

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE No. 3D23-1904

ROBERT G. RISMAN, TRUSTEE, *et al.*,

Appellants,

v.

SEASIDE VILLAS CONDOMINIUM ASSOCIATION (FISHER ISLAND),
and
159 FISHER ISLAND HOLDINGS, LLC,

Appellees.

ANSWER BRIEF
OF APPELLEE 159 FISHER ISLAND HOLDINGS, LLC

ON APPEAL FROM A FINAL SUMMARY JUDGMENT ENTERED IN THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	2
TABLE OF CITATIONS.....	5
INTRODUCTION.....	10
STATEMENT OF THE CASE AND FACTS	11
I. SUMMARY OF THE DISPUTE OVER 159 HOLDINGS’S CONSTRUCTION PROJECT.....	11
II. RISMAN AND SHERMAN SUED FOR DECLARATORY RELIEF.....	12
A. The Operative Complaint.	12
B. The Summary Judgment Proceedings.....	14
C. The Final Summary Judgment.	15
III. THE FINAL SUMMARY JUDGMENT APPEAL AND MANDATE (<i>RISMAN I</i>).....	16
A. The Plaintiffs Attempted to Expand the Record to Include Architectural Drawings Never Presented to the Trial Court (Despite their Prior Discoverability).	16
B. Plaintiffs’ Extra-Judicial Attack on the Board’s Approvals Based on the March 5, 2020, Architectural Drawings.	19
C. This Court’s Mandate Affirming Counts I and II, But Reversing Count III for Articulation of the Trial Court’s Reasoning on the Conflict Claim.	22
IV. THE LIMITED PROCEEDINGS ON REMAND — CONSISTENT WITH THIS COURT’S MANDATE.....	24

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
A. Holdings Moved to Amend the Final Summary Judgment to Include the Trial Court’s Rationale on Count III’s Claim of Conflict of Interest.	24
B. The Plaintiffs Opposed Holdings’s Motion to Amend the Final Summary Judgment, and Sought to Expand the Narrow Scope of Remand Beyond this Court’s Mandate.....	24
C. The Trial Court’s Amended Final Summary Judgment Articulating its Reasons for Judgment on Count III.	27
SUMMARY OF ARGUMENT	30
ARGUMENT.....	32
I. THE TRIAL COURT PROPERLY EXECUTED ITS MINISTERIAL DUTY TO CARRY OUT THIS COURT’S MANDATE ON REMAND.	32
A. The Mandate Rule.....	32
B. This Court’s Narrow Mandate Directed the Trial Court to Articulate a Rationale for Granting Summary Judgment on Count III, Pursuant to Rule 1.510.....	34
II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON COUNT III because IT FAILS AS A MATTER OF LAW.....	36
A. Standard of Review.....	36
B. Section 718.3027 Does Not Apply Retroactively.....	36

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
C. Plaintiffs Did Not Plead a Derivative Action for Breach of Fiduciary Duty.....	38
D. Even if General Corporate Fiduciary Principles Applied, There Is No Evidence That the Lease Was Unreasonable.....	41
III. THE TRIAL COURT PROPERLY DISREGARDED SO-CALLED NEW EVIDENCE.....	43
A. There is No Ruling for this Court to Review on the New Evidence.	43
B. The Trial Court Properly Refused to Allow a Fourth Amendment to the Complaint After Remand from <i>Risman I.</i>	44
C. The Trial Court Properly Refused to Vacate Based on New Evidence.	53
D. Rule 1.510 Barred Consideration of Evidence Not Timely Filed in Opposition to Summary Judgment.....	55
CONCLUSION.....	58
CERTIFICATE OF SERVICE.....	59
CERTIFICATE OF COMPLIANCE.....	60

TABLE OF CITATIONS

	<u>Page</u>
Cases	
<i>Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.</i> , 328 So. 2d 825 (Fla. 1975).....	32
<i>Buckley v. City of Miami Beach</i> , 559 So. 2d 310 (Fla. 3d DCA 1990)	17
<i>City of Miami Beach v. Arthree, Inc.</i> , 300 So. 2d 65 (Fla. 3d DCA 1973).....	33
<i>Cleveland v. Crown Fin., LLC</i> , 212 So. 3d 1065 (Fla. 1st DCA 2017)	54
<i>Cohen v. Hattaway</i> , 595 So. 2d 105 (Fla. 5th DCA 1992)	39, 42
<i>Columbus Apartments, LLC v. MJM Structural Corp.</i> , 346 So. 3d 1248 (Fla. 3d DCA 2022)	53
<i>Conn. Gen. Life Ins. Co. v. Dyess</i> , 588 So. 2d 1045	46, 47
<i>Corr v. Leisey</i> , 138 So. 2d 795 (Fla. 2d DCA 1962)	40
<i>Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc.</i> , 105 So. 3d 579 (Fla. 3d DCA 2012)	36
<i>Dade Cnty. Sch. Bd. v. Radio Station WQBA</i> , 731 So. 2d 638 (Fla. 1999).....	57
<i>Dimitri v. Commercial Ctr. of Miami Master Ass'n, Inc.</i> , 253 So. 3d 715 (Fla. 3d DCA 2018)	37
<i>Dober v. Worrell</i> , 401 So. 2d 1322 (Fla. 1981).....	46

TABLE OF CITATIONS
(Continued)

	<u>Page</u>
<i>Don Suntan Corp. v. Tanning Research Labs., Inc.</i> , 505 So. 2d 35 (Fla. 5th DCA 1987)	45, 46
<i>Fla. Digestive Health Specialists, LLP v. Colina</i> , 202 So. 3d 94 (Fla. 2d DCA 2016)	32, 33
<i>Frehling v. Garcia</i> , 2023 WL 6450464, 2023 Fla. App. LEXIS 6889 (Fla. 3d DCA Oct. 4, 2023)	49
<i>Haas v. Spiegel</i> , 772 So. 2d 539 (Fla. 3d DCA 1997)	32
<i>Hill v. Palm Beach Polo, Inc.</i> , 805 So. 2d 1014 (Fla. 4th DCA 2001)	33
<i>Home Loan Co. Inc. of Boston v. Sloane Co. of Sarasota</i> , 240 So. 2d 526 (Fla. 2d DCA 1970)	39
<i>Hunt v. SCI Funeral Services of Florida, LLC</i> , 307 So. 3d 891 (Fla. 3d DCA 2020)	57
<i>In re Amendments to Fla. R. Civ. P. 1.510</i> , 317 So. 3d 72 (2021)	23, 34
<i>Inman v. Club on Sailboat Key, Inc.</i> , 342 So. 2d 1069 (Fla. 3d DCA 1977)	39, 49
<i>Jain v. Buchanan Ingersoll & Rooney PC</i> , 322 So. 3d 1201 (Fla. 3d DCA 2021)	39, 44, 48, 49
<i>Kaufman v. Shere</i> , 347 So. 2d 627 (Fla. 3d DCA 1977)	37
<i>Kohn v. City of Miami Beach</i> , 611 So. 2d 538 (Fla. 3d DCA 1992)	50

TABLE OF CITATIONS
(Continued)

	<u>Page</u>
<i>Metro. Dade Cnty. v. Dusseau</i> , 826 So. 2d 442 (Fla. 3d DCA 2002)	32, 34
<i>Minotty v. Baudo</i> , 42 So. 3d 824 (Fla. 4th DCA 2010)	50
<i>Nazzaro v. Moksel</i> , 508 So. 2d 544 (Fla. 3d DCA 1987)	35, 45
<i>Neapolitan Enters., LLC v. Fishman</i> , 303 So. 3d 1258 (Fla. 2d DCA 2020)	54
<i>Nguyen v. Roth Realty, Inc.</i> , 550 So. 2d 490 (Fla. 5th DCA 1989)	45
<i>Old Port Cove Prop. Owners Ass'n, Inc. v. Ecclestone</i> , 500 So. 2d 331 (Fla. 4th DCA 1986)	41
<i>Orlando Orange Groves Co. v. Hale</i> , 144 So. 674 (Fla. 1932)	39
<i>Quality Roof Services, Inc. v. Intervest Nat. Bank</i> , 21 So. 3d 883 (Fla. 4th DCA 2009)	52
<i>Ramos v. Philip Morris Co., Inc.</i> , 743 So. 2d 24 (Fla. 3d DCA 1999)	38
<i>Risman v. Seaside Villas Condo. Ass'n, Inc.</i> , 356 So. 3d 901 (Fla. 3d DCA 2023)	10, 11, 12, 16, 22, 23, 34, 35, 36
<i>Rodriguez v. Recovery Performance & Marine, LLC</i> , 38 So. 3d 178 (Fla. 3d DCA 2010)	50
<i>Rosenberg v. Rosenberg</i> , 511 So. 2d 593	18
<i>Savage v. Macy's E., Inc.</i> , 719 So. 2d 1208 (Fla. 3d DCA 1998)	32

