

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

CASE NO. 3D23-1430
L.T. CASE NO. 2021-014000-CA-01

BLUE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

vs.

BLUE GROUPER VENTURES, LLC,

Appellee.

ANSWER BRIEF OF APPELLEE

Jose M. Ferrer
Florida Bar No. 173746
Desiree Fernandez
Florida Bar No. 119518
MARK MIGDAL & HAYDEN
80 S.W. 8th Street, Suite 1999
Miami, Florida 33130
Telephone: (305) 374-0440
jose@markmigdal.com
desiree@markmigdal.com
eservice@markmigdal.com
Counsel for Appellee

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE AND FACTS 2

 A. Development Hurdles and Association Disputes..... 2

 B. Blue Grouper Files Suit to Enforce its Right to Access Utilities.. 5

 C. The Jury’s Verdict and the Final Judgment..... 8

III. SUMMARY OF THE ARGUMENT 9

IV. ARGUMENT10

 A. Standard of Review10

 B. The Award of Prejudgment Interest Was Appropriate and Justified12

 C. The Permanent Injunction Was Proper to Prevent Future Violations17

 D. The Trial Court Properly Excluded Mention of the “As Is” Language in the Purchase Agreement to Avoid Confusion and Prejudice23

V. CONCLUSION27

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Amelio v. Marilyn Pines Unit II Condo. Ass’n, Inc.</i> , 173 So. 3d 1037 (Fla. 2d DCA 2015)	19
<i>Argonaut Ins. Co. v. May Plumbing Co.</i> , 474 So.2d 212 (Fla.1985).....	12, 13, 16
<i>Bailey v. Christo</i> , 453 so. 2d 1134 (Fla. 4 DCA 1984)	22
<i>Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.</i> , 903 So. 2d 251 (Fla. 2005).....	26
<i>Briarwinds Condo. Ass’n, Inc. v. Rigsby</i> , 51 So. 3d 532 (Fla. 3d DCA 2010).....	19
<i>Cabana Key Condo. Assoc. v. Schofield</i> , 278 So. 3d 887 (Fla. 5th DCA 2019).....	19
<i>Charles Buzbee & Sons, Inc. v. Falkner</i> , 585 So.2d 1190 (Fla. 2d DCA 1991)	15
<i>Dailey v. Multicon Dev. Inc.</i> , 417 So. 2d 1106 (Fla. 4th DCA 1982).....	25
<i>Elzinga & Volkers, Inc. v. LOSSC Corp.</i> , 838 F.Supp. 1306 (N.D. Ind. 1993)	26
<i>Gastaldi v. Sunvest Communities USA, LLC</i> , 637 F.Supp.2d 1045 (S.D. Fla. 2009)	26
<i>Glover Distrib. Co., Inc. v. F.T.D.K., Inc.</i> , 816 So. 2d 1207 (Fla. 5th DCA 2002).....	15
<i>Gulf Bay land Investments, In. v. Trecker</i> , 955 So. 2d 1157 (Fla. 3d DCA 2007)	11
<i>H & S Corp. v. U.S. Fidelity & Guar., Co.</i> , 667 So.2d 393 (Fla. 1st DCA 1995).....	12

<i>Lauderdale Marine Center, Ltd. v. MYD Marine Distribution, Inc.,</i> 31 So. 3d 256 (Fla. 4 DCA 2010).....	13
<i>Lewis v. Peters,</i> 66 So. 2d 489 (Fla. 1953).....	22
<i>Lumbermens Mut. Cas. Co. v. Percefull,</i> 653 So. 2d 389 (Fla. 1995).....	14
<i>McDuffie v. State,</i> 970 So. 2d 312 (Fla. 2007).....	24
<i>Mission Square, Inc. v. O’Malley’s, Inc.,</i> 783 So. 2d 1151 (Fla. 1st DCA 2001)	13
<i>Mitchell v. Beach Club of Hallandale Condo. Ass’n,</i> 17 So. 3d 1265 (Fla. 4th DCA 2009).....	18
<i>Nova Southeastern Univ. of Health Sciences, Inc. v. Sharick,</i> 21 So. 3d 41 (Fla. 3d DCA 2009).....	13
<i>Off Lease Only, Inc. v. LeJeune Auto Wholesale, Inc.,</i> 187 So. 3d 868 (Fla. 3d DCA 2016).....	20
<i>Output, Inc. v. Danka Business Systems, Inc.,</i> 991 So. 2d 941 (Fla. 4th DCA 2008).....	26
<i>Patrick v. State,</i> 104 So. 3d 1046 (Fla. 2012).....	11
<i>Pine Ridge at Haverhill Condo. Ass’n, Inc. v. Hovnanian of Palm Beach II, Inc.,</i> 629 So. 2d 151 (Fla. 4th DCA 1993).....	15
<i>Premier Lab Supply, Inc. v. Chemplex Indus., Inc.,</i> 10 So. 3d 202 (Fla. 4th DCA 2009)	17, 18
<i>Residences at Bath Club Condo. Assoc., Inc. v. Bath Club Entertainment, LLC,</i> 355 So. 3d 990 (Fla. 3d DCA 2023).....	11

