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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D2024-0782
L.T. NO.: 2020-CA-000278

JAMES G. LINCE, TODD R. BARTOS, ESQ., & THE BARTOS GROUP, LLC,

Appellants,

v.

PELICAN CIRCLE ASSOCIATION, INC., et al.,

Appellees.

ON APPEAL FROM THE FIRST JUDICIAL CIRCUIT COURT
IN AND FOR WALTON COUNTY

INITIAL BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

This appeal involves critical issues of (1) a trial court's baseless finding that counsel and client were subject to sanctions for filing a frivolous claim and (2) fundamental property rights in the context of Florida's subdivision laws and common law.

Section 57.105 Sanctions. The court below ignored the required evidentiary standard to award sanctions and determined, without basis or explanation, that Count XXIV of the Fourth Amended Complaint was frivolous when, as outlined by counsel in the motion papers and at the January 30, 2024, hearing (through a detailed presentation (see Exhibit A hereto)) of the factual and legal predicate for the claim. It defies logic, and illustrates an abuse of discretion and error of law, to enter sanctions when there was (1) a factual basis for the claim, (2) a legal basis for the claim, and (3) a good faith reliance on existing law for the claim. The lower court summarily decided that the claim was frivolous and cited no evidence for the same. That is not the standard required and this Court should reverse the lower court's order regarding sanctions.

Property Rights. More specifically, the court below summarily and without explanation or basis (1) rewrote decades of Florida law, (2) ignored other portions of Florida law, (3) reversed a 20-year precedent from the

same trial court regarding the same subdivision and issue, and (4) granted summary judgment on multiple counts that (i) arose from an operative complaint filed months prior to the motions being filed (ii) during a time that discovery remained ongoing, (iii) and for which there were multiple issues of material fact present that were summarily ignored. These four actions are clear errors of law and abuses of discretion and must be overturned.

This case involves a subdivision formed in 1977 with a recorded declaration that was upheld multiple times as conveying the Common Areas (as defined therein) to the owners of property within the subdivision plat's numbered lots only. Prior attempts to circumvent both its declaration and Florida law were previously rejected by the courts.

Nevertheless, the lower court decided to endorse the formation of an illegal Chapter 720 HOA, permit the transfer of rights not held by the subdivision's developer to the illegally formed HOA, allow a so-called quitclaim deed to amend the declaration, and to disregard multiple documents that were in the chain of title for every property considered part of the subdivision.

In short, a grave injustice has been allowed that has taken away valuable property and rights related to subdivision's common areas from Appellant, clouded previously clear title of properties considered part of the

subdivision, and improperly amended the subdivision's declaration to allow for the creation of a "voluntary" Chapter 720 HOA that vests power to manage and/or participate in decisions regarding common areas only in the relatively few homeowners willing to pay the improper HOA annual assessments and grant it lien rights against their respectively owned subdivision properties.

STATEMENT OF THE CASE AND FACTS

I. RELEVANT FACTUAL BACKGROUND

Formation & Evolution of the Camp Creek Lake Subdivision

Camp Creek Lake Subdivision (the "Subdivision") in Walton County, Florida was originally formed in 1977 by Camp Creek Lake Development Co., Inc. (the "Developer"). The Subdivision's plat (the "Plat") and its Declaration of Covenants and Restrictions (the "Declaration") were both recorded in 1977. (R. 2167).

Since 1977 the Subdivision's common areas (the "Common Areas") consisted of the following areas labeled/featured on Plat:

- the private beach located in front of lots numbered 1-15 (the "Private Beach"),
- "Recreation Area",

- the labeled 5' and 10’ pedestrian easements,
- "S.R.D. Easement" (herein the "Lakefront"), and
- the right of way and road ("Pelican Circle Road").

(R. 2167). Public property records identify the Common Areas as a single, unpartitioned parcel. (R.2148).

The Common Areas were specifically dedicated to only some of the lots. The Plat shows there are forty-eight (48) numbered lots in the Subdivision (“Numbered Lot(s)”). (R. 2168). The Numbered Lots now consist of fifty-nine (59) unique properties, which represent all Subdivision properties subject to the Declaration, and their owners are collectively referred to herein as “Subdivision Owners” or “Numbered Lot Owners”. (R. 2170).

Prior final, non-appealable orders of First Judicial Circuit entered well before the commencement of this action have already conclusively determined the Common Areas are owned by the Plat’s Numbered Lot Owners as tenants in common. (R. 2167). That determination was recorded in the chain of title and the municipality’s tax records reflected that the Numbered Lot Owners held an undivided 1/59th interest in the Common Areas as tenants in common.

Critically, there are clearly defined areas titled “Not Included In Plat” (“NIIP”), which are specifically excluded from the Plat/Subdivision. (Id.). The Developer specifically reserved those rights for the Subdivision Owners, and this intent was clarified subsequently in a recorded release exempting certain lots from the Declaration (the “Release”) wherein Developer stated that “[NIIP] parcels are **not** covered by the Declaration”. (R. 2169-71, emphasis added).

The Developer never made changes to the Declaration when it had the ability to do so, and was administratively dissolved on October 11, 1991. (R. 2153). By 1991, Developer already sold all Numbered Lots. (R. 563). It is undisputed Developer has not been reinstated. (R. 2240). Therefore, in 2019, no authorized representative for Developer remained, and the Declaration could not be amended to permit an HOA committee without it first being approved or appointed by a majority of the Subdivision Owners. (Id.). No such amendment ever occurred.

Improper Amendment of Declaration

The Declaration contains the following covenants and restrictions relevant to this appeal:

- Developer would only retain total architectural control until it sold all Numbered Lots or transferred such control to Subdivision Owners (R. 2239);
- in the absence of any remaining authorized representative for Developer, a committee cannot assume Developer's rights, powers, privileges, and authorities granted under Declaration unless first elected or appointed by a majority of Subdivision Owners (noting specifically that "[n]othing herein shall be construed as conferring any rights, powers, privileges and authorities in said committee ***except*** in the event aforesaid")(R. 2239 - 40)(emphasis added);
- a dedication granting exclusive use of the Private Beach and the Recreation Area to Subdivision Owners and affirming that "by so doing, the Developer retain[ed] no right, title or interest in said areas" (the "Dedication")(R. 2168-69);
- a restriction on amending the Declaration without the recorded consent from at least two-thirds of all Subdivision Owners (R.406); and
- confirmation that the "covenants and restrictions herein shall be deemed to be covenants running with the land. If any person claiming under the Developer shall violate or attempt to violate any of such

restrictions or covenants, it shall be lawful for" any Subdivision Owner to maintain an action in law or equity against such perpetrators of the actual or attempted violation. (R. 406).

While attempts have previously been made to reach the requisite threshold of approval for amendment of the Declaration, they have all failed.

In 2003, the First Judicial District issued an order stating that the Common Areas are owned by the Subdivision Owners as tenants in common. (R. 2160). The real property records for Common Areas reflected that ownership and value vested in the Subdivision Owners prior to 2019. (R. 2172-73). That value was purloined by Appellees' improper actions and remained stolen by the lower court's improper rulings.

Knowing that the issue was already definitively determined in 2003, nevertheless fifteen years later a small group of owners undertook a scheme to attempt to circumvent that ownership. First, a homeowner's association under Fla. Stat. § 720 (a "Chapter 720 HOA") needed to be created; on May 6, 2019, Pelican Circle Association, Inc. ("PCA") filed articles of incorporation ("PCA's Original Articles"). (R. 2187). PCA filings stated (and still advertises to this day) that it exists solely to serve as a Chapter 720 HOA for Subdivision. (R. 2187). Chapter 720 is for a

mandatory HOA, which cannot exist here due to the Declaration and the failure of a requisite number of Subdivision Owners to consent.

The second step required PCA to solicit from the aged and infirm representative of Developer and his counsel the execution of so-called quitclaim deeds purporting to transfer to PCA title to the Common Areas. (R. 2164). This end-run around the procedures required by statute and the Declaration was ratified by the lower court's summary judgment order issued in 2022. (R. 2052). The only way the lower court could torture this result was to ignore binding precedent, Florida statute, and the facts as presented, which were still under discovery.

Pablo's Purchase of Subdivision Property

Appellant James G. Lince (herein "Pablo's") purchased real property[1] in the Subdivision on June 6, 2016. (R. 2152). Pablo's specifically relied on representations from seller, public records, databases, title company reports, and even other Subdivision Owners, which cumulatively established that (1) the Subdivision Owners collectively owned Common Areas as tenants-in-common, and (2) that the Subdivision was **not** governed by an HOA. (R. 3378-79).

[1] Identified as Parcel ID No. 28-3S-18-16071-00A-0301. (R. 2152).

Prior to Pablo's purchase of Subdivision property, the Subdivision Owners' ownership interest in Common Areas was expressly affirmed in final, non-appealable orders entered in previous actions in the First Circuit, which addressed ownership of Subdivision's Common Areas (collectively the "Prior Orders"). (R. 2172-77). The Prior Orders relevantly made the following findings:

- the Common Areas are "owned in equal undivided shares" by [Subdivision Owners] (R. 2158);
- "[the voluntary HOA] has no authority to bind the owners, the lots or the [Common Areas] by its actions" (Id.);
- "[the voluntary HOA] has no authority to create, sell or enforce [any grant of rights to Common Areas to persons other than Subdivision Owners] which creates, at the very least, a license for the use of [Common Areas]" (Id.);

Consistent with the Prior Orders, property tax records prior to 2019 listed "Camp Creek Lake Owners" as the owner of the Common Areas parcel[2]. (R. 2172-73).

[2] despite Quitclaim Deeds including NIIP properties in their respective definitions of persons considered "Owners".