TABLE OF CITATIONS
(Continued)

	<u>Page</u>
<i>State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.</i> , 368 So. 3d 1049 (Fla. 3d DCA 2023)	55, 56, 57
<i>State v. Smith</i> , 557 So. 2d 904 (Fla. 1st DCA 1990)	43
<i>Thompson v. Bank of New York</i> , 862 So. 2d 768 (Fla. 4th DCA 2003)	52
<i>Tillis v. United Parts, Inc.</i> , 395 So. 2d 618 (Fla. 5th DCA 1981)	39
<i>Torres v. Jones</i> , 652 So. 2d 893 (Fla. 3d DCA 1995)	33
<i>Toscano Condo. Ass'n v. DDA Eng'rs, P.A.</i> , 274 So. 3d 487 (Fla. 3d DCA 2019)	51
<i>Tracton v. City of Miami Beach</i> , 657 So. 2d 31 (Fla. 3d DCA 1995)	32
<i>Vella v. Salaues</i> , 290 So. 3d 946 (Fla. 3d DCA 2019)	44, 47
<i>Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.</i> , 760 So. 2d 126 (Fla. 2000)	36
<i>Wilcox v. Hotelarama Assocs., Ltd.</i> , 619 So. 2d 444 (Fla. 3d DCA 1993)	33

Statutes

§ 718.3027(3), Fla. Stat. (2019)	37
§ 718.3027, Fla. Stat. (2019)	14, 15, 16, 37, 38, 40

TABLE OF CITATIONS
(Continued)

	<u>Page</u>
Rules	
Fla. R. Civ. P. 1.510 (2021).....	55, 56
Fla. R. Civ. P. 1.510(a) (2021)	35
Fla. R. Civ. P. 1.510(c)(5) (2021).....	55, 56, 57
Fla. R. Civ. P. 1.510(d) (2021)	51

INTRODUCTION

This is an appeal from the trial court's proper execution of this Court's mandate in the prior appeal of *Risman v. Seaside Villas Condo. Ass'n, Inc.*, 356 So. 3d 901 (Fla. 3d DCA 2023). There, this Court affirmed summary judgment on two of three counts of a third amended complaint, and narrowly reversed as to part of the third count because this Court could not conduct "meaningful review" absent written reasons from the trial court. On remand, the trial court gave its reasoning. This Court may now conclude its review of the summary judgment on the remaining part of count three, and upon so doing will find nothing warranting reversal.

Seeing the writing on the wall, appellants on remand attempted to bypass the mandate by filing a **fourth** amended complaint, moving to vacate the whole summary judgment, and thus restarting litigation anew on all claims (even those affirmed by this Court) based on purportedly new evidence. But this "new" evidence was available **before** the third amended complaint and summary judgment. And, in fact, despite failing to file this evidence in opposition to summary judgment, the appellants attempted to inject it **into the prior appeal** (a maneuver this Court properly rejected). Enough is enough. Finality must obtain. Affirmance is warranted.

STATEMENT OF THE CASE AND FACTS

I. SUMMARY OF THE DISPUTE OVER 159 HOLDINGS'S CONSTRUCTION PROJECT.

This Court's opinion in the prior final appeal, *Risman v. Seaside Villas Condo. Ass'n, Inc.*, 356 So. 3d 901 (Fla. 3d DCA 2023), provides a concise summation of the underlying dispute between appellants/plaintiffs Robert G. Risman and George Sherman ("Plaintiffs"), and defendant/appellee 159 Fisher Island Holdings, LLC ("Holdings"):

In 2018, Holdings purchased a condominium building ("Building 9") on Fisher Island, Miami Beach. Building 9 was one of the nine buildings of the Association. With the approval of Association's Board of Directors, Holdings demolished Building 9 with the intention of constructing only a large, single-family home on the site. To facilitate Holdings's project, Association — with the approval of Association's Board of Directors — leased approximately 960 square feet of common elements and/or limited common elements property to Holdings for ninety-nine years (subject to renewal) in exchange for a one-time rent payment of \$381,046.

Association's three-person Board of Directors approved Holdings's demolition and new construction plan on October 10, 2018, by a 3-0 vote; and on May 30, 2019, the Board of Directors approved the lease by a 2-0 vote. Association's counsel, an attorney board-certified in condominium law, advised that, pursuant to the Declaration, the Board of Directors' votes on the Building 9 project did not require amendment to the Declaration or ratification of the other condominium unit owners. Holdings's real estate agent, Board of Directors member Archie Drury (who had received a commission when Holdings purchased Building 9), voted to approve both the demolition and construction plan and the

lease. Drury neither disclosed his earlier financial involvement in the Building 9 project, nor recused himself from either vote.

Id. at 903.

II. RISMAN AND SHERMAN SUED FOR DECLARATORY RELIEF.

A. The Operative Complaint.

The Plaintiffs¹ initiated a declaratory judgment action against the Association and Holdings in 2019. R:42–54.

On November 4, 2020, the Plaintiffs filed their Third Amended Complaint (their fourth overall), asserting three counts for declaratory judgment.

Count I asserted the “Demolition and New Construction Plan Required ... an Amendment to the Declaration Per §6.1.” R:2244. Specifically, the Plaintiffs alleged the Project required approval of “(a) more than 50% of the Association members and 66 2/3% of the Board or (b) 80% of the Association members, per §6.1 of the Declaration.” R:2248. Plaintiffs thus sought a declaration that the “Association’s approval” of the

¹ George Sherman passed away during the pendency of the action and was substituted by the personal representative of his estate. R:4007–14.

construction Project was void for failure to comply with Section 6.1.
R:2248.

Count II asserted the “Demolition and New Construction Plan Required an Amendment to the Declaration per §6.4.” R:2249. Specifically, Plaintiffs interpreted Section 6.4 as “prevent[ing] a Unit Owner from (1) ‘materially’ changing the configuration or size of its Unit; (2) ‘materially’ altering or modifying the appurtenances to its Unit; or (3) changing the percentage by which the Unit Owner shares Common Expenses and owns the Common Elements and Common Surplus without the consent of ‘record Owner(s) thereof.’” R:2251.

Plaintiffs thus sought a declaration that the construction approvals were void for failure to comply with Section 6.4. R:2253.

Count III sought a declaratory judgment that the Lease was invalid for two separate reasons. R:2253.

First, Plaintiffs alleged the Lease to Holdings was “a de-facto sale” of “Common Elements,” and thus required approval of 100% of the Association membership pursuant to Section 6.4 of the Declaration. R:2255. The Plaintiffs thus sought a declaration that the “Association’s approval of the Lease solely by vote of the Board of Directors was ... void,” and thus the Lease was invalid. R:2257.

Second, the Plaintiffs alleged that Board member Archie Drury was ineligible to vote on the Lease due to “possible conflicts of interest pursuant to Section 718.3027, Fla. Stat. (2019), and thus there was no quorum of the Board of Directors” sufficient to approve the Lease. R:2255–57. Count III sought a specific declaration that “Drury had no right to vote on the Lease issue due to his ‘possible’ conflicts of interest ***pursuant to Section 718.3027.***” R:2256–57 (quoting § 718.3027, Fla. Stat. (2019)) (emphasis added).

B. The Summary Judgment Proceedings.²

On May 17, 2021, Holdings filed its Amended Motion for Final Summary Judgment, arguing that Plaintiffs’ claim in Count III that Drury’s “possible” conflict voided the Lease failed as a matter of law. R:2853–54. That is, Plaintiffs’ Third Amended Complaint expressly sought a declaration that Section 718.3027 had been violated, but this statute post-dated the Declaration and was thus inapplicable. R:2853–54.

