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IN THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

GRAND HARBOR COMMUNITY ASSOCIATION, INC.,

Appellant,

vs.

Fla. 4th DCA Case No. 4D23-1191

L.T. Case No. 312021CA000281

GH VERO BEACH DEVELOPMENT, LLC, et al.,

Appellees.
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APPEAL FROM A FINAL JUDGMENT OF THE NINETEENTH JUDICIAL CIRCUIT COURT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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NOTICE OF RELATED CASES

This appeal is related to *Grand Harbor Golf & Beach Club, Inc. v. Grand Harbor Golf Club, LLC, et. al.*, Case No. 4D23-1378, which involves two of the same defendants as this appeal and was decided by the same trial judge.

STATEMENT OF CASE AND FACTS

A. The Grand Harbor Community

The Grand Harbor Community is a large, 848-acre multi-use gated community located on the Indian River, near Vero Beach (R 412, 426, 795),[1] and includes single family homes, condominiums, golf courses, a club house, and a marina (R 26, 795, 923-925). It also includes the "Oak Harbor" sub-community (R 1473-1474, 1837-1838). The Community includes extensive common areas and properties (R 26, 795, 923-925), and infrastructure such as sidewalks, guardrails, bulkheads, lighting, bridges, guard houses, retaining walls, pedestrian tunnels, a fishing pier, irrigation pumps, and other common property (R 26, 787-788, 795, 923-925).

The Community also has an extensive stormwater management system which includes the systems for the collection, conveyance, treatment

[1] Citations to **"R"** refer to the record on appeal, and to "**A**" refer to the appendix filed along with this initial brief.

and discharge of runoff from the Community, including the roadways and golf courses (R 792, 795, 923-925). The stormwater management system includes a man-made estuary adjacent to the Indian River Lagoon (R 923-925, 943-947). Both the stormwater system and estuary must be maintained and kept in working order by the Appellant, Grand Harbor Community Association, Inc. (the "**Association**"), in accordance with permits issued by environmental regulatory agencies, and related agreements (R 792, 795, 923-925, 943-947).

B. Grand Harbor Community Association, Inc.

The Association is a Florida not-for-profit corporation created in 1988 to own and maintain the common areas, common property, and amenities in and for the Grand Harbor Community (R 26). The Association was established in 1988 by the original developer, Grand Harbor, Inc. (R 41, 43).

The Association is governed by its Articles of Incorporation and its Declaration of Covenants, Conditions, and Restrictions (the "**Declaration**"), executed on March 7, 1988 (R 26, 35-142).

Declaration Article III establishes that the Association will be effectively controlled by the developer until such time as the developer walks away and transfers control to the residents (R 47-50). The Declaration establishes two classes of members, Class "A" consisting of the "Owners" (i.e., all persons who hold title to units in the development) and Class "B," consisting of a single member, the developer (referred to as the Declarant in the Declaration)(R 48-49).

The Declaration states the Class "B" member, i.e., the developer, is entitled to appoint a majority of the members of the Association's Board of Directors during the Class "B" Control Period (R 48-49). The Association's By-Laws, which are incorporated into the Declaration, state the "the Directors shall be selected by the Class 'B' Member acting in its sole discretion and shall serve at the pleasure of the Class 'B' Member ..." (R 125). The By-Laws further provide that "[s]o long as the Class 'B' membership exists, the Class 'B' Member shall have a right to disapprove actions of the Board..." and that "[t]his right shall be exercisable only by the Class 'B' Member, its successors, and assigns who specifically take this power" (R 125-126).

The By-Laws also establish that the Class "B" member, i.e., the developer, will maintain sole control over the Association's Board of Directors through the right to appoint three of the five Directors, until the Class "B" Control Period is terminated (R 127-128). As explained herein, the Class "B" Control Period was not terminated by the Association until

December 1, 2020 (R 27).[2]

In sum, the Declaration and By-Laws establish that, during the Class "B" Control Period, the developer had both full control of the Association's Board of Directors through the appointment and control of a majority of its members, and that the developer held an uncontestable veto over any Board action (R 47-50, 125-128).

Declaration Article IV also establishes obligations of the Association to maintain and keep in good repair the "Area of Common Responsibility," which includes the "Common Area,"[3] including but not limited to:

> maintenance, repair, and replacement, subject to any insurance then in effect, of all landscaping and other flora, structures. and improvements situated upon the Common Areas, including, but not limited to, drainage systems, recreation and open space, estuarine systems, utilities, traffic control devices, the mosquito control program, the pedestrian system, such emergency shelters which Declarant may construct, all private streets within the Properties, and such portions of any additional property included within the Area of Common Responsibility as may be dictated by this Declaration, or by a contract or agreement for maintenance thereof by the Association.

(R 50). In other words, the Declaration imposes an unescapable obligation

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[2] The Declaration originally provided that the Class "B" Control Period would end no later than December 31, 1997 (R 125). That date was changed to December 21, 2020, by an amendment to the Declaration (R 940).

[3] The terms "Area of Common Responsibility" and "Common Area" are defined in the Declaration (R 41-46), and encompass the common areas.

upon the Association to perform ongoing maintenance of the common areas, even while the Association was controlled by the developer.

Declaration Article X describes the process by which the Association levies assessments (R 62-68). Section 2 of Article X requires the Association to prepare annual budgets to cover "estimated Common Expenses" for each coming year, including the capital contributions necessary to establish reserve funds[4] and meet capital budgets (R 63-64).

Declaration Article X, Section 7 requires the Association's capital budgets to take into account the number, nature, expected lifespan, and expected repair/replacement costs of replaceable assets (R 66). All capital contributions necessary to meet those capital budgets must be included in the annual budget, and therefore, the assessments levied on all unit owners, including Developer's Units. (R 66).

As amended on April 13, 1992, the Articles of Incorporation required the Association to "levy and collect adequate assessments against [its] members...to be used for the maintenance and repair of the stormwater management system" (R 793, 932). Under a December 1, 1992 amendment to the Declaration, the Association is require to maintain the stormwater

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[4] "Reserve funds" are those set aside for future capital expenditures and deferred maintenance of common areas. *MacKenzie v. Centex Homes*, 208 So.3d 790, 792 (Fla. 5th DCA 2017).

management system (R 793, 914).

C. The Defendant/Appellees

Defendant/Appellee GH Vero Beach Development LLC ("**GH Development**") assumed responsibility as the successor developer of the Grand Harbor Community in approximately July 2004 (R 27, 190, 510). Therefore, from July 2004 through December 1, 2020, GH Development stood in the shoes of Grand Harbor, Inc., as its successor, and the Declarant under the Declaration (R 27, 43). This means that GH Development was also the sole "Class 'B' Member" under the Declaration, and held and exercised the right to appoint a majority of the Association's Board of Directors, as well as the authority to disapprove any actions of the Board (R 125-126).

The remaining Defendants/Appellees, Christopher J. Cleary, Joseph Colasuonno, Chris Card, Michael Gostomski, and Danica Bahadur (collectively, the "**Developer-Directors**"), were Directors of the Association who were appointed and employed by GH Development between 2017 and December 2020, when control of the Board of Directors was transferred by GH Development to the Owners (R 27, 783).

D. Failure of Maintenance During the Developer Control Period

As explained above, pursuant to the Declaration, from 1988 to July 2004, GH Development's predecessors (i.e., the original developer, Grand

Harbor, Inc.) controlled the Association's Board of Directors, and had veto power over any action of the Board (R 47-50, 125-128). Then, for the 16-year period from July 2004 to December 2020, GH Development wielded that same authority and thereby controlled the action or inaction of the Association's Board of Directors.

Before control of the Association was transferred to the Owners, the Association failed to conduct required maintenance and improvements throughout the Common Areas of the Grand Harbor Community (R 923-925). During this timeframe, the Association only established a single asset reserve account for the purpose of covering deferred maintenance and capital improvement costs related to the roads (R 923). No other reserve accounts were established or funded (R 923).

This left the Association with no reserves and no funds for numerous maintenance and capital improvement costs, including costs that are now required to repair, replace, and/or rebuild the following major components of the community's Common Areas:

- The stormwater management system is required to be maintained in compliance with the terms and conditions of the regulatory permits issued to the Association and the Association's Declaration and Articles themselves (R 793). Corrective actions are now required to restore the system including the extensive system of stormwater lakes associated the golf courses and other parts of the community (R 793-794), littoral zone vegetations areas of the lakes, eroded lake shorelines to reestablish proper sloping required by the permit conditions, and proper lake volumes, to install an aeration mechanical system, and to restorethe swales surrounding the golf course lakes (R 793-794). The estimated costs for these corrective actions exceed $10 million (R 794).