Execution of Quitclaim Deeds

Sometime prior to May 2019, Defendants Alex Marks and Susan Portanova (together the "Incorporators") retained defendant Frank Watson, Esq. ("Mr. Watson") of Watson Sewell P.L.. (together with Mr. Watson, the "Watson Defendants"). (R. 2730). This was represented as being for the benefit of all Subdivision Owners, including Appellant, as the actions sought to be taken were being taken for the benefit of all owners (including NIIP owners). As part of this representation, in early 2019, Mr. Watson attempted to contact Kenneth Padgett, the last known President of the dissolved Developer, and connected with Charles E. Garris, Esq. ("Mr. Garris"), the personal attorney-in-fact for Mr. Padgett. (R. 2182). Mr. Watson told Mr. Garris he was reaching out to request Developer execute a quitclaim deed conveying title for Common Areas to PCA[3]. (Id.). Mr. Watson represented himself as counsel for Subdivision's "association" to Mr. Garris (neglecting to inform him that it was not a valid HOA), informed him that a quitclaim deed was necessary to permit reconstruction of a boardwalk within Common Areas (it was actually already rebuilt in 2018), and that the requested conveyance represented the Subdivision Owners' wishes (it did

[3] At the time this conversation took place, PCA was not yet incorporated in Florida. (R. 1905).

not). (Id.). Notably, the Subdivision had no HOA and the Common Areas were already owned by the Subdivision Owners. (R. 960).

Despite only serving as Mr. Padgett's personal Attorney-in-Fact, and not as an authorized corporate representative of the dissolved Developer[4], on May 2, 2019, Mr. Garris personally executed the first quitclaim deed (the "May Quitclaim"). (R. 2184, R. 465). The May Quitclaim, recorded on May 16, 2019, was not in fact a true quitclaim deed, as it contained revisions and amendments to the Declaration – changes that were null and void since the Declaration expressly prescribes a specific process for its revision and amendment. (Id.).

On June 6, 2019, Mr. Garris facilitated having Mr. Padgett personally execute on behalf of Developer a second quitclaim deed drafted and provided by Mr. Watson, which again attempted to convey PCA title to Common Areas (the "June Quitclaim", and together with the May Quitclaim

[4] Underwriting counsel for PCA's insurer emailed Mr. Watson on May 13, 2019 to opine that "there is no presumption that the president of a corporation dissolved or otherwise can delegate their powers via power of attorney to some other party. The [Developer] would have to have articles or a resolution authorizing the president to delegate his authority […] [a]lso, the POA itself doesn't grant [Mr. Garris] powers to transfer any assets owned by this Developer". (R. 2183). Therefore Mr. Garris as attorney-in-fact for Mr. Padgett, lacked any attorney-client relationship with Developer.

the “Quitclaim Deeds”), and it was recorded on June 12, 2019. (R. 2185, R. 471).

PCA’s Articles of Incorporation

PCA was formed without prior notice to all Subdivision Owners or consent from the same[5,6], contrary to requirements of Fla. Stat. § 720. (R. 554). PCA’s Initial Officers and Board of Directors were also appointed without regard for Florida law or the Declaration. (R. 555). Instead, PCA’s Articles appointed the following individuals without any vote to PCA’s Board of Directors: Susan Portanova, Alex Marks, Daniel Duggan, Cammie Rash, and Charles Harmon (together “PCA’s Initial Directors”); and appointed the following as PCA’s Initial Officers: President - Marks; Vice President - Harmon; Secretary - Duggan; and Treasurer - Rash (together “PCA’s Initial Officers”). (R. 2187).

[5] This is confirmed by an email produced through discovery in which Mr. Marks states “[w]ithout the ability to timely reach out to 74 homeowners, the HOA was formed [at the direction of [Incorporators]”. (R. 619).

[6] Pablo’s does not dispute the implication that consent of all owners was required –it only disputes the claim that 74 homeowners needed to provide consent when there were only 59 Numbered Lot Owners.

Alex Marks and Susan Portanova executed PCA's Original Articles as its incorporators, and Mr. Watson executed the same on behalf of Watson Sewell, P.L. as PCA's authorized agent. (R. 1531).

PCA later amended its articles of incorporation on February 20, 2020 ("PCA's Amended Articles", and collectively with PCA's Original Articles "PCA's Articles") (Id.) naming the following individuals as members of PCA's Board of Directors: Marks, Alan Sielbeck, and Rash (together "PCA's Amended Directors"); and named as PCA's Officers: President - Marks; Vice President – Sielbeck; and Secretary/Treasurer – Rash (together "PCA's Amended Officers"). (Id.).

PCA's Articles identically make the following representations:

- PCA's corporate purpose is to "provid[e] an entity under the Florida Statute Chapter 720 (the "Statute") for the operation of an Owners' Association … [t]he purpose of [PCA] is to own, maintain and preserve the [C]ommon [A]reas…" (R. 632- 636, emphasis added);
- "[PCA] shall have the following specific [power]: 1. To own, hold, improve, and maintain the Common Areas" (R. 633);
- "[a]n Owner may become a Member by executing and recording a covenant encumbering the Owner's real property subjecting their property to the levying powers of [PCA] … [c]hanges of membership

in [PCA] shall be established by recording … a deed or other instrument establishing a transfer of record title to a Member's Lot, Parcel or Sub-parcel" (R. 634- 635); and

- "[a]ll terms [used in PCA's Articles] shall have the same meaning as set forth, defined and used in Chapter 720, Florida Statute" (herein the "Supremacy Clause"). (R. 636, emphasis added).

A joining covenant must be executed to become a member of PCA ("PCA Member"), which covenant states "[t]he Owner acknowledges and agrees that by voluntarily joining [PCA] the [Owner's] Property will permanently become subject to and encumbered by the Articles, Bylaws, and any other governing documents of [PCA] and mandatory Membership will be binding on the Owner, and the Owner's assignees, heirs, successors and/or assigns" and subsequent owners of Owner's property. (R. 2963-67). The practical impact of this is that once joined "voluntarily", the HOA becomes mandatory.

PCA's DEP Resolution

On or around June 18, 2019, PCA's President executed both a "Joinder and Consent of Owner" and a "Certificate of Corporate Resolution" (together the "PCA DEP Resolution"), which essentially allowed PCA to resolve a potential violation from Florida's Department of Environment

Protection ("DEP") related to the reconstruction of a boardwalk structure within Common Areas, completed without unanimous consent of Subdivision Owners. (R. 2187). That resolution became a permanent record of the DEP related to the Subdivision and further clouded the previously clear title.

PCA Easement

On February 18, 2020, PCA recorded a document purporting to grant "Pelican Owners" (a group including both Subdivision Owners and NIIP Owners) an easement for ingress, egress and use of the "Easement Area" ("PCA Easement"). (R. 2166). The PCA Easement operated to provide, without prior consent/approval of the Owners and without payment, NIIP Owners with rights to access Common Areas equal to that held by Subdivision Owners. (Id.) The PCA Easement was proposed and ratified without any prior notice or consent from the Subdivision Owners. (R. 2212). This further clouded title and caused damage to all of the Subdivision Owners. The lower court's December 12, 2022 Order (the "2022 Order") has already affirmed NIIP Owners are **not** entitled to rights equal to those of Subdivision Owners under Declaration, and that the Dedication's grant of exclusive use supersedes any grant of those rights to

NIIP Owners contained in the PCA Easement (despite the language of the recorded easement). (R. 2055- 56).

Sale of Pablo's Property

Pablo's sold its property on April 15, 2022 to James and Kecia Costello via Warranty Deed (recorded in OR 3248, 440), but retained its rights and interest in this litigation. (R. 2152- 53).

II. RELEVANT PROCEDURAL HISTORY

The original Complaint was filed on July 28, 2020 by Pablo's and its co-Plaintiffs Robert and Barbara Brooke (who have not joined Pablo's in this appeal)(together with Pablo's, the "Plaintiffs") against Defendants PCA, each of its Initial Officer and Directors individually[7], Mr. Padgett, Developer, and all then-existing NIIP Owners[8]. (R. 92- 94). The Complaint alleged six counts: (I) Declaratory Judgment as to Subdivision Owner's rights to Common Areas, (II) Quiet Title/Cancellation of Quitclaim Deeds and PCA

[7] including Mr. Harmon

[8] Complaint was first amended on October 7, 2020 to correct persons listed as NIIP Owners.

Easement, (III) Trespass[9], (IV) Slander of Title, (V) Fraud, and (VI) Civil Conspiracy. (R. 103,105, 108, 110 112, 113).

On July 9, 2021, the lower court issued an order granting Plaintiffs' motion seeking to join Subdivision Owners as co-plaintiffs, and a Third Amended Complaint including all Subdivision Owners was filed on July 28, 2021. (R. 370).

Plaintiffs first noticed Mr. Garris for deposition on June 23, 2021[10] (taken on August 2, 2021), Mr. Padgett on June 25, 2021 (a Suggestion of Death for Mr. Padgett was later filed on July 14, 2021), and Mr. Watson on July 19, 2021 (still to occur) (R. 367). Plaintiffs additionally noticed PCA, Incorporators, Mr. Sielbeck & Mr. Dugan for depositions on February 2, 2022 (to which Defendants filed a Motion for Protective Order in response and none have occurred to-date) (R. 999, 1003- 1009). In May 2022, PCA additionally sought a Protective Order continuing Plaintiffs' requested depositions indefinitely. (R. 1739- 40).

The lower court's 2022 Order upholding the validity of the Quitclaim Deeds was issued in response to the following motions (R. 2092, 2109):

[9] Voluntarily dismissed without prejudice on July 19, 2020.

[10] It was only during this deposition that the true extent of Mr. Garris' actions was first known to Appellant, and the claim against the Garris Defendants was filing within 2 years of that date.

- Pablos' Amended Motion for Partial Summary Judgment as to Count I/Quitclaim Deeds and PCA Easement (and PCA's Response in Opposition) (R. 540- 667),
- Second Amended Motion for Partial Summary Judgment as to Count II and NIIP of Count I (and PCA's Response in Opposition) (R. 1639-40), and
- PCA's Cross Motion for Summary Final Judgment as to Plaintiff's Motions for Partial Summary Judgment (and Plaintiff's separate Responses in Opposition, along with Pablo's Memorandum of Law)(R. 1389-1488).

Pablo's moved to amend the Third Amended Complaint in May of 2022 (following Brookes' filing for the same in March of 2022), which were granted on May 23, 2023, and the operative Fourth Amended Complaint ("4AC") was filed in May 2023, alleging 24 Counts and adding new persons as named Defendants which relevantly included Defendants Charles Garris, Charles E. Garris, P.A., Franklin Watson, & Watson Sewell P.L.. (R. 2146- 2426).

