

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
SIXTH DISTRICT

LYNN SANDFORD,

Case No. 6D23-2753

Appellant,

v.

NORTH SHORE AT LAKE HART  
HOMEOWNERS' ASSOCIATION, INC.,  
DAVID S. GORDON, JOHN DICK,  
STEPHEN SMITH, RANDOLPH PINNA,  
MICHAEL MCCAULEY, ROB TAUB,  
ALBERT PEARSALL, DAVID BAUER,  
LISA SOLICK, PAUL SNYDER,  
JENNIFER ENGLERT and THE  
ORLANDO LAW GROUP, PL,

Appellees.

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On Appeal from the Circuit Court of the Ninth Judicial  
Circuit in and for Orange County, Florida

**ANSWER BRIEF OF APPELLEES**

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## **INTRODUCTION**

The Appellant, Lynn Sandford, will be referred to by name or as Appellant. The Appellees, North Shore at Lake Hart Homeowners' Association, Inc., David S. Gordon, John Dick, Stephen Smith, Randolph Pinna, Michael McCauley, Rob Taub, Albert Pearsall, David Bauer, Lisa Solick, Paul Snyder, Jennifer Englert and The Orlando Law Group, PL, will be referred to by name or collectively as the Appellees. Citations to the record on appeal will be indicated as (R \_\_\_\_), with the appropriate page number inserted. Citations to the transcript will be indicated as (T \_\_\_\_), with the appropriate page number inserted. Citations to the supplemental record on appeal indicated as (SR) with the appropriate page number inserted.

## **STATEMENT OF THE CASE AND FACTS**

The Appellees object to the Statement of Case and Facts in Appellant's Initial Brief because it contains material misrepresentations and violates Florida Rules of Appellate Procedure. Appellant provides no record citations for the vast majority of assertions made, many of which are inflammatory and reference matters outside the record. And in the few instances where there is a citation to the record, the cited page often does not support the allegation. Moreover, Appellant often confusingly references an unauthorized "Bates Appendix" he created rather than the record on appeal.

For example, the first four sentences in Appellant's Statement of the Case and Facts have no record citation, including the inflammatory allegation that "director Gordon was spending of homeowner funds to personally sue multiple other homeowners, mostly for alleged defamation against himself." (IB 5). And pages 264-66 of the record do not support Appellant's inflammatory claim that: "And to make matters worse, Association attorney Englert was acting as litigation counsel and billing the Association for these tens of thousands of dollars in litigation fees which were then approved for payment by President Gordon and treasurer Smith without any further board review." See (IB 5).

Appellant continues with uncited inflammatory claims, references to matters outside the record, inaccurate record citations, and confusing references to a “Bates Appendix” throughout her Statement of the Case and Facts. (IB 4-15). While Appellant argues that the trial court could only look to the four-corners of the Fifth Amended Complaint in determining whether to dismiss it (IB 18-33), she spends six pages (IB 4-10) of her Statement of the Case and Facts discussing matters outside the record relating to other litigation and arbitration involving the parties. Consequently, the Appellees request that this Court not consider statements or assertions in Appellant’s brief that reference matters outside the record and are not supported by a citation to the record on appeal.

And notwithstanding Appellant’s repeated efforts to bring irrelevant, non-record matters into this appeal in her Initial Brief, as well as through multiple notices to this Court of “Related Cases,” the basic facts that are material to the correctness of the two orders<sup>1</sup> challenged by Appellant are straightforward.

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<sup>1</sup> The Appellant challenges the October 4, 2023, “Order Dismissing Plaintiff’s Fifth Amended Complaint With Prejudice and Final Judgment,” and the May 13, 2022, “Order on Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Depositing Plaintiff Lynn Sanford Outside the Presence of Counsel.”

On September 22, 2020, Appellant, Jane Doe 1, and Jane Doe 2, filed a derivative action on behalf of North Shore Lake Hart Homeowner's Association, Inc. against David S. Gordon, John Dick, Stephen Smith, Michael McCauley, Randolph Pinna, Rob Taub, Burt Pearsall, John Doe 1, Individually and as Officers, David Bauer, individually, and against North Shore at Lake Hart Homeowners Association, Inc. (R 40). The defendants, through their counsel Jennifer Englert, Esquire and The Orlando Law Group, PL, moved to dismiss the complaint, arguing that the complaint should be dismissed for failure to state a cause of action, for being pled as an improper "shotgun pleading," for failing to comply with Florida Rules of Civil Procedure 1.110 and 1.130, for failing to comply with Florida Statute sections 720.303, 720.311, and 617.07401, for improper venue, and for pleading anonymous Plaintiffs. (R 166).

Various motions were also filed by both Plaintiffs and Defendants, including Plaintiffs' January 11, 2021, "Motion to Disqualify or Recuse defendants' attorney Jennifer Englert for conflict of interest, aiding and abetting defalcation of corporate assets and misrepresentation." (R 2, 248-54). The parties continued to file numerous discovery motions (R 3-4), and on May 20, 2021, Appellant and the two "Does" filed an "AMENDED DIRECT AND DERIVATIVE COMPLAINT FOR CIVIL THEFT, CONSPIRACY TO

COMMIT CIVIL THEFT, MISAPPROPRIATION, CONVERSION AND THEFT OF CORPORATE ASSETS BY TRICK, BREACH OF FIDUCIARY DUTY, UNJUST ENRICHMENT AND INJUNCTIVE RELIEF,” which added Lisa Solick, Paul Snyder, attorney Englert, and The Orlando law Group, PL, as defendants. (R 453-89).

The Defendants moved to dismiss the amended complaint (R 586-607), after which Appellant filed another amended complaint. (R 631-54). The trial court granted the Defendant’s amended motion to dismiss, dismissing both amended complaints for failure to state causes of action and giving Plaintiffs 30 days to file an amended complaint. (R 708-09).

On October 11, 2021, Appellant filed what she titled her “First” amended complaint (but it was really her second amended complaint) which did not list the “Does” as Plaintiffs, and which dropped defendants Smith, McCauley, Pinna, Taub, Pearsall, John Doe 1, Bauer, Solick, Snyder and The Orlando Law Group, P.L., without leave of court or filing a voluntary dismissal. (R 755-65). The Defendants moved to dismiss Appellant’s third attempt to properly plead a cause of action, arguing that Appellant improperly dropped Defendants Stephen Smith, David Bauer, Michael McCauley, Randolph Pinna, Rob Taub, Burt Pearsall, John Doe 1, Ronald Pinna, The Orlando Law Group, PL, Lisa Solick and Paul Snyder without filing a

voluntary dismissal or obtaining leave of court, and argued that the amended complaint should be dismissed as an improper “shotgun” pleading, for failing to comply with Florida Rules of Civil Procedure 1.110 and 1.130, for failing to comply with Florida Statute sections 720.303, 720.311, and 617.07401, for improperly seeking “derivative” damages on behalf of the Association in her individual capacity, for confusion as to the parties to the lawsuit, for improperly commingling various claims against multiple defendants, and for making allegations beyond the statute of limitations. (R 755-65).

Before the trial court ruled on the Defendants’ October 21, 2021, motion to dismiss, on January 10, 2022, Appellant filed a “Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Deposing Plaintiff Lynn Sanford Outside the Presence of Counsel.” (R 1021-34). The sole argument for disqualification raised in Appellant’s January 10, 2022, motion was that by deposing Appellant in a different case without noticing attorney Burtoff, and asking questions that also were relevant to this action, attorney Englert improperly initiated direct contact with a represented party that provided her with an unfair informational advantage. (R 1031-32). Appellant did not raise or argue any alleged conflicts of interest between

attorney Englert and the other defendants as a basis for disqualification in the motion. (R 1031-33).

