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

CASE NUMBER: 4D24-1316

PATRICT MONTAGUE,

Appellant,

vs.

CENCLUB RECREATION MANAGEMENT, INC,
Appellees.

On Appeal of a Final Order of the Circuit Court of the 17th Judicial Circuit Court in and for Broward County, Florida

Circuit Court Case No.: CACE-20-015334

APPELLANT'S INITIAL BRIEF

Respectfully submitted by,

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Treatises

Statement of the Case and Facts

This is an appeal from a Final Judgment of the Circuit Court for Broward County entered on April 19, 2024, [A-581 – 583] as well as other ruling by the Court prior to trial on the merits which made it impossible for Montague to have a fair trial on the merits of the case.

On September 17, 2020, Appellee, Cenclub Recreation Management, Inc., formerly known as Cenclub Homeowners Association, Inc., (hereinafter referred to as, "CHOA" or "Cenclub") sued Appellant Patrick Montague (hereinafter referred to as, "Montague") to foreclose on claims of liens filed against his four (4) units in Prescott M, [A-18-75] an Association in Century Village East Deerfield Beach, Florida. Cenclub claims authority to lien and foreclose the properties because Montague is a member of Cenclub through the Joinder of Homeowners Association to CHOA (hereinafter referred to as, "CHOA Joinder") contained in the Prescott M Declaration.

Montague's ownership is governed by numerous documents containing covenants that run with the land, for his four Units. The

covenants contain specific rights and obligations between Montague and the various associations including Cenclub. The corporate entity CHOA was created for the sole purpose of allowing the 8508 Unit Owner members to elect a Board of Directors, that could exercise an option to purchase, and subsequently operate the recreational facilities in Century Village East.

Montague defended his refusal to pay CHOA recreational fees based on CHOA's failure to comply with the terms of its governing documents. [A-76-94] Specifically, CHOA failed to hold an election on or before November 1, 2019, wherein Montague would have a right to run, and a right to vote, for the Board of Directors who would decide whether to exercise CHOA's right option to purchase the recreational facilities.

However, the election was never had on or before November 1, 2019, and an unelected group of unit owners exercised the option to purchase. Montague believes the unelected group of unit owners in breach of the covenants running with the land that CHOA is using to impose fees and to lien and foreclose his four units.

Prior to trial, on October 4, 2023, the Court granted CHOA's Motion for partial summary judgment striking Montage's affirmative defense [A-289-298] that the unelected unit owners exercise of the option to purchase the recreational facilities was an *ultra vires* act that released Montague of an obligation to pay under the CHOA Joinder. Montague believes he was entitled to the Defense and this Court should review the same *de novo*. During the trial Montague attempted to enter evidence comprised of videos and official minutes of the Rec Committee and Master Management, where the unelected individuals that carried out the option to purchase admitted that an election of the CHOA Board had to occur on November 1, 2019. However, the evidence was excluded. [A-289-298] Montague believes the exclusion of the evidence was an abuse of discretion.

Throughout this case Montague argued that Plaintiff, CHOA, was without authority to assess Montague where it failed to carry out the option to purchase pursuant to the option agreement, its articles, and its bylaws. Montague purchased his four Units in Prescott M and became a member of the Prescott M condominium association.

Montague's membership in Prescott M came with all the rights and privileges contained in the duly recorded Declaration of Condominium of Prescott M, including his Joinder of Homeowners Association for CHOA. (hereinafter, "CHOA Joinder"). The CHOA Joinder contained the following relevant language:

> WHEREAS, it is the desire and in the best interests of the Member to provide after the expiration of the afore-described lease, the opportunity for the continued use and operation of the property described in said lease (hereinafter referred to as Cenclub) by CHOA and to provide for the collection of expenses for the operation of said property if title thereto is acquired by CHOA; and
>
> WHEREAS, it is appropriate therefore that said Member and others similarly situated join CHOA and commit to pay his fair share of said acquisition and operational costs of Cenclub and secure Mid commitment with a lien on the Member's condominium parcel described below (if said property is so acquired).
>
> **NOW,** THEREFORE…
>
> 2. After the acquisition of Cenclub by CHOA, the Member agrees to promptly pay monthly his pro rata share of the expenses of the acquisition and operation of Cenclub as the same are assessed by CHOA.
>
> 4. ….Further, this membership is given and accepted subject to the terms and conditions of the contract for sale and purchase between Century Village East, Inc. and CHOA for the