Following the filing of the 4AC, certain Defendants filed the first request for production of documents from Pablo's since the amendment on May 25, 2023. (R. 2146, 2433- 2466, 2677). Since June 2, 2023,

Defendants have collectively filed approximately 18 additional motions for summary judgment with the lower court (the most recent being filed on December 18, 2023). (R. 2578, 2593, 2611, 2629, 2655, 2826, 2952, 3560, 3235, 3561).

On September 2, 2023, Pablo's filed an Amended Motion for Summary Judgement, Renewed Motion for Summary Judgement, and Cross-Motions for Summary Judgement on All Counts of 4AC (relevant portions of which were considered by the lower court as related to the issues included in this appeal). (R. 3261-3394).

On February 19, 2024, orders for summary judgment and partial summary judgment were entered as to:

- Defendants Motion for Summary Judgment on Count V (Slander of Title by PCA Easement);
- Defendants' Motion for Summary Judgment for Count XXII (Adverse Possession);
- Defendants' Motion for Summary Judgment for Count XXIII (Seeking Relief as to Costello's Warranty Deed);
- Defendants' Motion for Summary Judgment for Count XX (Gross Negligence);

- Defendants' Motion for Summary Judgment for Count XXI (Seeking Involuntary Judicial Dissolution of PCA);
- Defendants' Motion for Summary Judgment for Counts XVII (Fraudulent Misrepresentation) & XVIII (Negligent Misrepresentation); and
- Defendants' Motion for Partial Summary Judgment for Counts II (Quit Title to Common Areas) & IX (Seeking Cancellation of Quitclaim Deeds & PCA Easement).

Following oral argument on January 30, 2024, on February 19, 2024, the lower court entered final judgment in favor of the Garris Defendants and against Pablo's and its counsel, Appellants Todd R. Bartos, Esq. ("Mr. Bartos") and The Bartos Group, LLC (together with Mr. Bartos, referred to jointly as "Pablo's Counsel") pursuant to Garris Defendants' Motion for Attorney's Fees and Sanctions under § 57.105.[11] The lower court summarily determined that that: (a) Pablo's lacked any good faith basis to assert the Garris Claim against the Garris Defendants, (b) there was no good faith argument for the extension, modification or reversal of existing law, (c) there was a complete absence of any justiciable issue related to the

[11] Filed in relation to the lower court's Summary Final Judgment rendered as to Garris Defendants only on August 21, 2023 on Count XXIV of the 4AC alleging gross negligence/negligence. (R. 3957)

Garris Claim, and (d) such absence should have been obvious to Pablo's Counsel. (R. 3957- 58). Notably, the lower court made no findings of fact and cited no evidence in support of its conclusions - both reversible error. The judgment awarded attorney's fees of $9,396.00 as sanctions (awarded one-half against Pablo's and one-half against Pablo's Counsel). (R. 3958-59).

The Watson Defendants were first added as Defendants with the filing of the 4AC, wherein Pablo's alleged a total of eleven claims against them.

Out of the eleven claims, six were claims alleging the following documents to be false filings pursuant to Fla. Stat. § 817.535 (the "False Filing Statute") in separate counts of the 4AC, each alleged against the following named Defendants: the May Quitclaim (Count XI against Defendants Watson, Watson Sewell, P.L., Marks, and Portanova), the June Quitclaim (Count XII against Defendants Watson, Watson Sewell, P.L., Marks, and Portanova), PCA's Original Articles (Count XIII against Defendants Watson, Watson Sewell, P.L., Marks, Portanova, and PCA), PCA's DEP Resolution (Count XIV against Defendants Watson, Watson

Sewell, P.L., Marks, Portanova, Harmon[12], Rash[13], and Sielbeck), PCA's Amended Articles (Count XV against Defendants Watson, Watson Sewell, P.L., Marks, Rash, and Sielbeck), and the PCA Easement (Count XVI against Defendants Watson, Watson Sewell, P.L., Marks, Rash, and Sielbeck)(collectively, the "False Filing Claims"). (R. 2228- 2252).

Six separate Motions for Summary Judgment on the False Filing Claims were all granted by the lower court in corresponding Orders dated November 1, 2023[14]. The orders on the False Filing Claims, together with the November 16, 2023 Amended Order Granting Defendant Frank Watson's and Watson Sewell, PL's Moton for Summary Judgment on Count XXIV of the 4AC and Denying Plaintiff James Lince's Cross Motion for Summary Judgment on Count XXIV, fully adjudicated the claims against the Watson Defendants. On November 20, 2023, the Watson Defendants filed the underlying Motion for Attorney's Fees for the Order of Final Judgment against Pablo's, which awarding a sum of $15,039.00 as Attorney's Fees

[12] Defendant Charles Harmon was awarded Summary Final Judgment by the lower court on 11/01/23 and that judgment is currently included in a separate appeal also pending before this Court. (Case No.1D2023-3091)
[13] Defendant Cammie Rash was dismissed from the lower court's action with prejudice on 01/09/24 and is therefore not a party to this appeal.
[14] Pablo's previously noticed the False Filing Orders for appeal, which also remains pending before this Court (Case No. 1D2023-3091).

and an award of $1,784.00 in taxable costs in favor of the Watson Defendants pursuant to the False Filing claims.

ARGUMENT

I. LOWER COURT ERRED BY AWARDING ATTORNEY'S FEES PURSUANT TO FLA. STAT. § 57.105 IN FAVOR OF GARRIS DEFENDANTS RELATED TO COUNT XXIV OF 4AC.

The lower court erred in granting sanctions as there were factual and legal bases for the ordinary negligence[15] claims against the Garris Defendants. Further, the lower court failed to cite to any factual evidence in its findings of fact, instead making conclusory statements. Materially absent from the lower court's order is the lengthy presentation from Appellant's counsel outlining the multiple factual and legal bases for the claims against the Garris Defendants.

A detailed factual record was presented on January 30, 2024 (M.S. Ex. A, pp. 48-75[16]; R.3937-42; and related presentation at Ex. A hereto)

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[15] The lower court ignored the ordinary negligence allegations and determined without basis that because Mr. Garris was an attorney, the only duty he could owe was that of an attorney. That unilateral determination was erroneous because the negligence theories were pleaded in the alternative and it was an unsettled issue whether Mr. Garris could even represent the dissolved entity.

[16] The transcript was identified as part of the record but was not included by the Clerk. A Motion to Supplement the record on appeal is being filed on the same date as this Brief and is attached thereto as Exhibit A (herein "M.S. Ex. A".

demonstrating that Mr. Garris owed a duty to all Subdivision Owners as intended third-party beneficiaries of the Quitclaim Deeds, and that he breached that duty, to the detriment of the Subdivision Owners. The factual record presented to the lower court provided ample support for the claims being asserted. Looking at Mr. Garris' deposition alone, he acted in a manner that a jury could have easily determined he breached the duty owed. A detailed summary of this evidence is provided infra.

A. Standard of Review

Florida Statute § 57.105 provides:

> (1) Upon ... motion of any party, the court shall award a reasonable attorney's fee ... to be paid to the prevailing party ... at any time ... in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) [w]as not supported by the material facts necessary to establish the claim or defense; or (b) [w]ould not be supported by the application of then-existing law to those material facts.
> ....
> (3) Notwithstanding [the above], monetary sanctions may not be awarded: (a) [u]nder paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

§ 57.105(1)(a)-(b), (3)(a), Fla. Stat. (2020).

The standard of review is an abuse of discretion one. Minto PBLH, LLC v. 1000 Friends of Fla., Inc., 228 So. 3d 147, 149 (Fla. 4th DCA 2017)(citation and internal quotation marks omitted).

Florida law sets an extremely high bar for the imposition of sanctions – namely that the claim must be "completely lacking" in merit. This standard is intentionally high to prevent § 57.105 from being leveraged as a weapon by counsel. Sanctions are inappropriate if there is any arguable basis in law and fact for a party's claim. Dental Law Firm, P.A. v. People's Choice Pub. Adjusters, LLC, 345 So. 3d 897, 903 (Fla. 4th DCA 2022) (finding that "[c]ourts must apply section 57.105 'with restraint to ensure that it serves its intended purpose of discouraging baseless claims without casting a chilling effect on use of the courts'"(internal citations omitted)); see also Wendy's of N.E. Florida, Inc. v. Vandergriff, 865 So. 2d 520, 524–25 (Fla. 1st DCA 2003).

An argument can only be justifiably determined frivolous if its underlying law and facts are so completely lacking in merit the argument is rendered completely untenable. Tr. Mortg., LLC v. Ferlanti, 193 So. 3d 997, 1000 (Fla. 4th DCA 2016) (internal citations omitted); see also de Vaux v. Westwood Baptist Church, 953 So. 2d 677, 683 (Fla. 1st DCA 2007)(internal citations omitted). Additionally, a good faith argument for the

extension, modification, or reversal of existing law cannot be the basis for sanctions under 57.105. Yakavonis v. Dolphin Petroleum, Inc., 595 So. 2d 1020, 1021 (Fla. 3d DCA 1992). Stated another way – if there is a scintilla of factual and legal basis in making the claim at issue, then the court must deny sanctions.

The movant alleging a frivolous claim bears a heavy burden. Pappalardo v. Richfield Hosp. Services, Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001). Conclusive evidence of a claim is not required at the time the non-moving party files such claim to avoid any threat of sanctions – if such party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts. MC Liberty Express, Inc. v. All Points Services, Inc., 252 So. 3d 397, 403 (Fla. 3d DCA 2018) (citing to Bridgestone/Firestone, Inc. v. Herron, 828 So.2d 417-18 (Fla. 1st DCA 2002))(noting that "if attempts to prove those facts are fruitless, that is still not cause for sanctions where the party's initial belief was well-founded"). Further, if the factual predicate exists from the face of the pleadings, and is further bolstered by discovery, sanctions are de jure improper.

