THIRD DISTRICT COURT OF APPEAL
MIAMI, FLORIDA

Appeal No. 3D23-1550
(Consolidated with 3D23-1551)
L.T. No. 21-17867

CRESTVIEW TOWERS
CONDOMINIUM ASSOCIATION, INC.;
et al.,
Appellants/Defendants,

v.

CAMITA BRESILLA;
OKSANA MONASTIRSKI;
SONIA BORTOLIN; and
EDGAR BORTOLIN,
Appellees/Plaintiffs.
_____/

ANSWER BRIEF OF APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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PREFACE

Appellant, CRESTVIEW TOWERS CONDOMINIUM ASSOCIATION, INC., was a defendant below and is referenced herein as the "**Association**."

Appellant, MANAGEMENT 1, LLC, was a defendant below and is referenced herein as "**Management 1**."

Appellant, GLOBAL MANAGEMENT SERVICES CORPORATION, was a defendant below and is referenced herein as "**Global**."

Appellant MARIAN MORI was a defendant below and is referenced herein as "**Mori**."

Appellant OROSMAN ROMERO was a defendant below and is referenced herein as "**Romero.**"

Appellees, CAMITA BRESILLA; OKSANA MONASTIRSKI; SONIA BORTOLIN; and EDGAR BORTOLIN, were the plaintiffs below and are referenced herein collectively as "**Plaintiffs**, "**class representatives**," or as "**Bresilla**," "**Monastirski**," "**Ms. Bortolin**," and "**Mr. Bortolin**."

The Appendix attached to appellants' initial brief is referenced herein as "**APP [page number]**."

STATEMENT OF THE CASE AND FACTS

Concise Statement of the Case. This class action concerns the sudden evacuation of the Crestview Towers condominium building on July 2, 2021 by an emergency condemnation order issued by the City of North Miami Beach, in the wake of the tragic collapse of the nearby Champlain Towers South condominium building.[1] Nearly 300 residents were given approximately fifteen minutes to grab their belongings and vacate the building. They have been physically dispossessed of their homes ever since, even to this day. The structural, electrical, and financial issues underlying the condemnation, which Defendants negligently let languish, persist to this day.[2]

The Parties. Defendants are the condominium association for the building, Crestview Towers Condominium Association, Inc. (the "Association"); board member Marian Mori; and the Association's former property managers, Orosman Romero, Management 1, LLC ("Management 1"), and Global Management Services Corporation ("Global").[3] Plaintiffs are unit owners and residents of Crestview Towers, Camita Bresilla, Oksana Monastirski, Sonia Bortolin (who has since passed

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[1] *See* Defendant's Appendix, Fourth Amended Complaint, at APP 000025, at ¶2.

[2] *See* Fourth Amended Complaint, APP 000034, at ¶54. *See also generally* Plaintiffs' Expert Reports, at APP 000557 to APP000798.

[3] *See* Fourth Amended Complaint, APP 000026 – APP000027, at ¶¶8-16 (Identifying all parties).

away), and Edgar Bortolin.[4] They represent a class of other unit owners and residents of Crestview Towers.

Claims. Plaintiffs assert negligence, gross negligence, breach of contract, and breach of fiduciary duty claims against Defendants for their failure to address serious structural and electrical issues; to obtain the 40-year and 50-year building recertifications; and to properly maintain the Association's finances.[5] The parties engaged in multiple rounds of extensive motions to dismiss briefing, through which Plaintiffs' claims largely survived.

Crestview Towers, and Its Structural, Electrical, and Financial Troubles. The Crestview Towers Condominium Building is a 10-story, 156-unit condominium building located at 2025 NE 164th Street, North Miami Beach, Florida, 33162 in Miami-Dade County.[6] The Association is responsible for maintaining the condition of the Property and its finances.[7] State and municipal law impose duties of care on the Association as well.[8]

All buildings in Miami-Dade County are required to obtain a 40-year

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[4] *See id.*

[5] *See id.,* APP 000040-APP 000067, at ¶¶78-202.

[6] *See id.*, APP 000028, at ¶22.

[7] *See id.*, APP 000028-APP 000030, at ¶¶24-31.

[8] *See id.*, APP 000030, at ¶30.

recertification that the building is safe and habitable. But this recertification was never obtained for Crestview. Numerous structural and electrical issues precluding recertification went unaddressed by the Association, and the property manager Defendants hired by the Association, for years.[9] Multiple engineering or electrical reports obtained by the Association and its agents over the years, all of which they concealed, identified serious issues in need of immediate repairs.[10] None of this was ever addressed. The building's 40-year recertification, due in 2011, was never obtained. The building's 50-year recertification due in 2021 was not obtained, either. Both remain unobtained to this day.[11]

During that time period, the Association's finances were in disarray. For example, an audit proposal in February 2020 sought to address the Association's 2017 finances from three years earlier.[12] Not only was this purported audit late itself, addressing years-old finances, but it was sharply critical of the Association's finances insofar as audits had not been done in prior years, key financial documents

[9] *See id.*, APP 000024 to APP 000025, at ¶2.

