce its order against a successor of the enjoined organization." *Vacco*, 80 F.3d at 70. To determine whether a successor falls into this category, we look to "whether there is a substantial continuity of identity" between the enjoined party and the successor. *Id.*

Still, though, we have found no cases where a court has applied the successor-in-interest theory to an individual instead of a business or an organization. When we are talking about an individual, we think the question becomes whether that person can be legally identified with an enjoined party. The Seventh Circuit has commented on the meaning of "legal identity" in the former-employee context. It has said the term "usually means successors and assigns, but it can include a limited class of other nonparties as well—*provided* the evidence establishes a very close identity of interest and such significant control over the organization *and* the underlying litigation that it is fair to say that the nonparty had his day in court when the injunction was issued." *Nat'l Spiritual Assembly*, 628 F.3d at 853.

In determining whether a nonparty satisfies this threshold, courts have considered "the officer's position and responsibilities in the enjoined corporation, his participation in the litigation that preceded the entry of the injunction, and the degree of similarity between his activities in the old and new businesses." *Additive Controls*, 154 F.3d at 1352; *see also G. & C. Merriam Co.*, 639 F.2d at 37-38. Essentially, we view this category "as an instance of piercing corporate veils." *G. & C. Merriam Co.*, 639 F.2d at 39; *see also Nat'l Spiritual Assembly*, 628 F.3d at 854.

To show what that means in practical terms, we turn to the First Circuit's discussion in *G. & C. Merriam Co.* of the "legal identity" concept. The First Circuit has explained that it's not enough for a former employee to have been a "key employee" of the enjoined company and to have known of the injunction. 639 F.2d at 37. Rather, the employee must have had "such a key role in the corporation's participation in the injunction proceedings that it can be fairly said that he has had his day in court in relation to the validity of the injunction." *Id.* Not only that, but to find such a former employee in contempt, the record must prove each of these facts. *See id.*

These important qualities keep the scope of contempt liability "within the limits of due process." *Nat'l Spiritual Assembly*, 628 F.3d at 852. Indeed, as the Seventh Circuit has recognized, "due process requires an extremely close identification [between the enjoined party and the nonparty legally identified with it]." *Id.* at 854. So it is "satisfied only when the nonparty 'key employee' against whom contempt sanctions are sought had substantial discretion, control, and influence over the enjoined organization—both in general and with respect to its participation in the underlying liti-gation—and there is a high degree of similarity between the activities of the old organization and the new." *Id.*

The record here does not clear these hurdles. The district court did not make factual findings about whether Robinson was a key employee. Nor did it determine whether she so controlled Phazzer Electronics and the litigation that resulted in the 2017 injunction that it would be fair to say she had her day in court on that injunction. Because the record lacks findings and relevant evidence on these important questions, we cannot conclude that Robinson was bound by the 2017 injunction on this basis.

iii. The district court did not consider whether Robinson aided and abetted a person or an entity in privity with Phazzer Electronics.

Finally, we reach the category that includes those aiding and abetting an entity or person in privity with a party bound by the injunction. Once again, Rule 65(d) does not expressly address this possibility. But as we've noted, Rule 65(d) "cannot be read to restrict the inherent power of a

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court to protect its ability to render a binding judgment." *Hall*, 472 F.2d at 267. And just as "an organization and its agents may not circumvent a valid court order merely by making superficial changes in the organization's name or form," nor may a person knowingly aid and abet such an organization acting in violation of the injunction. *See Vacco*, 80 F.3d at 70; *see also Additive Controls*, 154 F.3d at 1353. Or as the district court put it when discussing another category of liability, "[a]n injunction is not a game of whack-a-mole where the Court must repeatedly issue new injunctions to address the Defendants' post-injunction craftiness."

Here, the government did not pursue the theory that Robinson aided and abetted someone in privity with a party bound by the 2017 injunction, and the district court did not consider it. Of course, it's really not a wonder why: we have not previously expressly discussed this category of those bound by an injunction.

Still, though, as we've noted, other circuits and treatises had recognized the theory before the district-court proceedings here. So had the government believed it had the goods, the government certainly had a good-faith basis to advocate for the district court to find Robinson in contempt of the 2017 injunction because she allegedly aided and abetted someone or some entity in privity with a bound party. But it did not do that.

And that fact has consequences here. In other contexts, the Supreme Court has rejected the notion that an appellate court should affirm a conviction on a theory that the government did not advocate and the factfinder did not consider in the district court. For instance, just recently in the fraud context, the Supreme Court refused the government's efforts to defend an honest-services-fraud conviction by (1) relying on a theory that "differ[ed] substantially" from the jury instructions and (2) relying on a second theory that the jury was not instructed on. *Percoco v. United States*, 598 U.S. 319, 331-32 (2023) [29 Fla. L. Weekly Fed. S776a]. And though the Supreme Court remanded the case for further proceedings consistent with its opinion, *see id.* at 333, the Second Circuit then vacated the defendant's conviction on that count, *United States v. Percoco*, ___ F.4th ___, 2023 WL 5688662, *2 (2d Cir. Sept. 5, 2023).

The Supreme Court has reached similar conclusions in other fraud cases. In *Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023) [29 Fla. L. Weekly Fed. S760a], for example, the Court disapprovingly said, "With profuse citations to the records below, the Government asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance." The Court continued, "In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role." *Id.* at 317. Similarly, in *Chiarella v. United States*, 445 U.S. 222, 236 (1980), the Court cautioned that it could not "affirm a criminal conviction on the basis of a theory not presented to the jury," so it refused to "speculate upon whether [the alleged] duty [the government raised for the first time on appeal] exists, whether it has been breached, or whether such a breach constitutes a violation of § 10(b)" (citations omitted). Instead, the Court simply reversed the defendant's conviction on the spot and did not remand for further proceedings. *Id.* at 237.

And the Court has also rejected the government's attempts to substitute a new theory of liability in the extortion context. *See McCormick v. United States*, 500 U.S. 257, 270-71, n.8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.").

To be sure, these Supreme Court cases involved jury trials, and that factored into the Court's holdings. *See*, *e.g.*, *McCormick*, 500 U.S. at 270-71 n.8 ("[I]n a criminal case a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance."). But we think due-process considerations of notice also support these conclusions. After all, a defendant who knows she faces a different theory of prosecution may choose to present different evidence, argument, or both, in her defense.

In our view, this principle applies equally in the criminal-contempt context and equally when a judge, rather than a jury, is the factfinder. Defending against a claim of contempt when the government alleges the defendant is an employee of an enjoined company certainly implicates different evidence and arguments than defending against a claim of contempt when the government pursues the theory that the defendant aided and abetted someone or some entity in privity with a bound party. In the first instance, a defendant need only show that the enjoined company did not employ her at the time that alleged violations of the injunction occurred. Unlike in the second scenario, she has no reason to present evidence or argument about whether the person or entity alleged to be in privity with the enjoined company was, in fact, in privity with that company. Nor does she have any reason to show or argue that she did not aid or abet that person or entity that is allegedly in privity with the enjoined party.

So we do not consider whether Robinson aided and abetted a party or entity in privity with Phazzer Electronics. Instead, we vacate Robinson's conviction for insufficiency of the evidence under the first four categories of persons and entities that the 2017 injunction enjoined. Of course, if new alleged violations of the 2017 injunction occur, nothing prevents the government from prosecuting them under the aiding-and-abetting-someone-in-privity-with-a-bound-party theory in the future.

III. CONCLUSION

For the reasons we've explained, we vacate Robinson's criminal-contempt conviction. Because we vacate her conviction, we do not address Robinson's argument about the propriety of her supervised-release sentence.

VACATED.

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[1]For nearly all Phazzer Electronics's existence, French did not receive compensation from the company, though Phazzer Electronics did pay his cell-phone bill.

[2]The district court also entered the same injunction for Phazzer Electronics's stun-gun cartridges.

[3]Abboud and Binyamin previously met around 2013 or 2014 when Binyamin was filling a request for proposal for the Israeli police.

[4]To avoid confusion and for convenience, we refer to Axon as TASER throughout this opinion.

[5]We recognize decisions of the former Fifth Circuit issued before October 1, 1981, as binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

* * *

Municipal corporations—Ordinances—Zoning—Permits—Denial—Religion—Substantial burden—Free exercise—Action by Buddhist meditation association and its incorporators alleging city's denial, based on compatibility concerns, of their applications for zoning permits to construct a meditation and retreat center in a residential area violated Free Exercise and Equal Protection Clauses, provisions of Religious Land Use and Institutionalized Persons Act, the Alabama constitution's Religious Freedom Amendment, and state common-law principles—District court should not have entered summary judgment for either party on RLUIPA substantial burden claim where both parties raised genuine and material factual disputes—Free exercise—Government action may incidentally burden religious practices, subject to rational basis review, so long as it is both neutral and generally applicable—City's R-1 zoning designation, which allows residential usage as of right and allows for other uses, such as religious uses, subject to "planning approval," is both neutral and generally applicable—Planning approval process does not provide type of discretionary exemption that violates general applicability, as ordinances impose specific criteria that guide the approval or denial of a particular use—City's asserted interests in traffic safety and zoning were rationally related to legitimate government interests—District court correctly granted summary judgment in favor of city on First Amendment free exercise claim—State constitutional claims—Strict scrutiny—Alabama Religious Freedom Amendment applies to city's zoning decision to extent that it restricts plaintiff's, or its members', right to worship freely and practice their religion as they conceive it—To survive strict scrutiny under ARFA, city must demonstrate that its planning decision was least restrictive means to achieve compelling government interest—Generalized invocations of neighborhood character and zoning are not compelling government interests as a matter of law under Eleventh Circuit precedent—Further, concerns over increased traffic must be linked specifically to particular details and alleged ills posed by zoning application, which city failed to do—City not entitled to summary judgment on ARFA count

THAI MEDITATION ASSOCIATION OF ALABAMA,

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INC., (the "Center"), SIVAPORN NIMITYONGSKUL, VARIN NIMITYONGSKUL, SERENA NIMITYONGSKUL, PRASIT NIMITYONGSKUL, Plaintiffs-Appellants, v. CITY OF MOBILE, ALABAMA, Defendant-Appellee. CITY OF MOBILE PLANNING COMMISSION, et al., Defendants. 11th Circuit. Case No. 22-11674. October 2, 2023. Appeal from the U.S. District Court for the Southern District of Alabama (No. 1:16-cv-00395-TFM-MU).

(Before WILSON, JILL PRYOR, Circuit Judges, and CONWAY,* District Judge.)

(WILSON, Circuit Judge.) In this long-running property use dispute, the plaintiffs, the Thai Meditation Association of Alabama and four of its organizers (collectively, TMAA), seek to convert a property zoned for residential use into a meditation center. In *Thai Meditation Association of Alabama v. City of Mobile*, 980 F.3d 821 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C2139a] (*TMAA I*), we reviewed the outcome of a bench trial that ended in judgment for the City of Mobile on all counts. We affirmed in part but remanded three counts for further consideration. *Id.* at 841. The vacated and remanded claims consisted of: (1) a substantial burden challenge under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a)(1); (2) a Free Exercise challenge under the First Amendment; and (3) a state law challenge under the Alabama Constitution's Religious Freedom Amendment (ARFA). On remand, the district court granted summary judgment to the City on all three counts, and this appeal followed.

After careful review of the record and with the benefit of oral argument, we conclude that summary judgment was improper, for either party, on the RLUIPA claim; summary judgment was proper on the Free Exercise claim; and the City has failed to carry its burden to satisfy strict scrutiny on the ARFA claim. Accordingly, we **VACATE** in part, **AFFIRM** in part, and **REVERSE** in part.

I. Background

The details of this case were thoroughly recounted in *TMAA I*, so we only recount the facts essential to this decision. TMAA is a Buddhist religious organization belonging to the Dhammakaya school of Buddhism. TMAA's "purpose is teaching and research into growth and development of mind and spirit through meditation and expanding the knowledge of Buddhism." *TMAA I*, 980 F.3d at 826 (cleaned up). TMAA has been seeking a permanent home in Mobile, Alabama for several years now. In 2007, it operated out of a converted house in a residential neighborhood. After neighbors complained and TMAA was unable to obtain the proper zoning authorization, it moved to its present location inside a shopping center. Because this location is on a commercial street and shares a building with commercial businesses, TMAA alleges it is far too loud and disruptive for them to meditate—that is, to practice their religion. TMAA also alleges their current location is too small to allow them to hold classes to teach others about their religion. *Id.*

In Mobile, there are two zoning classifications relevant to this appeal. The first is the R-1 zoning designation, which allows for residential usage as of right and allows for other uses—like religious uses—subject to "planning approval" by the Planning Commission. The second is the commercial zoning designation, which allows certain uses—including religious uses—by right. TMAA's first location, the converted house, was in an R-1 district. TMAA's second and current location is in a commercial district.

In 2015, TMAA bought the house that is the subject of this litigation, the Eloong Drive property. Like TMAA's original location, the Eloong Drive property is located in an R-1 residential district and thus required planning approval to be put to a religious use. Before purchasing the property, TMAA engaged in pre-approval meetings with City officials, and TMAA alleges they received positive feedback on their preliminary plans. When TMAA finally submitted its application, it received immense pushback from the public. Many public comments focused on, and objected to, the Buddhist character of TMAA's proposed usage. Some questioned whether TMAA's usage was even religious at all. Some commentors objected to TMAA's application because of concerns about compatibility and traffic in the small neighborhood in which the Eloong Drive property is located. Ultimately, noting those compatibility concerns, the Planning Commission denied TMAA's application, and the City Council denied TMAA's appeal. This suit followed.

TMAA alleged six counts against the City, and the district court originally ruled in favor of the City on all six counts. In *TMAA I*, we vacated the district court's analysis of the RLUIPA substantial burden claim, the Free Exercise claim, and the ARFA claim. 980 F.3d at 841. On remand, the parties filed cross-motions for summary judgment on these three counts. The district court again granted summary judgment to the City on all three claims. We address each of these in turn.

II. Standard of Review

We review the district court's grant or denial of summary judgment de novo, applying the same legal standard as the district court. *Seff v. Broward Cnty.*, 691 F.3d 1221, 1222-23 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1432a]. Summary judgment is proper where, construing all facts in favor of the non-movant, there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. *Id.* at 1223. This appeal arises from the district court's resolution of cross-motions for summary judgment. "In practice, cross motions for summary judgment may be probative of the nonexistence of a factual dispute." *Ga. State Conf. of NAACP v. Fayette Cnty.*, 775 F.3d 1336, 1345 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C767a] (cleaned up) (quoting *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983)). But we have cautioned that the mere filing of cross-motions "do[es] not automatically empower the court" to enter summary judgment for one party. *Id.* (quoting *La Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983)). Instead, the district court must methodically take each motion in turn and construe all the facts in favor of the non-movant for each. If, after engaging in this analysis, the district court determines no genuine issue of material fact exists, then it may appropriately enter summary judgment for a party.

III. RLUIPA Substantial Burden

"Congress sought, through RLUIPA, to protect religious land uses from discriminatory processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C453a]. Under RLUIPA,

> (a)(1) No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

Shortly after the passage of RLUIPA, we interpreted this substantial burden provision in *Midrash Sephardi*. There, we held that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi*, 366 F.3d at 1227. In *TMAA I*, we applied this standard and clarified that "it isn't necessary for a plaintiff to prove . . . that the government required her to *completely surrender* her religious beliefs; modified behavior, if the result of government coercion or pressure, can be enough." *TMAA I*, 980 F.3d at 831. We then articulated six factors that the district court should consider on remand.[1]

While we received extensive briefing on how to apply this framework, including from five groups of *amici curiae*, we will not reach the merits of this issue today. Despite the parties' representation that there are no disputed facts remaining in this case, we cannot see how that is true. For one thing, in the district court, both TMAA and the City filed lengthy objections to the other's statement of undisputed facts and substituted their own statements of undisputed facts. *See NAACP*, 775 F.3d at 1345 (noting this situation suggests summary judgment is inappropriate). Moreover, as will be discussed below, these factual disputes are both genuine and material. Accordingly, due to these disputes, the district court should not have entered summary judgment for either party in this case on the RLUIPA count.

We provide two illustrative—though not exhaustive—examples of material factual disputes that remain. One of the factors relates to whether there are alternative sites for TMAA to use. *TMAA I*, 980 F.3d at 832. The City argues that TMAA owns a 100-acre parcel that would be suitable for its meditation center. TMAA's land-use expert has opined that this site is unsuitable for TMAA's intended use. The availability of a large property similar to the Eloong Drive property would weigh heavily on this factor. A factual

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dispute like this on a key factor precludes the issuance of summary judgment at this stage.

Similarly, another factor deals with whether the Planning Commission's denial of TMAA's application reflected arbitrariness. *Id.* TMAA cites several specific instances of the Planning Commission deviating from its typical procedure, failing to work with TMAA, and allegedly editing the minutes of its meetings to obscure the true reason for the denial of planning approval. The City disputes that there were any irregularities in its processes, and denies the minutes were edited. Again, only one of these accounts can be right, and it bears on an important factor of the substantial-burden analysis laid out in *TMAA I*.

Because factual disputes like these preclude the issuance of summary judgment to either party, we vacate the entry of summary judgment on the RLUIPA count.[2]

IV. Free Exercise Clause

Turning next to the district court's entry of summary judgment on TMAA's First Amendment Free Exercise claim. In *TMAA I*, we directed the district court to independently evaluate the Free Exercise claim, rather than cross-reference its analysis of—and expressly tether its rejection to—the RLUIPA substantial burden issue. *TMAA I*, 980 F.3d at 833. However, on remand, the district court carried over much of its original analysis after briefly concluding that "Plaintiffs have not shown the Zoning Ordinance targeted religious practices or imposed burdens on religious conduct in a selective manner[, therefore] rational basis review applies." Again, this was error. In light of this error, we will review the record to determine whether the City was properly entitled to summary judgment on TMAA's Free Exercise claim. *See Gundy v. City of Jacksonville*, 50 F.4th 60, 70 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1842a] ("We may affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court.") (citations omitted).

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. However, government action may incidentally burden religious practices—subject to rational basis review—so long as it is both "neutral" and "generally applicable." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 880 (1990). The Supreme Court recently clarified these two principles:

> A government policy will not qualify as neutral if it is "specifically directed at . . . religious practice." . . . A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemption."

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) [29 Fla. L. Weekly Fed. S543a] (citations omitted). Notably, we have found the enforcement of zoning ordinances as both neutral and generally applicable. *See First Assembly of God of Naples, Fla., Inc. v. Collier Cnty.*, 20 F.3d 419, 422-24 (11th Cir. 1994). Several of our sister circuits have come to the same conclusion.[3]

Here, the R-1 zoning designation process satisfies *Smith*'s requirements. First, the planning approval process is neutral. We affirmed that TMAA failed to prove that a majority of the Planning Commission acted with an intent to discriminate on the basis of religion, *TMAA I*, 980 F.3d at 836, and because TMAA raised only general applicability challenges in their present brief, they have abandoned any additional neutrality arguments on appeal. *See Sapuppo v. Allstate Floridians Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C916a]. Second, the R-1 planning approval process does not provide the type of discretionary exemption that violates general applicability. When a use requires planning approval, the ordinances impose specific criteria that guide the approval or denial of a particular use.[4] While the approval process necessarily requires individual assessment, it is not sufficient to establish an individualized exemption. The criteria apply to all property uses eligible for approval, religious or secular. Furthermore, the scheme does not allow for the kind of blanket discretionary mechanism that historically fails *Smith*'s general applicability requirement. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) [28 Fla. L. Weekly Fed. S882a] (holding that a city official's "sole discretion" to deny exceptions from the non-discrimination referral provision for a Catholic adoption center is not generally applicable).

As a result, Mobile's R-1 zoning designation process is both neutral and generally applicable, subjecting it to rational basis review. Because rational basis review is "highly deferential to government action," we agree that the City's asserted interests in traffic safety and zoning are "rationally related to a legitimate government interest." *See Jones v. Governor of Fla.*, 950 F.3d 795, 809 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1823a] (per curiam). We therefore affirm the entry of summary judgment on TMAA's Free Exercise count.

V. Alabama Religious Freedom Amendment

Turning now to TMAA's state constitutional law claim. The ARFA's purpose "is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government." Ala. Const. amend. 622, § III. The ARFA applies to local governments, like the City of Mobile, *id.* § IV(3), and provides that they "shall not burden a person's freedom of religion" unless the city can demonstrate that the burden is the least restrictive means of achieving a compelling government interest. *Id.* §§ V(a), V(b). Thus, ARFA, like RLUIPA, requires the government's action to satisfy strict scrutiny to survive review. However, the ARFA is triggered by a much lower burden on religious freedom than RLUIPA. While RLUIPA requires a "substantial" burden, we held in *TMAA I* that under ARFA, "*any* burden—even an incidental or insubstantial one—suffices to trigger strict scrutiny." *TMAA I*, 980 F.3d at 840.

We also held that TMAA's efforts to construct a meditation center and relocate to a site more conducive to their religious practices implicated TMAA's religious freedom rights. *Id.* at 829. While it is still uncertain at this stage whether the City's planning decision is a *substantial* burden on TMAA's rights, it clearly is *a* burden. It therefore clears *TMAA I*'s low bar to trigger ARFA's strict scrutiny review.

Before turning to the strict scrutiny analysis, we first address the City's threshold argument that the ARFA simply does not apply to zoning decisions like the one at issue here. The ARFA broadly applies to "[a]ny government statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatever." Ala. Const. amend. 622, § IV(4); *see also id.* § VI(a) ("This amendment applies to all government rules and implementations thereof, whether statutory or otherwise . . . ."). The City's zoning regulations and approval decisions fall within the wide breadth of this definition. The City argues the ARFA's conception of "religious freedom" is co-extensive with Article I, § 3 of the Alabama Constitution, and thus narrower than that of the First Amendment.

We decline to accept this argument because it is contrary to the observed practice of Alabama courts interpreting the Alabama Constitution's guarantee of freedom of religion in lockstep with the federal Constitution's First Amendment guarantees. *See, e.g.*, *Ex parte Hilley*, 405 So. 2d 708, 711 (Ala. 1981) ("Viewed in the light of the free exercise clauses of the United States Constitution, amend. I, and the Alabama Constitution, art. I, § 3 . . . ."); *Rheuark v. State*, 601 So. 2d 135,139-40 (Ala. Crim. App. 1992) (citing United States Supreme Court precedent to resolve a challenge under both the federal First Amendment and the Alabama Constitution). And the Alabama Supreme Court has expressly held that Article I, § 3 of the Alabama Constitution is "not more restrictive than the Federal Establishment of Religion Clause in the First Amendment to the United States Constitution." *Alabama Educ. Ass'n v. James*, 373 So. 2d 1076, 1081 (Ala. 1979); *see also id.* (describing Article I, § 3 as "the Alabama counterpart of the Religion *Clauses* of the First Amendment to the United States Constitution" (emphasis added)). All of this evidence tends to cast doubt on the City's cabined view of the Alabama Constitution's protections for religious freedom.

Finally, we are persuaded that a narrow cabining of ARFA would be inconsistent with its ratification context, *see* Ala. Const. amend. 622, § II(4)-(6) (describing ARFA in the context of federal constitutional law developments in *Employment Division v. Smith*, 494 U.S. 872 (1990) and *City of Boerne v. Flores*, 521 U.S. 507 (1997)),[5] and its broad remedial purpose, *id.* § VII(a) ("This amendment shall be liberally construed to effectuate its remedial and deterrent purposes."). Given this evidence, we feel comfortable rejecting the City's argument that ARFA and

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Article I, § 3 of the Alabama Constitution have a narrower conception of religious freedom than the First Amendment. And accordingly, we conclude that the ARFA applies to the City's zoning decision to the extent that it restricts TMAA's, or its members', right to worship freely and practice their religion as they conceive it.

* * *

Having resolved that threshold question, we turn to the strict scrutiny analysis. To survive strict scrutiny under ARFA, the City must carry its burden to demonstrate that its planning decision is the least restrictive means to achieve a compelling government interest. Ala. Const. amend. 622, § V(b). A compelling government interest is one that advances "interests of the highest order." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Further, "generalized statement[s] of interests, unsupported by specific and reliable evidence" will not do. *See Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C754a]. Allowing government entities to state their interest at the highest levels of generality permits them to shrug off the heavy burden that strict scrutiny analysis is designed to impose.

Here, the district court concluded that the city satisfied strict scrutiny because denial of TMAA's application was the least restrictive means to further "[t]he City's interest to preserve the character of the property and the surrounding neighborhood." *Thai Meditation Ass'n of Ala. v. City of Mobile*, 599 F. Supp. 3d 1120, 1144 (S.D. Ala. 2022) The City also argues that concerns about increased traffic at the Eloong Drive Property constitute a compelling government interest. We find these asserted interests lacking.

To begin, we have never held that neighborhood character or zoning are compelling government interests sufficient to justify abridging core constitutional rights. Indeed, in *Solantic, LLC v. City of Neptune Beach*, we held that "aesthetics and traffic safety" were not compelling government interests justifying content-based restrictions on signs. 410 F.3d 1250, 1267-69 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C575b]. Similarly, a group of *amici curiae* in this case direct us to *Dimmit v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993), where we again held that "visual aesthetics and traffic safety . . . [are] not a compelling state interest" in the First Amendment speech context. Those *amici* also note that generalized, high-level invocations of "zoning" are often used to target minority faith's land use applications. *See* Br. of Amicus Curiae of the General Conference of Seventh-Day Adventists, *et al.*, at 25-26. These concerns underscore why it is necessary to hold government entities to their burden to state and support a well-defined government interest.

The City notes that we said in *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) that "zoning objectives" were a "significant" government interest. *Id.* at 738-40. *Grosz* is of little persuasive weight here because it was decided under an *ad hoc* balancing framework and not the strict scrutiny, "compelling government" interest framework we apply today. *See id.* at 740. We think that *Grosz* means what it says: "zoning objectives" may be "significant" government interests and may justify government action in a different balancing context. However, the ARFA requires that the government's interest be "compelling," and vague, generalized invocations of government interests in "zoning" and "neighborhood character" are insufficient to carry the government's burden.

Here, the City has failed to carry its burden to demonstrate a compelling government interest. The generalized invocations of neighborhood character and zoning fail as a matter of law under our precedents. The City's invocation of traffic concerns fare slightly better because they are specific to the Eloong Drive property, but they are unsubstantiated in the record. The City's own traffic engineer testified that there would be no traffic safety issues at the Eloong Drive property site from a traffic engineering perspective. That engineer further testified that the increase in the number of vehicles traveling along the streets to the Eloong Drive property would not be substantial if TMAA's application were approved. However, the engineer did testify that the increase in traffic would be large in terms of a percentage change because the roads are so infrequently used presently. The City discusses at length the statements of neighbors living near the Eloong Drive Property to substantiate its concerns about traffic. But review of these statements reveals that they are the same generalized, sometimes speculative, concerns that we have cautioned are inappropriate. To carry its burden to demonstrate a compelling government interest, the City must present more evidence of its interest, and that evidence must be specific. The City must link its concerns to the particular details, and alleged ills, posed by TMAA's application. Because it failed to do so, it was not entitled to summary judgment in this matter. Further, unlike the RLUIPA and Free Exercise claims there are no disputed facts remaining for this issue. The testimony of the city engineer, and the neighbors at the Planning Commission meeting are in the record and are insufficient to support that the City has a compelling government interest in denying TMAA's application. Accordingly, we reverse the entry of summary judgment on this count and direct the district court to enter judgment for TMAA.

VI. Conclusion

Because there are factual disputes relating to the burden that the City has imposed on TMAA, summary judgment was improper on the RLUIPA substantial claim. Accordingly, we **VACATE** the entry of summary judgment on that count. Because the City's planning approval process satisfies rational basis review, summary judgment was proper on the Free Exercise claim. Accordingly, we **AFFIRM** the entry of summary judgment on that count. Because the City is imposing a burden on TMAA's religious freedom, and because it has failed to carry its burden to demonstrate a compelling government interest, TMAA is entitled to judgment on the ARFA claim. Accordingly, we **REVERSE** the entry of summary judgment on the ARFA claim and **REMAND** with instructions to enter judgment for TMAA.

VACATED in part, AFFIRMED in part, and REVERSED in part, REMANDED with instructions.

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*Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

[1]The non-exhaustive factors include: (1) "whether the plaintiffs have demonstrated a genuine need for new or more space—for instance, to accommodate a growing congregation or to facilitate additional services or programming"; (2) "the extent to which the City's decision, and the application of its zoning policy more generally, effectively deprives the plaintiffs of any viable means by which to engage in protected religious exercise"; (3) "whether there is a meaningful 'nexus' between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise"; (4) "whether the City's decisionmaking process concerning the plaintiffs' applications reflects any arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have been, are being, or will be . . . jerked around"; (5) "whether the City's denial of the plaintiffs' zoning applications was final or whether, instead, the plaintiffs had (or have) an opportunity to submit modified applications that might satisfy the City's objections"; and (6) "whether the alleged burden is properly attributable to the government . . . or whether the burden is instead self-imposed." *TMAA I*, 980 F.3d at 831-32 (footnotes omitted).

[2]One option available to the district court in this situation would have been to convert the cross-motions for summary judgment into a bench trial. *See NAACP*, 775 F.3d at 1345-46 (describing this option); *see also Voigt*, 700 F.2d at 349. If the court had done so, it would have proceeded under Federal Rule of Civil Procedure 52, which would have mandated compliance with Rule 52(a)'s requirement that findings of fact and conclusions of law be entered. *See* Fed. R. Civ. P. 52(a)(1). If this option had been taken, there would be a clear factual record enabling our review of the district court's legal conclusions. But that did not happen here. Instead, the district court entered summary judgment in this matter and that is how the parties have addressed the issues on appeal.

[3]*See, e.g.*, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006); *C.L. for Urban Believers v. City of Chicago*, 342 F.3d 752, 764-65 (7th Cir. 2003); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3d Cir. 2007).

[4]The use must be "appropriate with regard to transportation and access, water supply, waste disposal, fire and police protection and other public facilities"; not cause "undue traffic congestion or create[e] a traffic hazard"; and be "in harmony with the orderly and appropriate development of the district in which the use is located." *See* Mobile Code of Ordinances § 64-12(1)(b) (amended and reincorporated in 2022).

[5]*Compare with Midrash Sephardi*, 366 F.3d at 1236-37 (describing a similar context for RLUIPA).

* * *

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Criminal law—Sentencing—Federal guidelines—Probation revocation—Upward variance—Reasonableness of sentence—Appeal of above-guidelines sentence imposed following revocation of probation was properly before appellate court, even though defense counsel did not object to the reasonableness of sentence imposed at conclusion of the revocation proceeding, where defendant argued that his sentence should be vacated and remanded because district court failed to state a specific reason for imposing an upward variance to statutory maximum in violation of 18 U.S.C. §3553(c)(2)—Eleventh Circuit precedents establish that when a district court imposes an above-guideline sentence a specific statement of explanation is required—Vacatur and remand for resentencing is required where district court failed to comply with its obligation under section 3553(c)(2) to explain deviations from guidelines sentencing range—Court's statements at conclusion of revocation proceeding were not sufficiently specific to allow appellate court to understand why an above-guideline sentence was imposed or to determine whether the departure was justified

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HENRY MARTIN STEIGER, a.k.a. Henry Matthew Steiger, a.k.a. H M Steiger, a.k.a. Robert Woods, Defendant-Appellant. 11th Circuit. Case No. 22-10742. October 3, 2023. Appeal from the U.S. District Court for the Northern District of Florida (No. 3:17-cr-00043-RV-2).

(Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, Circuit Judge, and COOGLER,* Chief District Judge.)

(COOGLER, Chief District Judge.) Henry Steiger appeals his sentence of 20 years of imprisonment following the revocation of his probation pursuant to 18 U.S.C. § 3565. Steiger argues that, where the Sentencing Guidelines recommended a sentence of 12 to 18 months of imprisonment, his sentence is procedurally and substantively unreasonable. One of his arguments is that the district court failed to give a specific reason for imposing an upward variance to the statutory maximum, in violation of 18 U.S.C. § 3553(c)(2). Based upon this Court's precedents, we vacate and remand for resentencing.

I. BACKGROUND

In September 2017, Steiger pleaded guilty to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349, and three counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2. Steiger's presentence investigation report ("PSI") noted that the statutory imprisonment range on each count was 20 years, for a total maximum of 80 years. The PSI calculated a guideline imprisonment range of zero to six months. Further, the PSI noted that because all four counts were Class C Felonies, Steiger was eligible for one to five years of probation under 18 U.S.C. § 3561(c)(1). In December 2017, the district court sentenced Steiger to three years of probation.

In September 2019, the United States Probation Office filed a petition for revocation of Steiger's probation, alleging that Steiger had committed nine violations. At the revocation proceeding conducted in February 2022, the government explained that it would proceed only on the eighth violation, which was premised on the fact that Steiger had been convicted in Florida state court in June 2019 of one count of second-degree murder.

At the revocation proceeding, United States Probation Officer Kailey Minnick testified that Steiger began his probation sentence in December 2017 and was under Minnick's supervision when he was charged by the State of Florida with committing a murder in February 2018. After Steiger's arrest, he pleaded not guilty, and after a trial, was found guilty of one count of second-degree murder in August 2019. The court sentenced Steiger to life in prison. Steiger appealed his conviction. The Florida First District Court of Appeal affirmed his conviction.

