

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

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**CASE NO. 6D24-0858**

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**ASS MONKEY, LLC,  
Appellant,**

**v.**

**ORLANDO APOPKA AIRPORT ASSOCIATION, INC.,  
Appellee.**

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**ON APPEAL FROM FINAL JUDGMENT OF THE CIRCUIT COURT OF  
THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY  
LOWER TRIBUNAL CASE NO. 2019-CA-3579-O**

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**ANSWER BRIEF**

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

### **I. OVERVIEW**

Appellant Ass Monkey LLC (“Ass Monkey”) built a structure in an airport condominium controlled by Appellee Orlando Apopka Airport Association, Inc. (the “Association”) without the Association’s permission. Some believe it is better to ask for forgiveness than permission. In this case and through five years of litigation, Ass Monkey has received neither. In this appeal, Ass Monkey asks that this Court ratify Ass Monkey’s behavior. But there are not many condos where an owner can build something without association approval. This case is no different.

### **II. STATEMENT OF FACTS**

Ass Monkey’s Statement of Facts is long but leaves out many relevant facts that go to the heart of the matter. Ass Monkey’s appeal lives and dies based on the Association’s authority under a declaration of condominium. The Declaration of Condominium of Orlando - Apopka Airport is dated May 7, 2004 and was recorded in Official Records Book 7431, Page 1846, Public Records of Orange County, Florida (also, the “Declaration,” as amended) on May 13, 2004. R. 42-98.<sup>1</sup> In 2004, James

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<sup>1</sup> As in the Initial Brief, the record on appeal will be cited as “R.” followed by the relevant page number(s).

Thompson, developed the airport condominium plan, along with associated lots for hangars. R. 1221. He created a 1-page bullet list of architectural standards given to new owners. R. 1222, 1396. After multiple amendments to the Declaration, Thompson handed control over the development to the Association. R. 99-100, 1385-93, and 1222. After the Association took control, it created an architectural committee to continue the pattern and scheme of development at the airport. R. 1222. On January 5, 2010, the Association's Board of Directors added an action item for it to develop rules and ARB guidelines for standards at the airport. R. 1443-45. Those Architectural Guidelines were published on August 29, 2012, revised in September 2015, and then again in January 2016, as follows:

No.	Date	Page No.	Description of Revision
1	1/2/2016	7	Added "Document Revision Sheet History" to track ARB Guideline changes
2	1/2/2016	All	Typo – where applicable, change page heading from "Architectural Review Form Procedural Guidelines – Cont" to read, "Architectural Guidelines – Cont" " Revised
3	1/2/2016	1	Verbiage Change – "Outside Appearance": "Architecturally, the Orlando Apopka Airport Association's governing documents and intent is focused on a community of hangars that are generally uniform in their overall appearance, dimensionally consistent with respect to each varying site plan, height, and scale."  Changed to read: "...generally uniform in their overall exterior appearance, color, and dimensionally consistent with respect to each varying site plan, height and scale."
4	1/2/2016	5	Inserted new paragraphs to Page 5, "Painting" & "Utilities, Access & Safety Systems" Adjusted balance of pages formatting where necessary to accommodate change.

R. 110, 1399-1421.

Ass Monkey purchased real property subject to the Declaration, in October 2016. R. 1262. It is described as Hangar 28 and already had improvements constructed on it at the time. *Id.* A few months later, Ass Monkey purchased Hangar 27, which was vacant land. *Id.* At the time of

Hangar 27's purchase, it was Ass Monkey's intention to merge the lots for one large hangar. R. 1541. In July 2017, Ass Monkey hired an architect to design and facilitate construction on the Hangar 27 addition of approximately 2,800 square feet, appended to an existing aircraft hangar at Hangar 28. R. 202-03.

The owner and managing member of Ass Monkey is Laurence Albrecht. R. 142, 1550. It was Albrecht's understanding that the architect hired was aware of the Association's ARB Guidelines. R. 1543. After receiving a building permit from the City of Apopka, Ass Monkey began construction on Hangar 27. R. 117-20, 178. In May 2018, the Association's attorney sent a letter to Ass Monkey informing him that the construction violated the terms of the Declaration and demanded that construction cease until the alterations were reviewed and approved. R. 121-22. A few days later, Ass Monkey submitted an Architectural Review Form for an addition to Hangar 28. R. 101. Specifically, Ass Monkey claimed that it would be a "50x50 addition to Hangar #28, same color, same eve height, will have faux finished stone on front to match. Addition meets all requirements on the list of architectural guidelines." R. 101. The Association's Board of Directors met to review and discuss the proposed construction, including the failure of Ass Monkey to submit a complete

application to the Architectural Review Board showing proposed construction plans, proof of insurance, and approval from City of Apopka, among other things. R. 129. At that meeting, Ass Monkey verbally committed to submitting a complete application to the Board within 30 days. *Id.* No application was ever submitted. *Id.*

On June 14, 2018, the Association through Joel Kagan sent a letter to the City of Apopka regarding the Association's review of some construction issues, including Ass Monkey's failure to follow setbacks required by the Association's ARB guidelines. Two days later, the Association through Kagan sent a letter to Ass Monkey documenting Ass Monkey's noncompliance on items including setbacks, roofline, and no hangar door large enough for an aviation vehicle. R. 1104-07. The letter informs Ass Monkey that design plans must be resubmitted. *Id.*

A month later, the Board preliminary review was conducted regarding the ARB issues. R. 131, 1473. The Board decided to issue a letter to Ass Monkey detailing items required for review. *Id.* On August 1, 2018, the Association sent a letter to Ass Monkey acknowledging Ass Monkey's requests for conceptual approval of a revised design, but the request still did not meet ARB requirements. R. 123-27. For the ARB to reconsider Ass Monkey's application, the ARB required the following:

- Certified site survey depicting the footprint location and all set backs of the existing and proposed hangars on Lot 27/28.
- Illustration(s), drawings, reference information, location, and design intent of the manner in which parking and/or driving through West set back will be rendered inaccessible.
- Full set of permitted drawings to include structural drawings of the manner in which the two hangar roofs will be joined.

*Id.* A few days later, the ARB changed the name and address where approval requests could be submitted. R. 1429.