² Because this Court in *Risman I* affirmed the trial court’s Final Summary Judgment in Holdings’s favor as to Counts I and II, as well as the part of Count III that the Lease was an improper de facto sale, only the proceedings relevant to the “possible” conflict of interest declaration are set forth here.

On June 22, 2021, the Plaintiffs filed their opposition to Holdings’s Amended Motion for Final Summary Judgment. R:3632–922. Plaintiffs argued it was irrelevant that Section 718.3027 post-dated the Declaration, because it “codified long-standing common law” on breach of fiduciary duty claims (none of which Plaintiffs referenced in their Third Amended Complaint). R:3664.

Holdings filed its reply, arguing that the Plaintiffs were bound by their pleadings in the Third Amended Complaint, which sought a declaration only that Section 718.3027, Florida Statutes (2019) required Drury to recuse himself, and had not pled any other law or claims (either statutory or common law). R:3956.

Holdings further argued that, to the extent common law principles of breach of fiduciary duty applied from the corporate context, a contract will be upheld unless it is shown to be unfair or unreasonable. There was no evidence to challenge the reasonableness of the Lease. R:3956.

C. The Final Summary Judgment.

After a hearing on August 30, 2021, the trial court granted Holdings’s Amended Motion for Final Summary Judgment on all three counts of Plaintiffs’ Third Amended Complaint (“Final Summary Judgment”).

R:4001–03. The trial court ruled that the declaratory relief “sought by the Plaintiffs [was] contradicted by the terms of the Association’s Declaration of condominium and the lease between Holdings and the Association.”

R:4001–02. The trial court further ruled there were no genuine issues of fact, and that “summary judgment shall be granted for the reasons set forth in the Motion and the Reply in Support thereof.” R:4001.

The Final Summary Judgment did not expressly explain why it granted judgment on Plaintiffs’ second assertion in Count III that the Lease was void because the Board lacked quorum to vote due to Drury’s alleged conflict of interest under Section 718.3027, instead stating that summary judgment was granted for the “reasons stated on the record.” *Id.*

III. THE FINAL SUMMARY JUDGMENT APPEAL AND MANDATE (*RISMAN I*).

A. The Plaintiffs Attempted to Expand the Record to Include Architectural Drawings Never Presented to the Trial Court (Despite their Prior Discoverability).

The Plaintiffs appealed the Final Summary Judgment to this Court.

R:4018–22. See also *Risman v. Seaside Villas Condo. Ass’n, Inc.*, 356 So. 3d 901 (Fla. 3d DCA 2023) (“*Risman I*”).

On January 21, 2022, the Plaintiffs filed their Initial Brief, in which they sought to inject into the appeal extra-record evidence not presented to

the trial court below — despite the evidence existing prior to the Plaintiffs’ Third Amended Complaint. See Initial Brief, Case No. 3D21-1963.³

That is, the Plaintiffs’ argued the unit owners’ approval was required for the demolition and new construction plan because Holdings’s architectural drawings, filed on March 5, 2020 in the Miami-Dade County Public records, allegedly showed an interior square footage of Holdings’s building being almost 50% larger than the prior building. Initial Brief, Case No. 3D21-1963 at 45. This increase, argued the Plaintiffs, adjusted the total ownership percentages of Common Element space of all association members, and thus required a vote of the whole membership on the original demolition and new construction plans (implicating Counts I and II of the Third Amended Complaint). *Id.* at 42-44.

Because the March 5, 2020, architectural drawings were not in the Record on Appeal — despite their existence at the time of Plaintiffs’ November 4, 2020, Third Amended Complaint and Plaintiffs’ June 22,

³ This Court “can take judicial notice of its own files.” *Buckley v. City of Miami Beach*, 559 So. 2d 310, 313 n.1 (Fla. 3d DCA 1990).

2021, response to Holdings’s motion for summary judgment — Plaintiffs embedded a request for judicial notice in their Initial Brief.

Such a request was a subversion of the proper appellate process, and, upon motion by Holdings, this Court struck the Initial Brief and ordered the Plaintiffs to file a compliant brief omitting all extra-record materials. See Order, March 25, 2022, Case No. 3D21-1963 (striking “[t]he Initial Brief, and any embedded motion to take judicial notice ... as improper”).

Undeterred, Plaintiffs re-filed their Initial Brief with the same reference to the extra-record, March 5, 2020, architectural drawings, and moved contemporaneously for this Court to take judicial notice. See Amended Initial Brief, and Appellant’s Motion to Take Judicial Notice, Case No. 3D21-1963.

This Court again properly denied Plaintiffs’ attempts to expand the record and cure their evidentiary deficiencies on appeal, ruling:

The records Appellants seek to provide were not in the trial court record, or otherwise properly considered by the trial court in its determination of the final summary judgment now on appeal. See *Rosenberg v. Rosenberg*, 511 So. 2d 593, 595, n. 3 (Fla. 3d DCA 1987) (explaining that record on appeal is limited to the evidence before the trial court when it entered the contested order).

April 25, 2022, Order, Case No. 3D21-1963.

On May 4, 2022, Plaintiffs finally filed a compliant Second Amended Initial Brief omitting reference to, and argument based on, the March 5, 2020, architectural drawings.

B. Plaintiffs' Extra-Judicial Attack on the Board's Approvals Based on the March 5, 2020, Architectural Drawings.

Having failed in their efforts to subvert the proceedings in *Risman I* with extra-record materials (and having neglected to discover and raise these materials in the trial court prior to summary judgment), the Plaintiffs embarked on an extra-judicial attack of the Board's approvals with those very same materials.

On May 20, 2022 (while *Risman I* was still pending and just weeks after having their briefs stricken), Plaintiffs' trial counsel sent a letter to the Association's Board of Directors containing an "analysis prepared by Daniel C. Fortin Jr. of Fortin, Leavy, Skiles, Inc.," which purportedly showed that Holdings's "newly constructed single-family home is approximately 50% larger than the original Building 9" (the "Fortin Report").⁴ R:4817-18.

⁴ It should be noted that Holdings vehemently disputes the allegations in the Fortin Report.

Recall, this was the same assertion Plaintiffs made in their stricken Initial Brief referencing the March 5, 2020, architectural drawings. Initial Brief, Case No. 3D21-1963 at 45 (asserting Holdings’s new building was 50% larger than the prior building). Indeed, the Fortin Report included in Plaintiffs’ counsel’s May 20, 2022, letter to the Board relied on the very same March 5, 2020, architectural drawings that Plaintiffs attempted to inject into the *Risman I* appeal (and which they neglected to present to the trial court in the first instance):

6. As part of my calculation, I reviewed (1) the Certificate of Amendment to the Declaration of Condominium of Seaside Villas Condominium Association, Inc. (“Declaration”) recorded in Official Records Book 30977, Pages 1224-1228 of the Public Records of Miami-Dade County, Florida (“Amendment”), attached hereto as **Exhibit A**; and (2) the Architectural Drawings of the ground level and second level floor plan of the newly constructed Unit 15912 that were filed with the Miami-Dade County Department of Regulatory And Economic Resources, sketch stamp dated March 5, 2020, Reference Number 0001062501 (“Architectural Drawings”), attached here to as **Exhibit B**.

R:4824. *Compare with* Initial Brief, Case No. 3D21-1963 at 45 (citing “Miami-Dade County Department of Records—Architectural Drawings, Department of Regulatory and Economic Resources 0001062501, 3/5/2020”). See also R:4831-33 (March 5, 2020 architectural drawings, attached as Ex. B to Fortin Report); R:4837 (Ex. D to Fortin Report, Calculation Drawings “Using Architectural Drawing”).

Shortly after Plaintiffs’ counsel forwarded the Fortin Report (which was procured by the Plaintiffs) to the Association’s Board, on August 9,

2022, the Board's outside counsel, Marnie Ragan, sent a letter to trial counsel for Holdings referencing the Fortin Report (the "August 9, 2022 Letter"). R:4815-16.

