Filing # 200409577 E-Filed 06/12/2024 02:39:54 PM

THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D-______
L.T. Case No. 2023-004472-CA-01

MOSS & ASSOCIATES, LLC,

Petitioner,

v.

3401 MIDTOWN CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation; PRH MIDTOWN 3, LLC, a Florida limited liability company; ARQUITECTONICA INTERNATIONAL CORPORATION; a Florida corporation; CONSULTING ENGINEERING & SCIENCE, INC., B & J CONSULTING ENGINEERS, INC.; a Florida corporation; ARQUITECTONICA GEO CORPORATION; a Florida corporation; ASSOCIATED STEEL AND ALUMINUM, INC. a Florida corporation; BISCAYNE CONSTRUCTION COMPANY, INC., a Florida corporation; CAILIS MECHANICAL CORP., a Florida corporation; CITY ENGINEERING CONTRACTORS, INC., a Florida corporation; COASTAL MASONRY, INC., a Florida corporation; COMMERCIAL FORMING CORP SOUTH, a Florida corporation; CONCRETE HOLDINGS & SERVICES, LLC; a Florida limited liability company; DILLON POOLS, INC., a Florida corporation; EVERLAST DRYWALL CONSTRUCTION, INC., a Florida corporation; FBD CONTRACTING GROUP, INC., a Florida corporation; GM&P CONSULTING AND GLAZING CONTRACTORS, INC., a Florida corporation; JAMES J. BROOKS, INC. d/b/a ADVANCED STUCCO, a Florida corporation; MCCOURT CONSTRUCTION, INC., a Florida corporation; MODERN STONES, LLC, a Florida limited liability company; NEXT DOOR DISTRIBUTION COMPANY, an inactive Florida corporation; PASS PAINTING COMPANY, INC., a Florida corporation; PROFESSIONAL PLUMBING, CORP., a Florida corporation; REBAR UNLIMITED, INC., a Florida corporation; SIGNATURE DESIGN PAVING CORPORATION OF SOUTH FLORIDA, a Florida corporation;

SPRINKLERMATIC FIRE PROTECTION SYSTEMS, INC., a Florida corporation; THYSSENKRUPP ELEVATOR CORPORATION, A.K.A. TK ELEVATOR CORPORATION, a foreign corporation; TODD CONSTRUCTION, LLC, a Florida limited liability company; UNLIMITED ELECTRICAL CONTRACTORS CORP., a Florida corporation; and ADVANCE WATER TECHNOLOGY, CORP.,

Respondents.

Petition for Writ of Certiorari

On Review from the Circuit Court of the Eleventh Judicial Circuit
In and For Miami-Dade County, Florida

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INTRODUCTION

This case involves the trial court's failure to stay the construction-defect litigation in violation of a statutory mandate. Under chapter 558, Florida Statutes, a claimant that intends to sue a general contractor for construction defects must first serve the contractor with pre-suit notice of the alleged construction defects, referred to as a "558 notice." Chapter 558 prescribes the form and timing of the 558 notice, dictates the remedy (a stay) for the claimant's failure to comply with the statute's requirements, and enumerates the contractor's responses to the 558 notice.

If new construction defects are discovered during the litigation, the plaintiff must serve the contractor with an amended 558 notice identifying the newly discovered defects. If particular defects are not properly noticed and are not reasonably related to or caused by a properly noticed defect, then the plaintiff cannot proceed to trial on those defects. That is the situation here.

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Respondent 3401 Midtown Condominium, Inc. (the "Association")[1], the plaintiff below, failed to give Petitioner, Moss & Associates, LLC ("Moss"), pre-suit 558 notice or an amended notice of certain defects claimed in the Association's eight expert reports served on Moss during the litigation in January 2024. Moss properly moved to stay the action under section 558.003, Florida Statutes (2023), which provides that the court "shall stay the action" until the plaintiff complies with its chapter 558 obligations. The trial court here denied Moss's motion for a stay of litigation ("Stay Order"). (App'x 2171–74).