On September 4, 2018, the Association's Board unanimously approved guidelines for owners, including Ass Monkey, to provide a copy of contractors liability insurance and to name the Association as an additional insured with a minimum of \$1 million in coverage. R. 1488-90. At that time, the Board also noticed it had not yet received a response from Ass Monkey to its prior August letter. *Id.* A few days after that meeting, the ARB Guidelines were updated to reduce the required builder's risk insurance from a minimum of \$500,000 to \$250,000. R. 1422-34. Other sections were added regarding the Association being an additional insured. *Id.*

On October 2, 2018, two things happened. First, the Association sent a letter to Ass Monkey informing it that the Association has still not received a revised package from Ass Monkey, but also that there are new insurance requirements. Second, the Association's Board met and discussed ARB Guidelines.

On November 6, 2018, the Association sent a letter to Apopka that confirmed Ass Monkey had not received ARB approval and there are problems with the plans submitted by Ass Monkey, including setbacks, structural design, engineering, and storm drainage. R. 1506.

Almost a year later, the Association again sent a letter through its counsel to Ass Monkey demanding that construction on the hangars cease because it has not received approval from the ARB. R. 129-30. Later, in March 2019, the Association noted many of Ass Monkey's failures in a letter to the City of Apopka, including "but not limited" to an inaccurate permit application to the City, zero lot lines with no setbacks that would not be approved by the ARB, roof pitch and eave height discrepancies, an inability to determine satisfactory fire suppression, ADA compliance, structural integrity, oil, grease, and pollution containment compliance, storm drainage adequacy, electrical and lighting adequacy, potential perjury on the owner-builder affidavit, and a failure to provide necessary insurance. R. 1516-18, 1520-21.

### **III. PROCEDURAL BACKGROUND**

Shortly thereafter, on March 21, 2019, the Association filed its initial Complaint in this case. R. 32-132. On April 3, 2019, attorney William Saliba appeared on behalf of Ass Monkey. R. 133. By September 2019, Ass

Monkey filed its Answer and Affirmative Defenses. R. 171-89. Those defenses included waiver and acquiescence (R. 183-85), strictly construing the Declaration (R. 182-83), the Declaration is vague (R. 186), injunctive relief is extraordinary (R. 186-87), unclean hands (R. 187), laches (R. 187), selective enforcement (R. 188), and equitable estoppel (R. 189). The Association filed a Reply. R. 190-91.

On January 31, 2020, the Association filed its Initial Expert Disclosure, disclosing Asima Azam, Esq., for expert testimony on, *inter alia*, interpreting the Declaration. R. 224-26. Wean & Malchow, P.A. entered an appearance as co-counsel for Ass Monkey in February 2020. R. 227-28. On October 26, 2020, the Association sought leave to file an Amended Complaint. In its opposition, Ass Monkey claimed that the Amended Complaint is prejudicial because of undue delay. R. 493-97. The lower court granted leave to file the Amended Complaint, which became the active pleading on November 19, 2020. R. 527-30. Ass Monkey answered the Amended Complaint with affirmative defenses including all the ones from before, R. 171-89, but also that the Association lacked authority to appoint an ARB or to adopt ARB Guidelines (R. 599-605), the Declaration does not permit the Board to disapprove Hangar 27 and Hangar 28 improvements (R. 605-11), construction of the new structure using the

exterior wall does not change the exterior wall (R. 611), and that the ARB Guidelines were not validly approved by owners (R. 612). Again, the Association timely filed a Reply, containing several avoidances of Ass Monkey's Affirmative Defenses. R. 616-631.

Around March 2021, Christian Smed, Esq., files a limited appearance for Ass Monkey as co-counsel. R. 632-33. A few months later, Wean & Malchow, P.A. withdraws as co-counsel for Ass Monkey due to irreconcilable differences in June 2021. R. 677. The same month, Ass Monkey through William Saliba files a motion for leave to file an Amended Answer, Affirmative Defenses, Counterclaim, and Third-Party Complaints. R. 678-98. The Affirmative Defenses were essentially those already pled, but the Counterclaim included several fanciful breach of duty, fraud, and FDUTPA actions against the Association. R. 736-52. Most interesting, Ass Monkey's Third Party claims were made against the *individual* members of the Association and its ARB, including various creative species of breach of fiduciary duty actions. R. 753-76. In the Association's response in opposition, the Association recited a detailed history of the case showing Ass Monkey's delay tactics in resolving the case. R. 912-13.

The response also conclusively demonstrated that Ass Monkey's attorney, Saliba, plagiarized a huge portion of the motion seeking to amend

the pleadings. R. 914-16. On August 18, 2021, the trial court denied Ass Monkey's motion and attorney Saliba failed to attend the hearing. R. 1118-19. On September 10, 2021, the trial court held both attorney Saliba and Ass Monkey in contempt, imposing 50/50 financial responsibility for all attorney fees and costs related to undue delay and expense in the case. R. 1169-70. The trial court followed this up with a detailed order imposing sanctions. R. 1193-97. On October 6, 2021, attorney Saliba withdrew.

On November 29, 2021, the Association filed its Motion for Summary Judgment (the "MSJ"). R. 1220-28. Attorney Smed became Ass Monkey's sole lawyer in February 2022. R. 1232-33. On March 29, 2022, the trial court denied an amended motion to amend its pleadings and assert a counterclaim and third-party claims but did *grant* Ass Monkey permission to amend its affirmative defenses. R. 1250-51. The trial court permitted Ass Monkey to amend its affirmative defenses over the Association's objections. R. 1234-43. Ass Monkey substantially cleaned up its affirmative defenses, dropping 7 of them and keeping the following 7: (1) the Board exceeded its power under the Declaration; (2) through (4) the Board failed to provide appropriate notice for adoption of Association rules in 2007, 2012, or 2015; (5) the Board failed to approve the ARB Guidelines in 2016; (6) the Board failed to provide appropriate notice for adoption of changes to

ARB Guidelines in 2018; and (7) the Board failed to approve ARB Guideline revisions in 2018. R. 1252-60. On May 19, 2022, the trial court granted the Association Summary Judgment. R. 3206-07. Two days later, Ass Monkey filed a motion for relief from judgment due to excusable neglect claiming technical difficulties prevented Ass Monkey's counsel from full participation in the hearing. R. 3212-15. Ten days after that, Ass Monkey filed another motion seeking relief, this time asking the trial court for reconsideration. R. 3216-33. These motions were both denied on June 9, 2022. R. 3376-77.