Notably, the Board's outside counsel did not take the position that the Board's previous approvals of the demolition and construction plan or the Lease, were invalid or unreasonable. *Id.*

The foregoing discussion of Plaintiffs' disregard for basic appellate principles is necessary to establish Plaintiffs were on constructive notice of the architectural drawings well before their operative Third Amended Complaint, and before the time for filing their evidentiary response to Holdings's Amended Motion for Summary Judgment, because the documents were already in the Miami-Dade County public records as of March 5, 2020. (The information contained in these architectural drawings, as will be argued below, formed the operative facts of Plaintiffs' so-called new evidence upon which they sought vacatur and a Fourth Amended Complaint after limited remand by this Court in *Risman I*).

C. This Court’s Mandate Affirming Counts I and II, But Reversing Count III for Articulation of the Trial Court’s Reasoning on the Conflict Claim.

This Court issued its opinion in *Risman I* affirming the trial court’s grant of summary judgment on Counts I and II, which sought declaratory judgment that “Holdings’s demolition and new construction plan required an amendment to the Declaration.” *Risman I*, 356 So. 3d at 902. This Court held it was “affirm[ing] that portion of the trial court’s summary judgment adjudicating Appellants’ claims that Holdings’s demolition and new construction plan **and lease** would require an amendment to the Declaration and unit owner ratification.” *Id.* at 905 (emphasis added).

But this Court reversed the Final Summary Judgment on the narrow issue of Drury’s alleged conflict of interest only (the second claim in Count III), holding:

We are compelled, however, to reverse that portion of the final summary judgment on Appellants’ conflict of interest claim because, contrary to the mandates of Florida’s new summary judgment rule, neither the trial court’s order, nor any statement by the trial court on the record, **discloses the reason the trial court granted Holdings’s summary judgment motion as it related to the alleged conflict of interest issue.**

Id. at 902–03 (emphasis added).

This Court held it was “unable to discern from the record (i.e. both the order and the transcript of the summary judgment hearing) the reasons

relied upon by the trial court” in granting summary judgment on Plaintiffs’ claim “that the lease is invalid for the reason that the Board of Directors lacked a quorum when it approved the lease on a 2-0 vote.” *Id.* at 905.

This Court further explained that in amending Rule 1.510(a) to require written reasons for summary judgment, Florida’s Supreme Court made “clear that the court’s obligation in this regard is mandatory,” and that the “court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, **to allow appellate review.**” *Id.* at 905 (emphasis added; underline omitted) (quoting *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 77 (2021)).

This Court then held that it was “simply unable to meaningfully review the trial court’s rationale in granting Holdings’s summary judgment on this claim,” *i.e.*, “that the lease is invalid for the reason that the Board of Directors lacked a quorum when it approved the lease on a 2-0 vote.” *Id.* at 905-06. This Court, therefore, “reverse[d] the judgment and remand[ed] for proceedings consistent with this opinion.” *Id.* at 906.

IV. THE LIMITED PROCEEDINGS ON REMAND — CONSISTENT WITH THIS COURT’S MANDATE.

A. Holdings Moved to Amend the Final Summary Judgment to Include the Trial Court’s Rationale on Count III’s Claim of Conflict of Interest.

Upon remand, Holdings filed a Motion for Entry of an Amended Final Order Granting 159 Fisher Island Holdings, LLC’s Amended Motion for Summary Final Judgment, requesting the trial court to abide by this Court’s mandate to provide a rationale for summary judgment on Count III’s claim of conflict of interest. R:4323–28. Holdings referenced its prior arguments for summary judgment on the conflict-of-interest claim (*i.e.*, that Section 718.3027 did not apply retroactively to the Declaration and there was no evidence that the Lease was unfair or unreasonable). R:4326-28. And Holdings “respectfully request[ed] that the [trial] Court amend its order to articulate its reasoning,” and thereby “comply with Florida’s new summary judgment rules and the Appellate Order.” R:4327.

B. The Plaintiffs Opposed Holdings’s Motion to Amend the Final Summary Judgment, and Sought to Expand the Narrow Scope of Remand Beyond this Court’s Mandate.

After Holdings moved to enforce this Court’s mandate that the trial court provide a rationale for its grant of summary judgment on Count III,

Plaintiffs sought to expand the narrow scope of remand to assert additional theories, claims, and evidence.

Plaintiffs filed a Revised Motion for Leave to Amend, seeking leave to file a **fourth** Amended Complaint — their fifth complaint overall (the “Motion for Leave to File Fourth Amended Complaint”). R:4631-848. Plaintiffs sought to amend all three previous counts (including Counts I and II, on which summary judgment was previously granted and affirmed by this Court in *Risman I*), as well as assert an additional Count IV. *Id.* Unlike the claims in the prior Third Amended Complaint, this proposed Count IV dealt not with whether the board had authority to approve the project, or whether Drury had a conflict of interest, but instead delved into whether Holdings had complied with the Association’s approvals after-the-fact. *Id.*

The Plaintiffs represented that they had discovered “new evidence” about the newly constructed building’s square footage and footprint. R:4631. See *also* R:4824. But this “new evidence” was based on the March 5, 2020, architectural drawings, which Plaintiffs had failed to provide to the trial court in opposition to summary judgment, and which Plaintiffs had improperly attempted to interject into *Risman I*. R:4824; 4837 (Ex. D to Fortin Report, Calculation Drawings “Using Architectural Drawing”).

That is, the only **evidence** of the new building's square footage and footprint was the March 5, 2020, architectural drawings.

Upon this evidence, the Plaintiffs also moved to vacate the Final Summary Judgment under Rule 1.540(b)(2), arguing that the August 9, 2022, Letter was newly discovered evidence necessitating further proceedings on all previously affirmed Counts (the "Motion to Vacate"). R:4849–919. The Plaintiffs took the position that, while the association had approved the plans that Holdings used to construct its home, because the square footage and footprint numbers of the building **as-constructed** allegedly exceeded the previous structure's size by 50%, it "negate[d] Ms. Ragan's 'blessing'" of those approvals *nunc-pro-tunc*. R:4852–53.

Finally, Plaintiffs filed an opposition to Holdings' Amended Motion for Summary Final Judgment, also relying on the newly asserted evidence of the as-constructed building's footprint established by the March 5, 2020, architectural drawings. R:4970–5053. See also R:5035 (Fortin Report attached to opposition to Motion for Entry of Amended Final Order Granting Defendant's Amended Motion for Summary Final Judgment).

C. The Trial Court’s Amended Final Summary Judgment Articulating its Reasons for Judgment on Count III.

(1)The Amended Final Summary Judgment.

After a case management hearing (R:5479–504) and a hearing on Holdings’s Amended Motion for Summary Final Judgment (R:5506–35), the trial court entered its Order Granting Defendant 159 Fisher Island Holdings, LLC’s Motion for Entry of an Amended Final Order Granting 159 Fisher Island Holdings, LLC’s Amended Motion for Summary Final Judgment (the “Amended Final Summary Judgment”). R:5542–45. The trial court complied with this Court’s mandate by providing its rationale for summary judgment on Count III’s conflict of interest claim:

- The Lease approval vote in which Drury participated did not violate Section 718.3027 because that statute was adopted in 2018 and did not apply retroactively to the Association’s Declaration, recorded in 1988. R:5542.
- There was no evidence that the Lease was unfair or unreasonable, a condition precedent to establishing a claim for conflict of interest. R:5542–43.
- Alternatively, Drury did “disclose his commission involving the property at issue to the board on April 24, 2019 — [a] month prior to

the vote.” just a few weeks before the Board voted to approve the Lease.⁵ *Id.*

Notably: The trial court did not address Plaintiffs’ motion for leave to amend its complaint or their motion to vacate the Final Summary Judgment under Rule 1.540. No order (either oral or written) appears in the record on these two motions.

(2) Order Denying Rehearing.

Plaintiffs moved for rehearing of the Amended Final Summary Judgment under Rule 1.530. R:5057–67. In addition to rearguing the merits of the summary judgment, Plaintiffs argued the trial court should have considered its motion for leave to amend and motion to vacate Final

⁵ The Plaintiffs’ argument that this finding “was error” because Drury “did not make disclosure” misrepresents the record. Initial Brief of Appellant (“IB”) at 32. The trial court’s finding is based on the minutes of the April 24, 2019, Board meeting at which the Association’s Board approved the Lease, which the Plaintiffs themselves filed in opposition the summary judgment. R:3413–14. Those minutes reflect that the Plaintiffs themselves raised the conflict issue in open session before the Board, at which it was discussed by all the participants. R:3414. Thus, undisputed documentary evidence established that by the time of the vote on the Lease, Drury’s relationship as a broker related to the property was well-known. The trial court’s finding was accurate. Nonetheless, because the trial court primarily ruled that the Plaintiffs’ claim fails as a matter of law, the alternative finding on Drury’s disclosure is immaterial.