> purchase of the Cenclub property and the charter and by-laws of CHOA.…
>
> 7. The Member, by executing this joinder agreement:
>
> > (c) ratifies and confirms each and every provision of the CHOA charter, by-laws., and option to purchase Cenclub from Century Village East, Inc., all the terms and provisions thereof having been fully disclosed and accepted as being reasonable and in the best interests and for the benefit of all of the Members of CHOA and himself as a Member thereof.
>
> 8. THE MEMBER EXECUTING THIS JOINDER ACKNOWLEDGES THAT HE HAS HAD ADEQUATE OPPORTUNITY TO READ THE DOCUMENTS REFERRED TO HEREIN AND AGREES TO BE BOUND BY ALL OF THEM. THE UNDERSIGNED ACKNOWLEDGES THAT HE UNDERSTANDS THE NATURE OF HIS JOINDER IN THE CHOA AND THE OPTION TO PURCHASE PROPERTY BY CHOA FROM CENTURY VILLAGE EAST, INC.…

The Articles of CHOA [A-13-16] that were incorporated by reference into the CHOA Joinder specifically stated:

> II.
>
> The purpose for which CHOA is organized is solely to provide an entity to acquire, own and operate those certain recreational facilities at Century Village, Deerfield Beach, Florida, more particularly described on Schedule A to the option agreement in accordance with this charter, the by-laws of CHOA and CHOA's contractual option to acquire and operate said

facilities. (such recreational facilities hereinafter referred to as Cenclub).

III.

If CHOA acquires Cenclub, CHOA shall have the following powers…

2. CHOA shall have all of the powers reasonably necessary…

(i) To enter into agreements whereby CHOA acquires Cenclub for the enjoyment, recreation or other use or benefit of its members residing in that development known as Century Village, Deerfield Beach. Florida.

3. Provided, however, that the powers herein or in the Florida Statutes granted to CHOA (excluding those provided in paragraph (i) above) to exercise any dominion or control over the Cenclub property are expressly limited to being exercised only after CHOA acquires title thereto in accordance with its contractual undertakings with Century Village East, Inc.

IV.

3. On all matters on which the membership shall be entitled to vote, each Member shall have one vote for each Unit owned by such Member. Such vote may be exercised or cast by the owner or owners of each Unit in such manner as is provided for in the by-laws hereinafter adopted by CHOA.

VII.

The affairs of CHOA will be managed by a Board of Directors (Board) consisting of not less than

> three but not more than 21 directors who, except those individuals named as the first board and substitutions thereon, must be Members of CHOA.
>
> Directors of CHOA shall be elected in the manner provided by the by-laws Directors may be removed and vacancies on the Board shall be filled in the manner provided by the by-laws.
>
> The first election of directors, except the Board named herein, by the members shall not be held until November 1, 2019 or 60 days prior to the time of conveyance whichever is earlier.

The bylaws [A-5-12] that were incorporated by referenced in the CHOA Joinder specifically stated:

> ARTICLE II Board of Directors,
>
> Section 8. Terms of Members of the Board: The first Board named in the Charter of the Corporation shall serve until November 1, 2019, or the time of conveyance whichever is earlier. Thereafter, and not before, they shall be elected by the members of the Corporation.
>
> ARTICLE III Meetings of Members
>
> Section 1: Annual Meeting: Commencing Nov. 1 2019, or 60 days prior to conveyance whichever is earlier, there shall be an annual meeting of the members of the Corporation at such place and time as may be designated,

A jury trial was conducted on November 7 and 8, 2023. [See generally A328-580] The Plaintiff called one witness, Michael Burdman. Mr. Burdman testified that he was the executive director

who runs everything and that he had been there for the last six years. [A-345 lines7]. He was not a member of the Board of Directors of any entity at Century Village East. He testified that the governing body of Plaintiff was its Board made up of seven residents elected by their peers, including Rita Pricard[1] [sic] (hereinafter "Rita Pickar") and Michael Rackman. [A-349 lines 12 -21]. He testified that he believed there was an election in 2019 by paper ballot. [A-352 lines 12-15]. Yet he could not identify when or for what entity the alleged 2019 election took place. Burman testified that when Cenclub was figuring out how to exercise the option it increased the monthly fee $10 to "pay the lease off" [A-472 lines 17-25]. Montague had minutes and video evidence of the COOVE Recreation Committee that the Court refused to admit during the trial. The minutes and the video both had Rita Throughout Mr. Burdman's testimony he testified about meeting of various committees. He testified that minutes are created during the meeting and everything is recorded on video and audio. He went on everything is available on our website and in the reporter. [A-369 lines 8-12].

