DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

No. 4D23-2816

GARY STEINBERG,

Appellant,

v.

EVA CUDAK, et al.,

Appellees.
_____/

On appeal of a final order of the circuit court, Seventeenth Judicial Circuit, Broward County, Florida

L.T. No. CONO23-015596
Keathan B. Frink, Judge

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND OF THE FACTS

I. The Nature of the Case, the Course of the Proceedings, and the Disposition in the Lower Tribunal.

This is Gary Steinberg's fourth appeal arising from a dispute over assessments and monthly dues passed by Fiesta Homeowners Association in 2021. His first three actions against Fiesta were dismissed because they were not brought as derivative actions as required under section 617.07401, Florida Statutes. (R. at 590–91, 605–10, 1376–78). This Court affirmed all three dismissals. Undeterred, Steinberg brought the present action against Fiesta's president, its management company, and its accounting firm (the "Fiesta Defendants") with an unusual twist: this time, his theory is that Fiesta's allegedly improper assessments caused him to bring (and lose) his previous cases, so he is entitled to attorneys' fees expended in those cases under the wrongful-act doctrine. *See* (R. at 1218–1241, 1243–46).

The Fiesta Defendants moved to dismiss the action on two grounds: (1) Steinberg had once again brought an individual action for derivative claims in violation of section 617.07401, and (2) his claims were barred by res judicata. (R. at 1282–92, 1346). In addressing these issues, both Steinberg and the Fiesta Defendants requested judicial notice of the records from Steinberg's prior actions. (R. at 574–761, 1372–85, 1390–2174). Judge

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Frink dismissed the case based on res judicata and denied Steinberg's rehearing motion. (R. at 2175–78, 2180–89, 2240). Steinberg appeals.

II. Statement of the Facts.

Steinberg is one of 348 members of Fiesta, a homeowners' association in Margate, Florida. (R. at 1178, 1180). As his operative complaint explains, he had been involved in prior cases against Fiesta over special assessments it had assessed in the past, causing him to expend legal fees. (R. at 1181, 1201–03, 1243–46).

Steinberg then brought the present case, declining to name Fiesta as a defendant this time and instead naming its president and its management and accounting firms. (R. at 1178–79, 1182–84). The operative complaint consisted of 667 paragraphs and spanned 73 pages (not including exhibits). (R. at 1178–1251). Reduced to its essentials, the complaint alleged a number of improprieties by the Fiesta Defendants in a claimed scheme to illegally impose the assessments in question and thereby enrich the president and the management firm. *See, e.g.*, (R. at 1203–04, 1209–13). Counts I through XV were for claims such as breaches of fiduciary duties, unjust enrichment, and professional negligence. (R. at 1218–1241). For each of these counts, Steinberg's alleged damages were the "significant legal expenses" he had to expend in his prior actions against Fiesta. (R. at 1218–

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1241). The final count, Count XVI, was for intentional infliction of emotional distress (IIED). (R. at 1241–43).

In the "Damages" section of the complaint, Steinberg reiterated his claim that he is entitled to recover what he expended as legal costs and fees in his first two cases under the wrongful-act doctrine. (R. at 1243–46). In doing so, he specifically described some of the proceedings in those cases and provided the trial-court case numbers. (R. at 1245–46); *see also* (R. at 1201–03) (providing further detail).

In its motion to dismiss, the Fiesta Defendants elaborated on this litigation history and explained that this was but one of four cases Steinberg had brought based on the same dispute. (R. at 1282–84) (Cudak and Sunstate Management's motion to dismiss); (R. at 1346) (Moody Accounting's notice of joinder in motion). His first case ("*Steinberg I*") sought an injunction and declaratory relief to undo a 2021 special assessment (among other things), but it was dismissed for failure to bring a derivative action representing the interests of all 348 members of the association, *see* § 617.07401, Fla. Stat. , and for failure to make a presuit demand for mediation, *see* § 720.311(2)(a), Fla. Stat. (R. at 1283); *see* (R. at 578–91). This Court affirmed per curiam. *Steinberg v. Fiesta Homeowners Ass'n*, 350 So. 3d 348 (Fla. 4th DCA 2022).

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Steinberg brought the second case ("*Steinberg II*") with 34 other members of Fiesta. (R. at 1283). The complaint once again asked the court to undo the 2021 special assessment (and to hold Fiesta, its directors, and its management company liable for money damages), but it was likewise dismissed in part because it was not brought as a derivative action. (R. at 1283); *see* (R. at 593–610). This Court again affirmed per curiam. *Alexander v. Fiesta Homeowners Ass'n*, No. 4D22-2482, 2023 WL 4783396 (Fla. 4th DCA July 27, 2023).

Steinberg then brought a third case pro se ("*Steinberg III*") against Fiesta, seeking to avoid the bar against individual actions by challenging Fiesta's efforts to *collect* the assessments rather than contesting the assessments themselves. (R. at 1284); *see* (R. at 612–28). It did not work; that case was also dismissed for failure to bring a derivative action. (R. at 1284); *see* (R. at 1376–78). This Court recently affirmed that dismissal per curiam as well, pending issuance of the mandate. *Steinberg v. Fiesta Homeowners Ass'n*, No. 4D23-2298, 2024 WL 1673194 (Fla. 4th DCA Apr. 18, 2024).