Thereafter, Appellant filed a memorandum in support of her January 10, 2022, motion. (R 1149). Appellant argued that attorney Englert should also be disqualified for reasons not raised in the motion, including for an alleged conflict of interest between herself and the other defendants. (R 1164-66). The trial court issued an order denying Appellant's motion for disqualification of attorney Englert and granting Appellant's request for sanctions, finding that attorney Englert improperly deposed Appellant outside the presence of her counsel. (R 1874).

On May 27, 2022, Appellant filed a motion for leave to amend her second amended complaint (wrongly identified as her first amended complaint) and attaching the proposed amended complaint. (R 1901-46). The trial court entered an order dismissing Appellant's "First Amended Complaint" (really her second amended complaint) and giving her 15 days to file yet another amended complaint. (R 1955). On June 15, 2022, Appellant filed her third amended complaint (R 1962-2005), and the Defendants moved to dismiss that complaint with prejudice, arguing, among other things, that the parties to the lawsuit are still unclear, that Smith, McCauley, Pinna, Taub, Pearsall, John Doe 1, Bauer, Solick, Snyder and

The Orlando Law Group, P.L., were added back to the lawsuit without proper service, that the complaint is still an improper “shotgun pleading” that commingles multiple claims against multiple defendants, that the complaint still fails to state a cause of action and fails to comply with the Florida Rules of Civil Procedure and Florida Statute sections 720.303, 720.311, and 617.07401, that Appellant lacks standing to seek damages to the association as a whole in her individual capacity, and that the allegations of the complaint are conclusory. (R 2088-2129).

On October 19, 2022, the trial court dismissed Appellant’s Third Amended Complaint, again giving Appellant leave to amend the complaint, this time within 20 days. (R 2195). On November 1, 2022, Appellant filed her **third** motion to disqualify attorney Englert. (R 2217-20). On November 7, 2022, Appellant filed her Fourth Amended Complaint. (R 2225-56).

Thereafter, the Defendants filed a response to the disqualification motion and moved to dismiss Appellant’s fourth amended complaint with prejudice on November 17, 2022. (R 11-12). On February 1, 2023, new trial judge Emerson Thompson held a hearing on the Defendants’ motion to dismiss the Fourth Amended Complaint. (R 2395-2436). At the end of the hearing, Judge Thompson explained why he was granting the motion to dismiss:

All right, Lawyers. I've read through the complaint, I looked at the documents that were filed by Attorney Englert, and I read the various orders that had been entered previously. And I'll direct your attention, excuse me, to an order entered on October the 19th of 2022 as to the third amended complaint . . . and if you look at the reasons why it was dismissed and look at the complaint and the lack of change from the first or third complaint to this complaint, that is some of the paragraphs are almost verbatim like they were before. . . . So the complaint as of today has not changed much from the complaint that was dismissed previously by court order. And I understand you have multiple times to make a change, but it strikes me that you have not made the corrections that the previous motion to dismiss. . . . So it's pretty much the same pleading as it was previously with minimal changes, so I'm going to dismiss it, and I'll do this. Now *this is an excessive amount of time to amend the complaint when you don't change the things the judge asked or ordered that you change, so if you're going to keep repeating the same things with the same result, then this is your last time to amend, and if you file it again and it doesn't meet the minimum standard based on the four corners of the document, it'll be dismissed with prejudice.* . . .

(R 2420-22) (emphasis added).

Consistent with his oral ruling, Judge Thompson granted the Defendants' motion to dismiss, but gave Appellant one last opportunity to amend, stating:

The Court grants Defendants' Motion to Dismiss Plaintiff's Fourth Amended Complaint and orders that this is the last time the Plaintiff shall amend, within 20 days from the date of this order. The Defendant shall have 10 days to respond from the date of filing the amended complaint.

(R 2382).

On February 25, 2023, Appellant filed her Fifth Amended Complaint in the case. (R 2550-81). Once again, because of the complaint's continued defects, the Defendants moved to dismiss the fifth amended complaint with prejudice. (R 2704-35). The Defendants argued that the Fifth Amended Complaint was virtually unchanged from and contained the same deficiencies as the prior complaints (R 2704-34), including that:

- The parties to the lawsuit are still unclear as parties to the lawsuit have been dropped and added without proper service or leave of court (R 2096, 2551-53, 2587-88);
- The complaint is an improper "shotgun" pleading that re-alleges paragraphs 1-32 of the complaint before each count and commingles separate and distinct claims against multiple defendants (R 2586-2615, 2594-95, 2596-98);
- Counts I and II fail to state a cause of action because the Association itself owes no duty to Appellant individually or as a single member, as opposed to the membership as a whole (R 2594-97, 2714-16);
- The complaint includes numerous allegations damages to the Association as a whole, (Paragraph 19(i) alleges vexatious litigation against Appellant *and others*), (R 2591), (Paragraphs 20-24 allege that expenditures for a dock and dog park were "concealed *from the homeowners*" (R 2591-92), (Paragraph 23 alleges that funds should "rightfully have been returned to the homeowners" (R 2592), (Paragraph 25 states that: "These monies belonged to the homeowners...") (R 2592);
- The complaint is littered with conclusory allegations without specific and sufficient facts to support the allegations (Count 1 vaguely alleges that "The Homeowners' Association through its directors breached its agreement with Sandford,

mismanaging budgeting and daily operations and maintenance of the Association, directly harming, defaming and humiliating Plaintiff Sandford verbally and through its correspondence,” but provided no specific facts indicating what was allegedly done, when it was done, or who allegedly did it) (R 2595); (Count 2 makes the conclusory allegation that “Defendant Association violated the implied covenant of good faith and fair dealing in multiple ways, as stated in the above history which is incorporated by reference” (R 2596-97); (Counts 3 and 4 make conclusory allegations that Defendant Gordon “approved many acts and omissions, harsh penalties, and budgetary malfeasance” (R 2598) and “engaged in self-dealing and unjust enrichment by reimbursing himself and other directors selectively or authorizing reimbursement for his personal litigation and pet projects, by the Association, in violation of the governing documents,” but provide no specifics other than to refer to Paragraphs 1-32 of the complaint (R 2599); (Paragraphs 67-77 in Count 5, in addition to being conclusory in nature, do not allege Defendant Gordon made any statements at all. For example, Paragraph 69 alleges “Defendant knew at the time that use of community property was not prohibited to Plaintiff and to say otherwise was false.” (R 2600). Paragraph 69 does not identify when or to whom any such statement was made. (R 2600). This same defect occurs throughout the allegations in Paragraphs 69-72 (R 2600).

- All the Counts in the complaint for breach of fiduciary duty (against all defendants) and aiding and abetting the breach of fiduciary duty (against Defendants Englert and The Orlando Law Group) fail to state a cause of action because none of the Appellees owe an individual fiduciary duty to Appellant.
- The allegation in Paragraph 131 that attorney Englert aided and abetted a breach of fiduciary duty by sending Appellant letters “threatening criminal prosecution” fails to state a cause of action because sending a letter threatening criminal charges is not impermissible under the rules of the Florida Bar.

- Counts 4 and 7 for Unjust Enrichment as to Gordon and Dick respectively fail to state a cause of action because Appellant has no standing to claim damages incurred by the Association. (R 2599, 2602-03).