Finally, a moving party is not entitled to an award of attorney's fees under § 57.105 solely because it successfully obtained an entry of

summary judgment. Failing to state a cause of action, on its own, is not sufficient grounds to support a finding for sanctions. Mason v. Highlands Cnty. Bd. of Cnty. Com'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) (citing to Stagl v. Bridgers, 807 So.2d 177 (Fla. 2d DCA 2002)). As summarized by the court in Bowen v. Brewer:

> A finding that a party is entitled to recover attorney's fees under section 57.105 ***must be based upon substantial, competent evidence*** presented at the hearing on attorney's fees or otherwise before the court and in the record." Mason v. Highlands County Bd. of County Comm'rs, 817 So.2d 922, 923 (Fla. 2d DCA 2002). It is also true that "courts have made clear that an award of fees may not be appropriate under section 57.105, even though the party seeking fees was successful in obtaining the dismissal of the action." Read v. Taylor, 832 So.2d 219, 222 (Fla. 4th DCA 2002) (holding that the claims were not so completely lacking in factual or legal basis as to warrant an award of fees under section 57.105).

936 So. 2d 757, 761 (Fla. 2d DCA 2006). Even if the claim is dismissed on summary judgment, a court's decision to award of attorney's fees as sanctions pursuant to §57.105(1) is inappropriate if it is not based on substantial and competent evidence included in the record. Sheriff of Alachua Cnty. v. Hardie, 433 So. 2d 15, 16 (Fla. 1st DCA 1983) (reversing an award of attorney's fees and noting that any finding of frivolousness by the lower court would have been clearly erroneous based on the lack of supporting record evidence). Otherwise, § 57.105 turns itself on its head

and becomes a cudgel for counsel to wield against each other – something the legislature never intended.

Further, in Ferm v. Saba, the court indicated that where a motion to dismiss was not previously filed by movants prior to summary judgment, an award for sanctions may be reversed. 444 So. 2d 976, 977 (Fla. Dist. Ct. App. 1983). The Ferm court determined that where the standard for an award under 57.105 is when a claim is "so clearly devoid of merit both on the facts and the law as to be completely untenable". Id.

Even looking beyond this threshold bar to sanctions, and looking at the facts of this case in light of other sanctions case law, it was error to sanction Pablo's and Pablo's Counsel, as case law weighs heavily in favor of reversal:

- "Although section 57.105 requires that plaintiffs and their attorneys make reasonable efforts to investigate their claims before filing suit, absolute verification often is impractical... the requirement of frivolousness for an award of attorney's fees is not equivalent to the standard required to prevail on a summary judgment, judgment on the pleadings, or even a motion to dismiss for failure to state a cause of action. Rather, an award of attorney's fees under section 57.105 is only proper where the action is so clearly devoid of merit both on the

facts and the law as to be completely untenable " Rojas v. Drake, 569 So. 2d 859, 860 (Fla. Dist. Ct. App. 1990) (internal citations omitted).

- "[W]here the party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts. If attempts to prove those facts are fruitless, that is still not cause for sanctions where the party's initial belief was well-founded." Ferlanti, 193 So. 3d at 1001.
- "Florida courts have continued to caution that section 57.105 must be carefully applied to ensure that it serves the purpose for which it was intended – to deter frivolous pleadings. Thus, an award of fees under section 57.105 requires more than the moving party succeeding in obtaining a dismissal of the action or the entry of a summary judgment in its favor…[w]here a party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts. If attempts to prove those facts are fruitless, that is still not cause for sanctions where the party's initial belief was well-founded. MC Liberty Express, 252 So. 3d at 403 (internal citations and quotations omitted).
- “The central purpose of section 57.105 is, and always has been, to deter meritless filings and thus streamline the administration and

> procedure of the courts…Although the statute, like Federal Rule of Civil Procedure 11 upon which it was modeled must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, any interpretation of the statute must give effect to its central goal of deterrence. Mullins v. Kennelly, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003) (internal quotations omitted).

The case law is clear and unambiguous – so long as there exists material facts necessary to support the claim and existing law (or a good faith argument to extend existing law) recognizes the claim, then sanctions are not available.

B. Abuse of Discretion for Lower Court to Find Pablo's Claim Was Frivolous Despite Pablo's Establishing a Good Faith Basis.

It was an abuse of discretion to find Count XXIV of the 4AC frivolous despite Pablo's counsel more than sufficiently establishing its good faith basis for bringing the same during the corresponding evidentiary hearing.

Count XXIV specifically asserted negligence against the Garris Defendants on the basis that the Garris Defendants owed a duty to the Subdivision Owners as intended third-party beneficiaries of the quitclaim deeds. The third-party beneficiary doctrine is long- and well-recognized in negligence law in Florida. Further, the Garris Defendants owed a duty to

the Subdivision owners as the Quitclaim Deeds specifically identified them and intended to benefit them. Florida law even extends professional negligence to third parties under these exact circumstances. Count XXIV was initially presented, and continued, based on "a good faith argument for the extension, modification, or reversal of existing law…". § 57.105(3)(a), Fla. Stat. (2020) As such, it was not frivolous.

It is undisputed that:

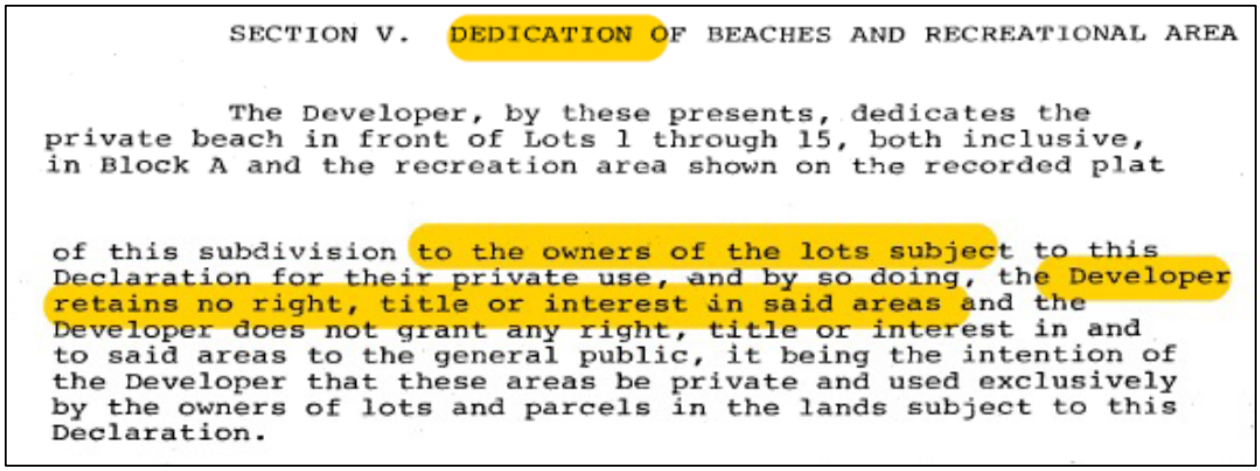
- Mr. Garris did not read the Declaration, Plat, or search the Walton County public records prior to executing the Quitclaim Deeds;
- Mr. Garris, having done no analysis at all, simply "picked up a pen, and ...signed [the May Quitclaim]" (R. 959);
- Mr. Garris did no diligence and no research regarding the Subdivision or the Declaration – simple research that would have shown that the Developer had no remaining interest;
- Pablo's principal, James G. Lince, hired his own counsel prior to his purchase of Pablo's Property in 2016; and
- Mr. Lince's counsel researched the records and title history and concluded that the Common Areas were owned by the Subdivision Owners (diligence that the Garris Defendants could have undertaken and did not).

The documents available to the Garris Defendants in 2019 conclusively showed that (1) the Developer retained **no** ownership rights, (2) the Declaration was intended to (and did) reserve to the Subdivision Owners the Common Areas, including the Private Beach, (3) the Quitclaim Deeds materially changed the rights and merged two separate classes of owners (Subdivision Owners & NIIP Owners) into a single class of owner and provided rights to the NIIP Owners that did not exist in the Declaration. In failing to perform this simple research, the Garris Defendants set in motion a series of filings that clouded the Subdivision Owner's title, necessitating this action.

The Documentary Record as of 2019 supports Count XXIV

Strikingly absent from the lower court's order is any indication of facts that were presented that supported Count XXIV. A detailed review is necessary here to show that there was ample factual evidence to support the claims and sanctions were erroneously imposed.

The 1977 Declaration was clear that it ran with the land, applied to the numbered lots (specifically excluding NIIP), required a 2/3 approval of the Subdivision Owners for any changes to the Declaration, and disclaimed any retained ownership interest by the Developer through its Dedication:



SECTION V. DEDICATION OF BEACHES AND RECREATIONAL AREA

The Developer, by these presents, dedicates the private beach in front of Lots 1 through 15, both inclusive, in Block A and the recreation area shown on the recorded plat of this subdivision to the owners of the lots subject to this Declaration for their private use, and by so doing, the Developer retains no right, title or interest in said areas and the Developer does not grant any right, title or interest in and to said areas to the general public, it being the intention of the Developer that these areas be private and used exclusively by the owners of lots and parcels in the lands subject to this Declaration.

(R. 2161). The Declaration was clarified by Developer in 1981 with a recorded Release of Lots (the "Release"), which again specified that the NIIP parcels were **not covered** by the Declaration. (R. 2169).

Had the Garris Defendants read the Declaration (and later the Release) it would have been facially obvious that (1) the Developer retained no residual interest and (2) the Quitclaim Deeds provided by the Watson Defendants sought to change the rights of Subdivision Owners without the proper process.

Mr. Garris was deposed and his testimony indicated that he did not think the Quitclaim Deeds were a big deal because, stated simply, if there is no interest to convey, then a quitclaim deed is worthless and harmless. That is not entirely true or accurate. First, it has to be an actual quitclaim deed and not a deed with new rights and conditions that happened to be titled a "quitclaim deed". Also, even a quitclaim deed that ultimately

conveys no interest can still be an improperly filed document that creates a cloud on title. The Garris Defendants ignored that risk, causing harm to the Subdivision Owners.

Several other public records in the chain of title for Common Areas further indicated that the Developer retained no rights and that the Subdivision Owners alone were the beneficiaries of the Declaration. A reasonably prudent person/attorney would have reviewed the title history and operative documents before executing documents that fundamentally changed the rights of the Subdivision Owners.