For the next year, until about late September 2023, the parties engaged in various motions and arguments regarding attorney fees as well as the Association's entitlement to final judgment. R. 3378-3957. But on September 28, 2023, Ass Monkey's current appellate counsel, Lawson Huck Gonzalez PLLC appeared. R. 3958-59. On the same day, Ass Monkey filed its second motion for reconsideration, almost a year and a half since summary judgment was originally granted. R. 3965-4032. In that second motion for reconsideration, Ass Monkey argued that it is "axiomatic" that in order to prevail on summary judgment, a plaintiff must "either prove or disprove those defenses by evidence..." citing *Howdeshell v. First Nat. Bank of Clearwater*, 369 So. 2d 432, 433 (Fla. 2d DCA 1979). The

Association pointed out that this was false as the new summary judgment standard in Florida no longer required a summary judgment movant to preemptively tackle all of a nonmovant's affirmative defenses, citing *G&G In-Between Bridge Club Corporation v. Palm Plaza Associates, Ltd.*, 356 So. 3d 292, 299 (Fla. 2d DCA 2023). R. 3965-4032. Ass Monkey commendably conceded error. R. 4033-44. The trial court denied the second motion for reconsideration on October 30, 2023. R. 4057-58. Together, the first and second motions for reconsideration are referred to as the "Reconsideration Orders," *infra*.

A day later and only 18 months after summary judgment was granted, Ass Monkey filed a motion for leave to conform current pleadings to summary judgment evidence by amending to *re-add* affirmative defenses. R. 4059-77. This was opposed by the Association. R. 4171-79. The trial court denied the motion on March 19, 2024 in what Association refers to as the "Affirmative Defenses Order," *infra*. R. 4194-95. The same day, the trial court entered final judgment in favor of the Association. R. 4180-84. Ass Monkey timely filed its notice of appeal. R. 4202-09.

### **SUMMARY OF THE ARGUMENT**

This Court should affirm the orders of the trial court.

First, Ass Monkey argues that summary judgment should not have been entered in favor of the Association. The argument is predicated on the notion that the Declaration does not give authority to the Association to regulate the construction, alterations, and changes made by Ass Monkey on property indisputably subject to the Declaration. This is false. The Declaration clearly provides authority under the plain meaning of what a change or alteration is. Ass Monkey also claims that the Association only has the power of review if the Association's insurance might go up from the work. This is false, but even if it did, the Association presented sufficient evidence to demonstrate its concerns over insurance, which were repeatedly raised to Ass Monkey prior to litigation and which are all a matter of the record here.

Relatedly, Ass Monkey argues summary judgment is improper because the Association lacks the authority to enforce any kind of standards, even pursuant to the Declaration. But Florida law is clear that an association may have control over aesthetic standards even when such standards are not described in the Declaration. Finally, Ass Monkey argues that the trial court erred by entering summary judgment because the Association acted unreasonably, arbitrarily, or capriciously. Such an argument does not have traction when Ass Monkey has failed to plead it as

an affirmative defense, and Ass Monkey did fail, but even with such a defense, the evidence does not justify it.

Second, Ass Monkey argues, with no supporting case law, that multiple motions for reconsideration were improperly denied. But Ass Monkey's arguments rest entirely on its summary judgment arguments. Since those are incorrect, the arguments underpinning reconsideration are incorrect, too, except, in addition to those, reconsideration was well within the discretion of the trial court and in the case of the last motion for reconsideration, made *eighteen months* after summary judgment was entered.

Third, Ass Monkey's argument that it should have been permitted to amend its affirmative defenses *eighteen months* after summary judgment should be dead on arrival. It was obviously untimely, for starters. But, more importantly, it would have severely prejudiced the Association, the privilege to amend had been abused at that point, and the amendment would have been futile.

### **STANDARD OF REVIEW**

Ass Monkey explains to this Court that it should review the trial court's Summary Judgment Order de novo. See p. 36, Initial Brief. Ass Monkey is correct in this. This is because summary judgment is proper only

when there is no genuine issue of material fact and a movant is entitled to judgment as a matter of law. See *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Ass Monkey is also correct to explain that this Court reviews the trial court's interpretations of applicable governing documents, such as the Declaration and Bylaws in this case, de novo. But a trial court entering summary judgment is entitled to a presumption of correctness when the record supports its ruling. *Watson v. Hahn*, 664 So. 2d 1083, 1084 (Fla. 5th DCA 1995).

However, Ass Monkey appeals not only the Summary Judgment Order. Ass Monkey also appeals the Reconsideration Orders and the Affirmative Defenses Order. Appellant fails to explain the applicable standard of review for either of these orders under appeal either in its Standard of Review section or later in the Initial Brief. The denial of Ass Monkey's numerous motions for reconsideration, entered years apart, is subject to an abuse of discretion standard of review. *Dale v. Schaub*, 301 So. 3d 1000, 1002 (Fla. 4th DCA 2020) (citing *Commercial Garden Mall v. Success Acad., Inc.*, 453 So. 2d 934, 935-36 (Fla. 4th DCA 1984)). So, too, for the Affirmative Defenses Order. See, e.g., *Saidi v. Saqr*, 207 So. 3d 991, 992 (Fla. 5th DCA 2016) (in the context of a routine motion for leave to amend); *Anglo American Auto Auctions, Inc. v. Tuminello*, 732 So. 2d

1218, 1220-21 (Fla. 5th DCA 1999) (in the context a motion to conform to the evidence).

## **ARGUMENT: THE TRIAL COURT’S ORDERS SHOULD BE AFFIRMED**

### **I. SUMMARY JUDGMENT SHOULD BE AFFIRMED**

#### **A. The Trial Court Correctly Granted Summary Judgment Because the Association Must Approve Ass Monkey’s Construction**

##### **i. Ass Monkey Required the Association’s Approval under the Declaration**

In the Initial Brief, Ass Monkey’s first argument for reversing Summary Judgment is that the “plain language of the Declaration did not require a vote of the Board” for Ass Monkey’s improvements. But the plain language of the Declaration shows just that. The Declaration clearly, obviously, requires the Association’s approval.

As ¶7 of the Amended Complaint states, “[Ass Monkey] violated the condominium’s covenants by altering an existing building and constructing a new 2,500 square-foot building.” In its Amended Complaint, the Association cites to Article V, §2(c) of the Declaration, which states as in relevant part: “...a Unit Owner shall make no changes or alterations to any exterior wall, windows, structural or load-bearing wall or color of any exterior wall or awning, without first obtaining approval in writing of the Association Board of Directors.”