Summary Judgment before complying with the trial court's mandate. R:5063. And the Plaintiffs again argued the trial court should have expanded the proceedings on remand to include the so-called new evidence of square footage. R:5064.

The trial court denied rehearing. R:5546–48.

The Plaintiffs appealed from the Amended Final Summary Judgment and denial of rehearing. R:5464–75.

SUMMARY OF ARGUMENT

THE TRIAL COURT PROPERLY EXECUTED THIS COURT'S MANDATE ON REMAND

This Court's mandate in *Risman I* was narrow: it affirmed summary judgment on Counts I and II, but remanded for the trial court to articulate its rationale on the conflict-of-interest portion of Count III. The trial court complied by entering the Amended Final Summary Judgment setting forth its reasons for granting summary judgment on Count III. Returning from that narrow remand, only the judgment on Count III is now within this Court's scope of review.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON COUNT III

The trial court's grant of summary judgment on Count III should be affirmed because the Plaintiffs' conflict-of-interest allegations fail as a matter of law. Count III specifically sought a declaration that Section 718.3027, which does not apply retroactively to the Association's 1988 Declaration, had been violated. Recognizing this deficiency, Plaintiffs have attempted to recast Count III as a breach-of-fiduciary-duty claim, but they are bound by their pleadings. And such a claim could only have been brought as a derivative action against the Association and Drury — not Holdings. What's more, there is no evidence that the Lease was unfair or unreasonable, a condition precedent to a breach-of-fiduciary-duty claim.

THE TRIAL COURT PROPERLY DISREGARDED SO-CALLED NEW EVIDENCE

The Plaintiffs' arguments that the trial court should have ruled on their Motion to File Fourth Amended Complaint and Motion to Vacate lie beyond this Court's review. For starters, this Court lacks jurisdiction to review these issues, as the trial court never entered any orders (oral or written) on these motions. The trial court properly proceeded to adhere to this Court's *Risman I* mandate without addressing such distractions.

To the extent that the Motions were implicitly denied, the trial court properly exercised its discretion, as amendments are barred on remand absent express authorization from the appellate court. Moreover, Plaintiffs' belated amendment was untimely (they could have discovered the so-called new evidence before the Third Amended Complaint), and futile (the square footage evidence did not invalidate the prior Board approvals).

As for the Rule 1.540 Motion to Vacate, this was an unauthorized motion directed to a non-final order. This Court, accordingly, lacks jurisdiction to entertain an appeal therefrom. And, jurisdiction aside, Plaintiffs failed to exercise diligence in discovering the so-called new evidence, such that relief could not have been granted from the Final Summary Judgment.

For all these reasons, affirmance is warranted.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXECUTED ITS MINISTERIAL DUTY TO CARRY OUT THIS COURT'S MANDATE ON REMAND.

A. The Mandate Rule.

It is “one of the most basic principles of appellate review that the lower tribunal ‘utterly lacks the power to deviate from the terms of an appellate mandate.’” *Savage v. Macy’s E., Inc.*, 719 So. 2d 1208, 1209 (Fla. 3d DCA 1998) (citations omitted). *Accord Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 328 So. 2d 825, 827 (Fla. 1975) (“A trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so.”); *Fla. Digestive Health Specialists, LLP v. Colina*, 202 So. 3d 94, 96 (Fla. 2d DCA 2016) (“No principle of appellate jurisdiction is more firmly established than the one which provides that a trial court utterly lacks the power to deviate from the terms of an appellate mandate.”); *e.g.*, *Tracton v. City of Miami Beach*, 657 So. 2d 31 (Fla. 3d DCA 1995).

“Upon the issuance of a mandate from an appellate court, the lower court’s role becomes purely ministerial, and its function is **limited to obeying the appellate court’s order or decree.**” *Metro. Dade Cnty. v. Dusseau*, 826 So. 2d 442, 444 (Fla. 3d DCA 2002) (citations omitted; emphasis added); *accord, e.g.*, *Haas v. Spiegel*, 772 So. 2d 539, 540 (Fla.

3d DCA 1997); *Torres v. Jones*, 652 So. 2d 893, 894 (Fla. 3d DCA 1995). “A trial court does not have discretionary power to alter or modify the mandate of an appellate court in any way, shape, or form.” *Wilcox v. Hotelarama Assocs., Ltd.*, 619 So. 2d 444, 446 (Fla. 3d DCA 1993). It “must execute the mandate without variance or examination; it may not ... grant any additional or further relief.” *Colina*, 202 So. 3d at 96–97. See also *City of Miami Beach v. Arthree, Inc.*, 300 So. 2d 65, 67 (Fla. 3d DCA 1973) (“[U]pon the issuance of our mandate, the trial court is without authority to take any action other than to compose an order carrying out the terms of the mandate.”).

The appellate court’s decision is binding:

On remand the trial court lacks the power to deviate from the terms of an appellate court’s instructions. A trial court lacks discretionary power to go beyond the scope of the relief granted by the appellate court.

When a case has once been decided ... on appeal ... the circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than its execution; or give any further relief ... than to settle so much as has been remanded.

Hill v. Palm Beach Polo, Inc., 805 So. 2d 1014, 1016 (Fla. 4th DCA 2001)
(citations omitted).

Absent the appellate court's consent, a trial court may not deviate from the appellate court's mandate. *Dusseau*, 826 So. 2d at 444.

B. This Court's Narrow Mandate Directed the Trial Court to Articulate a Rationale for Granting Summary Judgment on Count III, Pursuant to Rule 1.510.

This Court's mandate was clear.

As for Counts I, II, and the portion of Count III alleging the Lease required a unit-owner vote, it "***affirm[ed]*** that portion of the trial court's summary judgment adjudicating Appellants' claims that Holdings's demolition and new construction plan and lease would require an amendment to the Declaration and unit owner ratification." *Risman I* at 905 (emphasis added). The proceedings were, therefore, closed on these counts.

As for the remaining portion of Count III seeking a declaration that Section 718.3027 had been violated, this Court reversed ***on procedural grounds*** for the trial court to "state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow appellate review." *Id.* at 905 (emphasis added; underline omitted) (quoting *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 77

(2021)). *Risman I* held the trial court’s Final Summary Judgment failed to comply with Rule 1.510(a) because “neither the trial court’s order, nor any statement by the trial court on the record, disclose[d] the reason the trial court granted Holdings’s summary judgment motion as it related to the alleged conflict of interest issue.” *Id.* at 902–03 (emphasis added).

The scope of remand, therefore, was narrow. Two out of three claims — and a portion of the third — were finally resolved. The remaining portion of the third claim, on which judgment also had been granted, merely required explication. The trial court was bound to carry out this Court’s mandate to express its reasons so this Court could “meaningfully review the trial court’s rationale in granting Holdings’s summary judgment on this claim.” *Id.* at 905-06.

Until the trial court “first compl[ied] with this [C]ourt’s mandate ..., no further orders” could be “entered by the trial court until this [was] accomplished.” *Nazzaro v. Moksel*, 508 So. 2d 544, 544 (Fla. 3d DCA 1987).

The trial court properly complied with this Court’s mandate and the mandate rule. It proceeded immediately to enter the Amended Final Summary Judgment articulating its reasons for entering judgment on the claim that Board member Drury’s vote on the Lease was null and void due

to conflicts of interest. R:5542–45. It is that ruling — and that ruling alone — that is now within this Court’s scope of review. This Court reversed only to allow the trial court to provide its rationale so that this Court could engage in “meaningful[] review ... [of] summary judgment on this claim.” *Id.* at 905-06. This Court may now conduct that meaningful review.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON COUNT III BECAUSE IT FAILS AS A MATTER OF LAW.

A. Standard of Review.

The trial court’s Amended Final Summary Judgment is reviewed de novo. *Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass’n, Inc.*, 105 So. 3d 579, 580 (Fla. 3d DCA 2012) (citing *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)).