<i>Sarasota Beverage Co. v. Johnson</i> , 551 So. 2d 503 (Fla. 2d DCA 1989).....	21
<i>Schuenzel v. Schuenzel</i> , 320 So. 3d 214.....	10
<i>SEB S.A. v. Sunbeam Corp.</i> , 148 Fed. Appx. 774 (11th Cir. 2005).....	16
<i>Security Mut. Cas. Co. v. Pacura</i> , 402 So. 2d 1266, (Fla. 3d DCA 1981).....	26
<i>Singer v. Singer</i> , 442 So. 2d 1020 (Fla. 3d DCA 1984).....	18
<i>Swift & Co. v. U.S.</i> , 276 U.S. 311 (1928).....	21
<i>Taylor v. Nicholson-Williams, Inc.</i> , 368 So. 3d 1007 (Fla. 5th DCA 2023).....	27
<i>Vining v. Martyn</i> , 660 So.2d 1081 (Fla. 4th DCA 1995).....	15
<u>Statutes</u>	
Fla. Stat. § 90.403	24
Fla. Stat. § 718.303	6, 9, 18, 22
<u>Rules</u>	
Fla. R. App. P. 9.210(a)(2)	28
Fla. R. App. P. 9.045.....	28

I. INTRODUCTION

Appellant, Blue Condominium Association, Inc. (the “Association”), appeals the trial court’s partial final judgment which awarded Appellee, Blue Grouper Ventures, LLC (“Blue Grouper”), \$1,514,528.91, and enjoined the Association permanently from using Blue Grouper’s property without its consent.

The appeal focuses on three key issues: first, the award of prejudgment interest as a remedy for the Association’s failure to provide essential utilities to Blue Grouper, anchored in the principle of making the plaintiff whole; second, the enforcement of a permanent injunction to curtail the Association’s infringement of Blue Grouper’s property rights, a measure crucial for preventing future violations; and, third, the exclusion of the “as is” language contained in an unrelated purchase agreement – a critical decision to prevent prejudice and jury confusion, and ensure the jury’s focus remained on the Association’s obligations and failures.

Consideration of these issues demonstrates the trial court’s correct application of the law in this case, underscoring the need to affirm its decisions.

II. STATEMENT OF THE CASE AND FACTS

A. Development Hurdles and Association Disputes

Appellee owns units CU-1, CU-2, and CU-3 (the “Blue Grouper Units”), which comprise floors 1 through 5 of Blue on the Bay, a condominium building located in the City of Miami. (R. 2848; 2853; 3244). Blue Grouper purchased the Blue Grouper Units from the building’s developer in 2006, along with fourteen designated parking spaces and a designated storage unit. (R. 1803-1804; 2851-2852). When Blue Grouper purchased the Blue Grouper Units, they were in their unfinished state, meaning that they lacked interior walls, finished floors, lighting fixtures, and other finishing touches. (R. 2854). Notwithstanding the Blue Grouper Unit’s unfinished state, Blue Grouper expected that it would be able to connect to basic utilities once it decided their intended use. (R. 2856).

Shortly after Blue Grouper purchased the Blue Grouper Units, the real estate market crashed. (R. 2854-2855). Blue Grouper began exploring buildout options and installed certain required life safety systems in the units, such as an emergency staircase and safety pathway lighting, but otherwise made no attempt during the financial

crisis to develop the Blue Grouper Units. (R. 2854-2856; 2860-2862). Once the real estate market had sufficiently recovered, however, Blue Grouper decided to begin construction. (R. 1694).

