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IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD CIRCUIT

CASE NUMBER 3D2024-0254
Lower Tribunal Case Number: 2022-044774-CC-23

OSWALDO VIEIRA ABREU,

Defendant/Appellant,

v.

BONITA VILLAS CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff/Appellee.
___________________________________/

On Appeal from Non-Final Order
of the County Court for the Eleventh Judicial Circuit
of Florida, In and For Miami-Dade County

ANSWER BRIEF OF APPELLEE BONITA VILLAS CONDOMINIUM ASSOCIATION, INC.

IGLESIAS LAW GROUP, P.A.
Counsel for Appellee
15800 Pines Boulevard
Third Floor
Pembroke Pines, FL 33027
(954) 362-5222

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Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

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Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

PREFACE

In this Brief, BONITA VILLAS CONDOMINIUM ASSOCIATION, INC., shall be referred to as "Appellee," "Plaintiff," or "Association".

OSWALDO VIEIRA ABREU shall be referred to as "Appellant" or "Defendant".

The Following symbols will be used for citation:

(A) for the Appendix to Answer Brief

(IB) for the Initial Brief of Appellant

STATEMENT OF THE CASE

This case was initiated by Appellee on November 4, 2022, with the filing of Appellee's Complaint for Foreclosure to foreclose upon the lien on Appellant's property due to his failure to pay assessments pursuant to Appellee's Declaration of Condominium and Chapter 718 of the Florida Statutes. (A – 10). On November 30, 2023, Appellee filed its Revised Motion for Final Summary Judgment of Foreclosure. (A –28). On December 6, 2023, the Lower Tribunal issued a Notice of Special Set Hearing setting an in-person bench trial for January 31, 2024, and setting Appellee's Motion for Summary Judgment for hearing on January 9, 2024. (A – 41). On January 4, 2024, Appellant filed his Emergency Motion to Deposit in the Registry of the Court Invoking the Equal Rights Provision(s) Pursuant to Article 13.3 of the Governed Declaration Document(s) of Bonita Villas Condominium Association Inc, Specifically in the Mandatory Part Expiration Stipulation Before

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

Any Final Judgment of Foreclosure is Enter [sic]. (A – 43). Said Motion was not set for hearing prior to the January 9, 2024, hearing on Appellee's Motion for Summary Judgment. At the January 9, 2024, hearing, the Lower Tribunal granted summary judgment in favor of Appellee, also finding entitlement to attorneys' fees and costs, and denied Appellant's Emergency Motion regarding depositing into the Registry of the Court, with an order stating same being entered on January 12, 2024. (A – 4). Notably, the Lower Tribunal did not enter its final judgment, as it desired to first hear and rule upon Appellee's claimed amounts for attorneys' fees and costs. On January 16, 2024, Appellant filed his Emergency Motion for Reconsideration of January 12, 2024, Court Order Denying Defendant Emergency Motion to Deposit in the Registry of the Court All Unpaid Assessments and Special Assessments Pursuant Florida Rule 1.600 and Pursuant Article 13.3 of the Governing Documents of Bonita Villas Condominium Association Inc [sic]. (A – 206). Also on January 16, 2024, Appellant filed his Emergency Motion for Clarification January 12, 2024 Court Order [sic]. (A – 213). On January 19, 2024, the Lower Tribunal specially set a hearing on Appellant's Emergency Motions for Reconsideration and Clarification. (A – 218). On February 8, 2024, Appellant filed his Notice of Appeal. (A – 221). On February 20, 2024, the Lower Tribunal entered its Order on Defendant's Motion for Reconsideration and Motion for Clarification, granting reconsideration, in part, as to Appellant's ability to deposit funds, voluntarily, into the registry of the Court;

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

all other aspects of Appellant's Motions for Reconsideration and Clarification were denied. (A – 225). To date, Appellant has placed no funds into the registry of the Circuit Court. For the reasons stated herein below, the Orders of the Lower Tribunal must be affirmed.