Finally, Steinberg brought the present case. Although *Steinberg III* was pending when this case was filed, a final order of dismissal was entered in

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Steinberg III before Judge Frink considered the motion to dismiss the operative complaint in this case. *Compare* (R. at 1376–78), *with* (R. at 2216).

The Fiesta Defendants filed two requests for judicial notice of the complaints and dismissal orders in Steinberg's three prior cases. (R. at 574–761, 1372–85). In responding to the first request, Steinberg said that he "knows of no reason this Court cannot take notice of these cases," but he asked the court to disregard any factual statements made in the motion itself. (R. at 880–81). As for the second request, Steinberg claimed it was untimely under the court's procedures, but he did not suggest the court could not take notice of the records in the earlier cases. (R. at 1370–71).

Returning to the Fiesta Defendants' motion to dismiss, it raised two grounds. First, Steinberg had once again failed to bring his claims in a derivative action despite asserting injuries to the corporation, not himself. (R. at 1286–89). To the extent the assessments had harmed him, that injury was not "sufficiently separate and distinct from the alleged injury to the Association as a whole, and its membership generally," because every member would have been affected by the alleged scheme and resulting assessments. (R. at 1288). The claims were thus governed by section 617.07401, which requires that claims in the name of not-for-profit corporations—including homeowners' associations—be brought as

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derivative actions and comply with conditions precedent to suit. (R. at 1286–89). Steinberg's failure to comply with the statute required the trial court to dismiss the case without prejudice to file a separate derivative action after complying with the conditions precedent. *See* (R. at 1288–89).

Second, the Fiesta Defendants argued that the action was barred by res judicata. (R. at 1289–91). They noted that res judicata will bind not just the parties in a prior proceeding but also their privies, and that it applies to any claim arising from the same core facts as the earlier proceeding. (R. at 1290–91). Steinberg's claims were based on injuries flowing from the very same assessments he had sued over before, and he could have brought those claims in the earlier cases, so the action was precluded by the prior dismissals. (R. at 1289–91).

At the motion hearing, the Fiesta Defendants discussed the prior cases in detail without any objection from Steinberg. (R. at 2219–23). Steinberg discussed those cases as well in arguing that res judicata did not apply. (R. at 2228). Judge Frink took the matter under advisement. (R. at 2229).

After the hearing but before Judge Frink had made any decision on the motion to dismiss, Steinberg made two requests of his own for judicial notice. (R. at 1390–2174). Attached to the first request was Steinberg's initial brief in the appeal of *Steinberg III*, (R. at 1393–1464), which described the trial

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proceedings in that case as well as those in *Steinberg I*, *Steinberg II*, and this case, *see* (R. at 1442–45). And attached to the second request was Steinberg's appendix from that appeal, (R. at 1468–2174), which included the dismissal order and hearing transcript in *Steinberg I* as well as the hearing transcript and one of the appellate briefs in *Steinberg II*, *see* (R. at 1872–1913, 1946–80, 2006–49).

Judge Frink ultimately entered an order dismissing the case with prejudice based on res judicata. (R. at 2175–78). He later denied Steinberg's motion for rehearing. (R. at 2180–89, 2240). Steinberg appeals.

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SUMMARY OF ARGUMENT

Judge Frink properly dismissed this action. Despite the dismissals of his last three cases for failure to bring a derivative action under section 617.07401, Steinberg regurgitates the same old dispute—again, without bringing a derivative action. This warranted dismissal.

The action was also precluded by res judicata. Steinberg asked Judge Frink to look at his prior cases, which were also incorporated into the complaint, so the judge properly took them into consideration. This case involves the very same parties or their privies, and the complaint simply expanded on the same dispute that Steinberg lost three times before. He was thus barred from bringing the case.

Finally, the complaint simply failed to state a cause of action. To suggest that the wrongful-act doctrine allows Steinberg to recover his legal expenses for losing prior cases that *he* brought is frivolous. Moreover, his allegation that the Fiesta Defendants caused him emotional harm by exercising their constitutional right to defend themselves in the earlier cases (and *successfully* doing so) instead of acquiescing to his demands does not come close to showing the necessary element of outrageousness for his IIED claim.

This Court should affirm.

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STANDARD OF REVIEW

A trial court's order dismissing a case with prejudice is reviewed de novo. *Ackerman v. HMC Assets, LLC*, 338 So. 3d 295, 296 (Fla. 4th DCA 2022) (per curiam).

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ARGUMENT

I. Judge Frink correctly dismissed Steinberg's complaint.

Although Judge Frink dismissed the case based on res judicata, this Court can affirm based on the simpler ground that Steinberg has again failed to bring a derivative suit in compliance with section 617.07401, Florida Statutes. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999) (stating that an appellate court "must affirm the judgment" if the trial court reached the correct result, even if for the wrong reasons or for reasons not addressed by the trial court). As explained below, Steinberg's alleged injuries were plainly derivative because they flowed principally to the association and cannot be separated from any harm the association's other members would have suffered as well.

Res judicata also barred Steinberg's action. He waived—indeed, invited—any error in considering his prior cases, so Judge Frink properly found that this action was merely a repackaging of his earlier claims.