On May 4, 2023, Judge Thompson orally granted the Defendants' Motion to Dismiss Appellant's Fifth Amended Complaint. (R 2835). Notwithstanding that no order had been rendered, on June 2, 2023, Appellant filed a notice of appeal directed to "the Order of this Court granted on Defendants'/Appellees' Motion to Dismiss the fifth Amended Complaint with Prejudice, announced at hearing on May 4, 2023." (R 2838). On October 4, 2023, Judge Thompson issued an "Order Dismissing Plaintiff's Fifth Amended Complaint with Prejudice," finding:

Multiple courts have ruled that the Complaints do not comply with the Florida Rules of Civil Procedure," that "the multiple counts which span several years and involve several Boards of Directors, does not clearly allege which board members acted improperly during a particular period of time," and that "[n]or does the complaint specify who the board members were when an alleged unauthorized act occurred or what the act was as it relates specific board members. Thus, the Defendants are unable to properly respond or file affirmative defenses [to the] nebulous [complaint]. See Fla. R. Civ. P. 1.110(b).

Sandford was informed on multiple occasions by the Court that the Complaints were repetitive and incoherent, yet each new complaint tracked verbatim previous complaints.

*Gladstone v. Smith*, 729 So. 2d 1002, 1005 (Fla. 4th DCA 1999) [held] that "where no viable cause of action is asserted after

repeated opportunities to amend, dismissal is appropriate. This court agrees.

(SR 2949-50). Appellant then filed an “Amended Notice of Appeal” on November 12, 2023, attaching the October 4, 2023, order. (SR 2891-92).

## **SUMMARY OF THE ARGUMENT**

Appellant's argument that the trial court improperly applied the standard for a motion for summary judgment in dismissing the Fifth Amended Complaint is unsupported by the record and is without merit. The "Order Dismissing Plaintiff's Fifth Amended Complaint With Prejudice and Final Judgment" specifically cited Florida Rule of Civil Procedure 1.110(b) as the basis for dismissal and makes no mention of the summary judgment standard. As plainly stated in the order, the trial court dismissed the Fifth Amended Complaint with prejudice for multiple pleading defects that Appellant failed to correct after being given five opportunities to amend.

And the trial court was correct to do so. Even after five amended complaints, it was not clear who the parties to the lawsuit were. Appellant added defendants to the lawsuit in her first amended complaint, dropped defendants without seeking leave of court or filing a voluntary dismissal in her second amended complaint, and then added those defendants back in to the lawsuit, without proper service, in her third, fourth, and fifth amended complaints.

The "Fifth Amended Complaint" was also an improper "shotgun pleading" that re-alleged paragraphs 1-32 of the complaint before each count, making it virtually impossible to know which allegations of fact were

intended to support which claims for relief. It also asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants each claim is brought against. As the trial court found, the Fifth Amended Complaint failed to provide notice of what allegations were made against which specific defendants, and when those actions allegedly occurred. Consequently, the trial court's dismissal of the Fifth Amended Complaint with prejudice should be affirmed.

While these multiple uncorrected pleading defects supported the trial court's dismissal of the Fifth Amended Complaint with prejudice, dismissal was also required because the allegations in the complaint failed to state a cause of action because the Homeowners' Association owes no duty to Appellant individually as opposed to the membership as a whole, which is not a party to this lawsuit. And because "derivative" allegations of damages to the Association as a whole are incorporated into every count of the Fifth Amended Complaint "where material," and because the complaint never identifies which allegations are material to which counts, the trial court correctly dismissed the entire Fifth Amended Complaint.

The Fifth Amended Complaint is also littered with conclusory allegations without specific and sufficient facts to support the allegations.

Even after five opportunities to amend, Appellant produced an improper shotgun complaint that failed to clearly identify the parties suing and being sued, commingled separate and distinct claims against multiple defendants, made conclusory allegations, and failed to state a valid cause of action for the reasons discussed above. The trial court patiently gave Appellant multiple opportunities to correct these defects, to no avail. Enough is enough—the Order on Appeal dismissing the Fifth Amended Complaint should be affirmed.

Contrary to Appellant’s argument, the trial court was not required to individually address each of the 147 allegations contained in Appellant’s “repetitive and incoherent” Fifth Amended Complaint before dismissing that Complaint. Appellant cites no authority, nor is there any, that requires a trial court to make specific findings about each and every allegation in a complaint before granting a motion to dismiss. Affirmance is required if there is any basis in the record that supports the trial court’s order of dismissal, which there plainly is in this case. And Appellant has failed to preserve this issue for appellate review by filing a motion for rehearing raising that alleged error with the trial court.

Finally, Appellant lacked standing to seek disqualification of attorney Englert for alleged conflicts of interest with the other Appellees because it is

undisputed that Appellant had no attorney/client relationship with attorney Englert. Because attorney Englert never represented Appellant she received no confidential information that could be used to disadvantage Appellant in this case.

Moreover, Appellant's arguments about attorney Englert's alleged conflicts of interest with the other Appellees were not preserved for appellate review because Appellant's January 10, 2022, motion for disqualification did not raise any of the conflicts of interest alleged in the Initial Brief as a basis for disqualification. Rather, the motion alleged that attorney Englert improperly initiated direct contact with Appellant. And in any event, Appellant cites no authority, nor is there any, for her erroneous argument that a Homeowner's Association paying its attorney or representing individual board members in other litigation somehow creates an unwaivable conflict of interest. To the contrary, the Florida Rules of Professional Conduct specifically permit a lawyer to represent an organization and also represent any of its officers or directors. For all these reasons, this Court should affirm the trial court's orders challenged on appeal.

## **ARGUMENT OF ANSWER BRIEF**

### **ISSUE I. [RESTATED] THE TRIAL COURT PROPERLY APPLIED RULE OF CIVIL PROCEDURE 1.110(b) IN DISMISSING THE FIFTH AMENDED COMPLAINT.**

#### **STANDARD OF REVIEW**

The issue of whether the trial court applied the correct law in dismissing Appellant's Fifth Amended Complaint is reviewed *de novo*. *Nugent v. Michelis*, 312 So. 3d 954 (Fla. 4th DCA 2021). The trial court's determination that dismissal of the Fifth Amended Complaint should be with prejudice because no viable cause of action was asserted after multiple opportunities to amend is reviewed for abuse of discretion. *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992).

#### **ARGUMENT ON THE MERITS**

Appellant's argument that the trial court improperly applied the standard for a motion for summary judgment in dismissing the Fifth Amended Complaint (IB 19-21) is unsupported by the record and is without merit. Judge Thompson's October 4, 2023, "Order Dismissing Plaintiff's Fifth Amended Complaint With Prejudice and Final Judgment" specifically cited Florida Rule of Civil Procedure 1.110(b), which addresses the requirements for stating a cause of action, as the basis for dismissal. (SR 2950). The Order makes no mention of the summary judgment standard. The phrase

“summary judgment” does not appear anywhere in the Order. (SR 2949-50). Indeed, at the February 1, 2023, hearing on the Appellees’ Motion to Dismiss the Fourth Amended Complaint with Prejudice, Judge Thompson specifically told Appellant’s counsel that: “I will rule on what’s contained in the four corners of the document, anything extraneous to that is not to be considered by me, so you’ll need to look to the complaint and within the four corners of the complaint and recitations or citations to case law or statutes, but I cannot go outside the four corners of that complaint.” (R 2753).

And contrary to Appellant’s argument, Judge Thompson’s findings in the Order that “[m]ultiple courts have ruled that the Complaints do not comply with the Florida Rules of Civil Procedure,” that “the multiple counts which span several years and involve several Boards of Directors, does not clearly allege which board members acted improperly during a particular period of time,” and that “[n]or does the complaint specify who the board members were when an alleged unauthorized act occurred or what the act was as it relates specific board members. Thus, the Defendants are unable to properly respond or file affirmative defenses [to the] nebulous [complaint].” (SR 2949-50) (citing Fla. R. Civ. P. 1.110(b) (supporting dismissal of the complaint for failure to state a cause of action)); *see also Collado v. Baroukh*, 226 So. 3d 924, 927-28 (Fla. 4th DCA 2017) (stating that commingling various claims

against all defendants together may warrant dismissal of a complaint pursuant to Florida Rule of Civil Procedure 1.110(f)), and citing *Aspssoft, Inc. v. WebClay*, 983 So. 2d 761, 768 (Fla. 5th DCA 2008) (commingling separate and distinct claims against multiple defendants warrants dismissal of the complaint).