In October 2012, Blue Grouper provided the Association with building plans for its intended development of the Blue Grouper Units. (R. 1606-1614; 2855-2857). When Blue Grouper informed the condominium association (the “Association”) that it intended to tie into the building’s heating, ventilation, and air conditioning (HVAC) systems, it prompted the Association to commission a condensing water supply study, which was completed on November 11, 2014. (R. 2066-2077; 2867-2868; 3205). The study revealed for the first time ever that the building’s HVAC systems – and specifically the building’s cooling tower – were insufficient to meet the load requirements to supply the Blue Grouper Units with air conditioning and ventilation. (R. 2066-2077; 2868; 3208). Shortly thereafter, on March 3, 2015, the parties also discovered that the building was missing certain “risers,” which are basically shafts running the length of the building through which certain conduits, plumbing, wiring, and other facilities are channeled to connect the building’s

HVAC system to the Blue Grouper Units. (R. 1638-1648; 2882-2884; 2960; 3219).

For several years thereafter, Blue Grouper attempted to work in good faith with the Association on numerous alternatives to resolve these issues, but they were not able to agree on any concrete plan. (R. 3082-3084). Reaching a consensus with the condominium board proved unattainable due in large part to the intervening elections and subsequent turnover of board members. (R. 2873-2874; 3216-3217). This cycle of continuous change rendered the establishment of a unified approach to any solution unfeasible, as agreement on a concise idea could not be sustained across successive boards. (R. 2873-2874; 3216-3217).

Throughout this time, the Association was using the Blue Grouper's empty units to store supplies and dump construction debris. (R. 3253-3256). The Association also allowed building contractors and employees, as well as the building's valet service, to use Blue Grouper's parking spaces without Blue Grouper's consent. (R. 3251). Adding insult to injury, the Association also began renting to other tenants Blue Grouper's storage unit without Blue Grouper's consent. (R. 3245-3246).

**B. Blue Grouper Files Suit to Enforce its Right to
Access Utilities**

By late 2020, the parties had reached an impasse in their efforts to resolve these issues of access to basic utilities. (R. 3083-3084). Blue on the Bay's condominium declaration ("Declaration") places the obligation of providing access to these utilities squarely on the Association.

Section 7.2 of the Declaration provides that "**all maintenance, repairs and replacements in or to the Common Elements . . . shall be performed by the Association and the cost and expenses thereof shall be charged to all Unit Owners as a Common Expense[.]**" (R. 52). Section 2.10 of the Declaration defines the term "**Common Elements**" to include "**easements through Units for conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility and other services to Units, Common Elements and/or the Association Property,**" and "**[t]he property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements and/or the Association Property.**" (R. 43).

Thus, on June 15, 2021, Blue Grouper sued the Association for various breaches of the Declaration, namely its failure to provide the Blue Grouper Units with access to basic utilities enjoyed by every other unit owner in the building. (R. 29-229). Blue Grouper also alleged claims for trespass associated with the Association's unauthorized use of the Blue Grouper Units, the parking spaces, and the storage unit. (R. 29-229). Blue Grouper alleged a claim for unjust enrichment which sought to recover the overpayment of maintenance fees Blue Grouper paid the Association over the years for services it never received. (R. 29-229). Finally, Blue Grouper sought temporary and permanent injunctive relief pursuant to Fla. Stat. § 718.303 to prevent the Association from continuing to use the Blue Grouper Units, the parking spaces, and the storage unit without Blue Grouper's consent. (R. 29-229).

Shortly after filing its lawsuit, Blue Grouper moved on an emergency basis to enjoin the Association from continuing to use the Blue Grouper Units, its parking spaces, and its storage unit without Blue Grouper's consent. (R. 263-454). Before the trial court could hear the matter, however, the Association agreed to the entry of an order that memorialized the Association's agreement to stop using

Blue Grouper's units as a dumping ground for construction waste, to cease renting out Blue Grouper's storage unit without permission, and to refrain from using Blue Grouper's parking spaces as a makeshift hub for building contractors and staff. (R. 455-457).

As the trial neared, Blue Grouper moved *in limine* to preclude the Association from referring or seeking to introduce at trial Blue Grouper's "As Is" purchase agreement with the developer. (R. 802-805). Blue Grouper argued that allowing the Association to disclose that provision to the jury would be highly prejudicial because it would suggest to the jury that the Association could avoid its contractual responsibilities under the Declaration based on a contract that the Association was not a party to and had no right to invoke. (R. 806-809). The trial court agreed to bar references to the "As Is" clause but allowed the Association to use the agreement to show "plaintiff's knowledge regarding what exactly Defendant was providing or was not providing." (R. 922-923). In other words, the trial court carefully tailored its ruling to preclude evidence only of those damaging references to the "As Is" provision that might prejudice Blue Grouper's case, but nothing else.