Finally, Steinberg failed to state a cause of action. *See id.* ("[A]n appellee . . . is not limited to legal arguments expressly asserted as grounds for the judgment in the court below."). At bottom, this is simply a frivolous case by a litigant who is unsatisfied with the previous rulings against him. Steinberg's prior cases were dismissed with prejudice, yet somehow he

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asserts that losing the prior cases entitles *him* to attorneys' fees under the wrongful-act doctrine. And to manufacture the requisite "third party" under that doctrine, Steinberg opted not to sue Fiesta itself, but to bring this action against parties associated with Fiesta so that he could pin the association as the third party. This is too clever by half, and it should not be countenanced by this Court. Moreover, Steinberg failed to allege any semblance of outrageous behavior by the Fiesta Defendants as required to plead a claim of IIED.

Judge Frink was right to dismiss the case, and this Court should affirm.

A. Steinberg was required, but failed, to bring his claims in a derivative action under section 617.07401 because any injury flowed from the corporation and was shared equally among its members.

As Steinberg has repeatedly been told in his prior cases, his claims must be brought in a derivative action because they concern harm to Fiesta or its members generally. He has not listened, and he once again brought an impermissible individual action.

This case involves the interplay of two chapters of the Florida Statutes: chapter 720, which governs homeowners' associations specifically, and chapter 617, which governs not-for-profit corporations generally and expressly includes homeowners' associations within its ambit. Fiesta is a homeowners' association (as the operative complaint acknowledged) and

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thus governed by chapter 720. *See* §§ 720.301(9), .305(1), Fla. Stat. As such, Fiesta is also a not-for-profit corporation governed by chapter 617. *See* § 617.1703(1)(a), Fla. Stat. ("This chapter is applicable to a corporation that is an association as defined in and regulated by . . . chapter 720 regarding homeowners' associations . . . ."); *see also* § 720.302(1), Fla. Stat. (describing homeowners' associations as "corporations not for profit"). Chapter 720 controls in the event of conflict, but otherwise, the provisions of both chapters apply. § 617.1703(1)(a)–(b).

Section 617.07401, enacted in 2009 as part of an overhaul of the Florida Not for Profit Corporation Act, provides for derivative actions where a proceeding is commenced in the right of a not-for-profit corporation. The statute further imposes conditions precedent to such a proceeding. The person bringing the suit must have been a member at the time of the alleged misconduct. *Id.* § (1). The complaint must be verified. *Id.* § (2). The complaint must also "allege with particularity" that demand was made on the corporation to take the requested action and that either the corporation refused or ignored the demand for 90 days; the corporation rejected the demand in writing; or irreparable injury to the corporation would result from waiting for the 90-day period to expire. *Id.* This last condition is important because the corporation is entitled to investigate and ask the court to dismiss

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the proceeding if it makes an independent and good-faith determination that the suit "is not in the best interests of the corporation." *Id.* § (3).

At this point, it would help to provide context for the statute. Even before derivative suits against not-for-profit corporations were specifically authorized by statute, Florida courts had already held that an individual bringing a claim affecting all the members of such a corporation must follow the same procedures as those for bringing derivative claims against for-profit corporations. *See, e.g.*, *Leppert v. Lakebreeze Homeowners Ass'n*, 500 So. 2d 250, 252 (Fla. 1st DCA 1986).

This was important because resolving such a claim will necessarily impact the rights of the corporation's other members, as the Florida Supreme Court recognized in *Rogers & Ford Construction Corp. v. Carlandia Corp.*, 626 So. 2d 1350 (Fla. 1993). The court there held that a condominium unit owner has standing to sue a general contractor for causing injuries common to all unit owners, *id.* at 1354–55, but the court recognized the "numerous practical problems" in bringing such a suit "without having the interests of other unit owners represented in the action," *id.* at 1354. The court thus held that the suit can be maintained "only after ensuring that the interests of the other unit owners are represented in the action," *id.* at 1355, and pointed to class actions, derivative actions, and joinder of the condominium association

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or other unit owners as methods of representing the common interest, *id.* at 1354–55. But because the suit in that case was against a contractor, the court declined to address whether a unit owner could proceed individually against a condominium association or its directors for harm common to all members. *Id.* at 1355 n.7.

The legislature in 2009 essentially codified the holding in *Rogers & Ford* by enacting section 617.07401, authorizing derivative suits for not-for-profit corporations and imposing conditions precedent to suit. The courts have thus determined that the statute now provides the exclusive mechanism for bringing claims based on injury to the corporation or its members generally. For example, the First District recognized that section 617.07401 "provid[es] a pre-suit process for members to bring derivative claims in the right of not-for-profit corporations," which thus "resolves the representative issues discussed in" the *Rogers & Ford* decision. *Iezzi Fam. Ltd. P'ship v. Edgewater Beach Owners Ass'n*, 254 So. 3d 584, 588 (Fla. 1st DCA 2018). Accordingly, plaintiffs bringing derivative claims "*must* comply with the requirements necessary for any not-for-profit corporation under section 617.07401." *Id.* (emphasis added).