Here, the trial court properly applied *Collado* and *Aspssoft* and explicitly dismissed Plaintiff's Fifth Amended Complaint pursuant to Florida Rule of Civil Procedure 1.110(b). (SR 2949-50). And because Appellant "filed repetitive motions to amend and abused the privilege" the trial court was within its discretion to dismiss the Fifth Amended Complaint with prejudice. See *Collado, supra*, at 928; *SDSol Technologies, LLC v. Stardam, LLC*, 48 Fla. L. Weekly D2344 (Fla. 3d DCA) (December 23, 2023) (affirming trial court's dismissal of Fourth Amended Complaint with prejudice and noting that "as an action progresses, the privilege of amendment progressively decreases to the point that the trial judge does not abuse his discretion in dismissing with prejudice (quoting *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992)). As the trial court found:

Sanford was informed on multiple occasions by the Court that the Complaints were repetitive and incoherent, yet each new complaint tracked verbatim previous complaints. "[In] *Gladstone v. Smith*, 729 So. 2d 1002, 1005 (Fla. 4th DCA 1999), the court held that 'where no viable cause of action is asserted after

repeated opportunities to amend, dismissal is appropriate.” This court agrees.

(SR 2950).

The trial court correctly dismissed the Fifth Amended Complaint for failure to state a cause of action with prejudice, and did not apply the summary judgment standard, as Appellant erroneously claims. *See Collado, Aspsoft, and Kohn, supra*. Consequently, this Court should affirm the trial court’s “Order Dismissing Plaintiff’s Fifth Amended Complaint With Prejudice And Final Judgment.”

**ISSUE II. [RESTATED] THE TRIAL COURT PROPERLY DISMISSED THE FIFTH AMENDED COMPLAINT WITH PREJUDICE FOR MULTIPLE PLEADING DEFECTS THAT PLAINTIFF FAILED TO CORRECT AFTER BEING GIVEN FIVE OPPORTUNITIES TO AMEND.**

### **STANDARD OF REVIEW**

The issue of whether the trial court applied the correct law in dismissing Appellant's Fifth Amended Complaint is reviewed *de novo*. *Nugent v. Michelis*, 312 So. 3d 954 (Fla. 4th DCA 2021). The trial court's determination that dismissal of the Fifth Amended Complaint should be with prejudice because no viable cause of action was asserted after multiple opportunities to amend is reviewed for abuse of discretion. *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992).

### **ARGUMENT ON THE MERITS**

As addressed in Issue I, the trial court dismissed Appellant's Fifth Amended Complaint for failure to state a cause of action with prejudice because the complaint improperly commingled separate and distinct claims against multiple defendants, among other defects, after being given multiple opportunities to amend. And as discussed below, the trial court was correct to do so.

*A. Even after five amended complaints, it was not clear who the parties were to the lawsuit.*

As detailed in Appellees' multiple motions to dismiss Appellant's initial and amended complaints (R 162-89, 586-607, 631-54, 2088-2129, 2350-79, 2704-35), the trial court correctly dismissed all of Appellant's complaints, including the "Fifth Amended Complaint," which was dismissed with prejudice. As argued below, despite Appellant having multiple opportunities to amend, the Appellees had "no way of knowing who the actual parties" were in the case. (R 2554). Appellant added defendants to the lawsuit in her "First Amended Complaint" (Solick, Snyder, Englert and The Orlando Law Group, P.L.) (R 453). Appellant then dropped defendants Smith, McCauley, Pinna, Taub, Pearsall, John Doe 1, Bauer, Solick, Snyder and The Orlando Law Group, P.L., without leave of court or filing a voluntary dismissal, in her "Second Amended Complaint" (R 755-56). Then, inexplicably, Appellant added those defendants back to the lawsuit, without proper service, in her third "Amended Complaint" (improperly titled as "Second Amended Complaint" (R 1905-07), as well as in Appellant's fourth and fifth "Amended Complaints." (R 2551-53, 2587-28). And the confusion as to exactly who the parties are in the case extends to the Plaintiffs as well as the Defendants. The original and first amended complaint listed Jane Doe I and Joe Doe I as

Plaintiffs along with Appellant, but subsequent amendments only list Appellant as Plaintiff. (R 2708).

Appellant did not include defendants Smith, McCauley, Pinna, Taub, Pearsall, Bauer, Solick, Snyder and The Orlando Law Group, P.L. in her “Second Amended Complaint,” and did not seek leave of court or file a voluntary dismissal as to those defendants. (R 755-56). Consequently, that complaint “must be considered an imperfect dropping of [those defendants] as of that date and although no order formally dropping them was obtained, the action must be considered as being terminated as to them as of that act.” *Shannon v. McBride*, 105 So. 2d 16, 19 (Fla. 2d DCA 1958). Appellant could only rejoin those defendants to the lawsuit through leave of court or stipulation of the parties pursuant to Florida Rule of Civil Procedure 1.250(c), or by service of process. *See Federal Ins. Co. v. Fatolitis*, 478 So. 2d 106, 109 (Fla. 2d DCA 1985) (holding that “once a party has been dropped from a lawsuit that party may be rejoined only by service of process).

Because Appellant never provided service of process to Defendants Smith, McCauley, Pinna, Taub, Pearsall, Bauer, Solick, Snyder and The Orlando Law Group, P.L. after dropping them as parties (R 2096), the trial court correctly dismissed the entire Fifth Amended Complaint as to those defendants, regardless of the trial court’s other reasons for dismissal. *See*

*id.* And as Appellees argued below, “Defendants should not have to guess each and every time Plaintiff(s) decide to randomly and without any regard to procedural matters, file another amended complaint, as to who is and who is not a party to this action.” (R 2354). Appellant had five opportunities to amend her complaint to make clear “who is suing who” and failed to do so. Indeed, the confusion as to exactly who the parties are to this lawsuit has increased, not decreased, with each successive attempted amendment. Five opportunities are certainly sufficient to clearly identify the parties. The trial court’s dismissal of Appellant’s Fifth Amended Complaint with prejudice should be affirmed as to all defendants.

*B. The Fifth Amended Complaint is an improper “shotgun pleading” where each count adopts the allegations of all preceding counts making it virtually impossible to know which allegations of fact are intended to support which claims for relief.*

A complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint can be described as a “shotgun pleading” that is “calculated to confuse the ‘enemy,’ and the court, so that theories for relief not provided by law and which can prejudice an opponent's case . . . can be masked.” *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015); *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1283-

1284 (Fla. 1992) (noting that because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, Florida Courts will often look to the Federal Rules of Procedure for guidance in interpreting Florida's civil procedure rules). A shotgun pleading thus makes it "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. Dist. Bd. of Trs. of Cent. Florida Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996).

Appellant's Fifth Amended Complaint is a classic example of this type of shotgun pleading and was properly dismissed by the trial court. The Fifth Amended Complaint re-alleges paragraphs 1-32 of the complaint before each count, making it "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." See *id.*; (R 2586-2615).