The Stay Order causes Moss continuing, irreparable harm that cannot be remedied on direct appeal and constitutes a departure from chapter 558's essential requirements. Moss therefore requests that the Court grant this Petition for Writ of Certiorari and quash the Stay Order.

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[1] The only party opposing Moss's motion to stay the litigation below was the Association. The remaining Respondents in this case are all other defendants below. *See* Fla. R. App. P. 9.020(g)(4).

BASIS FOR JURISDICTION

This Court has jurisdiction to review the non-final Stay Order and issue a writ of common-law certiorari under Florida Rules of Appellate Procedure 9.100(a) and 9.030(b)(2)(A). *See also Sorena v. Gerald J. Tobin, P.A.*, 47 So. 3d 875, 877 (Fla. 3d DCA 2010) ("This Court has certiorari jurisdiction to review a trial court's non-final order denying a motion for stay." (citing *Pilevsky v. Morgans Hotel Grp. Mgmt., LLC*, 961 So. 2d 1032, 1033, n.1 (Fla. 3d DCA 2007))).

STATEMENT OF THE CASE AND FACTS

Moss was the licensed general contractor engaged to construct a 32-story condominium building in Miami known as the Hyde Midtown Condominium ("Project"), now controlled by the Association. (App'x[2] 1289–90, 1291). Before filing the lawsuit, the Association served Moss with three 558 notices ("Pre-Suit Notices"). (App'x 9–334, 335–37, 338–58). These Pre-Suit Notices identified certain alleged construction defects at the Project that were ultimately pleaded as

[2] References to Petitioner's Appendix to the Petition for Writ of Certiorari filed on June 11, 2024, will be denoted as "App'x pg. #."

the factual basis for Moss's liability in the first amended complaint.[3] *See* (App'x 9–334, 335–37, 338–58).

The trial court's case management order required the Association to serve Moss with the Association's expert reports identifying the alleged defects. (App'x 1611). In January 2024, the Association served Moss with eight expert reports at issue here: (1) the Epic Expert Report and Supplements[4]; (2) the KAMM Building Observation Report of the Mechanical – Electrical – Plumbing – Life Safety Systems Report; (3) the 2024 VDA Expert Report; (4) the HHCP Preliminary Cost Report; and (5) four additional reports prepared by Matergenics (collectively, the "2024 Expert Reports"). (App'x 549–863, 864–910, 911–67, 968–1103, 1104–18, 1119–27, 1128–1251, 1252–86); *see also* (App'x 1611–12).

After reviewing the 2024 Expert Reports, Moss discovered for the first time that the Expert Reports included alleged defects that

[3] The trial court recently granted in part Moss's motion to dismiss the Association's first amended complaint. *See* (App'x 2143). As of the filing of this Petition, the Association has not yet filed its operative second amended complaint. *See* (App'x 2143).

[4] The Epic report located at Appendix 22, dated December 20, 2019, was attached to the first Pre-Suit 558 Notice at Appendix 9 and was re-served on Moss in January 2024. *See* App'x 549.

the Association is trying to recover damages for in this lawsuit but that were not disclosed in the Pre-Suit Notices. *See* (App'x 1611–23). Consequently, Moss filed its subject motion to stay litigation, arguing that the action must be stayed under section 558.003, Florida Statutes, until the Association complies with its statutory obligations. (App'x 1611–23). For each of the 2024 Expert Reports, Moss identified the line items of the alleged defects that the Association failed to previously disclose in any of its Pre-Suit Notices. *See* (App'x 1615–23).

The Association, in its opposition to Moss's motion to stay, argued that a stay was not warranted because, in accordance with section 558.004(1) and (11), Florida Statutes (2023), the defects described in the 2024 Expert Reports were "reasonably related to, or caused by, the construction defects previously noticed" in the Association's Pre-Suit Notices.[5] *See* (App'x 1624–2123). In its opposition, the Association cited the Pre-Suit Notices it believed covered the new defects asserted in the 2024 Expert Reports. (App'x

[5] The Association's opposition also included a motion for fees against Moss under the trial court's inherent authority for Moss's alleged bad faith and delay tactics. (App'x 1634–35). The trial court did not rule on that motion in its Stay Order. *See* (App'x 2171).