- The Common Areas including guardrails, concrete sidewalks, cart paths, stucco walls, light poles, a fishing pier, irrigation pumps, and two bridges were not maintained while the Association was under GH Development's control (R 787-788). The extensive neglect of these maintenance and capital items requires restoration at an estimated cost of $5 million (R 787-788).
- The man-made estuary constructed as part of the stormwater management system was also not properly maintained (R 428-429, 943-946). In particular, circulation in the estuary flushing system has been significantly diminished due to lack of maintenance which the Association was required to perform before control of the Association was transferred from GH Development to the Owners (R 945-946).

This neglected maintenance includes the dredging of areas where long-term sediment accumulation has occurred, trimming of mangroves obstructing flow ways, disposal of dredge spoils, and establishment of a nutrient management plan (R 945-946). The estimated costs to restore the estuary system is exceeds $1.2 million (R 946).

In sum, during the 16-year period in which GH Development controlled the Association's Board of Directors and wielded the authority to veto any action taken by the Board, maintenance expenses in excess of $16.2 million accumulated and went unaddressed (R 787-788, 792-794, 923-925, 943-947). Furthermore, at no time during the 16-year period in which GH Development controlled the Board did the Association establish reserve funds to address any of these ongoing maintenance and capital costs (R 923-925).

Article X, Section 7 of the Declaration requires that a capital budget be prepared each year and that all replaceable assets of the Association be considered as to their condition, useful life, and future replacement (R 66, 1356-1357). According to the unrebutted testimony of the Association's expert witness, Francis J. Nardozza, while the Association was developer-controlled, it failed to prepare such annual capital budgets to take into account the number and nature of replaceable assets of the Association, the expected life of each asset, the expected repair or replacement cost of each asset, and to set the required capital contribution amount based on these considerations (R 1356-1360, 1409-1413). With the exception of limited reserves established for road repair, no capital budget was established for other major replaceable assets, including the bridges, sidewalks, guard rails, cart paths, retaining walls, light poles and other assets (R 1411). Mr. Nardozza further testified that based on both these capital cost requirements in the Declaration, as well as industry practice, GH Development and its representatives on the Board were obligated to establish appropriate reserves (R 1356-1358, 1409-1416). He also opined that the Association incurred damages as a result of the failure of GH Development and the Developer-Directors' failure to maintain the stormwater management system and estuary in accordance with the Association's obligations (R 1424-1435).

E. Financial Mismanagement

In addition to the failure to maintain appropriate reserves, the Defendants also failed to properly account for the total number of units subject to the Declaration, resulting in an overassessment of Common Expenses to non-GH Development-owned units, and underfunding of GH Development's obligations as the developer (R 1396). In particular, Mr.

Nardozza's review of the Association's annual budget while under GH Development's control shows that the Defendants failed to properly account for the total number of units within the Grand Harbor Community that were subject to the Declaration, resulting in a material understatement of the denominator used for budgetary purposes to divide, allocate, and assess common expenses to owners in the community (R 1436-1443). Mr. Nardozza further determined that GH Development underfunded its obligations concerning security gate fee income (R 1443-1447).

F. GH Development's Control of the Board

According to statements of the Developer-Directors made during the time period leading up to the transfer of Board control from GH Development to the Owners, GH Development controlled the Association through the appointment of a majority of the Board, and the Developer-Directors appointed by GH Development saw their role on the Board was to act in the best interests of GH Development, not the Association to which they owed a fiduciary duty (R 783, 940-942, 1541, 1545-1547, 1554-1556, 1568-1569, 1577-1579, 1593-1601, 1639-1640, 1659-1660, 1667-1669, 1680-1683, 1689-1690, 1693-1694, 1700-1701, 1711-1718, 1794-1795, 1808-1809).

On March 8, 2018, a Grand Harbor resident and minority member of the Association's Board of Directors, J. Rock Tonkel, sent a letter to Board

President and Developer-Director, Joseph Colasuonno (R 940-941). At the time, Mr. Colasuonno was both President of the Association's Board, and President of GH Development (R 1545, 1547). Mr. Tonkel's letter explains that resident members of a Grand Harbor finance committee had begun evaluating the impending turnover of the Association to the Owners, and requested that the Board establish a source of funding to address deferred maintenance and capital costs before control of the Board was to be transferred by GH Development to the Owners in 2020 (R 940). In anticipation of that upcoming transfer of control, Mr. Tonkel's letter requested that the GH Development-controlled Association evaluate the assets for which the Association has responsibility, and approve reserve funding to address issues with roads and guardrails, the stormwater management system, the irrigation system, bridges and tunnels, and other Common Area properties (R 940-941).

On March 26, 2018, Developer-Director and Board President, Mr. Colasuonno, sent a response letter to Mr. Tonkel, and explained that "while we will continue to hold a majority of the Board of Directors...prior to transfer of its control...we must approach the transfer of control process as the Declarant [i.e., GH Development] rather than as members of the Board" (R 942). Mr. Colasuonno's letter goes on to explain that "the actions we will be taking will be from the standpoint of the developer, which will be performing various transition tasks as provided in our governing documents and the Florida HOA Act" (R 942). Next, Mr. Colasuonno's letter states that "we do not necessarily share your view in all the statements made" but that they would be discussed "in due course" (R 942).

Mr. Colasuonno testified[5] that when he referred to "we" throughout his March 26, 2018 letter, he was referring to himself and the other two Board members appointed by GH Development (R 1568-1569). Those other GH Development-appointed Directors were, like Mr. Colasuonno, also employed by GH Development (R 783, 1541, 1568-1569).

Mr. Colasuonno also testified that GH Development's parent company, Icahn Enterprises, established an "Authority Limits" document that limited the authority of GH Development and its employees and required Icahn Enterprises' approval before any proposed budget for the Association could be approved (R 1577-1579, 1593-1601).

As reflected above, the evaluations and reserves requested by Mr. Tonkel's March 8, 2018 letter were never established before GH

[5] The depositions of Mr. Colasuonno (R 1535-1625), and of the other Developer-Directors (R 1626-1940), did not take place until after the hearing on the motion for summary judgment which is the subject of this appeal (R 1250).

Development transferred control of the Association to the Owners on December 1, 2020 (R 1554-1556).

Christopher Cleary was Mr. Colasuonno's predecessor as President of the Association's Board of Directors (R 1545). Mr. Cleary testified that he too was employed by GH Development, that his authority as a Developer-Director was limited by the authority limits established by Icahn Enterprises, that those limitations applied to all the Developer-Directors that served on the Board, and that limitation included the requirement that all Association budgets be approved by Icahn Enterprises (R 1659-1660, 1667-1669, 1700-1701, 1711-1718). According to Mr. Cleary, the only reserve account established was a road reserve and a temporary reserve account to address bad debt, but no other reserve account was established while the Board was controlled by GH Development (R 1680-1682). Mr. Cleary claimed he did not see his role as a Director to consider the establishment of such reserve accounts, and that if such reserve accounts were to be established, it would have had to come through Icahn Enterprises (R 1682-1683). Mr. Cleary also claimed that he was unfamiliar with any provision in the Declaration that required the establishment of reserves, and that such reserves were not something he would have ever requested (R 1689-1690, 1693-1694).

Danica Bahadur was another Developer-Director who was employed by GH Development (R 1748, 1768-1769). Like Mr. Colasuonno and Mr. Cleary, Ms. Bahadur testified that reserve accounts were never considered by the Board, even as to assets that were known to be failing such as the main bridges in Grand Harbor (R 1794-1795). She also testified that she was unaware of any standards governing the Association's directors, and that there were conflicting financial duties between her role as a Developer-Director and a GH Development employee (R 1808-1809).

Sachin Latawa was the former CFO of Icahn Enterprises (R 1631-1632). Mr. Latawa testified that the Developer-Directors appointed and employed by GH Development did not have the authority to establish reserve accounts, and that no reserve accounts could have been established or funded without his approval or the approval of Icahn Enterprises' Senior Vice President, Hunter Gary (R 1639-1640).

In sum, in this case there is no need to speculate as to whether the Developer-Directors were acting on behalf of the Association or on behalf of GH Development. They were appointed by GH Development, employed by GH Development or its parent organization, and they admitted, in writing and in sworn testimony, that they were acting in the best interests of the developer (i.e., GH Development), and not of the Association or the Owners, who inquired regarding the establishment of an appropriate reserve fund prior to the transfer of control to the Owners. The Developer-Directors further admitted that they had no authority to adopt a budget or establish reserves without approval from GH Development or its parent company.

G. The Lawsuit

On December 1, 2020, GH Development transferred control of the Association to the Owners (R 27, 510). Within a few months thereafter, on April 28, 2021, the Association promptly filed suit against GH Development and the Developer-Directors (R 26-146).