*C. The Fifth Amended Complaint improperly commingles separate and distinct claims against multiple defendants.*

The Fifth Amended Complaint is also improper because it asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants each claim is brought against. *Weiland, supra*. As held in *Collado* and *Aspssoft, supra*, commingling separate and distinct claims against multiple defendants warrants dismissal of the complaint. Indeed, the trial court explicitly dismissed Appellant's Fifth Amended Complaint on this basis.

Judge Thompson found that “[m]ultiple courts have ruled that the Complaints do not comply with the Florida Rules of Civil Procedure,” that “the multiple counts which span several years and involve several Boards of Directors, does not clearly allege which board members acted improperly during a particular period of time,” and that “[n]or does the complaint specify who the board members were when an alleged unauthorized act occurred or what the act was as it relates specific board members. Thus, the Defendants are unable to properly respond or file affirmative defenses [to the] nebulous [complaint]. See Fla. R. Civ. P. 1.110(b)” (SR 2949-50).

Here, Count I alleges that the Homeowner’s Association breached a contract with Appellant. (R 2594). But Paragraphs 42 and 43 of Count I are unclear as to which Defendant or Defendants are actually being sued because those paragraphs are alleged against “The Homeowners’ Association, *through its directors....*” (R 2595). There is no way to tell from Count I which “directors” allegedly breached which contractual provisions and when they allegedly did so. See *Collado, supra*.

Count II alleges a breach of the implied covenant of good faith and fair dealing by the Association. (R 2598). But Paragraph 50 claims that the Association violated this purported “covenant” “in multiple ways, as stated in the above history which is incorporated by reference.” (R 2597). Again, this

is a classic shotgun complaint that makes it impossible to know what specific allegations are being made against the Association and when they allegedly occurred. *Collado, supra; Aspsoft, supra*. In addition, Paragraph 46 incorporates allegations 1 through 32 “as material.” (R 2596). The Appellees have no way of knowing what allegations Plaintiff deems “material” in order to determine what allegations are incorporated into Count II.

Moreover, the Fifth Amended Complaint attempts to lump all eight Director Defendants into a “Board” and then makes the same allegations against all Director Defendants as it makes against the “Board” itself since 2019, making it impossible to tell which Defendants were on the Board at what time, and which actions complained of occurred during any specific time period. Thus, for every reference in the Fifth Amended Complaint to “the board,” we have no idea which Defendants those claims are alleged against. The Fifth Amended Complaint makes all Director Defendants liable for all actions of the Board, regardless of whether that Director Defendant was even on the Board at that time those actions occurred.

Simply put, the Fifth Amended Complaint failed to provide notice of what allegations were made against which specific Defendants, and when those actions allegedly occurred. Each Defendant is alleged to have been a director/officer for a different time period over eight years and some

Defendants (Englert and The Orlando Law Group) are not even members of the Association, which itself is also a Defendant. We know that a Defendant could not have committed any of the acts alleged when that Defendant was not an officer and/or director and we know that not all eight Director Defendants served on the Board together continuously from January 01, 2019, to the present. (R 117-19). The trial court's dismissal of the Fifth Amended Complaint with prejudice should be affirmed. See *Collado, supra*; *Aspssoft, supra*.

*D. While Appellant's failure to correct the above pleading defects after multiple opportunities to amend supported the trial court's dismissal of the Fifth Amended Complaint with prejudice, dismissal was also required because the allegations in the complaint failed to state a cause of action.*

As noted above, commingling separate and distinct claims against multiple defendants warrants dismissal of the complaint. See *Collado, supra*; *Aspssoft, supra*. But the trial court also properly dismissed the Fifth Amended Complaint for failure to state a cause of action. Counts I and II fail to state a cause of action because the Association itself owes no duty to Appellant individually or as a single member, as opposed to the membership as a whole, which are not parties to this action. *Chambless v. Officers & Directors of Snapper Creek*, 743 So. 2d 129, 130 (Fla. 3d DCA 1999); review denied 767 So.2d 454 (Fla. 2000) (holding that a Homeowner's Association has a

general obligation to protect the property of all the members of the association, and not the property of one member in particular to the exclusion of the others). *Khodam v. Escondido Homeowner's Ass'n, Inc.*, 87 So. 3d 65 (Fla. 4th DCA 2012) and *Coconut Key Homeowner's Assn., Inc. v. Gonzalez*, 246 So. 3d 428 (Fla. 4th DCA 2019), cited by Appellant, are easily distinguishable because those cases addressed the issue of prevailing party costs, not the sufficiency of a complaint, which is at issue here. Indeed, Appellant concedes the derivative nature of the complaint in her brief: "The gravamen of the 5th Amended Complaint, though it details harms imposed on Plaintiff/Appellant Sandford, show all of these individual harms were also imposed upon the other one thousand plus homeowners by the Defendants." (IB 9).

Appellant thus lacks standing to recover alleged damages on behalf of the membership of the Association as a whole while suing in her individual capacity. *Taubenfeld v. Lasko*, 324 So. 3d 529, 539 (Fla. 4th DCA 2021) (stating that officers and directors of a corporation are liable for damages to the corporation which result from a breach of their trust, a violation of authority or neglect of duty, not to the individual shareholder). But the Fifth Amended Complaint includes numerous allegations of damages to the Association as a whole. Paragraph 19(i) alleges vexatious litigation against

Appellant *and others*. (R 2591). Paragraphs 20-24 allege that expenditures for a dock and dog park were “concealed *from the homeowners*.” (R 2591-92). Paragraph 23 alleges that funds should “rightfully have been returned to the homeowners.” (R 2592). Paragraph 25 states that: “These monies belonged to the homeowners...” (R 2592).

Because these “derivative” allegations are incorporated into every count of the Fifth Amended Complaint “where material,” and because the complaint never identifies which factual allegations are material to which counts, the trial court correctly dismissed the entire Fifth Amended Complaint. *Taubenfield, supra*. And because Appellant was unable to draft an operative complaint after five opportunities over two years, the trial court was well within its discretion to dismiss the Fifth Amended Complaint with prejudice. *See Collado, supra; SDSol Technologies, LLC; supra*.

The Fifth Amended Complaint also fails to state a cause of action because it is littered with conclusory allegations without specific and sufficient facts to support the allegations. Appellant was required to set forth the supporting facts in the Complaint so as to reasonably inform the Appellees what Appellant proposed to prove, so the Appellees would have a fair opportunity to meet it with affirmative defenses and prepare their evidence. *See Fla. R. Civ. P. 1.110(b); Zito v. Washington Fed. Sav. and*

*Loan Ass'n of Miami Beach*, 318 So. 2d 175, 176 (Fla. 3d DCA 1975) (pleading did not set forth claim with requisite degree of certainty); *Cady v. Chevy Chase Sav. and Loan, Inc.*, 528 So. 2d 126, 138 (Fla.4th DCA 1988) (pleading failed to allege sufficient facts for requisite certainty); *Walker v. Walker*, 254 So. 2d 832, 834 (Fla. 1st DCA 1971) (claimant did not plead sufficient facts to give responding party requisite certainty). Certainty is required when pleading, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *Id.* Failure to provide any specific factual allegations subjects the pleading to dismissal. *Id.* Because the Fifth Amended Complaint did not provide the required specificity and certainty, dismissal was warranted. *See id.*

Count 1 vaguely alleges that “The Homeowners’ Association through its directors breached its agreement with Sandford, mismanaging budgeting and daily operations and maintenance of the Association, directly harming, defaming and humiliating Plaintiff Sandford verbally and through its correspondence,” but provided no specific facts stating what was allegedly done, when it was done, or who allegedly did it. (R 2595). How and when was budgeting and daily operations mismanaged? How and when was Appellant defamed? Who did it and when? None of the conclusory

allegations in Count I contain sufficient and specific facts to support the allegations. (R 2594-96).