[10] *See generally* Plaintiffs' Motion for Class Certification, APP 000196 to APP 000803.

[11] *Id.* at APP 000201 ("To date, those repairs have not been fully completed; the 40-year (and 50-year) recertification remains outstanding. . .").

[12] *Id.* at APP 000200 (explaining the Association's failure to keep financial statements and filings up to date.).

(e.g., budgets) had not been prepared, dues and assessments had not been timely levied or collected, and necessary steps to address the finances (and physical condition of the property) had been ignored.[13]

Events Leading Up to Condemnation. By 2021, the 40-year recertification and the 50-year certifications remained delinquent. On January 11, 2021, yet another third-party engineering report declared the property was structurally and electrically unsafe for occupancy.[14] Neither the Association nor any of their hired agents (other Defendants here) ever timely submitted this report to the City of North Miami Beach. Rather, the report was suppressed and not provided to the City until July 2, 2021, a few days after the tragic collapse of nearby Champlain Towers South Condominium Building. [15]

In response, the City ordered the immediate evacuation of Crestview Towers.[16] Residents had but fifteen minutes notice to collect what belongings they could and vacate the building. They have not been allowed to re-occupy their homes since, and are incurring the cost of their homes (e.g., monthly mortgage payments) and the cost for alternative housing ever since, for 28 months and counting now.

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[13] *Id.*, at APP 000200.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Following the City's condemnation order in summer of 2021, the City sent the Association a detailed list of the structural and electrical items necessary to make the property habitable again and for the 40-year and 50-year recertifications to be obtained.[17] To date, those repairs have not been fully completed; the 40-year and 50-year recertifications remain outstanding; the Association has no money or insurance to effectuate necessary repairs; the condemnation order remains in place; owners and residents remain dispossessed; and, in the meantime, Defendants' failure to properly preserve the Property during the condemnation has resulted in further dilapidation and mold growth. [18]

Plaintiffs' Class Certification Experts and Evidence. Plaintiffs filed their class certification motion on April 18, 2023, attaching 20+ exhibits. Besides key documents from Defendants' own files, Plaintiffs also submitted the reports of five experts who opine on common issues, including:

(i) an engineering firm that performed a thorough on-site inspection and identified all of the repairs necessary to obtain the 40-year and 50-year recertifications and to make the property safe and habitable again[19];

(ii) a construction advisory firm that also performed an on-site inspection and, in connection with the engineering report, estimated that the scope of necessary repairs totaled $9,524,531 (notably these repairs would

[17] *Id.*, at APP 000201.

[18] *Id.*

[19] *See generally*, WJE Report (Plaintiffs' Expert), at APP000556 to APP 000583.

have cost markedly less had they been completed years ago when the issues were first identified)[20];

(iii) a professional condominium association manager and consultant to opine on Defendants' deviations from the standards of care[21];

(iv) a mold expert who, following on-site inspection, thoroughly documented mold issues that have arisen since the property's evacuation (e.g., Defendants shut off the air conditioning after July 2021), and estimated the substantial cost of remediation[22]; and

(v) a real estate valuation expert who opines how the Class's economic injuries are subject to a common calculation using common evidence.[23]

Plaintiffs' valuation expert calculates that the Class collectively have lost and continue to lose approximately $217,000 per month in use and rental value of their units. He calculates the cost of repairs to make the building habitable again is in excess of $16 million, whereas the value of the property as vacant is only about $14 million. He also presents an unchallenged common methodology that any class member would use to calculate their further economic losses based on the market value of each unit.

Defendants did not submit *any* expert reports themselves in opposition to class

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[20] *See generally*, JSH Report (Plaintiffs' Expert), at APP000585 to APP 000543.

[21] *See generally*, Aleyanis Report (Plaintiffs' Expert), at APP000784 to APP 000798.

[22] *See generally*, QEC Report (Plaintiffs' Expert), at APP000545 to APP 000771.

[23] *See generally*, Magenheimer Report (Plaintiffs' Expert), at APP000772 to APP000782.

certification; nor did they move to exclude any of Plaintiffs' experts.

Class Certification. The parties extensively briefed class certification and the trial court held a hearing on Plaintiffs' motion on July 20, 2023. The Court granted class certification on July 28, 2023 (the "Original Certification Order"). Plaintiffs moved to revise the order to correct scrivener's errors and, following another hearing, the trial court entered the superseding revised class certification order on October 4, 2023 (the "Revised Certification Order"). The trial court found that Plaintiffs satisfied all of the criteria of Florida Rule of Civil Procedure 1.220(a) & (b)(3). Both orders certified the same class and subclass as follows:

> Class: All persons residing as of July 2, 2021, and all persons currently owning property, in Crestview Towers Condominium Building, located at 2025 NE 164th Street, North Miami Beach, Florida, 33162.
>
> Owners' Subclass: All persons currently owning property in Crestview Towers Condominium Building, located at 2025 NE 164th Street, North Miami Beach, Florida, 33162.[24]