Beyond the subdivision documentation, in 2003, as recorded in the Walton County Official Records and properly included in the record before the lower court, the First Judicial Circuit issued its order for Universal Design Engineering & Construction Services Inc. v. Pace et al (Case No. 2001-CA-000044) (the "2003 Order"). The Universal Design case also arose from an improper attempt to form a voluntary HOA for the Subdivision. The 2003 Order is critical because ***it is binding precedent on the issues of Subdivision Owners' ownership and rights to the Common Areas as against that of a voluntary HOA for Subdivision*** - ***the exact issues giving rise to this action in the lower court***. The First Judicial Circuit pertinently found that:

- "[t]he Declaration does not provide for an Association for the management of the common property" (R. 2174),
- "[t]he Declaration has not been amended to provide for an Association for the management of the common property" (Id.), and
- "[t]he common property is owned in equal undivided shared by the [Subdivision Owners] shown on the [P]lat..." (Id.).

The Universal Design court further held:

> A. Camp Creek Lake Homeowners Association, Inc. has no ownership in the common property or lots in Camp Creek Lake and is therefore, not an owner as contemplated by the Declaration;
>
> B. Camp Creek Lake Homeowners Association, Inc has no authority to bind the owners, the lots or the common property in Camp Creek Lake by its actions regarding the common property in Camp Creek Lake;
>
> C. Camp Creek Lake Homeowners Association, Inc has no authority to create, sell or enforce the Associate Members program which creates, at the very least, a license for the use of the common property of Camp Creek Lake;
>
> D. Camp Creek Lake Homeowners Association, Inc. is not the committee contemplated by the provisions of Section II paragraph O of the Declaration (commonly called the Architectural Review Committee or ARC);
>
> E. Regarding the question of counting votes, absent amendment of the Declaration, a plain reading of the Declaration provides for one vote per lot. Lot means those lots shown on the Plat of the Camp Creek Lake.

(R. 2174). In short, the voluntary HOA was found to have no authority or basis for formation absent an amendment of the Declaration. The lower court, without explanation, declined to even consider Universal Design.

More public record documentation exists indicating that the Developer retained no interest and that the Common Areas were owned as tenants-in-common by the Subdivision Owners.

Walton County's taxing records showed that each Subdivision Owner's legal description of its property included "AN UNDIVIDED INT AS REC IN [THE DECLARATION]...". A separate account was set up for "Camp Creek Lake Owners" and, until 2023, stated that the "Owners" owned "ALL STREETS RECREATION AREAS SRD EASEMENT, COMMON & BEACH AREA AS RECD IN PLAT OF CAMP CREEK LAKE S/D PB 5-12". The Official Records, First Judicial Circuit precedent, and Walton County tax records all consistently stated that the Subdivision Owners **owned** the Common Areas[17].

Mr. Garris admitted that he did not read the Quitclaim Deeds. (R. 949). Had he done so, he would have seen that each of the proposed

[17] Only after the lower court's erroneous finding in the 2022 Order that the Quitclaim Deeds vested bare title for Common Areas in PCA was that reference removed from the Subdivision Owner's record and added to a newly created tax record for PCA.

Quitclaim Deeds contained clauses that (1) sought to expand access to Common Areas to owners of NIIP Properties and (2) contained material edits between the May and June Quitclaim, including the following perpetuity language:

- May

> 8. *The above Covenants and Deed Restrictions are binding on the Grantee, and any successor and assigns regardless of anything to the contrary in Grantees Articles and By Laws.*

- June

> 8. *The above Covenants and Deed Restrictions are perpetual, run with the land, and binding on the Grantee, and Grantee's successor and assigns regardless of anything to the contrary in Grantees Articles and By Laws.*

(R. 2452-62).

In failing to even read the Quitclaim Deeds, the Garris Defendants further breached their duty to the Subdivision Owners. The undisputed language of the Quitclaim Deeds states the conveyance to PCA was ***for the benefit*** of the owners of the specific parcels identified in the exhibits to each[18] (including the parcel number for Pablo's Property) – in other words, the owners, including Pablo's, were **intended third-party beneficiaries** of the Quitclaim Deeds - the sole necessary fact to open the door to asserting

[18] The Quitclaim Deeds both feature an identical Exhibit B, which provides the list of parcel identification numbers specifically identifying owners of all properties of Subdivision ***and*** NIIP areas as an "Owner" under the Quitclaim Deeds. (R. 2452-62).

Count XXIV. The recorded documents related to Subdivision collectively and conclusively indicate the Common Areas were intended to benefit only the Subdivision Owners. (R. 2711-14).

The issue of a good faith basis is not limited to just the Garris Defendants' actions (or inactions) – Pablo's and counsel's actions must have a good faith basis too. Pablo's hired counsel in 2016 (separate and distinct from Pablo's Counsel here, and therefore referred to as "Lince's Counsel" herein) as part of its due diligence prior to its purchase of Pablo's Property. Lince's Counsel again in 2019 affirmed that Pablo's and the Subdivision Owners "own an undivided interest in the [Private Beach]…". (R. 3378).

These are all relevant because they are facts of record that a reasonable person would have reviewed prior to simply picking up a pen and signing a document that was intended to benefit the Subdivision Owners, but actually harmed them[19]. Further, when coupled with the

[19] Pablo's does not (nor did it) dispute the well-established principle of law that a quitclaim deed only conveys such an interest in a property as may held by the grantor at the time the deed is executed. See, e.g., Blitch v. Sapp, 142 Fla. 166, 194 So. 328, 330 (1940). Pablo's has instead consistently argued that, contrary to the self-given title "QUIT CLAIM TITLE" placed near the top of each of the first pages of the Quitclaim Deeds, their intended result was not limited to a potential conveyance of Developer's interest in Common Areas. Rather, the express language of

undisputed facts that PCA was created for the sole purpose of creating a Chapter 720 HOA (i.e. a mandatory one), it was reasonable for Pablo's to conclude ownership rights in the Common Areas (including the Private Beach) were improperly changed from the Subdivision Owners to an association formed for the sole purpose of establishing a Chapter 720 HOA. This was only made possible by the same Quitclaim Deeds the Garris Defendants had a duty to review and evaluate. All of these facts (outlined in depositions and affidavits contained within the record) demonstrate Pablo's and its counsel had a sufficient, good faith basis for asserting Count XXIV against the Garris Defendants in the 4AC.

Given the above undisputed material facts, the legal standard under §57.105 cannot be met and sanctions are improper. Florida statute specifically states that monetary sanctions may not be awarded:

> (a) Under paragraph (1)(b) if the court determines that the **claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success**.
>
> (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has **acted in good**

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the Quitclaim Deeds, on their faces, indicated a clear intent to create new covenants and restrictions that would run with the Common Areas parcel, resulting in the Quitclaim Deeds actually serving as an improper amendment to the Declaration.

> **faith**, based on the representations of his or her client as to the existence of those material facts.

Fla. Stat. § 57.105(3)(a)-(b)(emphasis added). Case law further indicates the exceptionally high burden for imposing is not met, as a matter of law, where there is evidence of a good faith basis.

As outlined in Pablo's Counsel's presentation in opposition to the sanctions sought by the Garris Defendants, referenced during the hearing before the lower court for the same (which, over 59 pages exhaustively outlined the factual and legal bases for Count XXIV s), there was already existing case law acknowledging a general duty of care and an attorney can have a duty to non-client third-party persons. There was evidence that duty was breached. There was evidence the breach caused Pablo's damages. It is likely for these reasons that the Garris Defendants did not file a Motion to Dismiss as to Count XXIV.

Pablo's allegation that Mr. Garris' actions related to the execution of the Quitclaim Deeds were performed in reckless disregard of existing property rights had sufficient basis as it was evidenced, minimally, by Mr. Garris' own deposition testimony. (R. 2279- 80; R. 960; R. 966). Mr. Garris' testimony that Mr. Watson (on behalf of his clients) was just "asking [him] to execute a quitclaim deed which just says I give any rights I may have" (R. 961) further evidences that Mr. Garris' failure to obtain an actual

(or even basic) understanding of the contents of the Quitclaim Deeds prior to having them executed was unreasonable. The lower court has failed to acknowledge and/or consider how the inclusion of new covenants and restrictions altered the legal effect of the Quitclaim Deeds. It has also wholly failed to address the impact of the changes in Developer's signing corporate representative or in the language used between the two Quitclaim Deeds.

Where Pablo's relied on Florida law that pre-existed the date of filing for the 4AC to establish 1) that an attorney can owe a duty to a third party under the third-party beneficiary doctrine if the attorney was hired for the purpose of benefitting such, even where no direct attorney/client relationship exists[20], and 2) that Pablo's was an intended third-party beneficiary of Mr. Garris' services[21], it is clear Pablo's advanced before the lower court a legitimate theory of liability based on an arguable interpretation of existing law. Visoly v. Security Pacific Credit Corp., 768 S. 2d 482, 491 (Fla. 3d DCA 2000). The record demonstrates Count XXIV was based on valid legal theories. Builders Shoring & Scaffolding v. King,

[20] Dingle v. Dellinger, 134 So.3d 484, 491 (Fla. 5th DCA 2014).
[21] Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd., 647 So.2d 1028 (Fla. 4th DCA 1994).

453 So. 2d 534, 534 (Fla. Dist. Ct. App. 1984) (finding that "[a]t least some of the counts asserted … were arguable, and [the court] should not impose a penalty on a party who attempts to raise novel questions of law or who, in good faith, attempts to move the law in a slightly different direction" (internal citations omitted)).

C. Conclusion

Defendants have wholly failed to meet the heavy burden of proving Count XXIV was frivolous. To the contrary, the claim against the Garris Defendants was 1) alleged in good faith as of the filing of the 4AC, 2) supported by the relevant facts, circumstances and representations available and made to Pablo's Counsel by its client, and 3) was factually pleaded in a manner that advanced a good-faith legal argument. As a result, the lower court's findings and award of sanctions must be reversed as a clear abuse of the lower court's discretion.

II. LOWER COURT ERRED BY AWARDING ATTORNEY'S FEES IN FAVOR OF WATSON DEFENDANTS PURSUANT TO FLA. STAT. § 817.535.

It was as abuse of discretion for the lower court to award attorney's fees pursuant to the False Filing Statute where the fees claimed were not objectively limited to the scope of the attorney's work related only to the claims which provided a statutory basis for recovery of such fees.