C. The Jury's Verdict and the Final Judgment

On April 6, 2023, after a four-day trial, the jury issued its verdict in favor of Blue Grouper concerning its breach of contract and trespass claims. (R. 1780-1783). The jury found that the Association had breached its obligations to Blue Grouper by failing to provide Blue Grouper with access to basic utilities and awarded Blue Grouper \$1,040,482.61 – the exact amount Blue Grouper claimed it would cost to supply the Blue Grouper Units with access to basic utilities, namely heating, ventilation, and air conditioning. (R. 1780-1783). The jury also answered a special interrogatory intended to address the Association's statute of limitations defense, by finding that the breach occurred before February 11, 2016. (R. 1780-1783). The jury rejected the unjust enrichment claim but found that the Association had trespassed upon Blue Grouper's property, awarding Blue Grouper the minimum of \$1 dollar in damages for that offense. (R. 1780-1783).

On July 10, 2023, the trial court entered judgment upon the jury verdict in the amount of \$1,524,528.91. (R. 2637-2639). That amount consists of the amounts the jury awarded for breach of contract and trespass, plus prejudgment interest from November 11,

2014, which is when the parties discovered that the Blue Grouper Units lacked access to utilities. (R. 2637-2639). The trial court also adjudicated Blue Grouper's equitable claim for injunctive relief under Fla. Stat. § 718.303, consistent with the parties' earlier agreement to a temporary injunction, by permanently enjoining the Association from using Blue Grouper's units, parking spaces, and storage unit without Blue Grouper's consent. (R. 2637-2639).

III. SUMMARY OF THE ARGUMENT

Florida law guarantees every condominium unit owner certain rights related to their property. These rights are contained in the Declaration, which also spells out the condominium association's obligations concerning its owners.

One of these basic rights is access to essential utilities like air conditioning, water, and electricity. Despite these clear obligations, the Association did not provide Blue Grouper with the same access to these essential services as it did to other unit owners, a problem that persisted for years. Making matters worse, the Association violated Blue Grouper's property rights by making use of its property without Blue Grouper's consent. The jury recognized the significant harm the Association's failure to honor its contract and its

unauthorized use of Blue Grouper’s property caused Blue Grouper by awarding significant damages.

Consistent with the jury’s findings, the trial court awarded prejudgment interest to compensate Blue Grouper for the losses it suffered from the date it became clear that the Association was unfairly denying Blue Grouper access to these basic utilities. The trial court also properly put in place a permanent injunction that matched exactly an earlier agreement between the parties, ensuring that such violations would not happen again. Lastly, the trial court properly excluded information about an “as is” clause from a different and irrelevant contract, thus preventing such language from misleading the jury.

Thus, affirmance is required.

IV. ARGUMENT

A. Standard of Review

Appellate courts review an award of prejudgment interest *de novo*. *Schuenzel v. Schuenzel*, 320 So. 3d 214, 216 n. 1 (Fla. 3d DCA 2021) (“Our standard of review of an award of prejudgment interest is *de novo*.”).

Appellate courts review a trial court’s judgment granting a permanent injunction under the abuse of discretion standard. See *Gulf Bay land Investments, In. v. Trecker*, 955 So. 2d 1157, 1159 (Fla. 3d DCA 2007). The Association argues that the standard of review on this issue is *de novo*, based on precedent that holds that the question of whether the evidence is legally sufficient to justify imposing an injunction is a question of law subject to *de novo* review. See *Residences at Bath Club Condo. Assoc., Inc. v. Bath Club Entertainment, LLC*, 355 So. 3d 990, 998 (Fla. 3d DCA 2023). The Association is not challenging the sufficiency of the evidence, nor can it considering it consented to the very relief the trial court awarded. Rather the facial sufficiency of the injunction based on the failure to include specific findings. As such, the proper standard is abuse of discretion.

Appellate courts review a trial court’s ruling on a motion *in limine* for abuse of discretion. *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012) (“The standard of review of a trial court’s ruling on a motion *in limine* is abuse of discretion.”).