Count II merely makes the conclusory allegation that “Defendant Association violated the implied covenant of good faith and fair dealing in multiple ways, as stated in the above history which is incorporated by reference.” (R 2596-97). In what ways? Who is alleged to have done what, and when did they allegedly do it? Most significantly, Count II fails to state a cause of action because “[t]here can be no cause of action for a breach of the implied covenant ‘absent an allegation that an express term of the contract has been breached.’” *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 792 (Fla. 2d DCA 2005). Here, because Count II does not allege breach of an express term of any contract (R 2598) there can be no violation of the implied covenant of good faith and fair dealing. See *id.*

Counts 3 and 4 make similarly conclusory allegations that Defendant Gordon “approved many acts and omissions, harsh penalties, and budgetary malfeasance” (R 2598) and “engaged in self-dealing and unjust enrichment by reimbursing himself and other directors selectively or authorizing reimbursement for his personal litigation and pet projects, by the Association,

in violation of the governing documents,” but provide no specifics other than to refer to Paragraphs 1-32 of the complaint. (R 2599).

Count V alleges that Defendant Gordon made defamatory statements, but does not indicate precisely what was said, when it was said, to whom it was said, and how Appellant was allegedly damaged. (R 2600-01). This allows Count V to “mask” allegations not permitted by law, specifically allegations that occurred outside the statute of limitations. Appellant first alleged defamation on November 7, 2022, in the Fourth Amended Complaint (R 2225-56), so the statute of limitations would bar any allegations of defamation before November 7, 2020. *See Ashraf v. Adventist Health Sys./Sunbelt, Inc.*, 200 So. 3d 173 (Fla. 5th DCA 2016) (recognizing that two-year statute of limitations for actions for libel and slander begins to run at the time of publication, not when the plaintiff discovers the alleged defamatory material); *Margerum v. Ross Builders, Inc.*, 427 So. 2d 261 (Fla. 5th DCA 1983) (holding that only when an affirmative defense appears on the face of a prior pleading may that defense be argued as a ground for a motion to dismiss). Because the Fifth Amended Complaint incorporates Paragraphs 1-32 into every Count (R 2596-2615), and because allegations 16-19 reference alleged defamatory statements that occurred in 2019 (R 2589-91), those allegations are barred by the statute of limitations. *See Ashraf, supra*.

Moreover, Paragraphs 67-77 in Count 5, in addition to being conclusory in nature, do not allege Defendant Gordon made any statements at all. For example, Paragraph 69 alleges “Defendant knew at the time that use of community property was not prohibited to Plaintiff and to say otherwise was false.” (R 2600). Paragraph 69 does not identify when or to whom any such statement was made. (R 2600). This same defect occurs throughout the allegations in Paragraphs 69-72. (R 2600). And Appellant has pled no facts whatsoever in support of her actual damages, or how or why she incurred those damages, other than a conclusory allegation of “damages in excess of \$50,000.00 dollars.” (R 2601).

In addition, all the Counts in the fifth Amended Complaint for breach of fiduciary duty (against all defendants) and aiding and abetting the breach of fiduciary duty (against Defendants Englert and The Orlando Law Group) fail to state a cause of action because none of the Appellees owe an individual fiduciary duty to Appellant. It is well settled that a cause of action for aiding and abetting the breach of a fiduciary duty requires a plaintiff to establish: 1) a fiduciary duty on the part of a primary wrongdoer; 2) a breach of that fiduciary duty; 3) knowledge of the breach by the alleged aider and abettor; and 4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." *Logan v. Morgan, Lewis & Bockius LLP*, 350 So. 3d 404

(Fla. 2d DCA 2022). Because none of the Appellees owed a fiduciary duty to Appellant individually, as opposed to the membership of the Association as a whole, see *Chambliss, supra*, the trial court correctly dismissed the Fifth Amended Complaint, including the Counts for aiding and abetting against Defendants Englert and The Orlando Law Group. See *id.*

*Berg v. Wagner*, 935 So. 2d 100 (Fla. 4th DCA 2006), relied on by Appellant to establish a cause of action against the individual directors of the Association for breach of fiduciary duty, is easily distinguishable. First, *Berg* addressed a claim of statutory immunity by the defendant director, a claim not made in this case. *Id.*, at 101-02; (R 2721-25). Most significantly, there is no indication that Berg claimed derivative damages sustained by the Association as a whole, as Appellant did here in the Counts for alleged breaches of fiduciary duty by the individual directors. See *Chambliss, supra*.

Moreover, the aiding and abetting Counts fail to identify which directors Englert advised and aided, what specific acts were performed, or when those alleged incidents occurred. (R 2610-12). Paragraph 141 alleges Englert advised and aided the directors in violating the governing documents but fails to identify a single director that was advised to violate a single provision of any of the governing documents of the Association, what that provision was, and how or why this unknown director violated that provision. (R 2613).

Specifically, the Fifth Amended Complaint does not identify which statute or bylaw provision barred the Association from preventing a member from “being nominated to the Board” (R 2611).

Paragraph 131 alleges that Englert aided and abetted a breach of fiduciary duty by sending Appellant letters “threatening criminal prosecution,” but those alleged letters were not attached to the Fifth Amended Complaint in violation of Florida Rule of Civil Procedure 1.130. And sending a letter threatening criminal charges is not impermissible under the rules of the Florida Bar unless the charges are groundless, rule 4-3.1, the primary purpose for doing so is to harass or embarrass, rule 4-4.4, or the attorney deliberately misleads an adverse party into believing that attorney can control the filing or dropping of criminal charges, rule 4-8.4(c) – none of which are specifically alleged in the Fifth Amended complaint. (R 2586-2614).

Even if all of the above was not sufficient to support the trial court’s dismissal of the breach of fiduciary duty and aiding and abetting Counts (it plainly is), these Counts still fail to state a cause of action because all of the acts complained of were business judgment decisions made by the Board at the time those decisions were made. And even if the allegations against each Director Defendant are accepted as true, those claims fail to state a cause of action because none of those Director Defendants had the power or

authority to act alone, separate and apart from the Board for the actions complained of in the Fifth Amended Complaint. (R 116). As all of the acts complained of are actions taken by the Board, as opposed to any individual Director Defendant, no individual liability can be attached to those individual Director Defendants, separate and apart from the Board. (R 116) (Association Bylaw IV, which provides that “the affairs of the Association shall be managed by a Board of Directors).

Finally, Counts 4 and 7 for Unjust Enrichment as to Gordon and Dick respectively were properly dismissed for failure to state a cause of action. Both Counts allege that Gordon and Dick were unjustly enriched by the *Association* (R 2599, 2602-03). As discussed above, because this is not a derivative action, Appellant has no standing to claim damages incurred by the Association. See *Chambliss, supra*.

In sum, the trial Court’s dismissal of Appellant’s Fifth Amended Complaint is supported on multiple grounds. Even after five opportunities to amend, Appellant produced an improper shotgun complaint that failed to clearly identify the parties suing and being sued, commingled separate and distinct claims against multiple defendants, made conclusory allegations, and failed to state a valid cause of action for the reasons discussed above. The trial court patiently gave Appellant multiple opportunities to correct these

defects, to no avail. Enough is enough—the Order on Appeal dismissing the Fifth Amended Complaint should be affirmed.

**ISSUE III. [RESTATED] APPELLANT’S ARGUMENT THAT THE TRIAL COURT ERRED BY NOT MAKING SPECIFIC FINDINGS ADDRESSING THE LEGAL SUFFICIENCY OF EACH INDIVIDUAL COUNT OF THE FIFTH AMENDED COMPLAINT LACKS MERIT AND WAS NOT PRESERVED FOR APPELLATE REVIEW.**

**STANDARD OF REVIEW**

The issue of whether the trial court applied the correct law in dismissing Appellant’s Fifth Amended Complaint is reviewed *de novo*. *Nugent v. Michelis*, 312 So. 3d 954 (Fla. 4th DCA 2021).