The Association's complaint explains that when the Board was controlled by GH Development, it failed to prepare annual budgets to cover common expenses, and failed to establish or maintain funded reserves for required capital expenditures as required by the Declaration (R 28-29). The complaint further explains that GH Development, through its appointed Directors, systematically misclassified, misallocated, and misappropriated funds to artificially reduce it funding obligations under the Declaration and Florida law, illegally shifting those obligation to non-developer owner units (R 30).

The Association's complaint asserted three causes of action. Count I alleged that GH Development breached the Declaration through its failure fund capital reserve accounts and failure to comply with its other funding obligations under the Declaration (R 26-31). Count II alleged that the Developer-Directors and GH Development breached their fiduciary duty with regard to their actions taken on behalf of GH Development while serving on and controlling the Board of Directors with regard to the funding of adequate capital reserve accounts and the reduction of its assessment of funding obligations (R 26-32). The complaint also included a third count seeking declaratory relief (R 26-34), but that count was later voluntarily dismissed (R 2258-2260) and is not at issue in this appeal.

On June 25, 2021, the various Defendants filed separate motions to dismiss the Association's complaint and/or for a more definite statement (R 160-178). By order dated July 14, 2021, the trial court denied those motions (R 180-181).

H. <u>Defendants' Motion for Partial Summary Judgment</u>

1. The original motion for partial summary judgment

On December 22, 2022, the Defendants filed a motion for partial summary judgment (R 507-517). That motion identified three grounds for granting partial summary judgment.

The Defendants' first argument, which consisted of six sentences, was that GH Development was entitled to summary judgment on Count I because the Board of Directors, and not the developer, was required to create annual budgets, levy assessments, and establish reserve accounts (R 512-513).

The Defendant's second argument was that the Developer-Directors were entitled to summary judgment on Count II based on a Declaration provision which states that the Developer-Directors "shall not be held liable for any mistake of judgment, negligent or otherwise, except for their own individual willful misfeasance, malfeasance, misconduct, or bad faith" (R 513-514). The motion also contended that the "Association cannot point to any evidence in support of a claim of personal liability against the Director Defendants, including that any individual Director Defendant acted with willful misfeasance, malfeasance, misconduct, or bad faith" and that this purported lack of evidence warrants entry of summary judgment (R 514-515).

Notably, nowhere in the summary judgment motion did the Defendants ever acknowledge, distinguish, or otherwise avoid the March 26, 2018 letter, where Director-Defendant Colasuonno rejected Mr. Tonkel's request to evaluate or establish reserve funds for maintenance and capital costs (R 942). In that letter, he stated, "while we [i.e. he and the other Director-Defendants that make up a controlling majority of the Board] will continue to hold a majority of the Board of Directors of GHCA prior to transfer of its control... **we must approach the transfer of control process as the**

<u>Declarant</u> [i.e. GH Development]" and that "the **actions we will be taking <u>will be from the standpoint of the developer</u>**, which will be performing various transition tasks as provided in our governing documents and the Florida HOA Act." (R 942; emph. added). Nor did the motion acknowledge that Mr. Colasuonno and the other GH Development-appointed Directors were all employed by GH Development (R 783, 1541, 1568-1569).

The third and final argument in the summary judgment motion was that the Defendants were entitled to a summary judgment based on the applicable statute of limitations (R 515-516). The Defendants argued that the statute of limitations for breach of contract is five years, and the statute of limitations for breach of fiduciary duty is four years (R 515-516). Therefore, the motion contends that the Association should be prohibited from seeking damages for a breach contract that occurred prior to April 28, 2016, and prohibited from seeking damages for a breach of fiduciary duty that occurred prior to April 28, 2017 (R 516).

Notably, the motion did not contend that the applicable statutes of limitation prohibited recovery of damages incurred by the Association during the limitations period. The motion also did not raise as an issue whether the Association has standing, whether the Association can show damages, or whether the statutes of limitations acted as a complete bar to recovery (R

507-517).

On February 8, 2023, the hearing on the summary judgment motion was noticed to be conducted 22 days later, on March 2, 2023 (R 531).

2. The Association's response to the motion

On February 10, 2023, the Association filed its memorandum of law in opposition to the summary judgment motion (R 743-767). The Association also filed summary judgment evidence in the form of interrogatory responses, deposition transcripts, and affidavits with incorporated documents (R 533-690, 698-742, 768-987). The Association's response addressed each of the three arguments raised in the summary judgment motion, and cited to the filed summary judgment evidence to demonstrate that disputed issues of material fact exist (R 743-767). Included in the cited summary judgment evidence were affidavits demonstrating that the GH Development-controlled Board of Directors failed to establish or fund appropriate reserve accounts for the identified deferred maintenance and capital improvement costs (R 923-924), agreements showing that GH Development's predecessor developer and the Association had agreed to maintain the Grand Harbor estuary, and amendments to the Declaration showing that the Association was obligated by regulatory permits to maintain the community stormwater management system (R 924-925).

The Association's response also reiterated that GH Development controlled the Board of Directors during all relevant timeframes, and explained that the Declaration specifically required capital budgets to take into account the number, nature, expected lifespan, and expected repair/replacement costs of replaceable assets (R 748).

The Association's response also specifically cited to summary judgment evidence reflecting Mr. Colasuonno's March 2018 letter which confirmed that he and the other Developer-Directors were working on behalf of GH Development, not the Association, with regard to the issue of reserve funds and the transfer of authority to the Owners (R 746, 750-754).

In response to the Defendants' second argument in the summary judgment motion, the Association argued that under Florida law, directors of a homeowners' association may be held personally liable for decisions made in their capacity as directors if there has been fraud, self-dealing, or a betrayal of trust, and that such factual questions are generally not susceptible to determination by summary judgment (R 755).

The Association's response also contended the Defendants' argument concerning the Developer-Directors' breach of fiduciary duty necessarily fails, because their contention that Developer-Directors did not engage in any fraud, self-dealing, criminal activity, unjust enrichment or bad faith was asserted as affirmative defenses, and therefore, the affirmative burden to offer evidence in support of these issues lies with the Defendants, not the Association (R 755-760). *See, Gracia v. Sec. First Ins. Co.,* 347 So.3d 479, 484-485 (Fla. 5th DCA 2022).

With regard to the third point of the summary judgment motion concerning the statute of limitations, the Association's response explains that the five-year or four-year statutes of limitations do not bar the Association's claims because the issues identified in the complaint were not discovered until preparation for the turnover of the Association to the resident Owners, due to the Developer-controlled Board's failure to properly prepare capital budgets, or calculate assessments in accordance with the Declaration (R 757-758). The Association's response also points out that under the terms of the Declaration itself, the Association was not able to take action against the GH Development or the Developer-Directors until after the transfer of control had occurred, since those same entities controlled the Association, and held a veto over its actions until the turnover occurred (R 760-762).

Finally, the Association's response points out that discovery was ongoing, including the depositions of the Director-Defendants and the corporate representative of GH Development, and that proceedings on the summary judgment motion should await the completion of those key depositions and discovery (R 764-765).

3. Defendants' new motion in the guise of a reply

On February 27, 2023, just two days before the summary judgment hearing, the Defendants filed what they characterized as a "reply" in support of their motion (R 988-1003). However, instead of merely replying to the Association's response, the Defendants utilized this document to add new arguments not previously raised in their motion.

For example, the reply argued for the first time that the Association "has no damages" because, according to the Defendants, claims for deferred maintenance and capital improvement costs are mutually exclusive, and that the Association has "not put forth sufficient evidence of either theory" (R 994). In other words, the Defendants argued they should be granted summary judgment as to damages because the Association did not offer "sufficient evidence" to defeat a summary judgment argument that had not been previously raised in the motion itself.

The Defendants' reply also asserted for the first time that the Association lacked standing under Florida Rule of Civil Procedure 1.221 (R 997-1001).

The Defendants' reply also asserted for the first time that summary judgment should be entered with regard to damages because requiring the

Defendants to now pay for the shortfall in funds that should have been set aside as reserves during the time the Board was controlled by GH Development, would somehow result in a "windfall" to the Association (R 998-1001), without regard to the damages now faced by the Association because of the Defendants' failures.

4. The March 2 summary judgment hearing

The summary judgment hearing was conducted two days later, on March 2, 2023 (R 2049-2127). At that hearing, the Defendants expanded their arguments beyond those raised in the summary judgment motion, to include those arguments raised for the first time in their reply, over the Association's objections (R 2080-2083). At the end of the hearing, the trial judge deferred ruling and directed the parties to submit proposed orders for her consideration (R 2103-2104).

5. Key post-hearing discovery

As explained above, the Association pointed out in its response that previously scheduled depositions of critical witnesses, namely the Developer-Directors and other management associated with GH Development, were scheduled to occur shortly after the March 2, 2023 summary judgment hearing and requested additional time to complete those depositions before a decision (R 764-765). Without a decision on the summary judgment motion and with the trial date approaching, the parties went forward with those depositions during the timeframe between the summary judgment hearing and the trial court's entry of its summary judgment order (R 1535-1940).