For two pages in the Initial Brief, Ass Monkey focuses on a sentence in isolation, the last one, in §2(c), which states that “[n]o alteration or improvement may be made without the written approval of the Board of Directors of the Association, if such alteration or improvement may or would cause an increase in the cost of insurance carried by the Association.” What is funny about Ass Monkey’s argument is that it makes two serious logical errors in discussing this sentence. Both are ready-made for disposal at the hands of customary canons of judicial construction.

First, Ass Monkey concedes to this Court that “the Declaration is perplexing in that it seems odd to not require a Board vote for new hangar construction but to require a vote... for ‘changes or alterations to any exterior wall...’” See Initial Brief at p. 39. Yes, that would be very odd. Thus, it is only perplexing if one was to buy Ass Monkey’s argument. But an alternative exists: the Association’s argument, ratified by the trial court. This is the argument, first made in the Association’s pleadings, that because Ass Monkey’s new Hangar 27 was connected to the pre-existing Hangar 28, it altered Hangar 28’s exterior wall. This is not rocket science, but it does require Association approval. The extent of the Association’s control over the exterior is radical. Anything from antennae to signs, posters, awnings, or shutters attached to any part of the exterior of a

building is subject to Association approval. R. 425-28. Even the draperies, blinds, shades, and shutters on the *inside* if visible from an exterior window are subject to Association approval. R. 427-28.

It is in this context that Ass Monkey's position must be considered. "It is a fundamental rule of contract interpretation that a contract which is clear, complete, and unambiguous does not require judicial construction." *GEICO Indem. Co. v. Walker*, 319 So. 3d 661, 665 (Fla. 4th DCA 2021). "The goal of interpretation is to arrive at a 'fair reading' of the text by 'determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.'" *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). And, further, "[i]n construing the language of a contract, courts are to be mindful that 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.'" *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 203 (Fla. 1st DCA 2015) (quoting *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009)).

In its Response to the Association’s Motion for Summary Judgment, Ass Monkey \ conceded that the existing exterior wall from Hangar 28 “is now an interior wall.” R. 1615-16. Ass Monkey’s corporate representative, Laurence Albrecht, agreed that Ass Monkey would need to seek approval from the Association’s Board of Directors if it “was going to make a change or an alteration to an exterior wall.” R. 1578-79. Ass Monkey threw another building on top of its existing one, disappearing one of its exterior walls, and it wants this Court to believe that neither a change nor an alteration has occurred.

The summary judgment evidence cited by Ass Monkey shows that certain types of changes and alterations have not occurred to the old Hangar 28 wall. But, actually, this evidence supports Association’s argument. The photos at R. 2452-2460 show beyond all doubt that the exterior wall has been so radically altered and changed that it is *not an exterior wall at all anymore*. And, finally, perhaps it is just too glaring to examine in detail—like looking at the sun—but Ass Monkey’s construction of an entirely new building, is itself necessarily, with every act of the builder, making changes to new exterior walls, windows, structural walls, and colors of the same, all subject to the express plain language of Article V, §2(c) of the Declaration. This is exactly the type of *in pari materia*

reading required by Florida law when considering declarations of condominium. See *Europco Management Co. of America v. Smith*, 572 So. 2d 963, 967-68 (Fla. 1st DCA 1990); see also *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979) (holding that reasonable restrictions on condominium units are necessary for the operation and protection of the owners); *Cool Spaze, LLC v. Boca View Condo. Ass'n, Inc.*, 292 So. 3d 769, 772 (Fla. 4th DCA 2020) (holding that when construing a declaration of condominium, the intention of the parties should be construed from the whole document and not from separate phrases or paragraphs).

How could the trial court be faulted for seeing the obvious?

**ii. The Association Did Argue that Ass Monkey Caused an Increase in Liability**

On page 38 of the Initial Brief, Ass Monkey claims that “[t]he Association’s pleadings do not allege that [Ass Monkey’s] improvements might cause an increase in the Association’s insurance and the Association has never made this argument.”

Actually, the Association did both of those things—exhaustively. Not that it needed to. First, as Ass Monkey concedes in the Initial Brief, Article V, §2(c) of the Declaration does require permission from the Association for any new improvements, presumably including those at Hangar 27 and

connecting to Hangar 28. But Ass Monkey argues that entirely new construction is actually exempt unless it may or would cause an increase in the cost of insurance carried by the Association. This argument is predicated on *different* language requiring Association approval than that discussed in Section I.A.i, *supra*.

Second, the Association raised this issue in the pleadings. In the original Complaint in this case, the Association alleged that “[t]he purpose of the Declaration, and the ARB guidelines and procedures is... ensure that the risk associated with construction is appropriately borne by the party or unit owner making the improvements, by requiring proof of insurances.” R. 34. The Amended Complaint went further, describing irreparable harm of “increased liability for Airport Association for any accidents related to construction as a result of [Ass Monkey’s] failure to demonstrate compliance with insurance requirements.” R. 284.

Second, the evidentiary record is replete with references to this insurance issue. Take, for example, the Declaration itself and the Architectural Review Form Procedural guidelines. In the case of the former, the Declaration required owners to obtain coverage on improvements in addition to general liability insurance. R. 57. Owners are required to furnish copies of that information to the Association. *Id.* The Architectural Review

Form Procedural guidelines require builders risk insurance and contractors insurance among other things. R. 1936-37. The provision regarding contractors insurance, the Association “must be included as an additional insured under the policy... and must be provided to the [Association] prior to commencement of construction.” R. 1937.

These documents comprise the basis and authority for the Association to justify its insurance requirements. The record demonstrates that Ass Monkey did not just ignore these requirements. Rather, Ass Monkey willfully flouted them. In the deposition of Ass Monkey’s corporate representative, Mr. Albrecht testified that Ass Monkey did not get a builder’s risk insurance policy listing the Association as an additional insured. He also conceded that the amount of the builder’s risk policy Ass Monkey did get—solely for Ass Monkey and not the Association—was only for \$100,000.00, not the required amount of \$250,000.00. R. 1707-08. Mr. Albrecht refused to follow these requirements for various reasons, all of which deserve mentioning. He did not comply with obtaining liability insurance because he felt the Association was changing the requirements on him. R. 1704-09. Also, he felt that the failure to provide insurance is a “made-up issue.” R. 1714.