1627–28, 1631–32). The Association alternatively argued that, at this point in the litigation, a stay would be futile because Moss is not hindered in the presentation of its defense—Moss now knows the scope of all the defects asserted in the 2024 Expert Reports and has had the opportunity to inspect the Project both before and after the lawsuit was filed. *See* (App'x 1633–34).

Moss filed a reply to the Association's opposition. *See* (App'x 2124–37). In the reply, Moss argued that section 558.003 was a mandatory—not discretionary—statute requiring a stay; that the defects asserted in the 2024 Expert Reports were not reasonably related to or caused by any construction defects previously noticed in the Pre-Suit Notices; and that a stay would afford Moss the due process prescribed under chapter 558 by allowing Moss to confidentially take any one of the statutorily enumerated options to remove the particular defect and associated damages from the scope of litigation. (App'x 2124–37).

Notably, Moss attached to its reply the affidavit of Christopher M. Moran, P.E., Moss's expert. (App'x 2134–37). Mr. Moran attested that at least forty-nine defects identified in the Association's 2024 Expert Reports were not previously disclosed in any Pre-Suit Notices

and were not reasonably related to or caused by any previously noticed defect. (App'x 2134–35). In Mr. Moran's professional opinion, these defects were entirely new and unrelated defects. (App'x 2135). These defects alone constituted over $1,900,000 in claimed damages by the Association. *See* (App'x 2137). The Association did not rebut Mr. Moran's affidavit.

The trial court held a hearing on Moss's motion to stay. (App'x 2138–70). Moss argued that the 2024 Expert Reports contained more than forty defects that were new defects not previously disclosed in the Pre-Suit Notices and that under section 558.004(11) and 558.003, the Association could not proceed with the litigation on those defects. (App'x 2143, 2145). Without the proper 558 notices, Moss was deprived of its statutory ability to participate in confidential settlement negotiations pertaining to those defects. (App'x 2147).

The Association responded that chapter 558 requires only "substantial compliance, not "strict compliance," and that the Association's 2024 Expert Reports complied with chapter 558's requirements of sufficient detail of the claimed defects. *See* (App'x 2149–50). Further, the Association argued that a stay would be futile because Moss had full notice of all defects at issue in this case

through pre-suit and post-suit inspections, various testing, and walk-throughs of the Project. *See* (App'x 2150–51, 2153).

In denying Moss's motion to stay, the trial court questioned whether it was the court's role to determine, before trial, if the Association previously gave notice of each defect identified in its 2024 Expert Reports. *See* (App'x 2143–44, 2154, 2156–57). The court believed that Moss could move for summary judgment on the defects not properly noticed, which would eliminate them from the scope of trial and that the Association would "live and die" by its stance that it could not proceed to trial on defects that were not reasonably related to or caused by previously noticed defects. *See* (App'x 2144–45, 2157).

The court further ruled that it was not appropriate for the court to direct the Association to file a new 558 notice "based on a declaration or based on reading an expert report," because to do so would be to "prejudg[e] an issue under the 558 process where the judge is supposed to stay out of that."[6] (App'x 2157); *see also* (App'x 2159). In short, in entering the Stay Order, the court ruled that it

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[6] The Association requested a jury trial on all issues so triable. (App'x 1480).

needed not determine, at this stage, whether the Association's defects in its 2024 Expert Reports complied with chapter 558's notice requirements and that a stay was not necessary as a practical matter. *See* (App'x 2159–60, 2171–74).

This Petition for Writ of Certiorari follows.

NATURE OF THE RELIEF SOUGHT

Moss requests that this Court grant this Petition for Writ of Certiorari and quash the Stay Order with instructions to the trial court to (1) determine which alleged defects asserted in the Association's 2024 Expert Reports are defects for which supplemental 558 notice must be given under section 558.004; and (2) stay the litigation under section 558.003, Florida Statutes, pending the Association's compliance with its statutory obligations of giving proper 558 notice of all defects alleged in its 2024 Expert Reports.

