

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT**

CASE No. 4D2024-1316

LT Case No. CACE-20-015334

PATRICK MONTAGUE,

v.

CENCLUB RECREATION MANAGEMENT, INC.,
F/K/A CENCLUB HOMEOWNERS ASSOCIATION, INC.,

APPELLEE.

*On Appeal from the Circuit Court of the Seventeenth
Judicial Circuit, In and For Broward County, Florida*

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND THE FACTS

The appellant, Patrick Montague (“Montague”) asks the Court to reverse the final judgment entered for the appellee, CenClub Recreation Management, Inc. f/k/a CenClub Homeowners Association (“CenClub”). Montague has presented a Statement of the Case and of the Facts in the Initial Brief [Montague Brief], but CenClub presents its Statement of the Case and the Facts to clarify points missing from the initial brief.

Century Village

Century Village East (“Century Village”) is a planned community in Deerfield Beach, Florida. [R-1626.] It consists of 8,508 condominium units in 253 condominiums, with the Prescott M Condominium among them. [R-1627.] Montague owns 4 condominium units (units 244, 245, 246, and 252) in the Prescott M Condominium. [R-1627.]

Century Village also encompasses certain common areas: a Clubhouse, various recreational areas, a theater, pools, tennis courts, and other recreational facilities (collectively, the “Demised Premises”). [R-1627.] Century Village East, Inc. (the “Developer”) created CenClub, a not-for-profit corporation, specifically to provide

an entity to acquire, own, and operate the Demised Premises. [R-1198.] The Developer also mandated that unit owners be CenClub members (the “Membership Covenant”). The Prescott M Condominium Declaration includes the Membership Covenant, obligating the Prescott M Condominium Association, Inc. to cause the first purchaser for every unit to execute a “Joinder of Homeowners Association Agreement” (the “Joinder”). [R-1198.]

The initial purchasers, Montague’s predecessors, signed Joinders recorded in official records. [R-1198.] The Joinder confirms Montague’s membership in CenClub:¹

[Members] may not resign from [CenClub] nor waive his right to membership in said corporation, nor shall the undersigned exempt himself from liability for any assessment levied by [CenClub] by waiver of the use or enjoyment of [the Demised Premises] or by abandonment of the undersigned’s residence, or in any other manner except

[R-1198.] The Membership Covenant runs with the land, binding all subsequent purchasers as well as Initial Purchasers:

subject to the declaration of restrictive covenants [of CenClub] . . . and that this joinder and said declaration shall run with said

¹ CHOA is the name used for CenClub in the Governing Documents, reflecting the name before it changed.

condominium parcel . . . or other ownership form on said property) and shall bind each and every subsequent owner thereof as if said subsequent owner had executed an original of this joinder.

[R-1198-1199.]

Initial Purchasers also signed an Acknowledgment and Acceptance by Grantee (the “Acknowledgement”) that the conveyance is “subject in every respect to the . . . joinder agreement, . . . by-laws and charter of CHOA.” [R-1199.] The Warranty Deeds for Montague’s units conveyed them subject to the Declaration of Condominium and its Exhibits, the Long-Term Lease for the Demised Premises, Declaration of Restrictive Covenants, and its Exhibits [the CenClub Declaration], and the Joinder of Homeowners Association Agreement.

[R-1199.]

The Developer entered various long-term leases with each condominium association and the unit owners to grant access to the Demised Premises. [R-1199.] Montague’s units entered the long-term lease attached to the Prescott M Declaration (the “Long Term Lease”). [R-1199.] Unit owners, like Montague, had access to the Demised Premises for their enjoyment under the Long-Term Lease and paid the Developer rent. [R-1197.] In the 1980s, the Developer sought to

amend its leases (“Lease Amendments”) with the condominium associations and unit owners, but Prescott M Condominium Association did not enter the Lease Amendments. Montague remained bound by the original lease until CenClub bought the Demised Premises. [R-1200.] By its own terms, the Long-Term Lease terminated on December 31, 2019, when CenClub purchased the Demised Premises. [R-1199.]

Since its purchase, CenClub has owned, managed, and operated the Demised Premises. [R-1627.] Montague had access to use the Demised Premises commencing January 1, 2020, as a CenClub member [R-1627], but not under the Long-Term Lease that terminated [R-1199]. Rather than paying rent, Montague had to pay the amounts assessed against his units by CenClub. [R-1197.]

CenClub

CenClub’s Articles of Incorporation of (the “Original Articles of Incorporation”) recorded on March 16, 1976, at Official Records Book 6521, Pages 208-11, as Schedule E to the [CenClub] Declaration. [R-1632.] CenClub is a “corporation not for profit” formed “in accordance with the provisions of the laws of the State of Florida for the formation

of corporations not for profit.” [R-1632.] CenClub has all the powers and privileges granted to corporations not for profit. [R-1632.]

On September 9, 2019, CenClub exercised its option to buy the Demised Premises from the Developer. [R-1637-1638.] Article VI of the bylaws governed CenClub’s power to assess members for fees:

Commencing upon acquisition and on the same day of each month thereafter, each member of [CenClub] shall pay to [CenClub] in advance, the maintenance charge attributable to his membership and such payments shall be used by [CenClub] to create and continue a maintenance fund for the purpose of paying the expense of [CenClub] to be used as hereinafter stated.

[R-2112.] On December 4, 2019, CenClub amended the Original Articles of Incorporation and Bylaws, effective January 1, 2020. [R-1640.] On December 31, 2019, CenClub closed on buying the Demised Premises. [R-1628.] After the closing, CenClub levied its first annual assessment for the 2020 calendar year, a second annual assessment for the 2021 calendar year, and a third annual assessment for the 2022 calendar year. [R-1200.] Montague refused to pay the assessments. [R-1200.]