In the revocation proceeding, Minnick read the following summary of the facts of the crime from the Florida appellate court's opinion. Steiger and the mother of his child, Cassandra Robinson, had a disagreement on February 1, 2018, and Robinson's family later reported her missing as of that date. Steiger's business associate, Julian Mesure, told law enforcement officers that Steiger had implied to Mesure that Steiger had killed Robinson and that he helped Steiger move items, including a 55-gallon drum, to Steiger's trailer and helped dispose of Robinson's iPad and iPod. In July 2018, investigators located Robinson's decomposing body inside the 55-gallon drum, inside Steiger's trailer. The medical examiner concluded that her manner of death was homicide. The date of the killing was February 1, 2018, which was Steiger and Robinson's daughter's first birthday. When Mesure had been questioned by law enforcement, he said Steiger talked to him about the plan to kill Robinson and just needed to decide the " 'when and where.' " Once he had decided, Steiger asked Mesure to climb into the 55-gallon drum to see if he would fit. Steiger had also demonstrated to Mesure a motion of choking with his hands and indicated the victim was holding the baby when this happened.

Minnick continued with the following facts from the Florida appellate court's opinion. Steiger testified at his trial that on the day of the birthday, Steiger found Robinson in the laundry room with a bag over her head and rope around her neck and believed she had committed suicide. He testified that he attempted to revive her but was unsuccessful and admitted that he did not call 911 or seek any medical assistance. He also admitted that his conduct afterwards of placing her inside the barrel was in an effort to " 'cover my tracks more like a guilty person.' " He denied making comments about the "when and where" and demonstrating the choking motion to Mesure. He testified that he did not come forward about the death because he wanted to maintain custody of his daughter.

Minnick further testified that Steiger had argued to the Florida appellate court, and subsequently to the Supreme Court of Florida, that his attorneys were ineffective in their representation at his trial, but that the Supreme Court of Florida affirmed the appellate court's refusal to consider the claim because Steiger had not preserved it for appeal.

After the probation officer's testimony concluded, Steiger's counsel informed the district court that Steiger was working with retained counsel on a post-conviction motion to raise an ineffective assistance of counsel claim and that he maintained his innocence to the murder charge.

The district court found that Steiger violated the conditions of his probation by committing the new crime as charged in the violation. The court revoked Steiger's probation and heard argument from the parties as to the sentence. Noting that Steiger had been trusted to be on probation for a term of three years, the government argued that Steiger then committed the most egregious of offenses while on probation. The government noted that while the guideline range was 12 to 18 months, that range greatly understated the seriousness of the new law violation, and it noted that the court, in its discretion, could impose a sentence of 20 years of imprisonment for each of the four offenses with a maximum of 80 years. In response, Steiger's counsel argued that the district court should sentence him to time served because Steiger's criminal history category was a I when he was originally sentenced, which meant that his original guideline range was zero to six months, and he had already been in prison for over three years.

The court gave Steiger the opportunity to allocute, at which time Steiger argued that his trial counsel was constitutionally ineffective, that he was confident that he would receive a new trial, and that the Florida appellate court's opinion contained an inaccurate summary of the facts of the case, which could be clarified with the trial record.

In reply, the government reminded the district court that the Florida First District Court of Appeal was able to review the entire transcript and record and noted that Steiger did not dispute that he put Robinson's body in a barrel for months.

The district court then stated the following:

> In determining an appropriate sentence, I have carefully considered not only the evidence that I've heard here today but also the matters presented during the course of the trial in the underlying case.
>
> There was a lot of question about determining who was telling the truth in that case. And the real unusual thing about that case is that it ended up with the object of the alleged fraud, the app itself being destroyed and therefore having no value, which resulted in a very low offense level for you and your codefendants in that case, and a probation sentence for you in response to a substantial assistance motion filed by the government as well.
>
> I do know, Mr. Steiger, you're a very smart man, and it's sad that you have ended up standing before me as you are currently.
>
> But I have fully considered all of the factors set out in Title 18, United States Code, Section 3553(a), as well as the applicable guidelines and policy statements from the United States Sentencing Commission and the decisions of the courts about sentencing under these circumstances, including decisions by the Supreme Court of the United States.

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So, under the authority of the Sentencing Reform Act of 1984 and its amendments, it is the judgment of the Court that you're hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 20 years on each count, each of the four counts, to be served concurrently one with the other. And this sentence of 20 years shall be served concurrently with the sentence imposed by the State of Florida in your murder trial case, that's Case No. 2018CF004365A.

The district court then asked whether either counsel had "any objections to any of my findings or conclusions of law or anything that needs to be amplified on the record with regard to the sentence I've imposed?" Neither counsel objected on any ground.

Steiger appealed.

II. STANDARD OF REVIEW

If a defendant fails to specifically object at the time of sentencing to the procedural reasonableness of the sentence imposed by the district court, this Court reviews for plain error. *United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1480a]. However, this Court reviews *de novo* whether the district court stated a specific reason for imposing a sentence outside the guideline range as required by 18 U.S.C. § 3553(c)(2), even when the defendant did not object on this ground before the district court, because the claim can be evaluated on a silent record. *United States v. Parks*, 823 F.3d 990, 996 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C309a].

III. DISCUSSION

Upon finding that a defendant violated a condition of probation, a district court may revoke the term of probation and impose a term of imprisonment, as long as the court considers the factors set forth in 18 U.S.C. § 3553(a), such as the need for the sentence imposed to reflect the "seriousness of the offense" and "afford adequate deterrence," among others. 18 U.S.C. § 3565.[1] The district court commits a "significant procedural error" in imposing a sentence if it calculates the guidelines incorrectly, fails to consider the § 3553(a) factors, bases the sentence on clearly erroneous facts, or, of particular relevance here, "fail[s] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007) [21 Fla. L. Weekly Fed. S11a].

Section 3553(c)(2) also provides that if the district court imposes a sentence outside of the guideline range, it must state in open court the specific reason for imposing that sentence. 18 U.S.C. § 3553(c)(2). To satisfy § 3553(c)(2), "[t]he district court's reasons must be sufficiently specific so that an appellate court can engage in the meaningful review envisioned by the Sentencing Guidelines." *Parks*, 823 F.3d at 997 (quotation omitted). The requirement that a court explain a non-guideline sentence is also important for the defendant and the public to understand why the defendant received the sentence. *Id.* & n.30. If the district court does not state a specific reason, remand for resentencing is required. *Id.* at 997.

Steiger does not cite § 3553(c)(2) or this Court's opinion in *Parks* in his appellate brief. However, because one of Steiger's arguments is that his sentence should be vacated and remanded because the district court did not state a reason for the upward variance to the statutory maximum, the issue is properly before this Court. And pursuant to *Parks*, we must review this claim *de novo*, even though Steiger's counsel did not object on this ground at the conclusion of the revocation proceeding. *See Parks*, 823 F.3d at 996.

The record reflects that the district court did not give any reason for why it was imposing an above-guideline sentence. The government urges that we can look to the context and record from the entire revocation proceeding to glean the reasoning for the sentence imposed. According to the government, because the facts surrounding the murder, which formed the basis of the probation violation, were so heinous, the district court didn't have to say much. In support, the government primarily relies upon *Rita v. United States*, 551 U.S. 338 (2007) [20 Fla. L. Weekly Fed. S381a], and *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018) [27 Fla. L. Weekly Fed. S368a]. In *Rita*, the Supreme Court held that an extensive explanation is not required when a case is "conceptually simple" and the record reveals that the court considered the evidence and arguments. 551 U.S. at 359. In *Chavez-Meza*, the Court reiterated that "[j]ust how much of an explanation" is required "depends . . . upon the circumstances of the particular case" and that sometimes it is enough "that the judge simply relied upon the record, while making clear that he or she has considered the parties' arguments and taken account of the § 3553(a) factors, among others." 138 S. Ct. at 1965. However, this case differs from *Rita* and *Chavez-Meza* in the significant respect that the district courts in those cases imposed within-guidelines sentences. *See Rita*, 551 U.S. at 345; *Chavez-Meza*, 138 S. Ct. at 1965.[2] The Court in *Rita* explained that a district court need not give a lengthy explanation for a guidelines sentence because "[c]ircumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case, and that the judge has found that the case before him is typical." 551 U.S. at 356-57.

Meanwhile, this Court's precedents establish that when a district court imposes an above-guideline sentence, as the court did here, a specific statement of explanation is required. *Parks*, 823 F.3d at 997 ("The burdens facing a busy district court are real, but the text of § 3553(c)(2) imposes a mandatory obligation."). Further, this Court has "adopted a per se rule of reversal for § 3553(c)(2) errors." *Id.* If the district court does not fulfill its "obligation . . . to explain deviations from the guideline sentencing range, *see* 18 U.S.C. § 3553(c)(2), so that [this C]ourt can determine whether the departure was justified," the case "*must be* remanded for resentencing." *Id.* & n.31 (quotation omitted) (citing *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C264a] (per curiam) (stating that it is the "duty of this Court" to vacate and remand when the district court does not comply with § 3553(c))).

The district court's statements at the conclusion of the revocation proceeding, quoted above, are not sufficiently specific to allow this Court to understand why the district court imposed an above-guideline sentence. Although the district court likely considered the heinous nature of Steiger's conduct as a reason for the upward variance, and we thus feel certain that we know what the district court will say on remand, we must nonetheless hold that, in light of this Court's precedents, the district court failed to comply with § 3553(c)(2), which requires vacatur and remand.[3]

IV. CONCLUSION

We **VACATE** Steiger's sentence and **REMAND** for resentencing.

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*Honorable L. Scott Coogler, Chief United States District Judge for the Northern District of Alabama, sitting by designation.

[1] In sentencing a probation violator, a district court is not restricted to the Sentencing Guidelines range applicable at the time of the initial sentencing hearing. *United States v. Cook*, 291 F.3d 1297, 1300 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C604a] (per curiam) (citing 18 U.S.C. § 3565(a)(2)). For revocations, the Sentencing Commission has promulgated policy statements that include a table with terms of imprisonment for defendants whose probation periods have been revoked based upon the grade of the probation violation and the defendant's criminal history at the time of the original sentencing hearing. *Id.* at 1301 (citing U.S.S.G. § 7B1.4). And while the sentencing judge may choose a specific penalty from the guideline range, he also has the authority to impose a sentence outside the guideline range because he chooses to "vary" from the guidelines by not applying them. *See United States v. Booker*, 543 U.S. 220, 258-65 (2005) [18 Fla. L. Weekly Fed. S70a] (holding the Sentencing Guidelines are advisory).

[2] The defendant in *Rita*, convicted of perjury, making false statements, and obstructing justice, sought a sentence lower than the recommended guideline range of 33 to 41 months based on his physical condition, military experience, and vulnerability in prison. 551 U.S. at 342, 344-45. The district court listened to his arguments but concluded that a sentence of 33 months was " 'appropriate,' " which the Supreme Court held was a legally sufficient explanation in those circumstances. *Id.* at 344-45. The defendant in *Chavez-Meza* was convicted of possession with intent to distribute methamphetamine and originally sentenced to 135 months of imprisonment, the bottom of the guideline range (135 to 168 months). 138 S. Ct. at 1964. After the Sentencing Commission reduced the guidelines range for certain drug offenses, he filed a motion for a sentence modification. *Id.* The district court ordered that the defendant's sentence be reduced to 114 months on a form issued by the Administrative Office of the United States Courts. *Id.* at 1965. Because the new sentence was not at the bottom end of the new guideline range—which would have been 108 months—the defendant appealed, arguing that he should have received a greater reduction and that the district court did not adequately explain the sentence. *See id.* at 1963, 1966. The Supreme Court rejected this argument, noting the "simplicity" of the case and the fact that the same judge had sentenced the defendant originally and was aware of his arguments. *Id.* at 1967.

[3] Because we vacate and remand for resentencing, we need not reach the merits of Steiger's other procedural unreasonableness claim or consider whether Steiger's sentence is also substantively unreasonable.

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See Gall, 552 U.S. at 51 ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.").

(WILLIAM PRYOR, Chief Judge, Concurring.) I join the panel opinion in full because it correctly applies our precedent. I write separately because we should rehear this appeal en banc to reconsider *United States v. Parks*, which requires a "per se rule of reversal for [section] 3553(c)(2) errors" even when the defendant never objected to the explanation of his sentence in the district court. 823 F.3d 990, 996-97 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C309a]. We should treat section 3553(c) challenges like all other procedural sentencing challenges, which we review for plain error when the defendant never objects in the district court. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1480a].

Ordinarily, "[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett v. United States*, 556 U.S. 129, 134 (2009) [21 Fla. L. Weekly Fed. S721a]; *see* FED. R. CRIM P. 51(b). If a defendant fails to do so, we review his objection on appeal for plain error only. *Puckett*, 556 U.S. at 134-35; FED. R. CRIM. P. 52(b). This rule, which "strictly circumscribe[s]" our review of unpreserved objections, *Puckett*, 556 U.S. at 134, "is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact," *United States v. Atkinson*, 297 U.S. 157, 159 (1936). The rule applies across the board except with respect to the narrow class of "structural errors undermining the fairness of a criminal proceeding as a whole." *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) [17 Fla. L. Weekly Fed. S379a]. The rule is especially crucial with respect to procedural errors because "the district court can often correct or avoid the mistake [if the litigant raises it] so that it cannot possibly affect the ultimate outcome" and require correction on appeal. *Puckett*, 556 U.S. at 134. And we apply the rule to most procedural sentencing challenges, such as the consideration of improper sentencing factors. *Vandergrift*, 754 F.3d at 1307.

The plain-error rule should apply also to an allegation on appeal that the district court did not "state in open court the reasons for its imposition of [a] particular sentence" or the "specific reason" for a sentence that varies from the guideline range. 18 U.S.C. § 3553(c). Nothing in the text of the Federal Rules of Criminal Procedure suggests that an objection based on this statute is different from any other "claim of error." *See* FED. R. CRIM. P. 51(b) ("A party may preserve a claim of error by informing the court" of the objection or requested action "when the court ruling or order is made or sought."). No one suggests that a failure to explain a sentence is a structural error not susceptible of harmlessness review. And there is nothing unique about a section 3553(c) objection that suggests an exception from the plain-error rule. As the Second Circuit has explained, the "long-standing requirements [of section 3553(c)] present no novel or complex issues" that are not apparent in the moment. *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007).

The district court is "better positioned to articulate its reasons during the first sentencing hearing rather than long after the fact." *Id.* Contemporaneous objection develops the record that we need to evaluate the reasonableness of a sentence. *See Parks*, 823 F.3d at 996. And encouraging contemporaneous objection also avoids the wasteful exercise that we see in this appeal.

Today we vacate a sentence of a defendant who will almost certainly receive the same sentence—with an explanation we can all guess—years after the fact. But every other court of appeals to have spoken on the subject would apply plain-error review and likely affirm the district court because Steiger's substantial rights were not violated. *See United States v. Gilman*, 478 F.3d 440, 448 (1st Cir. 2007); *Villafuerte*, 502 F.3d at 211; *United States v. Parker*, 462 F.3d 273, 278-79 (3d Cir. 2006); *United States v. Lynn*, 592 F.3d 572, 576-77 (4th Cir. 2010); *United States v. Gore*, 298 F.3d 322, 324-25 (5th Cir. 2002); *United States v. Eversole*, 487 F.3d 1024, 1035 (6th Cir. 2007); *United States v. Phelps*, 536 F.3d 862, 866 (8th Cir. 2008); *United States v. Vences*, 169 F.3d 611, 613 (9th Cir. 1999); *United States v. Romero*, 491 F.3d 1173, 1175-77 (10th Cir. 2007); *United States v. Ransom*, 756 F.3d 770, 773 (D.C. Cir. 2014). We should join their ranks.

Parks established a different rule only because the panel was bound by *United States v. Bonilla*, 463 F.3d 1176, 1181 & n.3 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C1017a], which itself relied on *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C264a]. *See Parks*, 823 F.3d at 995 & n.22. "Because [section] 3553(c)(2) affirmatively requires the district court to provide a specific reason for a non-guideline sentence," *Bonilla* and *Williams* reasoned that a "silent record" would "reflect that the sentence is illegal for want of a required statement," so no objection is necessary for record development. *See Parks*, 823 F.3d at 996. The *Parks* panel found this distinction "plausible" as a "possible" way to reconcile *Bonilla* and *Williams* with our general rule for procedural reasonableness challenges. *Id.* (internal quotation marks omitted). That distinction does not hold water outside the context of a panel's obligation to reconcile conflicting panel precedents. *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993).

Bonilla and *Williams* are wrong. We routinely apply plain-error review even when a silent record would reveal that the district court committed an error of omission. For example, plain-error review applies to an objection that the district court failed its affirmative obligation to " 'advise the defendant that the defendant has no right to withdraw [a] plea' " if the district court declines to apply the prosecution's sentencing recommendation. *Dominguez Benitez*, 542 U.S. at 80-83 (quoting FED. R. CRIM. P. 11(c)(3)(B)); *see also Neder v. United States*, 527 U.S. 1, 8-9 (1999) (plain-error rule applies to a failure to instruct the jury on an element of the offense). And we review for plain error an unpreserved objection to a "fail[ure] to articulate any specific findings regarding the need to seal [an] order" in a criminal trial, *United States v. Cordero*, 7 F.4th 1058, 1066 n.8 (11th Cir. 2021) [29 Fla. L. Weekly Fed. C171b], even though the court "must articulate" those findings on the record, *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C1057a].

This appeal shows why we should reconsider *Parks* and the decisions on which it relied. As the panel opinion recounts, the district court revoked Steiger's probation because he was convicted of brutally murdering the mother of his child and concealing her remains. We have no doubt that the district court on remand will say what we all know is true—that Steiger received a long federal sentence for his breach of probation terms because he committed what his own counsel conceded was the most egregious sort of breach of the trust that probation implies. But because of our "per se rule of reversal," *Parks*, 823 F.3d at 997, this panel is forced to remand for a new sentencing hearing. We should abolish our idiosyncratic and unprincipled treatment of section 3553(c) errors.

* * *

Aliens—Removal—Aggravated felon—Massachusetts conviction for armed robbery constitutes a "theft offense" within meaning of Immigration and Nationality Act, which defines an aggravated felony as a theft offense for which term of imprisonment is at least one year, and therefore noncitizen's armed robbery conviction was an aggravated felony and he was removable as aggravated felon—Asylum—A noncitizen is ineligible for asylum or withholding of removal if, having been convicted of particularly serious crime, he is a danger to the community—Noncitizen was not eligible for asylum because his conviction of an aggravated felony per se constitutes a conviction of particularly serious crime and, under Eleventh Circuit precedent, his conviction for particularly serious crime makes him a danger to the community—Withholding of removal—For purposes of withholding of removal, a conviction of an aggravated felony per se constitutes a particularly serious crime only if noncitizen has been sentenced to an aggregate term of imprisonment of at least five years—Because noncitizen was sentenced to less than five years in prison, his aggravated felony conviction does not per se constitute a particularly serious crime with respect to withholding of removal—Remand for reconsideration of noncitizen's request for withholding of removal is warranted where Attorney General issued intervening decision concluding that mental health evidence can be considered in determining whether an offense constitutes a particularly serious crime making the noncitizen a danger to the community and noncitizen presented mental health evidence which was not considered by either the immigration judge or the Bureau of Immigration Appeals

MUCKTARU KEMOKAI, Petitioner, v. U.S. ATTORNEY GENERAL, Respondent. 11th Circuit. Case No. 21-12743.

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October 2, 2023. Petition for Review of a Decision of the Board of Immigration Appeals (Agency No. A047-851-957).

(Before JORDAN, NEWSOM, Circuit Judges, and GRIMBERG, District Judge.*)

(JORDAN, Circuit Judge.) The Board of Immigration Appeals ruled that Mucktaru Kemokai is removable as an aggravated felon and denied his requests for asylum and withholding of removal. Mr. Kemokai petitions for review, arguing that his Massachusetts conviction for armed robbery does not constitute a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), and therefore is not an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii). We reject the argument and deny the petition in that respect.

But we agree with the parties that a remand to the BIA is nevertheless required. The Attorney General has issued an intervening decision which might impact Mr. Kemokai's request for withholding of removal, and the BIA should have the opportunity to consider the effect of that decision. We therefore grant the petition in part.

I

Mr. Kemokai, a native and citizen of Sierra Leone, was admitted to the United States as a lawful permanent resident in 2001. In 2018, he pled guilty to armed robbery in violation of Mass. Gen. Laws ch. 265, § 17, and was sentenced to two years of supervised release. But he violated the terms of his release, and the state court sentenced him to a prison term of one to one-and-a-half years.

The Department of Homeland Security then initiated removal proceedings. As relevant here, the notice to appear charged Mr. Kemokai with removability as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii) on the ground that he had committed a theft offense within the meaning of 8 U.S.C. § 1101(a)(43)(G).[1]

After retaining counsel, Mr. Kemokai moved to terminate the removal proceedings, arguing in part that his armed robbery conviction did not constitute a theft offense because the relevant Massachusetts statute was broader than the generic definition of theft. In his view, generic theft requires a taking of property without the victim's consent, but armed robbery under Massachusetts law does not. This, according to Mr. Kemokai, was because larceny in Massachusetts is an element of robbery (and thus, armed robbery) and encompasses both consensual and nonconsensual takings.

The immigration judge disagreed, reasoning that robbery requires the use of force or that the victim be put in fear. This additional element renders any taking under Massachusetts' armed robbery statute nonconsensual. Because the armed robbery statute categorically matches the generic definition of a theft offense, the immigration judge sustained the aggravated felony charge.

Mr. Kemokai appealed to the BIA. The BIA dismissed the appeal, concluding that Massachusetts' armed robbery statute is not broader than generic theft.

II

The INA limits our jurisdiction over final orders of removal to constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D); *Patel v. U.S. Att'y. Gen.*, 971 F.3d 1258, 1272 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1709a] (en banc). Whether Mr. Kemokai's armed robbery conviction constitutes an aggravated felony is a question of law, so we have jurisdiction. *See Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380, 1383 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C626a].

The government argues, however, that we lack jurisdiction because Mr. Kemokai failed to exhaust his challenge before the BIA. Under 8 U.S.C. § 1252(d)(1), "[a] court may review a final order of removal only if" the noncitizen "has exhausted all administrative remedies available to [him] as of right." Our cases have interpreted this provision as a jurisdictional bar on review of removal challenges not raised before the BIA. *See, e.g., Sundar v. I.N.S.*, 328 F.3d 1320, 1323 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C551a] (holding that, because of § 1251(d)(1), "we lack jurisdiction to consider claims that have not been raised before the BIA"). But the Supreme Court recently held, in *Santos-Zacaria v. Garland*, 598 U.S. 411, 413, 419 (2023) [29 Fla. L. Weekly Fed. S755a], that § 1252(d)(1) is not jurisdictional. *Santos-Zacaria* therefore abrogates our prior precedent to the contrary.

Nevertheless, § 1252(d)(1) remains a "claim-processing rule." *Id.* at 417. And such a rule is generally applied where, as here, it has been asserted by a party. *See Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) [27 Fla. L. Weekly Fed. S867a]; *United States v. Harris*, 989 F.3d 908, 910-11 (11th Cir. 2021) [29 Fla. L. Weekly Fed. C181a].

We are satisfied that Mr. Kemokai exhausted his challenge to removability before the BIA. At bottom, he presents the same core argument here that he raised before the immigration judge and the BIA—that his conviction does not constitute an aggravated felony because Massachusetts' armed robbery statute is broader than generic theft. *See Indrawati v. U.S. Atty. Gen.*, 779 F.3d 1284, 1297 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C952a] (explaining that exhaustion "is not a stringent requirement" and is satisfied if the petitioner "previously argued the 'core issue now on appeal' before the BIA") (citation omitted). We therefore move on to the merits.

III

Whether Mr. Kemokai's armed robbery conviction constitutes an aggravated felony presents a question of law subject to plenary review. *See Cintron*, 882 F.3d at 1383; *Accardo v. U.S. Atty. Gen.*, 634 F.3d 1333, 1335-36 (11th Cir. 2011) [22 Fla. L. Weekly Fed. C1877a]. As noted earlier, a noncitizen is removable if he "is convicted of an aggravated felony at any time after admission," 8 U.S.C. § 1227(a)(2)(A)(iii), and under 8 U.S.C. § 1101(a)(43)(G) the term "aggravated felony" includes "a theft offense . . . for which the term of imprisonment [is] at least one year."

Because the Immigration and Nationality Act does not define the term "theft offense," we look to the "generic definition of theft." *Vassell v. U.S. Atty. Gen.*, 839 F.3d 1352, 1356 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C914a]. Generic theft, as defined by the BIA and by us, means "the taking of, or exercise of control over, property without consent whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id.* (quoting *In re Garcia-Madruga*, 24 I. & N. Dec. 436, 440-41 (BIA 2008)).

To determine if a state conviction falls within the generic federal definition of a corresponding aggravated felony we generally employ a "categorical approach." *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1280 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C779a]. We look only to the relevant statute of conviction, as construed by the state courts, and ask whether it "categorically fits" within the generic definition of the federal offense. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) [24 Fla. L. Weekly Fed. S160a]. In other words, we "compare[ ] the generic offense to the minimum conduct criminalized by the . . . statute [of conviction]." *Vassell*, 839 F.3d at 1356 (citation and internal quotation marks omitted). *See also Mathis v. United States*, 579 U.S. 500, 505 (2016) [26 Fla. L. Weekly Fed. S315a] ("The court . . . lines up th[e] crime's elements alongside those of the generic offense and sees if they match."). A statute of conviction constitutes a categorical match only if "the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013) [24 Fla. L. Weekly Fed. S343a].

A

Mr. Kemokai was convicted of armed robbery in violation of Mass. Gen. Laws ch. 265, § 17. In relevant part, § 17 provides that "[w]hoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment[.]"[2]

The offense of armed robbery under § 17 entails a number of elements. The prosecution must prove that "(1) the defendant was armed with a dangerous weapon (though it need not be used); (2) the defendant either applied actual force or violence to the body of the person identified in the indictment, or by words or gestures put him in fear (i.e., the defendant committed an assault on that person); and (3) the defendant took the money or . . . the property of another with intent to steal it." *United States v. Luna*, 649 F.3d 91, 108 (1st Cir. 2011) (citing *Commonwealth v. Rogers,* 945 N.E.2d 295, 300 n.4 (Mass. 2011)) (internal quotation marks omitted).[3]

These elements, under the categorical approach, match the generic definition of theft. Generic theft requires taking the property of another without consent and with intent to steal. *See Vassell*, 839 F.3d at 1356. The third element of armed robbery under § 17—the taking of property with the intent to steal—matches two of the requirements of a generic theft offense—i.e., the taking of property with the criminal intent to deprive the victim of the rights and benefits of ownership. And the second element of armed robbery under § 17—the taking of property by the

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use of force or by putting the victim in fear—matches the generic theft requirement that the taking be without the consent of the victim. Massachusetts law teaches that "[t]he essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property . . . which is so within his reach . . . that he could, if not overcome by violence or prevented by fear, retain his possession of it." *Commonwealth v. Novicki*, 87 N.E.2d 1, 3 (Mass. 1949). This understanding satisfies the "without consent" requirement of generic theft, and we find persuasive the BIA's decision in *Matter of Ibarra*, 26 I. & N. Dec. 809, 811 (BIA 2016), on this point: "There is no meaningful difference between a taking of property accomplished against the victim's will and one where his 'consent' to parting with his property is coerced through force, fear, or threats."

We recognize, of course, that § 17 has an additional element—being armed with a dangerous weapon—but this makes the offense of armed robbery narrower, not broader, than generic theft. In other words, § 17 does not cover "any more conduct" than generic theft. *See Mathis*, 579 U.S. at 504. *Cf. United States v. Turner*, 741 F.App'x 687, 691 (11th Cir. 2018) ("Although Turner is correct that [the statute of conviction] imposes additional elements—that the defendant must have caused injury or been armed with, or threated the use of a weapon—these additional elements . . . do not broaden the statute, but rather narrow it."); *United States v. Pacheco*, 709 F. App'x 556, 562 (11th Cir. 2017) ("To the extent the Michigan home invasion statutes add[ ] additional requirements—e.g., that the defendant be armed or that another person be present—their elements are simply narrower than those of generic burglary and still qualify.").[4]

This does not, however, end our analysis. As discussed below, Mr. Kemokai argues that a different aspect of Massachusetts law makes armed robbery broader than generic theft.

B

The Massachusetts larceny statute provides in relevant part that "[w]hoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section . . . shall be guilty of larceny." Mass. Gen. Laws ch. 266, § 30(1). The statute merges, into one statutory crime, the three distinct common-law offenses of larceny by theft (or by stealing), larceny by embezzlement, and larceny by false pretense. *See Commonwealth v. Mills*, 764 N.E.2d 854, 860 (Mass. 2002).[5]

Because larceny can encompass a victim turning over his or her property voluntarily due to a misrepresentation—i.e., through fraud—and because Massachusetts courts have held that "[r]obbery includes all the elements of larceny," *Commonwealth v. Johnson*, 396 N.E.2d 974, 977 (Mass. 1979), Mr. Kemokai contends that the armed robbery statute, § 17, is broader than generic theft. *See* Petitioner's Br. at 14-15. He relies on several cases holding that fraud is not within the definition of generic theft. *See Vassell*, 839 F.3d at 1359 (explaining that the "without consent" element differentiates theft from fraud: "The key and controlling distinction between these two crimes is . . . the 'consent' element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained.") (internal quotation marks and citation omitted); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1148 (9th Cir. 2020) ("We have explained elsewhere that theft statutes which include theft by deception fall outside the generic definition for theft.").

We are not persuaded. The language from *Johnson* cited by Mr. Kemokai cannot be read in a vacuum to mean that larceny, in all of its common-law forms, constitutes an element of robbery. Although *Johnson* does say that "[r]obbery includes all the elements of larceny," 396 N.E.2d at 977, the Supreme Judicial Court of Massachusetts has made clear that the larceny referenced in this passage is larceny by theft (i.e., by stealing) and not larceny by fraud (i.e., by false pretense): "[I]n order to sustain a charge of robbery, there must be proof of a larceny (1) 'from . . . (the) person' and (2) 'by force and violence, or by assault and putting in fear.' " *Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1972) (quoting Mass. Gen. Laws ch. 277, § 39 (defining the offense of robbery)). *See also id.* at 843 n.2 ("Larceny as an element of robbery means '(t)he taking and carrying away of (the) personal property of another . . . against his will . . . with intent to steal.' ") (quoting § 39); *Commonwealth v. Goldstein*, 768 N.E.2d 595, 598 (Mass. Ct. App. 2002) ("Robbery includes all of the elements of larceny and in addition requires that force and violence be used against the victim or that the victim be put in fear."); *Commonwealth v. Olivera*, 719 N.E.2d 515, 517 (Mass. Ct. App. 1999) ("Remove the weapon [in an armed robbery case] and the offense may be robbery, i.e., taking the property of another through the application of violence or intimidation. . . Remove violence or intimidation, and the offense becomes larceny."); *Dudley v. Ryan*, 62 F. Supp. 3d 193, 197-98 (D. Mass. 2014) ("In Massachusetts, the unarmed robbery statute draws substantially from the common law of robbery and requires a showing of larceny from a person by force and violence or by assault and putting in fear.").

IV

Mr. Kemokai also seeks review of the BIA's denial of his requests for withholding of removal and asylum. We discuss each form of relief below.

A noncitizen is ineligible for asylum if "the Attorney General determines" that he, "having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii). For purposes of asylum, a noncitizen "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." § 1158(b)(2)(B)(i). Mr. Kemokai was convicted of an aggravated felony, and as a result he is considered to have been convicted of a particularly serious crime. And under our precedent, his conviction for a particularly serious crime necessarily makes him a danger to the community. *See K.Y. v. U.S. Atty. Gen.*, 43 F.4th 1175, 1185 (11th Cir. 2020) [29 Fla. L. Weekly Fed. C1533a]; *Lapaix v. U.S. Atty. Gen.*, 605 F.3d 1138, 1141 n.2 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C802a]; *Crespo-Gomez v. Richard*, 780 F.2d 932, 934 (11th Cir. 1986). We therefore deny the asylum claim.

Withholding of removal is a somewhat different story. Similar to asylum, a noncitizen is ineligible for withholding of removal if "the Attorney General decides" that he, "having been convicted by a final judgment of a particularly serious crime is a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii). For purposes of withholding of removal, however, a conviction for an aggravated felony per se constitutes a particularly serious crime only if the noncitizen "has been sentenced to an aggregate term of imprisonment of at least [five] years." § 1231(b)(3)(B)(iv). If the sentence for an aggravated felony is less than five years, the Attorney General can still determine that the conviction was for a particularly serious crime. *See id. See also Lapaix*, 605 F.3d at 1143 ("When the offense in question is not a per se particularly serious crime, the Attorney General retains discretion to determine on a case-by-case basis whether the offense constituted a particularly serious crime.").

Mr. Kemokai was sentenced to less than five years in prison. His aggravated felony conviction, therefore, does not per se constitute a particularly serious crime with respect to withholding of removal.

The parties agree that we should remand to the BIA to reconsider Mr. Kemokai's request for withholding of removal. In an intervening decision, the Attorney General has concluded that mental health evidence can be considered in determining whether an offense constitutes a particularly serious crime making the noncitizen a danger. *See Matter of B-Z-R-*, 28 I. & N. Dec. 563, 567 (A.G. 2022). Because Mr. Kemokai presented evidence of mental health problems, and this evidence was not considered by either the immigration judge or the BIA, we remand for reconsideration in light of *Matter of B-Z-R-*.

V

Mr. Kemokai's petition is denied in part and granted in part, and the matter is remanded to the BIA for further proceedings consistent with our opinion.

PETITION DENIED IN PART, GRANTED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

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*The Honorable Steven D. Grimberg, U.S. District Judge for the Northern District of Georgia, sitting by designation.