**B. The Award of Prejudgment Interest Was
Appropriate and Justified**

In Florida, prejudgment interest is due as a matter of law when a verdict liquidates the pecuniary losses suffered by the plaintiff as of a prior date. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla.1985). The purpose of the award of prejudgment interest is to make the plaintiff whole from the date of the loss. *Id.* Once the jury determines the defendant's liability for damages and their amount, the damages are retroactively considered liquidated, and the plaintiff is entitled to prejudgment as of the date the damages were due. *Id.*; *see also H & S Corp. v. U.S. Fidelity & Guar., Co.*, 667 So.2d 393, 399 (Fla. 1st DCA 1995) (“A claim may become liquidated ... and thus susceptible of prejudgment interest, when a verdict has the effect of fixing damages as of a prior date.”).

Here, the jury’s verdict did not itemize damages, but the award equaled the exact amount Blue Grouper claimed as the cost for supplying the Blue Grouper Units with access to basic utilities, namely heating, ventilation, and air conditioning. The trial court’s award of prejudgment interest based on the jury’s finding of breach of contract falls squarely within the ambit of the principles

established in *Argonaut Ins. Co.*, of making a plaintiff whole as of the date of loss. Yet, the Association makes two arguments why it contends the trial court erred by awarding prejudgment interest – neither of which has merit.

First, the Association argues that Blue Grouper’s lack of immediate out-of-pocket expenses precludes prejudgment interest. This argument relies on inapposite precedent which rejected the imposition of prejudgment interest in cases involving future economic damages. See *Mission Square, Inc. v. O’Malley’s, Inc.*, 783 So. 2d 1151 (Fla. 1st DCA 2001) (denying prejudgment interest on award of future leasehold value reduced to present value); *Nova Southeastern Univ. of Health Sciences, Inc. v. Sharick*, 21 So. 3d 41 (Fla. 3d DCA 2009) (denying prejudgment interest on award of lost future earnings); *Lauderdale Marine Center, Ltd. v. MYD Marine Distribution, Inc.*, 31 So. 3d 256, 257 (Fla. 4 DCA 2010) (explaining that prejudgment interest cannot be awarded on any “anticipated” profits because those losses cannot be fixed with certainty to a particular date). Because the damages awarded in those cases were based on future anticipated business profits and lost future earnings,

there was no past loss for which the trial court could compensate the prevailing parties by awarding prejudgment interest.

Unlike the plaintiffs in those cases, Blue Grouper did not claim future economic damages, and the jury did not award that type of relief. Rather, the jury awarded Blue Grouper damages for the Association's past breaches of contract by failing to provide and pay for access to basic utilities. The trial court therefore properly granted Blue Grouper's request for prejudgment interest without requiring proof that Blue Grouper had incurred any out-of-pocket expenses. *See Lumbermens Mut. Cas. Co. v. Percefull*, 653 So. 2d 389, 390 (Fla. 1995) ("The trial court should have granted Percefull's request for prejudgment interest on the debt created by Percefull's contract with Lumbermens without requiring proof that Percefull had incurred any out-of-pocket expenses.").

Second, the Association challenges the trial court's decision to award prejudgment interest from November 11, 2014, which is when the parties discovered the Association's breach of its obligations under the Declaration to provide access to basic utilities. The Association acknowledges that courts can award prejudgment interest even when the jury does not specify a particular date of loss,

so long as it is clear from the context of the litigation. *See Charles Buzbee & Sons, Inc. v. Falkner*, 585 So.2d 1190, 1191 (Fla. 2d DCA 1991); *see also Vining v. Martyn*, 660 So.2d 1081, 1082 (Fla. 4th DCA 1995). The Association contends, however, that the record did not conclusively support a specific date of loss.

Contrary to the Association's argument, the evidence at trial amply supports the trial court's chosen date of loss. Specifically, Jose Martinez, an expert who the Association commissioned to conduct a condensing water study report, delivered his report to the Association on November 11, 2014. (R. 2066-2077). Mr. Martinez's report revealed for the first time ever that the Blue Grouper Units lacked access to utilities. (R. 2066-2077; 2868-2869; 3208).