[1] The person identified as Rita Pricard is Rita Pickar and the correct spelling will be used in this brief.

Mr. Burman then admitted that as the corporate representative of Plaintiff Cenclub he did not know how the option to purchase was executed or carried out. [A-383 lines 5-8]. Mr. Burman then testifies at the time of purchase of the property there were three elected Boards, but no Board he identified was an elected Board of CHOA or Cenclub. [A-386 lines 20-25]. Mr. Burman then testifies that 21 individuals decided to exercise the option to purchase 8,508 Units but could not when there was a change in voting rights for CHOA of one vote per unit. [A-387-388 line 20-6].

Mr. Burman, testifying as the corporate representative of the Plaintiff, testified that he had no involvement in the process of voting for boards. He stated quote 'I keep myself and my staff as far away from that as possible." [A-394 lines 3-11] Yet, he was the only witness offered by the Plaintiff to testify. Mr. Burman testifies that in January of 2019 the rec committee Board "just seamlessly moved over to the Cenclub Board and when pressed he admitted the 21 were appointed by the developer in January 2019. [A-408 lines 1-5].

Mr. Berman was questioned regarding his knowledge of unit owners voting at the meetings he attended. [A-428 line 21-25]. He

was shown minutes from a November 13, 2018, COOVE Recreation Committee meeting that he attended and began to respond that the minutes reflected unit owner voting was talked about by Rita Pickar[2] but the answer was objected to as hearsay and sustained by the Court. [A-429 lines 1-5] Mr. Berman was testifying as the corporate representative of Cenclub and had testified about several meetings of the COOVE Rec Committee during his direct testimony. Mr. Berman was at the meeting on November 13, 2018. The Minutes to the Meeting are provided in the appendix filed herewith. [A 17] Mr. Berman was asked if he remembered Rita Pricard ever talking about unit owners voting. He answered: Not specifically, no. *Id.* [A-429 lines 9 -11]. At which point Montague attempted to introduce a video of the November 13, 2018 COOVE Recreation Committee to refresh his recollection. However, the Court did not allow the video to be used. The Video had been excluded pursuant to a Motion in Limine order enter the day before the trial. The video showed Mr. Berman sitting beside Rita Pickar while she states in her capacity as a COOCVE Rec Committee Director that there will be a vote of the 8500-unit owners

[2] The transcript refers to Rita Pricard [sic], her name is in fact Rita Pickar and the correct spelling is used herein.

in approximately one year and she hopes everyone agrees to the purchase of the recreation facilities. [A mp.4] This admission by Rita Picard undermined Plaintiff's authority to assess Montague and supported his defense.

In the trial Montague would again try to get admitted minutes of meetings and Videos of meetings wherein Rita Pickar and other COOVE Recreation Committee members would admit there needed to be a Unit Owner vote. [A-429 9-121][A-445 25].

Montague testified at the trial that there was never an election by November 1, 2019, but had there been and the option to purchase was approved he would have paid the assessments. [A-464 lines 4-24]. That testimony is unrefuted.

The verdict form [A-302-310] used by the jury contained two substantive questions that were repeated for each of the four units. *Id.* Here are two questions for Unit 244 as exemplars.

1. Did Plaintiff assess Defendant in accordance with its governing documents' procedures with respect to Prescott M Unit 244?

2. Did the Defendant obtain a release from his membership in CenClub with respect to Prescott M Unit 244?

Montague timely moved for a judgment notwithstanding the verdict or in the alternative for a new trial [A 311-314] on the following grounds:

As to the JNOV: The Plaintiff failed to provide any evidence that it complied with the requirement of the governing documents to hold an election as required on November 1, 2019, prior to exercising the option to purchase the subject property that is the basis for the Plaintiffs claimed right to assess Defendant.