A. Standard of Review

The standard of review for the award of attorney's fees is abuse of discretion. Grapski v. City of Alachua, 134 So. 3d 987, 989 (Fla. 1st DCA 2012) (citing to Jones & Granger, 788 So.2d 381, 382 (Fla. 1st DCA 2001). Although the trial court's findings of fact on the issue of attorney's fees are generally presumed to be correct, a reversal of the same is warranted where the trial judge's decision is not supported by competent substantial evidence under the totality of the circumstances, and where it fails to satisfy the "reasonableness" test. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); State Dept. of Transp. v. Skinners Wholesale Nursery, Inc, 736 So. 2d 3, 6 (Fla. 1st DCA 1998) (quoting Pellar v. Granger Asphalt Paving, Inc., 282, 284–85 (Fla. 1st DCA 1997).

Further, although an abuse of discretion standard applies when reviewing a trial court's determination of attorney's fees; however, a trial court's determination of whether multiple claims within a lawsuit are separate and distinct is subject to a de novo review. Household Fin. Corp. III v. Williams, 290 So. 3d 508, 510 (Fla. 4th DCA 2020) (citing to Anglia Jacs & Co. v. Dubin, 830 So. 2d 169, 171 (Fla. 4th DCA 2002)).

B. Evidence Presented Failed to Reasonably and Objectively Establish the Attorney's Fees Sought Represented the Appropriate Allocation of Fees for Representation of just the Watson Defendants against False Filing Claims only.

Florida's False Filing Statute, § 817.535, states that "the prevailing party in such a suit is entitled to recover costs and reasonable attorney fees". Fla. Stat. § 817.535(3). When determining reasonableness of fees, an objective standard of reasonableness is preferred over extensive judicial scrutiny of private fee arrangements. Douglas v. Jones, 297 So. 3d 713, 716 (Fla. 1st DCA 2020). Additionally, a court's determination of attorney's fees awarded under the False Filing Statute should be reversed if it is not supported by competent and substantial evidence. Id.

In support of the Watson Defendants' claim for attorney fees under the False Filing Statute, a list of time entries (the "Watson Timesheet") was admitted. The entries allegedly relevant to calculation of the total attorney's fees claimed were highlighted in yellow. (R. 3919-3928). Additionally, an expert witness appearing on behalf of the Watson Defendants testified as to the reasonableness of the attorney's fees claimed under the False Filing Statute.

First, the total attorney's fees claimed by the Watson Defendants (and subsequently awarded by the trial court) were not limited to fees for legal work performed in relation to the False Filing Counts only.

It is well-established law in Florida that attorney's fees incurred related to prosecuting or defending a claim are generally not recoverable as damages by the prevailing party ***unless*** there is a statute or contract that expressly provides otherwise. Price v. Tyler, 890 So. 2d 246, 251 (Fla. 2004). A review of the highlighted entries on the Watson Timesheet shows:

- Date: 07/17/2023, Description: "Drafted Motion for MSJ on [Pablo's] claims to damages arising from ***the value of use of the Private Beach***", time 1.1 hours, Amount $357.50 (R. 3921);
- Date: 07/17/2023, Description: "Review and revise Motion for MSJ on [Pablo's] claims to damages arising from ***the value of use of the Private Beach***", time 0.2 hours, Amount $65.00 (Id.)
- Date: 07/18/2023, Description: "Revised Motion for MSJ on [Pablo's] claims to damages arising from the ***value of use of the Private Beach***", time 0.1 hours, Amount $32.50 (Id.);
- Date: 07/24/2023, Description: "Reviewed and analyzed [Pablo's] response in opposition to ***wrongful act doctrine***", time 0.4 hours, Amount $130.00 (Id.);
- Date: 07/24/2023, Description: "Reviewed and analyzed ***Second Amended Complaint, Counterclaim, and Amended Order*** in 2001 case", time 0.6 hours, Amount $195.00 (Id.);

- Date: 09/25/2023, Description: “Reviewed [Pablo’s] response to motion for summary judgment on the ***issue of [Private Beach]*** (Time split with other client group)”, time 0.3 hours, Amount $97.50 (R. 3926);
- Date: 11/20/2023, Description: “Email David Wilder regarding ***amended claim on negligence***”, time 0.1 hours, Amount $32.50 (R. 3927).

The express language used in the above entries affirms these entries reflect attorney’s fees billed for work on claims *other than* the False Filing counts, and therefore have no basis for recovery under Florida Statute (especially not the False Filing Statute)[22]. The lower court abused its discretion and the amount of the award should be vacated.

Second, the lower court additionally abused its discretion by determining it was appropriate to split the total attorney’s fees accrued by Defendants for the False Filing Claims 50/50 between the Watson Defendants and all other individual Defendants named in those counts. [M.S. Ex. A, p. 42, ¶15-24]. This finding was not supported by the evidence and testimony presented before the lower court.

[22] It is undisputed no contract between Pablo’s and Defendants exists, precluding any possible recovery for attorney’s fees on this basis.

Under Florida law, if multiple claims within a lawsuit are separate and distinct, the prevailing party on each distinct claim is entitled to an award of attorney's fees for those generated in connection with that claim. Household Fin. Corp. III, 290 So. 3d at 508. If the issues are so intertwined that allocation is not feasible, the party seeking fees has the burden to show this. Id.

Out of the six False Filing Claims raised, the Watson Defendants only represented 50% of the total named defendants in two claims (Counts XI and XII). (R. 2228, R. 2235). The Watson Defendants do not constitute 50% of the Defendant parties collectively named across the False Filing Counts of the 4AC and to find otherwise was error and an abuse of discretion.

Counsel for the Watson Defendants testified before the lower court that they had "made an arrangement in the outset of the litigation to represent [Defendant PCA] and [its individual officers and directors also named as Defendants] and bill [PCA]. [Counsel's] arrangement … to represent Mr. Watson was predicated on … splitting those fees that are common to them on a 50/50 basis". (M.S. Ex. A, pp. 39-40). Counsel additionally testified that the total claimed attorney's fees were the actual amounts the Watson Defendants paid (or had paid on their behalf via their

insurance carrier) under this private fee arrangement for the related legal services. (M.S. Ex. A, p. 25, 40).

In assessing the reasonableness of attorney's fees awarded under the False Filing Statute, this Court has previously noted that "use of an ***objective*** standard of reasonableness […] is far preferable to extensive judicial scrutiny of private fee arrangements". Douglas, 297 So. 3d at 716. (internal quotations omitted)(emphasis added); see also Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 570 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952)(finding the amount of attorney's fees a client actually pays to be irrelevant, since an objective determination of what fees should reasonably be made under § 817.535(9) does require any reference to a prior agreement between the parties).

Defendants' counsel had separate attorney/client obligations with more than four (and up to seven) Defendants for most of the False Filing Claims (M.S. Ex. A, p.41). The Watson Defendants could not have objectively constituted 50% of the individual interests Defendants' counsel was obligated to independently represent across such claims. A reasonable and objective determination would have been to split fees pro rata across all Defendants either separately per count or even collectively. Failure to use objective measures was error.

C. Conclusion

The lower court abused its discretion in granting final judgment against Pablo's and awarding attorney's fees pursuant to the False Filing Statute in favor of the Watson Defendants, and final judgment should be reversed.

III. LOWER COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON COUNTS II, V, IX, XX, AND XXIII OF THE 4AC BASED ON ITS PRIOR RULING UPHOLDING THE VALIDITY OF THE QUITCLAIM DEEDS.

During the hearing on the motions for summary judgment related to Counts II & IX, Count V, Count XX, & Count XXIII of the 4AC (the respective orders for each which were included in this appeal) the lower court ultimately granted summary judgment for Defendants based on the prior finding (also on appeal) that the Quitclaim Deeds were valid documents.

A. A reversal of summary judgment is warranted as a matter of law should the Quitclaim Deeds be found invalid on appeal.

Pablo's has previously and separately noticed for appeal the 2022 Order, which is currently still pending before this Court in Case Number 1D2023-3091 (the "Prior Appeal"). In the Prior Appeal, Pablo's has argued the Quitclaim Deeds are invalid as a matter of law based on the reasons

summarized therein. If the Prior Appeal is sustained and the Quitclaim Deeds found invalid as a matter of law, then summary judgment previously granted in favor of Defendants on the Counts from the 4AC should additionally be reversed.

B. Standard of Review

The question of the validity of the Quitclaim Deeds was ripe for summary judgment as it involves a purely legal issue. Each Quitclaim Deed is a document that can be reviewed on its face and the clear language evaluated to determine the legal effect. If an issue in a lawsuit can be resolved based on a review of the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially a matter of law and appropriate for summary judgment. Angell v. Don Jones Ins. Agency, 620 So. 2d 1012, 1014 (Fla. 2d DCA 1993) (citing Kochan v. Am. Fire & Cas. Co., 200 So. 2d 213, 220 (Fla. 2d DCA 1967)).

C. The lower court erred as a matter of law in finding Quitclaim Deeds were valid conveyances of bare title for Common Areas granted by Developer to PCA.

Because the lower court here specifically relied on the 2022 Order as a predicate for its grant of summary judgment in favor of Defendants in most of the orders noticed for this appeal, a brief review of the 2022 Order

is warranted as the invalidity of the Quitclaim Deeds themselves form the underlying basis for a majority of Pablo's claims in the 4AC.

The 2022 Order remains relevant here as the lower court expressly stated during the January 30, 2024 hearing that it will not revisit the issue of the validity of the Quitclaim Deeds. (M.S. Ex. A, p. 17).

As a result, Pablo's has, in the interest of judicial efficiency, agreed before the lower court that summary judgment in Defendants' favor as to Counts V (Slander of Title – PCA Easement), XX (Gross Negligence), and XXIII (Declaratory Judgment – Costello Warranty Deed), as well as partial summary judgment in Defendants favor as to Counts II and IX is appropriate based on the lower court's prior rulings and subject to the preservation of Pablo's right to appeal the respective orders. (M.S. Ex. A, pp. 126, 134, 135, 150, & 151).