In particular, the depositions of Developer-Directors and GH Development employees Joseph Colasuonno (R 1535-1625), Christopher Cleary (R 1653-1741), and Danica Bahadur (R 1742-1940), and of Icahn Enterprises' Chief Financial Officer, Sachin Latawa (R 1628-1652), were taken between March 7 and March 29, 2023. As explained herein, these witnesses offered testimony demonstrating that issues of material fact exist that were decisive with regard to the matters raised in the summary judgment motion and the Defendants' subsequent reply.

I. Order Granting Summary Judgment

On March 29, 2023, the trial court entered its order granting Defendants' summary judgment motion (R 1250-1262). In pertinent part, the order found that the Association's summary judgment evidence did not include "any testimony or opinions on what or when…reserves should have been set for such assets, or any opinion testimony on what individual Director Defendants should or should not have done, or failed to do, with regard to such assets," and that there are "no documents, testimony, or evidence" relating to what actions the Developer-Directors "did or did not take" (R 1253).

The order also found that the Association did not provide "any evidence as to the intent of the Director Defendants when serving on the Board" (R 1253). The order also construed Mr. Colasuonno's letter in the light most favorable to the Defendants, by finding that it is a "single letter" and that there is "no evidence" "of whether any Board action was or was not required or taken" (R 1253).

The order next ruled on issues that were not raised in the summary judgment motion, which were raised for the first time in the Defendant's reply (which was filed two days before the summary judgment hearing) and arguments raised for the first time at the summary judgment hearing itself (R 1253-1256). In particular, the order determined the Association lacks standing under Rule 1.221, that the Association cannot show damages, and that the statute of limitations is a complete bar to recovery by the Association (R 1253-1256, 1259).

The order then granted the Defendants' summary judgment motion with regard to Counts I and II of the complaint (R 1256-1260). The order also denied the Association's request for the opportunity to complete scheduled discovery before the summary judgment motion was considered, based on the rationale that the Association supposedly failed to explain what additional discovery was needed or how it would defeat the Defendants' motion (R 1260-1261). The order also concluded that such discovery would be futile given the trial court's rulings on the standing and damages issues that were raised for the first time in the reply filed two days before the summary judgment hearing (R 1261).

J. Motion for Rehearing

On April 13, 2023, the Association timely filed a motion for rehearing pursuant to Florida Rule of Civil Procedure 1.530 (R 1286-1312). The motion renewed the Association's objections to the Defendant's new arguments and defenses raised on the eve of the summary judgment hearing and at the summary judgment hearing (R 1288-1296). The motion also explained that the trial court decided Counts I and II without addressing the arguments raised in paragraphs 18, 19, and 20 of the complaint alleging that the Defendants' systematically misclassified, misallocated, and misappropriated funds by undercounting Declarant-owned units (R 1296-1297). The motion also argued that the trial court erroneously weighed the summary judgment evidence offered by the Association, and that discovery conducted after the summary judgment hearing had identified additional evidence that demonstrated disputed issues of material fact exist regarding Counts I and

II (R 1297-1310).

On April 21, 2023, the Defendants filed a response to the motion for rehearing (R 1947-2047). By order dated April 25, 2023, the trial court denied the motion without a hearing (R 2048).

On May 8, 2023, the trial court entered a final judgment in favor of the Defendants (R 2261-2262). The Association's timely notice of appeal followed (R 2261-2262, 2266-2284).

While this appeal was pending, the Defendants filed a motion to tax costs of over $326,000 (A 3-81).[6] The Association moved to stay proceedings on the motion to tax costs pending the outcome of this appeal (A 82-85), and the Defendants' opposed that motion (A 89-93). After conducting a hearing, the trial court denied the stay motion and directed the parties to proceed with the Defendants' motion to tax costs (A 86-88, 94).

SUMMARY OF THE ARGUMENTS

Despite the recent amendments to Rule 1.510, summary judgment by ambush is still not permitted in Florida. At the Defendants' urging, the trial court's summary judgment order accepted new arguments not raised until

[6] To avoid delay in filing this brief, the post-judgment documents cited in this paragraph are being filed in an appendix along with this brief. In addition, the Association is also filing a motion to supplement the record with these documents.

two days before the hearing, granted relief beyond that requested in the motion, and weighed the summary judgment evidence against the nonmoving party, all in violation of the standards governing summary judgment.

These new claims and defenses appeared for the first time two days before the hearing in a new motion disguised as a so-called "reply" memorandum. Additional novel arguments appeared in Defendants' proposed order, submitted after the summary judgment hearing. The trial court erred in considering those new arguments, and without considering additional evidence on those new arguments as requested by the Association.

The trial court also erroneously refused to delay consideration of the summary judgment motion to allow completion of critical pending discovery. This discovery conducted after the hearing confirmed the existence of disputed material facts that preclude summary judgment.

Finally, the trial court erroneously weighed the evidence in the light most favorable to the Defendants instead of the Association, and misconstrued applicable case law regarding the liability of developers and developer-controlled board members.

This Court should, therefore, reverse the final judgment and remand the case for further proceedings.

STANDARD OF REVIEW

A trial court's summary judgment is subject to *de novo* review. *Chandler v. Geico Indem. Co.*, 78 So.3d 1293, 1296 (Fla. 2011). *See also, Fla. Dept. of Transp. v. Schwefringhaus*, 188 So.3d 840, 844, n. 4 (Fla. 2016)(conclusions of law are reviewed *de novo*).

A trial court's denial of a motion for rehearing is reviewed under the abuse of discretion standard. *J.J.K. Intern., Inc. v. Shivbaran*, 985 So.2d 66, 68 (Fla. 4th DCA 2008).

ARGUMENTS

I. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS

(a) It was reversible error to rule on new claims and defenses

Motions for summary judgment are governed by Florida Rule of Civil Procedure 1.510. In pertinent part, that rule states:

> (a) ...A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense-on which summary judgment is sought. ....
>
> (b) ...The movant must serve the motion for summary judgment at least 40 days before the time fixed for the hearing.

(Emph. added). The plain text of Rule 1.510 requires that the "motion" itself must identify each claim or defense upon which summary judgment is sought, and that "motion" must be served at least 40 days before the time fixed for the hearing.

In this case, the Defendants' summary judgment motion was filed on December 22, 2022, and the hearing on the motion was set for March 2, 2022 (R 507-517, 531). The Association timely filed its response on February 10, 2023, 20 days before the date of the hearing, in accordance with the deadline established by Rule 1.510(c)(5). The Defendants then filed their reply to the Association's response on February 27, 2023, just two days before the hearing (R 988-1003).

The Defendants' reply improperly asserted new arguments regarding the Association's standing, the determination of damages, and the application of the statute of limitations (R 988-1003). Those new arguments raised in the reply were, for all intents and purposes, a *de facto* new motion for summary judgment without affording the Association the 40-day time period of Rule 1.510(b) or the 20-day time period of Rule 1.510(c)(5).

Over the Association's objections, the trial court erroneously relied on and granted the Defendants' new summary judgment arguments (R 1250-1262). This "summary judgment by ambush" tactic is contrary to the plain language of Rule 1.510 and the well-settled case law interpreting Rule 1.510 and its federal rule counterpart.

Rule 1.510 was substantially amended in 2021 to adopt the federal summary judgment standard. In amending Rule 1.510, the Florida Supreme Court acknowledged the need to "reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions." *In re Amendments to Florida Rule of Civil Procedure* 1.510, 317 So.3d 72, 77 (Fla. 2021). In bringing Rule 1.510 in line with the federal summary judgment standard, the revised Rule 1.510 requires a summary judgment motion to be filed "at least 40 days before the time fixed for hearing" and the nonmovant's response and supporting factual position be provided "at least 20 days before the hearing." *Id.*

Federal case law confirms that the trial court erred by granting summary judgment based on the new arguments presented for the first time in the Defendants' reply. "Because summary judgment is a final disposition on the merits, courts should not grant summary judgment based on *arguments or evidence to which the nonmoving party has not had a reasonable and meaningful opportunity to respond with contrary argument or evidence.*" *Atl. Specialty Ins. Co. v. Digit Dirt Worx, Inc.*, 793 Fed. Appx. 896,901 (11th Cir. 2019)(emph. added). For this reason, "[a]n opposing party is entitled to a response, whatever it may be, if the court relies on new materials or arguments in a reply brief." *Id.* at 902 (vacating summary judgment and remanding).