Contrary to Defendants' suggestion (Defs. Br. at 7-9), the Court did not simply adopt Plaintiffs' proposed orders. Rather, the trial court took care to add lengthy verbiage about the trial court's reserving consideration to potentially narrow the Class upon

[24] *See* Revised Order Granting Class Certification Order, at APP 000917 to APP 000920.

determination of issues raised by Defendants, including statute of limitations and other defenses.[25]

[25] *Id.*

SUMMARY OF ARGUMENT

This is the prototypical case for class treatment. The trial court properly certified a class of all unit owners and residents of a single condominium building, who all suffered the same type of harm, arising from the same common course of defense misconduct. Every class member was forcibly dispossessed of their homes, at the same time, because Defendants failed to maintain Crestview Towers. All class members remain physically dispossessed to this day. Certification in these circumstances certainly was not an abuse of discretion.

Trial in this case will use common, predominating evidence focusing on Defendants' actions (or inactions) establishing liability, as well as on the physical condition of the building and the distressed condition of the Association's finances. Common, generally-accepted methodologies exist to value the class's damages. No fundamental conflicts exist between class members; they all share the same interest. A single class trial is superior to the alternative of many individual trials rehashing the same claims and evidence against the same Defendants.

On this appeal, Defendants purport to challenge the trial court's findings on commonality, typicality, adequacy, and predominance. But Defendants really just repackage the same argument as to each of these certification criteria, *viz.*, their incorrect and factually unsupported assertions that individual variations in damages, or vague "individual discrepancies," might exist. Neither defeats certification, nor

rises to abuse of discretion.

Defendants' belated critique of the Revised Certification Order fares no better. The order is more than sufficient. Defendants also had multiple opportunities below to put forth critiques of the order. They failed to do so. Therefore, Defendants waived their belated and insufficient critiques.

Finally, Management 1 and Global's merits- and fact-based arguments are not properly before this Court. Class certification is a procedural matter, not the stage to ultimately decide the merits. Moreover, these arguments themselves present common questions susceptible to common proofs, further demonstrating the appropriateness of certification.

This Court should dismiss the appeal and affirm the trial court's class certification order.

ARGUMENT

This Court should affirm the trial court's decision because Plaintiffs satisfied all the prerequisites Florida Rule of Civil Procedure 1.220(a) & (b)(3), and the trial court committed no abuse of discretion in granting class certification.

I. THE CLASS CERTIFICATION STANDARD

Class certification is appropriate "when the court is faced with a multiplicity of individual actions" and that process "has a real and meaningful position in the administration of justice to address the ever-increasing caseload burden placed upon our trial courts." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 103, 105 (Fla. 2011). To certify a class, a trial court should analyze whether the moving party meets the requirements of Florida Rule of Civil Procedure 1.220(a), and at least one of the requirements of Rule 1.220(b). *Id.* Importantly, doubts should be resolved in favor of certification, especially when additional stages of discovery or pleadings remain, *see id.*, which is the situation here.

Trial courts should only analyze the merits of a case to the extent necessary to determine whether to certify a class. *Id.* However, "[w]hen determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action." *Id.* at 105. If a plaintiff shows that Rule 1.120's requirements are met, it is an abuse of discretion to decline to certify a class.

See Disc. Sleep of Ocala, LLC v. City of Ocala, 245 So. 3d 842 (Fla. 5th DCA 2018).

II. STANDARD OF APPELLATE REVIEW

Plaintiffs agree with Defendants (*see* Defs. Br. at 14) that an abuse of discretion standard applies to this Court's appellate review. *See Pet Supermarket, Inc. v. Eldridge*, 360 So.3d 1201, 1204 (Fla. 3d DCA 2023).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS SATISFIED RULE 1.220(A)

Florida Rule of Civil Procedure 1.220(a) lays out four threshold requirements for certification of a class action: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The trial court found that Plaintiffs satisfied each of these criteria. Defendants' appeal purports to challenge the trial court's ruling as to commonality, typicality, and adequacy (not numerosity).

A. The Trial Court Properly Found That Common Questions of Fact and Law Exist

"The threshold of the commonality requirement is not high." *Sosa*, 73 So.2d at 107. There need only be at least some common issues of fact or law. *Id.* "[E]ven a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (cleaned up). Not every class member must share the same factual and legal predicate. *Sosa*, 73 So.2d at 107.

Here, Plaintiffs' and other class members' claims stem from a common course of conduct. All of their claims focus on Defendants' common course of conduct, namely, their failure to properly maintain the building's physical condition and the Association's financial health. The many common fact and legal questions include, but are not limited to:

- The nature and scope of Defendants' duties to the class members;
- The nature and scope of the structural defects and/or deteriorating physical and related elements at Crestview Towers;
- Defendants' actual or constructive knowledge of the deteriorating conditions at Crestview Towers;
- The condition of the Association's finances;
- Defendants' actual or constructive knowledge of the deteriorating condition of the Association's finances;
- Defendants' failure to obtain the required 40-year and 50-year recertifications, and their knowledge of same;
- The scope and nature of fines imposed due to Defendants' failures that led to code violations; and
- The scope of monetary relief to remedy Defendants' wrongful conduct.