This Court reached a similar conclusion in *Collado v. Baroukh*, involving claims brought in a derivative action against a condominium

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association. 226 So. 3d 924, 926 (Fla. 4th DCA 2017). The Court first held that, "[b]ecause the association is a not-for-profit Florida corporation, it is governed by Chapter 617." *Id.* at 927. The Court proceeded to discuss the requirements of section 617.07401, finding that the complaint was properly dismissed for failing to comply with the statute. *Id.* If the claims were not required to be brought in a derivative action, then the Court could have analyzed the claims as individual instead of derivative after finding the complaint failed to comply with section 617.07401. Instead, the Court affirmed the complaint's dismissal.

Thus, Steinberg was prohibited from bringing an individual action if his claims were derivative; he did not dispute this in opposing the motion to dismiss. His only counterargument was that his claims were not in fact derivative. (R. at 1353–54). On that point, he is mistaken.

In defining a derivative action under section 617.07401, the courts have applied the same standards used in the context of for-profit corporations. *E.g.*, *Iezzi*, 254 So. 3d at 586. In *Strazzulla v. Riverside Banking Co.*, after surveying the governing law, this Court announced a two-prong test for determining if a claim is individual or derivative: "In order for shareholders to bring a direct action in their individual capacity, the shareholders must allege both a direct harm and a special injury." 175 So. 3d

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879, 884–85 (Fla. 4th DCA 2015).[1] For direct harm, a court must consider whether the harm flows first to the corporation and then results in injury to the shareholders, or instead "flows 'directly' to the shareholder or member in a way that is not secondary to the company's loss." *Id.* at 883 (quoting *Dinuro Invs. v. Camacho*, 141 So. 3d 731, 735 (Fla. 3d DCA 2014)). For special injury, the court must determine whether "the plaintiff's injury is separate and distinct from other members or shareholders." *Id.* (quoting *Dinuro*, 141 So. 3d at 736).

Accordingly, the First District in *Iezzi* found that an action was derivative where the complaint alleged "that the Association acted improperly and the Directors breached their fiduciary duties, *resulting in various illegal expenditures and assessments*, and losses of Association funds." 254 So. 3d at 585 (emphasis added). These claims were required to be brought under section 617.07401, despite being labeled as individual claims. *Id.* at 588–89.

Turning to this case, the Court must consider the "gravamen of the complaint" in determining whether the action is individual or derivative. *Iezzi*, 254 So. 3d at 586 (quoting *Leppert*, 500 So. 2d at 252). Steinberg helpfully

[1] As an exception, a plaintiff can also show that "there is a separate statutory or contractual duty owed by the wrongdoer to the individual shareholder." *Id.* at 885. Steinberg has not alleged a separate duty that was owed only to him.

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included a “Gravamen of the Complaint” section in his operative complaint, which states that “the association has also been injured by DEFENDANTS’ actions” and that Steinberg is just suing for his portion of the injury. (R. at 1180). This is the hallmark of a derivative claim.

This is confirmed by looking at the complaint’s actual allegations. As explained before, Steinberg alleged a scheme to improperly levy the disputed assessments, draining the association of required funds and enriching the Fiesta Defendants. His claims are for breaches of fiduciary duties, unjust enrichment and conversion, negligence, fraud, conspiracy, and IIED. Not once did Steinberg allege that any of these torts were directed specifically to him; his theory is that he was harmed as one of Fiesta’s members. Even the IIED claim flowed from his litigation over the assessments levied by Fiesta.

Although Steinberg was required to show “both a direct harm and a special injury,” *Strazzulla*, 175 So. 3d at 884–85, he failed to allege either. Regarding direct harm, his complaint describes at length the harm that was allegedly inflicted on *Fiesta*, which ultimately trickled down to Steinberg in the form of illegal assessments, the lack of necessary funds for repairs, and the like. In other words, the alleged harm flowed from Fiesta’s injury to Steinberg. For similar reasons, Steinberg failed to allege a special injury.

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Every other member of Fiesta would have suffered the same harm as Steinberg. He is not special in this regard.

Seizing on the wrongful-act doctrine, Steinberg has also pointed to the fact that he sued over the assessments and asserts he was harmed in expending legal costs, but those (voluntary) lawsuits still flowed from the alleged harm to Fiesta in the first place. It is not as if one can sue over a derivative injury, lose the case, and then say that makes it no longer derivative. That would be absurd. This also ignores that the wrongful-act doctrine does not provide an independent cause of action, but only an additional element of damages where liability is already established. *Rayburn v. Bright*, 163 So. 3d 735, 736–37 (Fla. 5th DCA 2015). Steinberg does not have a "wrongful act" claim; his claims are for the Fiesta Defendants' alleged breaches of duties they owed to the association, and these are necessarily derivative claims.

Therefore, Judge Frink would have been correct to dismiss the complaint on this ground.

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B. The action was barred by res judicata.

1. Judge Frink properly considered Steinberg's prior cases because Steinberg asked him to, and Steinberg also incorporated those cases into his complaint.

Steinberg argues that Judge Frink improperly considered his prior cases when ruling on the res-judicata issue, yet he neglects to mention that *he* asked the judge to do so through requests for judicial notice—twice. He thus expressly invited any error by Judge Frink in this regard. *See Bender v. Shatz*, 300 So. 3d 193, 195 (Fla. 4th DCA 2020) ("Under the invited error doctrine, a party may not make or invite error at trial and then take advantage of that error on appeal.").