Trial Court Litigation

On September 17, 2020, CenClub sued Montague: 4 claims to foreclose the liens on units 244, 245, 246, and 252, and 4 claims for damages against Montague to recover delinquent assessments, interest, costs, late charges, and attorneys' fees for those units. [R-29-86.] In response, Montague counterclaimed seeking a declaration that he was not a member of CenClub, and he did not bear the obligation to pay the fees assessed. [R-637-655.] Montague also raised 3 affirmative defenses: (1) that CenClub released Montague's units when the Developer entered the Lease Amendments; (2) the Florida Marketable Record Title Act ("MRTA") extinguished the obligations from Montague's units; and (3) CenClub actions since November 1, 2019, were *ultra vires*, rendering them void. [R-637-638.]

CenClub moved for summary judgment on the first 2 affirmative defenses and the counterclaim. [R-1194-1216.] The trial court granted the motion on the counterclaim, entering judgment against Montague. [R-1339.] The trial court held that membership in CenClub was a covenant that ran with the land and attached to

Montague's units, and therefore Montague was a CenClub member. [R-1339.]

On January 17, 2023, CenClub moved *in limine* to exclude video recordings from 2018 and 2019 meetings of Condominium Owners Organization of Centaury Village East ("COOCVE"). [R-1507.] Montague had identified and produced as evidence 5 video recordings of COOCVE meetings that took place before March 2019 ("Videos"). [R-1508.] In the Videos, COOCVE's chairperson (Rita Pickard) and COOCVE's first vice president (Michael Rackman) make various statements about CenClub. [R-1508.] The trial court granted CenClub's motion and excluded the Videos. [R-1605.]

On April 06, 2023, CenClub moved for summary judgment on the *ultra vires* affirmative defense for 3 reasons: (1) Florida law cloaked CenClub with the authority to act as it did; (2) Montague lacked standing to challenge CenClub's corporate acts as *ultra vires* in his individual capacity; and (3) the business judgment rule prevented Montague from asking the trial court to second-guess CenClub's business decisions. [R-1616.] Montague opposed, but did not dispute any facts from the summary judgment motion. [R-1692-

1699.] Montague acknowledged the facts were not in dispute. [R-1730.]

The trial court accepted the facts presented in the motion as undisputed. [R-1730.] The trial court granted summary judgment against Montague on the *ultra vires* defense. [R-1745-1746.] The trial court held Florida law prohibited Montague from challenging CenClub's corporate acts as *ultra vires* in his individual capacity. [R-1742-1743.] The trial court also ruled the business judgment rule applied to *ultra vires* claims against the corporation. [R-1742-1743.] The trial court further decided that Montague failed to produce evidence that CenClub's acts violated the Governing Documents. [R-1742-1743.]

The trial court conducted a jury trial on CenClub's damages claims between November 7, 2023, and November 8, 2023. CenClub's executive director, Michael Burdman testified to the following:

- (1) Before buying the Demised Premises, the recreation committee managed the facilities [R-2959:21-25];
- (2) CenClub funds all services provided for the Demised Premises through the assessments it charges residents [R-2960:5-8];
- (3) CenClub's board votes on the budget not the unit owners [R-2985:17-18];

- (4) CenClub, executed the purchase documents [R-2989:11-17];
- (5) When the CenClub board decided to exercise the option to purchase the Demised Premises, there was a meeting [R-3013:17-19]; and
- (6) Under the bylaws, amendments could be proposed by the board acting on a vote of a majority of the directors [R-3027:2-24].

Montague sought to introduce the Videos along with the COOCVE meeting minutes reproduced in a community newspaper (“Evidence”). [R-3050:8-3053:24.] But Montague failed to subpoena witnesses who could authenticate the Evidence, the trial court excluded them. [R-3050:8-3053:24.] Montague testified about the following:

- (1) that he was familiar with the Governing Documents, having been the president of Prescott M for 10 years [R-3058:5-9];
- (2) that he believed that, as a member of CHOA, he was entitled to vote for CenClub’s board [R-3061:17-19];
- (3) that CHOA decided to purchase the Demised Premises in 2018 [R-3063:18-23];
- (4) that he continued paying his assessed fees until December 2019, including the additional \$5 assessment fee which he understood was to buy CenClub. [R-3077:14-3079:25.]

Montague did not move for a directed verdict when CenClub closed its case or when Montague rested. [R-3043:9-3044:1.] After

receiving testimony from the two witnesses and evaluating the exhibits, the jury returned a verdict in CenClub's favor. [R-3167:15-3170:7.] On October 27, 2023, Montague moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. [R-2908-2911.] The trial court denied the motion. [R—2908-2911.]

SUMMARY OF THE ARGUMENT

The trial court did not err when it (1) granted summary judgment on Montague's *ultra vires* affirmative defense, (2) excluded evidence about a non-party's meeting video recordings and a community newspaper, (3) denied the request for judgment as a matter of law, or (4) denied the request for a new trial. Montague's arguments on appeal rehash arguments that failed with the trial court because they lacked factual and legal support. The appeal thus suffers from the same fatal defects.

A. Summary judgment was proper.

The *ultra vires* defense fails for several reasons. First, Montague cannot challenge CenClub's corporate action in his individual capacity. Montague lacks standing to do so. Montague could only challenge CenClub's acts as *ultra vires* as shareholder in a derivative action.

Second, the business judgment rule prevents Montague from second guessing CenClub's decisions. CenClub's actions were reasonable because CenClub acted within its authority. No record evidence shows CenClub's decisions were arbitrary, capricious, or in bad faith.

Third, the governing law and documents authorized CenClub's actions. The acts Montague complains about are not outside the authority vested in the board by the Governing Documents. The purported *ultra vires* acts are powers authorized under Florida Statutes Chapter 617. Thus, CenClub acts are not *ultra vires*.

Fourth, Montague offered no admissible evidence to challenge CenClub's authority to assess units. In granting summary judgment, the trial court noted that Montague had failed to show the defense applied because he produced no evidence that either the articles of incorporation or bylaws prohibited CenClub's actions. Montague was also unable to support his *ultra vires* defense with evidence because he failed to demonstrate the Governing Documents required unit owners elect the board before exercising the option.