Even before the new version of Rule 1.510 expanded the pre-hearing notice period, Florida jurisprudence was settled that failure to provide a meaningful opportunity to be heard by basing summary judgment on untimely evidence and argument was a violation of due process. "Indeed, '[i]t is reversible error to enter summary judgment on a ground not raised with particularity in the motion for summary judgment." *Design Neuroscience Centers, P.L., v. Preston J. Fields, P.A.*, 359 So.3d 1232, 1235-1236 (Fla. 3d DCA 2023). The rule "is designed to prevent 'ambush' by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing." *Fla. Holding 4800, LLC v. Lauderhill Lending, LLC*, 275 So.3d 183, 187 (Fla. 4th DCA 2019)(quoting *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So.2d 283, 284 (Fla. 4th DCA 1995)).

When the pre-2021 version of Rule 1.510 required at least 20 days advance notice of a summary judgment hearing, it was already well settled that reducing that pre-hearing time period was reversible error because it deprived the nonmovant "of the ability to both adequately respond and prepare for the summary judgment hearing." *Id.* (citations omitted).

The *Design Neuroscience Centers* case involved the shorter 20-day notice provision required by the old version of Rule 1.510, but is otherwise remarkably similar to the present case. There, the movant filed a reply two days prior to the hearing and "did not merely respond to arguments [nonmovant] made in its response in opposition," but rather "included, for the first time, [movant's] substantive arguments about [nonmovant's] counterclaim and affirmative defenses, and cited to evidence not referenced or attached to the motion for summary judgment." *Id.* The appellate court explained:

> In effect, [the movant's] reply was a new motion for summary judgment, for which [the nonmovant] was entitled to twenty-days' notice before a hearing was conducted on the motion. Instead, [the nonmovant] had only two-days' notice in contravention of rule 1.150(c), and objected to the reply and the entry of summary judgment on that basis. Because [the nonmovant] was deprived of the requisite notice required under rule 1.510(c), we reverse the trial court's grant of summary judgment in favor of [the movant].

Design Neuroscience Centers, 359 So.3d at 1235-1236.

The appellate court also noted that a nonmovant's objection to insufficient notice can be made before a summary judgment hearing, or at the summary judgment hearing, or in a motion for rehearing. *Id.* In the case at bar, the Association properly objected to consideration of the Defendant's new substantive arguments both during the summary judgment hearing (R 2081-2082) and in its motion for rehearing (R 1288-1296). By overruling those objections, the trial court clearly violated the Association's due process rights. *Wardell v. Fifth Third Mortgage Co.*, 325 So.3d 103, 105 (Fla. 5th DCA 2020). *See also, City of Cooper City v. Sunshine Wireless Co.*, 654 So.2d 283, 284 (Fla. 4th DCA 1995)(nonmovant had no opportunity to prepare and present evidence on issues actually adjudicated by the trial court on summary judgment).

Under the plain text of Rule 1.510(a), a motion for summary judgment must identify each claim or defense—or the part of each claim or defense—on which summary judgment is sought. Although Rule 1.510(f)(2) allows the trial court to independently grant a motion on grounds not raised by a party, that procedure can only be employed after giving notice and a reasonable opportunity to respond. *Id.* In this case, that did not happen.

(b) <u>Standing under Rule 1.221</u>

The Defendants' reply contended for the first time that the Association lacked standing to sue on behalf of its members under Rule 1.221. The trial court erroneously agreed with this new argument (R 1253-1256, 1259).

The Association's complaint alleged standing based on Rule 1.221 (R 26). Rule 1.221 allows a homeowners' association "after control of such association is obtained by homeowners or unit owners other than the developer" to institute actions in its name on behalf of all association members concerning matters of common interest to the members, including "the common property, area, or elements."

Besides not being raised in the Defendant's motion for summary judgment, the Defendant's lack of standing argument was not even pled in the Defendants' affirmative defenses. Well-settled case law confirms that a plaintiff's alleged lack of standing must be raised as an affirmative defense. *Cong. Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So.3d 602, 607 (Fla. 4th DCA 2013). Affirmative defenses not pleaded are waived. *See*, Fla. R. Civ. P. 1.140(h); *Kersey v. City of Riviera Beach*, 337 So.2d 995, 997 (Fla. 4th DCA 1976). Indeed, this Court has held that as firmly held that "[t]here is no question that lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver." *Schuster v. Blue Cross & Blue Shield of Fla., Inc.*, 843 So.2d 909, 912 (Fla. 4th DCA 2003). This is important because issues not specifically pled in a party's answer cannot be considered on summary judgment. *Wilson v. Jacks*, 310 So.3d 545, 547-548 (Fla. 1st DCA 2021).

Furthermore, the trial court erroneously intertwined its ruling based on Rule 1.221 with the other grounds for granting summary judgment. For example, the trial court's order concludes, "if [the Association] had standing, [the Association] could not recover more than the amount of reserves and assessments that the Developer would have paid pursuant to the Declaration as an owner of units in the community" (R 1254-1255).

Had the Association been afforded a meaningful opportunity to respond to the Defendants' freshly-minted Rule 1.221 arguments, the Association could have pointed out that Florida law allows homeowners' associations to maintain lawsuits on behalf of their members against the developer "concerning matters of common interest to the members," such as "the common areas," "structural components of a building," or "other improvements for which the association is responsible." *Lennar Homes, LLC v. Martinique at Oasis Neighborhood Ass'n, Inc.*, 332 So.3d 1054, 1057 (Fla. 3d DCA 2021)(citing § 720.303(1) and Fla. R. Civ. P. 1.221). "The sole requirement for the bundling of a class is that the members of the association have a common interest regarding the common elements of the property." *Lennar Homes*, 332 So.3d at 1058 (quoting *Homeowner's Ass'n of Overlook, Inc. v. Seabrooke Homeowners' Ass'n, Inc.*, 62 So.3d 667, 670 (Fla. 2d DCA 2011)).

Notably, the sole case cited by the Defendants in their reply in support of their unpled standing argument was a non-binding trial court order in *2711 Hollywood Beach Condominium Association, Inc. v. TRG Holiday, Ltd.,* 2018 WL 3371781 (Fla. Cir. Ct. June 29, 2018). Besides lacking precedential value, that trial-level decision is readily distinguishable because it merely held that an association lacked standing to assert claims of damage to property within ***individual units*** that were: (a) not owned by the association, and (b) not the financial responsibility of the association. *Id.* at *8. In sharp contrast, it is undisputed that the Association's claims in this case are founded on matters of common interest to its members, namely the maintenance and repair of ***common areas*** in the community that ***are*** clearly owned by the Association and within the Association's financial responsibility to maintain.

(c) <u>Damages</u>

The Defendants' reply also argued for the first time that the Association "has no damages" (R 994-996). A review of the Defendant's summary judgment motion shows that the only time the word "damages" is used is in the context of the Defendants' argument regarding the applicability of the statute of limitations, which was limited to its claim that the Association could not recover damages incurred prior to April 28, 2016 or April 28, 2017 (R 516).

As explained below, even if the Defendants' damages argument was properly raised in the motion for summary judgment, relevant case law confirms that when actual damages are incurred by an association due to the failure of a developer-controlled board to properly collect assessments and set reserves, those damages are recoverable from the developer. *Meritage Homes of Florida, Inc. v. Lake Roberts Landing Homeowners*, 190 So.3d 651, 651-52 (Fla. 5th DCA 2016); *B & J Holding Corp. v. Weiss*, 353 So.2d 141, 143 (Fla. 3d DCA 1977); *In Majorca Isles Master Association, Inc.*, 560 B.R. 824, 853-54 (Bankruptcy S.D. Fla. 2016).

(d) Statutes of limitations as a complete bar to recovery

As explained above, the summary judgment motion argued the Association is prohibited from seeking damages for a breach of contract that occurred prior to April 28, 2016, and prohibited from seeking damages for a breach of fiduciary duty that occurred prior to April 28, 2017 (R 516). The motion did not contend that the entirety of the Association's damages necessarily accrued outside the alleged limitations period, nor did any Defendant assert such an argument as an affirmative defense in its answer. However, in their reply, the Defendants argued for the first time that the statutes of limitations are a complete bar to recovery by the Association.

Setting aside the untimely nature of the Defendants' new arguments, the Association's response to the motion explained the Association was controlled by GH Development until control was transferred on December 1, 2020, and therefore, the Association could not have pursued those claims until after that date (R 760-761). For example, Section 720.303(1), Florida

Statutes, which is applicable to homeowners' associations, provides:

> After control of the association is obtained by members other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members, including, but not limited to, the common areas; roof or structural components of a building, or other improvements for which the association is responsible; mechanical, electrical, or plumbing elements serving an improvement or building for which the association is responsible; representations of the developer pertaining to any existing or proposed commonly used facility; and protesting ad valorem taxes on commonly used facilities.

This statute overcomes the Defendants' statute of limitations arguments.