A single one of these common questions would satisfy the commonality requirement. The constellation of these many questions more than satisfies it.

B. The Trial Court Properly Found That Plaintiffs' Claims Are Typical

The typicality requirement under Rule 1.220(a)(3) aims to assure that the interests of named class representatives align with the interests of the class. The "key inquiry for a trial court when it determines whether a proposed class satisfies the typicality requirement is whether the class representative possesses the same legal

interest and has endured the same legal injury as the class members." *Sosa*, 73 So.3d at 102-103, 105. Mere factual differences between a named class representative and other class members' claims will not defeat typicality so long as the there is a substantially factual and legal similarity between them. *Sosa,* 73 So.3d at 114-115.

Plaintiffs' claims and other class members' claims arise from the same facts, and rest on the same legal theories. To wit, each of their claims relates to Defendants' same wrongful conduct, during the same relevant period, about the same physical and financial issues. Plaintiffs seek the same relief as and for other class members. They will rely on the same evidence and types of experts. This satisfies the typicality requirement. *Sosa,* 73 So. 3d at 114-115.

C. The Trial Court Properly Found That Plaintiffs Are Adequate Class Representatives

Rule 1.220(a)(4) requires class representatives to "fairly and adequately protect and represent the interests of each class member of the class." "This inquiry serves to uncover conflicts of interest between the presumptive class representative and the class he or she seeks to represent." *Sosa*, 73 So.3d at 115. This requirement focuses on whether the representatives have any conflicts of interest with the interests of the class, and whether class counsel is capable of representing the class.

Id. Defendants did not challenge the adequacy of class counsel below, and do not challenge it here on appeal.

The trial court properly found Plaintiffs were adequate class representatives. Plaintiffs' interests are coextensive with, and not antagonistic to, those of other class members. Plaintiffs seek the same remedies, for the same wrongs, as each other class member. Plaintiffs seek to share *pro rata* in any recovery for the Class as a whole; they do not stand to recover more than other class members. They have pursued this litigation zealously since inception over two years ago. They have retained qualified, able counsel well-versed in construction, condominium, insurance, and class action law to vigorously represent the interests of the Class.[26] Counsel have engaged five different, highly reputable experts to prosecute claims successfully on behalf of Plaintiffs and the Class.[27] Thus, both Plaintiffs and their counsel will adequately represent the Class.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS SATISFIED RULE 1.220(B)(3)

Rule 1.220(b)(3) requires that common questions of law or fact predominate over individual questions, and that class action treatment is superior to other available methods of adjudication. "Florida courts have held that common questions

[26] *See* Declaration of Plaintiffs' Counsel, APP 000800 to APP 000803.

[27] *See generally*, Plaintiffs' Expert Reports, APP 000556 to APP 000798.

of fact predominate when the defendant acts toward the class members in a similar or common way." *Sosa*, 73 So.3d at 111. "[A] class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact." *Id.* at 112.

Plaintiffs satisfy the predominance requirement because liability questions common to the class substantially outweigh any possible individual issues. The claims of the proposed class representatives and the class are based on the same legal theories and the same conduct. Plaintiffs' and other class members' claims will turn on the same evidence relating to Defendants' common course of conduct that impacted each of them in a similar way. Were Plaintiffs' or other class members' claims to go to trial, the same evidence as to Defendants' conduct would be presented, under the same legal theories. Thus, common fact and legal issues predominate. *See, e.g.*, *Sosa*, 73 So.3d at 113 (predominance satisfied where each class member's individual claims would focus on defendant's conduct or knowledge).

Further, resolution of class members claims through the procedural device of a class action is far superior to individual lawsuits because it promotes consistency and efficiency of adjudication. *See* Fla. R. Civ. P. 1.220(b)(3). Absent certification, potential class members would lack incentive to pursue individual claims due to the relatively small individual amounts at issue. *See Sosa*, 73 So.3d at 116. Indeed,

multiple identical matters already have been filed after this one, including one filed post-class certification.[28]

Individual claims by multiple owners and residents in the same condominium building, against the same Defendants, also would risk inconsistent judgments and unnecessarily result in duplicative effort by, and taxation of resources of, the parties and the court system. *Id.* Given the number of class members who would base their claims on the same alleged common course of conduct by Defendants, "a class action is a more manageable and efficient use of judicial resources than individual claims." *Id.* Further, because one remedy here might end up being the sale of the property (akin to what happened to the property following the tragic Champlain Towers South collapse), class treatment is the only practical way to proceed with a singular sale of the property and an apportionment of the proceeds to all class members.