SUMMARY OF THE ARGUMENT

Appellant has appealed the Lower Tribunal's January 12, 2024, Order on Motion for Final Summary Judgment of Foreclosure, which denied Appellant's January 4, 2024, Emergency Motion to Deposit in the Registry of the Court Invoking the Equal Rights Provision(s) Pursuant the Article 13.3 of the Governed Declaration Document(s) of Bonita Villas Condominium Association Inc, Specifically in the Mandatory Part Expiration Stipulation Before Any Final Judgment of Foreclosure is Enter [sic] (hereinafter the "Emergency Motion to Deposit"); granted judgment in favor of Appellee, including entitlement to attorneys' fees and costs; required the setting of an evidentiary hearing to determine the amount of attorneys' fees and costs; and stated that a final judgment would be entered once the award of attorneys' fees was determined. (A – 4). It appears, however, that the only portion of the Lower Tribunal's January 12, 2024, Order on Motion for Final Summary Judgment

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

of Foreclosure with which Appellant takes umbrage is the denial of his Emergency Motion to Deposit.[1] (A – 221).

Appellant appears to be under the misconception that Section 13.3 of the Declaration of Bonita Villas Condominium permits him to avoid his responsibility and liability for reimbursing Appellee's attorneys' fees and costs incurred in collecting his delinquent assessments by simply paying the assessments and accrued interest owed before the entry of a final judgment of foreclosure. (IB – 6, 7, 13-18). The Lower Tribunal initially denied Appellant's attempts to avoid responsibility for Appellee's attorneys' fees by paying the delinquent assessments and interest into the registry of the Circuit Court (A – 4). Following a hearing on Appellant's January 16, 2024 Emergency Motion for Reconsideration of January 12, 2024, Court Order Denying Defendant Emergency Motion to Deposit in the Registry of the Court All Unpaid Assessments and Special Assessments Pursuant Florida Rule 1.600 and Pursuant Article 13.3 of the Governing Documents of Bonita Villas Condominium Association Inc [sic] (hereinafter, the "Motion for Reconsideration"), the Lower Tribunal issued an order stating that Appellee could voluntarily make payments into the registry of the Circuit Court. (A – 226). Notably, however, the Lower Tribunal

[1] Appellant's Initial Brief, however, states, at Page 4, that he seeks review of "two orders entered by the Circuit Court on January 12, 2024." It is unclear what "other order" Appellant is seeking review of, as only one Order was entered by the Lower Tribunal on January 12, 2024 – the Order on Motion for Final Summary Judgment of Foreclosure.

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

did not rule that payment into the registry of the Circuit Court would relieve Appellant of any obligation to reimburse Appellee's attorneys' fees and costs.

The depositing of funds into the registry of the Circuit Court will not allow Appellant to avoid his responsibility for the reasonable attorneys' fees and costs incurred by Appellee in the case below.

ARGUMENT

I. THE STANDARD OF REVIEW

The Standard of review of an order denying a motion to deposit funds into the registry of the court is *de novo*. *First States Inv'rs 3300, LLC v. Pheil*, 52 So. 3d 845, 848 (Fla. 2d DCA 2011) (citing *Baillargeon v. Sewell,* 33 So.3d 130, 136 (Fla. 2d DCA 2010)). While Appellee disagrees that this appeal is seeking review of the Lower Tribunal's order granting Summary Judgment, the same *de novo* standard of review is applicable. (A – 221). *Fini v. Glascoe*, 936 So. 2d 52, 54 (Fla. 4th DCA 2006). (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000)).

II. APPELLANT FAILED TO PRESERVE A RECORD FOR REVIEW

Aside from the Lower Tribunal's Order which is being appealed in this matter, the Record is void of any transcript of the summary judgment hearing at which the Lower Tribunal also initially denied Appellant's Emergency Motion to Deposit. Consequently, it is impossible for this Court to determine what evidence supporting

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

Appellant's attempt to avoid attorneys' fees and costs via a payment into the court registry, if any, was properly before the Lower Tribunal, as well as the arguments relating thereto.

"The appellate court is a court of review, not simply another forum to which the dissatisfied litigant may submit his or her list of grievances in hopes of a more favorable outcome." *Thomas v. State*, 89 So. 3d 300, 301 (Fla. 1st DCA 2012). *See, Chain Store Warehouses v. Picard*, 431 So. 2d 685, 687 (Fla. 1st DCA 1983) ("The need to preserve our role as a court of review, limited to deciding issues of law first presented to a deputy, requires that the award be affirmed for want of a significant contest on the issue below.")