B. The post judgment motions suffered from procedural and substantive infirmities.

The motion for judgment as a matter of law also failed because Montague did not adhere to procedure and lacked the facts to reverse the jury verdict. Montague did not move for a directed verdict when CenClub completed presenting its case or when the parties rested. Montague thus waived the right to seek a judgment notwithstanding the verdict.

The motion for judgment as a matter of law also failed because there was no evidence or testimony that supported a finding the jury was unreasonable in reaching its verdict for CenClub. There was also nothing for the trial court to scrutinize in the jury's decision: Montague did not object to the jury instructions or the verdict forms before the jury retired to deliberate. Nothing in the jury instructions or verdict form asked the jury to evaluate whether there was a question for it to decide about the votes Montague argued were necessary.

The request Montague submitted seeking a new trial turned on the trial court excluding the Evidence. But Montague admitted in the record testimony that mirrored the facts from the excluded Evidence,

and therefore, there was no prejudice sufficient to warrant a new trial. The Evidence was also hearsay not subject to any exception under the Florida Evidence Code. Montague decided not to subpoena the people who could have authenticated the Evidence and testified about what happened during the non-party meetings. Therefore, Montague cannot claim prejudice from his trial strategy as the reason a new trial is necessary.

C. Montague failed to meet his burden to support admitting the Evidence excluded by the trial court.

Finally, the trial court did not err when it excluded the Evidence. First, the Evidence was not relevant because the COOCVE meetings were not CenClub meetings. Those meetings occurred before CenClub exercised its option to purchase the Demised Premises. COOCVE's opinions had no bearing on what CenClub's board did and what they had power to do. The Evidence, thus, does not tend to prove or disprove whether CenClub had the authority to assess Montague.

Second, Montague did not authenticate the Evidence. Nothing in the record supports a finding that the Evidence is what Montague purported it to be. No evidence showed the writings in the community

newspaper were accurate reproductions of the minutes from the COOCVE meetings. There was also no one testifying from COOCVE to authenticate the Videos. The record also failed to show that the minutes reproduced in the community newspaper were substantially in the same form as the minutes COOCVE holds in its books and records.

Third, the Evidence is hearsay because they are out-of-court statements by declarants who did not testify at trial, and Montague offered those statements to prove the truth of the matters asserted about CenClub's actions. Montague offered the Videos and newspaper articles to prove what various people said during the COOCVE meetings from 2018 and 2019. Montague hoped to show CenClub acted outside its authority and that a vote was necessary to elect the board. Those hearsay statements do not fall within any statutory exception.

Fourth, admitting the Evidence threatened to confuse the issues and mislead the jury because, despite overlap between the board members from COOCVE and CenClub, they are not the same entity and have different members. Introducing evidence from COOCVE meetings would have blurred these distinctions. The

probative value for statements made during COOCVE meetings by COOCVE board members would be minimal when compared to the unfair prejudice admitting that evidence would cause CenClub.

In sum, the trial court did not err when it granted summary judgment on the *ultra vires* affirmative defense. From the evidence and testimony received during trial, there are no errors from which Montague may obtain judgment as a matter of law or a new trial. The evidence rulings rendered by the trial court stand on a sound legal and factual record. The Court should therefore affirm the trial court's decisions in all respects.

ARGUMENT

I. Standard of Review.

The standard of review for a trial court's order granting for summary judgment is *de novo*. *De Cruz-Haymer v. Festival Food Mkt., Inc.*, 117 So. 3d 885, 888 (Fla. 4th DCA 2013). The standard of review for a trial court's ruling granting a motion *in limine* is abuse of discretion. *Aarmada Prot. Sys. 2000, Inc. v. Yandell*, 73 So. 3d 893, 898 (Fla. 4th DCA 2011). "The standard of review for the admissibility of evidence is abuse of discretion, limited by the rules of evidence." *State v. Hubbs*, 377 So. 3d 1162, 1165 (Fla. 4th DCA 2023). But when

the trial court erred interpreting the law, appellate courts apply *de novo* review. *Bellevue v. Frenchy's S. Beach Cafe, Inc.*, 136 So. 3d 640, 643 (Fla. 2d DCA 2013).

The standard of review for a motion for judgment notwithstanding the verdict is *de novo*. *Lafayette v. Moody*, 316 So. 3d 708, 718 (Fla. 4th DCA 2021). The standard of review for a motion for new trial is abuse of discretion. *Moore v. State*, 800 So. 2d 747, 748 (Fla. 5th DCA 2001). To show there was an abuse of discretion, the losing party must establish that no reasonable person would take the view taken by the trial court, who enjoys broad discretion in deciding whether to grant a motion for a new trial. *Id.*

II. The Trial Court was Correct When It Granted Summary Judgment Against Montague on the *Ultra Vires* Affirmative Defense.

Montague argues the trial court erred when it granted summary judgment on the *ultra vires* affirmative defense because, he contends, the Governing Documents required unit owners elect the board before exercising the option. [Montague's Brief at 24-25.] If a corporation, through its board, acts beyond the authority vested in it, the act is *ultra vires*. See ULTRA VIRES, Black's Law Dictionary

(12th ed. 2024). *Ultra vires* means “unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.” *Id.*

Montague conjures the voting requirement without citing provisions from the Governing Documents. Instead, Montague relies on a trial that purportedly showed there was no election by November 1, 2019. [Montague’s Brief at 23.] Not only does the argument lack support under the Governing Documents, but evidence from trial is not a basis for reversing summary judgment. *Gisela Investments, N.V. v. Liberty Mut. Ins. Co.*, 452 So. 2d 1056, 1057 (Fla. 3d DCA 1984). Montague should have disputed the facts when he opposed the summary judgment motion – but he did not and could not.