Moreover, when the Fiesta Defendants made their own requests for judicial notice, Steinberg only asked that the court disregard the factual statements made in the first request and objected that the second request was untimely (even though his own requests were filed even later). But he never suggested that it would be improper to take notice of the materials included in the requests; quite the opposite, Steinberg said of the first request that he "knows of no reason this Court cannot take notice of these cases." (R. at 881). And when the Fiesta Defendants discussed the prior cases in detail at the dismissal hearing, Steinberg not only failed to object to their consideration, but he discussed them as well. So he invited error in this

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regard as well. *See also Nieves v. Senior Health TNF, LLC*, 369 So. 3d 760, 766 (Fla. 2d DCA 2023) (plaintiff waived trial court's improper consideration of matters outside the complaint by failing to raise the issue below); *Metro. Cas. Ins. Co. v. Tepper*, 969 So. 2d 403, 405 (Fla. 5th DCA 2007) (same).

Finally, Judge Frink was also entitled to consider the earlier cases because Steinberg's claims depended on them. This Court has held that a trial court may consider legal documents that are impliedly incorporated by reference into the complaint and that serve as the basis for the plaintiff's standing. *See SBP Homes, LLC v. 84 Lumber Co.*, 49 Fla. L. Weekly D403a (Fla. 4th DCA Feb. 21, 2024); *One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015).

Here, it is not just that the complaint specifically referred to two of Steinberg's prior cases by case number, or that the complaint described the proceedings in those cases. The complaint asserted that Steinberg was entitled to damages for the legal costs resulting from those earlier cases under the wrongful-act doctrine. In other words, Steinberg's standing and his entire claim for relief is predicated on those cases. He says so himself in his brief: "Steinberg vaguely mentioned two prior lawsuits in his Complaint because *the cause of action in the instant matter is predicated on the existence of attorney fees incurred in prior litigation with a third party*." (Am.

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Initial Br. of Appellant 32) (emphasis added). *Cf. Papa John's Int'l v. Cosentino*, 916 So. 2d 977, 983 (Fla. 4th DCA 2005) (finding that trial court improperly considered complaint in another case that did not serve as the basis for the plaintiff's claims).

Judge Frink properly considered the earlier cases in ruling on the motion to dismiss.

2. The prior dismissals had res-judicata effect because they adjudicated the merits of Steinberg's claims.

Steinberg next argues that the prior dismissals did not have res-judicata effect because they were not an adjudication on the merits. The starting point for this issue is Florida Rule of Civil Procedure 1.420(b): "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits" (emphasis added).

In *Allie v. Ionata*, the Florida Supreme Court held that this rule is the benchmark for determining whether a prior adjudication should receive res-judicata effect. 503 So. 2d 1237 (Fla. 1987). A party in that case contended that his claim was not barred by res judicata because a prior adjudication "did not dispose of the cause on its merits, but merely determined that the

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action was barred by the statute of limitations." *Id.* at 1240. The court acknowledged that statutes of limitations may be considered rules of procedure and that the common law did not necessarily deem a dismissal under a statute of limitations to be a judgment on the merits. *Id.* at 1240–41. But this changed with the adoption of Federal Rule of Civil Procedure 41(b) and Florida's counterpart in Rule 1.420(b). *Id.* at 1241–42. Because such a dismissal clearly falls under Rule 1.420(b) and does not concern lack of jurisdiction, venue, or lack of an indispensable party, the court was "compelled to hold that dismissals based on limitation statutes are adjudications on the merits for res judicata purposes." *Id.* at 1242.

Here, Steinberg's individual claims were dismissed with prejudice in each of his prior cases.[2] Each dismissal was predicated on Steinberg's failure to bring a separate derivative action in compliance with section 617.07401. Because these dismissals were not "for lack of jurisdiction or for

[2] Two of the counts in *Steinberg II* were dismissed without prejudice, but only so they could be refiled in a separate derivative action. *See* (R. at 609). In other words, those counts were finally adjudicated as to Steinberg's *individual* action. This Court affirmed that dismissal as a final order as to all counts—after requesting statements of jurisdiction, no less—in case number 2022-2482. *See also, e.g.*, *Valcarcel v. Chase Bank USA*, 54 So. 3d 989, 990 (Fla. 4th DCA 2010) ("The order of dismissal is clearly final when, for instance, the claim could only be pursued by filing a new complaint." (ellipsis omitted) (quoting *Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007) (per curiam))).

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improper venue or for lack of an indispensable party," they "operate[d] as an adjudication on the merits." *See* Fla. R. Civ. P. 1.420(b).

In arguing otherwise, Steinberg claims that the earlier dismissals involved a question of "standing" and were thus based on jurisdictional grounds, but this is a misconception of the doctrine. Although the term "standing" has sometimes been used in this context, that is a misnomer; "standing" in this sense is used as a shorthand to refer to a plaintiff's ability to bring an individual rather than a derivative action. It is not a true standing issue as it does not concern whether the plaintiff has a legally protectible interest in the controversy.