V. DEFENDANTS' PURPORTED INDIVIDUAL "VARIATIONS" OR "DISCREPANCIES" DO NOT DEFEAT CLASS CERTIFICATION

Defendants' purported challenges on this appeal as to commonality, typicality, adequacy, and predominance, really is just a repackaging of the same argument over and over. That is, Defendants speculate class members' individual

[28] *Arcila v. Crestview Towers Condo. Ass'n, Inc.*, No. 2023-003499-CA-01 (11th Jud. Cir. Ct.); *Mel Trustees, LLC*, *v. Crestview Towers Condo. Ass'n, Inc.*, No. 2021-016735-CA-01 (11th Jud. Cir. Ct.).

damages might vary (something they cannot prove because they did not submit their own damages expert report at class certification), or that vague "individual discrepancies" might exist between class members (again, something they do not prove through their pithy 9 pages of exhibits, half of which are just deposition transcript title pages).

Even if any of the above were true (and it is not), none of it negates Plaintiffs' satisfying each of these Rule 1.220(a) & (b)(3) criteria, or comes close to suggesting the trial court abused its discretion in granting certification.

Defendants cannot seriously contest commonality. Several liability questions relating to Defendants' alleged misconduct that led to the failure to obtain the building certifications and the evacuation and condemnation of the building, are common questions, and will be answered with common proofs. Not every question needs to be common. Commonality is satisfied if a *single* issue question of law or fact exists. *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003). The trial court rightly found Plaintiffs satisfied the commonality criterion.

So, too, with typicality. A class representative's claim is typical if it arises from the same event or pattern or practice and are based on the same legal theory. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984); *see, e.g.*, *Ault v. Walt Disney World Co.,* 692 F.3d 1212, 1216 (11th Cir. 2012) (typicality only requires "a sufficient nexus . . . between the legal claims of the named class

representatives and those of individual class members to warrant class certification"). Plaintiffs have shown this, too. They challenge the same event (the condemnation and evacuation) based on the same predicate facts (Defendants' failures to address dire structural and financial conditions), on the same legal theories (breaches of common-law, contractual, and statutory duties), for the same form of relief (e.g., compensation for all class members' loss of use).

The trial court was right to find Plaintiffs were adequate class representatives. "This inquiry serves to uncover conflicts of interest between the presumptive class representative and the class he or she seeks to represent." *Sosa*, 73 So.3d at 115. Not just any conflict will thwart certification. It must be a "fundamental" conflict, such as where one group of class members suffered harm from challenged conduct but another group benefited from the same conduct. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1275 (11th Cir. 2021).

No fundamental conflict exists here. Each Plaintiff's interests are coextensive with, not antagonistic to, those of other class members. They have zealously pursued this litigation for over two years, and seek a recovery not for themselves, but to be shared proportionally amongst all class members. This satisfies Rule 1.220(a)(4).

Defendants' concoction of an inter-class conflict between unit owners and residents (Defs. Br. at 18-20) is untimely and meritless. Defendants waived this

argument because they never raised it before the trial court below.[29] Waiver aside, not inter-class conflict exists, let alone one precluding certification. All class members, resident or owner, suffered the same harm at the same time, i.e., forcible dispossession. That a sub-class of unit owners suffered further economic harm (i.e., loss of use or rent of their properties for 28 months and counting), does create a conflict. That a jury ultimately might award unit owners more money on account of their greater economic losses does not preclude certification, nor does it put unit owners' interests in conflict with other class members' interests; all class members, owner or not, shares a common interest in vindicating the harm they experienced, however quantified, due to Defendants' wrongdoing that affected all of them. *See, e.g.*, *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, (2d Cir. 2001) (finding no issue with class comprised of different-sized members, some with greater financial interests than others, when all shared common interest in primary theories).

The trial court also rightly found Plaintiffs satisfied predominance. Predominance focuses on the significance of the common issues. *Sosa*, 73 So.3d at

[29] *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999); *see also, e.g.*, *Hamilton v. R.L. Best Int'l*, 996 So.2d 233, 234 (Fla. 1st DCA 2008) ("If the error is one that first appears in the final order, the aggrieved party must bring it to the judge's attention by filing a motion for rehearing."); *Clear Channel Commc'ns, Inc. v. City of N. Bay Village*, 911 So.2d 188, 190 (Fla. 3d DCA 2005) ("The purpose for requiring a contemporaneous objection is to put the trial judge on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it for tactical advantage.").

113 (predominance satisfied where each class member's individual claims would focus on defendant's conduct or knowledge). Plaintiffs have shown this as well. Predominating, common issues include why Defendants failed to perform the necessary repairs; why they did not obtain the 40-year and 50-recertifications; why they suppressed the engineering report from the city; and why they otherwise failed to take actions that ultimately led to the condemnation and evacuation of the building. All of these are subject to common, class-wide proof. Plaintiffs presented four different liability expert reports about the structural repairs overlooked and fiscal mismanagement of Defendants.[30] These experts opine on the various common issues pervading this case.