ARGUMENT

The trial court's Stay Order causes material injury to Moss throughout the remainder of the litigation below; causes irreparable injury to Moss that cannot be remedied on direct appeal; and constitutes a departure from the essential requirements of sections

558.003 and 558.004. *See Bank of N.Y. Mellon v. Figueroa*, 299 So. 3d 430, 433 (Fla. 3d DCA 2019) (explaining standard for petition for writ of certiorari); *Ocwen Loan Servicing, LLC v. 21 Asset Mgmt. Holding, LLC*, 307 So. 3d 923, 925 (Fla. 3d DCA 2020) (same). This Court should therefore grant this Petition for Writ of Certiorari.

I. The harm to Moss is irreparable, is continuing throughout the litigation below, and cannot be remedied on direct appeal.

This Court should grant certiorari review because the trial court's denial of the stay required under section 558.003 caused irreparable harm to Moss that is continuing throughout the litigation and that cannot be remedied on direct appeal. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012) ("[B]efore certiorari can be used to review non-final orders, the appellate court must focus on the threshold jurisdictional question: whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm." (citing *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 999 (Fla. 1999))); *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998) ("[A]s a condition precedent to invoking a district court's certiorari jurisdiction, the petitioning party

must establish that it has suffered an irreparable harm that cannot be remedied on direct appeal.”).

The Association’s notice obligation under chapter 558 is a statutory condition precedent to suing Moss for alleged construction defects. *See* § 558.003, Fla. Stat. (“A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. . . .”); *see also Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273, 276 (Fla. 2017) (explaining that chapter 558 “sets forth procedural requirements *before* a claimant may file an action for a construction defect” (citing § 558.003, Fla. Stat. (2012) (emphasis added)). If additional defects are discovered during the litigation, then the plaintiff cannot proceed to trial on those additional defects unless each has been properly noticed through a supplemental 558 notice. *See* § 558.004(1)(b), (11), Fla. Stat. The trial court here failed to require the Association to comply with the statutory conditions precedent to bringing and maintaining this lawsuit against Moss.

In similar circumstances, courts have held that certiorari review is proper where the trial court failed to adhere to procedural or statutory requirements in the litigation, including a condition

precedent. *See, e.g.*, *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003) (explaining that a trial court's interpretation or application of a statute or procedural rule may grant a basis for certiorari review); *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995) (holding that appellate courts have "certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72," governing punitive damages")[7]; *Miami Physical Therapy Assocs., Inc. v. Savage*, 632 So. 2d 114, 115–16 (Fla. 3d DCA 1994) (holding that certiorari review was "the proper method to test an order denying a motion to dismiss for failure to comply with the presuit notice requirement" of the medical malpractice statute, because "early intervention was necessary . . . to comply with the legislature's 'perception of urgency' in enacting medical malpractice reform"); *Rudnick v. Harman*, 301 So. 3d 266, 268 (Fla. 4th DCA 2020) ("A petitioner may obtain certiorari review of the denial of a motion to dismiss for failure to comply with presuit

[7] Since *Globe Newspaper* was decided, the appellate rules have been amended to include as an enumerated appealable non-final order an order granting or denying a motion for leave to amend to assert punitive damages. *See* Fla. R. App. P. 9.130(a)(3)(G).

conditions precedent." (citing *Kissimmee Health Care Assocs. v. Garcia*, 76 So. 3d 1107, 1108 n.1 (Fla. 2d DCA 2011))).

Here, Moss has demonstrated irreparable harm that cannot be remedied on direct appeal. As will be discussed further below, the entire purpose of chapter 558, which governs a claimant's notice to the putative defendant of construction defects, is to offer an "alternative method to resolve construction disputes that would reduce the need for litigation." § 558.001, Fla. Stat. (2023). The statutory notice scheme gives the putative defendant the "opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process." *Id.*; *see also id.* § 558.004(9) (providing that a responding party's statutory settlement responses are inadmissible in the lawsuit).