Actually, it is not. A failure to maintain insurance in standard landlord-tenant leases is considered a default that cannot be remedied. See *Apol v. Shaw and Pizza Hut of America, Inc.*, 647 So. 2d 139 (Fla. 1st DCA 1994); *Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So. 2d 851 (Fla. 2d DCA 1984), *rev. denied*, 464 So. 2d 554 (Fla. 1985). The reason is simple. It exposes the counterparty to risk. The cost of insurance would *necessarily* rise.

Albrecht's testimony was confirmed by the deposition of the Association's principal, wherein Mr. Kagan testified as to "the evolution, no management plan, no contractor information, no insurance information, varying drawings were presented...." R. 2217. Mr. Kagan also confirmed that Ass Monkey failed to ever provide insurance with the Association as an additional insured. R. 2260. None of these requirements were intrinsically difficult. But Ass Monkey made them difficult. Ass Monkey does not deserve to be relieved of them just because Ass Monkey does not like them.

**B. The Trial Court Correctly Granted Summary Judgment Because the Association Has the Authority to Enforce Standards**

Ass Monkey claims that the second reason summary judgment is improper is that "the Association can point to no provision in its Declaration

authorizing the architectural control standards or procedures that it seeks to enforce.” Initial Brief at p. 41. Ass Monkey cites the Bylaws saying that they “provide for appointment of an ‘Architectural Control Committee, as provided in the Declaration’ . . . .” *Id.* It appears to hang its hat on the notion that because such a committee is not mentioned in the Declaration that no such committee can ever exist. *Id.* at p. 42. Corporate bylaws are construed using principles of contract interpretation. *Naples Cmty. Hosp., Inc. v. Hussey*, 918 So. 2d 323, 325 (Fla. 2d DCA 2005). As a first matter, the qualifying phrase, “as provided in the Declaration,” simply means that the *appointment* of the committee must be consistent with the Declaration, not that the committee is somehow mentioned in the Declaration. This would require us to see who is entitled to vote, which is indeed provided for in the Declaration. See Art. II, §10, Declaration. Under the Declaration, the Association has the power to operate the condominium. See Art. VII, flush language, Declaration. This includes all of the Common Elements and Limited Common Elements. See Art. V., §1(a), Declaration. But those powers are not limited to those expressly set out in the Declaration, they are supplemented by those in chapter 718, Florida Statutes, as described in §718.111(2), Fla. Stat. Further, §617.0206, Fla. Stat., provides that “bylaws may contain any provision for the regulation and management of

the affairs of the corporation not inconsistent with law or the articles of incorporation.” There is no provision in any statute or Association governing document that is inconsistent with the ARB or ARB Guidelines.

But discussion about the Association’s committee is really beside the point. As discussed, *supra*, the Declaration itself gives the Association the authority to approve. Florida case law protects the Association’s authority in this instance, *regardless* of the existence of standards. In *Coral Gables Investments, Inc. v. Graham Companies*, 528 So. 2d 989, 990 (Fla. 3d DCA 1988), a restrictive covenant in a warranty deed stated that any property owner seeking to make alterations must first submit plans to an architectural review committee for approval. Specifically, the covenant stated that “[a]ny change in the exterior appearance of any building... shall be deemed an alteration requiring approval.” *Id.* at 991. The Third DCA held that the covenant put the owner on notice that plans needed to be approved and that the committee had broad discretion in such review. Indeed, such wide-ranging discretion “would logically include control over the type of building materials used,” even though the covenant did not specifically say so. *Id.* On this basis, the appellate court affirmed a permanent injunction against a material that the committee did not approve. *Id.* Consider *Beachwood Villas Condo. v. Poor*, 448 So. 2d 1143, 1144

(Fla. 4th DCA 1984) (explaining that restrictions in a declaration “are clothed with a very strong presumption of validity because the law requires their full disclosure prior to the time of purchase....”)

Ass Monkey repeatedly cites *Hollywood Towers Condo. Ass’n, Inc., v. Hampton*, 40 So. 3d 784 (Fla. 4th DCA 2010) for the proposition that the Association “can only act within the authority granted to it by governing documents legally adopted....” See, e.g., Initial Brief at p. 43. But the Association needs no such additional documents when *the Declaration itself* is the basis for the authority. Consider the discussion in *Europco* regarding how to derive the extent of control for an association from a declaration:

Reading all the covenants in pari materia demonstrates rather clearly the intent that the developer reserve control over the architectural design and aesthetics of the structures and landscapes in the project, and that such control, although amounting to plenary discretion in such matters, is to be fairly exercised in a reasonable manner by the developer directly or through delegation to a committee. The covenants make specific provisions for enforcement of the restrictions by resort to liens and court proceedings, but do not predicate enforcement solely on a showing of diminished value to the surrounding property. They simply vest in the developer or a delegated committee reasonable authority and discretion to control exterior architectural design and construction so as to maintain the consistency and compatibility of the design and appearance with the entire project pursuant to reasonable policies and standards uniformly and fairly, not arbitrarily, applied. ***There is no requirement that such policies and***

***standards be in writing.***

*Europco*, 572 So. 2d at 967-68 (emphasis added). It has been suggested that restrictions must be construed strictly against those seeking to enforce them. But the Fifth DCA in *Sweeney v. Mack*, 625 So. 2d 15, 17 (Fla. 5th DCA 1993) cited to and at least partially relied upon *Johnson v. Linton*, 491 S.W.2d 189 (Tex. Civ. App. 1973), wherein the court held “[w]here any doubt exists concerning the meaning of the deed restrictions, the ARC’s decision is entitled to deference.”