The lower court's failure to find Quitclaim Deeds invalid as a matter of law (despite the wealth of record evidence that supported such a finding) was arbitrary, capricious and it materially prejudiced Pablo's ability to subsequently fairly litigate its remaining claims.

i. A Dissolved Corporation Cannot Validly Convey Title To Real Property After It Is Finished Winding Up Its Affairs.

First, the Quitclaim Deeds were executed by a defunct and dissolved

corporate entity, which should have rendered them void. DGG Dev. Corp. v. Est. of Capponi, 983 So. 2d 1232,1234 (Fla. Dist. Ct. App. 2008); see also § 607.1421(3), Florida Statutes (2018)[23]. Outside of this narrow exception, it's generally accepted that "**[a] conveyance** … **by a dissolved corporation *is void and of no effect"*[24]**. Brend v. Dome Development, Ltd., 418 N.W.2d 610 (N.D. 1988)(emphasis added).

Developer was administratively dissolved in 1991, and the Quitclaim Deeds were both executed in 2019. The Quitclaim Deeds on their face state the grantor is "a ***dissolved*** Florida Corporation". (R. 596, emphasis added). The Quitclaim Deeds were improperly and untimely executed by a dissolved corporation outside of its wind-up phase – making them void as a matter of law.

ii. The Quitclaim Deeds Unilaterally Attempted To Amend The Declaration Without The Requisite Consent And Are Therefore Void Ab Initio.

Florida law considers a subdivision's recorded declaration of

[23] Although Fla. Stat. 607.1421 (2018) was repealed by Laws 2019, c. 2019-90, § 186, eff. January 1, 2020, the disputed transactions occurred prior to this date.

[24] Whether a conveyance by a dissolved corporation is void is an issue of first impression before this Court.

covenants and restrictions as taking precedence over the governing documents for its HOA (if one exists).In Florida, HOAs must overcome the presumption that “covenants that run with the land [are] strictly construed in favor of free and unrestricted use of real property... [and] restrictive covenants are strictly construed against those who assert the power to limit the homeowner's free use of his land”. Lathan v. Hanover Woods Homeowners Assoc., 547 So. 2d 319, 321 (Fla. 5th DCA 1989) (internal citations omitted).

“Amendments that alter the pre-existing relationships and rights of subdivision owners are void absent consent with regard to their ability to control subdivision property (or contradict express provisions of subdivision’s declaration). Such amendments are usually considered to destroy the general plan of a subdivision’s development and are therefore considered void and unenforceable without the prior consent of all affected owners”. Klinow v. Island Court at Boca W. Prop. Owners' Ass'n, 64 So. 3d 177, 180 (Fla. 4th DCA 2011). A person seeking to amend a subdivision’s governing documents without being expressly authorized to do so under the same must therefore have prior consent of **all** subdivision owners. Van Loan v. Heather Hills Prop. Owners Ass'n, Inc., 216 So. 3d 18, 23 (Fla. Dist. Ct. App. 2016) (emphasis added); see also Berger v. Riverwind Parking,

LLP, 842 So. 2d 918, 919 (Fla. Dist. Ct. App. 2003); Endruschat v. Am. Title Ins. Co., 377 So. 2d 738, 741 (Fla. Dist. Ct. App. 1979).

It is undisputed that (1) the Declaration does not authorize the formation of any HOA to manage the Subdivision (nor has it been amended to), (2) the Declaration has never been amended by either the Developer (when it had control to amend) or the Subdivision Owners (following Developer's sale of the threshold number of lots), and (3) no vote of a sufficient number of Subdivision Owners has ever been held that would permit any amendment of the Declaration to permit an HOA, and/or subject Subdivision's platted lots to additional restrictive covenants has ever occurred. Therefore, they are void on their face.

Further, the Quitclaim Deeds are not even proper quitclaim deeds. Despite the fact they each bear the title "QUIT CLAIM DEED", the documents include substantial "Covenants & Restrictions" that seek to unilaterally change the Declaration and the rights of the Subdivision Owners.

As a result, the effect of the Quitclaim Deeds (and PCA's subsequent recording and reliance on the same) created additional restrictive covenants that directly conflicted with those originally granted under Declaration, causing the Quitclaim Deeds to serve as an attempt to amend

the Declaration. See Pensacola Beach, LLC v. Am. Fid. Life Ins. Co., 294 So. 3d 976, 983 (Fla. 1st DCA 2020) (finding the legal effect of a document will generally control versus its assigned title).

This Court should reverse the lower court's granting of PCA's Motion for Partial Summary Judgment.

IV. LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT IN DEFENDANTS' FAVOR ON COUNTS XVII, XVIII, XXI, XXII OF THE 4AC.

For each of the summary judgment motions filed by Defendants as to Counts XVII, XVIII, XXI, and XXII of the 4AC, material issues of fact existed as to each claim and element of the cause of action. Even if the Quitclaim Deeds are upheld as valid on appeal, nevertheless, the lower court erred by granting summary judgment where the record contained sufficient evidence to prove each of elements required for the claim. As a result, it was an abuse of discretion for the lower court to grant summary judgment in favor of Defendants with respect to these Counts.

There were pertinent, unresolved factual issues material to the elements of the claims requiring this Court to vacate summary judgment and remand for completion of discovery and further proceedings.

A. Standard of Review

On appeal, an order for summary judgment is reviewed de novo. Emerald Coast Utilities Auth. v. Thomas Home Corp., 359 So. 3d 1239, 1249 (Fla. Dist. Ct. App. 2023). Florida has adopted the Federal summary judgment standard. United Auto. Ins. Co. v. Progressive Rehab. & Orthopedic Servs., LLC, 324 So. 3d 1006, 1008 n.4 (Fla. 3d DCA 2021). Under the Federal standard, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits (if any) show there is no genuine issue of material fact and show the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986). Summary judgment is warranted if after adequate time for discovery and, upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. Id. Every possible inference in favor of the non-moving party opposing summary judgment must be drawn by the appellate court. Bowman v. Barker, 172 So. 3d 1013, 1015 (Fla. 1st DCA 2015).

B. Summary Judgment Is Inappropriate When Genuine Issues of Material Fact Exist

Summary judgment should only be granted if “the facts are so crystallized that nothing remains but questions of law”. Bowman, 172 So.

3d at 115 (quoting Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985)). If the record on appeal evidences a reasonable possibility of a genuine dispute regarding a materially factual issue, a grant of summary judgment is inappropriate. Key v. Trattmann, 959 So. 2d 339, 341 (Fla. 1st DCA 2007).

If a court determines the summary judgment record contains conflicting evidence on a material issue of fact from which a factfinder could reach different conclusions by crediting some evidence over other evidence, the jury as the factfinder should resolve the factual dispute. CG Tides LLC v. SHEDDF3 VNB, LLC, No. 3D23-0071, 2024 WL 2034825, at *3 (Fla. 3d DCA May 8, 2024)(noting summary judgment should not have been entered and explaining that "[t]he point is not that any of these 'facts' have been finally established as 'true.' ***The point is that the evidence and inferences therefrom conflict***.")(emphasis added).

i. *Genuine Issue of Material Fact Exists as to Whether Pablo's Possession of Common Areas was Hostile.*

In its order granting summary judgment on Count XXII (Adverse Possession) of the 4AC in favor of Defendants, the lower court incorrectly determined Pablo's permissive right to use Common Areas pursuant to the Declaration and other recorded documents related to Subdivision prevented Pablo's from meeting its burden to sufficiently show its hostile use of the same. (R. 4251).

The lower court's decision to grant summary judgment failed to advance any argument as to why Pablo's reliance on Batterbee v. Roderick[25], cited to in its response in opposition to Defendants' original motion (M.S. Ex. B, p.2), did not create a genuine dispute of material fact as to whether Pablo's use of the Common Areas, despite being permissive, was sufficiently hostile to maintain a claim for adverse possession.

The Batterbee court additionally explained that an adverse possessor would clearly have asserted a hostile right to real property as against any true owner if the evidence showed the possessor, in good faith, accepted and recorded a deed to the property, improved it, paid property taxes for it, and treated it openly as if it were the possessor's. Batterbee, So. 3d at 886. Such possession would be not only hostile, but also be sufficiently open and notorious for a claim of adverse possession since the recorded deed provided true owner(s) constructive notice. Id.[26].

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[25] Batterbee v. Roderick, 278 So. 3d 882 (Fla. 2d DCA 2019).

[26] "[I]n order to perfect title by adverse possession it is not necessary that the true owner should have had actual knowledge or notice of the claim. ***If the claimant's possession is open and notorious under claim of title it is sufficient in its character, whether the true owner knew the facts or not. The claimant need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title*** .... Such possession is the equivalent of actual notice of the claim under which it is held, and if the owner fails to look after his interests until the title of the adverse claimant grows into maturity he has no one but himself to blame

Pablo's based its claim that any such permissive use of Common Areas by Subdivision Owners under the Declaration and other recorded Subdivision documents become openly hostile and adverse to Developer's title based on the following record evidence:

(a) the Universal Order, recorded in 2003, which stated on p. 4 "[t]he Common Areas are] owned in equal undivided shares by the [Subdivision Owners]" (R. 2270-73);

(b) the annual property tax payments for Common Areas (publicly listed as owned by Subdivision Owners) made continuously by Pablo's and its predecessors-in-title for, a period in excess of 7 years between 2003 and the recording of the Quitclaim Deeds in 2019 (R. 2272);

(c) the Subdivision Owners holding themselves out to members of public, law enforcement, etc. as owners of Common Areas to enforce their rights as its collective owner (R. 2270-71);

(d) legal notices provided to Subdivision Owners as the recognized owners of Common Areas in Walton County Circuit Court Case

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for the loss of his estate." Batterbee, 278 So. 3d at 886 (quoting Harrison v. Speer, 114 So. 515, 517 (Fla. 1927)(emphasis added)).

No. 2018-CA-000547 (commonly referred to as the "Customary Use" case). (R. 2175); and

(e) the Affidavit of James G. Lince describing the general, universal understanding of Subdivision Owners and NIIP Owners prior to 2019 that Subdivision Owners owned Common Areas (R. 3379-80) as further evidenced by produced correspondence between Subdivision Owners and NIIP Owners prior to execution of the Quitclaim Deeds (e.g. R. 2165).