Case law likewise explains that "[t]he ability to elect the majority of the board of directors substantially affects non-developer unit owners" and "***until*** the non-developer unit owners control the association, the association ***may not*** institute, maintain, settle or appeal actions in its name on its behalf." *Bishop Assocs. Ltd. Partnership v. Belkin*, 521 So.2d 158, 161 (Fla. 1st DCA 1988). *See also, Magnolia N Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 725 S.E.2d 112, 125 (S.C. Ct. App. 2012)(rejecting developer's argument "that an organization they controlled would have initiated an action against itself during this period").

In other words, the Association's causes of action could not have accrued until control was transferred to the Owners on December 1, 2020. A statute of limitations does not begin to run until the cause of action accrues.

Penthouse N. Ass'n, Inc. v. Lombardi, 461 So.2d 1350, 1352 (Fla. 1984). In this case, the Association's complaint was filed on April 28, 2021 (R 26), which is before any applicable statute of limitations could have expired on the Association's claims.

Moreover, the obligation to establish and fund reserve accounts was a recurring obligation, arising each year. Therefore, even if the 4-year or 5-year statute of limitations applied, the damages incurred by the Association during those time periods would still be recoverable (R 1295-1296). As such, the statute of limitations would not act as a complete bar to the Association's claims for such damages.

II. THE TRIAL COURT ERRONEOUSLY DENIED THE ASSOCIATION'S REQUEST TO COMPLETE DISCOVERY BEFORE PROCEEDING WITH CONSIDERATION OF SUMMARY JUDGMENT

As explained above, the Defendants' summary judgment motion was filed on December 22, 2022. In that motion, the Defendants themselves acknowledged the motion was based on "discovery completed to date" that "discovery developed in the case" has been "limited," and that "discovery in this matter is ongoing" (R 510, 514, 521). At that time, discovery was indeed ongoing and the matter had not been set for trial.

Subsequently, on January 13, 2023, the trial court entered an order establishing a May 1, 2023 trial date, and establishing a March 10, 2023 deadline to complete depositions, a March 22, 2023 discovery cut-off, and a March 31, 2023 deadline for summary judgment hearings (R 527-528).

On February 8, 2023, the Defendants filed a notice setting their motion for summary judgment for hearing 22 days thereafter, on March 2, 2023 (R 531).

The Association filed its response to the summary judgment motion on February 10, 2023, which was 20 days before the scheduled date of the summary judgment hearing, as required by Rule 1.510(c)(R 743-767). In that response, the Association affirmatively requested that consideration of the summary judgment motion be delayed until discovery can be completed, and specifically explained that the depositions of the Director-Defendants and other corporate representatives of the Defendants had been scheduled but had not taken place as of the Association's deadline to file its response (R 764-765). The response also identified the schedule of the upcoming depositions (R 764).

On March 24, 2023 (i.e., 22 days after the March 1, 2023 summary judgment hearing and 5 days before the trial court entered its order granting summary judgment), the trial court entered an agreed-upon order which acknowledged that the parties were "continuing to take depositions," and extended the parties' deadlines to file deposition designations and counterdesignations (R 1248).

On March 27, 2023, the trial court entered its order granting the summary judgment motion (R 1250-1262). That order denied the Association's request for additional time to complete discovery because the Association did not file a Rule 1.510(d) affidavit or declaration, and because the Association supposedly "fail[ed] to explain what additional discovery it believes will show the Director Defendant's intent" (R 1260-1261). In support of this determination, the trial court cited *Cong. Park Off Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So.3d 602, 608 (Fla. 4th DCA 2013) for the proposition that a "trial court did not abuse its discretion in granting summary judgment, despite the pendency of discovery, where it had given the non-moving party sufficient time to pursue discovery, but the party failed to do so." (R 1260-1261).

The rules and case law do not define the distinction between an "affidavit" and a "declaration" for purposes of Rule 1.510(d). However, the principles of textual construction suggest that the Florida Supreme Court's decision to use different words within Rule 1.510(d) was intended to convey different meanings. *Ahearn v. Mayo Clinic*, 180 So.3d 165, 171 (Fla. 1st DCA 2015).

Although the Association did not file a Rule 1.510(d) "affidavit," the

Association's response to the summary judgment motion and the record should be deemed to include a sufficient "declaration" of the reasons to justify additional time to complete discovery for purposes of Rule 1.510(d). The Association's response clearly set forth the schedule of upcoming depositions and requested additional time to take those depositions (R 764-765). The court file clearly included the notices of those upcoming depositions (R 15-16). The Defendants' motion for summary judgment and the trial court's March 24, 2003 order both acknowledged that discovery was still ongoing (R 510, 514, 521, 1248).

The Defendants nonetheless scheduled the summary judgment hearing to be conducted in advance of the agreed-upon deposition deadlines and the discovery cut-off deadline, knowing full well that the Association's impending depositions were scheduled to be conducted after that hearing. Rule 1.510 was crafted to avoid this type of ambush tactic.

Contrary to the trial court's determination, this is not a situation where the nonmoving party "failed" to conduct discovery. Instead, as reflected in the Association's response and the court file, the depositions in question were already scheduled in coordination with the Defendants, prior to filing of the Association's response, prior to the scheduling of the summary judgment hearing, and those depositions were to be conducted by the extended deposition schedule to which the parties' agreed and the trial court approved (R 1248).

Aside from the outstanding depositions, the Association's response to the summary judgment motion identified Mr. Colasuonno's letter in which he indicated that "we must approach the transfer of control process as the Declarant [i.e. GH Development] rather than as members of the Board" and that "the actions we will be taking will be from the standpoint of the developer, which will be performing various transition tasks as provided in our governing documents and the Florida HOA Act" (R 942). Although Mr. Colasuonno's deposition had not yet been taken, he subsequently confirmed in his post-hearing deposition, that in his letter he was referring to himself and the two other members of the Board appointed by GH Development (R 1568-1569).

Furthermore, at their post-hearing depositions, Mr. Colasuonno and Mr. Cleary both confirmed that they and the other Developer-Directors were not free to act independently on behalf of the Association, but instead were strictly limited in their authority by the "Authority Limits" established by GH Development including as to matters as basic as the establishment of the Association budget (R 1577-1579, 1593-1601, 1659-1660, 1667-1669, 1700-1701, 1711-1718). Mr. Cleary further testified that he only would have established a reserve fund for the Association if GH Development had instructed him to do so (R 1682-1683).

The Association presented the post-hearing deposition testimony in its timely motion for rehearing (R 1301-1308). Nonetheless, the trial court erroneously denied that motion and turned a blind-eye to this additional evidence, which overwhelmingly undermines the findings in the summary judgment order that the Association "put forth no evidence to show that GH Development ever did anything to control any of the people GH Development appointed to the Board" (R 1257).

With regard to Count II, the trial court's order is likewise premised on its finding that the Association "put forth no evidence that the Director Defendants improperly exercised [their discretion regarding the setting reserves] in breach of the Declaration" and that "there is no evidence that the Director Defendants acted with 'individual willful misfeasance, malfeasance, or bad faith' or that their actions amount to 'fraud, self-dealing, or a betrayal of trust'" (R 1259). The trial court also found that the Association's "argument appears to be that, as a result of the fact that the Director Defendants were appointed by GH Development, they must have acted with intentional bad faith" (R 1259-1260).

On a motion seeking rehearing of a summary judgment, "the court may reopen the judgment if one has been entered, take additional testimony, and enter a new judgment." *See, e.g.,* Fla. R. Civ. P. 1.530(a). The trial court's refusal to consider the post-hearing deposition evidence was an abuse of discretion, requiring reversal. *See, Nat'l Enterprises, Inc. v. Martin,* 679 So.2d 331, 333 (Fla. 4th DCA 1996)(trial court abused its discretion in denying motion seeking rehearing of summary judgment, where motion for rehearing attached evidence which unequivocally established appellant's position); *Petrucci v. Brinson*, 179 So.3d 398, 400 (Fla. 1st DCA 2015)(trial court abused its discretion in denying appellant's motion for rehearing and failing to consider affidavit attached thereto in opposition to summary judgment); *Knowles v. JPMorgan Chase Bank, N.A.,* 994 So.2d 1218, 1219–1220 (Fla. 2d DCA 2008)(reversing summary judgment where appellant filed affidavit opposing summary judgment along with motion for rehearing); *Olesh v. Greenberg*, 978 So.2d 238, 243 (Fla. 5th DCA 2008)(trial court abused its discretion by denying motion for rehearing which included attachments and affidavit clearly raising material questions of fact, which would have precluded summary judgment); *Adelberg v. Adelberg*, 142 So.3d 895, 899–900 (Fla. 4th DCA 2014)(Warner, J., concurring in part)("Although discretionary, where the party has been diligent in presenting the newly discovered evidence to the court, and it bears on a material issue in the case, a court abuses its discretion in not hearing such evidence.")