A. Florida Law Prohibited Montague from Challenging Corporate Acts as *Ultra Vires* in His Individual Capacity.

Even if Montague attempted to present disputed facts, the *ultra vires* defense would still fail because Montague cannot challenge CenClub’s corporate action in his individual capacity. Florida Statutes section 617.0304 addresses how *ultra vires* works. Section 617.0304 states “the validity of a corporate action . . . may not be challenged on the ground that the corporation lacks or lacked power

to act.” Fla. Stat. § 617.0304(1). Instead, a person may only challenge corporate acts in the following ways:

- (a) In a proceeding by a member against the corporation to enjoin the act;
- (b) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an incumbent or former officer, employee, or agent of the corporation; or
- (c) In a proceeding by the Attorney General, as provided in this act, to dissolve the corporation or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

Fla. Stat. § 617.0304(2). To pursue an *ultra vires* defense, Montague must have sought to enjoin the acts or bring a derivative or representative action. *Id.*

Section 617.0304 does not permit Montague, in his individual capacity, to undo CenClub’s completed acts. *See Cambridge Credit Counseling Corp. v. 7100 Fairway, LLC*, 993 So. 2d 86, 89–90 (Fla. 4th DCA 2008). Despite the statutory bar, Montague attempts to undo buying the Demised Premises as well as amendments to the Governing Documents to avoid the assessments levied against his units.

In *Cambridge Credit Counseling*, the court explained that Section 617.0304(1) prevents challenging a corporation's act as *ultra vires* unless claimed by a shareholder in a derivative action or by the attorney general. 993 So. 2d at 89. The court reasoned that since the lawsuit fell outside any authorized proceedings to challenging the transaction, the trial court was correct in granting summary judgment on the *ultra vires* defense. *Id.*

Montague cannot claim *ultra vires* because he lacks standing to do so. To pursue *ultra vires*, Montague must have sought an injunction before the transaction closed. That did not happen. The trial court therefore did not err when it entered judgment as a matter of law against Montague on his run at *ultra vires*.

B. The Business Judgment Rule Also Supported Granting Summary Judgment.

The business judgment rule prevented Montague from asking the court to question CenClub's decisions to (a) exercise the option to purchase the Demised Premises; (b) close on the Demised Premises; (c) charge fees; and (d) adopt or amend bylaws and articles of incorporation. Under the business judgment rule, a court presumes that corporate directors acted in good faith. *Share v.*

Broken Sound Club, Inc., 312 So. 3d 962, 971 (Fla. 4th DCA 2021). The rule prevents a factfinder from using hindsight to second-guess directors' business decisions. *Id.*

Though applied to corporate directors, courts may use the rule to evaluate decisions by property associations to avoid second-guessing the directors. *Id.* The business judgment rule applies to *ultra vires* claims against the corporation itself. *Id.* Courts must give deference to an association's decision if that decision is within the scope of the association's authority and is reasonable – not arbitrary, capricious, or in bad faith. *Id.* 971-972.

The *Share* court found that, because the actions taken by the board were within their authority, the decisions were reasonable. *Id.* at 972. The court reasoned that the dues' structure imposed by a private club fell within the business judgment rule. *Id.* There was no evidence the board's actions were arbitrary, capricious, or in bad faith. The *Share* court did not second-guess or micromanage the board. *Id.*

There is no record evidence here showing CenClub's decisions were arbitrary, capricious, or in bad faith. Rather, the evidence shows CenClub acted within its authority, and thus, CenClub's actions were

reasonable. See Part IIC, *infra*. Montague asks the Court (and asked the trial court) to second-guess CenClub’s prior decisions because he wanted to avoid paying assessments. But the business judgment rule prevents Montague from using *ultra vires* as a defense to shield him from paying. The trial court thus did not err when it granted summary judgment against Montague on the *ultra vires* defense.

C. The Actions Challenged by Montague Were Not *Ultra Vires*.

CenClub is a not-for-profit corporation, governed by Florida Statutes Chapter 617. Section 617.0302 defines the powers CenClub holds:

- (1) Have succession by its corporate name for the period set forth in its articles of incorporation.
- (2) Sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person.
- (3) Adopt, use, and alter a common corporate seal. However, such seal must always contain the words “corporation not for profit.”
- (4) Elect or appoint such officers and agents as its affairs shall require and allow them reasonable compensation.
- (5) Adopt, change, amend, and repeal bylaws, not inconsistent with law or its articles of incorporation, for the administration of the

affairs of the corporation and the exercise of its corporate powers.

(6) Increase, by a vote of its members cast as the bylaws may direct, the number of its directors so that the number shall not be less than three but may be any number in excess thereof.

(7) Make contracts and guaranties, incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure its obligations by mortgage and pledge of all or any of its property, franchises, or income.

(8) Conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this act in any state, territory, district, or possession of the United States or any foreign country.

(9) Purchase, take, receive, lease, take by gift, devise, or bequest, or otherwise acquire, own, hold, improve, use, or otherwise deal in and with real or personal property, or any interest therein, wherever situated.

(10) Acquire, enjoy, utilize, and dispose of patents, copyrights, and trademarks and any licenses and other rights or interests thereunder or therein.

(11) Sell, convey, mortgage, pledge, lease, exchange, transfer, or otherwise dispose of all or any part of its property and assets.

(12) Purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise

dispose of and otherwise use and deal in and with, shares and other interests in, or obligations of, other domestic or foreign corporations, whether for profit or not for profit, associations, partnerships, or individuals, or direct or indirect obligations of the United States, or of any other government, state, territory, governmental district, municipality, or of any instrumentality thereof.

(13) Lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds loaned or invested except as prohibited by s. 617.0833.

(14) Make donations for the public welfare or for religious, charitable, scientific, educational, or other similar purposes.

(15) Have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(16) Merge with other corporations or other eligible entities identified in s. 607.1101, both for profit and not for profit, domestic and foreign, if the surviving corporation or other surviving eligible entity is a corporation not for profit or other eligible entity that has been organized as a not-for-profit entity under a governing statute or other applicable law that permits such a merger.