[1] A noncitizen "who is convicted of an aggravated felony at any time after admission is deportable." § 1227(a)(2)(A)(iii). A "theft offense . . . for which the term of imprisonment [is] at least one year" is an "aggravated felony." § 1101(a)(43)(G).

[2] The type of "property which may be the subject of larceny" is spelled out in the general larceny statute. *See* Mass. Gen. Laws ch. 266, § 30(2) (defining "[t]he term 'property' as used in the [larceny statute]"). *See also* 14A Mass. Prac., Summary of Basic Law § 7:215 (5th ed. 2022) ("The statute defining the crime of robbery

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refers to 'money or other property which may be the subject of larceny' as that which may be the subject of a robbery.").

[3]In analyzing § 17, we are bound by the construction given to it by the Massachusetts courts. *See, e.g., Johnson v. United States*, 559 U.S. 133, 138 (2010) [22 Fla. L. Weekly Fed. S152a] (indicating that, in determining whether a Florida offense constituted a "violent felony" under the Armed Career Criminal Act, federal courts were "bound by" the state courts' construction of a state criminal statute); *Murdock v. City of Memphis*, 87 U.S. 590, 609 (1874) (observing that "a fixed and received construction of the statutes of a State in its own courts" is "a part of the statutes") (internal quotation marks omitted); *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1282 n.4 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C779a] (noting that, in determining whether a Florida conviction constituted an aggravated felony, "we are bound by Florida Supreme Court's interpretation of state law" and "defer to its interpretation of the allocation of the burden [of proof] under the [state's] statutory scheme") (internal quotations omitted); *United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) [25 Fla. L. Weekly Fed. C1281a] ("[I]n determining whether a [state] conviction . . . is a 'crime of violence' for sentencing enhancement purposes, we are bound by [the state] courts' determination and construction of the substantive elements of that state offense.").

[4]*Turner* and *Pacheco* are unpublished opinions, but we find them persuasive for the point cited.

[5]Notwithstanding the statutory merger in § 30(1), the three variations of larceny remain distinct offenses with different elements. *See Mills*, 764 N.E.2d at 865. Larceny by theft requires an "unlawful taking and carrying away of the personal property of another with the specific intent to deprive the person of the property permanently." *Id.* at 861. Larceny by embezzlement requires proof that "the defendant fraudulently converted to his personal use property that was under his control by virtue of a position of trust or confidence and did so with the intent to deprive the owner of the property permanently." *Id.* at 861-62 (internal quotation marks omitted). And "larceny by false pretenses requires proof that (1) a false statement of fact was made; (2) the defendant knew or believed that the statement was false when he made it; (3) the defendant intended that the person to whom he made the false statement would rely on it; and (4) the person to whom the false statement was made did rely on it and, consequently, parted with property." *Id.* at 863.

* * *

Civil rights—Search and seizure—Vehicle stop—Passenger—Arrests—Probable cause—Passenger in vehicle stopped for a traffic violation filed Section 1983 complaint against sheriff's office deputy and sheriff claiming that deputy's demand that passenger identify himself without any specific basis for believing he was involved in criminal activity amounted to an unreasonable seizure in violation of Fourth Amendment and that deputy arrested passenger for resisting officer without violence in violation of Due Process Clause of Fourteenth Amendment—Deputy was entitled to dismissal of Fourth Amendment claim under the doctrine of qualified immunity—Supreme Court precedent did not clearly establish as a matter of Fourth Amendment law that an officer cannot ask a passenger to identify himself unless the officer has reasonable suspicion or reason to believe that the passenger poses a risk to his safety—District court erred in concluding that deputy lacked arguable probable cause to arrest passenger for resisting officer without violence in violation of Florida Statute § 843.02 because passenger had a Fourth Amendment right to refuse deputy's request to identify himself

MARQUES A. JOHNSON, Plaintiff-Appellee, v. CHRIS NOCCO, in his official capacity as Sheriff, Pasco County, Florida, Defendant, JAMES DUNN, in his individual capacity, Defendant-Appellant. 11th Circuit. Case No. 21-10670. October 2, 2023. Appeal from the U.S. District Court for the Middle District of Florida (No. 8:20-cv-01370-TPB-JSS).

(Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.)

(TJOFLAT, Circuit Judge.) This appeal presents two questions. The first is whether the Fourth Amendment precluded a law enforcement officer—who had stopped a vehicle for a traffic violation—from asking a passenger in the vehicle to identify himself *unless* the officer had reason to suspect that the passenger had committed, was in the process of committing, or was likely to commit a criminal offense. The second question is whether binding precedent[1] clearly established, at the time relevant here, that an officer could not ask a passenger to identify himself absent this reasonable suspicion. The District Court answered both questions in the affirmative and accordingly denied the officer's motion to dismiss the passenger's claim pursuant to the doctrine of qualified immunity.

The officer appeals the District Court's decisions.[2] Concluding that the District Court erred in denying the officer's motion to dismiss the passenger's claim, we reverse.

Our discussion proceeds as follows. Part I sets out the passenger's claim under the Fourth Amendment (and relatedly under the Fourteenth Amendment) and the District Court's reasons for denying the officer's motion to dismiss the claim. Part II reviews Supreme Court precedent concerning whether it is reasonable under the Fourth Amendment for an officer, during a traffic stop, to ask the vehicles occupants—the driver and passengers alike—to exit the vehicle. Part III addresses how that precedent informs the answer to the question here—whether an officer may ask a passenger for identification absent a reasonable suspicion that the passenger has committed, is committing, or is likely to commit a criminal offense. Part IV addresses whether the officer here lacked arguable probable cause to arrest the passenger under Florida Statute § 843.02 for refusing to comply with the officer's demand that he identify himself. Part V concludes.

I.

A.

The officer is James Dunn—a Pasco County, Florida Sherriff's Office deputy. Chris Nocco, the Pasco County Sheriff, is a codefendant with Dunn in the case below. The passenger is Marques A. Johnson. Johnson's initial complaint in this case consisted of twelve counts. Johnson's first amended complaint, the complaint at hand, contains ten counts. Count I of the amended complaint, which replicates *verbatim* Count I of the initial complaint, was brought against Dunn in his individual capacity and is the only count before us in this appeal.[3]

Count I seeks damages against Dunn under 42 U.S.C. § 1983[4] for violating Johnson's Fourth and Fourteenth Amendment rights on August 2, 2018, in Pasco County, Florida. Count I alleges that Dunn, accompanied by Deputies Christopher Ramos and Mark Pini, stopped a motor vehicle towing a motorcycle on a trailer because the trailer's license tag was obscured.[5] This vehicle was driven by Johnson's father (the "driver"). Dunn approached the front passenger side of the vehicle and obtained the driver's driver's license and vehicular registration. Next, he asked Johnson, seated in the front passenger seat (another passenger was in the back seat), if he "had his 'ID on him.' " Johnson replied that he was "merely a passenger in the vehicle and was not required to identify himself." Dunn responded that "under Florida law he was required to identify himself and that if he did not identify himself, [Dunn] would 'pull him out and he would go to jail for resisting.' " A Sheriff's Office "supervisor informed Deputy Dunn that he should arrest [Johnson]" for refusing to identify himself. Dunn accordingly placed Johnson "under arrest for resisting without violence" in violation of Florida Statute § 843.02.[6]

Count I is styled "Fourth Amendment Violation—False Arrest" and asserts two causes of action: a claim that Deputy Dunn's demand that Johnson identify himself amounted to an unreasonable seizure in violation of the Fourth Amendment[7] and a claim that Dunn arrested Johnson without probable cause in violation of the Due Process Clause of the Fourteenth Amendment. The Fourth Amendment claim is based on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), and its progeny. The due process claim is that Dunn lacked probable cause to arrest Johnson for violating § 843.02.

Dunn's request that Johnson identify himself was allegedly unreasonable because at the specific moment Dunn encountered Johnson he was, in effect, conducting a *Terry* stop[8] and could not demand that Johnson identify himself without "any specific basis for believing he [was] involved in criminal activity." Count I cites *Brown v. Texas*, 443 U.S. 47, 52-53, 99 S. Ct, 2637, 2641 (1979), a *Terry* progeny, in support of the claim. Moreover, Dunn could not "arrest [Johnson] for failure to identify himself if the request for identification [was] not related to the circumstances justifying the stop," according to the Supreme Court in *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 188, 124 S. Ct. 2451, 2459 (2004) [17 Fla. L. Weekly Fed. S406a]. The due process claim is that Johnson expressed his refusal to identify himself in "mere words." Dunn therefore lacked probable cause to arrest Johnson for resisting an officer without violence in violation of § 843.02.

Dunn moved to dismiss Count I of both the initial and amended complaints on the ground that the doctrine of qualified immunity immunized him from suit. Dunn's second motion took issue with the cases Count I relies on to support its Fourth Amendment claim, namely *Terry*, *Hiibel*,

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and *Brown*. Dunn argued that those cases did not support Count I's allegation that he could not ask Johnson to identify himself unless he reasonably suspected that Johnson had committed, was in the process of committing, or was likely to commit a criminal offense. He argued that, if anything, those cases supported his position—that Florida law permitted him to ask Johnson to identify himself. Dunn cited *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781 (2009) [21 Fla. L. Weekly Fed. S620a], and *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1992), as recognizing, in the interest of officer safety, an officer's need to question the occupants of vehicles stopped for traffic violations.

B.

The District Court ruled on Dunn's motion to dismiss Count I in two orders: one addressed the sufficiency of Count I of Johnson's initial complaint; the other addressed the sufficiency of Count I of the amended complaint.[9] For efficiency, we treat the two orders as one.

The District Court held that Dunn was entitled to assert the qualified immunity defense because, in conducting the traffic stop, he acted within the scope of his discretionary authority as a Sheriff's deputy.[10] To overcome this defense, Johnson had to show (1) that Count I's allegations established that Dunn violated his Fourth Amendment right not to be asked to identify himself, and if so, (2) that right was clearly established at the time of the violation. Exercising its discretion under *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009) [21 Fla. L. Weekly Fed. S588a], as to which showing it should address first, the Court addressed the two showings in order.

The District Court first found that Dunn had probable cause to initiate the traffic stop and a "valid basis to briefly detain both Plaintiff and his father who was driving the vehicle. *See, e.g.*, *Johnson*, 555 U.S. at 333 (temporary detention of driver and passengers during traffic stop remains reasonable for duration of the stop)." Dunn also had "a valid basis to require the driver to provide identification and vehicle registration." But he did not have "a valid basis to also require a passenger, such as Plaintiff, to provide identification, absent a reasonable suspicion that the passenger had committed, was committing, or was about to commit a criminal offense." The Court supported that statement by citing Florida Statute § 901.151(2)[11] and three U.S. Supreme Court decisions. In a parenthetical citation to this statute, the District Court said an "officer may detain [a] person for purpose of ascertaining identity when [the] officer reasonably believes [the] person has committed, is committing, or is about to commit a crime." The main Supreme Court decisions the District Court cited were *Hiibel*[12] and *Brown v. Texas*.[13]

Referring to § 901.151(2), the District Court acknowledged that the "Florida courts had not specifically held that law enforcement officers may require [a] passenger[ ] to provide identification during traffic stops absent a reasonable suspicion that the passenger had committed, was committing, or was about to commit a criminal offense." The District Court concluded that "the ultimate source of authority on this issue is the Fourth Amendment as interpreted by the U.S. Supreme Court, not a specific provision of Florida law."[14]

The District Court concluded its analysis of Johnson's Fourth Amendment and False Arrest claims:

> Plaintiff had a legal right to refuse to provide his identification to Deputy Dunn. *As such, Deputy Dunn had neither actual probable cause nor arguable probable cause to arrest Plaintiff* [for violating § 843.02]. The Court further finds that based on the Fourth Amendment itself and the case law discussed, the law was clearly established at the time of the arrest. Deputy Dunn is not entitled to qualified immunity, and the motion to dismiss is denied as to this ground.

(emphasis added). An inference reasonably drawn from the emphasized language is that if Johnson did not have a legal right to refuse Dunn's command that he identify himself, Dunn had at least arguable probable cause to arrest him under § 843.02 for refusing to do so. Another inference reasonably drawn from the District Court's discussion about § 901.151(2) is that, if Johnson did not have the right to refuse Dunn's command, the statute's language—"had committed, was committing, or was about to commit a criminal offense"—would be inoperative here.

II.

A.

Deputy Dunn stopped the Johnson vehicle because he had probable cause to believe the driver had committed a traffic violation: its trailer's license tag was obscured. The stop constituted a Fourth Amendment seizure and detention of the vehicle's occupants—the driver and two passengers—since they were not free to exit the vehicle or continue on their journey.[15] "[A] passenger is seized, just as the driver is, 'from the moment [a car stopped by the police comes] to a halt on the side of the road.' " *Johnson*, 555 U.S. at 332, 129 S. Ct. at 787 (second alteration in original) (quoting *Brendlin v. California*, 551 U.S. 249, 263, 127 S. Ct. 2400, 2410 (2007) [20 Fla. L. Weekly Fed. S365a]).

The traffic stop here was analogous to a *Terry* stop. "[I]n a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Id.* at 327, 129 S. Ct. at 784. Here, it was lawful for Deputy Dunn to stop the vehicle and detain its occupants for the violation of a Florida Statute regulating the "licensing of vehicles." Fla. Stat. § 316.605(1).[16] Moreover, the occupants would expect the detention to continue, and remain reasonable, for the duration of the stop; they would be free to leave when Dunn had no further need to control the scene. *See Johnson*, 555 U.S. at 333, 129 S. Ct. at 788 ("Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." (citing *Brendlin*, 551 U.S. at 258, 127 S. Ct. at 2407)).

Deputy Dunn's "mission" was "to address the traffic violation that warranted the stop" and to "attend to related safety concerns." *See Rodriguez v. United States*, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614 (2015) [25 Fla. L. Weekly Fed. S191a]. While carrying out his mission, Dunn would have been mindful of the safety risk that officers face when conducting traffic stops. The Supreme Court recognized such danger in *Johnson*:

> [T]raffic stops are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469 (1983). " 'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers routinely exercise unquestioned command of the situation.' " *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S. Ct. 882 (1997) (quoting *Michigan v. Summers*, 452 U.S. 692, 702-[ ]03, 101 S. Ct. 2587 (1981)).

555 U.S. at 330, 129 S. Ct. at 786 (second alteration in original).

Dunn exercised command of the seizure. He made the "ordinary inquiries incident to [the traffic] stop." *See Rodriguez*, 575 U.S. at 355, 135 S. Ct. at 1615 (alteration in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 837 (2005) [18 Fla. L. Weekly Fed. S100a]). Dunn asked the driver for his driver's license and vehicle registration, and he complied. Dunn could have asked any of the occupants about their travel plans and destinations. *See Campbell,* 26 F.4th at 885 (en banc) (collecting cases) ("Generally speaking, questions about travel plans are ordinary inquiries incident to a traffic stop.").

Deputy Dunn's mission focused on the traffic violation that warranted the stop and related safety concerns. Even if Dunn's exchanges with the driver and Johnson were focused exclusively on the reason for the stop and safety, any additional exchange would not be unreasonable unless it measurably extended the duration of the stop. *Johnson*, 555 U.S. at 333, 129 S. Ct. at 788 (citation omitted) ("An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").[17]

B.

In carrying out his mission, could Deputy Dunn ask the driver to step out of the vehicle?[18]

In *Mimms*, the Supreme Court considered whether requesting a driver to get out of his vehicle was reasonable under the Fourth Amendment. 434 U.S. at 108-13, 98 S. Ct. at 332-35. Given that "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the [officer's] invasion of [the driver's] personal security[,]" *Terry,* 392 U.S. at 19, 88 S. Ct. at 1878-79, the Court in *Mimms* held that the "[r]easonableness [of the officer's request] depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " 434 U.S. at 109, 98 S. Ct. at 332 (quoting *United States v. Brignoni-Ponce*, 422 U.S.

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873, 878, 95 S. Ct. 2574, 2579 (1975)).

In distinguishing its inquiry from that in *Terry*, the *Mimms* Court explained:

> [T]here is no question about the propriety of the initial restrictions on [Mimms's] freedom of movement. [Mimms] was driving an automobile with expired license tags in violation of the Pennsylvania Motor Vehicle Code. . . . [The Court] need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle . . . but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

Id. (footnote omitted).

In striking the balance described in *Brignoni-Ponce*, the *Mimms* Court "weigh[ed] the intrusion into [Mimms's] personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified [as part of the officer's mission], but by the order to get out of the car." *Id.* at 111, 98 S. Ct. at 333. The Court concluded that the additional intrusion was "*de minimis*" and accordingly held that the officer's order was reasonable. *Id.* at 111, 98 S. Ct. 333. "[I]t hardly rises to the level of a 'petty indignity.' " *Id.* (quoting *Terry*, 392 U.S. at 17, 88 S. Ct. at 1877).

The answer to the question posed above is that Deputy Dunn could have asked the driver to step out of his vehicle—not as part of Dunn's mission, but as an additional, incremental, and reasonable intrusion.

C.

In carrying out his mission, could Deputy Dunn have asked a passenger—here, Johnson—to step out of the vehicle? Specifically, would the *Mimms* rationale and holding apply to a passenger?

In *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882 (1997), the Supreme Court decided that it does. Ordering a passenger to exit the vehicle did not appear to be part of the officer's mission, so, as before, the *Wilson* Court struck the same balance described in *Brignoni-Ponce*. In doing so, it recalled how it weighed the public's interest and the driver's personal liberty in *Mimms*:

> On the public interest side of the balance, we noted that the State "freely concede[d]" that there had been nothing unusual or suspicious to justify ordering Mimms out of the car, but that it was the officer's "practice to order all drivers [stopped in traffic stops] out of their vehicles as a matter of course" as a "precautionary measure" to protect the officer's safety. We thought it "too plain for argument" that this justification—officer safety—was "both legitimate and weighty."[19]
>
> On the other side of the balance, we considered the intrusion into the driver's liberty occasioned by the officer's ordering him out of the car. Noting that the driver's car was already validly stopped for a traffic infraction, we deemed the additional intrusion of asking him to step outside his car "*de minimis*." Accordingly, we concluded that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures."[20]

Id. at 412, 117 S. Ct. at 885 (first and second alterations in original) (citations omitted).

The *Wilson* Court next moved to the issue then before it: whether *Mimms*'s reasonableness holding applied to passengers as well as drivers. The Court struck a balance between the public's and the passenger's respective interests:

> On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger. Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71, 33 (1994). In the case of passengers, the danger of the officer's standing in the path of oncoming traffic would not be present except in the case of a passenger in the left rear seat, but the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.
>
> On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. at 413-14, 137 S. Ct. at 885-86 (footnotes omitted). On balance, the *Wilson* Court concluded that the public's interest in officer safety had greater weight than the passenger's personal liberty. As the Court summarized:

> [D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.

Id. at 414-15, 137 S. Ct. at 886.

So, in the case at hand, Deputy Dunn could ask Johnson to step out of the vehicle during the vehicular stop.

III.

The District Court's answer to the first question this appeal presents was that the Fourth Amendment precluded Deputy Dunn from requesting Johnson to identify himself because Dunn had no reason to suspect that Johnson had, was, or was likely to commit a criminal offense. Stated another way, Johnson had a Fourth Amendment right to refuse Dunn's request.

Paraphrasing what the Supreme Court said in *Brendlin*, Johnson was seized just as the driver was from the moment the vehicle in which they were riding came to a halt on the side of the road. Under Florida law, all the vehicle's occupants would be asked to identify themselves. The driver would be asked to produce his license and vehicle registration as part of Dunn's mission to investigate the traffic violation. Assume for the sake of discussion that asking Johnson to identify himself was not part of Dunn's mission to investigate the violation; rather it was an additional intrusion into Johnson's liberty.

Mimms and *Wilson* instruct on how to determine whether the additional intrusion amounted to an unreasonable search under the Fourth Amendment. We engage in *Brignoni-Ponce* balancing. In the setting here, we weigh the additional intrusion into the passenger's liberty against the public's interest in protecting officer safety. In Florida, a passenger, like the vehicle's driver, expects to be asked for identification. It is a precautionary measure to protect officer safety. In *Mimms*, it was the officer's practice, not a state law, to order all drivers stopped for traffic violations to exit the vehicle as a " 'precautionary measure' to protect the officer's safety." *Wilson*, 519 U.S. at 412 (citation omitted). That this practice weighed heavily on the public side of the *Brignoni-Ponce* scales was "too plain for argument." *Id.* The practice's purpose, officer safety, was "both legitimate and weighty." *Id.*

The protection of officer safety was legitimate and weighty when Dunn asked Johnson to identify himself. Johnson was unaware of the state policy of requiring passengers in lawfully stopped vehicles to identify themselves. Should that unawareness counter the weight given the public's interest in officer safety? At best for Johnson, it's an open question.

The District Court's answer to the second question this appeal presents was that Supreme Court precedent clearly established that Deputy Dunn violated Johnson's Fourth Amendment right not to be subjected to an unreasonable seizure in requiring Johnson to identify himself. We disagree. Supreme Court precedent—in particular, the decisions the District Court relied on—did not clearly establish as a matter of Fourth Amendment law that an officer cannot ask a passenger to identify himself unless the officer has this reason-

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able suspicion or reason to believe that the passenger poses a risk to his safety. Therefore, Dunn is entitled to the dismissal of Johnson's Fourth Amendment claim under the doctrine of qualified immunity.

IV.

The District Court concluded that Deputy Dunn lacked arguable probable cause to arrest Johnson for violating § 843.02 because Johnson had a Fourth Amendment right to refuse to identify himself when Dunn asked him to. The District Court erred. We doubt that the Florida Supreme Court would hold that a passenger is free to resist an officer's request for identification in the setting this case presents. At the very least, it is arguable that the Court would uphold the request and find the officer had at least arguable cause to arrest the passenger for resisting an officer without violence in violation of § 843.02.

V.

For the reasons we have expressed, the District Court's judgment denying Deputy Dunn's motion to dismiss pursuant to the doctrine of qualified immunity is

REVERSED.

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[1] *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) [22 Fla. L. Weekly Fed. C2131a] ("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.").

[2] We have jurisdiction to entertain this appeal under 28 U.S.C.§ 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.").

[3] The remaining nine counts of the amended complaint contain the following claims: Count II, against Nocco in his official capacity, alleging the constitutional claims asserted against Dunn in Count I; Count III, a common law claim against Nocco for negligence in training Dunn and others; Count IV, a common law claim against Nocco for negligence in supervising Dunn and others; Count V, a common law claim against Dunn for malicious prosecution; Count VI, a common law claim against Dunn for intentional infliction of emotional distress; Counts VII and VIII, common law claims against Dunn and Nocco respectively for battery; Counts IX and X, common law claims against Dunn and Nocco respectively for false imprisonment.

[4] Section 1983 (Civil action for deprivation of rights) states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress[.]

42 U.S.C. § 1983.

[5] *See* Fla. Stat. § 316.605(1) (Licensing of vehicles).

[6] Fla. Stat. § 843.02 (Resisting officer without violence to his or her person) states: "Whoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty . . . shall be guilty of a misdemeanor of the first degree."

As noted in the above text, Johnson was arrested on August 2, 2018. He moved the County Court for Pasco County to dismiss the § 843.02 charge, and on November 9, 2018, the County Court heard the motion and granted it. The State moved the Court for reconsideration, and the Court denied the motion on November 21, 2018. Johnson brought this lawsuit on June 15, 2020.

[7] The Fourth Amendment is applicable to the states and local government through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S. Ct. 1684, 1694 (1961).

[8] *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

[9] The second order, which is very brief, essentially adopted the first order's analysis regarding Count I's sufficiency.

[10] A government official sued under a theory of direct liability, may "seek to have the complaint dismissed on qualified immunity grounds prior to discovery, based solely on the allegations in the pleadings." *See Holloman ex. rel. Holloman v. Harland*, 370 F.3d 1252, 1263 n.6 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C593a].

> To . . . be potentially eligible for . . . judgment due to qualified immunity, the official must have been engaged in a "discretionary function" when he performed the acts of which the plaintiff complains. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (holding that qualified immunity extends to "government officials performing discretionary functions"). It is the burden of the governmental official to make this showing. *Storck v. City of Coral Springs*, 354 F.3d 1307, 1314 (2003) [17 Fla. L. Weekly Fed. C164a] ("Under qualified immunity analysis, *the public official* must first prove that he was acting within the scope of his discretionary authority when the allegedly unconstitutional acts took place." (emphasis added)).

Id. at 1263-64.

[11] Section 901.151(2), Florida's "Stop and Frisk Law," states in relevant part:

> Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.

Fla. Stat. § 901.151(2).

[12] This parenthetical followed the *Hiibel* citation: "an officer may not arrest an individual for failing to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop."

[13] This parenthetical followed the *Brown* citation: "law enforcement cannot stop and demand identification from individual without a specific basis for believing he is involved in criminal activity."

The Court cited other decisions in reaching it decision to deny Dunn's motion to dismiss, but *Hiibel* and *Brown* were the Court's principal authorities.

[14] The District Court added: "In 1982, the Florida Constitution was amended to provide that Florida courts would follow the United States Supreme Court's decisions in addressing search and seizure issues. *See Perez v. State*, 620 So. 2d 1256, 1258 (Fla. 1993).' " *State v. Jacoby*, 907 So. 2d 676, 680 (Fla. 2d DCA 2005) [42 Fla. L. Weekly D736a]."

[15] As noted, Dunn was aided by Deputies Ramos and Pini, who were with Dunn when he made the stop, and their supervisor.

[16] "[A]n officer making a [traffic] stop must have 'a particularized and objective basis for suspecting the person stopped of criminal activity.' Even minor traffic violations qualify as criminal activity." *United States v. Campbell*, 26 F.4th 860, 880 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C819a] (en banc) (quoting *Navarette v. California*, 572 U.S. 393, 396, 134 S. Ct. 1683, 1687 (2014) [24 Fla. L. Weekly Fed. S690a]) (other citations omitted), *cert. denied*, 143 S. Ct. 95, 214 L.Ed.2d 19 (2022).

[17] Count I of the amended complaint does not allege that Dunn's conduct measurably extended the duration of the stop.

[18] Deputy Pini ordered the vehicle's occupants to exit the vehicle so he and his dog could conduct a narcotics sniff. The question I pose in the above text is whether, before the narcotics sniff, Dunn could have ordered the driver to exit the vehicle while Dunn engaged in the inquiries called for by the stop.

[19] After making that statement, the *Mimms* Court added this regarding the public interest: "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." 434 U.S. at 110, 98 S. Ct. at 333 (quotation marks omitted) (quoting *Terry*, 392 U.S. at 23, 88 S. Ct. at 1881). "And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.*

[20] The *Mimms* Court added that requiring the driver to exit his vehicle was "not a 'serious intrusion upon the sanctity of the person[.]' " 434 U.S. at 111, 98 S. Ct. at 333 (quoting *Terry*, 392 U.S. at 17, 88 S. Ct. at 1877). According to the *Mimms* Court, "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Id.*

(BRANCH, Circuit Judge, Concurring.) To overcome a government official's invocation of the defense of qualified immunity, a plaintiff must show (1) that the official violated a constitutional right and (2) that the right was "clearly established" at the time of the official's purported misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) [21 Fla. L. Weekly Fed. S588a]. Notably, we may address the two prongs in any order. *Id.* at 236. I take the second prong first.

The majority concludes that *Brown v. Texas*, 443 U.S. 47 (1979), and *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004) [17 Fla. L. Weekly Fed. S406a], establish that Officer Dunn did not commit a constitutional violation when he required Johnson to provide identification during the traffic stop. The dissent, on the other hand, argues that binding Supreme Court precedent, including *Brown* and *Hiibel*, establishes that Officer Dunn did commit a constitutional violation when he required Johnson to provide identification. That the majority and the dissent vehemently debate the proper application of *Brown* and *Hiibel* to the particular facts of this case is an indication that the caselaw does not clearly establish that a constitutional violation occurred. *See District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) [27 Fla. L. Weekly Fed. S37a] (emphasizing that "existing precedent must place the lawfulness of the particular arrest 'beyond debate' " for a violation to be clearly established (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) [22 Fla. L. Weekly Fed. S1057a])).

The majority concludes that Johnson has

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failed to meet his burden on both prongs. But because Johnson has not satisfied the "clearly established" prong of the qualified immunity analysis, I stop here and conclude that Officer Dunn is entitled to qualified immunity and that we need not address the first prong. As such, I concur only in the judgment of the majority.

(WILSON, Circuit Judge, Dissenting.) Appellant James Dunn and other Pasco County police officers pulled over Appellee Marques Johnson's father for driving with an allegedly obscured license plate. The traffic stop was routine, and the interactions between Johnson's father and the officers were amicable. Officer Dunn demanded that Johnson—who was quietly sitting in the passenger seat of his father's car—identify himself. Johnson calmly stated that he was not the subject of the investigation and declined to provide his identification. So, Officer Dunn arrested him.

The Supreme Court has consistently held that law enforcement officers cannot require, by threat of arrest, that an individual identify himself absent reasonable suspicion of wrongdoing, and to this day, the Court has not qualified this basic principle. Because the majority attempts to manufacture a new exception to this important constitutional protection, I respectfully dissent.

I would affirm the well-reasoned decision of the district court denying Officer Dunn's motion to dismiss.

I.

On August 2, 2018, Johnson and another person were passengers in a motor vehicle driven by Johnson's father in Pasco County, Florida. Officer Dunn stopped the vehicle, which was towing a motorcycle on a trailer, on the basis that the car's license plate was obscured from view. Officer Dunn arrived with Officers Ramos and Pini and a film crew from the A&E television show "Live PD."[1]

Officer Dunn approached the passenger side of the vehicle and requested the driver's information. He then asked Johnson if he had his "ID on him too." Johnson responded that he was not required to identify himself, being merely a passenger and not the subject of the investigation. Officer Dunn responded that Florida law required Johnson to identify himself and that he, Officer Dunn, would pull Johnson from the vehicle and arrest him for resisting an officer if he did not identify himself. Officer Ramos repeated that Johnson must identify himself. Officer Ramos then stated to Johnson's father, "Listen, you can tell us who he is. We can do it that way." Johnson's father, who had already provided his own identification, then identified Johnson as his son and provided Johnson's name to both Officers Dunn and Ramos. Officer Pini then approached, and Officer Dunn stated to him, "He didn't want to give me his ID and all that, but his dad gave him up."

After making a brief trip to the police car to enter information into his computer, Officer Dunn returned and asked Officer Pini to have his police dog conduct a drug sniff of the car. Officers Dunn and Pini agreed they would ask Johnson to exit the car and would forcefully pull him out if he did not exit voluntarily. Officer Pini then told Johnson and the other vehicle occupants that his dog would be conducting a narcotics sniff of the vehicle and ordered Johnson to exit. As Johnson was exiting the vehicle, Officer Dunn stated to Officer Pini that "I am going to take him in no matter what because he's resisting me." Officer Dunn then placed Johnson in handcuffs. After placing him in handcuffs, Officer Dunn grabbed Johnson's pinky finger and twisted it away from the rest of his hand to force him to release his wallet. After Johnson asked why he was being arrested, Officer Dunn responded that it was because Johnson did not give his name when it was demanded, and therefore, he was resisting. While Johnson was seated in Officer Dunn's police vehicle, Officer Dunn entered Johnson's information into the computer.

At this time, Officer Ramos was speaking to Johnson's father and the other passenger, while Officer Pini searched the vehicle. Johnson's father again provided Johnson's information to Officer Ramos, even confirming the spelling of Johnson's first name and providing Johnson's date of birth.

Officer Ramos then went to Officer Dunn to provide him with this information, but Officer Dunn responded, "Oh, I got it. I got his ID out of his wallet." Officer Dunn then explained to Johnson's father that he was taking Johnson to jail because Florida law mandated that "all occupants of the vehicle are required to . . . identify themselves, they don't have to physically produce an identification, but they got to at least ID themselves and we got to be able to ID who is in the car . . . [s]o with him doing that, its obstruction . . . ." He then stated, ". . . if anyone prevents me from doing my job, I am going to take them to jail. I understand he is trying to exercise his rights there and everything, but we also have rights to do our job." Officer Pini did not find any drugs in the car.

Johnson was taken to the Pasco County Jail and charged with a violation of Florida Statute § 843.02, Resisting Officer Without Violence to His or Her Person. The charges against Johnson were dismissed.

Johnson sued Officer Dunn in his individual capacity, and Sheriff Chris Nocco in his official capacity, in federal district court for alleged constitutional and state law violations. The defendant officers moved to dismiss. In response to Johnson's constitutional claim—False Arrest in violation of the Fourth Amendment—the officers argued they were entitled to qualified immunity. The district court granted the motion in part and denied it in part. Relevant here, the district court rejected Officer Dunn's qualified immunity defense because Johnson had a legal right to refuse to provide his identification; therefore, Officer Dunn had neither actual nor arguable probable cause to arrest Johnson based on law that was clearly established at the time of the arrest. Officer Dunn appealed the denial of qualified immunity.

II.

Officer Dunn challenges the district court's denial of qualified immunity for Johnson's § 1983 false arrest claim. Qualified immunity protects municipal officers from liability in § 1983 actions if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Establishing a qualified immunity claim engages the parties in a burden-shifting test. *See Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1630a]. Under this test, the officer must first demonstrate that he acted "within his discretionary authority." *Id.* Once the officer has established this, the plaintiff must "show that qualified immunity should not apply." *Id.* At this point, we utilize a two-prong framework, asking 1) whether the officer's conduct "amounted to a constitutional violation," and 2) whether the right was "clearly established" at the time of the violation. *T.R. ex rel. Brock v. Lamar Cnty. Bd. of Educ.*, 25 F.4th 877, 882-83 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C794a].