In *Patient Depot, LLC v. Acadia Enterprises, Inc.*, 360 So.3d 399, 409-410 (Fla. 4th DCA 2023), the nonmoving party to a summary judgment motion contended that summary judgment was inappropriate while discovery was outstanding. When the request was denied, the nonmoving party filed a motion for rehearing attaching documents showing that issues of material fact existed. This Court reversed and remanded, explaining that:

> In adopting the new summary judgment rule, our supreme court noted the importance of the parties having adequate time for discovery, stating "it is equally important to emphasize that, **before being subjected to summary judgment because of the absence of evidence, the nonmovant must have been afforded 'adequate time for discovery.'**" *In re Amends. 1.510 II*, 317 So.3d at 77 (quoting *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548); see also *In re Amends. 1.510 I*, 309 So.3d at 193 (stating "provided there has been an 'adequate time for discovery,' the Supreme Court has held that summary judgment should be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial' " (quoting *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548)). We have followed that admonition. "**Where the information contained in outstanding discovery could create genuine issues of material fact, summary judgment would not be proper**." *Babani v. Broward Auto., Inc.*, 348 So.3d 608, 609 (Fla. 4th DCA 2022).

Patient Depot, at 409–410 (emph. added).

The post-hearing discovery was timely conducted in accordance with the parties' agreed upon and court-approved extended deposition schedule, and clearly confirms the existence of genuine issues of material fact which precluded summary judgment. *See also, Brandauer v. Publix Super Mkts., Inc.,* 657 So.2d 932, 933 (Fla. 2d DCA 1995)(generally, court should not enter summary judgment when opposing party has not completed discovery); *Colby v. Ellis,* 562 So.2d 356, 357 (Fla. 2d DCA 1990)(it is generally premature to grant summary judgment where opposing party has not completed discovery); *Almond Entm't, Inc. v. Bayview Loan Servicing, LLC,* 98 So.3d 723, 723 (Fla. 2d DCA 2012)(circuit court erred by granting summary judgment when facts of case had not been sufficiently developed); *Abbate v. Publix Super Mkts., Inc.,* 632 So.2d 1141 (Fla. 4th DCA 1994)(reversing summary judgment as premature when interrogatory answers were outstanding); *Villages at Mango Key Homeowners Ass'n, Inc. v. Hunter Dev., Inc.,* 699 So.2d 337, 338 (Fla. 5th DCA 1997)(unless facts have been developed sufficiently to determine that no issues of fact exist, summary judgment must not be entered).

III. THE TRIAL COURT ERRONEOUSLY FAILED TO APPLY THE CORRECT SUMMARY JUDGMENT STANDARD

(a) Introduction

The trial court's decision on Count I is premised on the conclusion that the Association "put forth no evidence to show that GH Development ever did anything to control any of the people GH Development appointed to the

Board" (R 1257). The trial court's decision on Count II is premised on the finding that the Association "put forth no evidence that the Director Defendants improperly exercised [their discretion regarding the setting reserves] in breach of the Declaration" and that "there is no evidence that the Director Defendants acted with 'individual willful misfeasance, malfeasance, or bad faith' or that their actions amount to 'fraud, self-dealing, or a betrayal of trust'" (R 1259). With regard to Count II, the trial court also found that the Association's "argument appears to be that, as a result of the fact that the Director Defendants were appointed by GH Development, they must have acted with intentional bad faith" (R 1259-1260).

As explained below, the trial court violated the controlling summary judgment standards and erroneously ignored the summary judgment evidence offered by the Association in opposition and/or erroneously weighed the evidence in the light most favorable to the Defendants instead of the light most favorable to the Association.

(b) <u>The controlling standard</u>

Under the federal summary judgment standard, the trial court must accept the nonmovant's evidence as truthful and must draw all factual inferences in favor of the nonmovant. *Powell v. Carey Intern., Inc.*, 490 F.Supp.2d 1202, 1208 (S.D. Fla. 2006)(*citing Allen v. Tyson Foods, Inc.*, 121

F.3d 642, 646 (11th Cir. 1997)(quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 (1986)). "In determining whether to grant summary judgment, the [trial] court must remember that 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Powell*, 490 F.Supp.2d at 1208 (quoting *Anderson*, 477 U.S. at 255).

Summary judgment cannot be granted unless the evidence is "so one-sided that one party must prevail as a matter of law." *Powell*, 490 F.Supp.2d at 1208 (quoting *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)(quoting *Anderson*, 477 U.S. at 251-52)). If there is any "one-sided evidence" in this case, it favors the Association, not the Defendants. And, to the extent the evidence is not "one-sided," all conflicting evidence and all reasonable inferences were required to be viewed in the light most favorable to the Association, as the nonmoving party.

Florida state courts similarly have confirmed that credibility determinations and weighing the evidence remain jury functions under the revised summary judgment standard. *Juan Gervas, et al., v. Gazul Producciones SL Unipersonal*, 358 So.3d 1257, 1260 (Fla. 3d DCA 2023)("We...are unable to reconcile the declarations of the competing witnesses without improperly weighing the evidence."); *Gracia v. Sec. First*

Ins. Co., 347 So.3d 479, 482 (Fla. 5th DCA 2022)(under the new summary judgment standard, "the general rule remains intact: credibility determinations and weighing the evidence 'are jury functions, not those of a judge,' when ruling on a motion for summary judgment").

(c) Improper weighing of summary judgment evidence

The trial court erroneously determined that the Association "failed to produce any evidence of actual control by GH Development" and "put forth no evidence to show that GH Development ever did anything to control any of the people GH Development appointed to the Board" (R 1257). In reality, especially when viewed in the light most favorable to the Association as the nonmoving party, the Association's evidence concerning GH Development's control of the Board went far beyond merely showing that GH Development appointed three of the Board's five Directors.

As explained in the Statement of Case and Facts, evidence in the record shows that:[7]

- GH Development was the Declarant from 2004 to 2020 (R 27, 43, 510).
- The Declaration requires the establishment of reserves (R 62-68).

[7] As previously explained, some of the record evidence cited above only came to light after the summary judgment hearing, because discovery was still ongoing and the trial court denied the Association's request to delay the summary judgment decision until after this critical discovery could be completed within the time remaining before the impending trial date.

- During the 2004-2020 timeframe, no reserves were established to address deferred maintenance or capital costs for the Association's Common Areas (R 923-925).
- The current cost of addressing deferred maintenance and capital costs for the Common Areas now exceeds $16 million (R 787-788, 792-794, 923-925, 943-947).
- GH Development appointed a controlling majority of the Board of Directors during that timeframe (R 47-50, 125-128).
- The Developer-Directors were employees of GH Development (R 27, 783).
- GH Development prohibited the Developer-Directors from considering budgets or reserves without GH Development's approval (R 1659-1660, 1667-1669, 1700-1701, 1711-1718).
- The Developer-Directors considered themselves to be acting on behalf of GH Development with regard to the reserve issue (R 942, 1568-1569).
- Despite inquiries by residents regarding the establishment of reserves before control of the Board was transferred, the Developer-Directors took no action (R 940-942).

This evidence, especially when viewed in the light most favorable to the Association, create genuine issues of disputed material facts and contradict the trial court's ruling that there was "no evidence to show that GH Development ever did anything to control any of the people GH Development appointed to the Board" (R 1257). Taken together, this unrebutted evidence is more than sufficient to draw legitimate inferences, if not definitively conclude, that GH Development controlled the Board, and that the issue is not appropriate for summary judgment, but instead should have been left to the jury to decide. *Gracia v. Sec. First Ins. Co.*, 347 So.3d 479, 482 (Fla. 5th DCA 2022).

In addition, contrary to the trial court's conclusions, developers are liable for the failure of a developer-controlled association board to establish and maintain appropriate reserves. The case *Meritage Homes of Florida, Inc. v. Lake Roberts Landing Homeowners*, 190 So.3d 651 (Fla. 5th DCA 2016) describes a remarkably similar situation in which a developer was held liable for the damages caused by the developer-controlled association's failure to comply with applicable reserve requirements and declarations. In that case, while an association was developer-controlled, it established certain reserve accounts, but then proposed to waive those reserves for two years. *Id.* at 651-652. The association's board, which was composed of three developer employees, approved the proposed budget but improperly waived reserves.

Id. at 652-653. The appellate court affirmed the trial court's judgment in favor of the association and against the developer, based on the failure of the developer-controlled board to follow the applicable legal requirements in implementing the declaration's reserve budgeting requirements. *Id.*

Likewise, in this case, it is undisputed the Board was developer-controlled during the relevant time frames and failed to establish reserves despite the requirement in the Declaration that such reserves be established (R 923-925). The Association's expert, Mr. Nardozza, testified the developer-controlled Board failed to comply with its obligations under both the Declaration and industry practice to establish appropriate capital budgets and reserves, which was a violation of the Defendants' obligations (R 1356-1358, 1409-1416). For these reasons, the trial court erroneously granted summary judgment on Count I.