Florida law is clear that trial courts may properly award prejudgment interest from the latest possible date of loss. *See Pine Ridge at Haverhill Condo. Ass'n, Inc. v. Hovnanian of Palm Beach II, Inc.*, 629 So. 2d 151 (Fla. 4th DCA 1993) (holding that jury verdict awarding damages for construction defects in condominium complex had the effect of fixing damages as of the date when the owner turned over the property to the condominium association even though jury did not fix a specific date of loss); *Glover Distrib. Co., Inc. v. F.T.D.K.*,

Inc., 816 So. 2d 1207, 1213 (Fla. 5th DCA 2002) (awarding prejudgment interest from the latest possible date on which damages could have been suffered); *see also SEB S.A. v. Sunbeam Corp.* 148 Fed. Appx. 774, 795 (11th Cir. 2005) (recognizing that, under Florida law, prejudgment interest can be awarded properly from the latest possible date of loss).

The jury's finding that the Association breached its contract with Blue Grouper, **coupled with its finding that the Association's breach of contract occurred before February 11, 2016**, had the effect of fixing the damages no later than November 11, 2014, when the parties discovered that the Blue Grouper Units lacked access to utilities. *See Argonaut*, 474 So. 2d at 214 (holding that "a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date."). Thus, the court properly granted prejudgment interest from that date, consistent with ample Florida precedent allowing such interest from the latest possible date of loss.

C. The Permanent Injunction Was Proper to Prevent Future Violations

The trial court permanently enjoined the Association from using Blue Grouper's units, parking spaces, and storage unit without Blue Grouper's prior written consent. This relief is a commonsense and uncontroversial measure to protect Blue Grouper against clear infringement of its property rights that should hardly raise eyebrows. It merely memorializes the parties' prior agreement to the entry of a temporary injunction providing the same relief.

Under the terms of this temporary injunction, the Association already had consented to stop using Blue Grouper's units as a dumping ground for construction waste, to cease renting out Blue Grouper's storage unit without permission, and to refrain from using Blue Grouper's parking spaces as a makeshift hub for building contractors and staff. Yet, despite previously agreeing to this exact injunctive relief, the Association now assails the trial court for not providing detailed reasons to justify the relief.

The Association relies on *Premier Lab Supply, Inc. v. Chemplex Indus., Inc.*, 10 So. 3d 202 (Fla. 4th DCA 2009), which reversed a permanent injunction order and remanded for the trial court to

specify the reasons for its entry. But, unlike the defendant in *Premier Lab Supply*, the Association here waived any defect in the trial court's ruling by agreeing to the entry of an identical injunction at the onset of this case. *See Singer v. Singer*, 442 So. 2d 1020 (Fla. 3d DCA 1984) (“As a general principle of law, the doctrine of waiver encompasses not only the intentional or voluntary relinquishment of a known right, but also conduct that warrants an inference of the relinquishment of a known right.”). Also, the basis for injunctive relief in this case is different than it was in *Premier Lab Supply*.

Here, the injunction is based on Count IV of Blue Grouper's complaint, which sought an injunction based on the Association's violation of section 718.303(1), Fla. Stat. (2020). That law “permits a unit owner to seek injunctive relief for failure of a condominium association to comply with its rules or the Condominium Act.” *See Mitchell v. Beach Club of Hallandale Condo. Ass'n*, 17 So. 3d 1265, 1267 (Fla. 4th DCA 2009). In an action under 718.303, a violation of the condominium declaration is itself a harm for which section 718.303 authorizes injunctive relief. *Id.* (“When bringing an action for injunctive relief against an association, an alleged violation of chapter 718 is itself a harm for which section 718.303 authorizes injunctive

relief.”); *Amelio v. Marilyn Pines Unit II Condo. Ass’n, Inc.*, 173 So. 3d 1037, 1040-41 (Fla. 2d DCA 2015) (holding that condominium unit owner had satisfied requirements to obtain mandatory injunction against condominium association where association failed to maintain and repair a concrete slab on which the owner’s unit sat); *see also Briarwinds Condo. Ass’n, Inc. v. Rigsby*, 51 So. 3d 532, 533 (Fla. 3d DCA 2010) (holding that “[b]y alleging that the unit owner and tenant violated the condominium documents, which is prohibited by the statute, the association adequately pled irreparable harm.”).

The jury’s findings that the Association breached the Condominium declaration, and trespassed upon Blue Grouper’s property, established the Association’s violation of the statute for which 718.303 authorizes injunctive relief. Thus, the trial court correctly determined that Blue Grouper had satisfied the requirements to obtain a mandatory injunction. Any error in failing to specify the obvious reasons for entry of the injunction, **especially considering the Association’s prior agreement to the exact relief**, is harmless. *But see Cabana Key Condo. Assoc. v. Schofield*, 278 So. 3d 887, 888 (Fla. 5th DCA 2019) (finding that the trial court correctly

determined that plaintiff had satisfied the requirements to obtain a mandatory injunction by establishing a violation of the condominium documents but remanding for entry of an order delineating the required factual findings).