Montague argued CenClub committed *ultra vires* acts. See Part IIB, *supra*. But all the purported *ultra vires* acts are powers authorized under Chapter 617. Section 617.0302(5) authorizes

CenClub to amend its bylaws and articles of incorporation. Section 617.0302(7) authorizes CenClub to enter contracts like the contract to buy the Demised Premises. Section 617.0302(8) authorizes CenClub to conduct its affairs, including purchasing the Demised premises and charging its members assessments. Section 617.0302(9) authorizes CenClub to buy, acquire, own, and hold real property like the Demised Premises. Section 617.0302(15) authorizes CenClub to exercise the powers necessary to accomplish its purpose, including to buy and maintain the Demised Premises using assessed fees. The acts are not beyond the power CenClub holds. Thus, those acts are not *ultra vires*.

The acts Montague complains about are also powers vested in the board under the Governing Documents. [R-2108 to R-2119.] The bylaws authorize assessing fees. [R-2112.] The bylaws also provide for how to buy the Demised Premises, the meeting required to decide to buy the Demised Premises, who must attend that meeting, and who votes to make the decision. [R-2109-2110.] Under the articles of incorporation, a board majority may amend the Governing Documents. [R-2118.]

Despite the authority described by Section 617.0302 and the Governing Documents, Montague argues that there needed to be a membership vote to decide whether to exercise the option. [Montague's Brief at 16-17.] But unit owners would not get a vote before CenClub bought the Demised Premises because the vote for board members could only occur after the closing. [R-2110.] Until then, only board members could appoint board members, who then would decide whether to exercise the option. [R-2117.] And that makes sense because the Developer, who controlled CenClub before selling the Demised Premises, would not agree to relinquish control to the unit owners else risk the rental income under the Leases.

Montague argues that there was no evidence at the summary judgment hearing showing that CenClub's appointed board stepped down on November 1, 2019, and that the members elected the new board members. [Montague's Brief at 23.] But Montague bore the burden to show there was evidence supporting the *ultra vires* affirmative defense. *Ellingham v. Florida Dept. of Child. & Family Services*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005). The trial court, in granting summary judgment, noted that Montague had failed to show the defense applied because he produced no evidence that either the

articles of incorporation or bylaws prohibited CenClub's actions. [R-1744-1745.]

Montague also argues the evidence at trial established there was no election on November 1, 2019. [Montague Brief at 23.] But even if that fact was relevant to the issues at trial, Montague did not show the Governing Documents required the unit owners (members) elect the board. To the contrary, article III under the bylaws, states the following: "No notice shall be required for such meeting prior to November 1, 2019, or conveyance, whichever is earlier. These annual meetings of the members are deemed waived." [R-3016:21-24.] Burdman testified that the members did not vote on November 1, 2019, because they had nothing to vote on. [R-3017:20-24.] And evidence at trial does not inform the summary judgment decision heard by the trial court months earlier.

Ultra vires was not available to Montague as a matter of law. CenClub also did not act contrary to any laws or terms from the Governing Documents. Montague did not contend there were any disputed facts and offered no record evidence to support his *ultra vires* defense. The trial court therefore did not err when it granted

summary judgment against Montague on the *ultra vires* affirmative defense.

III. Judgment Notwithstanding the Verdict Was Not Appropriate.

A judgment as a matter of law or notwithstanding the verdict (JNOV) is appropriate only when there is no evidence on which the jury could rely when it found for the non-moving party. *Mulvey v. Stephens*, 250 So. 3d 106, 109 (Fla. 4th DCA 2018). Florida Rule of Civil Procedure 1.480(b) governs post-trial motion for judgment as a matter of law:

When a motion for a directed verdict is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 15 days after the return of a verdict, a party who has timely moved for a directed verdict may serve a motion to set aside the verdict and any judgment entered thereon and to enter judgment in accordance with the motion for a directed verdict. If a verdict was not returned, ***a party who has timely moved for a directed verdict may serve a motion for judgment in accordance with the motion for a directed verdict*** within 15 days after discharge of the jury.

(emphasis added). A party seeking relief under this rule must first timely move for a directed verdict. *Id.*

The plaintiff must complete presenting its evidence before a defendant may move for directed verdict. *Dodge v. Weiss*, App., 191 So. 2d 71 (1966); *Sapp v. Redding*, App., 178 So. 2d 204 (1965). A party waives the right to seek judgment as a matter of law when he fails to move for directed verdict at trial. *Seavey v. Concepcion*, 651 So. 2d 1312 (Fla. 3d DCA 1995). When a court fails to grant a motion for directed verdict at the close of the evidence, a party has only 10 days after receiving the verdict to move for direct verdict. *Williams v. School Bd. of Palm Beach Cty.*, 770 So. 2d 706 (Fla. 4th DCA 2000). Failing to timely move is a waiver. *Id.*

Montague argues the trial court should have granted the JNOV motion. But Montague failed to move for a directed verdict when CenClub completed presenting its case. [R-3043:9-3044:1]. Montague also failed to move for a directed verdict when both parties rested. A judgment notwithstanding the verdict in Montague's favor would thus not be appropriate. [R-3043:9-3044:1.] Montague's waiver dooms the JNOV motion. The Court should thus not disturb the trial court order denying JNOV.

Even if Montague had complied with the Rules and timely moved for a directed verdict, the JNOV motion still fails. "[T]rial

courts may grant motion for JNOV only when there is no evidence which may support the opposing party's position." *Citizens Prop. Ins. Corp. v. Hernandez*, 360 So. 3d 737, 740 (Fla. 4th DCA 2023) (quoting *Fast Laundry II v. Gray*, 861 So. 2d 81, 82 (Fla. 3d DCA 2003)). The trial court must view "all of the evidence in a light most favorable to the non-movant, and, in the face of evidence, which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made." *Id.* (quoting *Prewitt Enters., LLC v. Tommy Constantine Racing, LLC*, 185 So. 3d 566, 569 (Fla. 4th DCA 2016)).