Officer Dunn arrested Johnson for violating Florida Statute § 843.02, which states that "[w]hoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree." There is no dispute that Officer Dunn was acting within his discretionary authority at the time of the arrest. So, for Johnson's claim to overcome Officer Dunn's defense of qualified immunity, Johnson must first show that Officer Dunn lacked probable cause to make the arrest—a constitutional violation—by showing either 1) that Officer Dunn was not engaged in "the lawful execution of any legal duty" when he required Johnson to reveal his identity, or 2) that he, Johnson, was not "resist[ing], obstruct[ing], or oppos[ing] any officer" under our interpretation of § 843.02. Then, Johnson must demonstrate that at least one of these foundations for a constitutional violation was clearly established at the time of the incident, such that Officer Dunn would not have even arguable probable cause to make the arrest. If Johnson makes either of these showings, Officer Dunn is not entitled to qualified immunity.

I would conclude that Officer Dunn lacked probable cause to arrest Johnson for two reasons. First, because the Supreme Court has time and again held that law enforcement officers cannot require identification from citizens without reasonable suspicion of wrongdoing, and they certainly cannot arrest those citizens unsuspected of wrongdoing for declining to disclose their identities, Officer Dunn was not engaged "in the lawful execution of any legal duty" when he arrested Johnson. The majority seems to recognize this principle but concludes that officers' understandable anxiety about not knowing the names of everyone in a vehicle at a traffic stop justifies a new traffic-stop-safety exception to this constitutional safeguard. Because the Supreme Court has never carved out this deep of an exception, neither should we. Second, Johnson did not "resist, obstruct, or oppose" Officer Dunn under this court's interpretation of Florida Statute § 843.02. For these reasons, I would conclude that John-

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son's arrest lacked probable cause and thus violated the Fourth Amendment's protections. Further, because the Supreme Court precedents that establish these principles date back decades, I would hold that, at the time of Johnson's arrest, it was clearly established that Officer Dunn's conduct amounted to a constitutional violation. I will address each of these points in turn.

Before I do, though, I will pause to make a couple brief notes. There is no question that our nation's law enforcement officers must frequently perform difficult, dangerous, and often thankless tasks in the service of their communities. The risks borne by officers is often underappreciated, and I doubt many officers who stumble over the constitutional line while confronting the undeniable stresses of their sworn duties do so with any malicious intent. Yet even mistakes that carry well-meaning officers over the line are nonetheless constitutional violations. I hold nothing but the utmost respect for my colleagues in the majority for their well-articulated positions on this matter. But, because I believe a citizen's clearly established constitutional right was violated in this case, I believe the district judge got it right, and I must therefore dissent. Now, I will explain why.

III.

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Our analysis of whether a citizen's Fourth Amendment rights were violated under a particular set of facts considers "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

Whether an arrest meets the "reasonableness" requirement of the Fourth Amendment depends on "the presence or absence of probable cause for the arrest." *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C579a]. "[P]robable cause exists when the facts, considering the totality of the circumstances and viewed from the perspective of a reasonable officer, establish 'a probability or substantial chance of criminal activity.' " *Washington v. Howard*, 25 F.4th 891, 898-99 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C786a] (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) [27 Fla. L. Weekly Fed. S37a]).

Determining whether Officer Dunn's conduct amounted to a constitutional violation requires this court to decide whether an officer may compel a passenger at a lawful, routine traffic stop to identify himself—absent reasonable suspicion that the passenger was engaged in any criminality, and absent any extraordinary safety concerns. In addition, this court must consider whether the mere refusal to provide one's name to police officers while they investigate the conduct of another amounts to "resistance" or "obstruction" under Florida Statute § 843.02. Guided by precedent, I would answer both inquiries in the negative. Consequently, I would hold that Officer Dunn's arrest of Johnson lacked probable cause and constituted an unreasonable search and seizure in violation of the Fourth Amendment's protections.

A. Lawful Execution of Any Legal Duty

Officer Dunn arrested Johnson for declining to provide his name as a passenger at a routine traffic stop. For Officer Dunn to have probable cause to make this arrest under Florida Statute § 843.02, he must have been engaged in the "lawful execution of any legal duty" when he required Johnson to disclose his identity. The question, then, is whether it was lawful for Officer Dunn, absent any reasonable suspicion that Johnson had engaged in wrongdoing, to require Johnson to identify himself.

For Officer Dunn's requirement to be lawful, it must be consistent with the Fourth Amendment's command that government intrusions into privacy be reasonable under the circumstances. *See Grady v. North Carolina*, 575 U.S. 306, 310 (2015) [25 Fla. L. Weekly Fed. S181a] (per curiam) ("The Fourth Amendment prohibits only *unreasonable* searches."). An intrusion is generally reasonable if the government interest in conducting the search outweighs the private citizen's interest in remaining free from arbitrary government interference. *See Terry*, 392 U.S. at 20-21; *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) [17 Fla. L. Weekly Fed. S89a] ("[I]n judging reasonableness, we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' " (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979))).

For the government interest side of the scale to carry any weight, however, we must find both that the officer's "action was justified at its inception, and [that] it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* 392 U.S. at 20. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

I restate the facts of the stop as relevant to this point. Officer Dunn pulled over the vehicle carrying Johnson because the car's license plate was obscured by an attached trailer. Johnson's father operated the vehicle, while Johnson rode as a passenger in the front seat. Consistent with the scope of the investigation into the license plate, Officer Dunn requested identifying information from Johnson's father, who quickly complied. Then, despite *not suspecting Johnson of any connection to the license plate or any other criminal activity*, Officer Dunn required Johnson to disclose his identity as well. Johnson, citing his constitutional rights and the fact that he was only a passenger in the vehicle, declined to do so. Officer Ramos then told Johnson's father that they could obtain Johnson's information from him instead, and Johnson's father subsequently identified his son. So, within one minute of Johnson's initial refusal to reveal his identity, the officers acquired the information they sought. Nonetheless, Officer Dunn arrested Johnson for resisting an officer without violence.

In my view, this arrest ran afoul of the Fourth Amendment's protections. As caselaw from the Supreme Court and this circuit makes clear, a police officer may not arrest individuals for declining to provide their names absent any reasonable suspicion of wrongdoing.

In *Brown v. Texas*, police officers detained and arrested a pedestrian for violating a Texas law requiring a lawfully detained individual to provide his name and address to an officer who requests the information. 443 U.S. at 49. But there, the Supreme Court held that the arrest violated the Fourth Amendment "because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct." *Id.* at 52-53. Rejecting the State's justification that the statute advanced the social objective of "prevention of crime," the Court stated that "even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Id.* at 52. As the Court noted, "[in] the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Id.* Although *Brown* involved a plaintiff who was detained outside of a vehicle, the Court conducted the same *Terry* Fourth Amendment analysis relevant here. *See id.* at 50-51. This is because the Fourth Amendment "applies to all seizures of the person . . . [and] [w]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 50 (internal citations and quotations omitted). Thus, as far back as 1979, the Supreme Court made clear that officers may not detain individuals and require them to identify themselves absent reasonable suspicion of criminal conduct. *See id.* at 52.

Twenty-five years later, in *Hiibel v. Sixth Judicial District Court of Nevada*, investigating officers received a report that a man had assaulted a woman in a red and silver GMC truck at a specific location. 542 U.S. 177, 180 (2004) [17 Fla. L. Weekly Fed. S406a]. Police officers drove to that location, spotted the truck, approached the suspect, and asked for the suspect's identification in order to further their investigation. *Id.* at 180-81. The suspect refused to identify himself after being asked eleven times, so the officers arrested him for violating Nevada's "stop and identify" statute. *Id.* This time, the Court dismissed the petitioner's Fourth Amendment claims because "there [was] no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown*." *Id.* at 184. The Court determined that *suspects* may be required to identify themselves at *Terry* stops. *See id.* at 186 ("Our decisions make clear that questions concerning a *suspect's* identity are a routine and accepted part of many *Terry* stops." (emphasis added)); *see also id.* at 187-88 ("The principles of *Terry* permit a State to require a *suspect* to disclose his name in the course of a *Terry* stop. . . . The request for [the suspect's] identity has an immediate relation to the purpose,

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rationale, and practical demands of a *Terry* stop." (emphasis added)). But the Court also reaffirmed and reemphasized the principle that "an officer may not arrest a *suspect* for failure to identify himself if the request for identification is *not reasonably related* to the circumstances justifying the stop." *Id.* at 188 (emphases added).

Here, police officers stopped a vehicle driven by Johnson's father due to an allegedly obscured license plate. Unlike the petitioner in *Hiibel*, Johnson—a passenger in the vehicle—was not the "suspect" of any alleged crime, and his identity bore no relation to the allegedly obscured license plate that justified stopping his father's car in the first place. Much more like the petitioner in *Brown*, the officers possessed no reasonable suspicion to believe Johnson had engaged in any criminal conduct when they required him to reveal his identity. *See* 443 U.S. at 52-53. Without this requisite suspicion, however, the officers could not, consistent with the Fourth Amendment, require identification from Johnson. *See id.*[2] Although requiring the name of a passenger may seem like an insignificant procedural matter, I think it obvious that the government has no interest in taking any step, however slight, beyond the bounds of the Constitution.

By my reading of the caselaw, it was not lawful for Officer Dunn *to require* the disclosure of Johnson's identity absent reasonable suspicion of wrongdoing. Consequently, Officer Dunn was not engaged "in the lawful execution of [a] legal duty" under Florida Statute § 843.02 and lacked probable cause to arrest Johnson. The arrest, therefore, violated Johnson's constitutional rights.

B. Officer Safety

Notwithstanding *Terry*'s holding that a seizure must be "justified at its inception" and any subsequent search must be "reasonably related in scope to the circumstances" that justified the initial interference, 392 U.S. at 20, Officer Dunn asks this court to hold that a deputy can constitutionally command *passengers* at traffic stops to reveal their identities—even absent reasonable suspicion of wrongdoing—and arrest those who fail to comply. While this proposition seems to fly in the face of *Brown* and *Hiibel*, Officer Dunn argues that general traffic-stop safety concerns make such an intrusion into the liberties of vehicle passengers reasonable, even if those passengers have done nothing specific to warrant such an intrusion. In making this argument, Officer Dunn does not articulate any specific safety concerns the passengers presented during this routine traffic stop. Rather, Officer Dunn argues that a generalized concern that officers may not know "who a passenger might be and whether that passenger has a warrant out for his arrest or might otherwise present a safety risk" justifies a broad rule that officers may require identification from passengers at every traffic stop. Initial Brief of Defendant/Appellant James Dunn at 8, Johnson v. Dunn, No. 21-10670 (11th Cir. filed July 19, 2021). After reviewing the Supreme Court's precedents on this issue, I disagree.

I start with the basic rule that "[a] seizure for a traffic violation justifies a police investigation *of that violation*." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) [25 Fla. L. Weekly Fed. S191a] (emphasis added). During a traffic stop, police officers' "mission" is "to address the traffic violation that warranted the stop and attend to *related* safety concerns." *Id.* (emphasis added) (citation omitted). It must be remembered, though, that "the government's officer safety interest stems from the mission of the stop itself." *Id.* at 356. So, while traffic stops indeed pose unique risks to police officers, and those risks in turn may justify "negligibly burdensome precautions," those precautions may not "detour[ ]" from the officers' mission. *Id.*

To be sure, the Supreme Court has identified specific safety risks unique to traffic stops and related to officers' missions that warrant additional, targeted intrusions into vehicle occupants' liberties regardless of reasonable suspicion. Yet—as I discuss below—the specific dangers cited by the Court are not lessened to any significant degree by knowing the names of passengers entirely unsuspected of wrongdoing.

The majority highlights those same unique dangers to argue in favor of creating a broad rule that would allow police officers to extract the names of passengers at any traffic stop, regardless of reasonable suspicion. The majority cites principally to two cases: *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) and *Maryland v. Wilson*, 519 U.S. 408 (1997). Yet, by my reading, those cases do not support the proposition that requiring the names of passengers unsuspected of wrongdoing during a routine traffic stop is part of the officers' lawful mission or, at most, a *de minimis* additional intrusion. Rather, in my opinion, those cases stand for the principle that specific risks unique to traffic stops make it reasonable for officers to exercise temporary physical control over drivers and passengers.

In *Mimms*, the Court held that officers may require the *driver* of a vehicle reasonably stopped for a traffic violation to step out of the automobile. 434 U.S. at 111. To reach this conclusion, the Court balanced the public interest proffered by the State—police officer safety—with an individual's right to be free from arbitrary government interference. *Id.* at 109. The Court found "too plain for argument" the State's safety justification, citing 1) the danger that officers may face dealing with an individual whose movements may be obscured while inside a vehicle, and 2) the hazard created by passing traffic while an officer stands on the driver's side of an automobile. *Id.* at 110-11. "Against this important interest," the Court considered a request to get out of a vehicle to be a *de minimis* intrusion because "[t]he driver is being asked to expose to view very little more of his person than is already exposed" and "[t]he police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." *Id.* at 111.

In *Wilson*, the Supreme Court extended its reasoning in *Mimms* to hold that law enforcement may also require *passengers* to get out of a vehicle during a traffic stop. 519 U.S. at 415. This time, the Court weighed the public interest in officer safety against the personal liberties of passengers. *See id.* at 413-14. The Court found that while the danger posed by oncoming traffic is reduced on the passenger-side of the vehicle, "the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver," and therefore, it is reasonable to require passengers *to step outside of a vehicle* where they "will be *denied access to any possible weapon* that might be concealed in the interior of the passenger compartment." *Id.* at 414 (emphases added). Indeed, it is this risk of "sudden violence or frantic efforts to conceal or destroy evidence" that counsels officers to "routinely exercise unquestioned command of the situation." *Id.* (quoting *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981)). This situational command is achieved by briefly controlling the physical movements of vehicle occupants. Considering the personal liberty side of the scale again, the Court noted that although there is no probable cause to believe the passengers committed a vehicular offense, like in *Mimms*, the only practical difference for passengers "is that they will be outside of, rather than inside of, the stopped car." *Id.* On balance, then, the Court found that requiring passengers to step out of an automobile during a traffic stop is reasonable under the circumstances. *See id.* at 415.

Both *Mimms* and *Wilson* dealt with a specific risk inherent in traffic stops: the possibility of vehicle occupants accessing the means with which to do violence. The solution—permitting officers to require vehicle occupants to step outside of the automobile—directly targeted that specific risk by physically moving occupants away from any concealed weapons. Here, however, there is a misalignment between the specific risk identified in *Mimms* and *Wilson* and Officer Dunn's actions. Indeed, it is unclear how knowing the name of a passenger who is not suspected of any wrongdoing would significantly help to prevent that passenger from reaching concealed weapons and committing acts of violence. *See Mimms*, 434 U.S. at 110 (citing a report on officer shootings to support the Court's recognition of the "inordinate risk confronting an officer as he approaches a person seated in an automobile").[3] To the degree that knowing the names of each vehicle occupant does address the specific risk identified in *Mimms* and *Wilson*, it does so in a way far more indirect—far more like a proscribed "detour"—than the method endorsed in *Mimms* and *Wilson*.[4]

And I must still balance the government interest in taking this detour against considerations of individual liberties. Again, the liberty interest at stake here is quite different from the one addressed in *Mimms* and *Wilson*. Unlike being asked to expose a little more of one's body during a traffic stop, having to disclose one's identity is a much greater (and permanent) additional intrusion into privacy. The question in a case like Johnson's is not simply whether a passenger would spend a brief traffic stop inside or outside of a car, but whether a passenger would be forced to reveal to law enforcement his identity (and everything attendant to it). While the latter intrusion may only seem slight—or *de minimis*—its

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constitutional significance is highlighted by those cases that require officers to have reasonable suspicion of criminality before being able to require that information. *See Brown*, 443 U.S. at 52; *Hiibel*, 542 U.S. at 187-88; *Bostick*, 501 U.S. at 437. Given the minimal degree to which extracting the names of passengers unsuspected of wrongdoing addresses the risks identified in *Mimms* and *Wilson*, I would find that "the balance between the public interest and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown*, 443 U.S. at 52.

Because the rule proposed by Officer Dunn bears little relation to those dangers specifically identified in *Mimms* and *Wilson*, I am left only to consider the separate risk that Officer Dunn identified: not knowing every individual in the vehicle, their criminal record, or their proclivity for violence. This risk—not knowing everyone in a group while investigating the conduct of an individual—is not unique to a traffic-stop setting. Rather, it arises any time police officers deal with a single person in a gathering, and the Supreme Court has yet to identify any situation in which law enforcement may require individuals unsuspected of wrongdoing to disclose their identities. Thus far, the Court has only crafted a narrow, per se rule permitting additional intrusions *without reasonable suspicion* at traffic stops in order to address dangers that are inherent and unique to traffic stops. *See Wilson*, 519 U.S. at 414-15.

When police officers conducting traffic stops are faced with legitimate safety concerns and want to do anything more than have vehicle occupants step outside of the automobile, the Supreme Court generally requires something more to be shown in order to justify the additional intrusions into privacy. This "something more" may either be reasonable suspicion that a safety risk in fact exists or the development of a hazardous situation. In *Knowles v. Iowa*, the Court identified a number of precautionary steps that officers may take to protect themselves during traffic stops. 525 U.S. 113, 117-18 (1998). These steps include requiring drivers and passengers to step out of a vehicle, *id.* at 118 (citing *Mimms*, 434 U.S. at 111 and *Wilson*, 519 U.S. at 414, respectively); patting down drivers and passengers for concealed weapons "upon reasonable suspicion that they may be armed and dangerous," *id.* (citing *Terry*, 392 U.S. at 29-30); and searching the passenger compartment of a vehicle for weapons "upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon," *id.* (citing *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). *Arizona v. Gant* also grants officers the ability to search a vehicle's passenger compartment "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " 556 U.S. 332, 343 (2009) [21 Fla. L. Weekly Fed. S781a] (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) [17 Fla. L. Weekly Fed. S320a] (Scalia, J., concurring in judgment)).[5]

Importantly, these additional intrusions are specifically designed to physically separate vehicle occupants from weapons. And just as important for this case, out of this procedural toolkit, only the minimally invasive step of having vehicle occupants briefly step outside can be justified by general traffic stop safety concerns. That is, *Knowles* demonstrates that officers may, as a starting point to protect their safety, require occupants to step out of a vehicle at traffic stops. But if they wany to intrude any further, they need either reasonable suspicion or some extraordinary safety concern. *See Knowles*, 525 U.S. at 117-18 (noting that while officers may order the driver and passengers out of the car, they may only conduct pat-downs of individuals or search compartments "upon reasonable suspicion"). Here, neither were present.

In my view, the precedents established by the Supreme Court require this panel to reject Officer Dunn's invitation to create a new, broad rule granting police officers authority to extract the names of any vehicle passenger at any traffic stop, regardless of whether reasonable suspicion is present.

This is not to say, however, that officer safety concerns can never justify police requiring identification from passengers at traffic stops in the absence of reasonable suspicion. The record in this case does not require me to consider that question today. With regard to officer safety, all I would hold is that the safety concern alleged by Officer Dunn—the general risk arising from not knowing the names of every vehicle occupant at a routine traffic stop—does not justify the additional intrusion of compelling a passenger unsuspected of wrongdoing to disclose his identity to the government.

In my opinion, Officer Dunn's requirement that Johnson identify himself was not made lawful through reasonable suspicion or officer-safety concerns, and therefore, Johnson committed no crime by refusing to comply. As a result, there was no probable cause to believe that Johnson had violated Florida Statute § 843.02.

C. Resist, Obstruct, or Oppose

As a refresher, the statute under which Johnson was arrested makes it a crime to "resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer." Fla. Stat. § 843.02. Above, I addressed the question of whether, in my view, Officer Dunn was engaged in the "lawful execution of any legal duty," and answered in the negative. Here, I address the additional question of whether a person's nonviolent refusal to comply with an (unlawful) demand to disclose his identity can constitute resistance or obstruction of a nearby investigation unrelated to that demand. I would conclude that it cannot. Reviewing our caselaw, it is clear to me that "mere words" do not constitute obstruction under Florida Statute § 843.02. Accordingly, for this reason too, Johnson's arrest lacked probable cause and thus violated the protections guaranteed by our Constitution.

For years, we have recognized that verbal interruptions and inquiries as to an officer's purpose cannot, on their own, justify probable cause for an arrest under Florida Statute § 843.02. *See Davis v. Williams*, 451 F.3d 759, 767 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C640a]. We have also previously held that " 'mere words' would not suffice to provide probable cause for resisting without violence." *Alston v. Swarbrick*, 954 F.3d 1312, 1319 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C989a]. In doing so, we found that a defendant officer lacked probable cause for making an arrest under § 843.02 where the arrestee "merely declined to cooperate or provide useful information" concerning an officer's investigation into someone else. *Id.*

Officer Dunn required Johnson's identification while investigating an obscured license plate on a vehicle driven by Johnson's father. In response, Johnson simply stated—correctly, in my view—that he was only a passenger in the vehicle and was therefore not required to provide his name. Although Officer Ramos requested and quickly received Johnson's identifying information from Johnson's father, and although Officer Dunn later confirmed with his fellow officers that he had verified this information as true and accurate, Officer Dunn nonetheless arrested Johnson for obstructing an officer without violence. But absent some hinderance beyond mere words, Officer Dunn lacked probable cause to make this arrest under our interpretation of § 843.02.[6] Because Officer Dunn lacked probable cause, his arrest of Johnson violated Johnson's constitutional rights.

IV.

Having concluded that Officer Dunn violated Johnson's constitutional rights by arresting him under Florida Statute § 843.02 without probable cause, I now consider whether Johnson's rights in this situation were clearly established. *See Corbitt v. Vickers*, 929 F.3d 1304, 1311 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C2166b]. "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) [27 Fla. L. Weekly Fed. S37a] (internal quotation marks omitted).

> A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.

D.H. ex rel. Dawson v. Clayton Cnty. Sch. Dist., 830 F.3d 1306, 1318 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C581a].

Law enforcement officers can marshal a successful qualified immunity defense if they can show that they had "arguable probable cause" to effectuate an arrest. *Hardigree v. Lofton*, 992 F.3d 1216, 1225 (11th Cir. 2021) [28 Fla. L. Weekly Fed. C2619a]. "Arguable probable cause exists if 'reasonable officers in the same circumstances

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and possessing the same knowledge as the Defendants could have believed that probable cause existed.' " *Id.* (quoting *Swint v. City of Wadley*, 51 F.3d 988, 996 (11th Cir. 1995)). This determination "depends on the elements of the alleged crime and the operative facts." *Id.* at 1230. Here, if Johnson's rights were not "clearly established," then Officer Dunn had arguable probable cause to make the arrest.

In my opinion, it was clearly established that Officer Dunn's arrest of Johnson under Florida Statute § 843.02 violated Johnson's Fourth Amendment rights. At the time of Johnson's arrest, a string of controlling cases made clear that police officers may not require identification absent reasonable suspicion of criminality and that "mere words" do not constitute obstruction of officers performing their legal duties under § 843.02. Further, there was no reason to believe that concerns about officer safety at a routine traffic stop would justify requiring passengers unsuspected of wrongdoing to disclose their identities. On these three bases, I would find that "a broader, clearly established principle . . . control[s] the novel facts," making it apparent "in the light of pre-existing law" that Officer Dunn's actions were unlawful. *See Corbitt*, 929 F.3d at 1312.

A. Lawful Execution of Any Legal Duty

The first basis on which I would find Johnson's arrest unconstitutional is that Officer Dunn lacked reasonable suspicion of wrongdoing when he required Johnson to disclose his identity. Supreme Court precedent has consistently required an officer to have a reasonable and articulable suspicion that an individual is involved in criminal activity before requiring identification.

This principle has long been clearly established. First, that traffic stops are subject to the same rules as *Terry* stops has been clearly established since at least 1984. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop,' than to a formal arrest." (internal citation omitted)). Second, under *Terry*'s progeny—*Brown* and *Hiibel*—it has been clearly established since at least 2004 (if not 1979) that a person cannot be arrested for refusing to identify themselves absent reasonable suspicion. *See Hiibel*, 542 U.S. at 188 (approving compulsory identification only "in the course of a valid *Terry* stop" and emphasizing that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop") (2004); *Brown*, 443 U.S. at 51-53 (holding that officers could not require an individual who merely "looked suspicious" to identify himself absent "a reasonable suspicion that he was involved in criminal conduct") (1979). These decisions, handed down well before Johnson's arrest on August 2, 2018, set forth clearly established law that Johnson could not be arrested for refusing to identify himself where there was no reasonable suspicion that he had committed a crime.

Officer Dunn pushes back on this conclusion, arguing that *Brown* and *Hiibel* could not establish a guiding principle for officers in this particular situation because those cases did not deal with passengers in a lawfully stopped vehicle being asked to identify themselves. But our qualified immunity jurisprudence "does not require a case directly on point for a right to be clearly established." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8 (2021) [29 Fla. L. Weekly Fed. S25a] (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) [26 Fla. L. Weekly Fed. S409a] (per curiam)). A party cannot say that, because we have not yet considered a novel, context-specific exception to the general rule, that the rule itself is not clearly established in that context. But that is what the majority erroneously does here with little reasoning as to why.

B. Officer Safety

The second basis on which I would find Johnson's arrest unconstitutional is that general concerns for officer safety did not justify Officer Dunn's actions. The default rule is that officers must have reasonable suspicion of criminality to require individuals to identify themselves. *See Brown*, 443 U.S. at 51-52. However, recognizing the "legitimate and weighty" significance of officer safety and the specific risks to officers created by the unique circumstances of traffic stops, the Supreme Court has determined that it is constitutionally permissible for police officers conducting traffic stops to take certain precautions. *See Knowles*, 525 U.S. at 117-18.

Nevertheless, the Court has also noted that concerns for officer safety, even in the context of a traffic stop, do not render all additional intrusions into the privacy of vehicle occupants reasonable. Absent suspicion of wrongdoing, the Court has only permitted officers to take some control over passengers' physical movements in order to restrict their ability to do violence or destroy evidence. *See id.* at 117-18; *Wilson*, 519 U.S. at 414; *see also United States v. Lewis*, 674 F.3d 1298, 1306 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C859a] (noting in a case where two individuals in a group of four possessed firearms that "[c]ase precedent from both the Supreme Court and this Circuit has established that, for safety reasons, officers may, in some circumstances, briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop as to other related individuals"). Thus far, the Court has held that further intrusions require reasonable suspicion of wrongdoing or some heightened concern for officer safety. *See Knowles*, 525 U.S. at 117-18. Neither existed here, nor does Officer Dunn claim they did.

In short, although the Supreme Court has identified specific risks inherent in traffic stops and has crafted targeted procedural remedies to address them, the Court has not created the additional broad rule newly proposed by the majority. Instead, the Court has required more to be shown if officers want to justify anything beyond temporarily controlling the physical movements of passengers. So, I would find that at the time of Johnson's arrest, it was clear that the boundaries defining permissible police intrusions into passengers' privacy did not extend to cover Officer Dunn's conduct.

C. Resist, Obstruct, Oppose

The third basis on which I would find Johnson's arrest unconstitutional is that this court has found, as far back as "[June 2011] it was clearly established that . . . 'mere words' [do] not suffice to provide probable cause for resisting without violence" under Florida Statute § 843.02. *Alston*, 954 F.3d at 1319. We have also found that by 2011 it was clearly established that, absent some other form of obstruction, simply declining to cooperate or provide useful information cannot support even arguable probable cause for an arrest under § 843.02. *Id.* So here, in August 2018, Officer Dunn lacked even arguable probable cause to arrest Johnson under § 843.02 given that 1) the officers were investigating a traffic offense for which Johnson was not a suspect, 2) Johnson merely explained his rights and declined to provide his name, 3) Officer Ramos told Johnson's father that his identification of his son would suffice, and 4) Officer Dunn then quickly received and verified Johnson's information.

In my view, no "reasonable officer[ ] in the same circumstances and possessing the same knowledge as [Officer Dunn] could have believed that probable cause existed" for an arrest for obstructing an officer without violence where the detainee was not suspected of wrongdoing, simply declined to provide his name, was nonetheless quickly and truthfully identified, and was identified in a manner consistent with an officer's instructions. *Hardigree*, 992 F.3d at 1225. Therefore, I agree with the district court below that this arrest violated Johnson's clearly established Fourth Amendment rights.

V.

The Supreme Court has repeatedly held that reasonable suspicion of criminality is needed before police officers can require individuals to identify themselves. While the Court has found that safety concerns in the unique context of traffic stops justify officers taking certain precautions, it has not yet determined that those concerns warrant eschewing this well-established rule. Given the record in this case, I would decline to depart from that rule today. However, because the facts of this case do not necessitate it, I would go no further than to hold that in the context of a routine traffic stop, it is clear that general safety concerns do not justify officers requiring the names of passengers who are not suspected of any criminality. I would leave for another panel and a different record the question of whether safety concerns at traffic stops can ever reasonably justify such an intrusion. Further, I would hold that at the time of the arrest, it was clearly established that "mere words" do not constitute obstruction or resistance of an officer under Florida Statute § 843.02. Therefore, in my view, Officer Dunn lacked actual and arguable probable cause to arrest Johnson under § 843.02. This arrest, then, violated Johnson's clearly established Fourth Amendment rights.

Though sincerely appreciative of the risks faced by our law enforcement officers and of the views articulated by my colleagues in the major-

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ity, for the reasons above, I would affirm the decision of the district court.

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[1]The traffic stop was captured by the film crew, a video recording of which remains accessible at https://youtu.be/zXEXu640E1k.

[2]I note that Officer Dunn's conduct violated the Fourth Amendment because he *required* Johnson to disclose his identity. Contrary to the majority's contention, I recognize that it is abundantly clear that Officer Dunn was free to *request* Johnson's name. In *Florida v. Bostick*, the Supreme Court noted that "even when officers have no basis for suspecting a particular individual, they may generally *ask questions* of that individual." 501 U.S. 429, 434-35 (1991) (emphasis added). Police officers cross the constitutional line, however, when they "convey a message that compliance with their requests is required." *Id.* at 435. Indeed, the Court emphasized that absent reasonable suspicion of wrongdoing, it had "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437 (collecting cases). While *Bostick* did not involve a traditional traffic stop, it did involve questioning a passenger on a parked commercial bus, a situation that, largely, presents the same risks to officers at issue here. *See id.* at 431-32.

[3]My position would not leave police officers without any ability to take precautionary measures. If officers suspect that vehicle occupants are concealing weapons or might destroy evidence—or even if they do not—the Supreme Court has prescribed a solution: they may order everyone out of the vehicle. *See Wilson*, 519 U.S. at 415. As described in more detail below, officers have even more prophylactic tools at their disposal if they develop a reasonable suspicion that a safety risk in fact exists or if a hazardous situation arises.

[4]In *United States v. Landeros*, the Ninth Circuit rejected the idea that extending the length of a traffic stop to determine a passenger's name would enhance officer safety, noting that "knowing [the passenger's] name would not have made the officers any safer. Extending the stop, and thereby prolonging the officers' exposure to [the passenger], was, if anything, inversely related to officer safety." 913 F.3d 862, 868 (9th Cir. 2019) (quotation marks omitted). While I do not go so far here, I note that other circuits—though, only the Ninth explicitly contemplated officer safety concerns—have held that, absent reasonable suspicion of wrongdoing, officers may not rely on a passenger's mere failure to identify himself *at a traffic stop* as a justification for an arrest or a prolonged detention. *See id.* at 870 (finding that officers may not extend a traffic stop to demand a passenger's identity absent reasonable suspicion of criminality); *Corona v. Aguilar*, 959 F.3d 1278, 1283-85 (10th Cir. 2020) (holding that officers could not arrest a passenger for concealing his identity absent "a particularized and objective basis for suspecting Plaintiff had committed any offense or was engaging in criminal activity"); *Johnson v. Thibodaux City*, 887 F.3d 726, 734 (5th Cir. 2018) (concluding that officers could not continue the detention of a passenger unsuspected of wrongdoing "solely to obtain identification").

[5]*Knowles* originally cited *New York v. Belton*, 453 U.S. 454, 460 (1981) for the proposition that officers may conduct a full search of a vehicle and "containers therein" incident to a custodial arrest. 525 U.S. at 118. *Belton*, however, was effectively abrogated by *Gant*. *See* 556 U.S. at 343-44; *see also Davis v. United States*, 564 U.S. 229, 234-35 (2011) [22 Fla. L. Weekly Fed. S1144a] (recognizing the abrogation).

[6]Beyond declining to provide his name, nothing in the record suggests that Johnson did anything to obstruct the officers' investigation into the license plate and their later fruitless drug search. *See Alston*, 954 F.3d at 1319 (noting that that probable cause for an arrest under § 843.02 does not exist when someone "merely decline[s] to cooperate or provide useful information" and does not "physically obstruct [an officer's] path or otherwise prevent him from conducting his investigation as to [another person]").