The Association also argues that the permanent injunction is unjustified because “there is absolutely no evidence the Association attempted to access the Blue Grouper Units, or otherwise ‘infringe’ upon Blue Grouper’s rights,” (Initial Br., at p. 46), **after** the trial court entered the temporary injunction. The Association’s argument ignores a crucial fact: **it was the imposition of a temporary injunction that halted the Association’s infringements of Blue Grouper’s property rights.** Arguing there is “no evidence” of current attempts to trespass or infringe upon Blue Grouper’s rights after the trial court put in place such an injunction ignores this point entirely. The need for the temporary injunction itself demonstrates the threat of recurring violations.

Also, the mere voluntary cessation of conduct alleged to be in violation of Blue Grouper’s property rights does not foreclose Blue Grouper from pursuing permanent injunctive relief. *See Off Lease Only, Inc. v. LeJeune Auto Wholesale, Inc.*, 187 So. 3d 868, 870 (Fla.

3d DCA 2016) (explaining that the cessation of allegedly violative conduct does not, as a matter of law, preclude an aggrieved party from seeking injunctive relief for future violations); *Sarasota Beverage Co. v. Johnson*, 551 So. 2d 503, 509 (Fla. 2d DCA 1989) (“Courts have recognized that an injunction may be appropriate even though the defendant has voluntarily ceased a practice.”); *Swift & Co. v. U.S.*, 276 U.S. 311, 315 (1928) (recognizing that “an injunction may issue to prevent future wrong, although no right has yet been violated.”).

Without a permanent injunction, there will be nothing to stop the Association from reverting to its previous misconduct. Indeed, the Association’s bizarre challenge to the injunction, aimed simply at safeguarding Blue Grouper’s property rights from unauthorized infringements, suggests that the Association’s goal is to resume its encroachments upon Blue Grouper’s property rights. As such, the trial court did not abuse its discretion, and was entirely justified in granting Blue Grouper permanent injunctive relief to prevent future harm from the Association’s unauthorized encroachments on Blue Grouper’s property.

The Association's only other argument directed at the injunction is that it is improper because Blue Grouper can sue for any future violations, giving it an adequate remedy at law. This argument undermines the Association's other arguments because it concedes that future violations are possible which justify the imposition of an injunction now. *See Lewis v. Peters*, 66 So. 2d 489, 492 (Fla. 1953) ("One of the most valuable phases of injunctions is to prevent an injury from occurring and not to be forced to wait until after the damage is done and then attempt to seek redress for the same."); *Bailey v. Christo*, 453 so. 2d 1134, 1137 (Fla. 4 DCA 1984) ("One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred."). And the argument fails anyway for the same reasons that the Association's other arguments fail: the jury's findings that the Association breached the Declaration, and trespassed upon Blue Grouper's property, sufficiently established the Association's violation of the statute for which section 718.303 authorizes injunctive relief. Thus, the trial court correctly determined that Blue Grouper was entitled to a permanent injunction.

**D. The Trial Court Properly Excluded Mention of the
“As Is” Language in the Purchase Agreement to
Avoid Confusion and Prejudice**

Blue Grouper sued the Association for breach of the Declaration, which places squarely on the Association the responsibility of providing basic utilities to the unit owners. The Association attempted to excuse its failure to provide these services by invoking the “as is” provision in the purchase agreement between Blue Grouper and the prior owners of the Blue Grouper Units. The trial court’s decision to exclude evidence or mention of the “as is” provision contained in that separate and unrelated agreement was not only procedurally justified, but also necessary to maintain the focus of the lawsuit where it rightfully belonged: **the Association’s obligations to Blue Grouper under the Declaration.**

The Association argues that “the Purchase Agreement makes clear Blue Grouper knew the Association was not responsible” for utilities. But the Association’s attempt to link the “as is” language in the purchase agreement to the Association’s contractual obligation to provide unit owners with access to utilities requires a significant logical leap. The “as is” language in the purchase agreement does not in any way override or negate the Association’s explicit obligations

set forth in the Declaration, which operates independently of the purchase agreement and binds all unit owners and the Association in a continuing manner.