Damages, too, are susceptible to common proof. Plaintiffs presented the uncontested expert declaration of their real estate valuation expert, Andrew H. Magenheimer, MAI, of Slack, Johnston & Magenheimer.[31] Plaintiffs, through Mr. Magenheimer, present a common damages methodology that, when applied on a class-wide basis, will show the diminution in value of each unit, whether recently purchased or not.[32] Defendants neither presented their own damages expert at class

[30] *See* Plaintiffs' Expert Reports (excluding Magenheimer Report), APP 000556 to APP 000771 and APP 000783 to APP 000798.

[31] *See* Magenheimer Report (Plaintiffs' Expert), APP 000772 to APP 000782.

[32] *Id.*

certification, nor moved to exclude Plaintiff's damages expert.

That some variations in damages may exist between class members (e.g., different diminutions in value due to units' different sizes) does not defeat class certification. *See, e.g.*, *Concert Plantation, LLC v. Dorso*, 352 So.3d 914, 917 (Fla. 2d DCA 2022) (possible variations in damages "is not a basis to reject certification"); *Morgan v. Coats*, 33 So.3d 59, 65 (Fla. 2d DCA 2010) (differences among class member went to the determination of each class member's damages rather than to the elements of the claims"); *see also Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (differences in damages do not defeat class certification).

Defendants' hodgepodge of "individual discrepancies" does not defeat certification under any of the Rule 1.220(a) & (b)(3) elements. Their first "discrepancy" is that class members might possess differing "prior knowledge" of unspecified structural defects. Defs. Br. at 16. As an initial matter, this is not a hidden defect case, so 'knowledge' of unspecified structural defects or the Association's financial distress is neither an element nor a defense to Plaintiffs' claims. Assuming this is an oblique reference to a statute of limitations defense, it is of no moment. Even if there were a limitations issue (and there is not, because each class member's claim accrued upon evacuation in July 2021, mere days before Plaintiffs initiated this action), "[c]ourts consistently hold, however, that the statute of limitations does not bar class certification, even when individual issues are certain

to exist." *In re Checking Account Overdraft Litig.,* 307 F.R.D. 630, 651 (S.D. Fla. 2015). In any event, the ultimate merits-based success of a potential defense does not preclude the procedural certification of a class.[33] Also, when class members' accrued is a common fact and legal question. *Id.*

Defendants' suggestion that some class members may have contributed to the Association's financial straits by not timely paying all dues and assessments (Defs. Br. at 17), does not defeat class certification, either. One party's purported failure does not absolve another party (e.g., Defendants) of its own independent duties (e.g., Defendants' independent duties to take appropriate steps to maintain the property and finances). Further, "[u]nique defenses rarely predominate where a common course of conduct is shown." *In re Checking Account Overdraft Litig.*, 307 F.R.D. at 646. The existence of affirmative defenses does not undermine the predominance of the common issues. *Concert Plantation*, 352 So.3d at 917. "Like damages, affirmative defenses are often easy to resolve, and district courts have several tools available to manage them."[34] At best, Defendants' unsupported accusations about

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[33] *See, e.g.*, *In re Parmalat Secs. Litig.*, 2008 WL 3895539, at *5 (S.D.N.Y. Aug. 21, 2008) ("it is beyond reasonable dispute that a representative may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him that would not impact other class members.").

[34] *In re Scientific Atlanta, Inc. Secs. Litig.*, 517 F. Supp. 2d 1315, 1327-28 (N.D. Ga. 2007) (quotations and citations omitted); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under [the comparable federal rule governing class

non-payment of fees or dues goes to the amounts of individual damages, not the fact of damage, which does not defeat class certification. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (potential offsets to damages do not preclude certification).

Defendants' final contention, that unit owners are suing themselves here because any recovery may be passed along to unit owners by way of additional assessments (Defs. Br. at 2), also falls flat. This position is tantamount to Defendants' saying they enjoy absolute immunity from individual or class suit by any unit owner or resident.

This is legally untenable. Case after case holds that a condominium unit owner or resident may assert claims, individually or on behalf of a class, against a condominium association (or its agents) where, as here, the association has breached its contractual, statutory, and common-law duties owed to all unit owners or residents.[35] Indeed, the trial court below rejected this very argument multiple times

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actions, Fed. R. Civ. P. 23(b)(3),] even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (*quoting* 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–124 (3d ed. 2005) (footnotes omitted))).

[35] *See, e.g.*, *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So.2d 1121, 1124 (Fla. 1988) (certifying class facing same challenged rental increase); *Iezzi Family Ltd. P'ship v. Edgewater Beach Owners Ass'n, Inc.,* 254 So.3d 584, 587 (Fla. 1st DCA 2018) ("Many courts have permitted condominium unit owners to seek equitable relief from their associations and directors, especially when the alleged injury is to common areas of the condominium"); *Rogers & Ford Const. Corp. v. Carlandia Corp.*, 626 So.2d 1350, 1354 (Fla. 1993) ("Appellate

at the motion to dismiss stage in interlocutory orders that Defendants do not (and cannot) challenge on appeal, and which are not properly before this Court.

