NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CHARLES E. GITHLER, III, and GITHLER DEVELOPMENT, INC., a Florida corporation, Appellants, v. PHILIP J. GRANDE; MARTA A. GRANDE, and SPOT LINK, LLC, formerly known as Spot Link, Inc., a Florida Corporation, Appellees.	)	Case No. 2D17-4963

Opinion filed December 20, 2019.

Appeal from the Circuit Court for Sarasota County; Diana L. Moreland, Judge.

Daniel M. Samson of Samson Appellate Law, Miami; W. Andrew Clayton, Jr., and Worth S. Graham of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota; and Jeremy Roth of Roth Legal, Sarasota, for Appellants.

Kelley Geraghty Price of Cohen & Grigsby, P.C., Naples; and Thomas Avrutis of Hodges, Avrutis & Preschner, P.A., Sarasota, for Appellees Philip J. Grande and Marta A. Grande.

No appearance for remaining
Appellee.

EN BANC

ROTHSTEIN-YOUAKIM, Judge.

Charles E. Githler, III, and Githler Development, Inc., the plaintiffs in the civil action below, appeal from a final judgment in favor of defendants Philip J. Grande (Grande), Marta A. Grande (Marta), and Spot Link, LLC, on all claims in the plaintiffs' complaint and on both counts of Marta's counterclaim. On appeal, the plaintiffs challenge the judgment on Count III of the complaint (sale of unregistered securities) and the judgment on the counterclaim. For the reasons set forth below, we reverse the final judgment as to Count III and the final judgment on the counterclaim. In doing so, we recede from our opinions in Greater Ministries International, Inc. v. State, 689 So. 2d 328 (Fla. 2d DCA 1997), and Mortellite v. American Tower, L.P., 819 So. 2d 928, 933 (Fla. 2d DCA 2002), to the limited extent that those opinions articulate or rely upon an erroneous definition of "security." We also certify conflict with Rudd v. State, 386 So. 2d 1216 (Fla. 5th DCA 1980), and Levine v. I.R.E. Properties, Inc., 344 So. 2d 938 (Fla. 3d DCA 1977), to the extent that those opinions articulate or rely upon the same erroneous definition.

Background

In 2007, Grande and his wife, Marta, incorporated Spot Link, Inc. (d/b/a Phil's Gang Radio Show). Through the radio show and its related Phil's Gang website, Grande offers investment advice to his listeners. The listeners can become "members" of Phil's Gang for a subscription price and can purchase stock-trading software from the

website. When Spot Link was incorporated, Marta reportedly owned 100% of it (1000 shares at $1.00 par value).

In 2009, the Grandes decided they wanted to retire and began looking for someone to take over the business. They informed their friend/employee/software developer, Don Cogswell, of their decision, and Cogswell told another mutual friend, Peter Wish. Wish found a potential investor in Githler, founder of "The Money Show" and similar entities that offered a variety of investment-related products.

On October 18, 2013, Githler entered into a stock sale and purchase agreement with Spot Link in which he agreed to buy 811 shares; Cogswell would buy 29 shares, Marta would retain 60 shares, and Grande would "retain" 100 shares. The agreement provided that Githler would pay Marta for 303 of the shares and give her a promissory note securing the other 508 shares.[1] The agreement provided further that if Githler defaulted, he would have to sell his 303 shares back to Spot Link at the original purchase price. The agreement also included a contingent provision requiring Marta to sell her 60 shares to Wish in exchange for a "working capital loan" of $100,000.

Pursuant to a separate agreement executed on the same date, Githler sold 391 shares of his stock (88 shares of which appear to have still been hypothecated to Marta) to Cogswell, but Githler did not get any money; instead he took back a promissory note for $1,389,790. Pursuant to two employment agreements, also executed on the same date, Grande would continue to be employed by Spot Link as the voice/face of "Phil's Gang" and Githler would serve as both chairman of the board and

[1]The order on appeal states, "The total purchase price for the 811 shares was $2,942,000." By our calculation, Githler owed $2,842,000. We leave it to the trial court and the parties to double-check the math on remand.

vice president of Spot Link. In May 2014, Githler and Cogswell changed the business form of Spot Link from an S-Corporation to a limited liability company (LLC), with each of them as managers.