B. Section 718.3027 Does Not Apply Retroactively.

Count III of Plaintiffs’ Third Amended Complaint alleged that the Board’s approvals for the project and the Lease were null and void because the Board lacked a quorum due to a purported conflict by Drury. R:2255–57. Count III cited precisely one (1) authority for this novel theory that a conflict of interest can render a vote void: Section 718.3027. *Id.* Indeed,

Plaintiffs specifically sought a declaration that “Drury had no right to vote on the Lease issue due to his ‘possible’ conflicts of interest pursuant to Section 718.3027, Florida Statutes (2019), and thus there was no quorum of the Board of Directors at the May 30, 2019 meeting.” R:2256–57 (quoting § 718.3027(3) (2019)).

But, as the trial court correctly ruled, Section 718.3027 was adopted in 2018, and thus does not apply to the Association (which is governed by the 1987 Florida Condominium Act). It is well-established that the statutes in effect at the time a declaration of condominium is created govern that declaration, unless either:

- the declaration includes language indicating that it is governed by the Condominium Act as “may be amended from time to time,” or
- the later statute expressly applies retroactively.

Dimitri v. Commercial Ctr. of Miami Master Ass'n, Inc., 253 So. 3d 715, 718–19 & n.2 (Fla. 3d DCA 2018) (quoting *Kaufman v. Shere*, 347 So. 2d 627, 628 (Fla. 3d DCA 1977)).

It is undisputed that the Association’s 1988 Declaration lacks the express *Kaufman* language. See R:2920–3020 (1988 Declaration). And Section 718.3027(3), adopted in 2018, does not contain any express language applying it retroactively to existing declarations. See § 718.3027,

Fla. Stat. (2019). Thus, the sole legal basis upon which the Plaintiffs alleged their conflict-of-interest theory and sought a declaration is simply inapplicable. Plaintiffs were not entitled to a declaration that a statute that does not apply to the Association's Declaration precluded a Board member's vote.

Count III, therefore, fails as a matter of law. The Amended Final Summary Judgment should be affirmed.

C. Plaintiffs Did Not Plead a Derivative Action for Breach of Fiduciary Duty.

In their Initial Brief, Plaintiffs do not argue that Section 718.3027 applies to the Association and its directors. Instead, they argue that other, generic common law principles of corporate law created fiduciary duties that supported their argument that the Board's vote on the Lease was invalid. Initial Brief at 29–36. The Plaintiffs thus concede the inapplicability of Section 718.3027 — the only legal basis alleged in Claim III. See *Ramos v. Philip Morris Co., Inc.*, 743 So. 2d 24, 29 (Fla. 3d DCA 1999) (matters not raised in an initial brief are waived).

The Plaintiffs are bound by their pleadings. Count III was *not* a claim for breach of fiduciary duty; it was a declaratory judgment action seeking to declare the Lease invalid due to an alleged violation of Section 718.3027.

R:2255–57. Plaintiffs could not reclassify their declaratory action claim as one for breach of fiduciary duty to avoid summary judgment. This Court recently reaffirmed the longstanding rule that “[a] party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment.” *Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1206 (Fla. 3d DCA 2021) (citing *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069, 1070 (Fla. 3d DCA 1977) & *Home Loan Co. Inc. of Boston v. Sloane Co. of Sarasota*, 240 So. 2d 526 (Fla. 2d DCA 1970)).

Moreover, had Plaintiffs wished to bring a claim for breach of fiduciary duty, they could not have done so in their individual capacity, but were required to plead such a claim against the Association and Board Member Drury in a shareholders’ derivative action. Indeed, the very cases cited by Plaintiffs in their Initial Brief on their after-the-fact theory of corporate fiduciary duty are cases involving shareholders’ derivative claims. See *Cohen v. Hattaway*, 595 So. 2d 105, 107 (Fla. 5th DCA 1992) (concerning “a shareholder’s derivative action for breach of fiduciary duty”); *Tillis v. United Parts, Inc.*, 395 So. 2d 618 (Fla. 5th DCA 1981) (concerning “a stockholder’s derivative action”); *Orlando Orange Groves Co. v. Hale*, 144

So. 674 (Fla. 1932) (“The bill in this case was filed by certain minority stockholders, one of whom was a director, in Orlando Orange Groves Company, a corporation, in their own behalf and in behalf of all other similarly situated stockholders in said company, against the said corporation, J. P. Holbrook Company, and the officers and directors of the said Orlando Orange Groves Company, some of whom were not stockholders therein.”).

Not only that, but the proper defendants in such a breach-of-fiduciary-duty claim would be the Association and board member Drury — not Holdings. Indeed, assuming Plaintiffs had brought a shareholders’ derivative action for breach fiduciary duties to the Association members, the remedy would **not** be a declaration that the vote on the Lease was null and void, but rather liability “for the profits made by” Drury. *Corr v. Leisey*, 138 So. 2d 795, 797 (Fla. 2d DCA 1962).

Plaintiffs (i) cannot retroactively convert their claim for declaratory judgment under Section 718.3027 into a breach-of-fiduciary-duty claim, and (ii) have not presented a single authority for the proposition that a board member’s breach of generic fiduciary duties in the voting process somehow invalidates or voids the association board’s action.

D. Even if General Corporate Fiduciary Principles Applied, There Is No Evidence That the Lease Was Unreasonable.

Had the Plaintiffs actually pled a shareholders' derivative claim for breach of fiduciary duty, and if nullification of the Lease were an available remedy, the Plaintiffs nonetheless would have been required to show that the Lease was unfair or unreasonable — a mandatory condition precedent to a conflict-of-interest claim.

“Florida corporate law provides that when confronted with director conflicts of interest, such as those alleged here, the contract will be upheld providing it is ‘fair and reasonable as to the corporation **at the time it is authorized.**” *Old Port Cove Prop. Owners Ass’n, Inc. v. Ecclestone*, 500 So. 2d 331, 333 (Fla. 4th DCA 1986) (emphasis added) (rejecting a claim that a condominium association developer violated his fiduciary duty as a result of a conflict of interest).

Since there was no evidence establishing that the Lease — under which Holdings paid the Association nearly \$400,000 to lease fewer than 1,000 square feet of common and limited common elements — was unfair or unreasonable, there was no basis to invalidate it.

Plaintiffs' argument that **Holdings** bore the burden to establish the Lease's reasonableness misses the mark. As an initial matter of due

process, Holdings was never placed on notice that it was required to meet this burden, since Plaintiffs did not plead a claim for breach of fiduciary duty in their Third Amended Complaint. And even if Plaintiffs had pled such a cause of action, **Drury** would have borne the burden to demonstrate reasonableness, as the “fiduciary obligor.” *Cohen*, 595 So. 2d at 108 (“A purchase, by a fiduciary obligor of property belonging to the fiduciary beneficiary is not void but rather is voidable at the option of the fiduciary beneficiary, with the burden of showing the validity of such a contract and the fairness and honesty of such a transaction **being on the fiduciary obligor.**”) (emphasis added). But Drury was not a party to this declaratory judgment action.

Thus, Plaintiffs’ burden argument simply underscores that, to the extent they seek to reclassify Count III as a breach-of-fiduciary-duty claim, they brought it in the wrong capacity and against the wrong defendant. The trial court properly rejected Plaintiffs’ belated attempt to shift the theory of their case in opposition to summary judgment. Affirmance is warranted on the grant of judgment as to the remainder of Count III.

III. THE TRIAL COURT PROPERLY DISREGARDED SO-CALLED NEW EVIDENCE.

A. There is No Ruling for this Court to Review on the New Evidence.

As established above, the limited scope of remand from *Risman I* was to allow the trial court to express its rationale for granting summary judgment on Count III. This the trial court did: its rationale is now properly before this Court for “meaningful[] review.” *Risman I* at 905-06. And, upon review, this Court will find nothing warranting reversal of judgment on the legally deficient Count III, as argued above.

But Plaintiffs seek to expand this Court’s review to include issues beyond the scope of the limited remand. The Plaintiffs contend the trial court erred by remaining within the bounds of the limited remand when it did not entertain Plaintiffs’ Motion for Leave to File Fourth Amended Complaint or Motion to Vacate under Rule 1.540(b)(2). Initial Brief at 19–29. In other words, the Plaintiffs concede there was never a ruling on either of these motions for this Court to review.