In *Citizens*, the court reasoned that granting judgment as a matter of law was improper because the jury could have agreed with the nonmovant by affording it the reasonable conclusions derived from evidence and testimony. *Id.* at 742. In other words, there was competent and substantial evidence and testimony that supported the jury's verdict. *Id.* There was no basis for reversing the verdict. *Id.*

Montague argues CenClub provided no evidence that it complied with the requirements under the Governing Documents before exercising the option to purchase the Demised Premises. [Montague Brief at 15.] But the jury instructions and verdict form

only address whether there was authority to assess, not whether there was authority to buy, or the process to use when buying the Demised Premises. The following were the relevant jury instructions:

BURDEN OF PROOF ON PLAINTIFF ISSUES

If the greater weight of the evidence does not support Plaintiff's claim that it has a right to impose and collect assessments on Defendant, and did in fact impose those assessments on Defendant, then your verdict must be for Defendant and there is nothing further to consider.

If the greater weight of the evidence supports Plaintiff's claim that it has a right to impose and collect assessments on Defendant, and did in fact impose those assessments on Defendant Units, then you must consider Defendant's affirmative defense. [R-1788.]

BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support Defendant's affirmative defense that he obtained a release from his membership in Plaintiff and thus his obligation under Plaintiff's governing documents, then your verdict must be for Plaintiff in the total amount of damages.

If the greater weight of the evidence supports Defendant's affirmative defense that Defendant obtained a release from his membership in Plaintiff and thus his obligations under Plaintiff's governing documents, then your verdict must be for Defendant and you must award zero damages. [R-1789.]

PLAINTIFF CLAIM- RIGHT TO ASSESS
(PLAINTIFF'S PROPOSED INSTRUCTION²)

Plaintiff has asserted that it is entitled to collect from Defendant the unpaid assessment imposed on Defendant for each of his 4 units.

In order for Plaintiff to collect these unpaid assessments, Plaintiff must prove each of the following:

1. Defendant is a member of CenClub;
2. Plaintiff's governing documents give Plaintiff the right to impose assessments on members such as Defendant;
3. Plaintiff imposed assessments on Defendant consistent with its governing documents; and
4. Defendant did not pay the imposed assessments.

Plaintiff has the burden to establish by the greater weight of the evidence that it is entitled to collect unpaid assessments from Defendant.

The Court has already found that Defendant is a member of CenClub, and the parties have stipulated that Defendant did not pay any imposed assessments. Accordingly, I instruct you that Plaintiff has satisfied its burden on numbers 1 and 4. You must only evaluate whether Plaintiff has proved numbers 2 and 3.

If you find Plaintiff has proved numbers 2 and 3 above by the greater weight of the evidence, then you must evaluate whether Defendant's

² Montague failed to submit proposed instructions or object.

affirmative defense relieves him of his obligation to pay the assessments. [R-1791.]

AFFIRMATIVE DEFENSE- RELEASE FROM MEMBERSHIP OBLIGATIONS DUE TO LONG-TERM LEASE (PLAINTIFF'S PROPOSED INSTRUCTIONS)³

Defendant has asserted that his membership in Plaintiff and any obligation under the CenClub Declaration, including his obligations to pay assessments, were released due to Plaintiff's actions with respect to the Long-Term lease.

In order for Defendant to be released from his obligations, Defendant must prove each of the following:

1. Defendant's membership obligation is tied to compliance with the Long-Term Lease;
2. Plaintiff acted contrary to the terms of the Long-Term lease such that its purpose was frustrated.

Defendant has the burden to establish by the greater weight of the evidence that he was released from his membership and obligations.

If you find Defendant has established each factor by the greater weight of the evidence, then you must enter a verdict for Defendant, and award zero damages. If the greater weight of the evidence does not establish each factor, then you must enter a verdict for Plaintiff on this affirmative defense. [R-1798.]

³ Montague failed to submit proposed instructions or object.

The jury verdict form asked the following questions about assessing Montague's units:

Did Plaintiff assess Defendant in accordance with its governing documents' procedures with respect to Prescott M Unit 244⁴?

Did the Defendant obtain a release from his membership in CenClub with respect to Prescott M Unit 244? [R-2892.]

Appellant did not object to the jury instructions or the verdict forms before the jury retired to deliberate. [R-3159.] Nothing in the jury instructions or verdict forms asked the jury to evaluate whether there was a question for it to decide about the votes Montague argued were necessary. Thus, there was nothing for the trial court to evaluate from the jury's decision when analyzing whether to avoid the verdict.

Even if there were a jury instruction or verdict form that asked the questions Montague is asking now, the jury would still have to render the verdict for CenClub. Montague makes the same mistake he did throughout trial: CenClub did not bear the obligation to hold an election or vote before exercising the option to buy. The following are relevant terms from the Governing Documents:

⁴ All jury instructions applied equally to each of Montague's units, including units 244, 245, 246, and 252.

[CenClub] by and through its authorized officers shall notify Seller of the exercise of this option [to purchase the Demised Premises] in writing, certified mail, no later than November 15, 2019 . . . [R-2067:¶5.a.]

The option to acquire CenClub is to close on or before December 31, 2019 . . . [R-2108]; [R-2067:¶5].

Prior to Nov. 1, 2019 or conveyance, whichever is earlier, these annual meeting of the members are deemed waived. [R-2109.]

Until such time as the CenClub facilities which [CenClub] is intended to operate is conveyed to [CenClub] by the recordation of the deed of conveyance, **the voting membership of [CenClub] shall be comprised of the Board of Directors of the Corporation**, each of whom shall be entitled to cast one vote on all matters on which the membership shall be entitled to vote as provided in the By-Laws. [R-2117.] (emphasis added.)

These provisions, all presented to the jury, support the jury's conclusion that CenClub had the right to assess Montague because (1) CenClub could exercise the option to buy any time before November 15, 2019, which CenClub did on September 9, 2019, and (2) even if CenClub bore the obligation to hold a meeting and conduct an election (it did not), **only directors could vote**, as these events took place before the December 31, 2019 conveyance.

CenClub exercised the option and conducted the necessary vote consistent with the Governing Documents. The evidence thus supports the jury's decision to reject the defense and return a verdict in CenClub's favor, upholding the right to assess Montague. The Court should thus uphold the trial court's order denying the JNOV motion.