When a claimant fails to give the statutorily required pre-suit notice of an alleged construction defect, the court is required to stay the action, and the action cannot proceed until the claimant complies with the statutory conditions precedent. *See* § 558.003, Fla. Stat. If the claimant discovers a defect during the litigation, the claimant may amend the initial list of defects "to identify additional or new construction defects as they become known to the claimant." *Id.* §

558.004(11). A claimant *cannot proceed to trial* on any defect that is not properly noticed. *Id.*

Because the Association here has asserted alleged construction defects in its 2024 Expert Reports that are not supposed to be part of this litigation to begin with because they were not properly included in the Pre-Suit Notices or other supplemental 558 notices, Moss has been irreparably harmed by the trial court's failure to stay the action to compel the Association to comply with its statutory notice obligations. *Cf. Miami Physical Therapy Assocs., Inc.*, 632 So. 2d at 115–16; *Rudnick*, 301 So. 3d at 268.

Where—like here—"an order dispens[es] with a statutorily mandated presuit procedure, which is a condition precedent to a legal proceeding," the order may be reviewed by certiorari. *See Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995) (citing *Pearlstein v. Malunney*, 500 So. 2d 585 (Fla. 2d DCA 1986)). In this instance, such a statute "cannot be meaningfully enforced postjudgment because the purpose of the presuit screening is to avoid the filing of the lawsuit in the first instance." *Id.* (citing *Cohen v. DeYoung*, 655 So. 2d 1265 (Fla. 5th DCA 1995)); *see also Rudnick*, 301 So. 3d at 268 (same).

The Stay Order irreparably harms Moss because it fails to require the Association to comply with a statutory condition precedent. The material injury to Moss is continuing throughout the litigation and cannot be remedied on direct appeal because the action cannot proceed as to defects not properly noticed, and Moss has not been given the statutorily required opportunity to confidentially respond to each alleged defect such that Moss's responses cannot be used against it in the remainder of the litigation. Moss has therefore demonstrated the first two jurisdictional prongs of certiorari relief. *See Dade Truss Co. Inc. v. Beaty*, 271 So. 3d 59, 62 (Fla. 3d DCA 2019) (describing these prongs as jurisdictional).

II. The trial court departed from the essential requirements of section 558.003 in denying the stay.

First, the trial court erred in its interpretation and application of section 558.003, Florida Statutes. Second, contrary to the Association's argument below, a stay would not be futile.

A. Section 558.003 prescribes a mandatory, not discretionary, stay.

Section 558.003 requires the court to stay the litigation when a timely motion raises the claimant's failure to give pre-suit notice of defects:

> A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, on timely motion by a party to the action *the court shall stay the action*, without prejudice, *and the action may not proceed until the claimant has complied with such requirements*. . . .

§ 558.003, Fla. Stat. (emphasis added).

If the plaintiff files an action alleging a construction defect without first filing the pre-suit 558 notice—like the Association did here with respect to the 2024 Expert Reports—then the statute *requires* the court to stay the action until the claimant complies with its obligations under chapter 558. *See id.* This is a mandatory, not discretionary, directive given chapter 558's express purposes of imposing a condition precedent, reducing litigation, and offering alternative dispute resolution. *See S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977) (stating that the word "shall" in a statute is "normally meant to be mandatory in nature" and its "interpretation depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute" (citations omitted)).

Here, the trial court departed from the essential requirements of the law in failing to interpret section 558.003's clear and

unambiguous language according to its plain meaning. *See Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1284 (Fla. 3d DCA 2020) ("[W]hen construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning." (quoting *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 439 (Fla. 2013))); *Ortega v. United Auto. Ins. Co.*, 847 So. 2d 994, 997 (Fla. 3d DCA 2003) ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and obvious meaning." (citing *Rollins v. Pizzarelli*, 761 So. 2d 294, 294 (Fla. 2000))).