As to the request for a new trial: First the Plaintiff objected to evidence of entry of minutes of meetings as reported in The Reporter of CVE. The minutes as recorded in The Reporter were testified to by the Corporate representative as the minutes of meetings held by the various organizations within Century Village East that were deciding to carry out the purchase without holding an election as required by the governing documents. Second, the Plaintiff objected to the videos of the meetings that were testified to by the Corporate representative as the videos posted by the various organizations within Century Village East that were deciding to carry out the purchase without holding an election as required by the governing documents. The

failure to admit these key pieces of evidence were highly prejudicial to the Defendant's defense of the assessments in this case.

ISSUES ON APPEAL

I. Whether the Trial Court erred in granting partial summary judgment in favor of CHOA on Montague's affirmative defense of *ultra vires*, despite undisputed evidence that CHOA failed to hold a required election by November 1, 2019, to form a duly elected Board of Directors and then exercised powers it had not been granted.

II. Whether the Trial Court wrongfully excluded video evidence and meeting minutes that were material to Montague's defense, thereby depriving him of a fair trial.

SUMMARY OF THE ARGUMENT

The Trial Court erred in granting partial summary judgment in favor of CHOA on July 26, 2023, on Montague's affirmative defense of *ultra vires* because as a matter of law CHOA lacked the authority to exercise an option to purchase the recreational facilities. Specifically, CHOA admitted throughout the litigation that it failed to hold an election by Unit Owners to elect a Board of Directors by the

deadline of November 1, 2019, as required by its covenants. Without such an election, any subsequent action to purchase the recreational facilities was unauthorized. The summary judgment ruling ignored this critical failure, rendering the summary judgment improper.

Moreover, the Court erred in the exclusion of video evidence and meeting minutes at trial significantly prejudiced Montague's ability to defend against CHOA's right to collect fees based on CHOA's failure to hold an election on November 1, 2019. CHOA's failure to hold the election was a breach of the governing documents that eliminated its ability to exercise the option to purchase and to charge Montague assessments. The Plaintiff's sole witness testified that the videos were made at the time of the meetings, by the entities specifically involved in the purchase, and were maintained on the entities' website as official records of the meetings. The Court's exclusion of the evidence was an abuse of discretion requiring this Court to vacate the judgment against Montague and order a new trial.

ARGUMENT

I. Standard of Review

This appeal presents a mixed standard of review. As to the first issues on appeal, the Trial Court's granting of a partial summary judgment against Appellant Montague on the defense of *ultra vires*, Where the trial court dismisses a complaint or directs judgment as a matter of law (*e.g.,* summary judgment or directed verdict), the appellate court applies the de novo standard of review. *See, e.g., Menendez v. The Palms West Condominium Ass'n, Inc.*, 736 So. 2d 58 (Fla. 1st DCA 1999) (summary judgment); *Rittman v. All State Ins. Co.*, 727 So. 2d 391 (Fla. 1st DCA 1999) (dismissing complaint for failure to state a cause of action); *Plotch v. Gregory*, 463 So. 2d 432 (Fla. 4th DCA 1985).

In the summary judgment and directed verdict contexts, the test is whether there are factual questions whose resolution would permit a reasonable jury to decide in a different way than that directed by the court. *See Moore v. Morris*, 475 So. 2d 666 (Fla. 1985). In both contexts, appellate review is actually a two-step process: 1) whether a genuine issue (or, in the case of the directed verdict, a disputed issue) of material fact exists; and 2) whether the trial court

applied the correct rule of law. *See Feature: Appellate Standards Of Review*, 73 Fla. Bar J. 48 (December 1999), citing *Florida Appellate Practice* §9.4 at 148–49. De Novo review requires the summary judgment on the affirmative defense of ultra vires be reversed and the JNOV filed by Montague be granted.

As to the second issue on appeal, the Trial Court's exclusion of video evidence and minutes of meetings, the standard for reviewing a trial court's exclusion of evidence in Florida is generally an abuse of discretion. This means that an appellate court will not overturn the trial court's decision unless it was arbitrary, fanciful, or unreasonable, or if no reasonable person would take the view adopted by the trial court *McDuffie v. State,* 970 So. 2d 312 (Fla. 2007), *Johnson v. State,* 969 So. 2d 938 (Fla. 2007), *Pantoja v. State,* 59 So. 3d 1092 (Fla. 2011).