A similar situation exists on Count II. The trial court concluded the Association "put forth no evidence that the Director Defendants improperly exercised [their discretion regarding the setting reserves] in breach of the Declaration" and "no evidence that the Director Defendants acted with 'individual willful misfeasance, malfeasance, or bad faith' or that their actions amount to 'fraud, self-dealing, or a betrayal of trust." (R 1259). The trial court also concluded the Association's "argument appears to be that, as a result of the fact that the Director Defendants were appointed by GH Development, they must have acted with intentional bad faith" (R 1259-1260).

The same record evidence cited above contradicts the trial court's determinations that there was "no evidence" regarding the Director-Defendants acting with misfeasance, malfeasance, or bad faith or through fraud, self-dealing, or a betrayal of trust. Taken as a whole, and in the light most favorable to the Association as the nonmoving party, the record evidence is more than sufficient for a jury to conclude the Director-Defendants acted with willful misfeasance, malfeasance, or bad faith, and that their actions amount to fraud, self-dealing, or a betrayal of trust.

Even if the business judgment rule could be applied to the Director-Defendants' decisions, it would not protect their decisions that were made for the developer's benefit. As explained by this Court:

> When applying the business judgment rule to the decisions of a property association, the test is: 1) whether the association had the contractual or statutory authority to perform the relevant acts; and 2) if so, whether the board acted reasonably... "[C]ourts must give deference to a[n] ... association's decision if that decision is within the scope of the association's authority and is reasonable-that is, not arbitrary, capricious, or in bad faith."...The question of reasonableness is an issue of fact, and for an appellate court to affirm a final summary judgment in favor of an association, the record on appeal must clearly show that the association's actions were reasonable.

Miller v. Homeland Prop. Owners Ass'n, Inc., 284 So.3d 534, 537 (Fla. 4th

DCA 2019).

In *Miller,* this Court applied the business judgment rule to an association's interpretation and application of certain use restrictions. *Id.* at 538. In contrast, the instant matter relates to a developer-appointed and controlled Board of Directors, who not only failed to review its obligations owed to the Association as set forth in the Declaration but also deliberately acted in the best interests of the developer to the detriment of the residents.

In *B&J Holding Corp. v. Weiss*, 353 So.2d 141, 143 (Fla. 3d DCA 1977), the court found that evidence was sufficient to prove a breach of fiduciary duty by directors for their failure to collect from the developer maintenance payments for unsold units of a condominium association and confirmed that the directors were properly held personally liable for the damages caused by their breach. *See also, Oceancrest Condo. Apartments, Inc. v. Donner*, 504 So.2d 447, 454 (Fla. 4th DCA 1987)(quoting *B&J Holding Corp.* to confirm original officers and directors of association board owe fiduciary duties to collect assessments on developer-owned condominium units); *Olympian W Condo Ass'n, Inc. v. Kramer*, 427 So.2d 1039 (Fla. 3d DCA 1983)(citing *B&J Holding Corp.* to recognize director liability may attach when a "cognizable breach of a common law, statutory, or contractual duty" exists); *Sonny Boy, L.L.C. v. Asnani*, 879 So.2d 25, 27 (Fla. 5th DCA 2004).

To the extent that director liability requires a showing that there was fraudulent intent or the state of mind of the director is relevant to ascertaining whether there has been self-dealing or a betrayal of trust, such issues are generally not susceptible to summary judgment determination. *Gracia*, 347 So.3d at 485; *citing Bowman v. Barker*, 172 So.3d 1013, 1017 (Fla. 1st DCA 2015)(finding that material issues of fact as to vendor's intent precluded summary judgment on purchaser's fraudulent misrepresentation claim); *Fleming v. Peoples First Fin. Sav. & Loan Ass'n*, 667 So.2d 273, 274 (Fla. 1st DCA 1995)(fact issues relating to intent generally do not lend themselves to summary judgment). As explained above, the record evidence that was cited in the Association's response and the evidence that was offered but which the trial court improperly refused to consider is sufficient to create disputed issues of fact rendering summary judgment inappropriate.

Likewise, the issue of whether GH Development is vicariously liable for the actions of its Director-Developers under Count II implicates disputed issues of material fact precluding summary judgment. An employer is vicariously liable for an employee's tortious conduct where the conduct occurs within the scope of the employment. *Fields v. Devereux Found. Inc.*, 244 So.3d 1193, 1196 (Fla. 2d DCA 2018). In the case of intentional torts, the employee's conduct must be "of the kind he was employed to perform," must occur "substantially within the time and space limits authorized or required by the work to be performed," and must be "activated at least in part by a purpose to serve the master." *Id.* At the very least, the evidence regarding GH Development's direct control and limitation of the authority of the Developer-Directors is sufficient to create a disputed issue of material fact regarding this issue.

Accordingly, in the context of a motion for summary judgment and the factual and legal background described herein, genuine issues of material fact exist as to whether the Developer-Director's actions or inactions complied with their obligations and were reasonable.

(d) <u>The trial court erroneously granted summary judgment on issues that were never raised by the Defendants</u>

Paragraphs 18-20 of the Association's complaint allege the distinct claim that GH Development, through the Board of Directors it controlled, systematically misclassified, misallocated, and misappropriated funds by undercounting developer-owned units, to artificially reduce its own funding obligations under the Declaration, resulting in shifting those costs from GH Development to the non-developer unit owners (R 30). Paragraphs 18-20 are incorporated into both Counts I and II (R 30, 31).

As explained in the Association's motion for rehearing, the allegations in these paragraphs were not raised at all in the summary judgment motion, except to say they were subject to the cited statutes of limitation (R 516, 1296-1297). Even though this distinct issue that was raised in both Counts I and II was not addressed in the summary judgment motion, the trial court nevertheless granted summary judgment on both Counts I and II in its order (R 1250-1262), without providing reasonable notice and opportunity to respond, in violation of Rule 1.510(f)(2).

In fact, the Association's interrogatory responses, as well as the filed deposition testimony and expert report of the Association's expert, Francis J. Nardozza, describe and constitute the evidence supporting the Association's allegations concerning the wrongful misallocation and misappropriation of funds to the benefit of GH Development while the Board was developer-controlled (R 773-774, 1313-1534). Mr. Nardozza's analysis concludes that while GH Development controlled the Board, the Board consistently made over-assessments to non-developer unit owners, correspondingly underfunded the developer's obligations, and improperly accounted for collected fees (R 1436-1447). Mr. Nardozza's unrebutted opinion concluded this caused the Association to incur approximately $576,000 in damages due to assessment overcharges to unit owners and $463,000 in damages due to misapplication of fee income (R 1436-1447).

Because the Defendants made no legal arguments in their summary judgment motion on this issue and failed to address the evidence offered by the Association, the evidence offered by the Association in and of itself creates a genuine disputed issue of material fact. Therefore, granting summary judgment on Count I and II in relation to this issue was reversible error.

CONCLUSION

As described herein, during the 16-year period in which GH Development exercised full control over the Association Board of Directors, over $16 million in deferred maintenance and capital costs accumulated. As a result of the wrongful actions of GH Development and the Board it controlled, no reserve funds were ever established, and the Owners of the Grand Harbor Community were left holding the bag when GH Development exited the scene in December 2020.

Granting summary judgment was in error, and denying rehearing was an abuse of discretion. Among other things, the trial court violated the Association's rights as the responding party to receive required reasonable and timely notice of the matters at issue in the summary judgment motion, deprived the Association of its right to offer evidence showing that disputed issues of material fact exist, and failed to review the evidence and reasonable inferences in the light most favorable to the Association, as the nonmoving party.

After saddling the Association and the Owners with $16 million in repair expenses, the Defendants have added insult to injury by filing a motion to tax costs of over $326,000 against the Association (A 3-81).

The egregious errors and abuse of discretion committed in this case have resulted in a significant injustice and require reversal. The Association, therefore, respectfully requests this Honorable Court to reverse and remand for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished via the Florida Courts E-Filing Portal upon: Ashley Gomez-Rodon, Esquire, Jason Domark, Esquire, and Matthew Criscuolo, Esquire, *Co-counsel for Defendants,* Cozen O'Connor, Southeast Financial Center, 200 S. Biscayne Boulevard, Suite 3000, Miami, FL 33131, agomez-rodon@cozen.com; jdomark@cozen.com; mcriscuolo@cozen.com; Joanie Phelan jphelan@cozen.com; and Herbert Beigel, Esq., *Pro Hac Vice Co-counsel for Defendants,* Law Offices of Herbert Beigel, 5641 N. Chieftan Trail, Tucson, AZ 85750, hbeigel@me.com; on this 11th day of September, 20 23.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated document is printed in Arial 14-point font, complies with the applicable font and word count limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210, and does not exceed 13,000 words (excluding the words in any caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, and signature block) as indicated by the word count of the wordprocessing system used to prepare this document.

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