Appellate “court[s] lack[] jurisdiction to review oral orders of the trial court, where such orders have not been reduced to writing.” *State v. Smith*, 557 So. 2d 904 (Fla. 1st DCA 1990). Without signed, written orders on the Motion for Leave to File Fourth Amended Complaint or Motion to

Vacate under Rule 1.540, this Court lacks jurisdiction to consider these issues.

B. The Trial Court Properly Refused to Allow a Fourth Amendment to the Complaint After Remand from *Risman I*.

(1) Standard of Review.

To the extent that the trial court somehow implicitly denied the Motion for Leave to File Fourth Amended Complaint (and that this Court has jurisdiction to review that implicit order), such review would be for abuse of discretion. *Jain*, 322 So. 3d at 1204 (“We review for abuse of discretion a trial court's denial of leave to amend a pleading.”). *See also Vella v. Salaues*, 290 So. 3d 946 (Fla. 3d DCA 2019) (“The granting or denying of [amendments to the pleadings or] a motion for continuance is within the discretion of the trial judge and a **gross or flagrant abuse** of this discretion must be demonstrated by the complaining party before this court will substitute its judgment for that of the trial judge.”) (emphasis added; internal citations and quotation marks omitted).

(2) Amendments to the Complaint Were Not Authorized on Remand for Proceedings Consistent with the Mandate.

As an initial matter, there is a “clear policy of the courts of this state which disapproves reversing a judgment and then allowing the losing party

to amend to assert matters not previously raised.” *Nguyen v. Roth Realty, Inc.*, 550 So. 2d 490, 492 (Fla. 5th DCA 1989). “In order to prevent later events in the trial court from circumventing or ‘mooting’ the binding aspect of an appellate adjudication, the general rule is that once an appeal has been taken, the decision on appeal becomes ‘the law of the case,’ and, on remand, amendments to the pleadings cannot be made to present new and different issues of fact or law ***unless the appellate court in its opinion has authorized such amendments.***” *Don Suntan Corp. v. Tanning Research Labs., Inc.*, 505 So. 2d 35, 36 (Fla. 5th DCA 1987) (emphasis added).

Without express authorization from this Court, the trial court was precluded from allowing a (fourth) amendment to the complaint to assert new evidence (which could have been discovered and raised in the Third Amended complaint, see Point III.B.(3) *infra* at 48, and III.C. *infra* at 53), which potentially would have “circumvent[ed] or moot[ed]” *Risman I. Don Suntan Corp.*, 505 So. 2d at 36. The trial court was bound to first comply with this Court’s mandate and amend the Final Summary Judgment to include its rationale on Count III. See, e.g., *Nazzaro v. Moksel*, 508 So. 2d 544, 544 (Fla. 3d DCA 1987) (“As yet, this final judgment has not been set aside and the parties restored to the status quo ante by the trial court in

compliance with our mandate; in our view, no further orders — including the order under review — can be entered by the trial court until this is accomplished.”)

As the Florida Supreme Court explained over forty years ago:

It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the “finality” concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.

Dober v. Worrell, 401 So. 2d 1322, 1324 (Fla. 1981).

“Such amendments, when permitted, should not permit circumvention of the appellate decision or prior valid adjudication in the trial court, should not be inconsistent or repugnant to the allegations in the original pleadings, should not change or abandon the nature of the issues framed by the pleadings, and should not introduce a new theory of recovery or defense not theretofore asserted.” *Conn. Gen. Life Ins. Co. v. Dyess*, 588 So. 2d 1045, 1047 (Fla. 5th DCA 1991) (quoting *Don Suntan Corp.*, 505 So. 2d at 36)) (quashing order granting motion for leave to amend complaint post-remand).

The Plaintiffs’ proposed amendment undeniably sought to “change ... the nature of the issues framed by the pleadings,” and “introduce a new

theory of recovery ... not [h]eretofore asserted.” *Id.* The Third Amended Complaint asserted three counts for declaratory judgment based on the language of the Association’s Declaration and the Board’s actions in initially approving the demolition and construction plan, and Lease of common elements. See R:2244–57. By contrast, the proposed (fourth) amended complaint sought to challenge ***Holdings’s subsequent actions*** by reference to the building ***as-constructed***. This was an entirely new set of facts and theory of the case. To the extent there was an implicit denial, the trial court properly refused to allow such an amendment. See, e.g., *Dyess*, 588 So. 2d at 1047. See also *Vella*, 290 So. 3d at 949 (“a trial judge in the exercise of sound discretion may deny further amendments where the same materially varies from the relief initially sought”) (internal citation, quotation marks, and brackets omitted).

Where, as here, “no such permission [for leave to amend] was sought or given in the earlier appeal,” the trial court properly rejected the Plaintiffs’ attempts to raise novel claims and theories on remand. *Dyess*, 588 So. 2d at 1047. The trial court did not err by complying with the Court’s mandate.

(3)The Motion to Amend Was Untimely.

Assuming for purposes of argument that the Motion for Leave to File a Fourth Amended Complaint is properly before this Court, and that the scope of remand permitted such amendment (neither of which is the case), the Motion was nonetheless woefully late.

“A court may deny leave to amend when there is prejudice to a party, the amendment would be futile, or the privilege to amend has been abused.” *Jain*, 322 So. 3d at 1206.

Additionally, a “trial judge in his or her discretion may deny further amendments where the amendments **materially vary** from the relief initially sought, or **where a case has progressed** to a point that the liberality ordinarily to be indulged has diminished.” *Id.* (emphasis added; internal citations and quotation marks omitted). “Thus, in addition to the desirability of allowing amendments to pleadings so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached.” *Id.* (internal citations and quotation marks omitted).

In *Jain*, this Court affirmed the denial of a motion for leave to amend the complaint filed **after** summary judgment had already been entered. *Id.* at 1206. Based on the “compelling obligation on the court to see to it that

the end of all litigation be finally reached,” this Court held that the trial court properly rejected a “proposed amendment [that] would advance new issues that contradict [appellant’s] prior unsuccessful theories.” *Id.* (citing *Inman*, 342 So. 2d at 1070 (amendment improper where “Appellant was attempting to raise new issues for the first time in her motion for rehearing and for leave to amend; and summary judgment already [was] entered”)). *Accord Frehling v. Garcia*, 3D22-0949, 2023 WL 6450464, at *6, 2023 Fla. App. LEXIS 6889, at *13 (Fla. 3d DCA Oct. 4, 2023) (affirming denial of “motion to amend [that] sought to inject new issues and defenses into the proceedings following entry of final judgment”).

Here, Plaintiffs were seeking to file a **fourth** amended complaint not only after summary judgment was entered on their claims, but after that summary judgment had been **affirmed by this Court establishing law of the case**. Thus, the reasons for affirming here are even **more compelling** than those in *Jain* or *Frehling*.

And, leaving aside that Plaintiffs sought to amend **after** judgment and **after** affirmance of that judgment, this fifth attempt to assert legally sufficient causes of action should nonetheless have been denied. “While there is no magical number of amendments which are allowed, [this Court] ha[s] previously observed that with amendments beyond the third attempt,

dismissal with prejudice is generally *not* an abuse of discretion.” *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 181 (Fla. 3d DCA 2010) (emphasis added) (quoting *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992)).

Especially where, as here, “the [P]laintiffs could have brought the motion as to those claims much earlier,” the trial court cannot be said to have abused its discretion by refusing leave to amend. *Minotty v. Baudo*, 42 So. 3d 824, 836 (Fla. 4th DCA 2010).

Recall, Plaintiffs’ “new evidence” supposedly establishing that the constructed building’s square footage exceeded the plan approved by the Board was the March 5, 2020, architectural drawings. See R:4831–33 (March 5, 2020, architectural drawings, attached as Ex. B to Fortin Report). But these drawings were filed in the public records of Miami-Dade County’s Department of Regulatory and Economic Resources on March 5, 2020. *Id.* The Plaintiffs’ operative, Third Amended Complaint was not filed until **November 4, 2020**. R:2230–88. And Plaintiffs’ opposition to Holdings’ Amended Motion for Final Summary Judgment was not filed until **June 22, 2021**. R:3632–922. Plaintiffs could have discovered the fact of the building’s square footage at any time before their Third Amended Complaint or the summary judgment proceedings. Plaintiffs were on

constructive notice that the March 5, 2020, architectural drawings, filed in the public records, existed and showed the square footage amounts of the newly constructed building.