The law is clear that when a defendant timely moves for a stay for a plaintiff's failure to comply with its chapter 558 notice obligations, the court *must* stay the action until the plaintiff complies. *See In re Palafox Marina Hurricane Sally Litig.*, No. 3:20CV5943-TKW-MJF, 2023 WL 2889341, at *4 (N.D. Fla. Feb. 15, 2023) (applying Florida law) (stating that the proper remedy for a claimant's failure to comply with its pre-suit notice obligations in § 558.004, Fla. Stat., is abatement of the claims under § 558.003); *Busch v. Lennar Homes, LLC*, 219 So. 3d 93, 96 n.2 (Fla. 5th DCA 2017) (noting that the

defendant's remedy for a claimant's premature action under § 558.003 is a stay, not dismissal); *Hebden v. Roy A. Kunnemann Constr., Inc.*, 3 So. 3d 417, 419 (Fla. 4th DCA 2009) (explaining that the sole remedy for a claimant's non-compliance with chapter 558 is "abatement, upon a timely motion, until the offending party complies with the statutory procedures").

By failing to grant a stay, the trial court also departed from the legislature's expressed intent in enacting chapter 558. Section 558.003 is consistent with the legislature's intent of "hav[ing] an alternative method to resolve construction disputes that would reduce the need for litigation . . . ." § 558.001, Fla. Stat. Through the 558 notice process, the legislature intended that the claimant file a notice of claim with the contractor, which would allow the contractor "an opportunity to resolve the claim through confidential settlement negotiations *without resort to further legal process*." *Id.* (emphasis added). Because the court denied Moss's motion to stay, Moss continues to be involved in potentially unnecessary litigation as to the improperly noticed defects and does not have an opportunity to resolve the defects through confidential settlement negotiations without resort to protracted litigation.

Accordingly, the trial court had no discretion to deny a stay and departed from the essential requirements of the law in entering the Stay Order.

B. A stay would not be futile.

The Association argued below that the stay should be denied because it would be futile at this stage of the litigation. But section 558.003 does not permit a court to deny a stay on the basis of futility. The Association below did not argue that Moss's motion to stay was untimely, nor did the trial court find that the motion was untimely. Timeliness is the only condition on a motion to stay under section 558.003; if the motion is timely, a stay must be granted until the plaintiff complies with its statutory obligations. *See* § 558.003, Fla. Stat. It is undisputed that Moss's motion was timely.

Even assuming futility is a proper inquiry under this statute, the Association's position is contrary to the express language and purpose of chapter 558. If Moss had been served with proper 558 notice of the defects asserted in the 2024 Expert Reports, Moss would have been given the opportunity to respond to each defect—line-by-line—in one of five statutorily enumerated ways: (1) a written offer to remedy the alleged defect at no cost to the Association; (2) a written

offer to settle the claim by monetary payment; (3) a written offer to settle the claim by a combination of repairs and payment; (4) a written statement that Moss disputes the claim and will not repair or settle the claim; or (5) a written statement that monetary payment will be determined by Moss's insurer. *See* § 558.004(5)(a)–(e), Fla. Stat.; *see also Altman Contractors, Inc.*, 232 So. 3d at 276–77 (explaining contractor's potential statutory responses to notice of claim).

By circumventing the mandatory 558 notice requirements, the Association has precluded Moss from *confidentially* offering one of these statutorily required methods of responding to each alleged defect on a line-by-line basis. If Moss were to agree to make certain repairs or pay a settlement sum for certain defects asserted in the 2024 Expert Reports, then those defects would be eliminated from the scope of litigation, and the Association would not be able to use Moss's statements or actions against it in this litigation. *See* § 558.004(9), Fla. Stat. ("[A]ny offer or failure to offer pursuant to subsection (5) to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is

not admissible in an action brought under this chapter."); *see also* *Altman Contractors, Inc.*, 232 So. 3d at 277 (same).