But the promised rapid growth, syndication of the radio show, procurement of sponsors, and other events that purportedly induced Githler to get involved in Spot Link in the first place did not materialize. He grew dissatisfied, and on July 5, 2014, he was ousted.[2]

In December 2014, Githler sued the Grandes, Cogswell, Wish, and Spot Link, alleging, among other things, sale of unregistered securities (Count III).[3] The Grandes filed an answer and affirmative defenses, asserting that the Spot Link common stock was exempt from registration pursuant to the federal Securities Act of 1933 and to chapter 517, Florida Statutes (the Florida Securities and Investor Protection Act), which permit private corporations to make a limited sale of unregistered common stock to sophisticated or accredited investors.[4] The answer and affirmative defenses also included Marta's counterclaim seeking to foreclose on the note.

---

[2]The order on appeal says he was ousted by the Spot Link shareholders, but since Spot Link was an LLC by this point in time, there were no shareholders. In any case, he was terminated as a managing member of Spot Link, LLC.

[3]Githler also alleged (I) common-law fraud, (II) securities fraud, (IV) breach of contract, (V) promissory estoppel, (VI) conversion, (VII) "Money lent to Spot Link," and (VIII) "Money lent to Cogswell."

[4]"Accredited investor" is defined as a bank; a private business development company; certain 501(c)(3) organizations; a director, executive officer, or general partner of the issuer; a natural person with a net worth of over $1,000,000; a natural person with an annual income exceeding $200,000 ($300,000 married filing jointly); a trust with assets exceeding $5,000,000; or any entity the equity owners of which are accredited investors. See 17 C.F.R. § 230.501 (2014) (aka SEC Regulation D); see also § 517.061(11)(b)(5), Fla. Stat. (2014) (providing, in part, that a sale of a

Following a bench trial, the trial court entered judgment for the defendants on all counts of the complaint and in favor of Marta on the counterclaim. Pertinent to this appeal, the court concluded that Counts II and III of the complaint failed to state a cause of action for securities fraud or improper sale of unregistered securities because the stock purchase agreement "fails to satisfy the Howey[5] test" and, therefore, the transactions did not involve "securities" at all.[6]

Analysis

The issue that we address in this appeal is not whether the trial court correctly applied the Howey test but whether the Howey test applies here in the first place. As the court recognized in its final judgment, our precedent currently dictates that it does:

> Plaintiffs argue that the Howey test is inapplicable here, relying on Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985). There, the Supreme Court reasoned that applying the Howey test to a stock purchase "would make the Act's enumeration of many types of instruments superfluous." Id. at 692. As discussed below, however, the Second District has continued applying the Howey test to stock purchases decades after Landreth.[7] Accordingly, the Court finds that the Howey test governs the securities inquiry in this case.

Receding from that precedent, we now hold that it does not.

---

security to an accredited investor "as defined by . . . [17 C.F.R. § 230.501]" is exempt from registration.

[5]Sec. & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293 (1946).

[6]The court alternatively concluded that there was insufficient evidence to support a finding of fraud on Count II, and Githler does not challenge the judgment as to that count on appeal.

[7]The trial court later cites Mortellite, 819 So. 2d 928, which we address (and recede from) below.

To understand where the train went off the rails, we need to begin at the beginning. After the stock market crash of 1929, Congress passed the Securities Act of 1933. Shortly thereafter, it passed the Securities Exchange Act of 1934. These two acts (along with the Investment Company Act of 1940 and the Investment Adviser's Act of 1940) have formed the basis for securities regulation ever since. The 1933 Act defined "security," as currently codified at 15 U.S.C. § 77b(a)(1) (2012), as follows:

> The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(Emphases added).