* * *

Civil rights—Contracts—Public employees—Former superintendent of schools filed Section 1983 action against city board of education and board members asserting claims for denial of due process, conspiracy to deprive plaintiff of due process rights, and breach of contract—Due process—Plaintiff alleged, at minimum, a plausible claim for deprivation of procedural due process by alleging that her contract with board provided that she could only be terminated for cause and that her termination would not be effective until board provided her with statement of cause for termination and allowed her opportunity for hearing; that she did not voluntarily resign; that board terminated her without giving her statement of cause or opportunity to be heard before terminating her employment; and that there were no exigent circumstances necessitating lack of predeprivation process—Conspiracy—Complaint lacks necessary factual allegations to establish a conspiracy claim where there is no allegation regarding how two or more board members acted in concert when terminating plaintiff's contract or that board members discriminated against her under class-based, invidiously discriminatory animus—Board's decision to terminate superintendent did not violate civil rights conspiracy statute—Sovereign immunity—District court properly dismissed breach of contract claims against board members in their official and individual capacities where sovereign immunity applied and plaintiff did not plausibly plead an exception to immunity—Under Alabama law, sovereign immunity barred plaintiff's breach of contract claims against board members in their official capacities, where plaintiff sought money damages and did not seek prospective relief—Board members, who were acting as agents of board to accomplish board's objectives when they voted to terminate superintendent's employment contract, could not be liable in their individual capacities for breach of superintendent's contract with the board—Under Alabama law, agents cannot be held liable for principal's breach of contract

PHYLLIS EDWARDS, Plaintiff-Appellant, v. DOTHAN CITY SCHOOLS, DOTHAN CITY BOARD OF EDUCATION, MICHAEL SCHMITZ, individually and in his official capacity as a member of the Dothan Board of Education, BRENDA GUILFORD, individually and in her official capacity as a member of the Dothan Board of Education, FRANKLIN JONES, individually and in his official capacity as a member of the Dothan Board of Education, SUSAN VIERKANDT, individually and in her official capacity as a member of the Dothan Board of Education, BRETT STRICKLAND, individually and in his official capacity as a member of the Dothan Board of Education, AMY BONDS, individually and in her official capacity as a member of the Dothan Board of Education, CHRIS MADDOX, individually and in his official capacity as a member of the Dothan Board of Education, Defendants-Appellees. 11th Circuit. Case No. 22-10858. October 4, 2023. Appeal from the U.S. District Court for the Middle District of Alabama (No. 1:21-cv-00248-ECM-JTA).

(Before WILSON, GRANT, and BRASHER, Circuit Judges.)

(WILSON, Circuit Judge.) Dr. Phyllis Edwards appeals the district court's dismissal of her wrongful termination suit against Dothan City Schools and Dothan City Board of Education (collectively, the Board), as well as Michael Shmitz, Brenda Guilford, Franklin Jones, Susan Vierkandt, Brett Strickland, Amy Bonds, and Chris Maddox (collectively, the Board members). Dr. Edwards alleged three claims: (1) denial of due process; (2) conspiracy to deprive her of her due process rights; and (3) breach of contract by the Board members in their official and individual capacities. After reviewing the record, and with the benefit of oral argument, we reverse the district court's denial of Dr. Edwards' due process claim and affirm the denial of the conspiracy and breach of contract claims.

I. Background

On January 16, 2018, Dr. Edwards was hired as the Superintendent of Dothan City Schools in Dothan, Alabama. Her employment contract term spanned from February 26, 2018, until June 30, 2023. The employment contract stated Dr. Edwards could only be terminated for cause. Furthermore, the contract stated that the termination would not be effective until the Board provided Dr. Edwards with a statement of the cause for termination and allowed her an opportunity for a hearing. Lastly, the employment contract provided that Dr. Edwards could resign with or without cause as long as she gave at least 120 days' notice in writing of her resignation to the Board.

During Dr. Edwards' term of employment, she claims she experienced various interpersonal difficulties with the Board. The complaint alleges Dr. Edwards fielded criticism and accusations by Board members outside of official Board meetings. Due in large part to this treatment, Dr. Edwards emailed her "intent to resign" to the Board on September 8, 2020. Her letter states: "I intend to tender my resignation to the Dothan City School Board. Please let me know who I should deal with to iron out the details." The complaint alleges that, because this was only an intent to resign and not an official resignation, Dr. Edwards did not offer a date on which she planned to leave.

On September 14, 2020, six days after the intent to resign was sent, the complaint alleges that the Board voted to terminate Dr. Edwards' contract. The minutes, mentioned in the complaint but first supplied by the Board's motion to dismiss, detail the Board's vote to "accept" Dr. Edwards' resignation.

Consequently, Dr. Edwards filed the instant action in the district court. She brought claims for deprivation of due process under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments, conspiracy to violate civil rights in violation of 42 U.S.C. § 1985, and breach of contract. In response, the Board and the Board members filed a

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motion to dismiss on April 26, 2021. On February 28, 2022, the district court dismissed: (1) the due process and conspiracy claims with prejudice; (2) the breach of contract claim against the individual Defendants in their official capacity without prejudice on the basis of sovereign immunity; and (3) the breach of contract claim against the Board members in their individual capacities with prejudice. Dr. Edwards timely appealed.

II. Standard of Review

We review de novo a district court's order dismissing a complaint. *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1295 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C453a]. We must "accept the [factual] allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Henderson v. McMurray*, 987 F.3d 997, 1001 (11th Cir. 2021) [28 Fla. L. Weekly Fed. C2415a]. But we "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) [21 Fla. L. Weekly Fed. S853a] (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) [20 Fla. L. Weekly Fed. S267a]) (quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While the plausibility standard is not analogous to a "probability requirement," it requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

III. Analysis

Dr. Edwards claims (1) denial of procedural due process; (2) conspiracy to deprive her of her due process rights; and (3) breach of contract by the Board members in their official and individual capacities. We will address each claim in turn.

A. Procedural Due Process

When a public employee is in a position where they can only be discharged for cause, the public employee has a constitutionally protected property interest in their employment and cannot be fired without due process. *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997). When bringing an action under 42 U.S.C. § 1983, the plaintiff must show that the conduct was committed under the color of state law and deprived her of her constitutional rights. However, when an employee voluntarily resigns, the employee is not deprived of any protected interest in her employment. *Hargray v. City of Hallandale*, 57 F.3d 1560, 1573 (11th Cir. 1995) (per curiam).

The Supreme Court held that it is sufficient to uphold takings of property without any predeprivation process if the taking is the result of a "random and unauthorized" act by a state employee. *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Further, postdeprivation remedies alone are appropriate if there is a need for exigency by the State in the taking or if providing predeprivation process would be impracticable. *Id.* at 538-39. But we previously found that when there is a procedural due process violation, *Parratt* does not apply "when the state is in the position to provide predeprivation process." *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 (11th Cir. 1988) (en banc). Importantly, we have not addressed whether an unanticipated mistake is included in random and unauthorized conduct.

Our circuit encountered a similar case to the one at issue in *Fetner v. City of Roanoke*. 813 F.2d 1183 (11th Cir. 1987). In *Fetner*, a public employee was terminated without a formal hearing, whether the employee resigned or was terminated was at issue, and the claim was dismissed by the district court at the motion to dismiss stage. *Id.* at 1184, 1186. We decided that, when a state procedure exists to provide for the deprivation of property and it is practicable for the State to abide by those predeprivation measures, disregarding of the same constitutes a procedural due process violation. *Id.* at 1186. Further, we held that determining whether the employee voluntarily resigned or was terminated was a question of fact that precluded summary judgment. *Id.*

Dr. Edwards argues that she is a public employee dismissible only for cause, thereby ensuring a protected property interest in her employment. As such, she asserts that she could not be terminated without due process. She states that the district court erred in finding that the Board engaged in "random and unauthorized conduct" by misinterpreting her letter as a voluntary resignation. Dr. Edwards alleges that the Board, with premeditation, acted intentionally and willfully by terminating her, which deprived her of due process. She maintains her letter expressed an "intent to resign," with no date specified, and was subject to further discussion.

In arguing for its interpretation of the facts, the Board urges us to consider Dr. Edwards' letter, the minutes of the relevant Board meeting, and the employment contract. The Board argues these documents demonstrate that Dr. Edwards left of her own volition and support the district court's characterization of the Board's conduct as "random and unauthorized." Dr. Edwards referred to this group of documents in her complaint, and the Board attached the documents to the motion to dismiss the complaint without objection.

Normally, we will not consider anything beyond the face of the complaint and documents attached thereto when considering a motion to dismiss. *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) [21 Fla. L. Weekly Fed. C15a] (per curiam). However, we will consider outside documents attached to a defendant's motion to dismiss when: (1) the plaintiff mentions the document(s) at issue in the complaint; (2) the document is central to the claim; and (3) the contents are not in dispute, *i.e.*, the document's authenticity is unquestioned. *Id.*; *Baker v. City of Madison*, 67 F.4th 1268, 1276 (11th Cir. 2023) [29 Fla. L. Weekly Fed. C2448a]. When a document considered at the motion to dismiss stage contains "ambiguities . . . subject to interpretation," courts should interpret all ambiguities in the plaintiff's favor. *Baker*, 67 F.4th at 1277.

Here, there is no disagreement as to the contents of Dr. Edwards' letter or the employment contract, and these can properly be considered. But while neither party contests the minutes' authenticity, disagreement surrounds their consideration. The minutes refer to Dr. Edwards' letter as a resignation, while Edwards' allegations reflect that the Board terminated her without cause and in violation of the due process provisions contained in her contract. Though the minutes do present ambiguity as to whether Dr. Edwards' letter should be interpreted as a resignation or termination, this does not bar their consideration. Thus, the minutes were properly considered by the district court.

What was improper, however, was the district court's interpretation of the ambiguity against Dr. Edwards. Instead of construing all ambiguities in Dr. Edwards' favor, the district court used the minutes to recharacterize the allegations within Dr. Edwards' complaint. When taking the factual allegations in Dr. Edwards' complaint as true, there is a plausible claim for relief. In paragraph 18 of the complaint, Dr. Edwards classifies her communication as an "intent" to resign, not an actual resignation. In paragraphs 19 and 21, Dr. Edwards alleges that in the Board's "haste to get rid of" her, it did not give her a statement of cause or an opportunity to be heard, as required by the contract, before terminating her employment. These allegations, when taken as true, meet the plausibility standard that there is more than a sheer possibility that the Board and its members acted to deprive Dr. Edwards of due process. It is plausible that, based on the face of the complaint: Dr. Edwards did not voluntarily resign but was terminated; as in *Fetner*, there were no exigent circumstances necessitating a lack of predeprivation process; in such a scenario, the "random and unauthorized" exception under *Parratt* would be inapplicable; therefore, the lack of pre-deprivation process violated Dr. Edwards' procedural due process rights.

While our analysis should not be considered determinative on the merits, it is illustrative that Dr. Edwards alleged, at minimum, a plausible case worthy of surviving a motion to dismiss. The district court erred by ignoring that Dr. Edwards had a plausible claim to relief and not drawing reasonable inferences in her favor. We therefore reverse the dismissal of Dr. Edwards' due process claim.

B. Conspiracy

Conspiracy to interfere with civil rights occurs when two persons conspire to prevent another person from performing their duties or deprive them of their rights or privileges. 42 U.S.C. § 1985. A plaintiff seeking recourse under § 1985(3) must allege that the defendant had a "class-based, invidiously discriminatory animus behind the defendant's action taken in furtherance of the conspiracy." *Dean v. Warren*, 12 F.4th 1248, 1255 (11th Cir. 2021) [29 Fla. L. Weekly Fed. C324a] (internal quotation marks omitted).

Furthermore, the intracorporate conspiracy doctrine provides that a corporation's employees,

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acting as agents of the corporation, are unable to conspire among themselves or with the corporation. *Dickerson v. Alachua Cnty. Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000). We have not addressed exceptions to the intracorporate conspiracy doctrine. *See id.* at 770 (reserving consideration of exceptions); *Grider v. City of Auburn*, 618 F.3d 1240, 1263 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C1423a] (same); *but see Greenville Publ'g Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974) (holding the intracorporate conspiracy doctrine may not apply if "the officer has an independent personal stake in achieving the corporation's illegal objective").

Dr. Edwards argues that the Board members acted in concert when terminating her contract, failed to afford her a hearing, and prevented her performance of duties for the 120-day period mandated by her contract. Dr. Edwards further encourages this court to adopt the exception to the intracorporate conspiracy doctrine the Fourth Circuit identified in *Greenville*, as she claims the Board acted outside their lawful authority.

Dr. Edwards' complaint does not sufficiently allege a conspiracy. Her complaint contains several legal conclusions, stating the Board conspired and caused her to be injured, as well as having acted in concert when terminating the contract. She does not allege any factual scenarios to support these claims. Indeed, no information is provided regarding how two or more Board members supposedly worked together. This dearth of information regarding the Board members' conduct necessitates finding that the complaint lacks the necessary factual allegations to establish a conspiracy claim. *Ashcroft*, 556 U.S. at 678. Similarly, Dr. Edwards failed to allege that the Board discriminated against her under a "class-based, invidiously discriminatory animus," preventing her from seeking recourse under § 1985(3). *Dean*, 12 F.4th at 1255.

Based on the deficiencies in Dr. Edwards' complaint, she fails to show that the district court erred. Thus, we affirm the district court's dismissal of Dr. Edwards' conspiracy claim.[1]

C. Sovereign Immunity Law

The State of Alabama generally enjoys absolute immunity from lawsuits under Article I, Section 14 of the Alabama Constitution. This immunity applies to arms or agencies of the state. *Ex parte Tuscaloosa Cnty.*, 796 So. 2d 1100, 1103 (Ala. 2000). According to Alabama law, boards of education are considered state agencies, thus providing immunity from suit. S*ee Ex parte Phenix City Bd. of Educ.*, 67 So. 3d 56, 60 (Ala. 2011).

However, there are limited exceptions where sovereign immunity does not apply to breach of contract claims. *Ex parte Jackson Cnty. Bd. of Educ.*, 164 So. 3d 532, 536 (Ala. 2014). The Alabama Supreme Court has identified six exceptions to sovereign immunity:

> (1) actions brought to compel State officials to perform their legal duties;
>
> (2) actions brought to enjoin State officials from enforcing an unconstitutional law;
>
> (3) actions to compel State officials to perform ministerial acts;
>
> (4) actions brought under the Declaratory Judgments Act . . . seeking construction of a statute and its application in a given situation;
>
> (5) valid inverse condemnation actions brought against State officials in their representative capacity;
>
> (6)(a) actions for injunction brought against State officials in their representative capacity where it is alleged they acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law; and
>
> (6)(b) actions for damages brought against State officials in their individual capacity where it is alleged that they acted . . . beyond their authority.

Id. at 535-36 (citations omitted).

Dr. Edwards argues that sovereign immunity does not apply because her allegations fall within exceptions (1) and (3). She claims that the legal and ministerial obligations apply because the parties had a legally binding contract, and the Board members have no discretion over whether to comply with the contract. Thus, the Board members are left with a ministerial duty to perform according to the terms of the contract.

Dr. Edwards heavily relies on *Burch v. Birdsong*, 181 So. 3d 343 (Ala. Civ. App. 2015), to support her claim against the Board members in their official capacities. This support is misplaced. In *Burch*, the plaintiff did not sue for damages or backpay; both the court and the plaintiff acknowledged that § 14 immunity barred this recovery. *Burch*, 181 So. 3d at 351. Instead, the plaintiff was seeking prospective relief in the form of an order compelling the school board members to comply with their legal duties under the employment contract. *Id.*

Here, Dr. Edwards is seeking money damages—the very relief the plaintiff in *Burch* disclaimed. Because her suit does not seek prospective relief, exceptions (1) and (3) are inapposite. Dr. Edwards' claim against the Board members in their official capacities is, therefore, barred by sovereign immunity.[2]

Dr. Edwards' claims against the Board members in their individual capacities also must fail. While individual capacity claims against the Board members are not barred by sovereign immunity, agents cannot be held liable for a principal's breach of contract." *Harrell v. Reynolds Metals Co.*, 495 So. 2d 1381, 1389 (Ala. 1986); *see also Whitehead v. Davison Oil Co.*, 352 So. 2d 1339, 1341 (Ala. 1977). Dr. Edwards' contract was with the Board, not the Board members in their individual capacities. The Board members were acting as the Board's agents to accomplish the Board's objectives. Thus, the breach of contract claims against the Board members in their individual capacities are necessarily unsuccessful.

In sum, Dr. Edwards did not plausibly plead an exception to sovereign immunity, and the district court properly dismissed both breach of contract claims. We affirm the district court's dismissal of Dr. Edwards' breach of contract claims.

IV. Conclusion

For the reasons above, we reverse the district court's denial of Dr. Edwards' due process claims and affirm the district court's denial of Dr. Edwards' conspiracy and breach of contract claims.

AFFIRMED in part and **REVERSED** in part.

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[1]Even had Dr. Edwards properly alleged a conspiracy, the intracorporate conspiracy doctrine would bar her claim. *See Dickerson*, 200 F.3d at 767. Dr. Edwards encourages us to adopt an illegality exception. Due to the lack of factual allegations regarding the illegal actions, we need not reach the issue.

[2]As this court has firmly established, issues not raised in the initial brief on appeal are typically deemed abandoned. *United States v. Campbell*, 26 F.4th 860, 871 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C819a] (en banc); *see also Access Now, Inc. v. Sw. Airlines, Co.*, 385 F.3d 1324, 1330-32 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1064a]. Dr. Edwards did not argue the other exceptions to sovereign immunity. Therefore, we do not address them here.

(BRASHER, Circuit Judge, Concurring.) I concur in the Court's opinion. I write separately to flag an issue for the parties and district court.

We have long recognized that tenured public employees have a right to continued employment that is a constitutionally protected property interest under the Due Process Clause. Edwards says that her employment contract creates a protected property interest in continued employment because it prohibited her termination without cause.

At oral argument, the Board argued for the first time that Edwards lacks a constitutionally protected property interest in continued employment because her right to employment derives solely from a contract, not a state statute.

Although I do not know the right answer to the Board's argument, the issue is not as straightforward as the Board suggests. We have recognized, as a general matter, that "[t]he existence of an enforceable contract with a state or local government entity does not give rise to a constitutionally protected property interest." *Key W. Harbour Dev. Corp. v. City of Key W., Fla.*, 987 F.2d 723, 727 (11th Cir. 1993). But, as to continued employment, our predecessor court has said that "[t]he source of such a right can be a state statute, a local ordinance, or an express or implied contract." *White v. Mississippi State Oil & Gas Bd.*, 650 F.2d 540, 541 (5th Cir. Unit A. May 29, 1981). *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc) (recognizing that Fifth Circuit decisions issued before Oct. 1, 1981 are binding in the Eleventh Circuit).

The Court wisely declines to address this issue, as it was not briefed in this Court or the district court. But, considering the apparent tension in our precedents, I suggest the parties and the district court carefully evaluate this issue on remand.

* * *

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Civil rights—Employment discrimination—Hostile work environment—Retaliation—District court did not err in granting summary judgment to employer on claims of employment discrimination, hostile work environment, and retaliation brought by black nurse who was disciplined and ultimately fired by her employer—Race—Plaintiff forfeited on appeal any circumstantial-evidence claims of race discrimination where she relied solely on supervisor's highly offensive comment that "blacks are lazy, and don't like to work" as direct evidence and did not pursue either the burden-shifting analysis or the convincing mosaic standard to make out a circumstantial evidence case—Statement by supervisor who was not the formal decisionmaker was not direct evidence of discrimination—Assuming cat's-paw theory, which requires evidence that ultimate decisionmaker followed the biased recommendation of another without an independent investigation, applies to a direct-evidence claim, plaintiff provided no evidence of failure to investigate by the individual who fired her or supervisors who meted out her pre-termination reprimands—Harassment—On the merits, district court properly granted summary judgment to employer on hostile-work-environment claim, where alleged events, given totality of circumstances, were not sufficiently severe or pervasive to alter terms and conditions of plaintiff's employment or create an abusive working environment—District court properly excluded evidence of events occurring at plaintiff's physical work environment prior to her request for transfer to another location—District court correctly held the events at pre-transfer location were not relevant background evidence where prior events do not show that the within-period practices were caused by discrimination or that events were severe or pervasive—Events at prior work location cannot be deemed part of same, ongoing hostile work environment because plaintiff encountered no discrimination at hands of her former supervisors after her physical work environment changed—Plaintiff did not create a genuine dispute about whether her supervisor's alleged wrongful discipline, poke on the shoulder, or decision to deny plaintiff access to supply closet were caused by her race, and therefore these three incidents would not be considered as part of hostile-work-environment calculus—District court properly granted summary judgment to employer on Title VII and Florida Civil Rights Act retaliation claims because, even if plaintiff presented a prima facie case, she failed to show that employer's proffered reasons for her discipline and termination were pretextual—Plaintiff failed to create a genuine dispute about whether employer's stated reasons of tardiness, absences, and insubordination were pretextual by offering evidence that would allow a fact-finder to conclude that the desire to retaliate was the but-for cause of the challenged employment actions

MARY E. HARRIS, Plaintiff-Appellant, v. THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d.b.a. Jackson Health System, d.b.a. Jackson Memorial Hospital, d.b.a. Jackson Hospital Ambulatory Clinic, Defendant-Appellee. 11th Circuit. Case No. 21-11016. October 4, 2023. Appeal from the U.S. District Court for the Southern District of Florida (No. 1:19-cv-25298-KMM).

(Before JILL PRYOR, NEWSOM, and GRANT, Circuit Judges.)

(PER CURIAM.) Mary E. Harris—a black nurse who was disciplined and ultimately fired by her employer, Public Health Trust of Miami-Dade County—appeals the district court's entry of summary judgment on her Title VII and state-law claims alleging (1) employment discrimination, (2) hostile work environment, and (3) retaliation. Harris contends that the district court erred in rejecting all three claims. We disagree and affirm.

I

First, a few basic facts: Harris worked for Public Health Trust for ten years. For the first eight, she was at Jackson North Medical Center. After her position there was eliminated, she requested and received a transfer to Jackson Reeves Senior Health Center, but following a series of disciplinary actions, Public Health Trust fired her. Harris claims that she experienced discrimination at both locations and that her termination was based on her race.

II

Having set the stage, we will consider Harris's employment-discrimination, hostile-work-environment, and retaliation claims in turn, canvassing additional facts as necessary.[1]

A

Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act of 1992 both make it unlawful for a private employer to "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of" her race or national origin. 42 U.S.C. § 2000e-2(a)(1); *see* Fla. Stat. § 760.10(1)(a).[2]

In assessing an employment-discrimination claim at summary judgment, we use one or more of three legal frameworks. First, and most obviously, direct evidence of discrimination necessarily creates a sufficiently genuine dispute to prevent summary judgment. Cases in which there is no direct evidence may proceed under either the burden-shifting analysis outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or the "convincing mosaic" standard described in *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C64a].

The district court here found no direct evidence of race discrimination, and so applied the *McDonnell Douglas* framework. Before us, Harris insists that there *is* direct evidence—namely, an incredibly nasty comment made by her supervisor at Jackson Reeves, Gianella Carreno, that "blacks are lazy, and don't like to work." Indeed, on appeal, Harris puts all her eggs in the direct-evidence basket; she doesn't pursue either of the available methods of making out a circumstantial-evidence case. Under our precedent, she has thereby forfeited any circumstantial-evidence claims that she might have had. *See Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) [22 Fla. L. Weekly Fed. C1a] (holding that an argument under *McDonnell Douglas* was forfeited by failing to raise it in the district court); *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1274 (11th Cir. 2021) [28 Fla. L. Weekly Fed. C2645a] (holding that a convincing-mosaic argument was forfeited on appeal). Therefore, unless Carreno's statement constitutes direct evidence, Harris's employment-discrimination claim will fail.

We have held that only the "most blatant remarks," whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C715a]. "If the alleged statement suggests, but does not prove, a discriminatory motive, then it is circumstantial evidence"—not direct. *Id.* While statements made by a decisionmaker—*i.e.*, the one who ultimately fired, demoted, or punished the plaintiff—may constitute direct evidence, *see, e.g.*, *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990), "remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination," *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

Harris concedes that Carreno wasn't the formal decisionmaker but nonetheless insists that she was the driving force behind her discipline and eventual termination. Harris is thus making a so-called "cat's paw" argument, although "puppet master" might more aptly describe it. We have never applied the cat's-paw theory to a direct-evidence claim,[3] and we needn't decide today whether it so applies, because even if it did, it wouldn't be satisfied here. A cat's-paw argument requires evidence that the ultimate (and manipulated) decisionmaker—the puppet—"followed the biased recommendation" of another—the puppeteer—"without independently investigating the complaint against the employee." *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). But beyond "mere conclusions and unsupported factual allegations," which don't suffice to defeat summary judgment, *Ellis v. England*, 432 F.3d 1321, 1327 (11th Cir. 2005) [19 Fla. L. Weekly Fed. C127a], Harris provides no evidence of a failure to investigate. To the contrary, Harris concedes that the individual who fired her, Caridad Nieves, conducted her own investigation and relied on, if anything, the recommendation of someone other than Carreno. And the supervisors who meted out Harris's pre-termination reprimands likewise independently investigated the underlying facts. *See* Doc. 32-2 ¶¶ 7-12 (Freeman); Doc. 32-15 ¶¶ 3, 4-6 (Nieves). Harris responds that those supervisors failed to investigate whether Carreno was biased, but they didn't have to—Harris mistakes the object of the required investigation. As we have explained, what's required to rebut a cat's-paw allegation is

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an investigation of "the complaint against the employee"—not of the bias of the recommender. *Stimpson*, 186 F.3d at 1332.

We therefore affirm the district court's grant of summary judgment on Harris's employment-discrimination claim.

B

To prevail on her hostile-work-environment claim, Harris must establish that she suffered unwelcome harassment, that it was based on a protected characteristic, and that it was sufficiently "severe or pervasive" to alter the terms and conditions of her employment and create an abusive working environment. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C172a].

The "severe or pervasive" requirement entails both an objective component—namely, that a reasonable person would find the environment hostile or abusive—and a subjective component. *Id.* at 1276. In evaluating the objective severity of the harassment, we consider (1) the frequency of the conduct, (2) its severity, (3) whether it was "physically threatening or humiliating, or a mere offensive utterance," and (4) whether it unreasonably interfered with the employee's job performance. *Id.* Title VII, as we have emphasized, is not a federal "civility code." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C477a] (en banc) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

Harris alleges nine events or conditions that, she says, collectively rendered her workplace environment actionably hostile. In particular, she asserts that over a three-year period, her supervisors (1) made the one highly offensive comment (*i.e.*, Carreno's slur that "blacks are lazy, and don't like to work"), (2) restricted her access to a supply closet, (3) micromanaged and excessively monitored her work, (4) solicited peers to report on her violations, (5) made her work alongside colleagues with histories of abuse, (6) once poked her on the shoulder, (7) wrongfully disciplined her, (8) made her perform more clerical duties than her peers, and (9) disbelieved or otherwise ignored her complaints of race discrimination. The district court refused to consider parts of No. 3 and all of No. 5 on the ground that they were time-barred. It otherwise found that the conditions that Harris alleged weren't sufficiently severe or pervasive to constitute a hostile work environment.

Before us, the parties dispute which of the nine items we should consider. Harris argues that the district court incorrectly excluded evidence from her time at Jackson North as time-barred. Public Health Trust counters that several of the other events that Harris alleges are irrelevant because they weren't caused by her race. Separately, the parties dispute whether the workplace conduct met the severe-or-pervasive threshold. We'll address those issues in turn.

1

As an initial matter, we conclude that the district court properly refused to consider the Jackson North evidence, albeit for the wrong reason. Title VII and the FCRA require employees to file administrative complaints within a specified number of days from the challenged employment action(s). *See* 42 U.S.C. § 2000e-5(e); Fla. Stat. § 760.11(1). In general, events that occur outside the prescribed period aren't actionable. There are two respects, though, in which such events might be relevant.[4] First, for any type of discrimination claim, an employee can cite "prior acts as background evidence in support of a timely claim." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) [15 Fla. L. Weekly Fed. S347a]. Second, a single, continuing hostile work environment can include events that predate the applicable time period. *Id.* at 115-21. That's because "[h]ostile environment claims are different in kind" in that they are "composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' " *Id.* at 115, 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Importantly, though, events that occurred outside the prescribed period aren't part of the same timely hostilework-environment claim if they aren't related to those that occurred within the period. *Id.* at 118.

The district court correctly held that the events that Harris described at Jackson North—her previous supervisors' micromanaging and her being made to work with abusive colleagues—were not relevant "background evidence." By background evidence, we mean "prior practices" that are "relevant to show[ing] independently actionable conduct occurring within the statutory period." *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 540 (5th Cir. 1980) (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). Such background evidence could, for example, show that the within-period practices were caused by discrimination, *see Jepsen v. Fla. Bd. of Regents*, 610 F.2d 1379, 1383 (5th Cir. 1980), or that they were severe or pervasive. The events at Jackson North do neither. Actions taken by managers at one location aren't probative of what *caused* actions later taken by different managers at a different location. Nor are they probative of the later actions' severity.

The district court failed to consider whether the Jackson North events were part of the same, ongoing hostile work environment, but its error doesn't affect the outcome because they weren't. In *Watson v. Blue Circle, Inc.*, we held that where an employer confronted a harassing supervisor and the employee thereafter experienced no further problems with that individual, the pre-confrontation events weren't part of the same practice as later events. 324 F.3d 1252, 1259 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C429a]. So too here. In 2014, Public Health Trust granted Harris's requested transfer from Jackson North to Jackson Reeves. Because Harris changed physical work environments and thereafter encountered no discrimination at the hands of her former supervisors, the events at Jackson North can't be deemed part of the same, continuing practice as those that occurred at Jackson Reeves. *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 78 (2d Cir. 2010) (explaining that transfer to a "different sector of the building" is one reason prior events were unrelated).

2

Public Health Trust says that several incidents that occurred at Jackson Reeves shouldn't be considered because they weren't caused by Harris's race. Public Health Trust is correct that federal law doesn't prohibit hostility in the workplace—only hostility caused by impermissible discrimination. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Accordingly, Harris must ultimately show that "but for the fact of her" race, "she would not have been the object of" the actions that collectively constitute her hostile-work-environment claim. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247-48 & 1248 n.5 (11th Cir. 1999) (en banc) (assessing discrimination on an action-by-action basis and citing, among other cases, *Brill v. Lante Corp.*, 119 F.3d 1266, 1274 (7th Cir. 1997)); *cf. Oncale*, 523 U.S. at 81 ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.' ") (alteration in original). At summary judgment, therefore, she must demonstrate a genuine factual dispute about the causation issue.

We agree with Public Health Trust that three of the incidents weren't caused by Harris's race and, accordingly, shouldn't be considered as part of the hostile-work-environment calculus. The first is straightforward: In affirming the district court's grant of summary judgment on Harris's employment-discrimination claim, we have already concluded that her discipline wasn't based on her race.[5]

Second, the poke on the shoulder. The only evidence is Harris's testimony: "[O]n one occasion I was in the lab room, and Ms. Gianella came in and she tapped me on—I was—I had my back turned and she came and tapped me on my shoulder, and I said, 'Don't touch me. Why are you touching me?' " Doc. 32-5 at 81-82. To be sure, that is evidence that the event occurred. But "discrimination is a comparative concept." *Lewis v. City of Union City*, 918 F.3d 1213, 1223 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C145a] (en banc). Without evidence that the shoulder-poke was *caused by* discrimination, such as that similarly situated white employees were treated differently, "there's no way of knowing (or even inferring) that discrimination [was] afoot." *Id.* Because Harris has provided neither, she hasn't created a genuine dispute about whether the event was caused by her race.

Finally, access to the supply closet. At a weekly staff meeting, Public Health Trust announced a change in its policy: Access to the supply closet would thereafter be limited to a few specific individuals. Harris wasn't one of those given access. But she hasn't alleged that other similarly situated white nurses had access. Nor does she suggest in any other way—beyond mere assertion—that the change in policy or the decision to deny her access had anything to do with her race. Accordingly, Harris hasn't created a genuine factual dispute sufficient to survive summary judgment.

3

On, then, to the merits of Harris's hostile-work-environment claim. Of the original nine alleged events, we are left with only five: Harris's supervisors at Jackson Reeves made one highly offensive comment, micromanaged and exces-

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sively monitored her work, solicited peers to report on her violations, made her perform clerical duties, and disbelieved or ignored her complaints of race discrimination.

Even considering Harris's limited evidence in the light most favorable to her, these are not, given the totality of the circumstances, sufficiently severe or pervasive to alter the terms and conditions of her employment and create an abusive working environment. *See Miller*, 277 F.3d at 1275. On the one hand, Carreno's slur about black employees' poor work ethic was ignorant and extremely demeaning. On the other hand, it was isolated, it wasn't directed specifically at Harris, and it wasn't as severe as the remarks that courts have found created hostile environments. *See Smelter v. Southern Home Care Servs. Inc.*, 904 F.3d 1276, 1282 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C1359a] (describing seven similarly severe comments by the plaintiff's supervisors); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (discussing "the n-word"). From the limited evidence provided, there is no reasonable inference that the other conduct was particularly frequent, physically threatening, or humiliating or—even considered together with Carreno's statement—that it unreasonably interfered with Harris's job performance.

We thus conclude that the district court properly granted summary judgment to Public Health Trust on Harris's hostile-work-environment claim.

C

Title VII and the FCRA prohibit an employer from retaliating against an employee for opposing an unlawful employment practice. *See* 42 U.S.C. § 2000e-3(a); Fla. Stat. § 760.10(7).

A retaliation claim based on circumstantial evidence is analyzed under the *McDonnell Douglas* framework. *See Crawford v. Carroll*, 529 F.3d 961, 975-76 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C758a]. If the plaintiff establishes a prima facie case of retaliation, and the employer proffers a legitimate, nondiscriminatory reason for its actions, then the plaintiff must show that the employer's stated reason is pretextual. *See Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1135 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1535a] (en banc). In assessing pretext, the court "must evaluate whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.' " *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996)). Ultimately, the employee's burden is to prove that "the desire to retaliate was the but-for cause" of the challenged action. *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) [24 Fla. L. Weekly Fed. S366a].