IV. There Was No Basis to Grant a New Trial.

Montague also seeks a new trial because the trial court excluded the Evidence. [Montague's Brief at 15.] Courts decide whether to order a new trial by evaluating if the error claimed was so pervasive or prejudicial that the trial court denied the movant a fair trial. *Harlan Bakeries, Inc. v. Snow*, 884 So. 2d 336, 339 (Fla. 2d DCA 2004). If the movant failed to preserve the error, then the trial court must decide whether the error is so extreme that the trial court could not have corrected it upon timely objection. *Id.* The final hurdle requires a movant show the harm caused by the error would undermine the public's confidence in the judicial system. *Id.*

The trial court decisions about the Evidence were correct. See Section V, *infra*. The Evidence is not admissible. Even if the Evidence

were admissible, Montague's request for a new trial still fails because he cannot show the prejudice required.

Montague concedes Burdman testified about what occurred during the meetings without having the trial court admit the Evidence. (Montague's Brief at 15.) The testimony ranged from meetings involving various organizations at Century Village East. *Id.* The jurors therefore heard the testimony even if they did not receive the Evidence itself. Montague may not get a new trial because the jury decided to give little or no weight to the testimony about what occurred during the meeting.

Montague also could have subpoenaed for trial COOCVE's and CenClub's directors to authenticate the Evidence, which purported to quote their directors. [R-3052:17-21.] In *Harlan Bakeries*, the court found that the alleged error was not sufficient to warrant a new trial because the moving party invited the error. 884 So. 2d at 339. The error claimed also did not meet the standard required to grant a new trial for unpreserved, non-fundamental error. *Id.*; see also *Greene v. State*, 320 So. 3d 776 (Fla. 4th DCA 2021). The *Greene* court decided a new trial was not appropriate because the movant caused his own prejudice based on his decisions at trial. *Id.*

Montague chose not to subpoena the people he needed to present the case he wanted to show the jury. Instead, Montague opted to use the director's absence from trial as a trial strategy during closing. [R-3136:17-25.] Montague cannot claim prejudice from his own choices.

The trial court did not err when it excluded the Evidence Montague has raised as an issue on appeal. Montague cannot show he suffered prejudice. But if there was any prejudice, Montague caused it by failing to subpoena the witnesses he needed for trial. The Court should therefore affirm the trial court order denying the motion for a new trial.

V. The Trial Court Did Not Err When It Rendered the Decisions Excluding the Evidence.

Montague argues the Governing Documents state that the choice whether to exercise the option vested in the CenClub members. [Montague Brief at 26-28.] But section 5 of Article IV under the Articles of Incorporation provides that no membership vote could take place until CenClub bought the Demised Premises:

Until such time at the CenClub facilities, which [CenClub] is intended to operate, is conveyed to [CenClub] by the recordation of the deed of conveyance, the voting membership of

[CenClub] shall be comprised of the board of directors of the corporation. Each of whom shall be entitled to cast one vote on all matters on which the membership shall be entitled to vote as provided in the bylaws. [R-2117.]

A. The Evidence Was Not Relevant.

Evidence offered in support of a fact must be relevant to be admissible. *Shaver v. Carpenter*, 157 So. 3d 305, 308 (Fla. 2d DCA 2014). Evidence is relevant when it tends to prove or disprove a material fact. § 90.401, Fla. Stat. (2019). All relevant evidence is admissible unless precluded by a specific rule. Fla. Stat. § 90.402.

In *Shaver*, plaintiff sought to introduce interrogatories answers about surveillance that implied defendant's actions were unsavory and indicated a dismissive attitude towards the plaintiffs. 157 So. 3d at 308. The appellate court held the surveillance was not relevant to any issue, and therefore, the trial court erred when it admitted interrogatories answers about surveillance into evidence. *Id.* Here, the evidence is also not relevant because it is COOCVE meeting Videos and minutes reproduced in a community newspaper – and not CenClub meetings records. The COOCVE meetings occurred before CenClub exercised its option to purchase the Demised Premises. [R-

1509.] Thus, the COOCVE meetings occurred before CenClub engaged in any of the acts alleged to be *ultra vires*.

But COOCVE's opinions about what the CenClub board may do is irrelevant to what CenClub's board did and whether they had the power to do it. The evidence thus does not tend to prove or disprove whether CenClub had the power to assess fees. The trial court did not err when it decided the COOCVE Meeting Videos and newspapers articles (purporting to reproduce meeting minutes) were not relevant under Section 90.402.

B. Montague Failed to Authenticate the Evidence.

Montague could not authenticate the Evidence. Florida Statutes Section 90.901 states, "Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A party may authenticate evidence using various methods:

Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication. And,

unless clearly erroneous, the trial court's determination must stand.

Dyck-O'Neal, Inc. v. Herman, 307 So. 3d 52, 61 (Fla. 4th DCA 2020).

In *Dyck-O'Neal*, the court overruled objections to introducing tax forms because the witness testified that he received the tax forms from the other party. *Id.* at 61. The testimony therefore supported a finding that the witness received the tax forms from the party and thus were what they purported to be. *Id.* at 62.

Montague has not carried his burden under Section 90.901 or to show the foundation demonstrating the Evidence are what they purport to be. No evidence shows the writings in the community newspaper are accurate reproductions of the minutes from the COOCVE meetings. Montague sought to introduce a newspaper that looks to be a third-party's summary of COOCVE's Recreation Committee Meeting from November 13, 2018. [A-17.] In it, a third-party describes those in attendance, and what participants said during the meeting about several topics. *Id.*

The March 20, 2018 Video excerpt does not contain any identifying characteristics showing the time, place, or purpose of the video other than the filename given to it by Montague. [R-1510.]

Nowhere in the record are there facts showing Montague could authenticate the Videos by someone with knowledge to testify that the non-party meeting Video fairly and accurately depicts and records the entire meeting without edits. The record also fails to show that the minutes reproduced in the community newspaper are substantially in the same form as the minutes COOCVE holds in its books and records. The court explained the reasoning for its decision:

But what I'm saying is you have witnesses who can testify, you don't need anything that deals with hearsay. Somebody else wrote it. Somebody else is interpreting it. But you can have witnesses. You can't have your client or anyone else testify as to what's in a newspaper.