Additionally, it is worth considering that the beyond the restrictive covenants in the Declaration, the Association is empowered to establish rules and regulations, including those in the ARB Guidelines, so long as such rules and regulations do not contravene an express term of the Declaration. As the Fourth District Court of Appeal stated in *Beachwood Villas Condominium*:

A declaration of condominium is the condominium’s ‘constitution.’ Often it contains broad statements of general policy with due notice that the board of directors is empowered to implement these policies and address day-to-day problems in the condominium’s operating through the rulemaking process. It would be impossible to list all restrictive uses in a declaration of condominium. Parking regulations, limitations on the use of the swimming pool, tennis court and card room – the list is endless and subject to constant modification. ***Therefore, we have formulated the appropriate test in this fashion: provided that a board-enacted rule does not contravene either an express provision of the declaration or a right***

***reasonably inferable therefrom, it will be found valid, within the scope of the board's authority.***

448 So. 2d 1143, 1145 (Fla. 4th DCA 1983) (citations omitted) (emphasis added).

Finally, to the extent that Ass Monkey's challenges to any of the Association's rules, including the ARB Guidelines, are even cognizable, they are foreclosed by time. Thus, whether or not the Association used proper procedures, or had a proper vote, or any of that, is irrelevant. Courts have repeatedly held that a property owner's suit to deem amendments to declarations or promulgated rules thereunder are invalid when they are brought beyond five years from their enactment. See *Harris v. Aberdeen Prop. Owners Ass'n, Inc.*, 135 So. 3d 365, 367-68 (Fla. 4th DCA 2014); *Kelly v. Davis*, No. 3:10-cv-392, 2015 WL 12426152, at \*2 (N.D. Fla. Jan. 14, 2015); *Hilton v. Pearson*, 208 So. 3d 108, 109 (Fla. 1st DCA 2016). In the instant case, the first time that Ass Monkey even suggested improper adoption of any rules was as an affirmative defense on February 10, 2021 in its Affirmative Defenses to the Amended Complaint. Assuming that simply raising this as an affirmative defense is sufficient—and the Association does not think it is—because the Architectural Guidelines were adopted January 2, 2016, no challenge to them is even possible.

**C. The Trial Court Correctly Granted Summary Judgment Because the Association Did Not Act Unreasonably, Arbitrarily, or Capriciously**

The final reason Ass Monkey argues that summary judgment is error is because Ass Monkey “submitted evidence that the Association’s exercise of authority was unreasonable, arbitrary, and capricious....” Initial Brief at p. 50. While Ass Monkey makes no expressly wrong statements in this section, it buries the lede: Ass Monkey had no affirmative defense for the Association acting unreasonably, arbitrarily, or capriciously.

Ass Monkey’s initial counsel did file fourteen (14) affirmative defenses and they did include an affirmative defense on this point. Ass Monkey expressly sought—over the Association’s objections—to amend its affirmative defenses and did so prior to summary judgment. In so doing, Ass Monkey dropped that affirmative defense. This “selective enforcement” argument *requires* that it be an affirmative defense as it is no element of any cause of action that the Association pled. In *Small v. Devon Condominium B Ass’n, Inc.*, 141 So. 3d 574 (Fla. 4th DCA 2014), the case that Ass Monkey repeatedly cites for the proposition that an association must show its actions are reasonable and not arbitrary, the court analyzed a statute where reasonableness was an actual element of the cause of

action and the defendant had interposed an affirmative defense. This case is thus totally inapposite for Ass Monkey's purposes.

But even had Ass Monkey properly had the affirmative defense before the trial court, it would not have saved Ass Monkey. To prevail based on such a defense, Ass Monkey would have to show that the Association, with all the many deficiencies and issues—and admitted non-compliance on the part of Ass Monkey—had acted in an unreasonable or arbitrary manner. See *Killearn Acres Homeowners Ass'n v. Kever*, 595 So. 2d 1019, 1021 (Fla. 1st DCA 1992). This burden is “a heavy one.” *Id.* Ass Monkey would also have to provide evidence of similar violations through complaints from other owners. See *Laguna Tropical, a Condominium Association, Inc. v. Barnave*, 208 So. 3d 1262, 1264 (Fla. 3d DCA 2017). Ass Monkey totally failed to do that. See *Chattel Shipping and Inv., Inc. v. Brickell Place Condominium Ass'n, Inc.*, 481 So. 2d 29, 30 (Fla. 3d DCA 1985) (holding that it is not selective enforcement to apply a standard prospectively and not retroactively against those whose construction did not violate the standard at the time).

This is not a case where the Association decided to pick on Ass Monkey out of the blue. This is a case where, for years, Ass Monkey flouted the Association and the Declaration. Ass Monkey's many failures

included an inaccurate permit application to the City, zero lot lines with no setbacks that would not be approved by the ARB, roof pitch and eave height discrepancies, an inability to determine satisfactory fire suppression, ADA compliance, structural integrity, oil, grease, and pollution containment compliance, storm drainage adequacy, electrical and lighting adequacy, potential perjury on the owner-builder affidavit, and a failure to provide necessary insurance. R. 1516-18, 1520-21. Any one of those things would be enough to warrant the Association's attention. With all of them together, it is a wonder that the case has not escalated in some other manner.

In cases such as this, were Ass Monkey to really have the affirmative defense of selective enforcement (it does not), the Association would ask the Court to consider business judgment rule as a basis for affirming the trial court. "While the business judgment rule traditionally applied to protect corporate directors from personal liability in their business dealings, courts may use the rule to evaluate the management decisions of property associations and to avoid second-guessing those decisions." *Miller v. Homeland Prop. Owners Ass'n, Inc.*, 284 So. 3d 534, 537 (Fla. 4th DCA 2019). "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.” *Id.* Courts have adapted this rule to decisions made by condominium associations. *See, e.g., Tiffany Plaza Condo. Ass’n v. Spencer*, 416 So. 2d 823, 826 (Fla. 2d DCA 1982) (stating that courts will not interfere with an association’s decision to exercise its authority in a reasonable manner). Given this, “courts must give deference to a condominium association’s decision if that decision is within the scope of the association’s authority and reasonable....” *Hollywood Towers*, 40 So. 3d at 787.

How many more provisions of the Declaration or ARB Rules would Ass Monkey have to break before the Association’s action becomes reasonable?

## **II. THE TRIAL COURT’S DENIAL OF RECONSIDERATION SHOULD BE AFFIRMED**

For this section of the Initial Brief, Appellant offers five lines and cites *Hodge v. Cichon*, 79 So. 3d 950 (Fla. 5th DCA 2012) in passing. As a first matter, the Association suggests to this Court that such an argument should be considered waived and insufficient. *See Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (“Merely making references to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed waived.”) *see also Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (holding that a “failure to fully brief and argue” a

point “constitutes waiver”). There has been no attempt to explain on what legal basis the motions for reconsideration themselves were wrongly decided except to the extent that the Court’s decision on Summary Judgment was wrong. The lone case cited, *Hodge*, merely stands for the proposition that the attorney fee award is dependent on the judgment obtained. Of course, the Association does not dispute that. But the case does not in any way deal with reconsideration or the merits of it.