Yet the Association maintains the untenable position that, because Moss now knows of all the defects claimed in the 2024 Expert Reports and because this litigation is already underway, a stay for formal 558 notice would be futile. The Association's "futility" position contravenes not only the letter but also the spirit of chapter 558: to "reduce the need for litigation" and give Moss the "opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process." *See* § 558.001, Fla. Stat.

Finally, the Association's reliance below on *Banner Supply Co. v. Harrell*, 25 So. 3d 98 (Fla. 3d DCA 2009), in arguing futility was also misplaced. In *Banner Supply*, this Court noted that it did "not reach the issue of whether Chapter 558 even applie[d]" to that case. *Id.* at 100 n.6. That alone makes *Banner Supply* distinguishable from this case, where it is undisputed that chapter 558 applies.

Regardless, even within the chapter 558 framework, *Banner Supply*'s facts are distinguishable. The defendant-supplier there moved to abate the action under section 558.003, which the trial court denied. *Id.* at 99. The plaintiffs had filed an amended complaint

invoking chapter 558, but they failed to serve the statutorily required 558 notice before filing the amended complaint. *Id.* at 100. The supplier "did nothing to comply with Chapter 558 in response to the amended complaint"; the supplier neither sought to inspect the property nor attempted to negotiate a resolution. *Id.* All the supplier did was "file a motion to abate and wait until the hearing." *Id.* This Court held that abatement would have been futile because, despite being given the opportunity to do so, the supplier declined to inspect the property or otherwise comply with chapter 558's requirements. *Id.* This Court therefore denied the petition for writ of certiorari. *Id.*

But this case is different from *Banner Supply*. Here, Moss has done more than simply move for a stay. Since receiving the Association's 2024 Expert Reports listing defects not previously noticed, Moss has both inspected the property and was forced to attend mediation, despite not having formal notice of all alleged defects being claimed in this action. *See* (App'x 2150–52). Indeed, Moss attended mediation before its expert had the opportunity to review and respond to the Association's 2024 Expert Reports, so Moss was not fully apprised of the nature of the claimed defects. *See* (App'x 2128).

After mediation, Moss's experts provided the following responses to the Association's 2024 Expert Reports alleging new defects: "This item was not included in a pre-suit notice as required by Chapter 558 Fla. Stat. Therefore, Moss has no comment at this time because it was precluded pre-suit from inspecting, commenting and offering to repair per the requirements of the statute." (App'x 2128). During this litigation, Moss has also requested that the Association serve Moss with a supplemental 558 notice to cover the new defects, but the Association has refused to do so. (App'x 2128). At all times throughout this litigation, Moss has taken the consistent position that the Association has failed to comply with its statutory obligations. Thus, *Banner Supply* is distinguishable, and the trial court departed from the essential requirements of section 558.003 in entering the Stay Order.

III. The trial court departed from the essential requirements of section 558.004(1) and (11) in concluding that it needed not determine whether the Association gave proper notice of the alleged defects in the 2024 Expert Reports.

In denying Moss's request for a stay, the trial court reasoned that it needed not conduct a "mini trial" on the issue of whether the Association's alleged defects in the 2024 Expert Reports were

"reasonably related to, or caused by, the construction defects previously noticed" as set forth in section 558.004(11), Florida Statutes. *See* (App'x 2159). This conclusion was a departure from the essential requirements of the law.

The Association argued below that it was not required to give supplemental 558 notices for the construction defects set forth in the 2024 Expert Reports because those defects fell within section 558.004(11)'s ambit. But subsection (11) provides that the 558 notice procedures apply to *each* alleged defect:

> (11) The procedures in this chapter apply to *each* alleged construction defect. However, a claimant may include multiple defects in one notice of claim. The initial list of construction defects may be amended by the claimant to identify additional or new construction defects as they become known to the claimant. *The court shall allow the action to proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter and as to construction defects reasonably related to, or caused by, the construction defects previously noticed.* Nothing in this subsection shall preclude subsequent or further actions.