(. . .)

You can testify as to what happened at the meeting, et cetera. But you can't have anyone defer to a newspaper. That is hearsay, and cannot be basically authenticated. [R-3053:10-24.]

Montague has thus failed to provide sufficient evidence to support a finding that the Evidence is what he claims it to be. Nothing in the record supports finding that the trial court erred when it decided Montague had not authenticated the COOCVE Videos or newspapers. The Court should therefore affirm the trial court's evidentiary ruling because it did not abuse its discretion.

C. The Evidence is Hearsay.

Not only is the Evidence irrelevant and unauthenticated, but it is also hearsay. Section 90.801(1)(c) defines hearsay as a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. Hearsay evidence is inadmissible. Fla. Stat. § 90.802; *Brown v. State*, 294 So. 3d 367, 371 (Fla. 4th DCA 2020). A trial court may admit hearsay only if it falls within a statutory exception to the rule. *Philip Morris USA, Inc. v. Pollari*, 228 So. 3d 115, 120 (Fla. 4th DCA 2017). The party introducing the evidence has the burden to show that it is not hearsay, or it is subject to an exception. *Id.*

The court in *Brown* found that the witness's testimony was hearsay because the statements describing the defendant came from someone other than the witness testifying in court. 294 So. 3d at 371. The state introduced the statements to prove the defendant was the person who committed the crime – for the truth of the matter asserted – it was hearsay not subject to an exception. *Id.* at 371-372. In *Philip Morris*, the court excluded reports because they were hearsay on multiple levels. 228 So. 3d at 120. The *Philip Morris* report contained out-of-court statements by declarants who did not testify at trial. *Id.*

The proponent was offering the report for its truth but could not carry its burden to show an exception applied. *Id.*

Montague offered the Videos and newspaper articles to prove what various people said during the COOCVE meetings from 2018 and 2019. [Montague's Brief at 29.] The Evidence is hearsay because the declarants were out-of-court and Montague offered them to prove the truth of the matters asserted. [R-1510.]

At trial, Montague attempted to argue that the Evidence was admissible, falling under the "declaration against interest" exception. [R-3052:10-16.] But the Evidence is not a declaration against interest because COOCVE is not CenClub – a statement by COOCVE cannot be declaration against interest by CenClub. Fla. Stat. § 90.803. The trial court agreed, holding that the Evidence was hearsay and Montague cannot authenticate it. [R-3053:10-24.]

The trial court explained that Montague could bring witnesses to testify about the meetings, but he could not have anyone referring to the Evidence. *Id.* Any evidence about statements by Ms. Pickar and Mr. Rackman in meetings before exercising option are not attributable to CenClub because Ms. Pickar and Mr. Rackman were not yet CenClub directors. Nor is there any evidence CenClub

authorized Ms. Pickar and Mr. Rackman to make any statements for CenClub at the COOCVE meetings.

Appellant also sought to introduce written minutes from COOCVE meetings as reproduced in a community newspaper rather than books and records from CenClub or COOCVE. [R-3050:8-25; 3051:1-24.] The trial court found that the written minutes in the community newspaper were hearsay. [R-3052:17-19.]

The Evidence are hearsay. COOCVE board meetings however documented are not attributable to CenClub. There is no exception argued by Montague that supported admitting the Evidence. Thus, the trial court did not err when it excluded the Evidence.

D. The Danger of Confusing the Jury Outweighed Any Probative Value for the Evidence.

Even if Montague had overcome the other evidentiary hurdles, the Evidence remains inadmissible under Section 90.403. Otherwise admissible evidence is inadmissible “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.” Fla. Stat. § 90.403. In weighing probative value against the unfair prejudice, the court may consider the need for the evidence;

the tendency that the evidence would suggest an improper basis for the jury to use in resolving the matter; the chain of inference necessary to establish the material fact; and a limiting instruction's effectiveness. *Stewart v. Draleaus*, 226 So. 3d 990, 996 (Fla. 4th DCA 2017). "Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." *Johnson v. State*, 40 So. 3d 883, 886 (Fla. 4th DCA 2010).

Admitting the Evidence here would have risked confusing the issues and misleading the jury. The COOCVE Recreation Committee had a similar role as CenClub does now at Century Village East. CenClub now performs all duties previously performed by the COOCVE Recreation Committee. Despite the similarities and overlap, COOCVE and CenClub are not the same entity. CenClub is a separate corporation distinct from COOCVE with different members. Introducing meeting minutes and Videos from COOCVE meetings would have blurred that distinction.

Deepening the confusion is that some statements came from Ms. Pickar and Mr. Rackman, who served as COOCVE directors and

later, CenClub directors. [R-1508.] The confusion outweighed any probative value the evidence might have had. The issue Montague wanted to try before the jury was whether CenClub's board had authority to assess him.

The probative value of the statements by Ms. Pickar and Mr. Rackman made during COOCVE meetings while serving as COOCVE board members would be minimal when compared to the unfair prejudice admitting that evidence would cause. The confusion injected into the case was unnecessary. The trial court thus did not err when it excluded the evidence.

CONCLUSION

For those reasons, the appellee, CenClub Recreation Management, Inc., f/k/a CenClub Homeowners Association, Inc., respectfully requests that the Court affirm the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2024, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court via the Florida Courts E-Filing Portal and served via email to: Joseph D. Garrity, Esq., LORIUM LAW, *Attorneys for Montague*, 101 Northeast Third Avenue, Suite 1800, Fort Lauderdale, FL 33301, jgarrity@loriumlaw.com, GLTService@loriumlaw.com, and rganley@loriumlaw.com.

/s/ Jon Polenberg
Jon Polenberg

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B) because, excluding the parts of the document exempted by Florida Rule of Appellate Procedure 9.210(a)(2)(E), it contains 8,778 words.

I further certify that this document complies with the line spacing, type size, and typeface requirements of Florida Rule of Appellate Procedure 9.045(b) and has been prepared in 14-point font Bookman Old Style.

/s/ Jon Polenberg
Jon Polenberg