Consider the Florida Supreme Court's decision in *Rogers & Ford*. As explained before, this decision was a precursor to section 617.07401 and held that an individual condominium unit owner could not sue without ensuring the other unit owners' interests were represented. In reaching that holding, the supreme court distinguished an individual owner's *standing* to bring the claim from the issue that arises when the claim would impact other owners. Standing simply concerns whether the party has "a legally protectible right or interest at stake in an otherwise justiciable controversy" such that it is "a proper party to obtain judicial resolution of that controversy." 626 So. 2d at 1352. Importantly, the court noted that "the Legislature may

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not constitutionally determine whether a party has standing in a particular cause"; the legislature can only "affect standing through substantive regulation of the rights or interests at issue." *Id.*

The court found that the plaintiff–owner had a "sufficient interest at stake" because it owned an undivided share of the condominium's common elements and the lawsuit concerned damage to those common elements, which "necessarily affect[ed] [the unit owner's] property interest." *Id.* But even though there was standing, the "practical problems" from allowing the suit—namely, those arising from the fact that the other unit owners' interests were also affected—presented a different matter. *Id.* at 1354. Hence the court's holding that such an action would be disallowed unless those other interests were adequately represented. *Id.* at 1354–55. So the unit owner's legally cognizable interest in the litigation—i.e. the owner's standing—was distinct from the form of action the owner was required to bring (such as a derivative or class action).

Here, Steinberg's standing has never been in question because the assessments levied by the association necessarily affected his interest as a homeowner. Instead, the earlier dismissals were predicated on the distinct issue that he was required to bring a derivative instead of an individual action.

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Contrast that with the treatment of standing in mortgage-foreclosure cases, for example. The party seeking foreclosure must prove its standing by showing that it holds the note or was assigned or transferred the mortgage, as that is what demonstrates the party's legally recognized interest in the proceeding. *See McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012) (per curiam). In this case, Steinberg's standing would concern whether he had a legally recognized property or other interest that is impacted by the controversy. Again, that has never been in dispute, and that was not the basis of the prior dismissal orders. Rather, those dismissals held that despite Steinberg's interest in the case, he was required but failed to bring his claims in a derivative action. That has nothing to do with jurisdiction.

And although it is unnecessary in light of Rule 1.420(b), it is worth emphasizing that the dismissal orders *did* determine the merits of Steinberg's actions. In finding that his prior cases must be dismissed because they could not be brought as individual actions, those courts necessarily found that the facts alleged by Steinberg could never support his individual claims. *Cf. Darling v. Ill*, 375 So. 3d 291, 294 (Fla. 4th DCA 2023) (noting that determining the preclusive effect of a prior judgment "involves analyzing which facts were essential to the maintenance of the action"). In other words,

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the prior dismissals were really for failure to state a cause of action, which is a classic example of an adjudication on the merits. *See Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. 4th DCA 1998) ("An order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits."). These dismissals finally adjudicated Steinberg's individual claims, such that he had to file a separate derivative action to seek relief.

The prior dismissals were therefore adjudications on the merits and had res-judicata effect.

3. Steinberg was precluded from bringing this action because the four identities of res judicata were met.

Res judicata applies if there are four "identities" between the suits in question: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of the parties, and (4) identity of the quality of the persons for or against whom the claim is made. *Darling*, 375 So. 3d at 294. Each of these elements was met here.

For identity of the thing sued for, Steinberg conflates his causes of action with the relief he requested in each of his prior cases. The causes of action are discussed below, but this identity is concerned only with the requested relief. As Steinberg's own brief notes, two of his prior cases sought monetary damages arising from the levy of the assessments by the association. (Am. Initial Br. 11). The present case also seeks monetary

damages allegedly arising from the levy of the assessments. Moreover, it is immaterial whether the measure or form of relief requested is different than from the earlier cases. *See Russell v. A & L Dev.*, 273 So. 2d 439, 440 (Fla. 3d DCA 1973) ("[T]he fact that a different measure of relief is sought does not preclude the application of the prior judgment to estop the maintenance of a second action. If the claim or cause of action is substantially the same in both actions, it is not material that the relief demanded is in some manner different."); *Estate of Paulk v. Lindamood*, 529 So. 2d 1150, 1154 (Fla. 1st DCA 1988) ("[T]he fact that a different *form* of relief is sought . . . does not preclude the application of res judicata to bar the maintenance of the second proceeding . . . ."); *Pumo v. Pumo*, 405 So. 2d 224, 226 (Fla. 3d DCA 1981) ("The law, however, requires only that the claims or causes of action be substantially the same; a request for different relief does not prevent the first proceeding from serving as a bar to a second action.").

Identity of causes of action is also satisfied. Steinberg argues that the claims he raised in his complaint are not precisely the same ones he brought before, but res judicata is not so limited. The doctrine operates to preclude "relitigation of claims raised but also the litigation of claims *that could have been raised* in the prior action." *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003) (citing *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla.

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2001)); *see also Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984) ("A judgment on the merits . . . is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to *every other matter which might with propriety have been litigated and determined* in that action." (emphasis added) (quoting *Wade v. Clower*, 114 So. 548, 552 (Fla. 1927))).