Moreover, at any time prior to filing their Third Amended Complaint or response to summary judgment, Plaintiffs could have learned, through a simple interrogatory or question at a deposition, the square footage of the building. When faced with the Amended Motion for Final Summary Judgment, Florida Rule of Civil Procedure 1.510(d) permitted Plaintiffs to ask the trial court to defer ruling until it was able to obtain such discovery. They did not.

The evidence showing the actual square footage of the home was not new information. The Plaintiffs could have discovered it in time to either include it in their operative Third Amended Complaint or amend their pleadings before summary judgment. This Court did not excuse the Plaintiffs' lack of diligence in *Risman I* when Plaintiffs attempted to cure their evidentiary failures on appeal, and it should not excuse that lack of diligence now. Affirmance is warranted. See, e.g., *Toscana Condo. Ass'n v. DDA Eng'rs, P.A.*, 274 So. 3d 487, 491 (Fla. 3d DCA 2019) (affirming denial of fourth request to amend where "the Association was at a minimum

on notice of the potential claims ... yet waited until after it had already been granted leave to amend on three prior occasions”).

(4) Any Amendment Would Have Been Futile Because the Subsequent Square Footage Measurements are Irrelevant to the Initial Board Approvals.

This Court will generally look to the proposed amendment to determine whether amendment would be futile. “[A] proposed amendment is futile where it is insufficiently pled” or when it is insufficient as a matter of law. *Thompson v. Bank of New York*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003); *Quality Roof Services, Inc. v. Intervest Nat. Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009).

Here, the amendments sought by Plaintiffs would have been insufficient as a matter of law to alter the disposition of this case. Simply put, if Holdings exceeded the square footage requirements allowed by the Board’s approvals (a fact that Holdings vehemently denies), Holdings’s subsequent actions inconsistent with the prior approvals ***do not invalidate the prior approvals***. The ***Association*** — not the individual Plaintiffs here — would, perhaps, have a right to enforce the prior approvals. But the Plaintiffs simply have no individual claim to enforce the approvals. And

they've provided no authority for the proposition that allegedly out-of-compliance buildings subsequently nullify prior approvals of that building.

The proposed amendments were a futile, last-ditch effort to assert unsupported legal theories based on old evidence that could have been raised previously. Affirmance is warranted.

C. The Trial Court Properly Refused to Vacate Based on New Evidence.

Finally, the Plaintiffs contend that their so-called new evidence mandated that the Final Summary Judgment be vacated pursuant to Rule 1.540(b)(2).

But, as an initial matter, “[a]s set forth in the plain language of Rule 1.540(b), only motions seeking relief from *final* judgments, decrees, orders, or proceedings are authorized.” *Columbus Apartments, LLC v. MJM Structural Corp.*, 346 So. 3d 1248, 1250 (Fla. 3d DCA 2022) (emphasis added). “Here, the ... motion to vacate was not directed at a final order,” rather, it was directed to the prior Final Summary Judgment that had been partially reversed as to Count III. *Id.* Because there was additional judicial labor to be done on Count III at the time the Plaintiffs filed their Motion to Vacate, the Final Summary Judgment was not the proper target of a Rule

1.540 motion. This Court, should, accordingly, “dismiss for lack of jurisdiction” as to the Motion to Vacate.

Should this Court accept jurisdiction over the unauthorized Motion to Vacate, it should nonetheless affirm because, as argued above (see Point III.B.(3), *supra*, the evidence on which Plaintiffs relied was not new.

“Relief from judgment based on a newly discovered evidence claim should be seldom granted and only when the party seeking relief has exercised due diligence.” *Neapolitan Enters., LLC v. Fishman*, 303 So. 3d 1258, 1261 (Fla. 2d DCA 2020) (quoting *Cleveland v. Crown Fin., LLC*, 212 So. 3d 1065, 1069 (Fla. 1st DCA 2017)). “Because [the Plaintiffs] failed to establish that [t]he[y] exercised due diligence in discovering” the March 5, 2020, architectural drawings or the new building’s square footage, relief from judgment would have been reversible error. *Id.* The trial court properly refused to entertain the unauthorized and legally insufficient Rule 1.540 Motion to Vacate.

Affirmance is warranted.

D. Rule 1.510 Barred Consideration of Evidence Not Timely Filed in Opposition to Summary Judgment.

Finally, the trial court properly disregarded the so-called new evidence because it was not submitted 20 days before the summary judgment hearing, as mandated by Rule 1.510

“At least 20 days before the time fixed for the hearing, the nonmovant **must** serve a response that includes the nonmovant’s supporting factual position as provided in subdivision (1) above.” Fla. R. Civ. P. 1.510(c)(5) (2021) (emphasis added).

This deadline is mandatory and cannot be tolled. This Court in *State Farm Mut. Auto. Ins. Co. v. Advanced X-Ray Analysis, Inc.*, 368 So. 3d 1049 (Fla. 3d DCA 2023), considered whether evidence could be considered that had not been submitted 20 days before an initial summary judgment hearing, but which the nonmovant wished to have considered at a second hearing on the same motion. This Court rejected the nonmovant’s argument that the trial court’s continuance to allow additional hearing time at a later date tolled the time for submitting its material in opposition, holding that the plain language of the rule applied: the nonmovant had “twenty days ‘before the time fixed for the hearing,’” *i.e.*, the initial hearing date. *Id.* at 1051. “The fact that the trial court allowed

continued time for the hearing did not alleviate [nonmovant] of its burden to timely file its response. While a trial court has broad discretion to manage its docket, the trial court's discretionary decision to continue the hearing did not automatically reset the clock under rule 1.510 for State Farm to timely file a response." *Id.* (cleaned up).

Here, the "time fixed for the hearing" (Fla. R. Civ. P. 1.510(c)(5)) on Holdings's Amended Motion for Final Summary Judgment was August 30, 2021. R:4001. On remand from *Risman I*, ***Holdings did not file a new motion for summary judgment.*** Holdings merely sought an amended Final Summary Judgment, based on its prior summary judgment motion. The trial court did not set any summary judgment motions for hearing. Accordingly, the clock never reset under Rule 1.510(c)(5).

This Court's narrow remand did not nullify the previous summary judgment proceedings. Far from it, *Risman I* almost entirely affirmed the trial court's rulings from those proceedings. If a trial court's continuance ***before*** a final order, appeal, and affirmance of that final order cannot reset the clock, then it strains credulity to argue that a nonmovant can be relieved of its deadline under Rule 1.510(c)(5) ***after*** judgment and affirmance thereof. "It is far-fetched to argue a trial court abused its discretion by enforcing the plain language of a rule of civil procedure

promulgated to place practitioners and courts on notice of what is required” — especially where it was properly enforcing this Court’s narrow mandate. *Advanced X-Ray Analysis, Inc.*, 368 So. 3d 1051.

And it is no argument that Rule 1.510(c)(5) does not apply because the so-called new evidence could not have been timely filed. Again, the evidence existed as of March 5, 2020, and could have been discovered at any time prior to August 10, 2021 (20 days before the time fixed for hearing).

Because the time for filing evidence in opposition to summary judgment had long run before *Risman I*, the Amended Final Summary Judgment should be affirmed.⁶

⁶ Although the trial court did not expressly deny the Motion for Leave to File Fourth Amended Complaint, or the Motion to Vacate, the Court’s Amended Final Summary Judgment should nonetheless be affirmed, for all the reasons argued above, under the “Topsy Coachman” doctrine. “Under the Topsy Coachman doctrine, ‘if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.’” *Hunt v. SCI Funeral Services of Florida, LLC*, 307 So. 3d 891, 894 n.8 (Fla. 3d DCA 2020) (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)).

CONCLUSION

The Court should affirm the Amended Final Summary Judgment, in all respects.

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CERTIFICATE OF SERVICE

I certify that, on June 19, 2024, pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.516, this Answer Brief was served via the Florida courts ePortal on:

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I hereby certify that this Answer Brief was prepared in Arial, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure, and does not exceed 13,000 words, in compliance with Rule 9.210(a)(2)(B).

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