III. THE LOWER TRIBUNAL WAS NOT REQUIRED TO ORDER PAYMENT OF ASSESSMENTS INTO THE COURT'S REGISTRY

Generally, payment of money-in-controversy into the registry of the court is governed by Rule 1.600 of the Florida Rules of Civil Procedure. *Fernandez v. Olsavsky*, 722 So. 2d 953, 954 (Fla. 4th DCA 1998). A trial court has broad discretion in deciding whether to permit a deposit into the court registry as well as deciding whether to grant a withdrawal from the registry. *First States Inv'rs 3300, LLC v. Pheil*, 52 So. 3d 845, 848 (Fla. 2d DCA 2011) (citing *Pomponio v. Claridge of Pompano Condo., Inc.,* 378 So.2d 774, 780 n. 39 (Fla.1979)). See also, *Tixe Designs, Inc. v. Green Ice, Inc.*, 207 So. 3d 348, 349 (Fla. 3d DCA 2016). This Court has previously held that Rule 1.600 "is **permissive in nature** and does not

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

permit the trial court to enter an order compelling an unwilling party to deposit a disputed sum into the court's registry." *Fiscal Operations, Inc. v. Metro. Dade Cnty.*, 808 So. 2d 1287, 1288 (Fla. 3d DCA 2002) (emphasis added) (citing *Leon v. Franchise Stores Realty Corp.,* 549 So.2d 822, 823 (Fla. 4th DCA 1989)). This Court has also previously held that where an amount owed was contested by the parties, Rule 1.600 of the Florida Rules of Civil Procedure "**affords the trial court broad discretion in accepting or rejecting the** Tenant's **voluntary deposit** of its rent **into the court's registry**." *Tixe Designs, Inc. v. Green Ice, Inc.*, 207 So. 3d 348, 350–51 (Fla. 3d DCA 2016) (emphasis added).

Here, the Lower Tribunal initially denied Appellant's Emergency Motion to Deposit (A – 3), and then subsequently granted Appellant's Motion for Reconsideration, permitting Appellant to voluntarily deposit the funds in controversy into the registry of the Circuit Court (A – 226), and rendering his Notice of Appeal moot. Even assuming, *arguendo*, that the Lower Tribunal had denied Appellant's Motion for Reconsideration, there was no error committed, as the Lower Tribunal has broad discretion in accepting or rejecting the voluntary deposit. *Tixe Designs, Inc.* at 350–51 (Fla. 3d DCA 2016).

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

IV. APPELLANT IMPROPERLY RELIES UPON THE LANGUAGE OF THE DECLARATION

Appellant's entire basis for his appeal appears to be based upon an incorrect interpretation of Section 13.3 of Appellee's Declaration of Condominium (hereinafter, the "Declaration"), which states:

> Notice of intention to Foreclose Lien. No foreclosure judgment may be entered until at least thirty (30) days after the Association gives written notice to the Unit Owner of its intention to foreclose its lien to collect the unpaid Assessments and Special Assessments. **If this notice is not given at least thirty (30) days before the foreclosure action is filed, *and* if the unpaid Assessments and Special Assessments, including those coming due after the claim of lien is recorded, and other sums permitted hereunder are paid before the entry of a final judgment of foreclosure, the Association shall not recover attorney's fees or costs**. The notice must be given by delivery of a copy of it to the Unit Owner or by certified or registered mail, return receipt requested, addressed to the Unit Owner at the last known address, and upon such mailing, the notice shall he deemed to have been given, and the court shall proceed with the foreclosure action and may award attorneys' fees and costs as permitted by law. If after diligent search and inquiry the Association cannot find the Unit Owner or a mailing address at which the Unit the Owner will receive the notice, the court may proceed with the foreclosure action and may award attorney's fees and costs as permitted by law. The notice requirements of this subsection arc satisfied if the Unit Owner records a Notice of Contest of Lien as provided in the Act and shall not apply if an action to foreclose a mortgage on the Unit is pending before any court, if the Association's rights would be affected by such foreclosure, and if actual, constructive or substitute service of process has been made on the Unit Owner. (emphasis added)

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

(A – 243).

Of note, the language of this section appears to mirror that which was present in the 1996 version of Florida Statute §718.116(6)(b), which was in effect at the time Appellee's Declaration was recorded in August of 1996. Appellant's argument appears to be that he can avoid paying Appellee's attorneys' fees and costs as the prevailing party in the action below by simply paying the amounts of his past-due assessments, and interest accrued thereon, into the registry of the Circuit Court before the Lower Tribunal issues its final judgment in the matter. (IB – 6, 7, 13-18), (A – 55-60), and (A – 207-209). This is simply not the case, as Appellee has complied with both the requirements of Chapter 718 of the Florida Statutes and the requirements of its Declaration. Additionally, Appellant has overlooked or chosen to ignore the fact that both the Florida Statute §718.116(6)(b) (both circa 1996 and present) and Section 13.3 of Appellee's Declaration require a two-prong test, both of which must be satisfied in order to avoid the payment of attorneys' fees and costs.