Florida, like most states, adopted this definition with few alterations. As Githler correctly points out, the federal statute and section 517.021(22), Florida Statutes (2013), provide nearly identical lists of items that qualify as securities, including common instruments such as notes, stock, and bonds as well as more esoteric instruments such as collateral-trust certificates and investment contracts.

Although listing "investment contracts," however, the 1933 Act (like section 517.021(22)) omitted any definition of that term. In 1946, the Supreme Court

remedied the omission in Securities & Exchange Commission v. W.J. Howey Co., 328 U.S. 293 (1946). Howey arose from the SEC's efforts to enjoin a Florida citrus grower from using the mails and instrumentalities of interstate commerce to sell "service contracts" that purported to give the investor an interest in the profits of certain citrus groves. Id. at 294. Most of the investors were not residents of Florida, and none of them knew anything about the care or cultivation of citrus trees. Id. at 294-96. In determining that these "service contracts" met the definition of "investment contract" as intended by the 1933 Act, the Supreme Court observed:

> [A]lthough ["investment contract"] was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.' State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938 [(1920)]. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one [sic] other than themselves.

Id. at 298 (emphasis added). The Court adopted this last sentence as the de facto definition of "investment contract." Id. at 298-99.

Fast-forward to 1997. In Greater Ministries International, Inc., 689 So. 2d at 330, this court stated:

> The most widely-accepted definition of a security is found in [Howey]. There, the [C]ourt set forth the following factors to determine whether an investment is a security: (1) an investment of money, (2) in a common enterprise, and (3) an expectation of profits to be derived solely from the efforts of another. This court has adopted the Howey criteria.

(Citation omitted). Howey, however, did not define "security"; it defined "investment contract," which the 1933 Act had listed as a type of security but had not defined. And although an investment contract—like a stock or a bond or an option contract—is a type of security, see § 517.021(22)(q), the converse is not true: a security is not a type of investment contract. What we did in Greater Ministries is define an entire category by one of its members.[8] If "security" is synonymous with "investment contract," then the twenty-two things listed in section 517.021(22) *besides* "investment contracts," see § 517.021(22)(a)-(p), (r)-(w), are *also* investment contracts, which renders those twenty-two things wholly superfluous and makes no sense.

Unfortunately, we repeated that logical fallacy in Mortellite, 819 So. 2d at 933, by quoting with approval the trial court's final judgment: "Under Chapter 517, Florida Statutes, a security is an investment of money, in a common enterprise, with an expectation of profit, to be derived solely from the efforts of others." Although the trial court had cited chapter 517 rather than Howey, that chapter, like Howey, says nothing of the sort.

We are not alone in having made this mistake. See, e.g., Rudd, 386 So. 2d at 1218-19; Levine, 344 So. 2d at 940; Sunshine Kitchens v. Alanthus Corp., 403 F.Supp. 719, 720-722, (S.D. Fla. 1975). But as Githler argues, it is clearly a mistake.

[8]It is as if we defined all "forceable felonies," see § 776.08, Fla. Stat. (2019) (" 'Forcible felony' means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb . . . ."), by reference to robbery, thus defining "murder" as the taking of money or property from another person.

In Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 (1985), the Supreme Court observed that the definition of security is "quite broad," that it includes "stocks," and that "most instruments bearing such a traditional title are likely to be covered by the definition." Recognizing that the title of the instrument is insufficient to conclusively establish its nature, however, the Court identified the five usual characteristics of stock[9] and stated that "when an instrument is both called 'stock' and bears stock's usual characteristics, 'a purchaser justifiably [may] assume that the federal securities laws apply." Id. (alteration in original) (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 850 (1975)). The Court explicitly rejected the argument that it should "look beyond the label 'stock' and the characteristics of the instruments involved to determine whether application of the Acts is mandated by the economic substance of the transaction," id. at 688-93, and instead held to the contrary, see Gould v. Ruefenacht, 471 U.S. 701, 704 (1985) ("In Landreth, we held that where an instrument bears the label 'stock' and possesses all of the characteristics typically associated with stock, a court will not be required to look beyond the character of the instrument to the economic substance of the transaction to determine whether the stock is a 'security'

[9]Those characteristics are "(i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value." Landreth, 471 U.S. at 686 (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851 (1975)).