However, the trial court's discretion is not unlimited and is constrained by the rules of evidence and applicable case law. For instance, if the trial court's ruling is based on an erroneous interpretation of the law, the appellate court will review the decision de novo *Pantoja v. State*, 59 So. 3d 1092, *Washington v. State*, 281

So. 3d 609, *Anthony v. Gary J. Rotella & Assocs., P.A.*, 906 So. 2d 1205 (Fla. 4th DCA 2005). Additionally, the trial court must conduct a balancing test under Florida Statutes § 90.403 to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. *McDuffie v. State*, 970 So. 2d 312, *Johnson v. State*, 969 So. 2d 938, *Washington v. State*, 281 So. 3d 609. Montague believes the Trial Court abused its discretion, especially given that the Plaintiff's only witness testified on direct regarding the meetings at issue leading up to an unelected Board of Directors exercising an option to purchase the recreational facilities.

II. The Trial Court Erred in Granting Partial Summary Judgment in Favor of CHOA on Montague's Affirmative Defense of *Ultra Vires* and Should Have Granted Montague's JNOV motion.

Montague's *ultra vires* affirmative defense was based on clear provisions in CHOA's governing documents, which required an election of a Unit Owner Board of Directors, wherein Montague would

have a vote for every one of his four units, before the option to purchase the recreational facilities could be exercised.[3]

As argued by Montague in the Response to the Motion for Partial Summary Judgment (hereinafter "MPSJ Response") the Court was considering only legal arguments as it related to the Affirmative Defense. Neither side was asking the Court to determine undisputed facts. [See generally transcript A261-282] The MPSJ Response argued A corporation must act in accordance with its articles of incorporation and duly adopted by-laws. See *Yarnall Warehouse Transfer v. Three Ivory Bro. Moving Co.,* 226 So.2d 887, 890 (Fla. 2d DCA 1969) ("The corporation and its directors and officers are bound by and must comply with the charter and bylaws.")." *Word of Life Ministry v. Miller,* 778 So. 2d 360, 363 (Fla. pt DCA 2001). This is a true statement of law that applied throughout the hearing on the Motion for Partial Summary Judgment and during the trial. Notable

[3] This was argued at the hearing on July 26, 2023, [A-270-275]. The Court found that a reasonable jury could not render a verdict in favor of the Defendant on the affirmative defense of *ultra vires*. *Id.* [A-280 lines 4-9]. However, the governing documents themselves supported the affirmative defense. The interpretation of the governing documents and their meaning was a matter of law that the Trail Court simply got wrong. Indeed, there are no findings of fact contained in the Order granting the Partial Summary Judgment.

the verdict form in this case asked, “Did Plaintiff assess Defendant in accordance with its governing documents' procedures with respect to…” and “Did the Defendant obtain a release from his membership in CenClub with respect to…” These verdict questions required a factual determination if Plaintiff held an election on November 1, 2019. That fact would be applied by the Court to the governing documents to determine if CHOA acted outside its authority as defined in its articles, bylaws, and the CHOA Joinder agreement.

The Florida Supreme Court has held:

> *Thompson on Corporations* states that an act of a corporation is ultra vires “when it is outside the objects for which the corporation was created as defined by the laws of its organization and limited by the statutes authorizing its existence. In other words, it is an unauthorized act. In its primary sense, an act is 'ultra vires' the powers of a corporation when it is wholly outside of the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode.”
>
> *Liberty Counsel v. Fla. Bar Bd. of Govs.*, 12 So. 3d 183, 191 (Fla. 2009), citing *Knowles v. Magic City Grocery, Inc.*, 144 Fla. 78, 197 So. 843 (1940)

In *Knowles* the Supreme Court held, "In a secondary sense, an act is said to be *'ultra vires'* as it affects the rights of parties without whose consent it may not be done, or when the corporation is not authorized to perform it for the specific purposes or in the particular manner involved, notwithstanding it may come within the scope of its general powers. * * *." *Thompson on Corporations* (3rd ed.), Vol. 4, Sec. 2825, page 525. *Id.* at 81.

In this case, there was no evidence provided at the hearing on the Motion for Summary Judgment that CHOA's appointed Board stepped down on November 1, 2019, and that a new Board was elected by the Members of CHOA wherein Montague was entitled to one vote for each of his four units. In fact, at trial the only evidence in the record was Montague's testimony that no election occurred on November 1, 2019, as required. The Court limited testimony and evidence by Montague regarding *ultra vires* acts and excluded introducing evidence via minutes and video that the requirement to hold an election was known but not followed.

None the less, the evidence at trial was there was no election by the Members on November 1, 2019. Thereafter the unelected Board

was without authority to exercise the option to purchase and CHOA / Cenclub had no right to assess Montague going forward.