Steinberg's present claims stem from the very same core events that underlay the claims in his prior cases. His complaint alleged various improprieties by the Fiesta Defendants leading up to the association's decision to levy the disputed assessments and to later try to collect Steinberg's share of the assessments. The assessments and collection efforts have already been raised in Steinberg's prior cases.

And while Steinberg asserts that some of the Fiesta Defendants' alleged conduct occurred after *Steinberg I* and *Steinberg II* were filed, he totally ignores that *Steinberg III* was filed after all of the conduct he alleges in this case. Moreover, res judicata is determined not from the date the complaint was filed, but from the date of the judgment. *State St. Bank & Tr. Co. v. Badra*, 765 So. 2d 251, 253 (Fla. 4th DCA 2000) ("Res judicata extends only to the facts and conditions as they existed at the time the judgment was rendered . . . .").

Also, Steinberg's claims lie in the wrongful-act doctrine, based on his asserted right to recover the legal costs he expended in losing his prior cases. But as Judge Frink observed, because Steinberg's legal costs in the prior cases would necessarily be tied to those same cases, he was required to bring any claim for costs in the prior cases so the same factfinders could consider them. (R. at 2177–78). He failed to do so, and res judicata precludes him from taking a second bite at the apple by making a belated request in a later case. This identity is satisfied.

Identity of the parties was also present. Steinberg was of course a plaintiff in each of the prior cases, as he is here. And Steinberg acknowledges that two of the defendants in this case, Cudak and Sunstate Management, were also defendants in *Steinberg II*, (Am. Initial Br. 16.), though that is immaterial as explained below. He really only challenges how this identity applies to the remaining defendant, Moody Accounting.

Yet Steinberg overlooks that identity of the parties is present if multiple suits involve the same parties *or their privies*. *Kimbrell*, 448 So. 2d at 1012. In the context of res judicata, "[a] privy is one who is identified with the litigant in interest." *Progressive Am. Ins. Co. v. McKinnie*, 513 So. 2d 748, 749 (Fla. 4th DCA 1987). Privy extends to those who have "a mutuality of interest, an identification of interest of one person with another, and includes privity of

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contract, *the connection or relationship which exists between contracting parties*." *AMEC Civil, LLC v. PTG Constr. Servs. Co.*, 106 So. 3d 455, 456 (Fla. 1st DCA 2012) (per curiam) (emphasis added) (quoting *Radle v. Allstate Ins. Co.*, 758 F. Supp. 1464, 1467 (M.D. Fla. 1991)).

Again, Steinberg's complaint raises essentially the same claims that he raised (or could have raised) in his prior suits; the allegations are merely expanded, and the theory of recovery altered to an indirect one under the wrongful-act doctrine. The basic dispute is the same, and the complaint alleged that Moody Accounting's actions contributed to the same wrongdoing that Steinberg could have raised in his initial complaint. Moreover, Steinberg himself alleged that Moody Accounting provided "accounting and bookkeeping services" to the association. (R. at 1184).

Moody Accounting was thus in privity with Fiesta, Cudak, and Sunstate Management because they shared a strong mutuality of interest in defending against Steinberg's prior cases. Moody Accounting was also in clear contractual privity with Fiesta, a defendant in all three prior cases, due to their business relationship—a relationship that Steinberg claims lead to the very assessments challenged in each case.

But more importantly, this Court cannot ignore the broader context: Fiesta is the real party in interest. Steinberg *lost* his previous cases against

Fiesta, so he manufactured new defendants so he could pin the association as a "third party" and attempt to recover his legal costs under the wrongful-act doctrine. Putting aside for now the absurdity of this theory, identity of the parties is satisfied because the real party in interest has always been the same—from the first case through this one. On this point, the following observation from the Third District is illustrative:

> Whether we view Patricia Sandler's interest as an individual in 2010 or as trustee of the Conrad Trusts in 2013, the real party in interest on each side remains the same. The same issues are being litigated on the same notes, based on identical facts. *See e.g.*, *Olympian West Condominium Association, Inc. v. Kramer*, 427 So. 2d 1039 (Fla. 3d DCA), *rev. denied*, 438 So. 2d 833 (Fla. 1983) (holding that the prior dismissal with prejudice of these named individuals bars the present action against them under familiar principles of res judicata, notwithstanding that in this action they are designated as partners in a partnership). We conclude that the 2013 Action is properly barred by collateral estoppel and res judicata.

Pearce v. Sandler, 219 So. 3d 961, 967 (Fla. 3d DCA 2017); *see also R.D.J. Enters. v. Mega Bank*, 600 So. 2d 1229, 1232 (Fla. 3d DCA 1992) (per curiam) ("Further, there is no third party in this case. Here, Kantor was sued for acts which he performed while president of a party to the litigation. Regardless of which officer of the bank RDJ sought to sue, Mega Bank was the real party in interest.").

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As for identity of the quality of the persons for or against whom the claim is made, Steinberg has expressly waived any challenge to Judge Frink's finding that this identity was present: "There is no discussion herein of the fourth identity 'quality of the persons for or against whom the claim is made' since the other three identities are not present." (Am. Initial Br. 9 n.2). This waiver operates as a "procedural bar" precluding consideration of the issue. *See Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."), *abrogated on other grounds as recognized in State v. Johnson*, 122 So. 3d 856 (Fla. 2013).