The trial court correctly determined that the mere mention of the "as is" language in a completely different contract to which the Association was not a party could confuse and mislead the jury, by suggesting an unwarranted connection between the sale conditions of the Blue Grouper Units and Blue Grouper's right to enforce the Declaration. By excluding evidence of the "as is" language in the purchase agreement, the trial court correctly narrowed the scope of evidence to matters directly pertinent to the Association's alleged breach of the Declaration, thus eliminating the danger of unfair prejudice, confusion of issues, or misleading the jury. See Fla. Stat. § 90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."); *McDuffie v. State*, 970 So. 2d 312, 327 (Fla. 2007) ("Unfair prejudice' has been described as 'an undue tendency to suggest decision on an improper basis[.]").

The trial court's decision is entirely consistent with the well-established principle that motions *in limine* are appropriate to exclude evidence that is not relevant to the specific legal issues being litigated or that could unfairly prejudice one party. *Dailey v. Multicon Dev. Inc.*, 417 So. 2d 1106, 1107 (Fla. 4th DCA 1982) ("The purpose of a motion *in limine* is generally to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial."). Here, the potential for undue prejudice from introducing the "as is" language, which could imply improperly a broad waiver of rights not actually encompassed by the purchase agreement, underscored the necessity of the court's ruling. Thus, the trial court's exclusion of the "as is" language was essential to prevent irrelevant considerations from misleading the jury, thereby ensuring that the deliberations would be based solely on the relevant facts and legal obligations at issue – namely, the Association's responsibility for utilities as provided in the Declaration.

The trial court's prudent decision to exclude evidence concerning the "as is" language in the purchase agreement finds further support in caselaw which holds that entities that are neither parties nor third-party beneficiaries to a contract lack standing to

invoke a contract's provisions, including "as is" clauses. *See Gastaldi v. Sunvest Communities USA, LLC*, 637 F.Supp.2d 1045, 1055 (S.D. Fla. 2009) (recognizing that “a non-party to a contract may not invoke the contract.”); *see also Output, Inc. v. Danka Business Systems, Inc.*, 991 So. 2d 941, 944-45 (Fla. 4th DCA 2008) (Non-party to contract cannot take advantage of exculpatory clauses in contract); *Elzinga & Volkers, Inc. v. LOSSC Corp.*, 838 F.Supp. 1306, 1313 (N.D. Ind. 1993) (“As is” clause does not inure to the benefit of contractor who was not a party to the contract).

And just because the purchase agreement may also have served as Blue Grouper’s application for membership in the Association does not make the Association a third-party beneficiary of the purchase agreement with rights to enforce it. *See Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.*, 903 So. 2d 251, 254 (Fla. 2005) (“A non-party is the specifically intended beneficiary only if the contract clearly expresses and intent to primarily and directly benefit the third party or a class of persons to which that party belongs.”); *Security Mut. Cas. Co. v. Pacura*, 402 So. 2d 1266, (Fla. 3d DCA 1981) (“[I]n order to be considered a third party beneficiary to a contract, the parties to the contract must clearly

intend its benefits extend to the third party.”); *Taylor v. Nicholson-Williams, Inc.*, 368 So. 3d 1007, 1013 (Fla. 5th DCA 2023) (“It is axiomatic that ‘[a] party may qualify as a third-party beneficiary only if the contracting parties, or the contract itself, exhibits an intent to primarily and directly benefit the third party,’ and ‘[t]he best evidence of the parties’ intention is the contract’s plain language.”).

Accordingly, the trial court's decision was necessary to ensure that the case's resolution hinged on the interpretation and enforcement of the Declaration, not the unrelated terms of the unit's sale contained in a separate contract.

V. CONCLUSION

For the reasons set forth in this brief, Blue Grouper respectfully requests that this Court affirm the trial court’s judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail generated by the Florida Court E-Filing Portal this 19th day of March 2024, upon all counsel of record.

By: /s/ Jose M. Ferrer
Jose M. Ferrer

CERTIFICATE OF FONT AND WORD COUNT

As provided by Florida Rule of Appellate Procedure 9.045, I HEREBY CERTIFY that this brief was generated using the 14-point Bookman Old Style font in the Microsoft Word program and contains fewer than 13,000 words. See Fla. R. App. P. 9.210(a)(2).

By: /s/ Jose M. Ferrer
Jose M. Ferrer