§ 558.004(11), Fla. Stat. (emphasis added); *see also id.* § 558.004(1)(b) ("The notice of claim must describe *in reasonable detail* the nature of *each* alleged construction defect and, if known, the damage or loss resulting from the defect." (emphasis added)).

In Moss's motion to stay, it identified multiple defects that the Association failed to disclose in any of its Pre-Suit Notices. *See* (App'x 1615–23). In response, the Association identified defects from the 2024 Expert Reports that the Association believed were previously disclosed in the Pre-Suit Notices. *See* (App'x 1631–32). Moss supplied Mr. Moran's *unrebutted* affidavit in reply, in which Mr. Moran attested that at least forty-nine defects from the Association's 2024 Expert Reports were not reasonably related to or caused by any defects listed in the Association's Pre-Suit Notices; these defects were entirely new, unnoticed defects totaling over $1,900,000 in claimed damages. (App'x 2134–37).

The trial court, instead of attempting to resolve this dispute and determine which defects were required to be noticed, concluded that it was not required to conduct a "mini trial" on this issue and was not required to make the factual determination of whether the defects in the 2024 Expert Reports were reasonably related to or caused by previously noticed defects under section 558.004(11).[8] *See* (App'x

[8] The trial court's apparent suggestion that Moss move for summary judgment to eliminate the defects not properly noticed would not be a viable or successful motion. *See* (App'x 2144–45). Moss's expert attested that almost fifty defects were not previously disclosed in the

2159). In failing to make this determination at this stage and deciding to permit the Association to simply proceed with its action, the court departed from the essential requirements of section 558.004(11) and (1), which require supplemental 558 notices to be given for *each* alleged construction defect that is not "reasonably related to, or caused by," previously noticed defects. *See* § 558.004(1), (11), Fla. Stat. Because defects that are not properly noticed cannot proceed to trial, *see id.* §§ 558.003, 558.004(11), the trial court can—and must—make this factual determination before the trial stage if there is a factual dispute.

Further, nothing in chapter 558 indicates that mere substantial compliance, rather than strict compliance, is permitted as the Association argued below. *See* (App'x 2150). To the contrary, chapter 558 makes clear throughout its provisions that the claimant *must* comply with all its statutory obligations and cannot maintain an

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Association's Pre-Suit Notices. In contrast, the Association maintained that those same defects were, in fact, disclosed or that they are reasonably related to or caused by other defects previously noticed. The parties therefore have directly contradictory positions on this disputed factual issue, rendering the issue inappropriate for summary judgment because it would need to be resolved by the factfinder. *See generally* Fla. R. Civ. P. 1.510(a).

action if it fails to comply. *See* §§ 558.001, 558.003, 558.004(1)(a), (1)(b), (11), Fla. Stat. The Association here neither substantially nor fully complied with its chapter 558 obligations.

In short, the trial court departed from the essential requirements of section 558.004 in failing to evaluate the parties' positions and make the ultimate factual determination of whether any of the defects in the 2024 Expert Reports were not reasonably related to or caused by defects in the Pre-Suit Notices. Moss is therefore entitled to certiorari relief.

CONCLUSION

For the reasons discussed above, Petitioner, Moss & Associates, LLC, respectfully requests that this Court grant this Petition for Writ of Certiorari and quash the Stay Order. Moss also requests that the Court remand with instructions for the trial court to factually determine which alleged defects asserted in the Association's 2024 Expert Reports are not reasonably related to or caused by previously noticed defects under section 558.004(11), Florida Statutes, and to stay the litigation under section 558.003, Florida Statutes, until the Association complies with its chapter 558 notice obligations for the

unnoticed defects so that Moss may assert the appropriate statutory responses to the defects.

CERTIFICATE OF COMPLIANCE

I certify that this Petition for Writ of Certiorari complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.100(g) because it uses Bookman Old Style 14-point font and because the word count from Microsoft Word is 5,470 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was filed with the Third District Court of Appeal by using the Florida Courts e-Filing Portal, which will be furnished by E-service this 11th day of June 2024 to all counsel on the attached Service List.

/s/ William C. Davell

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