Only after the election could CHOA have the right to assess Montague for the recreational facilities. The most obvious fact that supports the order of operation describe above is the fact that Montague and the CHOA members could have voted in a Board of Directors on November 1, 2019, that did not want to exercise the option to purchase.

The failure to hold an election affected the voting rights of Montague which was an *ultra vires* act under *Knowles*. The self-appointed Board that exercised the option did not have consent of the voting members included Montague. CHOA's illicit Board was not authorized to perform the act of exercising the option to purchase. CHOA's illicit Board was not authorized to exercise the option to purchase in the manner it did.

Trial Court's decision to grant summary judgment in favor of CHOA on the affirmative defense of *ultra vires* was erroneous because it overlooked the fact that CHOA's governing documents imposed a mandatory precondition—the election of the Unit Owner Board—

before any decision regarding the option to purchase could be made. Given that no election was held, CHOA's actions to purchase the recreational facilities were unauthorized, and summary judgment was improperly granted.

The Court Order granting summary judgment regarding the *ultra vires* affirmative defense was reversable error requiring the judgment to be vacated and judgment entered in favor of Montague, or in the alternative vacated and remanded for a new trail.

II. The Trial Court Wrongfully Excluded Critical Evidence, Denying Montague a Fair Trial

A jury trial was conducted, and a verdict was returned on November 8, 2023. The verdict form [A-302-310] used by the jury contained the same questions for all four of Montague's Units in Prescott M. *Id.*

1. Did Plaintiff assess Defendant in accordance with its governing documents' procedures with respect to Prescott M Unit 244?

   If your answer to question 1 is YES, proceed to question 2. If your answer to question 1 is NO, proceed to question 4.

2. Did the Defendant obtain a release from his membership in CenClub with respect to Prescott M Unit 244?

If your answer to question 2 is YES, proceed to question 3. If your answer to question 2 is NO, proceed to question 4.

4. You have found that Plaintiff has not proven by the greater weight of the evidence that it has a right to assess Defendant and must indicate below that your verdict is for Defendant on Prescott M Unit 244.

Throughout this case Montague argued that Plaintiff, CHOA, was without authority to assess Montague where it failed to carry out the option to purchase pursuant to the Purchase Option Agreement. Montague purchased his four Units in Prescott M and became a member of the Prescott M condominium association. Montague's membership in Prescott M came with all the rights and privileges contained in the duly recorded Declaration of Condominium of Prescott M, including his Joinder of Homeowners Association for CHOA. (hereinafter, "CHOA Joinder"). The CHOA Joinder contained the following relevant language:

> 7. The Member, by executing this joinder agreement:
>
> (c) ratifies and confirms each and every provision of the CHOA charter, by-laws., and option to purchase Cenclub from Century Village East, Inc., all the terms and provisions thereof having been fully disclosed and accepted as being reasonable and in the best interests and for the benefit of all of the

> Members of CHOA and himself as a Member thereof.
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> 8. THE MEMBER EXECUTING THIS JOINDER ACKNOWLEDGES THAT HE HAS HAD ADEQUATE OPPORTUNITY TO READ THE DOCUMENTS REFERRED TO HEREIN AND AGREES TO BE BOUND BY ALL OF THEM. THE UNDERSIGNED ACKNOWLEDGES THAT HE UNDERSTANDS THE NATURE OF HIS JOINDER IN THE CHOA AND THE OPTION TO PURCHASE PROPERTY BY CHOA FROM CENTURY VILLAGE EAST, INC.…

The Articles of CHOA [A-13-16] that were incorporated by reference into the CHOA Joinder specifically stated:

> III.
>
> If CHOA acquires Cenclub, CHOA shall have the following powers…
>
> 2. CHOA shall have all of the powers reasonably necessary…
>
> > (i) To enter into agreements whereby CHOA acquires Cenclub for the enjoyment, recreation or other use or benefit of its members residing in that development known as Century Village, Deerfield Beach. Florida.
>
> 3. Provided, however, that the powers herein or in the Florida Statutes granted to CHOA (excluding those provided in paragraph (i) above) to exercise any dominion or control over the Cenclub property are expressly limited to being exercised only after CHOA acquires title

> thereto in accordance with its contractual undertakings with Century Village East, Inc.
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> VII.
>
> Directors of CHOA shall be elected in the manner provided by the by-laws Directors may be removed and vacancies on the Board shall be filled in the manner provided by the by-laws.
>
> The first election of directors, except the Board named herein, by the members shall not be held until November 1, 2019 or 60 days prior to the time of conveyance whichever is earlier.