Here, because the district court found that Harris's retaliation claims failed on several grounds, we can affirm on any one of them. *See Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 680 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C916a]. We conclude that, even if Harris presented a prima facie case, she failed to show that the employer's proffered reasons for her discipline and termination were pretextual.

Public Health Trust stated its reasons—primarily tardiness, absences, and insubordination—in six disciplinary-action reports, two suspension letters, and a termination letter. Other than her own testimony, Harris offers essentially no evidence that she wasn't tardy, absent, or insubordinate. Nor does she provide any basis for concluding that the hospital's timekeeping software's records were inaccurate.[6]

Harris separately argues that even if the underlying facts are true, others wouldn't have been punished for the same underlying facts—and, therefore, that her treatment was the product of race discrimination. While that would support a claim if true, Harris offers only "mere conclusions and unsupported factual allegations" of it. *Ellis*, 432 F.3d at 1327. She hasn't provided any evidence that, for instance, she was treated worse than any other nurse with a spotty attendance record. And that is dispositive. Because Harris offers nothing that would allow a fact-finder to conclude that "the desire to retaliate was the but-for cause of the challenged employment action," *Nassar*, 570 U.S. at 352, the district court correctly concluded that she has failed to create a genuine dispute about whether Public Health Trust's stated reasons were pretextual.[7]

III

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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[1]We review the district court's grant of summary judgment de novo, "considering all of the evidence and the inferences it may yield in the light most favorable to" Harris as "the nonmoving party." *Ellis v. England*, 432 F.3d 1321, 1325-26 (11th Cir. 2005) [19 Fla. L. Weekly Fed. C127a].

[2]Claims under Title VII and the FCRA are analyzed under the same framework. *See Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1271 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C1080a] (discrimination and retaliation); *Wilbur v. Correctional Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C104b] (hostile work environment).

[3]Neither decision that Harris cites held that a cat's-paw theory can be the basis for a direct-evidence claim. *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998); *Wright v. Southland Corp.*, 187 F.3d 1287, 1304 n.20 (11th Cir. 1999). The portion of *Wright* on which Harris relies also comes from an opinion joined only by a single judge. *See id.* at 1306 (Cox, J., concurring) ("I do not join Judge Tjoflat's opinion."); *id.* (Hull, J., concurring) ("I concur only in the result reached by Judge Tjoflat's opinion.").

[4]The citations that follow interpret Title VII. Florida's courts have adopted the same approach to the FCRA. *See, e.g., Maggio v. Dep't of Lab. & Emp. Sec.*, 910 So. 2d 876, 879-80 (Fla. 2d Dist. Ct. App. 2005) [30 Fla. L. Weekly D1899a].

[5]Technically, the standards applicable to Harris's employment-discrimination and hostile-work-environment claims are different. For whatever reason, we haven't applied the three traditional frameworks—direct evidence, *McDonnell Douglas*, and "convincing mosaic"—to hostile-work-environment claims. Others have. *See, e.g., Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1221 (10th Cir. 2015); *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 706 (6th Cir. 2007); *Erenberg v. Methodist Hosp.*, 357 F.3d 787, 792 (8th Cir. 2004); *Bhatti v. Trustees of Bos. Univ.*, 659 F.3d 64, 70 (1st Cir. 2011); *cf. also Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C477a] (en banc) (noting that a hostile-work-environment claim is just a species of disparate-treatment claim). We needn't go down that road today because, for reasons already explained, we conclude that Harris hasn't presented evidence to create a genuine dispute about whether her discipline was caused by her race.

[6]Harris also cites a co-worker's testimony that she (*i.e.*, the co-worker) did "not have knowledge of Ms. Harris being excessively tardy or absent" and "never witnessed Ms. Harris being insubordinate." Doc. 42-5. But even taking them in the light most favorable to Harris, those general attestations don't create a genuine dispute about whether the documented, specific instances—which the coworker doesn't deny—actually occurred.

[7]Neither of the other two methods of showing discrimination applies. Harris hasn't presented any direct evidence of retaliation. And because Harris hasn't raised a convincing-mosaic argument, our precedents hold that she has forfeited it. *See supra* at 4.

* * *

Insurance—Businessowner's insurance—Bad faith—Jurisdiction—Appeals—Final orders—Restaurant patron and her spouse sued owner and operator of restaurant after patron sustained injuries from a hot-soup spill, and restaurant owner sought and was denied insurance coverage on ground that policy named nonexistent entity—Court of Appeals had jurisdiction under 18 U.S.C. §1291 to hear appeal from partial summary judgment which did not resolve claim for bad-faith refusal to defend and indemnify in count three of complaint, because plaintiffs, without objection by the opposing party, filed a written notice abandoning the only remaining claim that partial summary judgment did not resolve—After a party, without objection, abandons the only remaining claim, the district court may enter a final judgment for exercise of appellate jurisdiction under section1291—Contract reformation—District court correctly equitably reformed businessowner's policy to substitute true restaurant owner as insured based on mutual mistake in naming the insured owner, which under Georgia law is an action intended to do equity among interested parties by changing completed transactions to reflect true intentions—Plaintiffs correctly sought reformation of the policy that was in force when injury was sustained, and not the original contract—Reformation of policy would not be prejudicial to insurer—District court did not err by granting summary judgment in favor of plaintiffs on their claim for breach of contract because breach of contract claim merged with claim for reformation of the policy—A claim for equitable reformation and claim for damages flowing from breach of reformed contract are "only one claim for relief"

HEE JIN LOWERY, JOHN LOWERY, Individually, and as assignees of Shou & Shou, Inc., Plaintiffs-Counter Defendants-Appellees, v. AMGUARD INSURANCE COMPANY, Defendant-Counter Claimant-Appellant. 11th Circuit. Case No. 22-13738. October 6, 2023. Appeal from the U.S. District Court for the Northern District of Georgia (No. 1:20-cv-05148-TWT).

(Before WILLIAM PRYOR, Chief Judge,

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ABUDU, Circuit Judge, and BARBER,* District Judge.)

(WILLIAM PRYOR, Chief Judge.) This appeal presents a jurisdictional issue that we must address before we can resolve the merits of equitable reformation of an insurance policy under Georgia law. After Gina Lowery sustained serious injuries from a hot-soup spill at Noodle College Park, an Atlanta-area restaurant, she and her spouse sued Shou & Shou, Inc., which owned and operated the restaurant. Shou & Shou tendered the defense to and sought coverage from AmGuard Insurance Company. But AmGuard denied coverage on the ground that the policy named "Noodle, Inc."—an entity that did not exist—as insured. Shou & Shou settled the suit and assigned the Lowerys its rights under the policy. The Lowerys, as assignees, then sued AmGuard for equitable reformation of the policy. The district court granted partial summary judgment in favor of the Lowerys and later entered a final judgment. We have jurisdiction to review that judgment because the Lowerys filed a written notice abandoning their remaining claim without objection. And because reformation of the policy was proper under Georgia law, we affirm.

I. BACKGROUND

Shou & Shou, Inc., owned several restaurants in the Atlanta area under the trade name "Noodle." One restaurant was located on Main Street in College Park. In 2013, the Shou siblings, who owned the company, bought businessowner's insurance and workers' compensation insurance from AmGuard Insurance Company. The businessowner's policy named "Noodle, Inc." as the insured and listed its address as 3693 Main Street in College Park. The policy listed three locations at which Shou & Shou operated restaurants. Location 001 was 3693 Main Street in College Park—Noodle College Park. The workers' compensation policy was also issued to "Noodle, Inc." But the Shous never had any ownership interest in an entity by that name. Noodle, Inc. was not a corporation at all; "Noodle, Inc." was "merely a reference to the tradename" of the Noodle restaurants.

The Shous renewed the businessowner's policy through the 2018-19 policy period. Each renewal retained the same name, mailing address, and Location 001 for the insured. Shou & Shou paid all policy premiums from its operating account. In 2014, AmGuard learned during an audit of the workers' compensation policy that Shou & Shou was doing business as "Noodle" at the insured locations. AmGuard accordingly added Shou & Shou to the workers' compensation policy from its inception. But AmGuard never added Shou & Shou to the businessowner's policy.

AmGuard provided legal representation to Shou & Shou under the businessowner's policy despite the omission of its name. In 2016, Eled Addus sued several corporate and individual defendants in the Noodle chain—but *not* Shou & Shou—for injuries she allegedly sustained at Noodle College Park. The Shous tendered the defense to AmGuard, which accepted representation and appointed defense counsel. During that litigation, defense counsel informed AmGuard that Noodle College Park was "owned and operated by Shou & Shou, Inc." AmGuard gave defense counsel authority to substitute Shou & Shou as the proper defendant and to represent it. Defense counsel later told AmGuard again that its "insured is Shou & Shou, Inc. This company owns and operates [Noodle College Park]." Yet, when AmGuard issued the 2016-17 businessowner's policy later that year, it retained the same information for the insured, its address, and Location 001. AmGuard eventually settled the *Addus* suit by obtaining a release for Shou & Shou.

AmGuard also investigated a claim by Zuri Zahara Love for injuries she sustained at Noodle College Park during the 2016-17 policy's coverage period. Love sued multiple defendants in the Noodle network, including Shou & Shou. Shou & Shou again tendered the defense to AmGuard, which again accepted representation. The assigned defense counsel told AmGuard that the "company that owns [Noodle College Park] is Shou & Shou, Inc." Defense counsel filed an answer for Shou & Shou and moved to dismiss the other defendants as improper parties. AmGuard later settled the *Love* suit by obtaining a release for Shou & Shou.

This appeal arises from a third lawsuit. Gina Lowery bought soup at Noodle College Park during the effective dates of the 2016-17 policy. The soup seriously injured her when it spilled through its packaging into her lap. She and her husband sued Shou & Shou in state court and demanded damages for personal injuries. Shou & Shou tendered the defense to AmGuard. But this time, the insurance company denied coverage on the ground that "Shou and Shou Inc. is not a named insured" or "otherwise qualif[ied] as an insured under the policy." Shou & Shou reached a $1 million consent judgment with the Lowerys and assigned them its rights under the 2016-17 policy.

The Lowerys sued AmGuard in the district court based on diversity jurisdiction. 28 U.S.C. § 1332(a). Their amended complaint alleged three counts: count one for equitable reformation of the 2016-17 policy based on mutual mistake in not naming Shou & Shou as the insured owner of Noodle College Park; count two for breach of contract of the reformed 2016-17 policy; and count three for bad-faith refusal to defend and indemnify Shou & Shou. AmGuard filed a counterclaim seeking a declaration that Shou & Shou had no rights under the 2016-17 policy.

The parties moved for summary judgment following discovery. The Lowerys sought partial summary judgment on counts one and two of their complaint and against the counterclaim. The district court granted partial summary judgment in favor of the Lowerys. But that order did not resolve count three of the complaint.

After AmGuard asked the district court to certify its order for interlocutory review, *see* 28 U.S.C. § 1292(b), the Lowerys filed a "notice of intent to abandon" the bad-faith claim alleged in count three. The notice stated that the Lowerys had "elect[ed] to forego" the penalties and fees they were seeking in count three and were "abandon[ing]" that count. The Lowerys also filed a "request for final judgment" under Federal Rule of Civil Procedure 58(d). The request alleged that "[n]o further matters [we]re before the District Court for resolution" because the Lowerys had abandoned the only count not resolved by the partial summary judgment. The Lowerys asked that the partial summary judgment "be made the final judgment of the court." They argued that the district court should not certify an interlocutory appeal because the motion to certify would become moot when "final judgment [was] entered consistent with the Court's summary judgment order."

AmGuard filed a notice of non-opposition to the Lowerys' request for final judgment based on their abandonment of the remaining claim. The district court entered a "final order and judgment" the next day. It found that "no additional claims for adjudication remain[ed] pending." And it declared its order granting partial summary judgment the "final judgment of the Court."

This Court submitted jurisdictional questions to the parties. First, the Court asked whether the Lowerys' "notice of intent to abandon" count three effectively dismissed that claim of bad faith. Second, the Court asked whether the allegations in the pleadings satisfied the requirements of diversity jurisdiction.

The parties argued for jurisdiction in a joint response. The jurisdictional panel agreed that the district court had diversity jurisdiction but carried the question whether count three had been resolved and whether the district court entered a final order.

II. STANDARDS OF REVIEW

We review our jurisdiction *de novo*. *Cavalieri v. Avior Airlines C.A.*, 25 F.4th 843, 848 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C779a]. We also review *de novo* a summary judgment, drawing all inferences in the nonmoving party's favor and affirming only if there are no genuine issues of material fact. *Sutton v. Wal-Mart Stores E., LP*, 64 F.4th 1166, 1168 (11th Cir. 2023) [29 Fla. L. Weekly Fed. C2337a] (citation omitted). We may affirm on any ground the record supports. *Mata Chorwadi, Inc. v. City of Boynton Beach*, 66 F.4th 1259, 1263 (11th Cir. 2023) [29 Fla. L. Weekly Fed. C2445a].

III. DISCUSSION

We divide our discussion into three parts. First, we explain why we have jurisdiction to hear this appeal. Next, we explain that the district court did not err by granting summary judgment in favor of the Lowerys on their claim for equitable reformation. Last, we explain that the district court did not err by granting summary judgment in favor of the Lowerys on their claim for breach of contract.

A. We Have Jurisdiction Under Section 1291.

Federal law grants us jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. A decision ordinarily is "final" only when it adjudicates all claims of all parties to an action. *Corsello v. Lincare, Inc.*, 276 F.3d 1229, 1230 (11th Cir. 2001) [15 Fla. L. Weekly

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Fed. C154a]. The partial summary judgment did not resolve the bad-faith claim in count three. But the district court rendered that partial summary judgment "final" under Rules 54 and 58 after the Lowerys filed their notice to abandon count three.

Our precedent establishes that the Lowerys resolved count three by abandoning it. A party may "abandon[ ]" a claim "in response to questioning by the trial judge." *Mid City Mgmt. Corp. v. Loewi Realty Corp.*, 643 F.2d 386, 388 n.2 (5th Cir. 1981). And a written notice abandoning a claim without objection by the opposing party accomplishes the same thing. After a party, without objection, abandons the only remaining claim, a district court may enter a final judgment for our exercise of appellate jurisdiction under section 1291. *See id.* Because the Lowerys expressly abandoned the only claim that the partial summary judgment did not resolve, the district court correctly found that "no additional claims for adjudication remain[ed] pending."

B. The District Court Correctly Equitably Reformed the 2016-17 Policy to Insure the True Owner of the Restaurant.

The Lowerys sought equitable reformation of the 2016-17 policy based on mutual mistake, which under Georgia law is "an action intended to 'do equity' among the interested parties by changing completed transactions to reflect true intentions." *Cherokee Nat. Life Ins. Co. v. Coastal Bank of Ga.*, 238 S.E.2d 866, 869 (Ga. 1977). A mistake of fact can be an "unintentional act, omission, or error" owing to "ignorance, surprise," or "misplaced confidence." GA. CODE § 23-2-21(a). A mutual mistake is one "shared by" the parties, *Ledford v. Smith*, 618 S.E.2d 627, 637 (Ga. Ct. App. 2005) (citation omitted), but the parties' mistakes need not be "exactly the same," *Bank of Am. v. Cuneo*, 770 S.E.2d 48, 54 (Ga. Ct. App. 2015). Georgia courts have defined mutual mistake at a high level of generality to accomplish the basic objective the parties set out to achieve. *See, e.g.*, *Curry v. Curry*, 473 S.E.2d 760, 761 (Ga. 1996) (granting reformation when the parties to a deed intended to convey a home lot); *Occidental Fire & Cas. of N.C. v. Goodman*, 793 S.E.2d 606, 609 (Ga. Ct. App. 2016) (granting reformation when the parties intended to insure a restaurant and bar). Awareness of the correct name of the party seeking reformation is not necessary for the mistake to be common to both parties. *See Occidental*, 793 S.E.2d at 609.

Reformation is proper only when the party seeking it proves mutual mistake with "clear, unequivocal, and decisive" evidence. GA. CODE § 23-2-21(c). But the mistake need not be "admitted by both parties." *Ga. Farm Bureau Mut. Ins. Co. v. Wall*, 249 S.E.2d 588, 590-91 (Ga. 1978). A court can reform an instrument even if the opposing party asserts in an affidavit that it did not share the claimant's intent. *See Cuneo*, 770 S.E.2d at 54.

We focus our analysis on the 2016-17 policy, not the original 2013-14 contract. A claim for reformation arises when the parties "labored under the same misconception . . . at the time of the execution of the instrument." *Fox v. Washburn*, 449 S.E.2d 513, 514 (Ga. 1994) (citation and internal quotation marks omitted). The Lowerys correctly seek reformation of the 2016-17 policy because that was the policy in force when Lowery sustained her injury at Noodle College Park.

AmGuard cites *Infinity General Insurance Co. v. Litton* to support its argument that we should focus our analysis on the original policy, but AmGuard misreads that decision. 707 S.E.2d 885 (Ga. Ct. App. 2011). *Litton* never discussed equitable reformation. It stands only for the proposition that a policy is a "renewal," not a "new contract," when "its terms . . . carr[y] forward the same obli-gation[s]" as an earlier policy. *Id.* at 888-89. The parties do not dispute that the 2016-17 policy is, as it says on its face, a "[r]enewal" of the original policy. It does not follow that the 2016-17 policy is not the proper instrument for our analysis. The 2016-17 policy does not expressly "void" its predecessor policies. *See Brannen v. Gulf Life Ins. Co.*, 410 S.E.2d 763, 764 (Ga. Ct. App. 1991) (finding that a "duplicate" policy was the proper instrument for the analysis of mistake when it "clearly and unequivocally" voided an earlier policy).

AmGuard also argues that the district court erred by considering events after the execution of the relevant policy, but we disagree. Courts may consult the parties' "subsequent conduct" as "evidence of their true intent." *First Chatham Bank v. Liberty Cap., LLC*, 755 S.E.2d 219, 224 (Ga. Ct. App. 2014). The "actual conduct of both parties" following contract formation is probative evidence of mutual mistake. *Fox*, 449 S.E.2d at 514.

A mutual mistake in naming the insured owner of a restaurant provides a basis for equitable reformation. In *Occidental Fire*, a limited liability company bought a bar and restaurant business. *See* 793 S.E.2d at 608. The individual member of the company then signed a commercial insurance application for the restaurant that identified the restaurant and its *former* owner as the insured. *Id.* The member later accepted an insurance proposal listing the former owner as the insured. *Id.* Then the estate of a patron who had been stabbed to death in the restaurant sued the company for wrongful death. The company sought defense and indemnification under the policy. But the insurer denied coverage on the ground that the entity "was not listed as, and did not come within the definition of, an insured under the policy." *Id.* After the restaurant settled the suit and assigned its policy rights to the estate, the estate obtained a reformation of the policy. *Id.* at 608. The Georgia Court of Appeals held that the insurer failed to explain why either party to the policy "would have intended for [it] to provide . . . coverage to the prior owner who no longer had any interest in the business, rather than the actual current owner." *Id.* at 609. The insurer "relied on" a mistaken application when it issued the policy and "labored under the same misconception that the name of the insured should be the prior corporate owner's name." *Id.*

Occidental controls this appeal. AmGuard insists that it could not have shared Shou & Shou's mistake because it did not know the "identit[y]" of the intended insured and could not have intended to "name" Shou & Shou as an insured. But Georgia law does not demand that degree of specificity in defining a mutual mistake. Nothing in *Occidental* suggests that the insurer knew or had reason to know the identity or name of the limited liability corporation. The mistake was that the insured should be an entity other than the true owner. And the mutual mistake here is identical: the 2016-17 policy insured a fictional entity with no insurable interest instead of the owner of the business that the policy was meant to insure, and the insurer reaped premiums even as the owner was denied coverage. As in *Occidental*, the parties could not have intended that outcome.

AmGuard argues that *Occidental* is "materially distinguishable" on three grounds, but each argument misses the mark. First, AmGuard contends that the 2016-17 policy was not issued to a prior owner of the insured business. But nothing in *Occidental* suggests the materiality of the fact that the mistaken insured was the *prior* owner of the bar and restaurant. What mattered was that the mistaken insured was *not* the "*current* owner"—that is, the true owner. *Id.* at 609 (emphasis added). Second, AmGuard asserts that the policy "*did* provide coverage"—to "Noodle Life" and for "various propert[ies]" owned by the Shous—and so was "not issued to an entity with *no* insurable interest." But the record contains no evidence that the policy insured "Noodle Life." The original policy and the 2016-17 policy were both issued to "Noodle, Inc." And the parties agree that "Noodle, Inc. was not an actual corporation" during the coverage period and could have "no insurable interest." Third, AmGuard argues that because the Shous "own several entities," no evidence "suggest[s] that the parties would have intended to solely insure Shou & Shou as opposed to Noodle [Inc.]." On the contrary, no evidence refutes the Lowerys' consistent assertion that the Shous intended to insure the owner of Noodle College Park—Shou & Shou.

Lee v. American Central Insurance Co., on which AmGuard relies, is inapposite. 530 S.E.2d 727 (Ga. Ct. App. 1999). The plaintiff in *Lee* sought reformation of an insurance policy to which he was not a party and that never mentioned his name. *Id.* at 729. The court of appeals explained that the insurer "was not informed" that the plaintiff owned the property, that the policy never mentioned the plaintiff, and that the plaintiff "did not conduct business" with the insurer "related to the policy." *Id.* at 730. AmGuard, in contrast, *was* informed that Shou & Shou owned Noodle College Park, and Shou & Shou *did* conduct business with AmGuard under the policy. AmGuard's appointed defense counsel in the *Addus* suit told AmGuard, "[y]our insured is Shou & Shou, Inc. This company owns and operates [Noodle College Park]." Defense counsel in the *Love* suit told AmGuard substantially the same thing. Shou & Shou paid all premiums for the policy and its predecessor policies out of its operating account. AmGuard also settled the *Addus* and *Love* suits by obtaining releases in favor of Shou & Shou. And AmGuard, in evaluating policy renewal and premium rates for "Noo-

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dle, Inc.," considered prior claims it had handled for Shou & Shou at Noodle College Park.

Reformation of the policy does not prejudice AmGuard. Although AmGuard contends that reformation would be prejudicial because it would require insuring Shou & Shou, an entity it "never agreed" or "intended" to insure, the same could be said of the insurer in *Occidental*. *See* 793 S.E.2d at 609. AmGuard also argues that the policy charged premiums reflecting the risks it judged "commensurate with insuring a single business entity" and that reforming the policy to "add" Shou & Shou would entail insuring "multiple entities." But the Lowerys seek only to substitute Shou & Shou for "Noodle, Inc.," a nonexistent entity; reformation would not change the "number of entities to be insured." And though AmGuard considers it "obviously prejudicial" to be "exposed" to the $1 million consent judgment in the Lowerys' state suit, the Georgia court rejected that argument in materially identical circumstances in *Occidental*, *see* 793 S.E.2d at 609. Other Georgia courts too have rejected prejudice arguments grounded in financial loss when the contract is otherwise reformable. *See, e.g.*, *Brannen*, 410 S.E.2d at 763-65.

C. The Lowerys' Claim of Breach of Contract Merges with Reformation of the Policy.

The district court also did not err by granting summary judgment in favor of the Lowerys on their claim of breach of contract. A claim for equitable reformation and a claim for damages flowing from breach of the reformed contract are "only one claim for relief." *Wall*, 249 S.E.2d at 590. Reformation relates back to the date of the policy's execution. *Aames Funding Corp. v. Henderson*, 620 S.E.2d 503, 506 (Ga. Ct. App. 2005). Because the district court correctly reformed the 2016-17 policy to substitute in Shou & Shou as the insured, the policy required AmGuard to defend and indemnify Shou & Shou in the Lowerys' state suit. *See Occidental*, 793 S.E.2d at 609.

IV. CONCLUSION

We **AFFIRM** the judgment in favor of the Lowerys.

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*Honorable Thomas P. Barber, United States District Judge for the Middle District of Florida, sitting by designation.

* * *

Civil rights—Employment discrimination—Retaliation—District court did not err in granting summary judgment for hospital employer and against former hospital nurse who sued hospital alleging race discrimination, including hostile work environment, and retaliation under Title VII and 42 U.S.C. §1981—Race—Hostile work environment—Plaintiff could not establish a racially hostile work environment claim where there was no evidence of harassment sufficiently severe or pervasive to alter terms of her employment—Plaintiff presented evidence clearly showing she subjectively perceived her coworkers' conduct as severe or pervasive but failed to meet her burden to show this subjective perception was objectively reasonable—Complained-of comments that were not directed at plaintiff, even if race-based, were not sufficient, alone or with other comments, to show hostile work environment—Supreme Court's decision in *Bostock v. Clayton County* did not undermine application of *McDonnell Douglas* framework to evaluate circumstantial-evidence-based retaliation claims because but-for causation still applies—District court did not err in applying *McDonnell Douglas* framework to claims requiring but-for causation, even if plaintiff asserted multiple but-for causes—Retaliation claim cannot survive under either *McDonnell Douglas* or convincing mosaic analysis—Assuming plaintiff made out a prima facie case that proffered adverse employment actions were retaliatory, hospital satisfied its burden of identifying nonretaliatory reasons for its actions, and plaintiff failed to point to evidence sufficient to allow a reasonable inference of pretext and that but-for her protected conduct she would not have faced the same outcome—Alternatively, applying the convincing mosaic analysis, plaintiff's "mosaic" of evidence was insufficient to allow a reasonable jury to infer but-for causation—District court did not err by granting summary judgment in favor of hospital on disparate-treatment claim where there was no evidence, direct or circumstantial, by which a reasonable jury could conclude race played a role in employee's termination

CYNTHIA DIANE YELLING, Plaintiff-Appellant, v. ST. VINCENT'S HEALTH SYSTEM, Defendant-Appellee. 11th Circuit. Case No. 21-10017. October 5, 2023. Appeal from the U.S. District Court for the Northern District of Alabama (No. 2:17-cv-01607-SGC).

(Before BRANCH and BRASHER, Circuit Judges, and WINSOR,* District Judge.)

(PER CURIAM.) Cynthia Yelling worked as a hospital nurse for St. Vincent's Health System. After St. Vincent's fired her, Yelling sued, alleging race discrimination (including hostile work environment) and retaliation under Title VII and 42 U.S.C. § 1981. The district court granted summary judgment for St. Vincent's,[1] and Yelling appealed.

On appeal, Yelling contends she presented sufficient evidence to survive summary judgment as to all claims. She also contends that after *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) [28 Fla. L. Weekly Fed. S294a], it is not appropriate to apply the *McDonnell Douglas* framework to a "mixed-motive" retaliation claim. After careful review, and with the benefit of oral argument, we conclude that (i) Yelling's hostile work environment claim fails because there is no evidence of severe or pervasive harassment; (ii) *Bostock* did nothing to undermine application of *McDonnell Douglas* to retaliation claims because but-for causation still applies; (iii) Yelling's retaliation claim cannot survive—either under *McDonnell Douglas* or otherwise; and (iv) Yelling's disparate-treatment claim fails because there is no evidence that race played a role in her termination. We therefore affirm.

I.

We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C1470a] (citing *Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755, 759 (11th Cir. 2006) [20 Fla. L. Weekly Fed. C74a]). "Summary judgment is proper if the evidence shows 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(a)).

Because we resolve all factual disputes in the nonmovant's favor, the " 'facts,' as accepted at the summary judgment stage of the proceedings, may not be the 'actual' facts of the case." *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000). What follows are the facts as accepted for summary judgment purposes.

II.

In 2010, Yelling began work as a pool nurse in St. Vincent's Birmingham hospital. Pool nurses were not permanently assigned to any hospital unit; instead, they worked throughout the hospital as needed. Yelling later secured a permanent registered nurse assignment in St. Vincent's Clinical Decision Unit ("CDU"). The CDU cared for patients who needed general observation, lab work, or other tests.

Yelling initially worked weekday shifts in the CDU, but she switched to weekend shifts in 2013. Her supervisors—charge nurse Casi Dubose and the patient care supervisor—sometimes had her work extra shifts during the week. Yelling would also volunteer to serve as a relief charge nurse when the CDU needed one. Dubose usually selected white pool nurses for those assignments, but she did choose Yelling—who is black—a few times.

During these first few years, things went smoothly. Dubose evaluated Yelling's job performance and reported that Yelling generally met expectations. But the employment relationship began to sour in 2015.

In March of that year, President Obama visited Lawson State Community College—a predominantly black school Yelling had attended. While nurses were chatting one day at the nurse station, charge nurse Jimmy Wilhite remarked, "What is he doing coming here? Is he handing out food stamps?"

After that, as Yelling explains, the CDU "got really kind of heated with . . . racially disparaging comments." Yelling overheard white pool nurse Sandy Sheffield say, "Michelle Obama looks like a monkey" and that the "President is a piece of shit." White staffer Tiffany Hardy made similar remarks. So too did white weekday nurse Linda Powell, who said President Obama was "stupid,"

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was the "worst president ever," and "needs to go back to Africa."

Yelling also heard these three coworkers refer to black patients as "boy" or "girl," "crack heads," "welfare queens," or "ghetto fabulous." And three other white coworkers—Tonya Larimore, Robin Calvert, and Jennifer Laroe—talked at the nurse station about their "redneck status," owning guns, and being "confederate flag flyers."

Yelling does not remember having any racial insult or slur directed at her personally. Still, Yelling reported the comments as offensive to the house supervisor on June 14, 2015. She also complained that Dubose maintained a "quota" of only staffing one black nurse per shift. St. Vincent's did not investigate Yelling's complaints or discipline any CDU staff for racist comments or staffing practices.

The weekend after Yelling complained, three coworkers reported that she left the CDU without explanation, acted lethargic and unsteady upon returning, and then fell asleep at the nurse station. When Dubose learned of Yelling's reported behavior that same day, she ordered the house supervisor to suspend Yelling pending a drug test. Yelling's suspension lasted only through the next weekend. The drug test came back negative, and St. Vincent's paid Yelling for the time she was suspended.

Before Yelling returned from her suspension, Dubose reached out to other CDU employees. She told each one about expected employee behavior, asked them to document any future issues with other staff, and emphasized the importance of wearing trackers. (St. Vincent's required CDU nurses to wear devices that tracked their physical locations throughout each day.)

CDU employees began reporting Yelling for not following doctors' patient-care orders and not respecting patients' personal boundaries. They specifically reported that Yelling disconnected a patient's IV, made that patient uncomfortable by praying with her in an unwanted way, delayed another patient's blood transfusion, and did not properly administer another's antibiotic. Citing this conduct, St. Vincent's placed Yelling in step one of its four-step disciplinary program by giving her a "coaching agreement" in October 2015. The coaching agreement outlined St. Vincent's expectations of Yelling, but it did not carry with it any suspension or loss of pay.

On November 22, 2015, Yelling accused her coworkers of stealing lab orders she printed. Yelling and Calvert got into a heated argument over the accusation, and Yelling shouted that the act of stealing the lab slips was "wicked." She warned that the act would "curse" the perpetrator's children, their children's children, and so on. Dubose learned of the incident and ordered the house supervisor to send Yelling home for the rest of the day. Calvert was not suspended.

When Yelling returned to work the next day, she met with Dubose and three other supervisors. Yelling complained that personnel issues with non-white CDU staff were "dealt with differently" than those with white staff. She filed an EEOC charge that same day, alleging race discrimination, hostile work environment, and other types of discrimination not at issue in this case (age, sex, religion, disability).

On November 24, and despite Yelling's complaints, St. Vincent's moved Yelling to step two of its disciplinary process by giving her a "verbal agreement." The verbal agreement cited Yelling's outburst toward her coworkers regarding the lab slips. By signing it, Yelling agreed to communicate more appropriately with her coworkers and not call them names. But the verbal agreement, like the coaching agreement, did not require any suspension or loss of pay.

Friction between Yelling and her coworkers continued. On January 10, 2016, Yelling had another heated argument with a nurse. It began while Yelling was at the nurse station talking to the son of a patient in Room 610. The other nurse approached and accused Yelling of not taking care of the Room 610 patient, forcing that nurse to step in and do Yelling's job. (The patient was assigned to Yelling.) Yelling filed a workplace violence complaint against the nurse over the incident, although it involved no violence.

When investigating her complaint, Yelling's supervisors checked her tracking report. The report showed that Yelling did not enter Room 610 any time after 4:01 p.m. Yelling, though, had written on the patient's chart that she observed the patient between 7 and 8 p.m. Six CDU employees separately reported that they saw Yelling at the nurse station after 4:01 p.m., but not in Room 610.

In February 2016, Yelling met with Dubose, another supervisor (who was black), and a human-resources representative to discuss the investigation. These supervisors told Yelling about the tracking report, about its inconsistency with her written reports, and about their belief that she falsified the patient's record. And citing the alleged falsification, they fired Yelling effective immediately. Yelling professed her innocence, telling them that her tracker did not always work, which she said she had told them before. But Dubose and her colleagues stuck with their decision to fire Yelling.

Although Yelling had not progressed through all four steps of St. Vincent's disciplinary process, her supervisors told her falsifying patient records prompts automatic termination. Before February 2016, white CDU staffers Felicia Parrish, Michael Pike, and Powell had failed to document making patient rounds or did so inaccurately. St. Vincent's disciplined these employees but did not immediately fire them.

St. Vincent's later replaced Yelling with a white nurse, and this suit followed.

III.

As noted above, Yelling alleged discrimination and retaliation under Title VII and § 1981. Her discrimination claims included separate claims for hostile work environment and disparate treatment. We address each claim in turn.