To the extent that this matter can be considered to have been substantively raised, the Association must point out to this Court that the trial court’s consideration of the issues was lengthy and no issue was ever unexamined, no stone unturned, in this case spanning half a decade.

True, a trial court has an inherent authority to reconsider its interlocutory rulings prior to the entry of a final judgment or final order. *Bettez v. City of Miami*, 510 So. 2d 1242 (Fla. 3d DCA 1987) *see also* *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 765 (Fla. 3rd DCA 2014) (recognizing the need to balance the desire for the correct result, thus permitting the court leeway to rehear and reconsider its rulings, with the need for finality and efficiency); *Panama City Gen. P’ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 292 (Fla. 1st DCA 2013) (explaining general ability of trial court to reconsider matters it could not

otherwise rehear). And, true, summary judgment orders are those that may be reconsidered. See *LoBello v. State Farm Florida Insurance Co.*, 152 So. 3d 595 (Fla. 2d DCA 2006).

But there is no requirement that a trial court exercise that authority. See *Schultz v. State*, 289 So. 3d 921, 924 (Fla. 4th DCA 2020). In federal court, courts have recognized three grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *Sussman v. Salem, Saxon, and Nielsen*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). None of those are present here. To be sure, under state law, the Court has more discretion. See *Dale*, 301 So. 3d at 1002 (Fla. 4th DCA 2020) (recognizing the significant discretion of a trial court in withdrawing any nonfinal rulings prior to entry of final judgment). While the federal standard gives an idea of the kind of things judges typically look for, the problem for Ass Monkey in this case is *precisely* the fact that state court judges *do* have more discretion under reconsideration. There is nothing requiring such reconsideration and, here, there was no error in the trial court's denial of several motions for reconsideration.

### **III. THE TRIAL COURT'S DENIAL OF ASS MONKEY'S MOTION TO RE-ADD AFFIRMATIVE DEFENSES SHOULD BE AFFIRMED**

#### **A. Overview**

Ass Monkey claims as its third argument that it “timely sought to correct a technical pleading issue... and raises the issue here to avoid any waiver argument.” It goes on, “[Ass Monkey] realized that it had dropped previously pled affirmative defenses alleging the Board’s unreasonable and selective enforcement of its ARB Guidelines and Procedures... and moved to re-add the issue as an affirmative defense.” Ass Monkey summarily claims that the trial court’s refusal to allow Ass Monkey to *re-add* these affirmative defenses was an abuse of discretion.

The trial court’s decision as nothing of the sort.

Interestingly, Ass Monkey cites *Dep’t of Health v. Khan*, 350 So. 3d 87, 92-93 (Fla. 1st DCA 2022) for the proposition that “absent exceptional circumstances... motions for leave to amend should be granted....” Initial Brief at p. 53. But *Khan* features a quotidian holding: motions for leave to amend a pleading may be denied if “it is clear that: (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile.” *Khan*, 350 So. 3d at 93.

All three are present here, in addition to the motion simply being untimely.

**B. Motion to Re-Add Was Untimely**

For starters, the motion to *re-add* its defenses was *not* timely. The lawsuit was originally filed before the pandemic in 2019. Summary judgment was granted in May 2022. Between the time of summary judgment and the time the motion to *re-add* was filed, in October 2023, a year and a half had passed and Ass Monkey had filed three other motions seeking relief from the summary judgment by way of reconsideration or otherwise.

More importantly, the trial court entered a Case Management Order on June 14, 2021. In that CMO, motions for leave to amend “must be set for hearing and heard within 30 days from the earlier of the date of this Agreed Case Management Plan or service on the last defendant, or deemed abandoned or denied.” See below:

<p><b>Deadline for Leave to Add Parties and Amend Pleadings:</b></p>	<p>Motions must be set for hearing and heard within <u>30</u> days from the earlier of the date of this Agreed Case Management Plan or service on the last defendant, or deemed abandoned and denied</p>
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R. 672-76. This order was never modified nor was leave ever sought to be excused from it. Ass Monkey did not bring up its motion on this point within thirty days of its filing in October 2023, let alone 30 days of the CMO in July 2021. This is especially important because the Court *already* granted leave to Ass Monkey when Ass Monkey violated this rule before. On March 28,

2022, the Court did grant Ass Monkey permission to file and serve its Amended Answer and Affirmative Defenses, prior to the summary judgment hearing. Thus, at a time when the hearing on the Airport's motion for summary judgment was already set, and three years after initial service occurred in the case, the Court allowed amendment.

This Court gave Ass Monkey exactly what it wanted in terms of affirmative defenses. Now, when Ass Monkey does not like the result, it seeks to retroactively change them. This is improper. See *Noble v. Martin Memorial Hos' Ass'n, Inc.*, 710 So. 2d 567 (Fla. 4th DCA 1997) (holding that a party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment). But, certainly, the trial court was well within its discretion in denying the incredibly late motion. See *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016) (recognizing the liberality required for amending pleadings but holding that this policy narrows as a case approaches trial); see also *Toscano Condo. Ass'n v. DDA Eng'rs, P.A.*, 274 So. 3d 487, 490 (Fla. 3d DCA 2019) (“[I]n addition to the desirability of allowing amendments to pleadings so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation finally be reached.”)

### **C. Motion to Re-Add Abuses Right to Amend**

Of course, it is well-settled that a trial judge may deny an untimely motion to amend a pleading. It can be denied, within the court's discretion, when a motion to amend is made two weeks before trial. *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817 (Fla. 1st DCA 1971). It can be denied when the motion is filed four days before a pretrial conference. *Dunn v. Campbell*, 166 So. 2d 217 (Fla. 2d DCA 1964). A court may decide that the motion is just plain too close to trial. *Liberty Transp., LLC v. Banyan Air Services, Inc.*, 982 So. 2d 1231 (Fla. 4th DCA 2008); *Barrett v. Barrett*, 973 So. 2d 632 (Fla. 4th DCA 2008). The Court already was frankly quite generous in allowing the prior amendment of affirmative defenses only weeks before the hearing on summary judgment. To allow it two years later would be a bizarre departure from general standards. Certainly, any notion of liberality with regard to amendment no longer exists. See *Gate Lands Co. v. Old Ponte Vedra Beach Condo.*, 715 So. 2d 1132, 1135 (Fla. 5th DCA 1998) (holding that the standard is liberal when leave to amend "is sought at or *before* a hearing on a motion for summary judgment"). Given that Ass Monkey *did* seek to amend just prior to summary judgment, and *chose* to remove these affirmative defenses, but now wants a do-over, the only word that can aptly characterize it would be "abuse."