Those characteristics, however, are guidelines, i.e., "those usually associated with common stock, the kind of stock often at issue in cases involving the sale of a business." Id. at 686 n.2 (emphasis added). Other types of stock may have different characteristics (such as different levels of voting or dividend rights) and still be covered by the Acts of 1933 and 1934. See id.

within the meaning of the Acts." (citation omitted)). In short, per Landreth, if it looks like a duck and quacks like a duck, we don't have to ask if it's a pig.

Clarifying the proper role of the Howey test, the Court explained:

> [Respondents] argue that our cases require us in every instance to look to the economic substance of the transaction to determine whether the Howey test has been met. . . .
>
> We disagree with respondents' interpretation of our cases. First, it is important to understand the contexts within which these cases were decided. All of the cases on which respondents rely involved unusual instruments not easily characterized as "securities." Thus, if the Acts were to apply in those cases at all, it would have to have been because the economic reality underlying the transactions indicated that the instruments were actually of a type that falls within the usual concept of a security. In the case at bar, in contrast, the instrument involved is traditional stock, plainly within the statutory definition. There is no need here, as there was in the prior cases, to look beyond the characteristics of the instrument to determine whether the Acts apply.

Landreth, 471 U.S. at 690 (emphasis added) (citation omitted). The Court added:

> [T]he Howey economic reality test was designed to determine whether a particular instrument is an "investment contract," not whether it fits within any of the examples listed in the statutory definition of "security." Our cases are consistent with this view. Moreover, applying the Howey test to traditional stock and all other types of instruments listed in the statutory definition would make the Acts' enumeration of many types of instruments superfluous.

Id. at 691-92 (emphasis added) (footnote omitted) (citations omitted).

We have found only one Florida case that even mentions Landreth. See Edelstein v. Flanagan, 630 So. 2d 1205, 1206 (Fla. 4th DCA 1994). Regardless, the Florida Securities and Investor Protection Act is patterned after federal securities law; in relying on Howey and other cases, Florida courts plainly have looked to federal

securities law for guidance in interpreting Florida securities law; no Florida case holds that we should *not* apply Landreth; and defining "securities" by reference to the definition of an investment contract would absurdly render most of section 517.021(22) superfluous. Therefore, although the trial court correctly followed our precedent, we reverse based on our conclusion, consistent with the reasoning in Landreth, that Howey does not apply in the first instance to determine whether the "stock" at issue falls within the definition of a security. In addition, to the extent that Githler also challenges the final judgment on Marta's counterclaim, which sought foreclosure on the note securing 508 of the shares that Githler purchased, we conclude that this challenge is inextricably intertwined with the propriety of the sale in the first instance. Accordingly, we reverse the judgment as to Count III and as to Marta's counterclaim and remand for further proceedings consistent with this opinion.[10] Finally, we recede from Greater Ministries and Mortellite and certify conflict with Rudd and Levine to the limited extent that those opinions articulate or rely upon an erroneous definition of "security."

Affirmed in part; reversed in part; remanded; conflict certified.

KHOUZAM, C.J., and NORTHCUTT, CASANUEVA, SILBERMAN, KELLY, VILLANTI, LaROSE, MORRIS, BLACK, SLEET, LUCAS, SALARIO, BADALAMENTI, ATKINSON, and SMITH, JJ., Concur.

[10]If the trial court determines that the Spot Link common stock meets the definition of a security, it must then determine whether the sale of the stock violated the registration requirement of section 517.07, Florida Statutes (2013), or if it was exempt from registration as an exempt security under section 517.051, Florida Statutes (2013), or as an exempt transaction under section 517.061, Florida Statutes (2013).