A.

To succeed on a racially hostile work environment claim under Title VII or § 1981, Yelling must prove: (1) she belongs to a protected class, (2) she experienced unwelcome harassment, (3) the harassment was based on her race, (4) the harassment was sufficiently severe or pervasive to alter the terms of her employment, and (5) employer responsibility under a theory of vicarious or direct liability. *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1283 n.3, 1284 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C1359a] (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C172a]).

Yelling has certainly provided evidence from which a jury could find she satisfied the first two elements. (St. Vincent's does not contend otherwise.) But Yelling has not provided sufficient evidence from which a jury could conclude the CDU was "permeated with 'discriminatory intimidation, ridicule, and insult, . . . sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.' " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

Showing that harassment is sufficiently severe or pervasive requires showing both a subjective and objective component. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (en banc). Specifically, "[t]he employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive . . . and this subjective perception must be objectively reasonable." *Id.* (quoting *Harris*, 510 U.S. at 21). Yelling has met her burden as to the subjective showing; she presented evidence clearly showing she subjectively perceived her coworkers' conduct as severe or pervasive. But she falls short as to the objective component.

"[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' " *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23). The Supreme Court, this court, and other Circuits have identified a nonexhaustive list of factors "to delineate a minimum level of severity or pervasiveness necessary for harassing conduct." *Mendoza*, 195 F.3d at 1246 (citations omitted). Those factors are (1) the conduct's frequency, (2) its severity, (3) whether it was physically threatening or humiliating, rather than "mere offensive utterance[s]," and (4) whether it unreasonably interfered with the employee's job performance. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997) (citing *Harris*, 510 U.S. at 23).

We examine the conduct in its context, "not as isolated acts." *Mendoza*, 195 F.3d at 1246 (citing *Allen*, 121 F.3d at 647). And this context includes comments and conduct beyond the timeframe otherwise actionable. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104-05 (2002) [18 Fla. L. Weekly Fed. C926a] (holding that the scope of harassment claims includes conduct that occurred outside 42 U.S.C. § 2000e-5(e)(1)'s EEOC filing period so long as the last-contributing act occurred within that period). We therefore recognize that the district court—by declining to consider Wilhite's statements about President Obama that were outside the EEOC charge period—did not consider the entire scope of Yelling's claim. But with a de novo review, it

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makes no difference now whether the district court did (or did not) consider all appropriate factors.

We conclude that Yelling has not presented evidence that would allow a reasonable jury to find in her favor. Yelling cites her own testimony that St. Vincent's became "kind of heated" with racist comments, or that her coworkers generally made racist comments multiple times. But that testimony lacks the specificity necessary to show frequency. *Cf. Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1153-54 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1200a] (reasoning that employee's testimony harassment occurred "every other day" or "nearly every day," which coworkers corroborated, was more specific than vague testimony harassment occurred "constantly"); *Nitkin v. Main Line Health*, 67 F.4th 565, 570-71 (3d Cir. 2023) (similar). And Yelling has not cited evidence that her coworkers' conduct was so extreme as to make up for the infrequency. *See Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1253-54 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1444a] (reasoning that where harassment is isolated but extreme, an employee may still have an actionable claim).

We begin with the comments about the former President and First Lady. We cannot say that all of these comments were race-based—as opposed to political or personal disagreement. For example, comments that the President was "stupid," the "worst," or a "piece of shit" are not inherently racial. But even if we considered these comments race-based, and even drawing all reasonable inferences in Yelling's favor, we conclude no reasonable jury could conclude these comments evince extreme harassment.

This is true even when considering these comments together with other comments—several of which plainly were racist. Those comments were only isolated epithets rather than extreme harassment. The mere fact that a supervisor (Wilhite) uttered at least one does not automatically transform the conduct (still inexcusable) from boorish or crude to extreme. *Cf. Adams*, 754 F.3d at 1254-55 (considering a supervisor who uttered "n-----" in front of plaintiff). And Yelling does not cite any evidence that her coworkers aimed these or any comments at her personally. To be sure, Yelling need not be the intended target of harassment to succeed. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982). But overhearing offensive comments is less severe or humiliating than being the intended target of direct harassment. *See Adams*, 754 F.3d at 1251-57; *cf. Miller*, 277 F.3d at 1277 (reasoning that the plaintiff cited evidence of severe harassment where he "did not suffer from overhearing occasional off-color comments," but instead experienced a coworker's shouting derogatory names at him). Even *Smelter*, on which Yelling relies heavily, drew this distinction. 904 F.3d at 1285-86 ("[The harassing coworker] did not simply use the epithet in [the plaintiff's] presence; instead, she directed it at [the plaintiff] as a means of insulting her in the midst of an argument.").

Yelling also points to the Larimore, Calvert, and Laroe comments about being "confederate flag flyers" or "redneck" gun owners, which the district court did not view as race-based. She argues at length that we must view these statements as racial harassment because of the context in which they were made. But the problem is that Yelling does not cite evidence adequately illuminating the context she says we must consider. She instead relies heavily on generalizations about changing "societal norms"—such as recent civil rights protests and confederate monument removals—that shed no light on what she experienced at St. Vincent's. The evidence that Yelling does cite to that end is that she was regularly the only black nurse on her shift and that coworkers other than Larimore, Calvert, and Laroe made racist statements about the Obamas and patients. But that does not speak to the context of the conversations in which the statements were uttered. Nothing cited suggests, for example, that a coworker called herself a "confederate flag flyer" in conjunction with a racial slur or in the same discussion as one.

We cannot conclude that the comments about the confederate flag or being gun-carrying rednecks were racial harassment since Yelling only offers them in a vacuum. But even if we agreed with Yelling that they were race-based harassment, the comments still would not—alone or with everything else Yelling offers—be sufficient to show a hostile work environment.

There is no question that Yelling overheard race-based comments that do not belong in any workplace. But it is a "bedrock principle" that not all subjectively offensive language in the workplace violates Title VII. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C477a] (en banc). Title VII only prohibits harassment that is "so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81; *see also Smelter*, 904 F.3d at 1283 n.3, 1284. On this summary judgment record, no reasonable jury could conclude Yelling experienced that. Accordingly, the district court did not err in granting summary judgment as to Yelling's hostile work environment claims.

B.

Next is Yelling's retaliation claim, which she based on circumstantial evidence. This court has "primarily" relied on the *McDonnell Douglas* framework to evaluate circumstantial-evidence-based employment claims at summary judgment. *See Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1236 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C40a] (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *see also Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1344-45 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1349a] (citing *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1135 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1535a] (en banc)) (*McDonnell Douglas* applicable to Title VII claims); *Gogel*, 967 F.3d at 1134 (same for § 1981 claims). Under that familiar framework, a plaintiff must first make out a prima facie case by showing (1) she engaged in a statutorily protected activity, (2) she experienced an adverse employment action, and (3) causation. *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997) (citing *Coutu v. Martin Cnty. Bd. of Cnty. Cmm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995)). If the plaintiff makes out a prima facie case, the employer must then "articulate a legitimate, nondiscriminatory reason or reasons" for its actions. *Patterson*, 38 F.4th at 1345 (citing *Gogel*, 967 F.3d at 1135). If the employer does, the plaintiff must show that the proffered reasons were pretext and that the employer's real reason was retaliation. *Id.*; *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000).

Yelling contends that test does not apply here. She contends the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) [28 Fla. L. Weekly Fed. S294a], shows that *McDonnell Douglas* has no application in "mixed motive Title VII retaliation" claims. Init. Br. at 36 (arguing that *Bostock* "made it clearer than ever that where an employee can point to *any* evidence of discrimination or retaliation, the case must go to a jury" (emphasis added)).[2] She contends the appropriate standard for her retaliation claim is akin to the standard used for mixed-motive discrimination claims under Title VII. *Cf. Quigg,* 814 F.3d at 1235.[3] She alternatively contends that if *McDonnell Douglas* does apply, she has shown enough to survive it. Finally, she contends that—*McDonnell Douglas* aside—she has presented enough evidence to show a convincing mosaic of retaliation. Yelling is incorrect on each contention.

1.

Though available for Title VII discrimination claims, it is well-established that the mixed-motive framework does not apply to Title VII retaliation claims. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) [24 Fla. L. Weekly Fed. S366a].[4] Rather, to succeed on her retaliation claim, Yelling must show that her "protected activity was a but-for cause of the alleged adverse action." *Id.* at 362; *see also Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) [28 Fla. L. Weekly Fed. S77a] (same standard for § 1981 case). The but-for standard asks whether "a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739 (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) [21 Fla. L. Weekly Fed. S958a]). "Stated another way, a plaintiff must prove that had she not complained, she would not have been fired." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C927a].

As the Supreme Court explained in *Nassar*, the motivating-factor standard under § 2000e-2(m), on the other hand, requires a "lessened" showing. 570 U.S. at 349. That "lessened" showing is sufficient for a Title VII discrimination claim, which requires only a showing that race "was *a* motivating factor for the defendant's adverse employment action," even if some other (lawful) consideration would have led to the same outcome. *Quigg*, 814 F.3d at 1239 (citation omitted). In other words, the motivating-factor standard only asks whether "illegal bias played a role" even if bias was not a necessary link in the causal

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chain. *Id.* at 1241. If it did, the claim can proceed.

But, as the Supreme Court made clear in *Nassar*, that "lessened" showing has no application to retaliation claims—like Yelling's—or any other claim that requires but-for causation. 570 U.S. at 360 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

Bostock, which involved a Title VII sex discrimination claim—not a retaliation claim—did nothing to change this. *Bostock* noted that Title VII bars discrimination "because of" sex, *see* 42 U.S.C. § 2000e-2(a)(1); that "because of" incorporates traditional but-for causation; and that sometimes "events have multiple but-for causes." *Bostock*, 140 S. Ct. at 1739-40. That means an employer cannot escape liability by pointing to some factor other than sex it considered if sex "was one but-for cause."[5] *Id.* at 1739.

Bostock's description of but-for causation—and the idea that outcomes can have multiple but-for causes—was nothing new. The Court articulated the longstanding traditional test for but-for causation: "a but-for test directs us to change one thing at a time and see if the outcome changes." *Id.* That standard is "textbook tort law," *Nassar*, 570 U.S. at 347, and reflects "the common understanding" of factual causation, *Burrage v. United States*, 571 U.S. 204, 211-12 (2014) [24 Fla. L. Weekly Fed. S531a] (illustrating the point with a baseball hypothetical).

In arguing that *Bostock* undermines application of *McDonnell Douglas* in the retaliation context, Yelling conflates the concept of multiple but-for causes with the concept of mixed motives. If there are multiple but-for causes, the removal of any one would change the outcome. Each would be a "necessary condition for the outcome," Restatement (Third) of Torts: Phys. & Emot. Harm § 26 cmt. b (Am. L. Inst. 2010), regardless of whether there was another such "necessary condition." Each could be viewed as "the straw that broke the camel's back." *Burrage*, 571 U.S. at 211; *cf. also Bostock*, 140 S. Ct. at 1742n ("If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met . . . .").

With a mixed-motive (or motivating-factor) claim, on the other hand, a plaintiff need only show that a protected consideration contributed in some way to the outcome—even if it ultimately changed nothing. *Quigg*, 814 F.3d at 1235. Consider the Supreme Court's example in *Babb v. Wilkie*:

> Suppose that a decision-maker is trying to decide whether to promote employee A, who is 35 years old, or employee B, who is 55. Under the employer's policy, candidates for promotion are first given numerical scores based on non-discriminatory factors. Candidates over the age of 40 are then docked five points, and the employee with the highest score is promoted. Based on the non-discriminatory factors, employee A (the 35-year-old) is given a score of 90, and employee B (the 55-year-old) gets a score of 85. But employee B is then docked 5 points because of age and thus ends up with a final score of 80. The decision-maker looks at the candidates' final scores and, seeing that employee A has the higher score, promotes employee A.

140 S. Ct. 1168, 1174 (2020) [28 Fla. L. Weekly Fed. S116a]. Age bias factored into (or motivated) the decision, meaning the decision was not "free from" discrimination. *Id.* (quoting 29 U.S.C. § 633a(a)). But the younger employee would have secured the promotion either way, meaning "age was not a but-for cause of the decision." *Id.* Rather than serving as one of several but-for causes, it was no but-for cause at all; it did not break the camel's back. But that did not defeat the claim because (unlike here) the statute at issue, 29 U.S.C. § 633a(a), did not require but-for causation. Rather, the statute required "that personnel actions be untainted by any consideration of age." *Babb*, 140 S. Ct. at 1171.

Yelling's case is different. A Title VII retaliation claim requires "proof that the desire to retaliate was the but-for-cause of the challenged employment action." *Nassar*, 570 U.S. at 352; *id.* at 360 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m)."). Where but-for causation is required, a plaintiff with evidence of only a tagalong "forbidden consideration" cannot meet her summary judgment burden because she cannot show "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id.*

Here, Yelling alleges multiple but-for causes: she contends St. Vincent's took its adverse action because of unlawful retaliation and because of other lawful reasons. But this does not transform her claim into a mixed-motive claim, and it does not relieve her of her obligation to show an *unlawful* but-for cause resulted in the alleged wrongful action. Moreover, in the context of the *McDonnell Douglas* framework, it does not relieve Yelling of her obligation to respond to St. Vincent's legitimate reason with a showing of pretext.

It is true that if Yelling were correct that there were two but-for causes—unlawful retaliation and a lawful factor—she could have a claim if the two combined to result in an adverse action that would not have occurred without that combination. In that instance, the retaliation would be a but-for cause because the adverse action would not have occurred without it. The fact that a lawful consideration was also a necessary factor would not defeat her claim. *See Bostock*, 140 S. Ct. at 1739.

But in this situation—and assuming Yelling makes a prima facie case—St. Vincent's can still meet its burden of production by showing that the adverse action was based on the lawful consideration. At this stage, where St. Vincent's burden is "exceedingly light," *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983), all St. Vincent's must do is produce evidence that it had a legitimate reason for its decision. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254-55 (1981). Thus, by articulating a legitimate reason—rather than remaining "silent in the face of the presumption" that follows a prima facie showing—St. Vincent's meets its burden, leaving Yelling to show that retaliation was a but-for cause of the adverse action. *Id.* at 254-56. "Importantly, throughout this entire process, the ultimate burden of persuasion remains on the employee." *Gogel*, 967 F.3d at 1135 (quoting *Sims v. MVM, Inc.*, 704 F.3d 1327, 1333 (11th Cir. 2013) [23 Fla. L. Weekly Fed. C1821a]). In short, nothing about *Bostock* is inconsistent with applying *McDonnell Douglas* to claims requiring but-for causation—even if a plaintiff asserts multiple but-for causes. The district court therefore did not err in applying it. And as we explain next, the district court did not err in concluding that Yelling could not succeed under that framework.

2.

Below, Yelling proffered four adverse employment actions: (1) the drug test and related suspension, (2) progressive discipline by the coaching and verbal agreement, (3) Dubose's not always choosing her as a relief charge nurse, and (4) her firing. The district court held that the first three did not qualify as "adverse employment actions." *See Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 861 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C991a] (holding that in the retaliation context, an adverse action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) [19 Fla. L. Weekly Fed. S326a])). As for Yelling's firing, the court applied *McDonnell Douglas*. It reasoned that Yelling did not show but-for causation because there was no evidence that St. Vincent's justification—falsification of patient records—was pretextual.

We need not address whether the district court erred in holding that the first three events were not adverse actions. Even if all the events qualify, Yelling has not shown retaliatory intent was a but-for cause behind any of them.

First, assuming Yelling made out a prima facie case that the drug test and suspension were retaliatory, St. Vincent's satisfied its light burden of identifying a nonretaliatory reason for its actions: three witnesses reported that Yelling left the CDU without explanation and looked under the influence when she returned. *See Chapman*, 229 F.3d at 1030. The question, then, is whether Yelling has pointed to evidence sufficient to allow a reasonable inference of pretext and that her protected conduct was a but-for cause. She has not.

Yelling cites the short time between her June 2015 complaints of racism and the subsequent drug test, but timing alone is not enough to show pretext. *See Gogel*, 967 F.3d at 1137 n.15. In short, Yelling has not rebutted St. Vincent's justification head on or plausibly suggested retaliation was the reason for the drug test and

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suspension. *Id.* at 1136.

Second, assuming Yelling made a prima facie showing as to St. Vincent's placing her in progressive discipline, she has again not shown pretext. St. Vincent's offered justifications that could motivate a reasonable employer: that Yelling ignored doctors' orders and made a patient uncomfortable by praying with her in an unwanted manner. Yelling contends she had good reasons for these actions. But it is not enough to quibble with St. Vincent's reasons. *Id.* at 1148-49 ("An employer 'may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory [or retaliatory] reason.' " (alteration in original) (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1363 n.3 (11th Cir. 1999))); *Elrod v. Sears, Robuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). And Yelling has not shown that but for her protected conduct she would not have faced the same outcome.

Yelling points to no specific evidence to support her claim as to the relief charge nurse assignments. So she has made no prima facie case as to this proffered adverse action.

That leaves the fourth proffered action—Yelling's firing. Like the drug test, the adverse action occurred a short time (about two months) after Yelling complained of racism and filed an EEOC complaint. But St. Vincent's cited its belief, based on Yelling's tracking report and six witnesses, that Yelling falsified the Room 610 patient's treatment information. And Yelling does not rebut that explanation head on. Instead, citing how she told her supervisors her tracker sometimes malfunctioned, her argument boils down to a mere disagreement with the proffered explanation.

That is where Yelling's retaliatory-firing claim fails—she cites no evidence beyond mere temporal proximity indicating retaliatory intent. Her theory is that once she first reported racist comments in June, St. Vincent's began building a case against her—pointing to the drug test, her coworkers' complaints about her conduct, and the coaching and verbal agreements. While this court has reasoned before that intensive monitoring or harassment by supervisors can suggest pretext,[6] the evidence here does not allow an inference that St. Vincent's deliberately searched for a fabricated reason to fire Yelling.

In short, then, Yelling cannot survive summary judgment under the *McDonnell Douglas* framework.

3.

Yelling alternatively argues that her retaliation claims survive under a "broader" convincing mosaic analysis. As she correctly notes, plaintiffs relying on circumstantial evidence can always survive summary judgment if "circumstantial evidence raises a reasonable inference that the employer discriminated." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) [23 Fla. L. Weekly Fed. C64a] (explaining that *McDonnell Douglas* is not "the *sine qua non*" for employee plaintiffs).

This court has used the phrase "convincing mosaic" simply to recognize that courts must consider the totality of a plaintiff's circumstantial evidence on summary judgment. *See id.* That entire evidentiary picture may include, "among other things," (1) suspicious timing or ambiguous statements, (2) systematically better treatment of similarly situated employees, and (3) pretext. *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C145a] (citing *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 733-34 (7th Cir. 2011), *overruled by Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016)). "Convincing mosaic," however, is not a "legal test of any kind." *Ortiz*, 834 F.3d at 764-65. At the end of the day, a retaliation plaintiff's "mosaic" of evidence must still be enough to allow a reasonable jury to infer but-for causation. *Cf. Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1273-74 & n.2, 1277-81 (11th Cir. 2021) [28 Fla. L. Weekly Fed. C2645a]. Yelling's evidence is insufficient to allow that inference.

C.

Last is Yelling's disparate-treatment claim. Yelling cites no direct evidence of intentional race discrimination. So to survive summary judgment, she had to point to sufficient circumstantial evidence of discriminatory intent. *See EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C775a].

Yelling proffered the same four adverse actions for her discrimination claim as for her retaliation claim. We need only address Yelling's firing, which is indisputably an adverse employment action. The district court held that the drug test, progressive discipline, and not being assigned as a relief charge nurse did not qualify as adverse actions for purposes of a discrimination claim. Yelling did not develop any detailed argument on appeal on why that was error, and she thus abandoned any claim challenging those three actions as racially discriminatory.[7] *See NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998).

As to her firing, Yelling argues that she presented a mixed-motive race discrimination claim and that the district court erred by applying *McDonnell Douglas*'s framework instead of *Quigg*'s mixed-motive standard. But even applying *Quigg*'s more lenient motivating-factor analysis, Yelling's discrimination claim still fails. She cites no evidence by which a reasonable jury could conclude that race at least "played a role" in her firing.[8] *Quigg*, 814 F.3d at 1241. Yelling relies on the same evidence she cites to support her hostile work environment claim, namely that some people made racist comments about the Obamas and patients, St. Vincent's inaction on Yelling's complaints, and Dubose's "quota." That evidence does not remotely suggest St. Vincent's decisionmakers—one of whom was black—considered race when firing Yelling based on the tracking report. Nor does it suggest Yelling's race motivated any of the six witnesses who reported seeing her at the nurse station instead of Room 610. She says these were biased witnesses who made the racist comments discussed earlier, but she cites no evidence to support that.

Yelling also points to white staffers Felicia Parrish, Pike, and Powell, whom St. Vincent's did not fire for misconduct. But St. Vincent's disciplined them for mere negligent conduct—for not documenting patient-care information accurately or at all. Yelling, in contrast, allegedly committed a more severe intentional offense—*falsifying* patient information. St. Vincent's treatment of these three, therefore, does not support a reasonable inference that race played a role in Yelling's terminations.

The district court did not err by granting summary judgment in St. Vincent's favor on the discrimination claim.

IV.

The order granting summary judgment for St. Vincent's is **AFFIRMED.**

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*Honorable Allen Winsor, United States District Judge for the Northern District of Florida, sitting by designation.

[1]With the parties' consent, a magistrate judge presided over the case and issued the order on appeal. *See* 28 U.S.C. § 636(c).

[2]Yelling did not plead a mixed motive in her complaint, and it is an open question in this Circuit whether that is necessary. Some unpublished decisions suggest pleading mixed-motive causation is not required, *see Williams v. Fla. Atl. Univ.*, 728 F. App'x 996, 999 (11th Cir. 2018); *Williams v. Housing Auth. of Savannah, Inc.*, 834 F. App'x 482, 489 (11th Cir. 2020), while others have suggested it is, *Stevenson v. City of Sunrise*, 2021 WL 4806722, at *7 (11th Cir. Oct. 15, 2021); *Fonte v. Lee Mem'l Health Sys.*, 2021 WL 5368096, at *4 (11th Cir. Nov. 18, 2021); *Smith v. Vestavia Hills Bd. of Ed.*, 791 F. App'x 127, 130-31 (11th Cir. 2019). St. Vincent's did not argue any pleading deficiency, so we assume (without deciding) that there is none.

[3]A plaintiff can survive summary judgment on a Title VII discrimination claim under 42 U.S.C. § 2000e-2(a)(1) by showing that, although an employer was motivated by more than one reason to take a particular action, a discriminatory reason was "a motivating factor" for the adverse employment action. *Quigg*, 814 F.3d at 1239; *see also* 42 U.S.C. § 2000e-2(a)(1). This theory is known as a "motivating factor" or "mixed-motive" discrimination claim. In other words, under the mixed-motive standard, when a plaintiff claims that the employer acted with mixed motives—and one of those motives was discriminatory—the plaintiff's claim can proceed, and the plaintiff is not required to prove that the employer's stated reason for the adverse action was pretextual. *Id.* at 1238-39.

Importantly, however, Yelling's Title VII retaliation claim is brought under 42 U.S.C. § 2000e-3(a), not § 2000e-2(a)(1). Thus, as explained further in this opinion, the mixed-motive framework does not apply to claims under § 2000e-3(a). Yelling's arguments to the contrary are unpersuasive.

[4]We use the term "mixed motive" to refer to claims based on the "motivating-factor" standard applicable in Title VII discrimination claims. *See Quigg*, 814 F.3d at 1235 ("An employee can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, 'was a motivating factor for' an adverse employment action, 'even though other factors also motivated' the action." (quoting 42 U.S.C. § 2000e-2(m))). At any rate, to the extent a retaliation claim based on multiple but-for causes is fairly called a "mixed-motive" claim, but-for causation still applies. *Cf. Gross*, 557 U.S. at 177-78.

[5]*Bostock* also noted that the motivating-factor (*i.e.*, mixed-motive) test was alive and well for discrimination claims under § 2000e-2(a)(1), meaning that "liability [could] sometimes follow even if sex wasn't a but-for

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cause of the employer's challenged decision." *Bostock*, 140 S. Ct. at 1739-40. Nevertheless, *Bostock* focused its analysis on the traditional but-for causation standard because the motivating-factor test was not at play. *Id.* at 1740.

[6]See *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522-23 (11th Cir. 1991), superseded on other grounds as stated in *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000).

[7]Our conclusion here is not inconsistent with our earlier assumption that Yelling pointed to qualifying adverse actions for her retaliation claim. Employer conduct may be "adverse action" for purposes of a retaliation claim, but not under the narrower standard that governs disparate-treatment claims. *See Crawford v. Carroll*, 529 F.3d 961, 973-74 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C758a].

[8]To the extent Yelling alternatively says the district court erred in its application of *McDonnell Douglas* (assuming a plaintiff can even argue both *McDonnell Douglas* and *Quigg* at the same time), she could not succeed under a true-motive theory for the same reason.

(BRASHER, Circuit Judge, concurring.) I concur in the Court's opinion. I write separately to discuss the First Amendment implications of Ms. Yelling's request that we hold her employer liable under Title VII for failing to censor her co-workers' speech. To be clear, a private hospital can (and probably should) discourage its nurses from disparaging politicians and discussing divisive social issues in the hallway. But this case is ultimately about whether Title VII requires employers to adopt that kind of policy.

As many judges have noted, a Title VII hostile work environment claim is "unusual." *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 793 (9th Cir. 2005) (Fletcher, J., concurring). Title VII bars discriminatory treatment in the terms, conditions, or privileges of employment. But a harassment claim isn't based on "inequality in hiring, firing, promotions, or duties;" instead, it holds an employer liable because of "abusive behavior by [a plaintiff's] coworkers in the workplace." *Id.* Because an employer's liability for harassment sometimes turns on an employee's speech—what they said, how often they said it, and what they meant by it—avoiding liability for harassment requires an employer to prohibit certain kinds of speech in its workplace. *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C477a] (en banc).

Although a private employer can adopt a speech code if it wants, the government usually cannot force people to speak in a particular way. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). For this reason, Title VII harassment law has always had an uneasy coexistence with the First Amendment. The government can penalize speech when that speech is merely incidental to tortious conduct. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) [22 Fla. L. Weekly Fed. S1246a]. And nonexpressive conduct is often the root of a workplace harassment claim. *Id.* But "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995). After all, when a plaintiff brings a Title VII "harassment claim[ ] founded solely on verbal insults" or other speech, she is necessarily asking a court to impose "content-based, viewpoint-discriminatory restrictions on speech," *id.* at 596-97, and these kinds of restrictions are subject to strict judicial scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015) [25 Fla. L. Weekly Fed. S383a].

To be clear, not every application of harassment law raises free speech concerns. As I've already noted, the government can regulate nonexpressive conduct, even if doing so has an incidental effect on speech. The First Amendment also "permit[s] restrictions upon the content of speech in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010) [22 Fla. L. Weekly Fed. S221a]. Most relevant to workplace harassment, the government may ban: (1) obscenity, *Miller v. California*, 413 U.S. 15, 24 (1973), (2) "true threats" of violence, *Virginia v. Black*, 538 U.S. 343, 360 (2003) [16 Fla. L. Weekly Fed. S203a], and (3) "fighting words"—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen v. California*, 403 U.S. 15, 20 (1971).

Turning to the facts of this case, Ms. Yelling's hostile work environment claim is based on pure speech. The Court's opinion fulsomely catalogues the boorish comments that Ms. Yelling overheard. No one would confuse Ms. Yelling's co-workers with Marcus Cicero or Henry Clay. But the question remains: how should we assess this claim in light of the First Amendment?

The EEOC—which filed a thoughtful amicus brief in support of Yelling's position—says we should disregard any free-speech implications. Its position at oral argument, which is contrary to decades of precedent, was that the First Amendment has no role to play in tort litigation between private parties. That's the wrong answer. A court cannot enforce a law in a dispute between private parties if doing so requires it to "impose invalid restrictions on [a person's] constitutional freedoms of speech and press." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (noting "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) (same).

For my part, I don't think we can ignore the tension between the First Amendment and Title VII harassment law. Instead, I think the objective prong of our hostile-work-environment standard must be applied consistent with First Amendment principles. That means that the closer objectionable workplace speech is to conduct or to traditionally unprotected areas of speech, the more leeway a court should have to find an objectively hostile work environment. But the closer objectionable speech comes to the heart of the First Amendment, the more reluctant a court should be to impose tort liability because of it.

Our harassment law already draws many lines consistent with the First Amendment. Consider our conclusion that a supervisor's objectionable comments are objectively more severe than a co-worker's. The reason is that a supervisor's objectionable comments carry an implicit threat of illegal *conduct*—discriminatory treatment in promotion or termination—and a co-worker's may not. *See Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (noting a supervisor's "advocacy of discriminatory ideas can connote an implicit threat of discriminatory treatment"). Likewise, we have recognized that overhearing an offensive comment is less severe than being the target of that comment. *See e.g.*, *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1250-57 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1444a] (finding direct racist comments to be inherently more harassing than indirect ones). That line makes sense, in part, because the latter is much closer to "fighting words" than the former. Direct insults do not "seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way." *Frisby v. Schultz,* 487 U.S. 474, 486 (1988).

Likewise, I would hold that speech on public matters is inherently less likely to create a hostile work environment than speech on private matters. "[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) [22 Fla. L. Weekly Fed. S836a]. But we give the highest degree of protection to speech on matters of public concern—that is, speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). For this reason, "even those commentators who conclude the First Amendment generally permits application of harassment laws to workplace speech recognize exceptions" for "debate on issues of public concern." *Avis Rent A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1141-42 (2000) (Thomas, J., dissenting from denial of certiorari) (citing Richard H. Fallon, Jr., S*exual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 41, 47 (1994)). *See generally* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1849 (1992).

In any event, these principles are one reason I agree with the Court that Ms. Yelling's hostile work environment claim fails as a matter of law. As Justice Sotomayor recently reminded us, "First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it." *Counterman v. Colorado*, 143 S. Ct. 2106, 2121-22 (2023) [29 Fla. L. Weekly Fed. S1074a] (Sotomayor, J., concurring). I think we should apply the objective element of workplace harassment law consistent with that idea.

* * *

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Torts—Negligence—Indemnification—Freight railroad company sued food company for breach of contract between the parties governing use of a sidetrack connecting railroad company's main rail line to food company's plant, claiming food company was required to indemnify railroad company for settlement and expenses incurred in defending underlying negligence suit brought by food company employee who suffered severe injuries while working on sidetrack—Sidetrack agreement did not require food company to indemnify railroad company when railroad company was solely negligent—Under Georgia law, a contract requires indemnification for an indemnitee's sole negligence only when it explicitly says that the indemnitor must pay even if he is not negligent, and parties' sidetrack agreement did not expressly, explicitly, and unequivocally require food company to indemnify railroad company for rail company's sole negligence—Georgia vouchment doctrine did not bar railroad company from establishing that food company was at least partially at fault for employee's injury and thus liable under sidetrack agreement—Because doctrine of vouchment does not preclude rail company from introducing evidence of food company's fault, rail company may be able to establish that food company was at least partially at fault for employee's injuries and thus required under sidetrack agreement to indemnify rail company for at least a portion of the settlement and expenses incurred in defending the underlying negligence litigation

CSX TRANSPORTATION, INC., Plaintiff-Appellant, v. GENERAL MILLS, INC., Defendant-Appellee. 11th Circuit. Case No. 22-10922. October 5, 2023. Appeal from the U.S. District Court for the Northern District of Georgia (No. 1:14-cv-00201-TWT).

(Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, Circuit Judge, and PROCTOR,* District Judge.)

(JILL PRYOR, Circuit Judge.) CSX Transportation, Inc. is a freight railroad company that provides rail transportation services. General Mills, Inc., a food company, operates a cereal processing plant in Georgia near one of CSX's rail lines. A small connecting railroad known as a "sidetrack" connects CSX's main rail line to General Mills's plant, allowing General Mills to receive materials, ingredients, and equipment at its plant and to send its cereal away for distribution. A contract between CSX and General Mills governs the use of the sidetrack.

To make a very long story short, a General Mills employee suffered severe injuries while working on the sidetrack and then sued CSX for negligence. After a jury found CSX liable, the employee recovered a large settlement from CSX. CSX then sought to recover the settlement amount, as well as the expenses it incurred in defending the negligence suit, from General Mills. In this lawsuit, CSX sued General Mills for breach of contract, claiming that under the parties' agreement, General Mills was required to indemnify CSX—regardless of whether CSX alone was responsible for the employee's injury or CSX and General Mills were jointly responsible. The district court dismissed one of CSX's breach-of-contract claims and granted General Mills summary judgment on the other.

On appeal, CSX challenges both the district court's rulings. We agree with the district court that under the parties' agreement, General Mills was not required to indemnify CSX if CSX was solely negligent. But we disagree with the district court that the Georgia-law doctrine of vouchment barred CSX from litigating the issue of General Mills's negligence. If it turns out that General Mills was at least partially at fault for the injury, then under the contract General Mills must indemnify CSX for at least a portion of the settlement and related expenses. We thus affirm in part, reverse in part, and remand.

I. BACKGROUND

We begin by reviewing the provisions in the contract between CSX and General Mills governing the sidetrack that connects the CSX rail line with the General Mills cereal plant. We then describe how a General Mills employee was injured on the sidetrack, sued CSX, and secured a substantial settlement. We then turn to CSX's efforts to hold General Mills liable for the settlement and expenses CSX incurred in the underlying litigation.