The language contained in the articles clearly states that there is a choice to exercise the option. The choice needed to be made by a Board elected by the members of CHOA. The evidence excluded contained statements by the individuals who exercised the option without an election that they were aware an election was required before a decision to exercise the purchase option could be made.

The bylaws [A-5-12] that were incorporated by referenced in the CHOA Joinder specifically stated:

> ARTICLE II Board of Directors,
>
> Section 8. Terms of Members of the Board: The first Board named in the Charter of the Corporation shall serve until November 1, 2019, or the time of conveyance whichever is earlier.

> Thereafter, and not before, they shall be elected by the members of the Corporation.
>
> ARTICLE III Meetings of Members
>
> Section 1: Annual Meeting: Commencing Nov. 1 2019, or 60 days prior to conveyance whichever is earlier, there shall be an annual meeting of the members of the Corporation at such place and time as may be designated,

The evidence that Montague sought to admit was videos and meeting of COOCVE Rec Committee Meetings during the years 2018 and 2019 leading up to the exercising of the option to purchase. Indeed, the only witness to testify for the Plaintiff gave testimony about events during direct examination that took place at a meeting he attended on November 13, 2018. The topic of discussion at the COOCVE Rec Committee meeting was the transition of ownership of the recreation facilities. The meeting discussed the need for an election and the hope that everyone would vote to approve exercising the option to purchase. This evidence was excluded, and it was critical to Montague's defense. The following is a transcription of the November 13, 2018 video of the meeting that Plaintiff's only witness attends as the record keeper. At the 4:00 minute mark and going to

12:00 minutes Rita Pickar is speaking as a Director of COOCVE Rec Committee and she states:

> I'd like to announce that I'm not real happy to ask, but I will announce that the recreation coupon will be going up five dollars and the reason it's gonna go up five dollars is as a lot of you know we are in the process of what we call transition and the transition is that we have the opportunity as per our documents to purchase the recreational facilities…
>
> so we have the opportunity now to purchase our facilities and it's a long entail process so there's been a committee. We've just dubbed it the rec lease committee and it's made up of all your volunteer elected volunteers, Cook members master management members and the recreational committee we felt that was the fairest way because you elected those people to represent you and that's exactly what they are doing.…
>
> …we pay CRF the owners a fee which totals $5 million a year now if we get our facilities so that we own them, we will not have to pay $5 million any longer so the next natural question is does that mean our power will go down well this is 2018 in approximately a year, we will hold the vote where we will ask you do you want to purchase the facility? I would just assume you will say yes you want to cause why would you want to keep giving away $5 million hopefully you will say yes we will negotiate and purchase get our get the facilities and then we according to the contract which is what you can find on our website CE events go to news and information.…
>
> …I have to say that master management also raise reserve coupon for the same reason involved in this lease transition you know we have to pay Legal we've been working with a dedicated lawyer that is just working on that one thing that I had asked for at the beginning of this process was for us to have a lawyer.…

….We have to do a survey which is costly we had we have the selection process were 8500. All of our condos are going to get to vote PR involved….

This video supports Montague's claim that a vote of the members was required. Rita Pickar states, "we will hold the vote where we will ask you do you want to purchase the facility?" This video contradicts the testimony of Burman, supports Montague's defense of this action, is highly relevant and should not have been excluded. This is typical of each of the videos and minutes of meetings the Trial Court excluded based on Plaintiff's Motion in limine. Even more prejudicial was the fact the Trial Court excluded the videos that day before the Trial started even though the Plaintiff Moved nine months prior to exclude. Up to that point, Montague was planning on using the evidence to support the defense of this case.

Montague's response to the Motion in Limine filed on February 8, 2023 [A-198-201] stated:

> 7. A pivotal issue, in this case, involves the Plaintiffs and its related entities ' acts leading up to the exercise of the option to purchase the Property without having a vote of the Membership on Nov. 1, 2019. The subject videos are official records of Plaintiff and its related entities that carried out the purchase of the Property, the legality of which is disputed by Defendant.