See also (M.S. Ex. A, p. 105 ¶¶ 12-19).

Based on the above, Pablo's prior permissive use of Common Areas pursuant to the Declaration does not preclude a claim for adverse possession. Since Defendants' claim Pablo's permissive use could not have become adverse, a clear and genuine dispute of material fact exists, the lower court's grant of summary judgment is a clear abuse of discretion and should be reversed and remanded for additional proceedings.

ii. *Genuine Issue of Material Fact Exists as to Whether Pablo's Had Standing to Seek Involuntary Dissolution of PCA Pursuant to Fla. Sta. § 607.1430.*

The lower court improperly granted summary judgment on Count XXI seeking Involuntary Dissolution of PCA under § 607.1430, finding that

based on its prior ruling in the 2022 Order that PCA is not a homeowner's association ("HOA") governed under Florida Statute § 720, Pablo's is not a "member" of PCA and has no standing to bring such a claim, nor did he have standing prior to the sale of Pablo's Property. (M.S. Ex. A, p. 103).

Florida Statute § 607.1430 provides that a circuit court can judicially dissolve a corporation if sought in a proceeding by a shareholder if it's established that "[t]he directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent". Fla. Stat. § 607.1430(1)(b)(4).

PCA's Articles (both original and amended), to this day, expressly state PCA's sole corporate purpose for formation was to serve as a HOA under Fla. Stat. § 720 (a "Ch. 720 HOA"). This continued representation is in contradiction to the lower court's finding in its 2022 Order that PCA was *not* a Ch. 720 HOA. The nature of the relationship between PCA and the Subdivision Owners is determined based on whether it is classified as a Ch. 720 HOA (making Subdivision Owners mandatory members similar to a shareholder under § 607.1430) or, as in this case, a non-profit corporation serving as a voluntary HOA (which would prevent PCA from having any lien rights against Subdivision property or any mandatory authority over the Subdivision's Common Areas by virtue of its status as a voluntary HOA).

Further, it is contrary to public policy that a Subdivision Owner would need this Court to first find PCA is a Ch. 720 HOA, consistent with its corporate purpose, for that Subdivision Owner to then have sufficient standing to bring a claim seeking judicial dissolution of PCA and allege those in control of PCA formed it in a fraudulent manner and in contravention to the Declaration, the 2003 Order, and the definitions of Fla. Stat. § 720 – which all ironically indicate Subdivision is not authorized to be governed by an HOA (whether voluntary or mandatory).

Because a genuine dispute of material fact existed, the lower court's grant of summary judgment was an abuse of the lower court's discretion and summary judgment should be reversed and remanded for further proceedings.

iii. ***Genuine Issue of Material Fact Exists as to Whether Pablo's Justifiably Relied on any Fraudulent or Negligent Misrepresentations of Defendants'.***

The lower court improperly granted summary judgment on Counts XVII (fraudulent misrepresentation) & XVIII (negligent misrepresentation) based on its finding there was no evidence of any representations made to Pablo's upon which he sufficiently relied. (M.S. Ex. A, p.133).

First, it was an abuse of discretion for the lower court to permit Defendants to rely on portions of Pablo's incomplete Deposition transcript to establish Pablo's failed to meet its burden of proof. (e.g. M.S. Ex. A, p. 120).

Second, it was an abuse of discretion to fail to acknowledge or address Pablo's arguments (which were also advanced by Pablo's Counsel at the hearing for this motion) that a misrepresentation (whether fraudulent or negligent) is not solely limited to a verbal statement spoken by the defendant to the alleging party as suggested by Defendants' counsel. (M.S. Ex. A, p. 127). Where Pablo's has cited to the alleged misrepresentations of Defendants made via other forms of communication including, for example, in writing through email from PCA's Directors or Officers or through recorded documents such as PCA's Articles (wherein it claims to be a Ch. 720 HOA despite this Court having since expressly ruled it is not in its 2022 Order), it is an abuse of discretion and error for the lower court to grant summary judgment.

For these reasons, summary judgment on Count XVIII granted in favor of Defendants should be reversed and remanded for further proceedings.

V. SUMMARY JUDGMENT WAS INAPPROPRIATE AS DISCOVERY IS STILL NECESSARY AND REMAINS ONGOING.

A trial court cannot grant summary judgment to a party when (1) discovery remains open and ongoing, (2) genuine issues of fact exist and persist, and (3) issues of fact remain that should be determined by a jury.

A. No Case Management Order Ever Issued By Lower Court

Walton County Administrative Order 2021-12, Section 6(b) provides that "[f]or cases filed before April 30, 2021, the case management order shall be issued by December 3, 2021", and shall include, amongst other requirements, deadlines for completing fact and expert discovery and resolving pretrial motion.

This action was filed with the lower court on July 28, 2020, yet no case management order giving parties notice of any deadline for completing discovery was ever issued to date, despite Pablo's still-undecided motion in May of 2021 requesting the lower court issue one. (R. 358). The lack of a deadline for discovery has prejudiced Pablo's ability to effectively fact-find related to its claims, and has allowed certain defendants to continuously delay (to their benefit and to Pablo's detriment) (e.g. Pablo's inability to depose Mr. Padgett prior to his death in 2021 (despite seeking to notice it numerous times)) (R. 2154, R. 3382).

B. Improper for Defendants to Rely on Transcript of Plaintiff's Incomplete Deposition

Florida District Courts agree that if there is a pending deposition that would most likely raise a genuine issue of material fact, discovery is considered ongoing and **summary judgment is premature**. Sacramento v. Citizens Prop. Ins. Corp., 342 So. 3d 737, 739 (Fla. 3d DCA 2022). Additionally, when there is a pending deposition that has the potential to create a genuine issue of material fact, procedural failures, including failure to file a proper motion for continuance and supporting affidavits, are set aside. See Smith v. Smith, 734 So. 2d 1142, 1144–45 (Fla. 5th DCA 1999); Singer v Star, 510 So. 2d 637, 639 (Fla. 4th DCA 1987).

Pablo's was first noticed for deposition by Defendants on October 9, 2023, and it occurred on December 6, 2023. (R. 3206). Pablo's deposition (the "Deposition") started at approximately 9:00 AM (CST) and adjourned around 5:30 PM (CST). It is relevant to the motions for summary judgment included in this appeal that ***to date, the Deposition of Pablo's remains open and* pending**. (M.S. Ex. C, pp. 265-68).

Discovery in the lower court was still open and pending for, making it reversible error for the lower court to 1) determine otherwise as to Pablo's, and 2) prematurely grant all prior orders for summary or partial summary judgment in favor of Defendants that were entered based on the lower

court's finding that Pablo's had sufficient time to conduct discovery. (M.S. Ex. C, pp. 265-68) It was additionally an abuse of discretion and reversible error for the lower court to allow excerpts from the transcript for Pablo's Deposition to be used by Defendants in certain Motions for Summary Judgment included in this appeal, and Pablo's Counsel objected to the use of the same before the lower Court. (M.S. Ex. A, p.129).

C. Pablo's Has Not Had Sufficient Opportunity To Conduct Meaningful Discovery Under The Applicable Circumstances.

In February of 2022, following the filing of the then-operative Third Amended Complaint, Pablo's noticed eight parties and non-parties for depositions in June of 2022. (R. 1651). In response to motions for protective orders from certain Defendants, an order from the lower court indefinitely continued the depositions until after December 2022 (when 2022 Order was anticipated to be issued). (R. 1739). PCA suggested (and Pablo's later agreed) the continuance would not cause Pablo's any prejudice as it would prevent the parties and the lower court to potentially expend undue and unnecessary efforts and expenses where Pablo's motion for leave of court to amend the Third Amended Complaint was still pending, and where the filed cross motions for summary judgment could

ultimately narrow the scope of issues to be addressed during the noticed depositions following their hearing. (R. 1652-53).

The undersigned counsel entered its appearance on Pablo's behalf in March 2023 prior to filing the 4AC (in May 2023), which added new parties and new counts not previously included in prior complaints. Beginning on July 17, 2023, Pablo's counsel resumed efforts to again schedule the first depositions of certain defendants. In August of 2023, the parties agreed to again defer the depositions confirmed (but not yet formally noticed) until the numerous pending summary judgment proceedings were resolved to avoid the parties expending any unnecessary time, labor or expenses before it was known what issues would remain relevant for discussion during depositions. (M.S. Ex. A, p. 144).

In large part due to the 18 motions for summary judgment filed by certain Defendants since the 4AC (combined with fact this action was initiated almost simultaneously with the onset of the COVID-19 pandemic), Pablo's, through no fault of its own, has still not yet been able to successfully conduct *any* depositions of Defendants or non-party witnesses (or serve any interrogatories or document requests needed following such depositions) despite numerous documented attempts to do so. Pablo's has repeatedly raised its concerns, and the lower court has repeatedly denied

Pablo's any additional opportunity for the same, unfairly precluding only Pablo's efforts (and not expressly barring Defendants' ability to complete Pablo's Deposition). (R. 31; M.S. Ex. A).

VI. CONCLUSION

First, this Court should reverse the lower court's improper grant of Attorney's fees as sanctions where Appellants have advanced clear evidence of its good faith basis. Second, all of the remaining summary judgment findings must be vacated and this matter remanded as it was an error of law and abuse of discretion to even allow summary judgment motions on fact-sensitive claims to be presented and ruled upon when (i) fact discovery remained open and ongoing, (ii) the first motions were filed less than 2 months following filing of the 4AC and no meaningful discovery could have even occurred at that time, (iii) no Case Management Order was ever entered, (iv) no dispositive motion deadline had been set, (v) significant and persistent material factual issues were present, and (vi) the lower court improperly engaged in credibility determinations that are solely within the province of the jury.

Date: August 2, 2024

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CERTIFICATE OF COMPLIANCE

The Undersigned hereby certifies that Arial 14-point font was used in preparation of this Initial Brief and the Brief is less than 13,000 words.

Dated this 2nd day of August, 2024.

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I HEREBY CERTIFY that this Brief of Appellant was filed via the Florida Courts E-Filing Portal on the 2nd of August 2024, which electronically served copies to all counsel of record, named as follows:

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