A. The Sidetrack Agreement

CSX and General Mills signed a contract to build the sidetrack in 1989 (the "Sidetrack Agreement"). They agreed that a physical railroad would be constructed and that General Mills would have the option to conduct its own "switching" on that sidetrack—that is, "moving railcars that have been previously delivered by a train or assembling railcars in the proper order so that they can be coupled to a locomotive and pulled out of [the General Mills] facility." Doc. 63 at 3-4.[1] To switch railcars, an operator uses a "trackmobile," a type of mobile railcar mover used to move railcars across short distances.

Relevant to this appeal, two contractual provisions addressed indemnification between the parties for losses related to use of the sidetrack. First, in Section 11 the parties agreed that "[e]xcept as otherwise provided" in the contract, for claims arising out of "use . . . of the Sidetrack," the parties would "jointly defend and bear equally" losses due to "joint or concurring negligence," but each party would "hold the other party harmless" for any losses due to "the indemnifying party's . . . sole negligence." Doc. 63-1 at 5-6. Section 11 carved out circumstances in which the default rule—that the parties would jointly defend and bear equally any losses—would not apply. The carved-out circumstances do not exist here.[2]

Second, Section 15 gave General Mills the option to conduct its own switching operations on the sidetrack. Section 15 provided that if General Mills exercised the option to perform its own switching, it would "assume[ ] *all* risk of loss, damage, cost, liability, judgment[,] and expense, (including attorneys' fees) in connection with *any* personal injury" sustained or incurred by "employees of either [General Mills] or [CSX] or third persons . . . in connection with, or arising from or growing out of, the operation of" General Mills's switching operations. *Id.* at 7 (emphasis in original).

For over a decade, General Mills chose not to conduct its own switching operations. Later, however, General Mills exercised its contractual option to conduct its own switching. It bought a trackmobile from a company that also provided training to General Mills's employees on how to use the trackmobile to conduct switching operations. As part of the training, employees were taught to use "chocks"—wedges placed on either side of a railcar's wheels to inhibit movement—and to employ the handbrakes on railcars when operating the trackmobile.

B. The Negligence Lawsuit

A couple of years later, Doug Burchfield and Rodney Turk, two General Mills employees, were using the trackmobile to move AEX 7136, a railcar stocked with wheat that CSX had delivered to the juncture between the main rail line and General Mills's sidetrack. After uncoupling AEX 7136 from the trackmobile and parking it, Turk thought he saw the railcar move. He asked Burchfield if he had set the handbrake. Burchfield assured Turk that he had set it. The pair left the railcar sitting on the track and moved away to switch an empty railcar that was located just downhill from AEX 7136. While Burchfield stood near the trackmobile, AEX 7136 sprung loose, rolled down the slope, and crashed into the track-mobile, which in turn ran into the empty railcar. All three vehicles derailed and ran over Burchfield. He suffered extensive injuries leading to the amputation of both his lower legs.

Burchfield filed a personal injury suit in the Northern District of Georgia against CSX and the company that owned AEX 7136.[3] In his complaint, Burchfield alleged that CSX negligently delivered AEX 7136 to General Mills with a faulty handbrake, which caused the accident.

CSX sent General Mills a letter notifying it of Burchfield's lawsuit. CSX demanded that General Mills provide a defense. General Mills refused to defend CSX.

In the *Burchfield* litigation, CSX sought to attribute fault to General Mills for Burchfield's injury. CSX argued that General Mills failed to train and supervise Burchfield and Turk and that because of General Mills's negligence AEX 7136 was left without chocks blocking the wheels or handbraking before the accident. CSX requested that the district court use a verdict form that would allow the jury to allocate fault to non-party General Mills.

Burchfield moved for summary judgment on the issue of General Mills's liability. The district court granted the summary judgment motion, concluding that CSX failed to raise the affirmative defense of General Mills's fault in a timely manner and also failed to introduce expert testimony regarding the standard of care. *See Burchfield v. CSX Transp. Inc*, No. 1:07-cv-1263, 2009 WL 1405144, at *9-11 (N.D. Ga. May 15, 2009).

Burchfield's negligence claim against CSX went to trial. The jury found in CSX's favor, and Burchfield appealed. *Burchfield v. CSX Transp.*

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Inc., 636 F.3d 1330, 1333 (11th Cir. 2011) [22 Fla. L. Weekly Fed. C1936a]. We reversed the judgment and remanded for a new trial on the ground that the district court erred in admitting certain evidence. *Id.* at 1338.

The case proceeded to a second trial. This time, the jury found CSX liable and awarded Burchfield more than $20 million. Asked to allocate fault between Burchfield and CSX, the jury found that Burchfield was zero percent negligent and CSX was 100 percent negligent. The jury was not asked about General Mills. CSX appealed. While CSX's appeal was pending, CSX and Burchfield settled for $16 million.

Following the settlement, CSX demanded indemnification from General Mills. CSX asserted that under the Sidetrack Agreement General Mills owed it the full amount of the settlement payment, as well as the attorney's fees and costs CSX incurred in defending the case. According to CSX, General Mills was required to indemnify it under both Section 11 and Section 15 of the Sidetrack Agreement.

General Mills again refused CSX's demand, contending that there was "no basis—contractual or otherwise—for the demand that General Mills indemnify CSX for its own negligence and resulting damages." Doc. 63-8 at 2. Addressing Section 11, General Mills maintained that it was required to indemnify CSX only if General Mills was also negligent. In General Mills's view, because the jury in the *Burchfield* litigation concluded that CSX was 100 percent at fault, "meaning 100% individually at fault as compared to anyone else in the world who could have been potentially at fault for Mr. Burchfield's injuries," Section 11 did not support CSX's request. *Id*. at 3.

As to Section 15, General Mills contended that it owed no duty to indemnify CSX for the same reason: CSX's negligence was the sole cause of Burchfield's injury. General Mills asserted that Section 15 did not require it to indemnify CSX for losses that arose solely from CSX's own negligence.

C. CSX's Breach-of-Contract Lawsuit

CSX sued General Mills for breach of contract, seeking indemnification for the settlement with Burchfield. As relevant on appeal, CSX alleged that under Section 15 of the Sidetrack Agreement General Mills was required to assume all costs for injuries arising from General Mills's switching operations "without regard to who ultimately was determined to be at fault." Doc. 1 at 18.

General Mills moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. The court explained that under Georgia law, a party is contractually obligated to indemnify another party for losses when the first party is not negligent only if the parties' contract meets the "heightened specificity requirement" of "expressly, plainly, clearly, and unequivocally" providing for indemnification under such circumstances. Doc. 36 at 8 (emphasis omitted). The court determined that Section 15 did not meet that standard and thus General Mills was not required to indemnify CSX when CSX alone was negligent. The district court thus concluded that the Sidetrack Agreement did not require General Mills to indemnify CSX for the *Burchfield* settlement or its litigation costs.

CSX moved for reconsideration of the district court's order dismissing the complaint. It argued that the dismissal relied on the "unspoken premise" that CSX could not litigate General Mills's fault because federal collateral estoppel principles precluded it from doing so. Doc. 38 at 5. In CSX's view, the district court committed legal error by applying federal collateral estoppel law when it should have applied Georgia law. Georgia's collateral estoppel rule would have allowed CSX to litigate General Mills's negligence.[4] The district court denied the motion, stating that CSX "failed to show that the Court committed a clear error of law." Doc. 41 at 3.

CSX appealed the district court's dismissal of its complaint, and we reversed. *CSX Transp., Inc. v. General Mills, Inc.*, 846 F.3d 1333 (11th Cir. 2017) [26 Fla. L. Weekly Fed. C1157a]. We focused on the district court's conclusion that federal collateral-estoppel principles precluded CSX from litigating General Mills's fault in the indemnification action. *Id.* at 1335. We agreed with CSX that the district court should have applied Georgia's collateral estoppel rule. *Id.* at 1340. But we remanded for the district court to determine whether, under that rule, General Mills and Burchfield were "identical parties" so that the *Burchfield* judgment was binding on CSX in the indemnity suit. *Id.* (internal quotation marks omitted). We expressly declined to decide "whether the Sidetrack Agreement requires indemnification assuming CSX was solely at fault." *Id.*

On remand, CSX filed an amended complaint alleging three counts. Count One again alleged that Section 15 of the Sidetrack Agreement required General Mills to indemnify CSX "without regard to who ultimately might be determined to be at fault." Doc. 63 at 16 (emphasis omitted). Count Two alleged, in the alternative, that Section 15 required General Mills to indemnify CSX because General Mills bore "at least some fault in causing Mr. Burchfield's injuries." *Id.* at 19 (emphasis omitted). Count Three alleged, also in the alternative, that if "Burchfield's injuries did not arise from or grow out of use of the trackmobile" and CSX and General Mills were jointly or concurrently negligent, Section 11 required General Mills to indemnify CSX for 50 percent of CSX's loss. *Id.* at 21.

General Mills again moved to dismiss CSX's claims. The district court dismissed Count One for the same reason it had dismissed the Section 15 claim in its earlier order: Section 15's language was too broad and vague to require General Mills to indemnify CSX without regard to fault. But the court did not dismiss Counts Two or Three. Applying Georgia's collateral estoppel rule, the court concluded that CSX was not barred from arguing that General Mills was partially at fault for Burchfield's injuries. Therefore, the claims in Counts Two and Three, which required CSX to show General Mills was at least partially at fault, survived.

After discovery, the parties filed cross-motions for summary judgment. In its summary judgment motion, General Mills explained that for CSX to prevail on Counts Two or Three, it had to show that General Mills's negligence caused or contributed to Burchfield's injuries. Again, General Mills maintained that CSX was precluded from litigating General Mills's negligence. This time, it argued that because CSX had vouched General Mills into the *Burchfield* litigation, CSX was bound by the *Burchfield* judgment, which General Mills said determined that "CSX was 100% at fault . . . Burchfield was 0% at fault . . . and General Mills was not negligent." Doc. 188 at 17. The district court agreed, remarking that "in the vouchment doctrine, [General Mills] appears to have finally hit on a viable preclusion argument." Doc. 258 at 7. The district court entered judgment against CSX.

CSX now appeals the district court's orders granting General Mills's motion to dismiss Count One and its motion for summary judgment on Counts Two and Three.

II. STANDARD OF REVIEW

We review *de novo* an order granting a motion to dismiss for failure to state a claim. *See Hoever v. Marks*, 993 F.3d 1353, 1357 (11th Cir. 2021) [28 Fla. L. Weekly Fed. C2665a] (en banc). We also review *de novo* a district court's grant of summary judgment. *See State Farm Mut. Auto. Ins. Co. v. Spangler*, 64 F.4th 1173, 1178 (11th Cir. 2023) [29 Fla. L. Weekly Fed. C2313a]. In addition, the interpretation of a contract or statute is a question of law that we review *de novo*. *See Hoever*, 993 F.3d at 1357 (statute); *Southland Distribs. Mktg. Co. v. S&P Co.*, 296 F.3d 1050, 1053 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C723a] (contract).

III. DISCUSSION

CSX raises two theories on appeal for why General Mills is required to indemnify it. First, CSX argues that even if it was solely at fault for Burchfield's injuries, Section 15 of the Sidetrack Agreement required General Mills to indemnify it. Second, it argues that that General Mills owed it a duty to defend because a reasonable jury could find that General Mills was at least partially at fault in causing Burchfield's injuries. As to this second theory, CSX argues that the district court erred in concluding that Georgia's vouchment statute precluded it from establishing that General Mills was at least partially at fault for Burchfield's injuries. We address the two theories in turn.

A. The Sidetrack Agreement does not require General Mills to indemnify CSX when CSX is solely at fault.

CSX argues the district court erred in dismissing Count One, its indemnification claim under Section 15. It reasons that the Sidetrack Agreement unambiguously required General Mills to indemnify CSX, even for CSX's sole negligence, so the district court erred in refusing to enforce the provision. We disagree.

Under Georgia law,[5] a contract requires indemnification for an indemnitee's sole negligence only when it explicitly says that the indemnitor must pay even if he is not negligent. *See Park Pride Atlanta, Inc. v. City of Atlanta*, 541 S.E.2d

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687, 689 (Ga. Ct. App. 2000). In *Park Pride*, a non-profit organization agreed to hold a city harmless "from any and all claims . . . of any kind . . . or nature . . . for any activity sponsored by" the organization. *Id.* (internal quotation marks omitted) At a park clean-up event sponsored by the organization, a city dump truck rolled backward crushing a woman, who died from her injuries, and injuring her husband. *Id.* at 688. The husband sued the city, bringing claims arising out of his wife's death and his injuries. *Id.* After the city settled the tort litigation, it sued the organization seeking indemnification. *Id.*

The Georgia Court of Appeals considered whether the indemnification agreement required the organization to indemnify the city for the city's own negligence. *Id.* at 689. The court began with the principle that "[p]ublic policy is reluctant to cast the burden for negligent actions upon those who are not actually at fault" because "[p]ublic policy seeks to encourage people to exercise due care in their activities for fear of liability, rather than to act carelessly cloaked with the knowledge that an indemnity contract will relieve such indifference." *Id.* Based on this public policy concern, it explained that a party who was not negligent generally would not be required to indemnify a party who was negligent unless a contract "explicitly and expressly" required indemnification. *Id.* The court emphasized that "[t]he words of a contract of indemnification . . . must be construed strictly against the indemnitee" with "every presumption" against indemnification. *Id.* (internal quotation marks omitted).

Relying on this standard, the Georgia Court of Appeals concluded that the parties' agreement did not require the organization to indemnify the city. Although the indemnification provision at first blush "appear[ed] to indemnify the [c]ity 'against any and all claims,' " the provision was "bereft of any express or explicit statement about coverage for the [c]ity's own negligent acts." *Id.* Because the indemnity provision "failed to expressly, plainly, clearly, and unequivocally state that [the organization] would indemnify the [c]ity from the [c]ity's own negligence," the organization had no obligation to indemnify the city for the settlement in the underlying litigation. *Id.*; *see also Viad Corp. v. U.S. Steel Corp.*, 808 S.E.2d 58, 60, 63 (Ga. Ct. App. 2017) (holding that an agreement to indemnify for "[a]ll debts, liabilities, and obligations" was not "sufficient" to require indemnification for a party's sole negligence because the agreement did not explicitly mention the "negligence" of the party seeking indemnification (internal quotation marks omitted)); *S. Ry. Co. v. Union Camp Corp.*, 353 S.E.2d 519, 520-21 (Ga. Ct. App. 1987) (reaching same conclusion for agreement to indemnify for "all loss, damage, liability or expense" (internal quotation marks omitted)).

With this guidance, we return to the Sidetrack Agreement. Section 15 set forth General Mills's option to conduct its own switching operations and the risk of liability it accepted in exchange. If General Mills chose to perform its own switching, it "assume[d] *all* risk of loss, damage, cost, liability, judgment[,] and expense . . . in connection with *any* personal injury. . . arising from . . . the operation of [General Mills's] trackmobile or locomotive power upon [the] Sidetrack." Doc. 63-1 at 7 (emphasis in original).

Applying Georgia law, we conclude that this provision did not require General Mills to indemnify CSX for CSX's sole negligence. Nothing in Section 15 "explicitly and expressly" stated that indemnification was required if General Mills was not at fault. *Park Pride*, 541 S.E.2d at 689. To be sure, under Section 15's broad terms, General Mills "assume[d] all risk of loss." Doc. 63-1 at 7 (emphasis omitted). But as *Park Pride* made clear, such language does not "expressly, plainly, clearly, and unequivocally" state that an indemnitor must cover losses that result from the indemnitee's own negligence. *Id.* at 689.

CSX's counterarguments are unavailing. It contends that Section 15 makes sense only if General Mills was required to indemnify it regardless of fault. In its view, the Sidetrack Agreement allowed General Mills to take over its switching operations—meaning that CSX would give up "both control over the risk and the revenue from performing the switching function for General Mills"—in exchange for General Mills's agreement to "assume *all* risk of liability for *any* personal injury to any person." Appellant's Br. at 25 (alterations adopted). At first blush, CSX's quid pro quo argument is compelling: CSX gave up control over—including the potential ability to prevent accidents—and revenue from switching activity on the sidetrack, and in return General Mills accepted all liability regardless of who was at fault. But the Georgia Court of Appeals concluded that a similar indemnification provision—in which the indemnitor agreed to assume liability for "all loss" that the indemnitee incurred "because of any injury to or death of any person or loss of or injury or damage to any property"—did not "expressly state[ ] that the negligence of the indemnitee is covered" and thus did not require indemnification for the indemnitee's own negligence. *See S. Ry. Co.*, 353 S.E.2d at 520-21. Section 15's language is simply not explicit enough to require General Mills to indemnify CSX for CSX's own negligence, particularly given that we must construe the contract "strictly against" CSX as the indemnitee. *Park Pride*, 541 S.E.2d at 689. Here, construing the contract strictly against CSX means that General Mills does not have to indemnify unless it was at least partially liable for Burchfield's accident.

Georgia's rules of contract construction require that we interpret Section 15 in the context of the entire agreement. *See Peachtree on Peachtree Invs., Ltd. v. Reed Drug Co.*, 308 S.E.2d 825, 828 (Ga. 1983). But our reading does not conflict with the rest of the contract. Section 11(A) generally provided that each party would "hold the other party harmless" for losses arising from "the indemnifying party's . . . sole negligence." Doc. 63-1 at 6. Section 11(C) carved out five specific exceptions in which General Mills agreed to indemnify CSX "irrespective of the sole . . . negligence of [CSX]." *Id.* These carveouts described the only circumstances in which General Mills was required to indemnify CSX if CSX was solely negligent. And none of the carveouts included incidents arising out of General Mills' switching operations discussed in Section 15.

Because Section 15 did not expressly, explicitly, and unequivocally require General Mills to indemnify CSX for CSX's sole negligence, the district court did not err in dismissing CSX's claim that General Mills was liable under Section 15 even if CSX alone was negligent. We thus affirm the district court's dismissal of Count One.

B. The vouchment doctrine does not bar CSX from establishing that General Mills was at least partially at fault and thus liable under the Sidetrack Agreement.

CSX's other argument on appeal arises from its alternative theory that the Sidetrack Agreement required General Mills to indemnify CSX because General Mills's negligence contributed to Burchfield's injuries. CSX argues that the district court erred in granting General Mills's motion for summary judgment because the court misapplied Georgia's vouchment law when it found that CSX was bound by the *Burchfield* jury's verdict and thus could not prove that General Mills was partially at fault.

We begin by introducing Georgia's vouchment statute. We then explain why we agree with CSX that the vouchment statute binds only General Mills to the *Burchfield* judgment.

1. Vouchment under Georgia law

Georgia's vouchment doctrine addresses when a non-party may be bound by the judgment in a lawsuit. The term "vouch" means "to call into court to warrant and defend." *Loeb v. May*, 198 S.E. 785, 786 (Ga. 1938) (internal quotation marks omitted). A rudimentary hypothetical demonstrates how vouchment works: A plaintiff sues a defendant for an injury. But the defendant believes that a non-party is liable for the plaintiff's injury instead. Vouchment empowers the defendant as a "voucher" to bind the nonparty as the "vouchee" to the judgment in the first lawsuit about the plaintiff's right to recover.

To use this tool, the defendant merely needs to notify the non-party about the action against the defendant. *See, e.g.*, *Chicago v. Robbins*, 67 U.S. (2 Black) 418, 423 (1862); *W. & Atl. R.R. Co. v. City of Atlanta*, 74 Ga. 774, 777 (1885). Importantly, vouchment *does not* make the non-party a party to the lawsuit. *See* 13 *Ga. Jurisprudence* § 10:27 (Sept. 2023 update). Instead, vouchment occurs outside of court and is subject to few procedural rules. It requires nothing more of the voucher than giving notice of the lawsuit to the vouchee, which can be done in a letter or even orally. *Id.*

In 1895, Georgia enacted a statute codifying the common-law doctrine of vouchment. The statute provides:

> Where a defendant may have a remedy over against another person and vouches him into court by giving notice of the pendency of the action, the judgment rendered therein shall be conclusive upon the person vouched, as to the amount and right of the plaintiff to recover.

O.C.G.A. § 9-10-13. The doctrine's primary purpose is judicial efficiency:

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> [I]f the act of the vouchee is the real thing complained of, so that, if there is a recovery by the injured party against the voucher, he can turn right around and claim indemnity from the vouchee, then it is to the interest of the state that a multiplicity of suits should be avoided by requiring the vouchee to appear in the original suit and set up any defense which he has.

Raleigh & G.R. Co. v. W. & A.R. Co., 65 S.E. 586, 588 (Ga. Ct. App. 1909). The idea is that the first lawsuit will conclusively determine the injured party's right to recover, limiting the scope of a later indemnification lawsuit to the sole question of "the relationships and liabilities between the party vouching and the person vouched." *McArthor v. Ogletree*, 61 S.E. 859, 860 (Ga. Ct. App. 1908). In this way, vouchment incentivizes the vouchee to support the voucher's defense against the plaintiff by raising affirmative defenses or introducing any relevant evidence in the first lawsuit. *See S. Ry. Co. v. Acme Fast Freight*, 19 S.E.2d 286, 287-88 (Ga. 1942). That said, the vouchee is not obligated to participate in the voucher's defense. *Id.* It may, as General Mills did, decline to defend. But it will be bound by the judgment in the underlying lawsuit. *See id.* With this background, we turn to the vouchment issue before us.

2. Application of Vouchment to the *Burchfield* Judgment

The parties agree that CSX vouched General Mills into the *Burchfield* case and that General Mills refused to participate. In a traditional vouchment scenario, CSX would then be able to invoke the vouchment doctrine to bar General Mills from relitigating issues related to Burchfield's right to recover or the amount of his damages because those issues were already decided in the *Burchfield* case. But in this lawsuit, it is General Mills—the vouchee—who seeks to use vouchment to bar CSX from litigating issues that General Mills insists were decided against CSX in the *Burchfield* litigation. As a federal court addressing an issue of Georgia state law in this diversity action, we must defer to the Georgia courts' appellate decisions on that issue.[6] But here, no Georgia court has ever considered whether an earlier judgment has preclusive effect on a voucher in an action against his vouchee. In the prior vouchment cases, the vouchee, not the voucher, sought to relitigate the earlier liability finding, so this question has not been decided. *See, e.g.*, *W. & Atl. R.R.*, 74 Ga. at 777. Thus, the question whether vouchment binds both parties or only the vouchee is one of first impression on which we have no state court guidance.

The district court determined that the *Burchfield* judgment decided the question of whether General Mills was liable for Burchfield's accident and that CSX was precluded from pursing indemnification based on General Mills's partial or complete fault for Burchfield's accident. CSX's claims for recovery under Counts Two and Three both depend on General Mills being at least partially at fault. So, by precluding CSX from attempting to show that General Mills was negligent to support its claims, the district court eviscerated CSX's theory of recovery and inevitably concluded that CSX's alternative claims failed.

CSX argues that the district court misinterpreted the vouchment statute because vouchment binds only the vouchee (General Mills), not the voucher (CSX), to a judgment. We agree with CSX's reading of the vouchment statute.

In interpreting Georgia's vouchment statute, we look to Georgia's rules of statutory construction. *See Grange Mut. Cas. Co. v. Woodard*, 826 F.3d 1289, 1300 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C427a] (explaining that we "examine Georgia's canons of statutory construction to attempt to determine how Georgia courts would interpret a statute"). Under Georgia law, "if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end." *Deal v. Coleman*, 751 S.E.2d 337, 341 (Ga. 2013) (internal quotation marks omitted).

As a reminder, the vouchment statute provides that when a defendant in a lawsuit gives notice to another person and vouches her into the lawsuit, "the judgment rendered therein shall be conclusive *upon the person vouched*, as to the amount and right of the plaintiff to recover." O.C.G.A. § 9-10-13 (emphasis added). By its plain language, the statute addresses the preclusive effect of a judgment in an underlying action on the vouchee, not the voucher. And the title of the statute, "Effect of judgment *on party vouched* into court," is consistent with that language. *Id.* (emphasis added); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 35, at 221 (2012) (recognizing that "title and headings are permissible indicators of meaning"); *Ne. Atlanta Bonding Co. v. State*, 707 S.E.2d 921, 926 n.5 (Ga. Ct. App. 2011) (explaining that statute's title may be considered when "ascertaining legislative intent"). As to the preclusive effect of the judgment on the vouching party, the statute is silent. *See* O.C.G.A. § 9-10-13.

This interpretation is also consistent with the canon of construction that "[a] statute will be construed to alter the common law only when that disposition is clear." Scalia & Garner, § 52, at 318; *see Boca Petroco, Inc. v. Petroleum Realty II, LLC*, 678 S.E.2d 330, 332-33 (Ga. 2009) (recognizing that a "common law rule survives [a] statute regarding same area of concern when [the] statute does not directly address certain elements of [the] common law rule"). Here, there are no clear signs that the statute altered the common law. Instead, the Georgia Supreme Court has repeatedly stated that the vouchment statute codified—and did not alter—the common-law doctrine of vouchment. *See, e.g.*, *Loeb*, 198 S.E. at 786; *McArthor*, 61 S.E. at 860. Therefore, we must interpret the statute in the light of its common-law history.

And we see nothing in the common law to suggest that vouchment precludes the voucher from litigating issues that may have been decided in earlier litigation between the injured party and the voucher. At the time Georgia enacted the vouchment statute, the key Georgia common-law decisions on vouchment were *Western & Atlantic Railroad*, 74 Ga. at 777, and *Faith v. City of Atlanta*, 78 Ga. 779 (1887). *See Loeb*, 198 S.E. at 786 (explaining that Georgia's vouchment statute adopted the reasoning from these decisions). Neither case holds that vouchment precludes the voucher from relitigating issues that were decided in the underlying litigation.

We start with *Western & Atlantic Railroad*. In that case, a pedestrian who was injured at a railroad crossing sued a city for negligent maintenance of the crossing. 74 Ga. at 776. Although the city notified the railroad of the case and claimed that the railroad was liable, the railroad did not participate in the pedestrian's negligence action. *Id.* at 776-77. After the city was held liable in the negligence action, it sued the railroad. *Id.* at 776.

In the indemnification action, the railroad (which was the vouchee) sought to introduce evidence that the pedestrian was at fault. *Id.* at 777. The trial court excluded the evidence. The Georgia Supreme Court affirmed, explaining that "both the city and the railroad company were concluded" by the verdict in the negligence case "and should not be heard to say that [the pedestrian] . . . could have avoided the injuries which he received." *Id. at* 778. Although the Court's broad language, read in isolation, could suggest that both the city and railroad were bound by the judgment, the decision was addressing the effect that the judgment in the underlying negligence action had on the vouchee (the railroad), not the voucher (the city). The Georgia Supreme Court made no ruling about the vouchment's preclusive effect on the city because that issue was not before it. *Id.*

A few years later, the Georgia Supreme Court again addressed vouchment in *Faith*. In that case, a person injured on a city street sued a city for negligence. 4 S.E. at 3. The city believed that the plaintiff's injuries were caused by a property owner who had dug holes in the street and left the holes uncovered. *Id.* The city asked the property owner to appear and defend the suit. *Id.* The property owner refused. *Id.* After the plaintiff recovered against the city in the negligence action, the city sued the property owner seeking indemnification. *Id.* The city prevailed in the indemnification action, and the property owner appealed. *Id.*

On appeal, the Georgia Supreme Court addressed the issues the property owner (the vouchee) could raise in defending the indemnification action brought by the city (the voucher). Because "the judgment of the injured party against the city" was "conclusive" as to the right of the injured party to recover and the amount of his damages, the property owner could not raise these issues. *Id.* at 4. But he could raise other defenses including that "he was under no obligation to keep that portion of the streets in safe condition;" that "it was not through his [fault] that the injury happened;" and that if he and the city were both responsible, the city could not recover against him. *Id.* Although the Georgia Supreme Court stated broadly that the judgment was "conclusive between the city and [the property owner]," it did not address the vouchment's

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preclusive effect on the voucher because that question was not at issue. *Id.*

In these two foundational common-law vouchment cases, the Georgia Supreme Court held that the earlier judgment bound the vouchee. No more, no less. We agree with CSX that we are not bound by any "loose language," Appellant's Br. at 46, in which the Georgia Supreme Court commented on issues not before it in each case. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C688a] ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case."); *State v. Dorsey*, 875 S.E.2d 900, 907 n.5 (Ga. Ct. App. 2022) ("Language that sounds like a holding—but actually exceeds the scope of the case's factual context—is not a holding no matter how much it sounds like one." (internal quotation marks omitted)). We thus conclude that the vouchment statute, consistent with Georgia common law, provides that the vouchee alone is bound from relitigating issues decided in the earlier litigation.

General Mills nevertheless argues that we should reject this interpretation of the vouchment statute because it allows a voucher to "unilaterally bind a vouchee to favorable findings and contest unfavorable ones," which provides an impermissible windfall to the voucher. Appellee's Br. at 24 (internal quotation marks omitted). This argument misunderstands vouchment's purpose.

"Vouchment is *a right granted to the voucher* under the statute, as is the binding effect of the judgment *against the vouchee*." *Hardee v. Allied Steel Bldgs., Inc.*, 356 S.E.2d 682, 684 (Ga. Ct. App. 1987) (emphasis added). In other words, *by design*, vouchment empowers the voucher, not the vouchee. Vouchment exists to incentivize the vouchee to participate in the earlier action, defend his interests there, and reduce the burden of duplicative litigation on the judicial system. To accomplish this purpose, vouchment creates carrots and sticks for the vouchee. One stick is that a vouchee who is invited to participate in the earlier action and chooses not to do so is more likely to find herself bound to determinations she does not like precisely because she chose not to participate when invited to do so. General Mills's concern that vouchment, if it only binds the vouchee, tends to work *against* vouchees is simply a feature of the doctrine.[7]

Because the doctrine of vouchment does not preclude CSX from introducing evidence of General Mills's fault, CSX may be able to establish that General Mills was at least partially at fault for Burchfield's injuries and thus required under the Sidetrack Agreement to indemnify CSX for at least a portion of the settlement and expenses incurred in the *Burchfield* litigation. Accordingly, we reverse the district court's order granting summary judgment on Counts Two and Three.

IV. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's dismissal of Count One, **REVERSE** the district court's entry of summary judgment on Counts Two and Three, and **REMAND** for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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*Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

[1]"Doc." numbers refer to the district court's docket entries.

[2]Under the carveout, General Mills is "solely responsible" for the following losses: (1) "the failure of [General Mills] to properly maintain its segment of the Sidetrack"; (2) "the construction, alteration[,] or removal of the Sidetrack by [General Mills]"; (3) the presence of a restricted clearance on [General Mills's] Segment"; (4) "any personal injuries (including death) or property damage (real or personal) sustained . . . as the result of any road crossing collision on [General Mills's] Segment"; and (5) "the explosion, spillage[,] and/or presence of Hazardous Materials on [General Mills's] properties, facility or on [General Mills's] Segment . . . when such Losses would not have occurred but for the dangerous nature of the Hazardous Materials." Doc. 63-1 at 6.

[3]Because Burchfield received workers' compensation for his injuries, Georgia law precluded him from suing General Mills, his employer, for damages. *See* O.C.G.A. § 34-9-11(a) ("The rights and the remedies granted to an employee by this chapter shall exclude and be in the place of all other rights and remedies of such employee . . . on account of such injury . . . ."); *see also Brooks-Powers v. Metro. Atlanta Rapid Transit Auth.*, 579 S.E.2d 802, 804 (Ga. Ct. App. 2003) (stating that "[w]here the [Georgia Workers' Compensation] Act is applicable, its provisions are the exclusive remedy for the employee against the employer" (internal quotation marks omitted)). And the company that owned the railcar settled with Burchfield, leaving CSX as the sole defendant.

[4]Under Georgia's collateral estoppel rule, CSX would be precluded from raising arguments about General Mills's negligence in the indemnity suit only if the *Burchfield* lawsuit involved "the same parties or their privies." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1264 (11th Cir. 2011) [26 Fla. L. Weekly Fed. C1157a] (internal quotation marks omitted); *see Camden Cnty. v. Sweatt*, 883 S.E.2d 827, 833 (Ga. 2023) (explaining that collateral estoppel precludes "re-adjudication of an issue that has previously been litigated . . . in another action between the same parties or their privies (emphasis omitted) (internal quotation marks omitted)). By contrast, under the federal rule, a non-party to a previous action (General Mills) may assert collateral estoppel offensively to preclude a party to the previous action (CSX) from litigating issues decided in the previous action. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979).

[5]The parties agree that Georgia law governs CSX's claims.

[6]Because our jurisdiction in this case rests on diversity of citizenship, *see* 28 U.S.C. § 1332, we apply the substantive law of Georgia—the forum state, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). When a state's highest appellate court (in this case the Georgia Supreme Court) has addressed an issue of state law, we simply apply its holding. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1021 (11th Cir. 2014) [24 Fla. L. Weekly Fed. C1082a]. But when we are confronted with a state-law issue of first impression, we must attempt to predict how the state's highest court would decide the issue. *See Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C539a]. Absent certainty from the state's highest court, we apply the decisions of the state's intermediate court—here, the Georgia Court of Appeals—unless there is "persuasive indication that the [Georgia Supreme Court] would rule otherwise." *CSX Transp., Inc. v. Trism Specialized Carriers, Inc.*, 182 F.3d 788, 791 (11th Cir. 1999).

[7]CSX argues in the alternative that the vouchment statute does not bar it from raising an issue about General Mills's fault because no issue regarding General Mills's negligence was decided in the *Burfield* litigation. Because we conclude that the vouchment statute does not preclude CSX (as voucher) from relitigating any issues against General Mills, we need not address this alternative argument.

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