#### **D. Motion to Re-Add is Futile**

Additionally, the re-pled affirmative defenses would be futile. For one thing, while Ass Monkey suggests to the Court that its summary judgment evidence justifies being able to bring its intentionally removed affirmative defenses back from the dead, Ass Monkey did not *argue* those defenses in its response in opposition to summary judgment. Ass Monkey asks this Court to give it a mulligan and re-animate the affirmative defenses of Waiver, Laches, Selective/Unequal Enforcement, and Unclean Hands, claiming that Ass Monkey “consistently continued to argue these facts and issues in defense of summary judgment....” See Initial Brief at p. 52.

Actually, it did no such thing, and its failure to do so means the motion to re-add is futile. Neither the word “waiver” nor “laches” appears in Ass Monkey’s response in opposition to summary judgment. Selective enforcement? No. Unequal enforcement? Nope. Unclean hands? Surprise: it is not there either. Under Florida law as it now stands, and as it stood at the time of summary judgment, it is Ass Monkey that would have had to raise those issues and argue those issues. See *G&G In-Between Bridge Club Corp.*, 356 So. at 299 (highlighting the application of Florida’s new summary judgment standard so that defendants bear the burden of showing that an affirmative defense is applicable). Ass Monkey did no such

thing. Further, Rule 1.510 *requires* that the non-movant identify the facts in opposition by “citing to particular parts of materials in the record....” Ass Monkey’s summary judgment record fails to do that.

One cannot just file masses of summary judgment evidence and hope for the best. Indeed, to the extent that Ass Monkey did, it was not evidence bearing on selective enforcement or arbitrary, unreasonable actions. Ass Monkey cites several portions of the record purportedly supporting this unpled affirmative defense but *all* of them are either attached to pleadings or summary judgment filings. There is no opportunity for the Association to object, even if it had wanted to, like there in trial, where failing to object makes a difference. The material at R. 843 was attached to a pleading. The material at R. 1588-95, 1602-06, 1614-15, 1639-42, 1645-46, 1648-51, 1654-55, 1660, 1663, 1671-72, 1676-78 1680-94, 1700-08, and 1723-24 all derives from the deposition of Ass Monkey’s corporate representative and was filed *in toto* with its response in opposition to summary judgment—again—no opportunity to object. The same goes for the other citations at R. 2382-83, 2839, 2894: all a part of summary judgment evidence for which there is no opportunity to object. In addition, *all* of these evidentiary sources were relevant for other purposes *besides* Ass Monkey’s unpled affirmative defenses because they were

massive depositions containing the gravamen of evidence for all other claims and defenses. See, e.g., *Book v. City of Winter Park*, 718 So. 2d 945, 947 (Fla. 5th DCA 1998) (holding that an issue is tried by consent when there is no objection to the introduction of evidence on that issue “unless the evidence is relevant to other, properly pled issues”).

#### **E. Motion to Re-Add Relief Prejudices Association**

In the few instances where affirmative defenses are permitted to be pled after summary judgment, it is generally where they do not “advance a new issue or otherwise undermine the trial court’s summary judgment liability determination.” *Hess v. PMG-S2 Sunny Isles, LLC*, 349 So. 3d 547, 550 (Fla. 3d DCA 2022). But that is exactly what Ass Monkey proposes that this Court allow. It is only interjecting these additional and long-forsaken affirmative defenses in the hopes of having some kind of stronger ground upon which to mount this appeal.

This is especially prejudicial when the Association relied on the pleadings to proceed with summary judgment. Permitting an amendment so late, indeed, *years* after the fact, effectively yanks the rug out from the Association. It is truly unfair and prejudicial, especially when the Association needs the certainty to proceed and the authority to run the premises. What kind of example does it show to the rest of the owners, or

prospective owners looking for value and strong leadership, that a clear-cut case of liability takes 5 years to resolve in our court system and 3 years after the Association established entitlement to it? It would require a wholesale re-litigation of the entire case, years later.

The only case Ass Monkey even provided to the trial court on this point was *Viscito v. Fred S. Carbon Co.*, 636 So. 2d 194, 195 (Fla. 4th DCA 1994) for the proposition that a motion for leave to conform pleadings to evidence at *trial* at the *close of evidence* when the *matter was tried by consent* is somehow analogous to the motion here. It is not. In fact, what Ass Monkey seeks to do here *is the complete opposite of a motion for leave to conform pleadings to evidence at trial*. For starters, Ass Monkey asked for and received permission to file the Amended Affirmative Defenses that stood for years, well through summary judgment, and to the end of the trial court's labor. The trial court granted Ass Monkey permission by order on March 28, 2022. It did so over the Association's objections! The *Association* asked the Court to deny any amendment in its opposition filed on February 14, 2022. This was not a case where the Association's counsel sat idly by at trial as Ass Monkey went on and on introducing evidence about irrelevant issues. Nor could Association's counsel have stricken Ass Monkey's summary judgment response or filings from the

record because they mentioned then-waived affirmative defenses. Ass Monkey not only failed to preserve the affirmative defenses it seeks to rejuvenate in its motion to re-add, it expressly moved the Court to kill them.

## **CONCLUSION**

This case is a quotidian dispute between a condominium association and an owner over whether covenants and restrictions mean what they say. Despite the integrity of the Declaration and ARB Guidelines, none of which have ever been legally challenged, Ass Monkey has thrown everything at the wall to see what sticks, be it several motions for reconsideration or even a motion to amend its affirmative defenses a year and a half after summary judgment. Irony is Ass Monkey proclaiming that the ARB Guidelines are a “joke and a pain.” R. 1613. Just so, after half a decade of litigation over a simple issue, the Association asks this Court to affirm the lower court rulings and let Ass Monkey continue to exist as nature apparently intended it.

**DATED:** November 28, 2024.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.045**

**I HEREBY CERTIFY** that this Motion was prepared in Arial 14-point font in compliance with Rule 9.045(b), Fla. R. App. P., and does not surpass the maximum word count permitted by Rule 9.210(a)(2)(B), Fla. R. App. P.

By: /s/ Christian W. Waugh  
CHRISTIAN W. WAUGH

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on November 28, 2024, a true and correct copy of the foregoing was filed in the Florida E-Filing Portal and a copy thereof transmitted through the portal to:

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