The videos show the witnesses admitting that a unit owner vote was required, admitting that it would be too difficult to have all unit owners vote, and admitting that a plan to have different voting was adopted in the Amended and Restated Articles and Bylaws. Accordingly, the videos of the 2018 and 2019 COOCVE meetings are entirely relevant as to the ultimate disposition of this case, and such relevance far outweighs the possibility of confusion of the issues and undue prejudice to Plaintiff and therefore should not be excluded under Rule 90.403, which provides in pertinent part:

Relevant 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.

8. In addition, Plaintiffs argument that the videos should be excluded because they are not authenticated and/or are hearsay also fails where the source of the videos is the Plaintiff and related entities. Indeed, Rita Pickar and Michael Rackman both testified the meetings they attended as Directors were recorded during their respective depositions. There is no real legitimate challenge to the authenticity of the videos. While the entire videos were provided, the Defendant only intends to use portion of meeting related to the subject matter of this litigation.

9. "The purpose of a motion in limine is generally to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." One West Bank, FSB v. Alessio, 182 So. 3d 855, 857 (Fla. 4th DCA 2016) (internal citations omitted). Thus, a motion in limine "is similar to a protective order in that it seeks to prohibit any reference to offending evidence at trial by first having its admissibility determined outside the presence of the jury." Rosa v. Florida Power & Light Co., 636 So.2d 60, 61 (Fla. 2d DCA 1994) (internal citations omitted). As such, a motion in limine "helps to shorten

> trial, simplify issues and reduce the possibility of mistrial, and thereby moves the case toward a conclusion on the merits. Id.

The exclusion of relevant, critical evidence can be considered reversible error in Florida. According to Florida law, relevant evidence is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence *Gosciminski v. State,* 132 So. 3d 678 (Fla. 2013), *McDuffie v. State,* 970 So. 2d 312 (Fla. 2007). The exclusion of such evidence, especially if it is central to the defense's theory, can adversely affect a substantial right of the party and may result in a miscarriage of justice, thereby constituting reversible error *Fla. Inst. for Neurologic Rehab., Inc. v. Marshall,* 943 So. 2d 976 (Fla. 2d DCA 2006), § 59.041, Fla. Stat. (LexisNexis, Lexis Advance through the 2024 regular session.***).

For instance, in *Jacobs v. State*, the court reversed the defendant's conviction because the exclusion of evidence central to the defendant's insanity defense was not deemed harmless error *Jacobs v. State,* 962 So. 2d 934 (Fla. 4th DCA 2007). Similarly, in *Rivera v. State*, the exclusion of evidence supporting the defendant's

entrapment defense was considered a reversible error as it was relevant to the defendant's lack of predisposition *Rivera v. State,* 180 So. 3d 1195 (Fla. 2d DCA 2015). Additionally, in *Annis v. First Union Nat'l Bank*, the exclusion of relevant impeachment evidence was found to be reversible error as it went to the credibility of trial testimony on a central issue *Annis v. First Union Nat'l Bank,* 566 So. 2d 273 (Fla. 1st DCA 1990). In this case, the Plaintiff's only witness testified that an election of the CHOA board was not required because the Rec Committee would just seamlessly take over. [A-408 lines 2-5] The minutes and the videos would have impeached that testimony.

Therefore, the exclusion of relevant, critical evidence that affects the substantial rights of a party can indeed be considered a reversible error. In this case the evidence was critical to Montague's defense of the foreclosure of his properties.

CONCLUSION

For the foregoing reasons, the Trial Court's rulings should be reversed. Montague respectfully requests that this Court reverse the summary judgment on the affirmative defense of *ultra vires* and find as a matter of law that the failure to hold an election on November 1,

2019, entitles Montague to his requested JNOV. In the alternative Montague asks this Court to find the exclusion of the minutes and video evidence was an abuse of discretion and that the final judgment be vacated and the matter remanded for a new trial.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.100(l).

/s/ JOSEPH D. GARRITY
JOSEPH D. GARRITY, ESQ.
Florida Bar No. 87531

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of the Fourth District Court of Appeal using the Florida Courts' e-filing portal, which will deliver electronic copies of said filing pursuant to Fla. R. Jud. Admin. 2.516 to Jon Polenberg, Esq., Becker & Poliakoff, P.A., One East Broward Boulevard, Suite 1800, Fort Lauderdale, Florida 33301 at jpolenberg@beckerlawyers.com, this 31st day of October, 2024.

Respectfully submitted,

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