Therefore, the four identities of res judicata were met in this case. Steinberg's claims were just a repackaged version of the very same dispute Steinberg sought to bring in his last three cases. After incurring a string of losses and cycling through three (now four) different judges who all ruled against him, he has increasingly taken the position of throwing everything at the wall and seeing what sticks in the hope that he will eventually find a favorable ear. These repeat efforts are precisely the kind of situation res judicata is designed to address, and Judge Frink correctly dismissed the complaint. Enough is enough.

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C. Steinberg failed to state a cause of action.

If nothing else, the dismissal should be affirmed because Steinberg simply failed to state a cause of action. *See Walters v. Ocean Gate Phase I Condo.*, 925 So. 2d 440, 442–44 (Fla. 4th DCA 2006) (affirming dismissal on alternative grounds under the tipsy-coachman doctrine); *Dade Cnty. Sch. Bd.*, 731 So. 2d at 645 (stating that an appellee is not limited to arguments raised in the trial court). Counts I through XV sought damages solely for the legal costs Steinberg expended in his previous cases against Fiesta and related entities under the wrongful-act doctrine. Count XVI claimed damages for IIED resulting from Fiesta's levying of the assessments and defending against Steinberg's prior cases.

Extended argument is unnecessary here. Steinberg *lost* his prior cases. He appealed all three dismissals, and this Court affirmed per curiam each time. So for Steinberg to bring an entirely new case and claim that *he* should recover his fees for losing is frivolous, vexatious, and a waste of both the trial court's and this Court's time—not to mention the legitimate fees that have been expended in defending this case. Steinberg also fails to heed Judge Frink's common-sense observation that if he were entitled to recover his costs in the prior cases, he should have asked for it in those cases.

And a necessary element of these damages is that a "wrongful act has caused the plaintiff to *litigate with third persons*" and incur legal costs. *Rayburn*, 163 So. 3d at 736–37 (emphasis added) (quoting *Horowitz v. Laske*, 855 So. 2d 169, 174 (Fla. 5th DCA 2003)). Sore about losing his first three cases against Fiesta, Steinberg decided to manufacture new defendants in the form of entities working for or associated with Fiesta so he could point to Fiesta as the requisite "third party." Fiesta has been the real party in interest the entire time; there is no third party. *Cf. R.D.J. Enters.*, 600 So. 2d at 1232 ("[T]here is no third party in this case. Here, Kantor was sued for acts which he performed while president of a party to the litigation. Regardless of which officer of the bank RDJ sought to sue, Mega Bank was the real party in interest.").

Steinberg failed to state a cause of action that would allow him to recover costs expended in unjustified litigation that he made the decision to bring and that he lost. Counts I through XV were properly dismissed for that reason, among the others already discussed.

For Count XVI, to state a cause of action for IIED, Steinberg was required to show that the Fiesta Defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

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community." *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278–79 (Fla. 1985) (quoting Restatement (Second) of Torts § 46, cmt. d (Am. L. Inst. 1965)). His allegations do not come remotely close to meeting this high bar.

He first claims that the Fiesta Defendants levied illegal assessments over his objection. (R. at 1241). That is not outrageous. He then alleges that they "caus[ed] [him] to have to litigate the issues surrounding their misconduct" for two years and that *Fiesta*—who is supposedly not a party here—failed to show up to mediation. (R. at 1241–42). That is not outrageous, especially where it was Steinberg who repeatedly brought individual claims against Fiesta despite clear guidance from the courts that he must bring a derivative action. *See also McCarson*, 467 So. 2d at 279 (noting that the defendant was "privileged" in "assert[ing] legal rights in a legally permissible way," even if in reckless disregard for what "tragic results" may follow).

Finally, Steinberg alleges that the Fiesta Defendants sent a letter to the association's members that "included copies of court documents relating to lawsuits which had been filed against FIESTA, including copies of orders from the judges in the cases." (R. at 1242). This cannot be considered "atrocious" and "utterly intolerable," and Fiesta had the legal right to disseminate public court documents to apprise the community of how its

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courts are addressing public controversies. *See id.* ("The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances." (quoting Restatement § 46, cmt. g)). This claim fails too.

Steinberg's complaint was nothing more than a grievance over losing his prior cases. This is exemplified by his allegation under the IIED claim that the Fiesta Defendants "willfully and knowingly attempted to prevent [Steinberg's] assertions ever being presented to a trier of fact in a court of law." (R. at 1241). By that he means that he was not able to proceed to discovery or trial because the Fiesta Defendants successfully moved to dismiss his prior cases, which somehow makes them liable in tort. That says it all.

Judge Frink properly dismissed this frivolous action.

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CONCLUSION

Steinberg personifies the vexatious litigant. Each loss in the courts has emboldened him to file increasingly frivolous complaints for the purpose of harassing Fiesta and anyone associated with it—all over the very same dispute he began litigating three years and three cases ago. Enough has to be enough. This Court should affirm the final dismissal order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2024, the foregoing was filed with the Clerk using the Florida Courts eFiling Portal, which will automatically serve a copy by e-mail on the following registered user:

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.045(e), undersigned counsel hereby certifies that this brief complies with the applicable font and word-count requirements; it is in Arial 14-point font and does not exceed 13,000 words.

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