**ARGUMENT ON THE MERITS**

Appellant’s argument (IB 33-35) that the trial court was required to individually address each of the 147 allegations contained in Appellant’s “repetitive and incoherent” Fifth Amended Complaint before dismissing that Complaint is without merit and should be rejected. As stated by Judge Thompson at the hearing on the Appellees’ Motion to Dismiss the Fourth Amended Complaint with Prejudice, that complaint was “pretty much the same pleading as it was previously with minimal changes.” (R 2673-74). Judge Thompson explained that he dismissed the Fourth Amended Complaint because of multiple pleading defects, addressed in detail in Issues I and II above, that Appellant failed to correct after being given

multiple opportunities to amend, and which were not corrected in the Fifth

Amended Complaint:

And if you look at the reasons why it was dismissed and look at the complaint and the lack of change from the first or third complaint to this complaint, that is some of the paragraphs are almost verbatim like they were before. And I look at the Motion for Protective Order that was entered August 28th, 29th of 2022, and it goes into details about the various statutes that were not complied with, citing the case law. And then in Paragraph 7, it reads, now again, for a fourth time, plaintiff had a third amended 2 complaint, only this time plaintiff Jane Doe 1 and Jane Doe -- Joe Doe 1 are still missing and no notices of voluntary dismissal or stipulation have been filed as to those claims brought by these plaintiffs. And you go through it and I look to see if those things were corrected and I didn't see any corrections or explanations. So the complaint has not -- it's -- it has not changed to the degree that the law requires. When you mentioned that there is no violation of statute of limitations, well there is if you go back multiple years past the time you have to bring the lawsuit. So in your own pleadings, you note going back to -- let me pull up the complaint again. Going back to 2000 and -- hold one second please. In your account, it noted -- well, going back to your -- the dates in there, the statute of limitation obviously has expired because it's over 10 years. So the complaint as of today has not changed much from the complaint that was dismissed previously by court order. And I understand you have multiple times to make a change, but it strikes me that you have not made the corrections that the previous motion to dismiss addressed and that the judge in an order granting the motion to dismiss. So it's pretty much the same pleading as it was previously with minimal changes, so I'm going to dismiss it.

(R 2671-23).

As the trial court found in its written order, [m]ultiple courts have ruled that the Complaints do not comply with the Florida Rules of Civil Procedure,”

that “the multiple counts which span several years and involve several Boards of Directors, does not clearly allege which board members acted improperly during a particular period of time,” and that “[n]or does the complaint specify who the board members were when an alleged unauthorized act occurred or what the act was as it relates specific board members. Thus, the Defendants are unable to properly respond or file affirmative defenses [to the] nebulous [complaint]. See Fla. R. Civ. P. 1.110(b). (SR 2949-50).

Thus, while none of the 14 Counts in the Fifth Amended Complaint state a valid cause of action (see Issue II (*D*), above), it would not matter if they did because dismissal was appropriate in any event based on multiple uncorrected pleading defects in the Fifth Amended Complaint, including confusion as to the identity of the parties to the lawsuit, the “shotgun” nature of the Complaint, the commingling of separate and distinct claims against multiple defendants, the vague and conclusory nature of the allegations, and Appellant’s lack of standing to seek damages incurred by the membership of the Association as a whole. Caselaw cited by Appellant that an amended pleading supersedes earlier pleadings has no bearing on these issues and therefore has no bearing on the correctness of the trial court’s order dismissing the Fifth Amended Complaint with prejudice.

Appellant cites no authority, nor is there any, that requires a trial court to make specific findings about each and every allegation in a complaint before granting a motion to dismiss. Affirmance is required if there is any basis in the record that supports the trial court's order of dismissal. But if there was such a requirement, Appellant has failed to preserve that issue for appellate review by filing a motion for rehearing raising that alleged error with the trial court. Florida Rule of Civil Procedure 1.530 now requires an Appellant to file a motion for rehearing to preserve for appeal a claim that the trial court failed to make necessary findings in a final judgment: "To preserve for appeal a challenge to the failure of the trial court to make required findings of fact in the final judgment, a party must raise that issue in a motion for rehearing under this rule." Here, Appellant never filed a motion for rehearing directed to the trial court's October 4, 2023, "Order Dismissing Plaintiff's Fifth Amended Complaint With Prejudice." Consequently, this Court should reject Appellant's argument both because it lacks merit and because it was not preserved for appellate review. *See id.*

**ISSUE IV. [RESTATED] APPELLANT LACKED STANDING TO SEEK DISQUALIFICATION OF ATTORNEY ENGLERT FOR ALLEGED CONFLICTS OF INTEREST BECAUSE APPELLANT HAD NO ATTORNEY-CLIENT RELATIONSHIP WITH ATTORNEY ENGLERT. ALTERNATIVELY, APPELLANT’S ARGUMENTS REGARDING ATTORNEY ENGLERT’S ALLEGED CONFLICTS OF INTEREST WERE NOT PRESERVED FOR APPELLATE REVIEW AND ARE WITHOUT MERIT IN ANY EVENT.**

**STANDARD OF REVIEW**

“The standard of review for orders entered on motions to disqualify counsel is that of an abuse of discretion.” *Kaplan v. Divosta Homes, L.P.*, 20 So. 3d 459, 461 (Fla. 2d DCA 2009) (citing *Applied Digit. Sols., Inc. v. Vasa*, 941 So. 2d 404, 408 (Fla. 4th DCA 2006)); *see also Stopa v. Cannon*, 330 So. 3d 1033, 1035 (Fla. 2d DCA 2021) (citing *Moriber v. Dreiling*, 95 So. 3d 449, 453 (Fla. 3d DCA 2012) (“On motions to disqualify, this standard is especially difficult to meet because the disqualification of counsel is left to the sound discretion of the trial court, as long as such discretion is exercised within the confines of the applicable law and the trial court's express or implied findings are supported by competent substantial evidence.” (citing *Applied Digit. Sols., Inc. v. Vasa*, 941 So. 2d 404, 408 (Fla. 4th DCA 2006))). This is so because “[d]isqualification of a party's counsel is an extraordinary remedy and should be resorted to sparingly.” *Vick v. Bailey*,

777 So. 2d 1005, 1007 (Fla. 2d DCA 2000) (citing *Carnival Corp. v. Romero*, 710 So. 2d 690 (Fla. 5th DCA 1998)).

### **ARGUMENT ON THE MERITS**

Contrary to Appellant's argument (IB 36-43), Appellant lacked standing to seek disqualification of attorney Englert for alleged conflicts of interest with the other Appellees because it is undisputed that Appellant had no attorney/client relationship with attorney Englert. See *Stopa, supra*; *THI Holdings, LLC v. Shattuck*, 93 So. 3d 419, 424 (Fla. 2d DCA 2012) (“[A] party . . . does not have standing to seek disqualification where . . . there is no privity of contract between the attorney and the party claiming a conflict of interest.” (quoting *Cont'l Cas. Co. v. Przewoznik*, 55 So. 3d 690, 691 (Fla. 3d DCA 2011)); see also *Anderson Trucking Serv., Inc. v. Gibson*, 884 So. 2d 1046, 1050-51 (Fla. 5th DCA 2004) (concluding that a party did not have standing to seek to disqualify opposing counsel who had never previously represented that party).