Were the Association and other Defendants correct, then no action, individual or class, by a unit owner or resident could proceed against a condominium association. That certainly is not the law, and the Association cites none for its novel proposition.[36] Courts also routinely grant class certification in analogous contexts where owners are wrongly said to be "suing themselves."[37]

VI. AMPLE RECORD EVIDENCE SUPPORTS THE TRIAL COURT'S CLASS CERTIFICATION ORDER

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decisions indicate that actions with respect to common areas or common elements of condominiums have been brought either as class actions, derivative actions, or by a unit owner joined by the condominium association and/or other unit owners."); *Imperial Towers Condominium, Inc. v. Brown*, 338 So.2d 1081 (Fla. 4th DCA 1976) (certifying class of condominium unit owners).

[36] Even if Defendants were correct (and they are not), their gripes would be *common* legal questions applicable to all class members, and supportive of class certification here.

[37] *See, e.g.*, *Shores v. Publix Super Mkts.*, Case No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *10 (M.D. Fla. Mar. 12, 1996) (certifying class of employees of defendant Publix Super Markets, despite defendant's argument that "many of the purported class members are shareholders of Publix and would therefore be suing themselves." The Court explicitly held that this was of no concern.); *see also In re Southeastern Milk Antitrust Litig.*, No. 08-md-1000, 2010 WL 3521747 (E.D. Tenn. Sept. 7, 2010) (certifying class of dairy farmers suing their own farmer-owned cooperative for breach of contract and other claims); *Freedom Life Ins. Co. of Am. v. Wallant*, 891 So.2d 1109, 1117 (Fla. 4th DCA 2004) (affirming certification of (b)(2) class where defendant sought to enforce same insurance contract clause in the same manner against all class members).

Defendants are simply incorrect that the Revised Certification Order lacks "sufficient findings." *See* Defs. Br. at 24-25. The trial court had ample fact and expert evidence on which to base its finding that Plaintiffs satisfied the criteria of Rule 1.220(a) & (b)(3). Plaintiffs submitted 590 pages of exhibits with their class certification motion. Among these exhibits were (i) five expert reports,[38] each of which, in turn, attached and relied upon many more exhibits; (ii) defense documents establishing each Defendant's respective duties and obligations vis-à-vis the building's physical condition and the Association's finances; and (iii) defense documents demonstrating Defendants' collective failure to obtain the recertifications and their concealment of same, all of which ultimately led to the condemnation and evacuation of the building.

In granting class certification, the trial court had the benefit of this ample record, as well as the parties' many pages of briefing on the original motion for class certification and the motion to revise it, and two separate hearings at which Defendants had every opportunity to argue their positions.

[38] Notably, Defendants did not submit a single expert report in opposition to class certification. Nor did Defendants move to exclude any of Plaintiffs' experts.

Defendants, on the other hand, did not submit a single expert report in opposition to class certification. Their collective fact exhibits totaled a mere nine pages, half of which are just deposition transcript title pages.[39]

More importantly, never in Defendants' four briefs or during the two separate hearings did they take issue with the verbiage of Plaintiffs' proposed orders, or the trial court's Original and Revised Certification Orders. Having not raised this issue with the trial court, Defendants waived their ability to argue "lack of sufficient findings" on appeal to this Court.[40]

Regardless, there is no requirement, and Defendants cite none, that a trial court must tediously catalogue all of the unrebutted fact and expert evidence that supports its findings. The Revised Certification Order properly identifies the pertinent elements; notes that the Court reviewed all of the parties' pleadings and evidence and heard oral argument; and rightly found that Plaintiffs' satisfied Rule 1.220(a) & (b)(3). This suffices. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 315 (3d Cir. 2011) (en banc) ("No particular format is necessary in order to meet the substantive requirement of Rule 23(c), and we will not set aside substantively conforming certification orders purely over matters of form.") (cleaned up).

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[39] *See* APP 000820 to APP000829 (Exhibit A to Defendants' Joint Amended Response in Opposition to Certification).

[40] *Dade Cty.*, 731 So. 2d at 640; *Hamilton*, 996 So.2d at 234; *Clear Channel*, 911 So.2d at 190.

VII. THE MANAGEMENT COMPANIES' MERITS- AND FACT-BASED ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT, AND ARE BASELESS

Management 1 and Global's two merits-based arguments about whether they owe duties to Plaintiffs and the statute of limitations (*see* Defs. Br. at 26-31), should be disregarded out of hand because they are procedurally improper and without any basis.

As an initial matter, Management 1 and Global's merits- and fact-based arguments are not properly before this Court. Management 1 raised these same arguments in a motion to dismiss, which the trial court denied.[41] Management 1 did not appeal that order, nor could it as the order was interlocutory and non-appealable. *See, e.g.*, *Southwinds Riding Academy v. Schneider*, 507 So.2d 782, 783 (Fla. 3d DCA 1987). After setting aside a clerk's default,[42] Global never even filed a motion to dismiss, but rather accepted the trial court's denial of Management 1's motion to dismiss and filed an answer.[43] Thus, Management 1's and Global's merits-based arguments, about whether they owe duties to Plaintiffs and about the statute of

[41] *See Camita Bresilla et al. v. Crestview Towers Condominium Association, Inc. et al*, 2021-017867-CA-01, Docket Entry No. 197.