A. SUFFICIENT NOTICE WAS PROVIDED TO APPELLANT

Section 13.3 of Appellee's Declaration, as well as the 1996 version of Florida Statute §718.116(6)(b), requires at least thirty (30) days' written notice of Appellee's intention to foreclose its lien upon a Unit for unpaid assessments. (A – 243). In addition, the present, operative version of Florida Statute §718.116(6)(a) and (b) provide, in pertinent part:

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

> (a) The association may bring an action in its name to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed and may also bring an action to recover a money judgment for the unpaid assessments without waiving any claim of lien. **The association is entitled to recover its reasonable attorney's fees incurred in either a lien foreclosure action or an action to recover a money judgment for unpaid assessments.**
> (b) No foreclosure judgment may be entered until **at least 45 days after the association gives written notice** to the unit owner of its intention to foreclose its lien to collect the unpaid assessments. […]
> **If this notice is not given at least 45 days before the foreclosure action is filed, *and* if the unpaid assessments, including those coming due after the claim of lien is recorded, are paid before the entry of a final judgment of foreclosure, the association shall not recover attorney fees or costs**. The notice must be given by delivery of a copy of it to the unit owner or by certified or registered mail, return receipt requested, addressed to the unit owner at his or her last known address; and, upon such mailing, the notice shall be deemed to have been given, and the court shall proceed with the foreclosure action and may award attorney fees and costs as permitted by law. The notice requirements of this subsection are satisfied if the unit owner records a notice of contest of lien as provided in subsection (5). The notice requirements of this subsection do not apply if an action to foreclose a mortgage on the condominium unit is pending before any court; if the rights of the association would be affected by such foreclosure; and if actual, constructive, or substitute service of process has been made on the unit owner. (emphasis added)

Here, Appellee provided Appellant with sufficient notice of its intent to file a lien against Appellant's condominium Unit, sending written notice to Appellant on June 17, 2022, of the Association's intent to record a Claim of Lien against the Unit

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

no sooner than forty-five (45) days after receipt of the letter unless the arrearage was paid in full. (A – 22). Appellee recorded its Claim of Lien on August 30, 2022, sixty-four (64) days after sending Appellant the written notice of its intent to do so. (A – 27). On August 30, 2022, the same date that the lien was recorded, Appellee sent written notice to Appellant that it intended to foreclose upon its lien within forty-five (45) days of the notice being provided to Appellant. (A – 24). Appellee's Complaint for Foreclosure was then filed in the County Court of Miami-Dade County on November 4, 2022, sixty-six (66) days after sending Appellant the written notice of its intent to do so. (A – 10, 14).

Pursuant to both Section 13.3 of its Declaration and Florida Statute §718.116(6)(b), Appellee provided more than sufficient notice to Appellant of its intent to place a lien upon his Unit and then foreclose upon same, allowing him ample time to pay the arrearage and bring his balance to zero in order to avoid the foreclosure of his Unit.

B. PAYMENT ALONE IS INSUFFICIENT

The second requirement of Section 13.3 of Appellee's Declaration, as well as both the 1996 and present version of Florida Statute §718.116(6)(b), in order to avoid the responsibility and liability of paying the Association's reasonable attorneys' fees and costs in an action to foreclose upon a Unit for unpaid assessments is "payment of the unpaid assessments, including those coming due after the claim

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

of lien is recorded." (A – 243). As stated previously, however, payment of these arrearages alone is insufficient.

1. THE WORD "AND"

The presence of the word "and" in Section 13.3 of Appellee's Declaration, as well as both the 1996 and present version of Florida Statute §718.116(6)(b) is crucial. The Florida Supreme Court has recently altered its view regarding the interpretation of statutes, holding:

> The United States encourages us to use an approach that is often linked to a passage from our Court's decision in *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931)). There we said that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction." In practice, following this maxim often leads the interpreter to focus on a disputed word or phrase in isolation; the maxim also leaves the interpreter in the dark about how to determine whether a particular word or phrase has a clear meaning.
>
> We believe that the *Holly* principle is misleading and outdated. More recently our Court has said that judges must "exhaust 'all the textual and structural clues' " that bear on the meaning of a disputed text. *Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022) (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021)). That is because "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

> Viewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end (recognizing that some canons, like the rule of lenity, by their own terms come into play only after other interpretive tools have been exhausted). It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a "plain" or "clear" meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute.