In *Stopa*, the alleged conflict was between the attorney for Mr. Cannon and Mr. Cannon. *Stopa, supra*, at 1036. In finding that Mr. Stopa lacked standing to assert that alleged conflict because he lacked a present or past attorney-client relationship with Mr. Cannon's attorney, the Court stated: “Mr. Stopa has no dog in that fight. Indeed, if Mr. Cannon wants Attorney

McGrath's continued legal services despite a purported conflict, Mr. Stopa has not explained how he, Mr. Stopa, is harmed.” *Id.*

Similarly, Appellant here “has no dog” in any alleged conflict between attorney Englert and the other Appellees in this case. *See id.* Appellant raises alleged conflicts of interest between attorney Englert and the other Appellees (IB 36), claiming that attorney Englert benefits financially from representing the Association as well as the individual Appellees, that she represents Appellee Gordon in personal matters to the detriment of the other Appellees, and that she represents herself and her law firm while receiving funds from the Association. (IB 36-37). The Appellees would first note that Appellant provides no citations to the record on appeal to support these allegations, particularly the allegation that attorney Englert represented Appellee Gordon “in his personal litigations and tiffs against homeowners for at least eight years.” (IB 36). And just like in *Stopa*, Appellant has not alleged, let alone explained, how she is harmed by these alleged conflicts. *See id.*

And while courts have recognized limited exceptions to the privity requirement to seek disqualification of counsel based on alleged conflicts of interest, none of those exceptions applies here. *See State Farm Mut. Auto Ins. Co. v. K.A.W.*, 575 So. 2d 630, 632-33 (Fla. 1991) (allowing disqualification challenge by insurance company to attorney for insured

where insured was plaintiff's father and "was in a position adverse to his daughter in theory only," and therefore attorney was in a position to use confidential information gained during prior representation of insured); see also *Pagidipati v. Vyas*, 353 So. 3d 1204, 1211-12 (Fla. 2d DCA 2022).

Here, attorney Englert never represented Appellant and therefore received no confidential information that could be used to disadvantage Appellant in this case. Rather, this case is controlled by *Stopa, THI Holdings*, and *Anderson Trucking Service, Inc. v. Gibson*, 884 So. 2d 1046, 1050-51 (Fla. 5th DCA 2004), which is directly on point to the situation here. In *Anderson Trucking*, the trial court granted Gibson's motion to disqualify attorney Levine, who initially represented all three defendants in the case, but eventually withdrew from representing defendant Minchew. *Id.* 1048. The Fifth District granted Anderson Trucking's petition for writ of certiorari, holding that the trial court departed from the essential requirements of the law in disqualifying Levine. *Id.* In granting certiorari, the Court distinguished *K.A.W.*, finding that:

Unlike the situation in *K.A.W.*, because the attorney for ICE and Anderson never represented Gibson, that attorney did not gain an informational advantage from confidences gained from a former representation of Gibson that can be used against Gibson in the attorney's current representation of ICE and Anderson. Hence, in the instant case, it is not the alleged conflict that calls into question the fair administration of justice; rather, it is the disqualification of ICE and Anderson's chosen counsel. The

Comment to Rule Regulating The Florida Bar 4–1.7 recognizes that certain ethical rules relating to conflict of interest may be misused:

Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Just as in *Anderson Trucking*, attorney Englert never represented Appellant and therefore did not gain an informational advantage that could be used against Appellant in this case. Consequently, just like in *Anderson Trucking*, it was not the alleged conflict that calls into question the fair administration of justice—it was Appellant’s attempt to disqualify attorney Englert that does so. See *id.* As cautioned by the Court, Appellant’s motion to disqualify attorney Englert should be viewed with caution as such motions can be misused as a technique of harassment. See *id.* Indeed, Appellant’s January 10, 2022, “Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Depositing Plaintiff Lynn Sanford Outside the Presence of Counsel” is Appellant’s *third* motion to disqualify attorney Englert filed by Appellant in this case, suggesting harassment as a possible motive by Appellant. (R 248-254). Appellant plainly lacks standing to seek

attorney Englert's disqualification, and the trial court's order denying Appellant's motion should be affirmed.

Alternatively, Appellant's arguments about attorney Englert's alleged conflicts of interest with the other Appellees were not preserved for appellate review and lack merit in any event. As an initial matter, Argument IV of Appellant's Initial Brief does not identify what ruling or order she is challenging. Page ii of the Initial Brief addressing "Jurisdiction" identifies the May 13, 2022, "Order on Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Depositing Plaintiff Lynn Sanford Outside the Presence of Counsel" so the Appellees can only assume that the May 13, 2022, order is the ruling challenged in Issue IV. (IB ii).

This is important because Appellant's January 10, 2022, "Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Depositing Plaintiff Lynn Sanford Outside the Presence of Counsel" does not raise any of the conflicts of interest alleged in the Initial Brief as a basis for disqualification. (R 1031-1033). Rather, Appellant's motion alleged that attorney Englert improperly initiated direct contact with Appellant. (R 1030). Consequently, because Appellant's conflict of interest arguments on appeal

were not properly presented to the trial court, those arguments are not preserved for appellate review. See *Eaton v. Eaton*, 293 So. 3d 567, 568 (Fla. 1st DCA 2020) (“The purpose of the preservation requirement is to ensure that the trial court has an opportunity to correct an error at the earliest opportunity, when the court is still in a position to recall the basis of its ruling.”).

In fact, at the April 7, 2022, hearing on Appellant’s motion, the trial court sustained attorney Englert’s relevance objection to a question posed by attorney Burtoff that he claimed was designed to “establish a conflict of interest.” (SR 2928-29). And while attorney Burtoff briefly mentioned an alleged conflict of interest with attorney Englert and defendant Gordon at the end of his closing argument, no such argument was made in his January 10, 2022, motion, and therefore was not addressed by attorney Englert in her response. (R 1436-49). While Appellant’s brief mention of an alleged conflict at the hearing was plainly insufficient to preserve the argument for appellate review, it was also untimely as Appellant clearly was aware of any alleged conflict since the beginning of the litigation and did not raise the issue in their January 10, 2022, motion. See *Transmark, U.S.A., Inc. v. State, Dep’t of Ins.*, 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994) (holding that motion to disqualify counsel must be made with reasonable promptness).

And regardless of Appellant's lack of standing and failure to preserve her conflict of interest arguments, those arguments lack merit and should be rejected. Appellant cites no authority, nor is there any, for her erroneous argument that a homeowner's association paying its attorney somehow creates an unwaivable conflict of interest. (IB 36-37). Appellant cites no authority or record evidence to support her argument that attorney Englert's representation of the Association and/or individual board members in suing Sanford for defamation somehow creates an unwaivable conflict of interest. (IB 39-41). To the contrary, Florida Rule of Professional Conduct 4-1.13(e) specifically permits a lawyer representing an organization to also represent any of its directors, officers, employees, members, shareholders, and other constituents. For all these reasons, this Court should affirm the trial court's "Order on Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Deposing Plaintiff Lynn Sanford Outside the Presence of Counsel."

## **CONCLUSION**

This Court should affirm the Order Dismissing Plaintiff's Fifth Amended Complaint With Prejudice and Final Judgment and the Order on Motion for Immediate Disqualification and Sanctions Against Attorney Englert and Defendant Homeowners Association For Egregious Misconduct, Deposing Plaintiff Lynn Sanford Outside the Presence of Counsel.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I CERTIFY that the foregoing was e-filed pursuant to Florida Rule of Judicial Administration 2.525 and that the foregoing was served by email in compliance with Florida Rule of Judicial Administration 2.516(b)(1)(A), on this 21st day of May 2024, to:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the applicable font and word count limit requirements of Florida Rule of General Practice & Judicial Administration 2.520 and Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2).

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