[42] *See id.*, at Docket Entry No. 201.

[43] *See id.*, at Docket Entry No. 202.

limitations, are beyond the scope of this Court's appellate review of the trial court's class certification order.

Even if Management 1's and Global's merits arguments were properly before this Court (or the trial court below at class certification, for that matter), it would be inappropriate to consider them. "When determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action." *Sosa v. Safeway Premium Finance Co.*, 73 So.3d 91, 105 (Fla. 2011); *Reese v. Miami–Dade County*, 209 F.R.D. 231, 232 (S.D. Fla. 2002) ("Class certification is strictly a procedural matter and the merits of the claims at stake are not considered when determining the propriety of the class action vehicle."). The question that was before the trial court, the answer to which this Court now reviews for abuse of discretion only, was whether Plaintiffs satisfied the criteria of Florida Rules of Civil Procedure 1.220(a) & (b)(3).

Whether Management 1 and Global owe duties to Plaintiffs, and the statute of limitations, are all ultimate merits determinations for a jury, or ultimate legal questions for the trial court. But these are not proper matters for the trial court's or this Court's consideration now. At this stage, the only issue is whether there are common questions that would be answered with common evidence. As the Florida Supreme Court has put it: "[a]t the class certification stage, the inquiry does not focus on whether the class representatives will prevail at trial." *Sosa*, 73 So.3d at

105. As this Court has added: "Instead, the focus is on whether a litigant's claim is suited for class certification and whether the proposed class provides a superior method for the fair and efficient adjudication of the controversy." *Porsche Cars N. Am., Inc. v. Diamond*, 140 So.3d 1090, 1095 (Fla. 3d DCA 2014) (quotations and citation omitted).

Even if Management 1's and Global's merits arguments were properly considerable before the trial court or now before this Court (and they were and are not), both arguments fail. The case on which Defendants rely, *Greenacre Properties, Inc. v. Rao*, 933 So.2d 19 (Fla. 2d DCA 2006), merely held that a condominium unit owner may not assert a breach of contract claim against a property management company based on the language of the contract at issue there. But Plaintiffs here do not allege such a claim. As Florida appellate courts have repeatedly held (and as the trial court held below), condominium unit owners may assert a negligence claim against a property management company where physical impact has occurred to the plaintiff or her property.[44]

As to statute of limitations, the triggering event for Plaintiffs' claims was the

[44] *See, e.g.*, *San Pedro v. Claridges Condominium, Inc.*, 125 So.3d 269, 270-71 (Fla. 4th DCA 2013); *see also Middleton v. Don Asher & Assocs., Inc.*, 262 So.3d 870, 871-72 (Fla. 5th DCA 2019) (reversing summary judgment for defendant association and property manager in negligence action brought by resident against association and property manager); *Firstservice Residential Fla., Inc. v. Rodriguez*, 261 So. 3d 674, 675 (Fla. 5th DCA 2018) (condominium owner suit against "property management company that managed the condominium property at the time").

condemnation and emergency evacuation of the Crestview Towers building on July 2, 2021. Plaintiffs commenced this action just a couple weeks later, on July 22, 2021. Further, Defendants concealed the true nature of the building's physical condition, including suppression of a January 2021 engineering report that catalogued the building's structural and electrical problems. Defendants did not disclose this report to the City of North Miami Beach (or anyone else) for months until June 24, 2021. A week later, the City condemned the building and evacuated all residents. To this day Plaintiffs and other Class Members remain dispossessed of their homes. Clearly, the limitations period has not run on Plaintiffs' and other Class Members' claims. Management 1 and Global's disagreement with this merely presents a fact question[45]—one common to the entire class—which does not prohibit class certification, let alone rise to an abuse of discretion.

[45] *See, e.g.*, *Mobley v. Homestead Hosp., Inc.*, 291 So.3d 987, 991-92 (Fla. 3d DCA 2019) (disputed issues of material fact precluded summary judgment on statute of limitations).

CONCLUSION

WHEREFORE, for the reasons set forth above, Appellees respectfully ask this Court to affirm the trial court's decision to granting class certification, dismiss the appeal, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November 2023, a true and correct copy of the foregoing was filed with the Clerk of Miami-Dade County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system: David C. Borucke, Barry A. Postman, Matthew A. Green, COLE, SCOTT & KISSANE, P.A., 500 N. Westshore Blvd., Suite 800, Tampa, Florida 33607, 813.289.9300, david.borucke@csklegal.com,barry.postman@csklegal.com,matthew.green@csklegal.com; and David B. Israel, Eric J. Israel, ISRAEL, ISRAEL & ASSOCIATES, P.A., 6099 Stirling Rd., Suite 211, Davie, FL 33314, 954.495.8602, disrael@israellawfl.com , ejisrael@israellawfl.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief uses the Times New Roman 14 font and is comprised of 7,975 words.

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