Conage v. United States, 346 So. 3d 594, 598 (Fla. 2022).

Here, the language at issue reads: "**If** this **notice is not given** at least 30 days before the foreclosure action is filed, ***and*** **if** the **unpaid assessments**, including those coming due after the claim of lien is recorded, **are paid before the entry of a final judgment** of foreclosure, **the association shall not recover attorney fees or costs**." (emphasis added) (A – 243). Meriam-Webster provides several definitions for the word "and," with the most pertinent being "a logical operator that **requires both of two inputs to be present or two conditions to be met** for an output to be made or a statement to be executed," (emphasis added). Admittedly, the word "and" can be used to join together more than just two words or phrases, but as it concerns the language of Section 13.3 of Appellee's Declaration and both the 1996 and present versions of Florida Statute §718.116(6)(b), the above-cited definition is fully applicable.

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

In order for a condominium unit owner to avoid liability for attorneys' fees and costs related to their association's actions to recover unpaid assessments, there are two conditions which must be met: 1) the association must fail to give timely written notice of its intent to foreclose upon its lien for the unpaid assessments, with the notice being given at least forty-five (45) days[2] before the initiation of litigation; **and** 2) the unit owner must pay the full amount of the unpaid assessments, including those which come due after the recording of the claim of line, before a final judgment is entered.

Here, Appellant claims that he desires to pay the full amount of unpaid assessments and the interest which has accrued thereon into the registry of the Circuit Court. (A – 60-61). Because the notice of Appellee's intent to foreclose upon its recorded claim of lien for unpaid assessments was timely given sixty-six (66) days prior to the initiation of the foreclosure action below, Appellant's desire and/or attempt to pay[3] the unpaid assessments and interest into the Circuit Court registry is irrelevant.

The Florida legislature's use of the word "and" when drafting both the 1996 and present versions of Florida Statute §718.116(6)(b) was deliberate. By simply

[2] Thirty (30) days pursuant to the 1996 version of Florida Statute §718.116(6)(b) and Section 13.3 of Appellee's Declaration.

[3] As of the date of this Answer Brief, Appellant has failed to deposit any funds into the registry of the Circuit Court, despite his Motion for Reconsideration being granted by the Lower Tribunal. (A – 6)

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

relying upon the plain meaning of the word, it is clear that the legislature desired for both requirements – the untimely giving of a written notice of intent to foreclose and the full payment of the unpaid assessments prior to the entry of final judgment – to be met in order to absolve a condominium unit owner of responsibility for the association's attorneys' fees and costs for bringing an action to collect those unpaid assessments. Empowering an owner to prevent an association, which has fully complied with the requirements of Chapter 718 of the Florida Statutes and its Governing Documents, from being able to recover its attorneys' fees and costs expended in collecting the unpaid assessments owed to it simply by paying those collection amounts at the eleventh hour before the entry of a final judgment would be inequitable and defies the spirit of the statute, which expressly states that "[t]he association is entitled to recover its reasonable attorney's fees incurred in either a lien foreclosure action or an action to recover a money judgment for unpaid assessments." Florida Statute §718.116(6)(a).

CONCLUSION

For the reasons set forth herein above, Appellee, BONITA VILLAS CONDOMINIUM ASSOCIATION, INC., respectfully requests that this Honorable Court affirm the Lower Tribunal's orders.

Iglesias Law Group, P.A.
15800 Pines Boulevard, Third Floor, Pembroke Pines, FL 33027
Telephone: (954) 362-5222 Facsimile: (954) 362-5210

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief was served upon all interested parties via U.S. Mail directed to **Oswaldo Vieira Abreu** at his last-known address of 14273 Southwest 120th Court, Miami, FL 33186 on this 5th day of July, 2024.

/s/ *Joshua W. Rosenberg*
DAVID D. IGLESIAS, ESQ.
Florida Bar No. 21002
JOSHUA W. ROSENBERG, ESQ.
Florida Bar No. 88804

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rules 9.045(b) and (e) of the Florida Rules of Appellate Procedure that the above and foregoing computer-generated Answer Brief complies with the word count, font, and spacing requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Joshua W. Rosenberg*
DAVID D. IGLESIAS, ESQ.
Florida Bar No. 21002
JOSHUA W. ROSENBERG, ESQ.
Florida Bar No. 88804